

**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
ONE HUNDRED THIRTEENTH CONGRESS

FIRST SESSION

APRIL 16, 2013

Serial No. J-113-13

Printed for the use of the Committee on the Judiciary



U.S. GOVERNMENT PUBLISHING OFFICE

98-754 PDF

WASHINGTON : 2016

For sale by the Superintendent of Documents, U.S. Government Publishing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512-1800; DC area (202) 512-1800
Fax: (202) 512-2104 Mail: Stop IDCC, Washington, DC 20402-0001

COMMITTEE ON THE JUDICIARY

PATRICK J. LEAHY, Vermont, *Chairman*

| | |
|----------------------------------|---|
| DIANNE FEINSTEIN, California | CHUCK GRASSLEY, Iowa, <i>Ranking Member</i> |
| CHUCK SCHUMER, New York | ORRIN G. HATCH, Utah |
| DICK DURBIN, Illinois | JEFF SESSIONS, Alabama |
| SHELDON WHITEHOUSE, Rhode Island | LINDSEY GRAHAM, South Carolina |
| AMY KLOBUCHAR, Minnesota | JOHN CORNYN, Texas |
| AL FRANKEN, Minnesota | MICHAEL S. LEE, Utah |
| CHRISTOPHER A. COONS, Delaware | TED CRUZ, Texas |
| RICHARD BLUMENTHAL, Connecticut | JEFF FLAKE, Arizona |
| MAZIE HIRONO, Hawaii | |

BRUCE A. COHEN, *Chief Counsel and Staff Director*

KOLAN DAVIS, *Republican Chief Counsel and Staff Director*

SUBCOMMITTEE ON ANTITRUST, COMPETITION POLICY AND CONSUMER RIGHTS

AMY KLOBUCHAR, Minnesota, *Chairman*

| | |
|---------------------------------|---|
| CHUCK SCHUMER, New York | MICHAEL S. LEE, Utah, <i>Ranking Member</i> |
| AL FRANKEN, Minnesota | LINDSEY GRAHAM, South Carolina |
| CHRISTOPHER A. COONS, Delaware | CHUCK GRASSLEY, Iowa |
| RICHARD BLUMENTHAL, Connecticut | JEFF FLAKE, Arizona |

CRAIG KALKUT, *Democratic Chief Counsel*

ROB PORTER, *Republican Chief Counsel*

CONTENTS

APRIL 16, 2013, 2:38 P.M.

STATEMENTS OF COMMITTEE MEMBERS

| | Page |
|---|------|
| Franken, Hon. Al, a U.S. Senator from the State of Minnesota | 4 |
| Klobuchar, Hon. Amy, a U.S. Senator from the State of Minnesota | 1 |
| Leahy, Hon. Patrick J., a U.S. Senator from the State of Vermont, prepared statement | 52 |
| Lee, Hon. Michael S., a U.S. Senator from the State of Utah | 2 |

WITNESSES

| | |
|--|----|
| Witness List | 27 |
| Baer, Hon. William J., Assistant Attorney General, Antitrust Division, U.S. Department of Justice, Washington, DC | 5 |
| prepared statement | 28 |
| Ramirez, Hon. Edith, Chairwoman, Federal Trade Commission, Washington, DC | 7 |
| prepared statement | 38 |

QUESTIONS

| | |
|---|----|
| Questions submitted to Hon. William J. Baer by: | |
| Senator Blumenthal | 54 |
| Senator Grassley | 56 |
| Senator Klobuchar | 59 |
| Senator Leahy | 62 |
| Senator Lee | 65 |
| Questions submitted to Hon. Edith Ramirez by: | |
| Senator Grassley | 58 |
| Senator Klobuchar | 61 |
| Senator Leahy | 63 |
| Senator Lee | 73 |

ANSWERS

| | |
|---|-----|
| Responses of Hon. William J. Baer to questions submitted by Senators Blumenthal, Grassley, Klobuchar, Leahy, and Lee | 115 |
| Responses of Hon. Edith Ramirez to questions submitted by Senators Grassley, Klobuchar, Leahy, and Lee | 82 |

MISCELLANEOUS SUBMISSIONS FOR THE RECORD

| | |
|--|-----|
| American Dental Association, statement | 140 |
|--|-----|

OVERSIGHT OF THE ENFORCEMENT OF THE ANTITRUST LAWS

TUESDAY, APRIL 16, 2013

UNITED STATES SENATE,
SUBCOMMITTEE ON ANTITRUST, COMPETITION POLICY AND
CONSUMER RIGHTS,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 2:38 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Amy Klobuchar, Chairman of the Subcommittee, presiding.

Present: Senators Klobuchar, Franken, Blumenthal, and Lee.

OPENING STATEMENT OF HON. AMY KLOBUCHAR, A U.S. SENATOR FROM THE STATE OF MINNESOTA

Chairman KLOBUCHAR. Good afternoon, everyone, and I think we all know before we start that all our thoughts and prayers are with the victims and their families in Boston. And seeing that last night, where I am sure everyone watched it on TV and saw those first responders, the police and fire and volunteers and just regular citizens, people who had just run 26 miles were not running away from that but were running toward it to help their fellow citizens. So our thoughts and prayers are with everyone in Boston.

We have a good hearing today, and we have a good attendance in our hearing room, and I want to thank my colleagues that are here: Ranking Member Senator Lee as well as my colleague in Minnesota, Senator Franken.

With us today, as you know, we have Assistant Attorney General Baer for his first appearance, right? Is that correct, except for your confirmation?

Mr. BAER. That is correct.

Chairman KLOBUCHAR. Okay, good. Just to get that clear. As well as FTC Chairman Ramirez, we thank you so much for coming and being here as well, and we congratulate you on your new appointment.

We are pleased to have both of you here so we can discuss the critical competition issues that impact consumers. We look forward to hearing about your priorities and what you envision as being the cutting-edge antitrust issues that our country faces, and that you believe we in Congress should be monitoring, focusing on, and pushing.

The legal technicalities behind our antitrust laws will not be familiar to most Americans, but the fruits of effective antitrust enforcement are. Companies vigorously competing for business to

offer the lowest prices and the highest quality and most innovative goods and services is really what competition is all about. And that is something I would like to highlight today in that vigilant anti-trust enforcement means more money in the pockets of American consumers.

It means identifying and preventing competitive problems before they occur, like stopping a merger that would allow a few dominant players to raise prices, or when a merger is allowed to move forward, putting conditions in place to protect competition.

It means stopping price-fixing cartels that hurt consumers by artificially inflating prices for goods such as auto parts, TVs, and tablet computers. Last year alone, the Justice Department obtained more than \$1 billion in criminal antitrust fines.

And it means challenging anticompetitive practices like pay-for-delays, settlement agreements that keep cheaper generic drugs from coming onto the market. The FTC estimates that consumers and taxpayers would save billions of dollars each year if these anti-consumer agreements were stopped.

Antitrust enforcement is also a boost for our economy. Unfettered competition spurs innovation and fosters economic growth, leading to more jobs and greater prosperity.

Antitrust and competition policy are not Republican or Democratic issues. They are consumer issues. We can all agree that robust competition is essential to our free market economy and critical to ensuring that consumers get the best prices. In the words of the great Supreme Court Justice Thurgood Marshall, Antitrust laws in general and the Sherman Act in particular are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.

As a former prosecutor, I know how important it is to have a good cop on the beat, ready and willing to go to court when necessary to enforce the law. So we hope that both of you, Mr. Baer and Chairman Ramirez, are mindful of that special responsibility that you have to consumers. And we trust but will also verify that you will see to it that the American people are well served by flourishing competition. Millions of consumers depend on your efforts and your judgment to ensure that the economy is sufficiently vibrant.

You both have inherited a legacy at the Antitrust Division and the FTC, and it is my sincere hope and full expectation that you will strive to uphold this legacy in the years ahead. I look forward to your testimony, and I turn it over to my Ranking Member here, Senator Lee.

**OPENING STATEMENT OF HON. MICHAEL S. LEE,
A U.S. SENATOR FROM THE STATE OF UTAH**

Senator LEE. Thank you very much, Madam Chair. Our meeting today marks the Subcommittee's first antitrust oversight hearing since President Obama's re-election last November. It is also the Subcommittee's first oversight hearing since Assistant Attorney General Baer was confirmed to lead the Department of Justice's Antitrust Division and Ms. Ramirez replaced Chairman Leibowitz as the head of the FTC. Both Mr. Baer and Chairwoman Ramirez

are highly respected within the Antitrust Committee, and I thank both of them for their service and for being here with us today.

Checks and balances are, of course, essential to our constitutional system. As James Madison wrote in Federalist No. 51, the Constitution establishes subordinate distributions of power where the constant aim is to divide and arrange the several offices in such a manner that each may be a check on the other. Congressional oversight is a critical means by which the legislative branch may act as a check on the executive. Meaningful oversight ensures that the executive branch and enforcement agencies within that branch are accountable to the people not only through the election of the President every 4 years, but also by means of democratically elected Representatives in Congress who seek to ensure that our laws are administered faithfully and impartially.

Compared to its prolix pronouncements in other areas of the law, Congress has given relatively little guidance to enforcement agencies regarding the proper approach to competition law. Whether wisely or not, Congress has enacted statutes with broad language and significant mandates, leaving many of the details to be sorted out in cases brought before Federal courts.

This does not, of course, mean that antitrust enforcement has not sometimes become political. To the contrary, industry participants have long sought to influence enforcement agencies or to apply, or even misuse, the antitrust laws to the detriment of their competitors.

Others with ideological rather than business goals in mind have attempted to transform competition law into a vehicle for wealth redistribution or for other social policies.

Fortunately, in recent decades, and particularly since the publication of Robert Bork's authoritative work, "The Antitrust Paradox," antitrust enforcers have increasingly relied on objective metrics and rigorous economic analysis. Doing so provides greater transparency and certainty for the business community, which can rely on stable rules and know that decisions are usually the result of a fair and rational process.

Perhaps most importantly, Bork's approach has become a consensus norm that the purpose of antitrust enforcement is neither to protect competitors from competition nor to inject Government regulators into the economy, but instead to maximize the welfare of the consumer.

As Mr. Baer very eloquently put it during his confirmation hearing before this Subcommittee last summer, antitrust enforcement is best when it has a sound analytical foundation and when it focuses on behavior that poses a serious risk to economic harm to the American people.

In light of these considerations, the need for congressional oversight of executive administration, the broad language of the antitrust statutes, and the risk that political forces will perversely seek to decouple antitrust enforcement from economic analysis, our Subcommittee's oversight role takes on particular significance. We must be vigilant in guarding against novel and illegitimate antitrust doctrines.

But our duty does not end there. We have an obligation to help ensure that antitrust analysis is grounded in consistent, rational,

evidence-based processes, and that antitrust enforcers are not swayed by political or business pressures extraneous to the objective task before them.

Although it requires patience and sustained effort, evidence-based antitrust is the only legitimate approach because it provides the best results for consumers. It grounds our discussion in facts, and it focuses our efforts on a shared goal: the benefit of the American people.

Properly limited enforcement of our antitrust laws, therefore, need not be partisan in nature. Antitrust law protects free markets, and free markets are the most effective means for allocating scarce resources to their highest-valued uses.

I am committed to protecting free markets from both unnecessary Government intervention and private anticompetitive conduct. I hope the matters we discuss today will help illuminate the ways in which the Department of Justice and the FTC are properly, and perhaps in some cases improperly, carrying out the important task of faithfully and objectively enforcing our Nation's antitrust laws.

Thank you, Madam Chair.

Chairman KLOBUCHAR. Well, thank you very much, Senator Lee.

I note, Mr. Baer, for your first hearing you kind of have a leg up when the Ranking Republican quotes you and Robert Bork in the same statement, so this is good for you.

[Laughter.]

Chairman KLOBUCHAR. Okay. We now turn to Senator Franken.

**OPENING STATEMENT OF HON. AL FRANKEN,
A U.S. SENATOR FROM THE STATE OF MINNESOTA**

Senator FRANKEN. I will make this short. Thank you, Madam Chair, for starting off today's hearing with your remarks about the senseless attack in Boston. All Minnesotans' and I know all Americans' hearts go out to the people up there.

I want to congratulate Chairwoman Klobuchar on her new position as Chair of the Antitrust Subcommittee. She has big shoes to fill following Senator Kohl's retirement, but I know she is up to the task and is going to do a tremendous job as Chair of this very important Subcommittee.

Mr. Baer and Ms. Ramirez, welcome. Thank you for appearing with us today. It has been far too long since our last oversight Committee hearing, and I hope these can be more regular going forward.

Mr. Baer, before we get started, I want to commend the Department for its comments to the FCC last week on the need to make spectrum available to smaller wireless carriers rather than the big incumbent carriers. As you may know, I opposed the AT&T/T-Mobile merger and was pleased that the Department sued to block that deal. More needs to be done to make sure that smaller and mid-sized carriers are able to build out their networks and to be competitive. And I hope that you will continue to play an active role in pushing the FCC to promote competition and protect the public interest.

With that, Madam Chair, I turn it to you.

Chairman KLOBUCHAR. Thank you very much, Senator.

I would like to introduce our witnesses here today.

The first witness, Mr. William Baer. Mr. Baer was sworn in as the Assistant Attorney General for the Department of Justice Antitrust Division on January 3, 2013. Prior to his appointment, he was a partner at Arnold & Porter and head of the firm's antitrust practice group and head of the FTC's Competition Bureau from 1995 to 1999.

Our second witness is FTC Chairwoman Edith Ramirez. She was sworn in as a Commissioner of the FTC in April 2010 and designated Chairwoman by President Obama on March 4th of this year. Before joining the Commission, Ms. Ramirez was a partner in private practice in Los Angeles representing clients in intellectual property, antitrust, and unfair competition suits.

Thanks to both of you for appearing at our Subcommittee hearing, and we are going to have you testify. I would ask you to rise and raise your right hand as I administer the oath. Do you affirm that the testimony you are about to give before the Committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. BAER. I do.

Ms. RAMIREZ. I do.

Chairman KLOBUCHAR. Thank you.

Please go ahead, Mr. Baer. You each have 5 minutes.

STATEMENT OF WILLIAM J. BAER, ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, DC

Mr. BAER. Thank you, Chairwoman Klobuchar, Ranking Member Lee, Senator Franken. It is a privilege to be here. It is even more of a privilege when the microphone is on.

[Laughter.]

Mr. BAER. As you may be aware, Attorney General Eric Holder issued a statement just a few minutes ago. I want to take a moment to convey on behalf of the Department of Justice our deepest condolences to the victims and their families who have been affected by yesterday's tragic attack in Boston. Our thoughts and prayers go out to them. Attorney General Holder has directed the full resources of the Justice Department to be deployed to ensure this matter is fully investigated.

As Chairwoman Klobuchar noted, I have been at the Antitrust Division for just a short time, but I am honored to be part of its proud and successful tradition of vigorous antitrust enforcement. It is a privilege as well to be sitting next to the new head of the Federal Trade Commission, Edith Ramirez. She is an exceptional public servant and a friend. We are looking forward to working together on behalf of American consumers.

Competition is the cornerstone of our Nation's economic foundation. The antitrust laws serve to promote and protect a free-market economy by prohibiting anticompetitive agreements, conduct, and mergers that distort market outcomes.

When markets are working, consumers benefit from lower prices and higher-quality goods and services. As Senator Lee noted, this is not a partisan issue. We all agree that firms should not be able to distort the economic choices available to consumers, or to sellers in upstream markets.

The Antitrust Division focuses its enforcement efforts on the products consumers use every day—the items we buy at the grocery store, media and entertainment, communications, consumer electronics, and new technologies—as well as other goods and services that have a significant impact on our Nation’s economy. That includes health care, agriculture, transportation, energy, and financial services. With your permission, I would like to drill down in two areas—first, cartel enforcement.

Price fixers and bid riggers do serious and demonstrable harm to consumers. Criminal prosecution of these wrongdoers is critical. We target domestic and international cartels that rob consumers of their hard-earned dollars. In the last Fiscal Year alone, the Division filed 67 criminal cases; 16 corporations and 63 individuals were charged. We obtained, as the Chairwoman noted, criminal fines of well over \$1 billion, and the courts sentenced 45 individuals to jail terms that averaged over 2 years per defendant.

Aggressively pursuing cartels benefits consumers in multiple ways. The specific price fixing is eliminated, and the wrongdoers are punished. Other wrongdoers are put on notice that they may be next, and they have a real incentive to discontinue yet undetected illegal conduct. And those contemplating price fixing realize the risk they are running and are deterred from committing the crime in the first instance.

American consumers and taxpayers are well served by these efforts. In the last 5 years, we averaged criminal fines of almost \$80 million per year, and at the same time, in that 5-year period, our average annual net appropriation was just about 10 percent of that, or \$80 million. These fines do not go to the Antitrust Division. They go to the Crime Victims Fund, helping those victimized by crimes, not just antitrust crimes, throughout the country.

Our civil enforcement efforts at the Antitrust Division also produce important results for American consumers. Let me just give one example.

Last year, together with 33 State Attorneys General, we challenged a conspiracy involving Apple and five major book publishers to raise prices for electronic books, e-books. The results tell us stories. Our State Attorney General partners have already obtained customer refunds of over \$80 million from the defendant publishers. Our settlements with those publishers forced them to abandon going forward the agreements that had kept e-books’ prices high, and those settlements have restored meaningful retail price competition for e-books. What do I mean? According to published reports, in just the last few months, the average price for the top 25 bestsellers on the New York Times Best Seller list dropped by over \$3, from \$11 a book to \$8.

As my statement for the record details, the Antitrust Division is busy doing other important work that I would be happy to discuss. That written statement further illustrates how our efforts can have a tangible and enduring impact on the markets that matter most to American consumers.

Senators, Chairwoman Klobuchar, I realize that Congress and the American public legitimately hold its public servants to a high standard, and you should. I can assure you that the Antitrust Division’s dedicated public servants are working hard to enforce the

antitrust laws vigorously for the benefit of American consumers. As my testimony seeks to demonstrate, we are putting scarce American taxpayer dollars you entrust us with to good use.

Thank you.

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

Chairman KLOBUCHAR. Thank you very much.

Chairman Ramirez.

STATEMENT OF THE HONORABLE EDITH RAMIREZ, CHAIRWOMAN, FEDERAL TRADE COMMISSION, WASHINGTON, DC

Ms. RAMIREZ. Thank you, Chairman Klobuchar, Ranking Member Lee, and Senator Franken, for inviting me to testify today regarding the Federal Trade Commission's current antitrust and competition policy efforts. Let me also thank you for all the support that you have given the FTC.

The FTC works in conjunction with the Department of Justice's Antitrust Division to ensure that the American economy remains competitive through vigorous antitrust enforcement. I am grateful for the excellent working relationship we have with Assistant Attorney General Bill Baer and his colleagues at the Antitrust Division. We will continue to work closely with the Division as well as our counterparts in the States whenever possible to enhance antitrust consistency, clarity, and transparency.

I would like to now turn to some of the FTC's recent highlights, beginning with the two FTC cases before the Supreme Court this term.

In February, in a rare unanimous decision, the Court revived the FTC's suit to stop an alleged hospital merger to monopoly in Albany, Georgia, by ruling that the State action doctrine did not immunize the transaction from the antitrust laws.

The second case, which I know members of this Subcommittee have been watching closely, involves a pay-for-delay patent settlement. The Court heard arguments at the end of March, and we are hopeful that the Court will hold that these agreements are presumptively unlawful.

As both of these Supreme Court cases show, the FTC remains broadly focused on preserving competition in health care markets as a way to help contain health care costs. In recent years, the Commission has stopped hospital mergers in Northern Virginia; Toledo, Ohio; and Rockford, Illinois. We are also looking closely at mergers involving other health care providers, challenging two such deals in recent months.

In December, the Commission, along with the Pennsylvania Attorney General, blocked a proposed merger between the dominant health care system in Reading, Pennsylvania, and a surgery center. Then, last month, the FTC, in conjunction with the Idaho Attorney General, challenged Idaho's largest health care system's acquisition of the State's largest physician practice group.

We also continue to target efforts by brand-name drug companies to stifle generic competition. In addition to pay-for-delay, we are looking at other brands' strategies to illegally preclude generic competition. This includes the potential abuse of safety protocols, known as REMs, to prevent generics from beginning the Hatch-

Waxman process and a practice known as product hopping where a brand introduces a follow-on product with minimal additional clinical value to prevent generic competition.

High-technology markets also play an increasingly important role in consumers' lives, and the Commission also remains focused on enforcement in this sector. The Commission recently challenged a proposed merger between Integrated Device Technology and PLX where there was evidence of intense head-to-head competition and a combined market share of over 80 percent.

However, the Commission recognizes the important role that innovation plays in technology markets and takes a cautious approach where action is more likely to deter rather than promote innovation, such as in our recent investigation of Google's search practices which the Commission unanimously decided to close.

The Commission also remains focused on preserving the integrity of the standard-setting process. In the Bosch and Google/MMI matters, we brought actions to prevent the owners of standard essential patents from improperly seeking injunctions against willing licensees to the potential detriment of consumers.

The Commission will continue to engage in an ongoing dialogue with stakeholders in this important area and to be vigilant where conduct threatens to distort the standard-setting process.

Thank you very much, and I am happy to respond to any questions.

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

Chairman KLOBUCHAR. Well, thank you very much to both of you, and I think a lot of people who are hearing you testify for the first time in this oversight hearing are most focused on what your top priorities are. When we look at the past, we know that, for instance, Chairman Leibowitz was very focused on pay-for-delay, and I think we get some sense from your testimony of what you are interested in. I do not want to put words in your mouth, Chairwoman Ramirez, but it seems that you are focused on the health care work that is going on with the FTC, as well as the patent standards, which I was interested to hear you talk about because I have heard a lot about that lately, as well as continuing the work for pay-for-delay.

Am I missing other things? Obviously, you have broader jurisdiction than that.

Ms. RAMIREZ. The key priority that I have, Senator—you have identified some key focus areas for the FTC and for me personally. Generally speaking, I intend to pursue active enforcement where there might be harm to competition and harm to consumers. But you have identified the areas of emphasis.

Chairman KLOBUCHAR. And I think you also know that on that issue of pay-for-delay, I have introduced legislation to put a stop to these anticompetitive practices. And will you support this legislation? And does the FTC support this legislation?

Ms. RAMIREZ. Senator, as you know, this area has been one of concern for many years for the FTC. I cannot speak for the current Commission with regard to your proposal, but I can tell you that I do support the bill.

Chairman KLOBUCHAR. Thank you very much.

Mr. Baer, same question about your partners, and I had some follow-up on the cartel issue as well, which I think is really interesting and that not many people realize that you are working on.

Mr. BAER. Thank you, Madam Chairwoman. Obviously—

Chairman KLOBUCHAR. Except the people you are going after, I guess.

Mr. BAER. There are those.

Cartel enforcement remains a top priority, making sure that we are going after not just domestic wrongdoers but wrongdoers overseas who enter price-fixing arrangements that end up having an impact on U.S. consumers.

We intend to work as well aggressively in health care, in communications, broadband issues, intellectual property issues. Much of this we will do and have been doing jointly with the FTC, holding hearings to explore some of the issues that will help us develop a sound analytical framework and factual-based approaches to our law enforcement activities.

Chairman KLOBUCHAR. And you and I talked earlier about the fact that, as the world becomes more global, you have a lot of these international cartels that actually hurt American businesses. We talked about the auto part cartels, and I wanted to ask why you think that these types of cases are on the rise. Is it because your Department has devoted more resources to investigating them or are certain market conditions causing this? Or is it related to the increasing concentrated markets that have been more susceptible to price-fixing schemes?

Mr. BAER. I think part of it—and perhaps most of it—is having the tools to begin to explore problematic behavior that occurs abroad with an impact on the United States. We have a program which encourages corporations to come in and self-report and identify their wrongdoing. And we have been working with foreign enforcers around the world to urge them to develop similarly aggressive cartel enforcement programs. So there has been progress on a number of fronts. My sense is that we are simply uncovering things that have been under a rock for a while, but we have now got the help and the resources to move the rock.

Chairman KLOBUCHAR. Very good.

Chairwoman Ramirez, you mentioned the patent issue, and I think what you are referring to has been a topic of conversation because of several cases that have been filed with the International Trade Commission. We can all agree that standardization of technology and essential patents have been critical to the development of the competitive market for smartphones and tablets, but recently, concerns have been raised about the practice of bringing standard essential patent cases to the ITC seeking an exclusion order to prevent products with the patent from being imported into the U.S. Some worry that the ITC exclusion orders related to standard essential patents could gravely harm competition.

What sort of negative effects might the use of exclusion orders regarding standard essential patents have on competition and consumer welfare in general?

Ms. RAMIREZ. Senator, thank you for that question. One of the concerns that we have is that injunctive relief generally, whether it be at a district court or at the ITC when it comes to a standard

essential patent, has the ability to deter innovation and competition and investment in standard compliant products. And that is because the patent holder in this context has made a voluntary commitment to license patents on a FRAND or RAND basis. And any effort to renege on that commitment then raises risks for both the competitive process in the standard-setting context and then again over time can have long-term impact on investment in standard compliant products.

So as a result, the FTC has advocated and asked district courts to take into account when there is a FRAND commitment that has been made and the patent holder is asking for an injunction. In addition, the FTC has also advocated that the ITC through its public interest authority also take this into account as they consider whether or not it is appropriate to issue an exclusion order.

Chairman KLOBUCHAR. Another issue on patents, a recent study found that 56 percent of all patent lawsuits are filed by so-called non-practicing entities or, as they are known to their critics, “patent trolls.” These entities purchase patents from the original holders and often sue companies for patent infringement. Critics say the suits are often unfounded, but the companies end up having to either pay large sums in legal fees to defend the suits—I know this because my State has a lot of patents. In fact, one of our companies has a patent for every employee. That is 3M—or simply end up paying the patent trolls under a settlement or licensing fee.

It seems to me that this practice could potentially have a negative effect on competition and consumer welfare, but there is also a concern that any efforts to address bad actors could have unintended consequences on our intellectual property system.

So I am wondering if something should be done about this. I have just heard it raised repeatedly as we are seeing, even despite the great work we did with the America Invents Act and patent reform and getting rid of the backlog and doing some good things, that there is still this issue out there.

Ms. RAMIREZ. Yes, Senator, this is another area in which the FTC, and also in conjunction with the Department of Justice, has been engaged in recently. We held a joint workshop in December to explore the ramifications on competition and on consumers of this model, patent assertion entities that are in the business of buying and then asserting patents. And the question is fundamentally whether, as some assert, patent assertion entities are able to assist small inventors in monetizing their inventions or whether this ends up being a tax on innovation.

So it is an issue that we are looking at very closely. We have just received—the comment period, I should say, has just closed with regard to this workshop, and we are examining those comments, and we are going to be deciding and proceeding from there how to move forward in this area.

We do feel that it is an area that warrants additional study so that we can properly evaluate the impact of patent assertion entities on competition.

But let me also add that we have heard also reports of patent assertion entities making unsubstantiated claims relative to small businesses. It is an issue that causes us great concern, and we will be continuing to look to see whether it might be appropriate for the

Federal Trade Commission to exercise its authority relative to these types of actions.

Chairman KLOBUCHAR. Very good.

Did you want to add anything, Mr. Baer, before I turn it over to Senator Lee?

Mr. BAER. I will defer to Senator Lee.

Chairman KLOBUCHAR. Very good. Okay. Senator Lee.

Senator LEE. Thank you. Thanks again to both of you.

Let us start with Mr. Baer. In 2008, the Department of Justice issued a 213-page report that sought to provide clarity and transparency in laying out its enforcement views and developing a set of objective and administrable standards for Section 2 analysis. Your predecessor, Ms. Varney, formally withdrew the report and in so doing promised especially vigorous Section 2 enforcement.

During your confirmation hearing, you noted that while the report generally contained sound analysis, you thought that some of it suggested enforcement standards were more restrictive than warranted by the case law and could inhibit the effective enforcement against anticompetitive conduct.

Given that you do not believe that the 2008 report got it quite right, can you please briefly describe for us the principles that you believe should guide Section 2 enforcement?

Mr. BAER. Thank you, Senator. My concern, as you state, with the 2008 report was that it may have been going too far too fast in articulating what was an evolving series of judicial precedent as it relates to Section 2.

I was also concerned, as was my predecessor, over the fact that the Federal Trade Commission had felt it inappropriate to join in that guidance, so we were at risk of having guidance out there that potentially was inconsistent or not fully subscribed to by both enforcement agencies. As a general matter, I think that is wrong.

We have, in approaching Section 2, a series of decisions out of the Supreme Court and out of the Court of Appeals for the District of Columbia providing some guidance about various tests that can be applied. Those tests have tended to evolve in fact-specific situations, industry-specific situations, and I think the better way to move forward with Section 2 enforcement is carefully articulating what we are doing and why we are doing it. But I do not think we were ready to put out guidance. If we did so, I am afraid it would be so qualified that the business community would not get the benefit of it. There is a concept, you know, of guidance in name only that I think we ought to resist as antitrust enforcers if the caveats are such that a counselor cannot effectively advise a corporation about what behavior is likely to get them in trouble with the FTC or the Antitrust Division.

Senator LEE. Okay. Thank you. That is helpful.

Also during your confirmation hearing, you said, in response to a question about Section 2 enforcement standards, "I believe that coordinated statements of policy engender confidence in the agencies and provide clearer guidance for businesses and practitioner, and that is what I would strive for, if confirmed."

I agree that clearer enforcement criteria will tend to help the agencies identify and prove violations as they do their work, and

will provide businesses with the information that they need to comply with law and to avoid violations moving forward.

So my question is this: What have you done so far and what will you commit to do moving from to provide such needed Section 2 guidance?

Mr. BAER. Senator, what I am prepared to commit to is to move forward cautiously. There are different forms of guidance that an antitrust enforcer can and should provide. It does not necessarily need to be in the form of a formal statement of principles such as in the horizontal merger guidelines, which the FTC and the Antitrust Division jointly issued a couple of years ago. We can through speeches, through statements that would accompany enforcement actions that are filed under the Tunney Act in Federal district court. We can also issue closing statements where we choose not to proceed with a possible Section 2 concern, and talk publicly about why we chose not to proceed in order to—it is almost a case-by-case look—help people understand what our thought process is, where we think we need to proceed, and where we do not.

Senator LEE. Supplying data points.

Chairwoman Ramirez, several current and past Commissioners have criticized the Commission for its seemingly unfettered views regarding Section 5 of the FTC Act, noting that the FTC's expansive decisions appear to lack regulatory humility, and some of them argue that decisions should instead be based on sound economic and empirical foundations.

Commissioner Ohlhausen recently noted that it is important that the Government strive for transparency and predictability in this context, and she called for the Commission to fully articulate its view about what constitutes an unfair method of competition before invoking Section 5.

At the ABA Antitrust Section Annual Meeting last week, you said that the Commission needs to apply Section 5 "carefully." Do you agree with me about the importance of transparency and predictability in this area? And in your view, what are the limiting principles that can find the scope of unfair methods claims brought pursuant to Section 5?

Ms. RAMIREZ. Senator, I do agree that it is beneficial for the agencies to provide clear enforcement criteria where they can. I do take a different view with regard to Section 5. I believe that this is an area where it is difficult to specify precisely what the outer bounds are. In my view, if you look at the recent past, the agency has been approaching its use of Section 5 in a very careful, judicious way. The statute was written expansively, as were the dictates of the Sherman Act, and that evolved incrementally on a case-by-case basis over the course of decades.

In light of the elasticity of the Sherman Act, it is really no surprise that Section 5 as a stand-alone basis for authority for the FTC has not developed in that same fashion. I think that this is an area where the Commission ought to—it is authority that the Commission ought to use where there is harm to competition and harm to consumers, and I think those are the central tenets that would guide its application.

Senator LEE. In December 1980, the FTC issued a policy statement on fairness, clarifying what was the scope of its consumer un-

fairness jurisdiction. Absent definitive policy statements, regulatory uncertainty results in additional and unnecessary costs to the business community, costs that are ultimately borne by and passed on to consumers.

When can we expect the Commission to articulate a definitive policy statement on the parameters of Section 5 authority relating to unfair methods of competition?

Ms. RAMIREZ. Senator, this is an area that I will continue to engage in a dialogue with my fellow Commissioners. However, I will say that I do believe that there is guidance that is provided. If you look back at the recent cases in which the agency has taken action using Section 5 on a stand-alone basis, it would include cases such as invitation-to-collude cases, in the context of the exchange of information that can then be used to facilitate collusion or other unlawful practices, and also in the standard-setting arena.

So it really is confined to a fairly narrow set of circumstances. I do differ with those—my current and former colleagues who think that we are applying it in a reckless manner. I think that, in fact, the agency has been using its Section 5 authority rigorously and judiciously.

Senator LEE. Okay. Thank you.

Thank you, Madam Chair.

Chairman KLOBUCHAR. Thank you very much.

Senator Blumenthal.

Senator BLUMENTHAL. Thank you, Madam Chair, and thank you to both Assistant Attorney General Baer and Chairman Ramirez.

Let me just say what is an obvious truth to everyone who has a familiarity with law enforcement, antitrust law enforcement these days, that we are at a critical juncture with the consolidation that has taken place in many of our most important industries, including communications, health care, pharmaceuticals, and financial services. And the public is beginning to understand the ramifications and consequences of consolidation in limiting their choices, potentially raising prices, and limiting the quality of service. And so the work that you do is ever more important, and I would hope that you would continue the resurgence of antitrust enforcement that we have seen over the last 3 years after a real dearth of activity and aggressive enforcement in some previous years. And I think that the solid effort that you have made to rein-vigorate antitrust law enforcement to preserve competition and promote jobs—it not only preserves competition, but it also promotes jobs—would continue.

Let me Chairman Ramirez, if I may, about an area that is of interest to me, group purchasing organizations—GPOs, as you know them. When I was Attorney General in Connecticut, we led an investigation into the Healthcare Research and Development Institute, also known as HRDI, which was profiting from anticompetitive behavior through a business model that failed to provide any benefit really to the hospitals and providers on whose behalf they were negotiating.

Since then, the FTC and the Department of Justice have investigated GPOs, and both have filed lawsuits against various of them, but they have not taken any industry-wide actions. And a lot of medical device manufacturers you probably heard from, as I have,

have demonstrated practices by GPOs that effectively foreclose them from entering the market. These exclusionary practices, some documented in the media, including kickbacks, sole-source contracts, bundling of products so that hospitals have to purchase the bulk of their supplies from a single vendor to qualify for a discount.

The kickbacks are particularly problematic, I believe. They are paid by manufacturers to the GPOs, and these kickbacks deceive buyers and distort demand and, in effect, artificially inflate prices.

So my question is, first of all, concerning the safe harbor that apparently GPOs occupy to some extent, given the investigations and ongoing concerns, Chairman Ramirez, do you believe that the safe harbor provisions relating to GPOs really protect the public from anticompetitive behavior? And should they be revisited?

Ms. RAMIREZ. Senator, I think that the agency has the authority, notwithstanding the safe harbor, to take action in appropriate circumstances if warranted. I am aware and appreciate your concerns that you have articulated relating to group purchasing organizations. I will note that I think a number of issues such as the applicability of the anti-kickback laws are ones that are not related to antitrust. So I know that this is an issue that raises a series of complicated questions.

What I can tell you and assure you is that we are fully committed to taking a look at these organizations and, if necessary, taking action if we find that there is a violation of the competition laws.

Senator BLUMENTHAL. So we can count on your commitment that you will do hearings, workshops, meetings to investigate the impacts of GPOs on the health care marketplace, costs and competition?

Ms. RAMIREZ. What I can commit to you is that we will continue to be vigilant in this area. Given resource constraints, I cannot commit to particular actions, but I will assure you that we will continue to take a look and investigate complaints as appropriate and as necessary.

Senator BLUMENTHAL. Well, if I bring to your attention some of these issues, I hope that you will investigate them.

Ms. RAMIREZ. Again, we will take a look at them and proceed as necessary. But I appreciate the concern, and I assure you that I will be vigilant in this area.

Senator BLUMENTHAL. Do you think that the FTC can better police this area as opposed to the specific actions that you brought?

Ms. RAMIREZ. As a law enforcer, the way that we approach these issues is to look at the specific facts of a case, so that is what I see as being the appropriate course of action in this area.

Senator BLUMENTHAL. General Baer, let me ask you, I read with interest the Division's letter recently to the FCC concerning policies relating to spectrum and competition, and I was happy to see that the Division is becoming active in this area in the role as an advocate for competition. Having just reviewed a number of transactions in the wireless marketplace, I understand that the Division has developed some expertise in this area, and I would like to ask you about the future of the marketplace.

Do you think that the FCC needs a policy like a spectrum screen or auction rules that specifically seek to encourage competition in the wireless marketplace?

Mr. BAER. The answer is yes, Senator. We believe that well-defined, competition-focused rules for putting spectrum, the newly available spectrum to use quickly and efficiently is the best way of promoting consumer welfare, and that was why we publicly filed the comments. In addition, we have spent a fair amount of time working very cooperatively, quietly with the Federal Communications Commission on these difficult policy choices.

Senator BLUMENTHAL. Do you think that the FCC should account for the differences in the quality between different spectrum, particularly high- and low-frequency spectrum?

Mr. BAER. Senator, yes. I think the fact that the low-frequency spectrum is sort of paradoxically higher quality, that is a factor that needs to be taken into account about how to allocate spectrum that is now becoming available to the Government, spectrum that previously was not available to be shared with the marketplace and market participants.

Senator BLUMENTHAL. Thank you. My time has expired. I thank both of you for your hard work in this area, and thank you for being here today. Thank you.

Chairman KLOBUCHAR. Senator Franken.

Senator FRANKEN. Thank you, Chairwoman.

Chairwoman Ramirez, I want to applaud the FTC for being proactive on pay-for-delay agreements between brand and generic drug manufacturers. I am a cosponsor of Chairwoman Klobuchar's excellent bill on this issue, and I have also introduced another bill, the Fair Generics Act, which has been referred to the HELP Committee.

CBO estimates that if we fix this problem, consumers could save \$11 billion in drug costs over the next 10 years. We need to put an end to these anticompetitive deals—and that is what they are—and I hope the Supreme Court will agree with me when it rules on this issue in a couple months. But pay-for-delay agreements are just one way that pharmaceutical companies are delaying generic drug entry.

You mentioned REMs and drug safety programs and product hopping before. Can you tell me what the Commission is doing to address unnecessary REMs and product hopping, which are also making it harder for consumers to purchase low-cost drugs?

Ms. RAMIREZ. Senator, first of all, let me thank you for your leadership in the area of pay-for-delay and in these other areas.

I cannot comment on any specific investigations, but I can tell you that the agency is very concerned about efforts by branded pharmaceutical manufacturers who employ strategies such as REMs and product hopping in an effort to impede or otherwise delay generic competition. So this is an area that we are looking at very closely. Again, I cannot comment on specific investigations, but these are areas in which we have weighed in publicly through the filing of amicus briefs, and it is one that we are looking at very closely.

Senator FRANKEN. Well, I certainly hope that if it is appropriate, you bring enforcement action, and I hope you will do that, again, if it is appropriate and not just file amicus briefs.

Ms. RAMIREZ. Without question. Again, I cannot comment on specific cases, but I can tell you that we are looking very closely at this issue, and if there is a violation, we will take immediate action.

Senator FRANKEN. Thank you. Thank you.

Mr. Baer, in early 2010, the Department collaborated with the USDA to hold the first-ever public workshops on competition in the agriculture and dairy sectors. That was 3 years ago, and very little has been done by the Department to address the competition issues that you uncovered.

Dairy farmers in Minnesota are getting a smaller and smaller share of the price of a gallon of milk, and this trend is playing out across the country as family farmers are getting less and less of each dollar spent on food.

What is the Department doing on this issue? And will you pledge to work closely with USDA to protect independent farmers?

Mr. BAER. I can make that commitment to you, Senator, and, indeed, one of the benefits of those hearings that were held in the first term of the Obama Administration, jointly with the Department of Agriculture, was to educate their folks and our folks as to the very issues that dairymen—as you know, I am from Wisconsin and appreciate those unique issues—and cattlemen and other growers, farmers, to understand what challenges they face, where they believe they were subject to anticompetitive conduct, where mergers ran the risk of inflating prices to consumers and unfairly lowering the price to growers and to dairymen.

We have been working closely with DOA. We are also working closely with State Attorneys General in farm States, and that will continue to be a big priority for us. We understand it is important to the farmers and to the American consumer.

Senator FRANKEN. Mr. Baer, consumers are paying a larger and larger percentage of their household budgets to their cable, wireless, and Internet providers. Families cannot afford to pay \$200 a month for cable and Internet while also paying several hundred dollars a month for their mobile phones. These markets are very consolidated, and the Comcast/NBCUniversal merger and agreements like the one between Verizon and big cable companies are only going to make it harder for consumers to find affordable options.

News reports indicate that you are investigating most-favored-nation clauses, and I want to urge you to continue your work and to keep a close eye on the terms of the Comcast/NBCUniversal deal and the agreement between Verizon, Comcast, and the other major cable companies.

These agreements mean nothing if they are not promptly and aggressively monitored and enforced. Will you make that pledge?

Mr. BAER. Yes, sir.

Senator FRANKEN. Thank you.

I am specifically worried about the broadband market. Comcast previously imposed discriminatory data caps on its customers, and we have seen providers artificially elevating the price of stand-

alone broadband service in order to press customers to buy an expensive bundle.

Will you keep an eye on this market to make sure consumers have meaningful options and are able to cut the cord and watch online video rather than signing up for expensive pay TV service?

Mr. BAER. Senator, that is a key part of our mission, and I can make that commitment to you.

Senator FRANKEN. Thank you.

This is for both of you. I am very concerned that the Supreme Court may soon make it hard or much harder for small businesses to file private antitrust enforcement actions. Instead, they may be forced to arbitrate their claims. Can you explain why private antitrust enforcement is so important and why forced arbitration is not an effective remedy? This is for either of you.

Ms. RAMIREZ. I will take that, Senator. It is our view that private enforcement of the antitrust laws is a very important complement to the enforcement by the agencies, and the position that we have articulated in a recently filed amicus brief on this issue is that an arbitration clause that eliminates the ability of an individual to obtain redress of the antitrust laws should not be enforced.

So I believe that, again, private enforcement plays an important role, and we have urged that position to the Supreme Court.

Mr. BAER. The Justice Department agrees with that. Indeed, the Solicitor General filed a brief in the American Express case stating the importance of allowing a private right of action and not allowing that to be stripped away through what is almost a contract of adhesion for small businesses and for others. We think that shared approach of public enforcement with the ability of private citizens to go in and recoup damages has worked very well, and there is no reason to change it.

Senator FRANKEN. Thank you both.

Thank you, Madam Chair.

Chairman KLOBUCHAR. Thank you very much, Senator.

Senator Lee.

Senator LEE. Thank you very much, Madam Chair.

Let me proceed with Mr. Baer to follow up on a line of questions from Senator Blumenthal a minute ago. The upcoming spectrum auctions hold the prospect of bringing much needed spectrum into the market. Consistent with competitive market forces, those entities with the most pressing need for additional spectrum will be willing to pay the most for that same spectrum, thus ensuring that the spectrum is put to the best and most efficient use in the marketplace.

But your recent FCC filing and your written testimony today seem to suggest a preference to forgo competitive bidding and instead steer low-frequency spectrum toward smaller nationwide networks.

I am concerned about any approach that might involve the Government meddling in the competitive bidding process, in effect to pick winners and losers, because antitrust laws are meant to protect competition and not individual competitors. So I am concerned with the process in which the administration would seek to protect and, in effect, subsidize certain carriers, especially those carriers—especially when those same carriers chose not to participate in the

last major low-frequency spectrum auction. So I would like to get your response to a few questions related to this.

First, should competition laws be used to steer a scarce resource toward particular competitors?

Second, are you suggesting that the parent companies of the smaller carriers lack the resources to bid in a competitive auction to determine who most values the spectrum, the scarce resources in question?

And, finally, is it your position that, absent this kind of Government intervention, larger carriers will obtain spectrum they do not actually need simply to keep it from others? In other words, are you suggesting they have sufficient spectrum to meet their needs?

Mr. BAER. Senator, all very fair and legitimate questions. Our comment tried to address some of those subtleties. Among other things, we urged the FCC, which ultimately is going to promulgate the rules that will govern the auction, to take a close look at whether some of the spectrum that is already available to some of the carriers is being warehoused and not being put to efficient use. This is a market where, because the input, the spectrum, is scarce, that control of that spectrum potentially has some ability to affect competition downstream.

So what we were trying to say—what we were saying to the Federal Communications Commission is balance these factors, take a look at whether or not the playing field is already tilted in favor of big guys who may or may not—we were not making a factual judgment, but it ought to be examined whether or not they are using what they already have, and use that as a factor in deciding what rules to set for the auctions going forward.

Senator LEE. Okay. Thank you.

And then this next line of questions is for both of you. It relates to the fact that some have expressed some concern that the FTC and the Department of Justice face different standards for obtaining a preliminary injunction in merger cases. Of course, under Section 13(b) of the FTC Act, the FTC may obtain an injunction by showing that weighing the equities in action would be in the public interest, but some courts have interpreted that language and found the standard may be satisfied where the FTC shows that a transaction raises serious and difficult questions.

The Department of Justice, on the other hand, must seek a preliminary injunction pursuant to Section 15 of the Clayton Act, which does not specify a standard for obtaining preliminary relief. Courts often apply such a standard using a version of the traditional equity test, which generally requires the Government to show a reasonable likelihood of success on the merits. So I guess I have got two interrelated questions, which I will pose to both of you.

In your view, first of all, does current law provide for diverging standards for the FTC and Department of Justice in seeking preliminary injunctions in merger cases? And if so, do you believe there is any legitimate reason for that difference?

The second question I have for you is: Do you believe this situation is problematic? And if so, is it necessary for Congress to act to clarify that the same standard applies to all preliminary injunction litigants?

So go ahead and answer that in any order you would prefer. It looks like you—

Ms. RAMIREZ. How about if I begin, Senator? Thank you for your question, and I do appreciate this concern.

In my view, even though the words are different, at the end of the day I believe that the standards that are used by the two agencies in obtaining a preliminary injunction are, in fact, quite similar.

As a practical matter, what each agency needs to do is to go before a judge and show and provide evidence that backs up the charges that are being made, and in persuading that judge. In my view, as a practical effect, the two standards are similar. And I think even though this issue has been raised, I believe it would be difficult to point to a specific situation where a case that would have led to a different outcome had it been handled by a different agency.

Senator LEE. So you are not concerned about it? You are not asking Congress to fix that? There is not a problem to fix, in other words.

Ms. RAMIREZ. Again, I do not see a practical difference between the standard as it is being applied by the courts.

Senator LEE. Thank you.

Mr. Baer.

Mr. BAER. Senator, briefly, I am in the somewhat unique position of actually having been at the FTC as Director of the Bureau of Competition having to evaluate what merger challenges to recommend to the Commission. I am now in a somewhat comparable position at the Antitrust Division, and I think what Chairwoman Ramirez says is exactly right. At the end of the day, in order to succeed in a Federal district court, either agency needs to offer compelling facts, a story that is coherent, analytically sound. We share merger guideline analytics together, and so at the end of the day, I do not think there is a practical problem that Congress needs to address.

Senator LEE. Not a practical problem because there is not a practical difference between the two standards.

Mr. BAER. Yes.

Senator LEE. Not something that is likely to produce differing outcomes either.

Mr. BAER. To me that is exactly the right question. Are we at risk of different outcomes depending on which agency a transaction lands at? And my experience, in the private sector as well as in the public sector, is no.

Senator LEE. Okay. Thank you, Madam Chair. I see my time has expired.

Chairman KLOBUCHAR. Thank you very much, Senator Lee.

Mr. Baer, one of the very few industries to enjoy an exemption from antitrust law is the railroad industry. Due to the exemption, we have heard from a lot of shippers—we call them “captive customers” in my State—that they suffer from high prices due to the conduct of dominant railroads, especially how the pricing works on the last leg of the trip. This means higher shipping costs are passed along to consumers, resulting in higher electricity bills, higher food prices, and higher prices for manufactured goods.

I have introduced a bipartisan bill, with a number of Republicans supporting it, to eliminate this obsolete antitrust exemption for railroads.

At your confirmation hearing, you said you would study up on this issue. What is your view of the railroad exemption? I think we all see rail as a major part of our transportation network, especially when we have to export to the world. But at the same time, we want those rates to be fair. And will you work within the administration to make sure the rates are fair? And what is your view of this if you have had a chance to study up on it?

Mr. BAER. Chairman, the Antitrust Division is committed to promoting competition in the railroad industry, and one of the parts of my job I have just begun to learn in the last 90 days is the importance of working within the administration to promote those competition principles as we work with the Senate and the House to formulate a position on legislation. And we will be an active voice within administration circles in favor of competition principles in that sector.

Chairman KLOBUCHAR. Thank you very much.

As a former prosecutor, I know the importance of being willing and ready to file suit and go to court, and you cannot just put on a good poker face. You have to show you are willing to do it. The party you are negotiating with needs to know that you will do that if the case requires it—not in all cases. Negotiation is also important, but I think they have to know you are willing to go to the mat.

Mr. Baer, some thought the Antitrust Division had gained a reputation for being more willing to tolerate mergers and cutting deals rather than going to court. Do you think the Division's recent suits to block the AT&T merger and the beer merger has put the perception to rest? By the way, that is the InBev/Grupo Modelo merger, which I know is still pending, although I did tell Senator Lee that I was hoping our first hearing was going to be about beer, but then the airline merger got in the way and your Department got in the way, so we decided not to have that be the hearing, as fun as it would have been. But could you comment about that willingness to litigate? And maybe you could as well, Chairman Ramirez.

Mr. BAER. First, as a kid from Milwaukee, talking about beer comes quite naturally to me.

One of the great legacies, I think, of Christine Varney and the people who succeeded her as Assistant Attorney General, was to work closely with the talented people in the Antitrust Division and bring in some outsiders with proven courtroom litigation skills and success. And I actually think that helps in the investigative stage. We ask tougher questions. How will this theory, how will these facts play out in court? But it also lets the people proposing a merger or involved in an investigation know that we are serious and prepared to go to court.

I think that is the right place for the Government to be in a law enforcement capacity, and I hope to be able to very much continue that proud tradition.

Chairman KLOBUCHAR. Very good.

Chairwoman Ramirez, any comment?

Ms. RAMIREZ. Senator, I concur wholeheartedly. I think you did a very good job of identifying the reasons why it is important for the agencies to be ready to litigate in order to obtain the best possible outcome for American consumers.

I have a litigation background, and I understand very well how important this is, and I think the FTC has also done a good job of making sure that litigation readiness is part and parcel of—is a top priority, and that we have litigators who are, in fact, ready to take a matter to trial.

I do think there can be a danger when one is dealing day in and day out with antitrust experts and economists to lose sight of the importance of being able to tell a compelling story and to be able to present that to a judge in Federal court. So I do believe that is critical and important.

Chairman KLOBUCHAR. Very good. I will put some follow-up questions about beer on the record, although I know you cannot comment on it. Minnesota is the home of Schell's, Summit. Need I go on. But we do care that that market stays competitive.

[The questions of Chairman Klobuchar appear as submissions for the record.]

Chairman KLOBUCHAR. Switching to airlines, last week the Wall Street Journal published an article about how in the wake of recent airline mergers we have seen price hikes on routes where carriers have merged and now dominate. For example, United Airlines and Continental Airlines used to compete for customers flying between Chicago and Houston. After the 2010 merger, the combined company now carries 79 percent of the traffic traveling between Houston Bush Intercontinental Airport and O'Hare, not counting connecting passengers.

United's average fare on that route soared 57 percent in the three months ending September 2012 compared to that same period three years ago. By comparison, United's total average domestic price per mile over the same three-year period went up only 16 percent.

I know you cannot comment on the pending American/USAirways merger. We had a very good hearing on that and got a lot of facts out there on that, including the concerns about some of the slots at Reagan Airport. But we have seen remarkable consolidation in this industry over the past decade.

Do you want to comment just generally about the airline industry and any concerns you have about consolidation? Mr. Baer.

Mr. BAER. Thank you, Madam Chair. Because it is an ongoing matter, I need to be very careful.

Obviously, in looking at a transaction in any sector of the economy, we take into account our learning from prior transactions, whether they were approved or challenged. We also do not limit ourselves to looking just backward or taking a snapshot of competitive conditions. In evaluating a transaction, we really need to look at where things are evolving, where is competition going. And probably the best example of doing that was the challenge to the AT&T/T-Mobile merger, where looking at the state of competition, what that merger would have done going forward to the state of competition, the Justice Department made the judgment and, along with the FCC, successfully blocked that transaction.

We looked both at competition very locally, but also looked at national impact of the transaction. And that is part of our job, and we will do it with the pending matters as well.

Chairman KLOBUCHAR. Okay. Thank you.

Chairman Ramirez, I would like to talk with you about Section 5 of the FTC Act. Everyone agrees that it has broader jurisdiction than the antitrust law, but with more limited remedies. And I was wondering—I talked a little bit to Mr. Baer about this, this international issue—if somehow that could be used to help level the competitive playing field on the international level.

As you know, over the last 10 years, the United States has lost more than two million manufacturing jobs, representing a loss of billions of dollars in manufacturing wages to countries such as China, and even though manufacturing is coming back strong in our State, one of the issues that we face all the time is piracy. China's piracy rate exceeds 80 to 90 percent. Foreign manufacturers use pirated software and other stolen technologies to gain significant cost advantages over their U.S. competitors who pay for the IT and comply with intellectual property and try to do everything right, and copyright laws.

Do you think Section 5 could be used in any way to combat this problem?

Ms. RAMIREZ. Senator, I do appreciate the concerns that you have raised, and it is an area that the agency is examining at this time, so I really cannot comment with details. But I can tell you that we are looking very closely at it to see if our Section 5 authority permits potential action in this regard.

Chairman KLOBUCHAR. Okay. One last question, following up on what you raised earlier in your testimony. The FTC worked with the Justice and Health and Human Services Departments on guidelines for accountable care organizations. Last week, Secretary of Health and Human Services Kathleen Sebelius said—and this is a quote—“there is a tight balance between a coordinated care strategy and a monopoly,” and that aspects of the Affordable Care Act were “in constant tension” with antitrust laws.

Do you agree with that characterization?

Ms. RAMIREZ. Senator, I believe that the antitrust laws are very much compatible with the objectives of the Affordable Care Act, which are to raise the quality of health care, lower cost, increase choices for consumers. So I do not believe that they are inconsistent. I know that when we are examining transactions—looking at consolidation, integration, collaboration—we will take into account any pro-competitive benefits, and that would include raising quality of health care and any efficiencies, any efforts that succeed in lowering costs.

So in my mind, they are not in tension, and I think that vigorous competition helps the aim and objectives of the Affordable Care Act.

Chairman KLOBUCHAR. All right. It is just interesting because Kathleen Sebelius has actually talked about this tension that I have heard about, because either some incentives toward consolidation and then at the same time you have the antitrust laws. Would you argue that those incentives just might create more mergers for you to look at? Or how would you characterize it?

Ms. RAMIREZ. Our aim is to make sure that health care quality is improved, that costs are low. I think vigorous competition assists that. At the same time, we are not going to stand in the way of pro-competitive collaboration.

Chairman KLOBUCHAR. Okay. Senator Lee.

Senator LEE. Thank you very much.

First of all, I wanted to respond briefly to the railroad antitrust bill that you discussed just a moment ago. I do have some concerns with this legislation and just wanted to run through those really quickly.

One, it would limit the doctrine of primary jurisdiction in anti-trust cases involving railroads. I think that could have some troubling implications. It would also repeal antitrust immunity for rail rate bureaus, but not just that but also it would repeal certain procedural protections that facilitate lawful rail transportation services, and it would effectively lead to retroactive application of anti-trust laws, allowing a Government agency or private plaintiff to bring a case attacking past railroad activities that were expressly immunized from antitrust laws. So I do have some concerns about that. We will address that on a different day, but I wanted to mention that briefly.

Chairwoman Ramirez, I wanted to ask you a question about something that concerned me recently. I was concerned by the FTC's decision to accept a series of voluntary commitments from Google in lieu of a consent order, and I worry a little bit about the precedent that that decision might set, if, in fact, it is setting a precedent. Accepting such voluntary commitments may represent a break from decades of Commission practice.

Typically, if there is problematic behavior, as three Commissioners seem to suggest is the case, you would institute enforceable commitments. If, on the other hand, there is not a violation of anti-trust laws, then the Government should not be involved in informal market regulation.

Now, I noticed in a footnote to the Commission's decision that you indicated that although you were pleased that Google has decided to change certain of its practices, you objected to the form of the commitments.

Given this set of circumstances, what I have just described, how is the FTC going to assure that Google adheres to these commitments? And if you determine that Google is not adhering to the voluntary commitments, will you consider making the commitments mandatory instead of voluntary?

Ms. RAMIREZ. Senator, thank you for your question and for allowing me an opportunity to address this issue.

I share your concern, as I expressed in that footnote that you referenced, that the voluntary commitment would create confusion over settlement practices at the Commission. What I can tell you is that that matter should not be considered a precedent. When there is a majority of Commissioners who find there has been a violation, any remedy should be embodied in a formal consent order. That is what happened before the Google matter, and that is what is going to continue to happen following the Google matter.

At the same time, Google did make these voluntary commitments to the agency, and I expect that they will fulfill them.

Senator LEE. And if they do not?

Ms. RAMIREZ. The agency will take appropriate action if Google does not.

Senator LEE. Okay. More broadly, I worry that such voluntary commitments take the Commission away from enforcing antitrust standards according to the rule of law, and instead toward an informal, and in my mind illegitimate, regulatory approach. Will voluntary commitments become a more commonly used practice at the FTC under your leadership? And if not, how do you avoid the concern articulated by Commissioner Rosch's dissent that the decision creates very bad precedent and may lead to the impression that well-heeled firms such as Google will receive special treatment by the Commission?

Ms. RAMIREZ. Senator, that would not be the right takeaway from the Google matter. As I mentioned, I think there is consensus among my colleagues that when there is a majority of Commissioners who find that there is a violation, any resulting remedy will be embodied in a formal consent order. So, in my view, what transpired in the Google matter does not change the practice of the Commission.

Senator LEE. Okay.

Mr. Baer, at your confirmation hearing last July, when asked how you would examine allegations that Google was engaged in anticompetitive conduct in the future, you answered by saying that you did not fully understand the precise division of responsibility for certain Internet-related subject matter between FTC and the Antitrust Division. But anytime a dominant firm is in a position to hit a tipping point and abuse its position of dominance, Antitrust ought to be looking. That was your statement at that hearing.

Am I correct in understanding your answer to mean that you believe it is within the scope of the Antitrust Division's responsibilities to examine allegations that might arise in the future that Google is engaged in anticompetitive conduct?

Mr. BAER. Senator, we have a clearance process between the FTC and the Antitrust Division that ensures that we are not investigating the same thing at the same time, or even the same thing seriatim.

To the extent concerns come up about behavior by any dominant firm, the protocol we have is the staff and, if we cannot agree at the staff level, the Chair and I will have a discussion about who is best equipped to take a look at behavior by a dominant firm. That process is working quite well, and one of the things we agreed on the first day that I heard that the President had designated Edith Ramirez as Chair was we were going to continue to make sure that process worked quickly and efficiently. This stuff is too important for there to be any delay in terms of addressing anticompetitive behavior in the marketplace.

Senator LEE. Based on what you have learned regarding the division of authority between the Antitrust Division and the FTC since becoming the Assistant AG, am I correct in assuming that if new facts came to light suggesting Google was abusing its dominant position, the FTC's prior investigation would not necessarily prevent the Department of Justice from investigating these allegations in the future?

Mr. BAER. We would have a prompt conversation about who is best equipped to do it.

Senator LEE. Okay.

Chairwoman Ramirez, the Commission found evidence that Google biases its search results against websites that compete with Google's secondary offerings, but ultimately concluded that because Google's preferential display of its own content would plausibly be viewed as an improvement in the overall quality of Google's search product, the conduct was not anticompetitive.

Can you help me understand what standard the Commission used in reaching this conclusion? Because, obviously, circumstances of innovation do not automatically overcome or override evidence of competitive harm.

Ms. RAMIREZ. Senator, in my view, the pertinent standard that governs product improvements is the standard that was applied by the D.C. Circuit in the Microsoft case. And I want to clarify that what we found was that the design changes were, in fact, pro-competitive changes designed to improve the overall search experience for the user, and that pro-competitive justification was supported by ample evidence, even though it also had the impact of negatively impacting rivals. So just to clarify the way you had structured your question.

Senator LEE. Okay. Now, Commissioner Rosch made clear that he was prepared to litigate against Google on antitrust and consumer protection principles for deceiving consumers by "telling half-truths to maintain a monopoly or near monopoly position."

Was this an issue the FTC investigated in its examination of Google's business practices?

Ms. RAMIREZ. The issue that was raised by Commissioner Rosch in his statement had a privacy dimension. It was one that we looked at but that the majority of the Commission felt was not a violation of the antitrust laws.

Senator LEE. Okay. Thank you.

Madam Chair, I have got one more question, with your leave.

Chairman KLOBUCHAR. Go ahead.

Senator LEE. This one is for Mr. Baer.

There are reports coming out of Europe that Google is abusing its search dominance for the Android operating system to exclude competitors in mobile markets there. Should we be concerned about these issues in the United States? And what is your view about the importance of robust competition in mobile technology markets?

Mr. BAER. Senator, part of our job is to make sure that there is robust competition in all markets, and part of the reason why—the reason why the Antitrust Division challenged AT&T's proposed acquisition of T-Mobile was out of concern that that competitive marketplace would deteriorate if that transaction were allowed to go forward.

Senator LEE. Okay. Thank you very much.

Thank you, Madam Chair.

Chairman KLOBUCHAR. Thank you very much, Senator Lee.

I just wanted to respond on the antitrust front on the railroad issue. I was sitting here thinking of how best to describe it, and that is, there were once, I think, 63 railroads in this country, and now only four provide over 90 percent of the service for freight rail,

and that is four, which is the exact number on the Monopoly board, I was thinking to myself. And so I think the point here is when you talk about the retroactivity issue, it is simply that these are contracts that were entered into 20 years ago and Congress gets involved in those kinds of things from time to time.

Just to give an example of what we are talking about, Blandon Paper, which is located in Minnesota, as everyone knows, the paper industry has not had the easiest time. It actually costs less for them to ship their paper to Finland, the country of Finland. There is a Finland, Minnesota, that probably you have not visited, Mr. Baer. But it costs less for them to ship their paper to Finland than it does to customers in Georgia and Pennsylvania and South Carolina because of the cost of being on a captive rail line from Grand Rapids, Minnesota. And so that is why we are talking about this, and there are obviously other ways to approach this as well with the Surface Transportation Board, but, unfortunately, we have not been able to move very far with that as well, and one of the reasons we keep pushing on this antitrust exemption, and we hope we can resolve this in the coming years. And Senator Vitter and I are working to do that.

As you can see from our hearing—I do not know if you have any other questions, Senator Lee. We have covered everything from trains and planes and auto parts as well as beer, and a far-reaching discussion of the issues, the competitive issues facing this country. And just because there has not been a lot of drama in this hearing, it is probably because our witnesses have had no “gotcha” moments because they have been so able to answer these questions, as well as the fact that we have tried to bring a lot of civility to this Subcommittee, and we will continue to do that, because while we may not agree on everything, Senator Lee and I, we do agree that we have to have strong competition in this country for the country’s prosperity as well as for the consumers. So I want to thank you both for attending today and for answering our questions so thoroughly.

The record will remain open for a week for anyone that wants to put things on the record. I thank you for attending, and this hearing is adjourned.

Do you want to add anything, Mike? Okay.

The hearing is adjourned. Thank you.

Mr. BAER. Thank you.

Ms. RAMIREZ. Thank you.

[Whereupon, at 4:02 p.m., the Subcommittee was adjourned.]

[Additional material submitted for the record follows.]

A P P E N D I X

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

Witness List

Hearing before the
Senate Committee on the Judiciary
Subcommittee on Antitrust, Competition Policy and Consumer Rights

On

“Oversight of the Enforcement of the Antitrust Laws”

Tuesday, April 16, 2013
Dirksen Senate Office Building, Room 226
2:30 p.m.

The Honorable William Baer
Assistant Attorney General
Antitrust Division, United States Department of Justice
Washington, DC

The Honorable Edith Ramirez
Chairwoman
Federal Trade Commission
Washington, DC



Department of Justice

STATEMENT

OF

WILLIAM J. BAER
ASSISTANT ATTORNEY GENERAL
ANTITRUST DIVISION

BEFORE THE

SUBCOMMITTEE ON ANTITRUST, COMPETITION
POLICY AND CONSUMER RIGHTS
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

HEARING ON

“OVERSIGHT OF THE ENFORCEMENT
OF THE ANTITRUST LAWS”

PRESENTED ON

APRIL 16, 2013

STATEMENT
OF
WILLIAM J. BAER
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
APRIL 16, 2013

Chairman Klobuchar, Ranking Member Lee, and distinguished members of the Subcommittee, thank you for inviting me to appear before you today to discuss the work of the Antitrust Division. I have been at the division for just a short time, but I am honored to be part of the proud and successful tradition of antitrust enforcement at the Department of Justice. I am also privileged to be sitting next to Federal Trade Commission Chair Ramirez. She is an exceptional public servant and a friend. We will work together closely on behalf of American consumers.

Competition is the cornerstone of our nation’s economic foundation. It makes our economy vibrant, innovative, and resilient. The antitrust laws serve to promote and protect a robust free-market economy by prohibiting anticompetitive agreements, conduct, and mergers that distort market outcomes. Vigilant antitrust enforcement ensures that consumers reap the benefits of competitive markets.

We can all agree that firms should not be able to distort the economic choices available to consumers or to sellers in upstream markets. We appreciate this subcommittee’s consistent and active interest in and strong support of vigorous and effective law enforcement.

When markets are working, consumers benefit from lower prices and higher quality goods and services. The focus of the division’s enforcement resources has been, and will continue to be, addressing competition issues that threaten to deny consumers those benefits. The division devotes substantial attention to the products consumers use every day—the items we buy at the grocery store, media

and entertainment, communications, consumer electronics, and new technologies—as well as other goods and services that have a significant impact on our nation’s economy, including health care, agriculture, transportation, energy, and financial services.

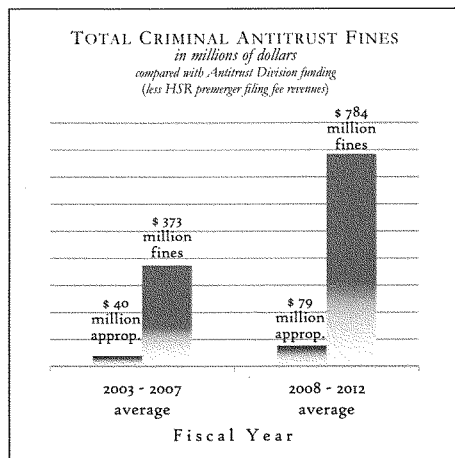
The tools we have at our disposal are varied, and include:

- criminal enforcement against hardcore antitrust violations—price fixing, bid rigging, market allocation, and other cartel behavior—which are subject to fines and imprisonment;
- challenging mergers that would raise prices and harm quality and innovation;
- halting behavior by companies that may result in monopolization or other serious harm to consumers; and
- working closely with our colleagues at the FTC and in other federal agencies, and with state and international authorities to promote free markets and consumer interests.

Let me start with our efforts to uncover and prosecute cartel behavior. Price fixers and bid riggers do serious and demonstrable harm to consumers. Criminal prosecution of those wrongdoers is critical to our mission. We target domestic and international cartels that rob consumers of their hard-earned dollars. We prosecute both corporate and individual wrongdoers (whether foreign or domestic). In Fiscal Year 2012 alone, the division filed 67 criminal cases. We charged 16 corporations and 63 individuals. The Division obtained criminal fines totaling over 1.1 billion dollars and courts sentenced 45 individuals to jail terms that average just over two years per defendant.

Aggressively pursuing criminal price fixers benefits consumers in multiple ways. The specific price fixing is eliminated, other wrongdoers are put on notice they may be next and are dissuaded from continuing their illegal conduct, and those contemplating price fixing realize the serious downsides and are deterred from committing the crime in the first instance. This results in lower prices for consumers, whether it is on computers, televisions, automobiles, shipping, hospital services, or numerous other products and services purchased every day.

American consumers and taxpayers are well-served by these efforts. In the last ten fiscal years, the division has obtained criminal fines averaging nearly \$580 million



per year. That is almost 10 times our average annual appropriation of \$60 million (net of the division's share of offsetting collections of Hart-Scott-Rodino fees collected by FTC). The last five fiscal years are even more impressive, with an average of nearly \$785 million in criminal fines versus an average appropriation of about \$79 million (again, net of HSR fees). These fines do not go to the Antitrust Division, but rather are contributed to the Crime Victim's Fund, helping those victimized by crimes throughout our country.

Protecting Consumers Across Important Sectors of the Economy

The division's accomplishments detailed below illustrate how our work has a tangible and enduring impact in the markets that matter most to American consumers' pocketbooks. Our most recent merger lawsuit challenged Anheuser-Busch InBev's (ABI) proposed acquisition of Grupo Modelo. The division's complaint alleges that this deal would merge the largest and third-largest firms selling beer in the United States, the world's second largest beer market. The division concluded that this acquisition would lead to higher prices, and since U.S. consumers spend tens of billions of dollars annually on beer, even small price increases result in sizeable harm to consumers.

High Technology and Telecommunications

Many Americans use cell phones as well as other electronics that feature an LCD screen (including most TVs and computers). The division's criminal investigation into liquid crystal display (LCD) panels uncovered long-running price-fixing conspiracies that have resulted in every family, school, business, and charity that

bought notebook computers, monitors, and LCD televisions paying unjustified, inflated prices during the course of the conspiracies. \$23.5 billion worth of price-fixed thin-film transistor LCDs came into the United States in finished monitors and notebook computers, and the division's expert estimated the overcharges on those panels exceeded \$2 billion. Our prosecution of these wrongdoers resulted in the conviction of eight companies and 12 executives. Fines totaled nearly \$1.4 billion, and the guilty executives received jail terms ranging from six months to three years.

Cartels put consumers at risk, but so can anticompetitive mergers. In 2011, after close coordination with the Federal Communications Commission (FCC), the Antitrust Division filed a lawsuit to block a transaction that would have combined two of the only four wireless carriers with nationwide networks, AT&T Inc. and T-Mobile USA Inc. This deal threatened to reduce competition significantly in the wireless market, raising prices for hundreds of millions of Americans and reducing consumer choice. The parties abandoned the merger in the face of the division's challenge.

Financial Services

Illegal behavior in the financial sector also threatens economic harm for many American consumers. The Antitrust Division's efforts here include an ongoing investigation into fraud and price fixing involving municipal bonds. To date, 20 former industry executives have been prosecuted for their roles in conspiracies involving re-investment contracts for the proceeds of municipal bonds. By manipulating the competitive bidding process, the conspirators cheated cities and towns out of money for important public works projects. The division, working closely with other federal and state enforcers, has obtained nearly \$745 million in restitution, penalties, and disgorgement to federal and state agencies.

Often we work in partnership with dedicated FBI teams to uncover financial fraud. For example, we are pursuing jointly with the FBI bid rigging and fraud in local real estate markets. We have uncovered conspiracies around the country to rig bids at real estate foreclosure and tax lien auctions, preventing lenders and distressed homeowners from getting competitive prices or interest rates. To date, this initiative has resulted in charges against 53 individuals and two companies around the country.

When mergers involving financial services firms put consumers at risk of higher prices, we move to block them. In 2011, the division convinced a federal district court judge to block H&R Block's proposed acquisition of TaxACT, a digital, do-it-yourself tax preparation provider. The transaction would have left American taxpayers with only two major providers of this service in a market in which the top three firms have 90% of all sales. TaxACT was a particularly aggressive competitor, and its loss would have led to higher prices, lower quality products, and less innovation. The court's opinion in this case serves as a valuable precedent in future division cases because the court relied on the revised 2010 Horizontal Merger Guidelines throughout.

Transportation

American consumers who buy a car, purchase products that have been shipped by air or sea, or purchase an airplane ticket expect the benefits of competition. Effective antitrust enforcement helps make that expectation a reality.

The division's ongoing auto parts matter is the widest-ranging criminal investigation in division history. We have uncovered conspiracies spanning over a decade and involving numerous auto parts suppliers. These companies have rigged bids and fixed prices for critical parts of autos sold in the U.S.—including safety systems such as seatbelts, airbags, steering wheels, antilock brake systems, instrument panel clusters, and electric wire harnesses. Thus far, nine corporations have admitted their participation and paid fines of more than \$800 million, and 12 executives have pleaded guilty and have been sentenced to serve significant prison sentences. The investigation continues.

We have uncovered and prosecuted cartels involving all modes of transportation for shipping services. Increases in shipping costs influence the prices of virtually all goods. In the division's investigation into price fixing in the air cargo industry, more than \$1.8 billion in criminal fines were imposed and a total of 22 airlines and 21 executives were charged. In addition, the division's ongoing criminal investigation into conspiratorial conduct in the market for coastal water freight transportation services has resulted in convictions against three companies and six individuals and \$46 million in criminal fines.

In July 2012, the division required United Technologies Corporation (UTC) to divest certain assets used in the production of electrical power systems and aircraft engine control systems in order to proceed with its acquisition of Goodrich

Corporation—the largest merger in the history of the aircraft industry, valued at \$ 18.4 billion. The division determined that the acquisition, as originally proposed, likely would have resulted in higher prices, less favorable contractual terms, and less innovation in the manufacture and sale of several critical aircraft components used on virtually all modern commercial, business and military aircraft. Higher prices for these critical components would have translated into higher costs for the military, businesses and consumers.

As this Subcommittee is well aware, antitrust issues involving air transportation continue to be front and center for the division. On December 11, 2012, Delta Air Lines and Virgin Atlantic Airways Ltd. announced an agreement for a proposed joint venture on flights between North America and the U.K., and on February 14, 2013, US Airways and American Airlines announced a proposed merger that would create the world's largest airline. The division currently is conducting thorough investigations of both of these transactions.

Health Care

Antitrust plays an important role in protecting competition in health care provider and insurance markets.

One area of focus for us and for the FTC is so-called “most favored nation clauses” (MFNs). Such provisions potentially distort the competitive process by raising the costs of health insurance and hospital services, preventing other insurers from entering the market, and discouraging discounts. In 2010, the Antitrust Division filed a lawsuit challenging Blue Cross Blue Shield of Michigan's (BCBSM) use and enforcement of MFNs in its contracts with Michigan hospitals. These provisions required hospitals to charge BCBSM no more than they charge its competitors or to charge competitors more than they charge BCBSM, making it harder for its rivals to compete and survive. In addition to this lawsuit, in 2012 the division and the FTC held a workshop on MFN clauses that examined how MFNs can present competitive concerns in health insurance markets and in a number of other industries.

This combination of enforcement and public discussion has shined a spotlight on the problems MFNs can cause, leading a number of states to take a hard look at these practices: On March 18, 2013, the State of Michigan enacted a statute to ban the use of MFNs in health care provider contracts, becoming the latest in a growing list of states that statutorily restrict or prohibit such provisions.

Illegal contractual behavior can raise health care costs as well. In 2011, the division challenged a Texas hospital's use of exclusionary contracts with health insurers to maintain market power in its local market. United Regional Health Care System of Wichita Falls had entered into a number of contracts with insurers that imposed a significant pricing penalty on those insurers if they contracted with a competing facility in the local region. The impact of these contracts was to slow or prevent expansion and entry by other health care providers, likely leading to higher insurance premiums and health care costs in the Wichita Falls area.

Advocacy, Interagency Collaboration, and Public Workshops

Effective enforcement is central to the division's mission to protect competition, but we can achieve positive results for American consumers in other ways as well. For example, the Department of Justice and the Department of Agriculture (USDA) conducted a successful series of workshops in 2010 in locations around the U.S., focusing on seeds and crops, livestock, dairy, and the agriculture supply chain and monopsony. We appreciated the participation and support of members of this committee in the workshops. The agriculture workshops allowed both agencies to listen to and learn from farmers, ranchers, cooperatives, processors, and retailers. Through new efforts, USDA and the department's Antitrust and Civil Divisions have successfully tapped opportunities for harnessing each other's expertise, expanded the scope of our coordination, and hence improved enforcement of laws designed to protect producers. Thanks to the workshops, we gained a more complete and detailed understanding of the agriculture sector. Last year, we released a report that discusses the division's learning from the workshops. The division will continue to work hard in conjunction with USDA to better ensure that farmers and processors reap the benefits of competitive agriculture markets and that consumers pay competitive prices for food.

In the telecommunications sector, policy efforts go hand in hand with the division's enforcement efforts. Earlier this month, the division filed at the FCC comments on our nation's policies regarding public allocation of spectrum, a key input for cellular and broadband services and other communications applications. In these comments, the division concludes that rules that ensure that smaller nationwide networks will have an opportunity to acquire substantial low-frequency spectrum—which they currently lack—could improve the competitive dynamic among nationwide carriers and benefit consumers. The division will continue to work with the FCC as it crafts its policies on spectrum holdings to help ensure

these industries are as competitive as possible and use spectrum efficiently.

With the importance of technology in our daily lives, we are focused on the role of competition and its interface with intellectual property. This requires close collaboration with other interested parts of the government. For example, the department and the U.S. Patent and Trademark Office jointly issued a Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments, which concluded that in most circumstances it would be inappropriate for a patent holder to seek injunctive relief in a judicial proceeding or seek an exclusion order if it has promised to license the patent on fair, reasonable and non-discriminatory terms. In 2012, the division and the FTC jointly conducted a workshop to study the growth of and antitrust risks associated with patent assertion entity (PAE) activities. Workshops such as this provide a forum for open discussion on what are among the most challenging and cutting-edge competition issues of the day.

International Cooperation and Coordination

The division's activities benefit from effective and increasing interaction and coordination with a host of other government entities. International case cooperation has been frequent and fruitful during the past few years. During 2011-2012, the division cooperated on civil matters with a number of non-U.S. competition agencies, including those in Australia, Brazil, Canada, Colombia, the European Union (EU), Germany, Japan, Mexico, South Africa, and the United Kingdom.

International case cooperation is particularly important to our criminal enforcement program. Cooperation with our sister agencies around the world allows for coordinated raids in international cartel investigations, helping to preserve crucial evidence. Recent criminal investigations where we have worked with international enforcers include our auto parts investigation, where we are working with our counterparts in Japan, the EU, and Canada, among others, and our air cargo cases, where we have worked with the Australian Competition and Consumer Commission, the European Commission, the New Zealand Commerce Commission, the U.K. Office of Fair Trading, and other agencies.

Finally, the division recently has signed important memoranda of understanding (MOUs) with foreign antitrust enforcers. In particular, in 2011, the Department of Justice and the FTC signed an MOU on Antitrust Cooperation with the three

Chinese antimonopoly agencies. The division continues to strengthen its relationship with these agencies through endeavors such as the first Joint Dialogue on competition policy among all signatories to the MOU at the senior official level, which was held in Washington, D.C., on September 24-25, 2012. And on September 27, 2012, the Department, the FTC, the Indian Ministry of Corporate Affairs, and the Competition Commission of India signed an MOU on Antitrust Cooperation setting forth provisions for increased communication and cooperation on policy and enforcement matters.

Conclusion

The Antitrust Division's dedicated public servants are working hard to vigorously enforce the antitrust laws for the benefit of American consumers. We use our tools—criminal and civil enforcement, together with focused and effective competition advocacy—to ensure that consumers get the full advantage of our free-market economy. We have been and we need to continue to be effective and efficient at protecting competition for products and services that consumers use every day and in industries that have a significant impact on our nation's economy. I am honored to be part of this hard-working team and to be associated with a law enforcement mission that is delivering real benefits to American consumers.

**Prepared Statement of
the Federal Trade Commission**

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

“Oversight of the Enforcement of the Antitrust Laws”

**Washington, D.C.
April 16, 2013**

Chairman Klobuchar, Ranking Member Lee, and Members of the Subcommittee, thank you for the opportunity to appear before you today. I am Edith Ramirez, Chairwoman 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 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 and overall consumer welfare by keeping prices competitive, expanding output and the variety of choices available, and promoting innovation.

I. The FTC's Competition Enforcement Work

The Commission seeks to promote and protect competition through an evidenced-based, balanced approach to law enforcement. The FTC has jurisdiction over a wide swath of the economy and focuses its enforcement efforts on sectors that most directly affect consumers, such as health care, technology, and energy. The FTC continues to examine potentially anticompetitive mergers and conduct that are likely to harm competition and consumers, and takes action where appropriate.

One of the agency's principal responsibilities is to prevent mergers that may substantially lessen competition. Pre-merger filings under the Hart-Scott-Rodino Act continue to recover from recessionary levels—indeed, FY 2012 saw twice as many filings as FY 2009.² Agency staff reviews the filings, and a small number of the proposed mergers require additional investigation

¹ This 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 Wright has voted to issue this Statement but takes no position with respect to enforcement actions or other matters that occurred prior to his tenure as Commissioner.

² In FY 2012, there were 1,400 adjusted transactions reported to the Agencies (transactions in which a second request could have been issued). Comparatively, in FY 2009 there were 684 such transactions.

to determine whether they are likely to violate Clayton Act Section 7. During FY 2012, the Commission challenged 25 mergers after the evidence showed that they would likely be anticompetitive.³ In the current fiscal year, the Commission has challenged 11 mergers,⁴ including two actions where the Commission sought a preliminary injunction in federal court to prevent consummation of the mergers.⁵

The FTC has also made significant progress in its ongoing efforts⁶ to review and update rules, regulations, and guidelines periodically so that they remain current, effective, and not unduly burdensome. For instance, the Commission has revised its rules governing administrative litigation to hold respondents, complaint counsel, the administrative law judge, and the Commission to aggressive timelines for discovery, motions practice, trial, and adjudication.⁷ The result is a faster-paced administrative process, one comparable to or even faster than federal court timelines for similar actions.⁸

³ Seven proposed mergers were abandoned or restructured after FTC staff raised competitive concerns; fifteen were resolved by entry of Commission consent orders; and in three, the FTC filed complaints to stop the mergers pending a full administrative trial. See case summaries in the FTC's Competition Enforcement Database, *available at* <http://www.ftc.gov/bc/caselist/merger/total/2012.pdf>.

⁴ See cases listed at <http://www.ftc.gov/bc/caselist/merger/total/2013.pdf>; several are discussed in more detail *infra*.

⁵ Press Release, FTC and Pennsylvania Attorney General Challenge Reading Health System's Proposed Acquisition of Surgical Institute of Reading (Nov. 16, 2012), *available at* <http://ftc.gov/opa/2012/11/reading.shtm>; Press Release, FTC Issues Complaint Seeking to Block Integrated Device Technology, Inc.'s Proposed \$330 Million Acquisition of PLX Technology, Inc. (Dec. 18, 2012), *available at* <http://www.ftc.gov/opa/2012/12/idtplx.shtm>.

⁶ See, e.g., 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>.

⁷ Press Release, FTC Issues Final Rules Amending Parts 3 and 4 of the Agency's Rules of Practice (Apr. 27, 2009), *available at* <http://www.ftc.gov/opa/2009/04/part3.shtm>. In August 2011, the Commission made additional changes relating to discovery, the labeling and admissibility of certain evidence, and deadlines for oral arguments. Press Release, FTC Modifies Part 3 of Agency's Rules of Practice (Aug. 12, 2011), *available at* <http://www.ftc.gov/opa/2011/08/part3.shtm>.

⁸ 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 preventing further integration. Meanwhile, both FTC complaint counsel and the respondents prepared for a full administrative trial that began on May 31, 2011. After 30 days of testimony and motions, including 81 witnesses and over 2,700 exhibits, the ALJ heard closing arguments on September 29. Overall, within

This testimony highlights these and other key Commission efforts to promote competition in crucial health care, technology, and energy markets.

A. Promoting Competition in Health Care Markets

The rising cost of health care is a serious concern for most Americans. Health care consolidation can threaten to undermine efforts to control these costs, and it is critical that the Commission act to preserve and promote competition in health care markets. Competition encourages market participants to deliver cost-effective, high-quality care and to pursue innovation to further these goals.⁹

1. Stopping Anticompetitive Health Care Mergers

A number of FTC merger enforcement actions in the past several years have involved companies in health care markets: hospitals, pharmacies, medical device and pharmaceutical manufacturers, and other market participants.

In particular, the Commission has redoubled its efforts to prevent hospital mergers that may leave insufficient local options for in-patient hospital services, leading to higher prices for health care. In the last two years, the Commission has successfully prevented anticompetitive

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.

⁹ For a complete list of FTC enforcement actions relating to health care, see Overview of FTC Antitrust Actions in Health Care Services and Products, *available at* <http://www.ftc.gov/bc/healthcare/antitrust/hcupdate.pdf> and Overview of FTC Antitrust Actions in Pharmaceutical Services and Products, *available at* <http://www.ftc.gov/bc/healthcare/antitrust/rxupdate.pdf>.

hospital mergers in Toledo, Ohio,¹⁰ and Rockford, Illinois,¹¹ as well as allegedly anticompetitive mergers involving other types of health care facilities.¹²

Additionally, in February, the Supreme Court unanimously ruled in favor of the Commission, reviving the Commission's challenge to a hospital merger resulting in an alleged monopoly for inpatient services in the Albany, Georgia area.¹³ In so ruling, the Court accepted the Commission's argument that the state action doctrine did not exempt the acquisition from antitrust scrutiny. It held that the Georgia legislature did not articulate a clear policy that hospital authorities could eliminate competition through a hospital merger by merely conferring general corporate powers on the local hospital authority. The administrative hearing will commence this summer.¹⁴

In addition to mergers between competing hospitals, the Commission is also increasingly concerned about the effect of combinations involving other health care providers. Much like hospitals mergers, these transactions can lead to higher health care costs. In March 2013, the Commission, along with the Idaho Attorney General, filed suit to prevent Idaho's dominant hospital system from raising health care costs through its acquisition of the state's largest multi-

¹⁰ Press Release, Citing Likely Anticompetitive Effects, FTC Requires ProMedica Health System to Divest St. Luke's Hospital in Toledo, Ohio, Area (Mar. 28, 2012), *available at* <http://www.ftc.gov/opa/2012/03/promedica.shtm>. An appeal of the Commission's order is pending before the Sixth Circuit. *ProMedica Health Sys., Inc. v. FTC*, No. 12-3583 (6th Cir. appeal docketed May 18, 2012).

¹¹ Press Release, OSF Healthcare System Abandons Plan to Buy Rockford in Light of FTC Lawsuit; FTC Dismisses its Complaint Seeking to Block the Transaction (Apr. 13, 2012), *available at* <http://www.ftc.gov/opa/2012/04/rockford2.shtm>.

¹² For instance, the Commission took action to remedy the alleged anticompetitive effects of a merger of a hospital and a surgery center in Reading, Pennsylvania, Press Release, FTC and Pennsylvania Attorney General Challenge Reading Health System's Proposed Acquisition of Surgical Institute of Reading (Nov. 16, 2012), *available at* <http://www.ftc.gov/opa/2012/11/reading.shtm>, and required a divestiture in a merger of facilities providing inpatient psychiatric services. Press Release, FTC Puts Conditions on UHS's Proposed Acquisition of Ascend Health Corporation (Oct. 5, 2012), *available at* <http://www.ftc.gov/opa/2012/10/uhs.shtm>. The Commission also prevented the merger of two long-term care pharmacies that provide medications to skilled nursing homes. *See* Press Release, Omnicare Abandons Plan to Buy Rival Pharmacy in Light of FTC Lawsuit; FTC Votes to Dismiss its Complaint Seeking to Block the Transaction (Feb. 23, 2012), *available at* <http://www.ftc.gov/opa/2012/02/omnicare.shtm>.

¹³ *FTC v. Phoebe Putney Health Sys. Inc.*, 133 S. Ct. 1003 (2013).

¹⁴ *Phoebe Putney Health Sys. Inc.*, Docket No. 9348 (April 3, 2013) (order denying Respondents' motion to reschedule hearing date), *available at* <http://www.ftc.gov/os/adjpro/d9348/130403phoebeorder.pdf>.

specialty physician group.¹⁵ While the Commission has concerns about consolidation among health care providers, we will not stand in the way of legitimate provider collaboration that will reduce costs and improve the quality of care.

The Commission also continues to review mergers between pharmaceutical manufacturers to prevent transactions or combinations that may allow companies to exercise market power by raising prices on needed medications. For instance, in the last two years, the Commission required divestitures to remedy competitive concerns stemming from eight proposed mergers between drug makers, preserving competition in the sale of over 40 drugs.¹⁶

2. Combatting Efforts to Stifle Generic Competition

A top priority for the Commission over the past decade has been 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. We of course are aware of Chairman Klobuchar, Senator Grassley and others’ bill to address pay-for-delay agreements and appreciate your efforts in this important area. These agreements enable branded manufacturers to buy more protection from competition than the assertion of their patent rights alone provide. The agreements profit both the branded

¹⁵ Press Release, FTC and Idaho Attorney General Challenge St. Luke’s Health System’s Acquisition of Saltzer Medical Group as Anticompetitive (Mar. 12, 2013), *available at* <http://www.ftc.gov/opa/2013/03/stluke.shtm>. Additionally, in December 2012, the FTC finalized a consent decree with the largest hospital system in Reno, Nevada, designed to restore competition to the market for cardiology services there following Renown’s acquisition of two local cardiology groups allegedly threatened competition in that market. Press Release, FTC Order Will Restore Competition for Adult Cardiology Services in Reno, Nevada (Aug. 6, 2012), *available at* <http://www.ftc.gov/opa/2012/08/renownhealth.shtm>.

¹⁶ *Watson Pharms.*, Docket No. C-4373 (Dec. 14, 2012) (consent order), *available at* <http://www.ftc.gov/os/caselist/1210132/index.shtm>; *Novartis AG*, Docket No. C-4364 (Sept. 5, 2012) (consent order), *available at* <http://www.ftc.gov/os/caselist/1210144/index.shtm>; *Valeant Pharm. Int’l, Inc.*, Docket No. C-4342 (Feb. 22, 2012) (consent order), *available at* <http://www.ftc.gov/opa/2012/02/valeant.shtm>; *Teva Pharm., Inc.*, Docket No. C-4335 (July 2, 2012) (consent order), *available at* <http://www.ftc.gov/os/caselist/1110166/index.shtm>; *Hikma Pharms.*, Docket No. C-4320 (June 7, 2011) (consent order), *available at* <http://www.ftc.gov/os/caselist/1110051/index.shtm>; *Grifols S.A.*, Docket No. C-4322 (July 22, 2011) (consent order), *available at* <http://www.ftc.gov/os/caselist/1010153/index.shtm>; *Perrigo Co.*, Docket No. C-4329 (June 26, 2012) (consent order), *available at* <http://www.ftc.gov/os/caselist/1110083/index.shtm>.

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, businesses, and taxpayers—as much as \$3.5 billion each year according to FTC economists¹⁷—and their numbers are growing. According to our most recent data, in FY 2012, the number of potentially anticompetitive patent dispute settlements between branded and generic drug companies increased significantly compared with FY 2011, jumping from 28 to 40.¹⁸ Overall, the FY 2012 agreements covered 31 different brand-name pharmaceutical products with combined annual U.S. sales of more than \$8.3 billion.

On March 25, 2013, the Supreme Court heard arguments in *FTC v. Actavis, Inc.*,¹⁹ a Commission appeal of the Eleventh Circuit’s dismissal of a challenge to an alleged “pay-for-delay” agreement involving the testosterone-replacement drug AndroGel. The Eleventh Circuit’s decision followed a string of decisions from the courts of appeals largely insulating these agreements from antitrust scrutiny, a trend broken last year by the Third Circuit’s ruling in the *In re K-Dur* litigation, which found the agreements presumptively unlawful.²⁰ We are hopeful for a favorable decision from the Supreme Court that stops these anticompetitive settlements.²¹

¹⁷ Fed. Trade Comm’n, *Pay For Delay: How Drug Company Pay-Offs Cost Consumers Billions* (Jan. 2010), available at <http://www.ftc.gov/os/2010/01/100112payfordelayrpt.pdf>.

¹⁸ Press Release, FTC Study: In FY 2012, Branded Drug Firms Significantly Increased the Use of Potential Pay-for-Delay Settlements to Keep Generic Competitors off the Market (Jan. 17, 2013), available at <http://www.ftc.gov/opa/2013/01/mmarpt.shtm>.

¹⁹ *FTC v. Actavis, Inc.*, 2013 U.S. LEXIS 9415, *cert. granted*, 133 S. Ct. 787 (U.S. Dec. 7, 2012) (No. 12-146). When the Supreme Court granted certiorari, the case name was *Federal Trade Commission v. Watson Pharmaceuticals, Inc.* On January 24, 2013, Watson notified the Supreme Court that the company had changed its name to “Actavis, Inc.,” which resulted in the Supreme Court modifying the name of the case.

²⁰ 686 F.3d 197 (3d Cir. 2012).

²¹ A large number of amici, including the American Medical Association, 118 law, economics, and business professors, and 36 states plus the District of Columbia and the Commonwealth of Puerto Rico, supported our position.

In addition to our pay-for-delay efforts, the Commission continues to monitor other strategies adopted by branded pharmaceutical companies that may be designed to delay or prevent generic entry. For example, we recently filed amicus briefs in private antitrust litigations involving two of these strategies. One involved the potentially anticompetitive abuses of safety protocols known as Risk Evaluation and Mitigation Strategies (“REMS”) to prevent a generic from being able to access samples of brand products to begin the bioequivalence testing process required by the Hatch-Waxman Act.²² The other involves product hopping, which occurs when brand companies, facing a threat of generic competition, make minor non-therapeutic changes to their products.²³ While these changes may offer little or no benefit to patients, they may enable the brand to preserve its monopoly by preventing generic substitution at the pharmacy level, which is a key to competition in the pharmaceutical industry.

B. Antitrust Oversight in Technology Markets

The Commission also takes a balanced and fact-based approach to enforcement in fast-paced technology markets. In some cases, the evidence supports a finding of competitive harm that requires Commission action. The Commission recently challenged a proposed merger between Integrated Device Technology, Inc. and PLX Technology, Inc. Both companies make Peripheral Component Interconnect Express (“PCIe”) switches, complex integrated circuits used to transmit data between processor chips and various endpoints in computer systems, such as

²² Fed. Trade Comm’n, Brief as Amicus Curiae, *Actelion Pharms. Ltd. v. Apotex Inc.*, No. 12-05743 (D.N.J. Mar. 11, 2013).

²³ Fed. Trade Comm’n, Brief as Amicus Curiae, *Mylan Pharms., Inc. v. Warner Chilcott Pub. Ltd. Co.*, No. 12-3824 (E.D. Pa. Nov. 21, 2012).

memory or graphics cards. There was substantial evidence of intense head-to-head competition on both price and innovation and a post-merger market share of over 80 percent in that matter.²⁴

At other times, the evidence supports a more cautious approach. For instance, the Commission voted unanimously to close its investigation into allegations that Google harmed competition by unfairly preferencing its own content on the Google search results page and selectively demoting its competitors' content, a practice some refer to as "search bias." The Commission concluded that challenging Google's product design decisions would require the Commission or a court to second-guess Google's product design in the face of plausible procompetitive justifications, where the evidence reasonably could be viewed as showing that Google's design decisions improved the overall quality of Google search results. Based on this evidence, the Commission did not have reason to believe that Google's business practices were, on balance, demonstrably anticompetitive. Google did agree to make changes to certain other business practices that some members of the Commission found objectionable.²⁵

The Commission also took action to stop Google's alleged misuse of standard essential patents ("SEPs"). Specifically, the Commission alleged that Google violated commitments made to several standard setting organizations to license patents essential to implementing several technology standards on fair, reasonable and non-discriminatory terms ("FRAND") to any interested manufacturer. The SEPs at issue were originally held by Motorola Mobility ("MMI") and covered technologies essential to interoperability standards used in a range of popular

²⁴ Press Release, FTC Issues Complaint Seeking to Block Integrated Device Technology, Inc.'s Proposed \$330 Million Acquisition of PLX Technology, Inc. (Dec. 18, 2012), *available at* <http://www.ftc.gov/opa/2012/12/idthlx.shtm>. The parties abandoned the deal soon after the Commission filed suit.

²⁵ Google agreed to remove restrictions on the use of its online search advertising platform, AdWords, that may have made it more difficult for advertisers to coordinate online advertising campaigns across multiple platforms. Google also agreed to give websites the ability to "opt out" of display on Google vertical properties. *See* Letter from David Drummond, Senior Vice President and Chief Legal Officer, Google, Inc., to Chairman Jon Leibowitz, Fed. Trade Comm'n (Dec. 27, 2012), *available at* <http://www.ftc.gov/os/2013/01/130103googleletterchairmanleibowitz.pdf>.

devices such as smartphones, tablets, and gaming consoles. MMI, and then Google (after it acquired the MMI patent portfolio), allegedly refused to license the SEPs to willing licensees on FRAND terms, after manufacturers had developed standard compliant products in reliance on those commitments. In its administrative complaint, the Commission charged that Google engaged in unfair methods of competition and unfair acts and practices in violation of Section 5 of the Federal Trade Commission Act by seeking injunctions on SEPs for which FRAND promises had been made, thus threatening to harm the standard-setting process, impair competition in the markets for products using those patents, and ultimately, raise prices to consumers. To settle those charges, Google has agreed not to seek an injunction for infringement of its SEPs unless and until it has followed the process outlined in the Commission's proposed order, a process that encourages negotiation with potential licensees over disputed terms or ruling by a neutral third party.²⁶

The proposed order in the Google-MMI decision is the most recent action²⁷ in more than two decades of Commission work involving complex issues at the intersection of antitrust and intellectual property law, issues pertaining to innovation, standard-setting, and patents. For instance, in 2003 and 2007, the Commission issued reports on competition and patent law,²⁸ and

²⁶ Commissioner Ohlhausen voted against the proposed consent agreement in Google/MMI and issued a dissenting statement, which is available at <http://www.ftc.gov/os/caselist/1210120/130103googlemotorolaohlhausenstmt.pdf>.

²⁷ In a proposed order in November 2012, the Commission required largely similar commitments regarding SEPs from Robert Bosch GmbH. In order to proceed with its acquisition of SPX Service Solutions, Bosch agreed to sell its automotive air conditioner repair equipment business and to abandon SPX's claims to injunctive relief after SPX reneged on FRAND commitments involving SEPs for its equipment. Press Release, FTC Order Restores Competition in U.S. Market for Equipment Used to Recharge Vehicle Air Conditioning Systems (Nov. 26, 2012), available at <http://www.ftc.gov/opa/2012/11/bosch.shtm>. Commissioner Ohlhausen voted against the proposed consent agreement in *Bosch* and issued a separate statement, which is available at <http://www.ftc.gov/os/caselist/1210081/121126boschohlhausenstatement.pdf>.

²⁸ Fed. Trade Comm'n and Dep't of Justice, Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition (2007), available at <http://www.ftc.gov/reports/innovation/P040101PromotingInnovationandCompetitionrpt0704.pdf>; Fed. Trade Comm'n, 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>.

in 2011, we issued another significant patent study, focusing on notice and remedies.²⁹ That same year 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.³⁰ Last December, the FTC and DOJ held a joint workshop to discuss the activities of patent assertion entities.³¹ In addition to this policy work, the Commission has brought several cases involving anticompetitive conduct by technology companies for undermining the standard-setting process.³²

The Commission will continue to foster an ongoing dialogue with stakeholders in this important area, and bring enforcement actions when necessary to prevent the distortion of the standard-setting process, which is so critical to the development of new products that benefit consumers and drive the American economy.

C. Preserving Competition in Energy Markets

Few issues are more important to consumers and businesses alike than the prices they pay for gasoline to run their vehicles and energy to heat and light their homes and businesses. Accordingly, the FTC works to maintain competition in energy industries, invoking all the powers at its disposal—including monitoring industry activities, investigating possible antitrust violations, prosecuting cases, and conducting studies—to protect consumers from anticompetitive conduct in the industry.

Mergers can significantly affect competition in energy markets, and the Commission's review of proposed mergers is essential to preserving competition in these markets. The FTC

²⁹ Fed. Trade Comm'n, *The Evolving IP Marketplace: Aligning Patent Notice and Remedies with Competition* (2011), available at <http://www.ftc.gov/os/2011/03/110307patentreport.pdf>.

³⁰ Fed. Trade Comm'n Workshop, *Tools to Prevent Patent "Hold-Up"* (June 21, 2011); materials available at <http://www.ftc.gov/opp/workshops/standards/index.shtml>.

³¹ The workshop materials are available at <http://www.ftc.gov/opp/workshops/pae/>.

³² *Dell Computer Corp.*, 121 F.T.C. 616 (1996); *Union Oil Co. of Cal.*, 140 F.T.C. 123 (2005); *Rambus Inc.*, 2007 F.T.C. LEXIS 13 (2007); *Negotiated Data Solutions, LLC*, 2008 F.T.C. LEXIS 120 (2008).

devotes significant resources to reviewing proposed mergers and acquisitions involving petroleum and other energy products, and to taking action where appropriate. As a recent example, last year the FTC required Kinder Morgan, Inc., one of the largest U.S. transporters of natural gas and other energy products, to sell three natural gas pipelines and two gas processing plants and associated storage capacity in the Rocky Mountain region to settle the Commission's charges that the acquisition likely would have been anticompetitive.³³ In another 2012 action, the FTC issued a consent order requiring that AmeriGas L.P. amend its proposed acquisition of Energy Transfer Partners' Heritage Propane business. AmeriGas and Heritage are two of the nation's largest propane distributors, and the FTC charged that the acquisition would reduce competition and raise prices in the market for propane exchange cylinders that consumers use to fuel barbeque grills and patio heaters.³⁴

The Commission also participates in the Oil and Gas Price Fraud Working Group created by the Attorney General to monitor oil and gas markets for potential violations of criminal or civil laws.

Additionally, the FTC 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 agency identify appropriate targets for further investigation of potentially anticompetitive conduct.³⁵ We also use the data generated by the monitoring project

³³ Press Release, FTC Requires Kinder Morgan to Sell Rocky Mountain Pipelines as a Condition of Acquiring El Paso Corporation (May 1, 2012), *available at* <http://www.ftc.gov/opa/2012/05/el Paso.shtm>.

³⁴ Press Release, FTC Puts Conditions on AmeriGas's Proposed Acquisition of Rival Propane Distributor Heritage Propane (Jan. 11, 2012), *available at* <http://www.ftc.gov/opa/2012/01/amerigas.shtm>.

³⁵ See Gasoline and Diesel Price Monitoring, *available at* http://www.ftc.gov/ftc/oilgas/gas_price.htm.

in conducting periodic studies of the factors that influence the prices that consumers pay for gasoline.³⁶

II. Cooperation with Other Antitrust Enforcers

Over the years, the Commission has fostered partnerships with other antitrust enforcers, most notably, the Antitrust Division of the Department of Justice. Recent joint efforts resulted in the publication of two significant policy statements—the revised Horizontal Merger Guidelines and the Antitrust Enforcement Policy Statement Regarding Accountable Care Organizations—that enhance the consistency, clarity, and transparency of U.S. antitrust policy and enforcement. Additionally, the agencies recently co-hosted two workshops: one exploring the antitrust implications of most-favored-nation clauses³⁷ and, as mentioned above, another exploring the impact of patent assertion entities. The Commission understands the special obligation of the law enforcement agencies to speak with one voice whenever possible in important areas of U.S. antitrust policy, and to work in tandem to promote the interests of American consumers.³⁸

It is also crucial for the U.S. antitrust agencies to cooperate with our counterparts worldwide to ensure that competition laws functions coherently and effectively now that antitrust enforcement has gone global, with well over 120 jurisdictions enforcing a variety of competition laws. The FTC has developed strong bilateral relationships with many of our sister agencies and works with its foreign counterparts in multilateral fora to promote cooperation and convergence

³⁶ A 2011 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* Press Release, FTC Issues New Report on Gasoline Prices and the Petroleum Industry (Sept. 1, 2011), *available at* <http://www.ftc.gov/opa/2011/09/gasprices.shtm>.

³⁷ Press Release, FTC and Department of Justice to Hold Workshop on "Most-Favored-Nation" Clauses (Aug. 17, 2012), *available at* <http://www.ftc.gov/opa/2012/08/mfn.shtm>.

³⁸ The FTC also routinely coordinates on law enforcement efforts with state attorneys general. For example, last month, the FTC and Idaho Attorney General jointly investigated and sued to block an Idaho hospital from acquiring the state's largest multi-specialty physician practice group. *See* Press Release, FTC and Idaho Attorney General Challenge St. Luke's Health System's Acquisition of Saltzer Medical Group as Anticompetitive (Mar. 12, 2013), *available at* <http://www.ftc.gov/opa/2013/03/stluke.shtm>.

toward sound competition policy. The past few years have seen some important milestones for international cooperation. For example, the FTC and DOJ entered into a Memorandum of Understanding (“MOU”) with the three Chinese antitrust agencies aimed at promoting greater communication and cooperation,³⁹ and signed a similar MOU with antitrust enforcers in India last fall.⁴⁰ In addition, at the recent annual bilateral consultations with the European Commission’s Directorate General for Competition (“DG COMP”),⁴¹ the FTC, DOJ, and EC issued revised Best Practices on Cooperation in Merger Investigations.⁴² In a world where commerce knows no borders, international cooperation has proven to be a critical component of effective antitrust enforcement.

Through these and other activities, the FTC is well-positioned to combat harmful conduct and mergers and encourage policies at home and abroad that support competitive markets.

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.

³⁹ Press Release, Federal Trade Commission and Department of Justice Sign Antitrust Memorandum of Understanding With Chinese Antitrust Agencies (July 27, 2011), *available at* <http://www.ftc.gov/opa/2007/06/chinamou.shtm>.

⁴⁰ Press Release, FTC and DOJ Sign Memorandum of Understanding With Indian Competition Authorities (Sept. 27, 2012), *available at* <http://www.ftc.gov/opa/2012/09/indiamou.shtm>.

⁴¹ The European Commission, together with the national competition authorities, enforces EU competition rules. Within the Commission, DG-Comp is primarily responsible for investigation and enforcement of these rules. http://ec.europa.eu/dgs/competition/index_en.htm.

⁴² Press Release, United States and European Union Antitrust Agencies Issue Revised Best Practices for Coordinating Merger Reviews (Oct. 14, 2011), *available at* <http://www.ftc.gov/opa/2011/10/eumerger.shtm>.

PREPARED STATEMENT OF CHAIRMAN PATRICK J. LEAHY

**Statement of Senator Patrick Leahy (D-Vt.)
Chairman, Senate Judiciary Committee
Hearing before the Senate Committee on the Judiciary
Subcommittee on Antitrust, Competition Policy and Consumer Rights
on "Oversight of the Enforcement of the Antitrust Laws"**

April 16, 2013

Our Nation's antitrust laws play a vital role in protecting hardworking Americans. By ensuring vibrant competition in our markets, the antitrust laws increase consumer choice, lower prices, and promote innovation. I am pleased that the Antitrust Subcommittee is conducting its regular oversight of the Federal agencies that enforce these important laws on behalf of American consumers.

Today, the subcommittee convenes its first such oversight hearing with our new chair. I welcome Chair Klobuchar, the new Assistant Attorney General for the Antitrust Division, Bill Baer, and the recently-elevated Chair of the Federal Trade Commission, Chairwoman Edith Ramirez. Senator Klobuchar comes to this work with an extensive background in law enforcement and consumer protection. Both of the witnesses have had distinguished careers in the field of antitrust and consumer protection before entering Government service, and both were confirmed by the Senate with widespread, bipartisan support. I look forward to their leadership on these important issues.

The antitrust enforcement agencies must work in an environment that is increasingly complex, and constantly evolving. Fortunately, the antitrust laws were designed to adapt to an innovative economy. As new technologies and new business models emerge, the antitrust laws and those who enforce them must welcome innovation while preserving the core principles of promoting consumer welfare that have allowed the American economy to thrive. The commitment to competition that drove our Nation's success in the 19th and 20th centuries remains important in the global economy we face today.

I am particularly interested in how the antitrust laws may be applied to prevent the misuse of patents – or patent trolling behavior – in our changing economy. Last July, I chaired a hearing at which then-Commissioner Ramirez and then-Assistant Attorney General Wayland testified regarding the intersection of patent and competition law. While a patent grants a limited monopoly, patent trolls often seek to extend their monopoly rights beyond the limited contours of the patent, and thereby harm competition. I asked whether this form of trolling behavior could constitute an antitrust violation. Assistant Attorney General Wayland responded: "Any effort by a patent owner to harm competition by improperly extending the exclusionary scope of its patent . . . may violate the antitrust laws, and allegations of such actions merit investigation."

I agree, and I was pleased that after the hearing the Justice Department and FTC convened a public workshop to consider when patent misuse may violate the competition laws. I look forward to hearing from our witnesses whether further action, including enforcement actions, are being considered.

The Antitrust Division and FTC have important roles to play in protecting American competition and consumers. I welcome our distinguished witnesses, and look forward to their testimony.

#####

QUESTIONS SUBMITTED TO HON. WILLIAM J. BAER BY SENATOR BLUMENTHAL

Senator Blumenthal questions for the record: "Oversight of the Enforcement of the Antitrust Laws"

Video Marketplace

According to FCC data, the cost of cable has been steadily increasing multiple times the rate of inflation for over a decade.

Cable distributors complain content owners are bundling programming together and charging supra-competitive rates.

Broadcasters and other major content owners argue they need the leverage of blacking out a channel in order to negotiate a fair rate for their programming.

Independent content owners argue that they are restricted from distributing their content more broadly online, due to contractual obligations with cable and satellite distributors.

Sometimes industry disagreement results in programming blackouts, blocking subscribers from watching their favorite team play, or their favorite program.

Caught in the middle of all of this are consumers, who are not able to vote with their wallets. I hear from constituents in Connecticut all the time upset about their run-away cable bills, or upset about the violence and language they see on television. They want lower prices and more choices to drop the channels they find offensive.

It seems to me there may be a big problem in this market. Consumers are forced to swallow price increases and sign up for unwanted bundles, and there is significant disagreement in the industry about what's fair.

- **Assistant Attorney General Baer, if the Antitrust Division were to find market power being abused in the rising costs of cable service, or the increasing frequency of programming blackouts, do you have sufficient legal tools and resources to ensure this market works better for consumers?**
- **Specifically, if you were to find abuse of market-power in this industry what kinds of actions could the DOJ take to address issues of product tying, or contractual restraints on trade?**

The Market for Special Access and Consumer Broadband Rates

Consumer demand for broadband services is growing at a breakneck pace, especially in the mobile market. I am concerned about reports on the lack of competition in the special access market, and the impact this may have on prices paid for access to these connections, and ultimately on the prices consumers pay for broadband access.

As you know, every time a consumer accesses the Internet to download a movie, complete a banking transaction online, or make a VoIP phone call, their content is transmitted across an ecosystem of broadband infrastructure. Known as the “on-ramps” to the Internet, dedicated special access telecommunication lines are needed to carry a subscribers’ Internet traffic.

There have been widespread reports about market power abuse and anticompetitive conduct in the special access market. For example, incumbent carriers have been accused of requiring “loyalty provisions” in service contracts to qualify for any rate that is not cost prohibitive.

Customers of these services have complained to the FCC that these contracts effectively (but not explicitly) require a customer to purchase a large proportion of their services from a given seller, de facto forcing the customer to purchase only from the seller. These reports describe incumbent providers leveraging access to their networks in markets where they are the sole provider, to make it cost prohibitive for their customers to seek a competitor’s service elsewhere.

In 2006, the GAO reported on the subject, “Unless the competitor can meet the customer’s entire demand, the customer has an incentive to stay with the incumbent and purchase additional circuits from the incumbent, rather than switch to a competitor or purchase a portion of their demand from a competitor –even if the competitor is less expensive.”

These practices may artificially inflate the cost of broadband service and contribute to rising costs for consumers.

- **Assistant Attorney General Baer, what kind of criteria does the Antitrust Division use to assess possible competitive harm in contracting arrangements?**
- **Has the Antitrust Division pursued cases where customers have been forced into contracts through tying and / or loyalty requirements?**

QUESTIONS SUBMITTED TO HON. WILLIAM J. BAER BY SENATOR GRASSLEY

**Written Questions of Senator Chuck Grassley for Judiciary Antitrust Subcommittee
Hearing "Oversight of the Enforcement of the Antitrust Laws", April 16, 2013**

Questions for Assistant Attorney General Baer

1. As you know, I'm concerned about increased consolidation in agriculture and possible anti-competitive and abusive practices in the industry.
 - a. What has the Antitrust Division been doing with respect to competition issues in agriculture since you've taken the helm?
 - b. Has the Antitrust Division made any changes to its policy, practices or procedures when looking at agriculture competition issues since the issuance of the DOJ-USDA agriculture workshop report?
 - c. 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?
 - d. Will the Justice Department be more pro-active in policing anti-competitive behavior in agriculture? What kind of assurances can you personally give me that the Antitrust Division is taking competition concerns in the agriculture sector seriously?
2. American Airlines and US Airways recently announced that the two companies would be merging. I want to make sure that air service to Iowa is not adversely impacted. Consumers in smaller communities and rural areas are often the hardest hit by these mergers.
 - a. Can you assure me that the Antitrust Division is taking a hard look at this proposed transaction to ensure that it does not lead to higher prices and reduced choices for Iowans?
 - b. How does the Justice Department evaluate consumer benefits created by airlines whose business models are based on a hub and spoke approach as compared to airlines whose business models are geared toward point-to-point service? When the Justice Department looks at hubs, either in the context of a merger or an investigation, how does it

account for the potential benefits hub operations can bring to smaller communities?

- c. How does the Justice Department look at the impact of divestiture of slots on service to smaller communities?

QUESTIONS SUBMITTED TO HON. EDITH RAMIREZ BY SENATOR GRASSLEY

**Written Questions of Senator Chuck Grassley for Judiciary Antitrust Subcommittee
Hearing "Oversight of the Enforcement of the Antitrust Laws", April 16, 2013**

Questions for Federal Trade Commission Chairwoman Ramirez

1. As you know, I've 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. Senator Kolbuchar and I have introduced a bill, the Preserve Access to Affordable Generics Act, 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. Former Chairman Jon Leibowitz was very supportive of our efforts to address this anti-competitive practice.
 - a. Do you agree that these "pay for delay" agreements harm consumers?
 - b. Do you agree that these kinds of agreements still a problem?
 - c. What is the FTC doing to prevent these kinds of agreements?
 - d. Do you believe that the Klobuchar/Grassley legislation would help preserve generic drug competition and ensure that more affordable drugs get to consumers as expeditiously as possible?

QUESTIONS SUBMITTED TO HON. WILLIAM J. BAER BY SENATOR KLOBUCHAR

Senator Klobuchar's Questions for the Record
Subcommittee on Antitrust, Competition Policy and Consumer Rights
"Oversight of the Enforcement of the Antitrust Laws"

For Assistant Attorney General Baer:

1. In these tough budget times, we're asking every agency to do more with less. Can you explain to us the value that you think antitrust enforcement brings to consumers and the economy as a whole?
2. The Antitrust Division and the Federal Trade Commission share responsibility for government enforcement of the federal antitrust laws. Sometimes this leads to 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 is your agency doing to resolve clearance disputes in a more effective way? Are you working with the Antitrust Division/FTC, as the Antitrust Modernization Commission suggested in 2007, to develop a new merger clearance agreement?
3. Recently, standard essential patents have been the subject of several cases filed at the International Trade Commission (ITC). We can all agree that standardization of technology and standard essential patents have been critical to the development of a competitive market for smartphones and tablets. But recently, concerns have been raised about the practice of bringing standard essential patents cases to the ITC seeking an exclusion order to prevent products with the patents from being imported into the U.S. Some worry that the ITC exclusion orders related to standard essential patents could gravely harm competition.
 - What sorts of negative effects might the use of exclusion orders regarding standard essential patents have on competition and consumer welfare in general?
 - Is there any justification for the use of exclusion orders in the context of standard essential patents?
4. You made assurances to the Committee during your confirmation hearing that effective local and regional enforcement would be a priority for you despite the planned closing for four regional offices Atlanta, Dallas, Cleveland and Philadelphia. News reports have indicated that very few attorneys opted to take the offer made to move to another Antitrust Division office. For example, the Division lost 14 of its 15 lawyers that had been in the Philadelphia office.
 - How are you ensuring that the work of these lawyers is being picked up either at main justice or another regional office?

- What policies or procedures have you put in place to ensure that local and regional price fixing and other anticompetitive conduct is investigated and charged?
5. The Justice Department recently settled its suit to block InBev's acquisition of Grupo Modelo. As part of the settlement, in order to resolve the Department's concerns, InBev's will have to sell all of Grupo Modelo's interest in the U.S. to a rival distributor, Constellation. Your settlement indicates that you're sure Constellation will be a vigorous competitor to InBev in the way that Grupo Modelo had been.
- How will you monitor competition and what action could you take if it Constellation does not or is not able to compete effectively?
 - It has been reported that ABI is pursuing a policy of pressuring its distributors to carry only ABI aligned brands and to cease distributing other brands like those of craft brewers. During the course of your investigation of the ABI/Modelo transaction, did you inquire about this policy and would approval of this transaction as proposed increase the leverage of ABI to effectuate this policy? Will your settlement address this problem in any way?

QUESTIONS SUBMITTED TO HON. EDITH RAMIREZ BY SENATOR KLOBUCHAR

Senator Klobuchar's Questions for the Record
Subcommittee on Antitrust, Competition Policy and Consumer Rights
"Oversight of the Enforcement of the Antitrust Laws"

For Chairwoman Ramirez:

1. In these tough budget times, we're asking every agency to do more with less. Can you explain to us the value that you think antitrust enforcement brings to consumers and the economy as a whole?
2. The Antitrust Division and the Federal Trade Commission share responsibility for government enforcement of the federal antitrust laws. Sometimes this leads to 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 is your agency doing to resolve clearance disputes in a more effective way? Are you working with the Antitrust Division/FTC, as the Antitrust Modernization Commission suggested in 2007, to develop a new merger clearance agreement?
3. Recently, standard essential patents have been the subject of several cases filed at the International Trade Commission (ITC). We can all agree that standardization of technology and standard essential patents have been critical to the development of a competitive market for smartphones and tablets. But recently, concerns have been raised about the practice of bringing standard essential patents cases to the ITC seeking an exclusion order to prevent products with the patents from being imported into the U.S. Some worry that the ITC exclusion orders related to standard essential patents could gravely harm competition.
 - What sorts of negative effects might the use of exclusion orders regarding standard essential patents have on competition and consumer welfare in general?
 - Is there any justification for the use of exclusion orders in the context of standard essential patents?

QUESTIONS SUBMITTED TO HON. WILLIAM J. BAER BY SENATOR LEAHY

**Questions for the Record Of Senator Patrick Leahy (D-Vt.),
Chairman, Senate Judiciary Committee
Hearing before the Senate Committee on the Judiciary
Subcommittee on Antitrust, Competition Policy and Consumer Rights
on “Oversight of the Enforcement of the Antitrust Laws”
April 16, 2013**

Questions for Assistant Attorney General Baer

1) In 2012, the Government Accountability Office (GAO) issued a report concerning Federal oversight and self-regulation of Group Purchasing Organizations (GPOs). This area has long been of interest to the Judiciary Committee. After I raised concerns about the potential impact on patient costs of GPO contracting practices with the Justice Department in 2000, and the Department of Health and Human Services in 2001, the Antitrust Subcommittee held a series of hearings on GPO practices that culminated in a joint report by the Department of Justice and Federal Trade Commission in 2004. During the hearings, many expressed concern that fees paid by vendors to GPOs distort demand, resulting in higher prices for hospitals and consumers.

Although the Department of Justice and FTC have investigated complaints against various GPOs, since 2004 the Department has filed only one lawsuit against a GPO under the antitrust laws, and the FTC has filed none. The GAO’s 2012 report observed: “While the oversight of GPOs is conducted through the exercise of investigatory authorities of HHS, DOJ, and FTC... this oversight does not address other key questions that have previously been raised about GPOs’ activities. For example, inasmuch as the collection of contract administrative fees is permitted under the safe harbor provision to the Anti-Kickback statute and safe harbor regulation, this oversight cannot address whether or to what extent these fees create a financial incentive that is inconsistent with GPOs obtaining the lowest prices for their customers.”

Do you believe that the current legislative framework is sufficient to address the risk of undesirable conduct by GPOs that increases prices for consumers? Do you agree that the legal framework could be strengthened through other measures, such as revisiting the safe harbor for GPOs provided in the Anti-Kickback Statute?

2) Last year, I asked then-Commissioner Ramirez and the Acting Assistant Attorney General for Antitrust, Joseph Wayland, whether “patent trolling” behavior by certain patent-assertion entities could constitute an antitrust violation. Mr. Wayland responded: “Any effort by a patent owner to harm competition by improperly extending the exclusionary scope of its patent . . . may violate the antitrust laws, and allegations of such actions merit investigation.” I was pleased that your agencies recently held a joint workshop to further investigate this question. How do your agencies intend to follow up on the workshop?

QUESTIONS SUBMITTED TO HON. EDITH RAMIREZ BY SENATOR LEAHY

**Questions for the Record Of Senator Patrick Leahy (D-Vt.),
Chairman, Senate Judiciary Committee
Hearing before the Senate Committee on the Judiciary
Subcommittee on Antitrust, Competition Policy and Consumer Rights
on "Oversight of the Enforcement of the Antitrust Laws"
April 16, 2013**

Questions for Chairwoman Ramirez

1) In 2012, the Government Accountability Office (GAO) issued a report concerning Federal oversight and self-regulation of Group Purchasing Organizations (GPOs). This area has long been of interest to the Judiciary Committee. After I raised concerns about the potential impact on patient costs of GPO contracting practices with the Justice Department in 2000, and the Department of Health and Human Services in 2001, the Antitrust Subcommittee held a series of hearings on GPO practices that culminated in a joint report by the Department of Justice and Federal Trade Commission in 2004. During the hearings, many expressed concern that fees paid by vendors to GPOs distort demand, resulting in higher prices for hospitals and consumers.

Although the Department of Justice and FTC have investigated complaints against various GPOs, since 2004 the Department has filed only one lawsuit against a GPO under the antitrust laws, and the FTC has filed none. The GAO's 2012 report observed: "While the oversight of GPOs is conducted through the exercise of investigatory authorities of HHS, DOJ, and FTC... this oversight does not address other key questions that have previously been raised about GPOs' activities. For example, inasmuch as the collection of contract administrative fees is permitted under the safe harbor provision to the Anti-Kickback statute and safe harbor regulation, this oversight cannot address whether or to what extent these fees create a financial incentive that is inconsistent with GPOs obtaining the lowest prices for their customers."

Do you believe that the current legislative framework is sufficient to address the risk of undesirable conduct by GPOs that increases prices for consumers? Do you agree that the legal framework could be strengthened through other measures, such as revisiting the safe harbor for GPOs provided in the Anti-Kickback Statute?

2) Last year, I asked then-Commissioner Ramirez and the Acting Assistant Attorney General for Antitrust, Joseph Wayland, whether "patent trolling" behavior by certain patent-assertion entities could constitute an antitrust violation. Mr. Wayland responded: "Any effort by a patent owner to harm competition by improperly extending the exclusionary scope of its patent . . . may violate the antitrust laws, and allegations of such actions merit investigation." I was pleased that your agencies recently held a joint workshop to further investigate this question. How do your agencies intend to follow up on the workshop?

3) In your testimony, you stated that the FTC has heard reports of patent assertion entities making unsubstantiated claims relative to small businesses. Unfortunately, I continue to hear frequently about this problem from small businesses in Vermont and across the country. What steps can the FTC take to address this conduct through its consumer protection authority? Will

you agree to monitor such activity and take appropriate action to address abusive behavior by patent trolls?

4) Earlier this year, the FTC concluded its investigation of Google's search engine practices. A majority of Commissioners found that certain practices used by Google threatened competition and innovation, yet the FTC relied on voluntary commitments from Google to end those practices, instead of a consent order.

- a. In your testimony, you expressed concern about the use of voluntary commitments to address anticompetitive violations. Can you please elaborate on that? What actions does the FTC intend to take to enforce Google's commitments?
- b. In discussing potential remedies, some commentators noted the challenges involved in overseeing a technologically complex business practice that is constantly being updated, such as a search engine algorithm. How is the Commission responding to the challenges of enforcement in an online world?
- c. In your testimony, you said that the FTC concluded that certain changes made by Google to its search engine algorithm were "pro-competitive" because they were "designed to improve the overall search experience for the user," even though they had the effect of negatively impacting rivals. Would your analysis have come out differently if the FTC had focused on the harm experienced by Google's other "users"; namely, the advertisers who pay to post ads on its site? How did the FTC determine its framework of analysis in assessing the procompetitive justifications of Google's conduct?
- d. In light of the recent reports of action by your European counterpart authorities, is the FTC taking any further action in these matters?

QUESTIONS SUBMITTED TO HON. WILLIAM J. BAER BY SENATOR LEE

**“Oversight of the Enforcement of the Antitrust Laws”
Senate Antitrust Subcommittee Hearing
April 16, 2013**

**Written Questions
Senator Michael S. Lee**

Questions for Assistant Attorney General Baer

1. At our Subcommittee’s hearing last week, you stated that you believed the report on Section 2 of the Sherman Act issued by the Department in 2008 and retracted by your predecessor, Ms. Varney, may have “been going too far too fast.”
 - a. On the Antitrust Division’s website, the Section 2 report is still listed under “Reports.”
 - i. What function does the “Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act” report play in antitrust guidance?
 - ii. Should those in the business community rely on the report?
 - iii. If not, why is it on the website?
 - iv. Should the business community assume that any of the report’s findings and conclusions are incorrect, and if so, which findings and conclusions?
 - b. You also stated that you were concerned about the 2008 report because the FTC had not joined in the guidance and you worried over having guidance not fully adopted by both enforcement agencies. But, in the absence of the report, the business community has little formal guidance as to the boundaries of Section 2 enforcement.
 - i. Do the FTC and DOJ Antitrust Division agree on the proper boundaries of Section 2 enforcement?
 - ii. If not, on which issues do the agencies disagree?
 - iii. If the agencies agree on the proper boundaries of enforcement, why not publish joint guidance on Section 2 enforcement so that the business community can rely on formal guidance?
 - iv. Will you commit to work with Ms. Ramirez to develop and publish guidance on Section 2 of the Sherman Act?
 - c. At our Subcommittee’s hearing last week, you stated that you fear any formal or official guidance on Section 2 enforcement “would be so qualified that the business community wouldn’t get the benefit of it.”

- i. Is it your view that there are no areas of Section 2 enforcement that are sufficiently clear and unqualified that guidance in those areas could be of use to the business community?
 - ii. Will you commit to releasing a Section 2 report that outlines, at a minimum, those areas of law on which there is sufficient clarity that guidance on the issues will be helpful to the business community?
- d. The Section 2 Report states: “[T]here is a significant risk of long-run harm to consumers from antitrust intervention against unilateral, unconditional refusals to deal with rivals, particularly considering the effects of economy-wide disincentives and remedial difficulties.”
 - i. Do you agree with this statement? If not, why not?
- e. The Section 2 Report concludes that “antitrust liability for unilateral, unconditional refusals to deal with rivals should not play a meaningful part in section 2 enforcement.”
 - i. Do you agree with this conclusion? If not, why not?
- f. The Section 2 Report states that “the essential-facilities doctrine is a flawed means of deciding whether a unilateral, unconditional refusal to deal harms competition.”
 - i. Do you agree with this statement? If not, why not?
 - ii. What is your view of the proper boundaries of this doctrine for current antitrust enforcement?
- g. Some criticized the Section 2 Report’s conclusions regarding unilateral, unconditional refusals to deal with rivals as creating a divergence from foreign jurisdictions.
 - i. Do you believe the enforcement agencies should increase enforcement of these doctrines in the United States so as to create greater uniformity with foreign jurisdictions in this area of law?
- h. The Section 2 Report states: “Compelling access to inputs, property rights, or resources undoubtedly can enhance short-term price competition, but doing so can do more harm than good to the competitive process over the long term.”
 - i. Do you agree with this statement? If not, why not?
- i. The Section 2 Report concludes that “antitrust liability for mere unilateral, unconditional refusals to deal with rivals should not play a meaningful role in section 2 enforcement.”
 - i. Do you agree with this conclusion? If not, why not?

- ii. Do you agree that it would be problematic if the identity of the reviewing agency led to different outcomes due to the parties' perception that the FTC and the DOJ face different standards for obtaining a preliminary injunction?
 - iii. What measures do you believe appropriate to remedy any perceived or real inconsistency in the preliminary injunction standards faced by the agencies?
- c. In *FTC v. CCC Holdings*, the district court granted the FTC's request for a preliminary injunction. The judge noted that although the defendants' arguments might "ultimately win the day," under Section 13(b) the trial court needed only to determine that "the FTC had raised questions that are so 'serious, substantial, difficult and doubtful' that they are 'fair ground for thorough investigation, study, deliberation and determination by the FTC'" to conclude that a preliminary injunction should issue. Commentators have written that "[t]he importance of the *CCC Holdings* decision therefore is not merely academic, and the resulting agency divergence is not merely procedural. It may be outcome determinative in some cases."¹
- i. Do you believe the standard applied by the district court in *FTC v. CCC Holdings* was the same as the preliminary injunction standard applicable to the DOJ in a merger case?
 - ii. Do you agree that application of that lower standard may have had an impact on the outcome of the case, in the sense that the outcome may have been different if the DOJ standard had been applied?
- d. In the *Whole Foods* litigation, the FTC argued on appeal before the D.C. Circuit: "This Court has recognized, in keeping with the intent of Congress in creating the Commission and in enacting Section 13(b), that the Commission is not required to 'prove' any aspect of its case in order to secure a preliminary injunction in aid of its own adjudicative and remedial powers; rather, it need only show 'serious, substantial' questions requiring plenary administrative consideration. The district court's contrary approach ignores the statutory scheme, and effectively usurps the adjudicative role of the Commission."²
- i. Do you contend the standard the Commission advanced in the *Whole Foods* appeal was the same standard DOJ has to meet in order to obtain a preliminary injunction in a merger case?
- e. *FTC v. Libbey, Inc.*, 211 F. Supp.2d 34 (D.D.C. 2002), is another case in which a court applied a lower preliminary injunction standard to an FTC merger challenge than would have been applied if DOJ had brought the case.
- i. Do you agree that the standard applied in that instance may have had an impact on the outcome of the case?

¹ Peter Love and Ryan C. Thomas, *FTC v. CCC Holdings: Message Received*, GCP (April 2009) at 10.

² <http://www.ftc.gov/os/caselist/0710114/080114ftcwholefoodsproofbrief.pdf> at 27.

- f. In February 2013, the Section of Antitrust Law of the American Bar Association issued a report entitled *Presidential Transition Report: The State of Antitrust Enforcement 2012*. The report commented that some circuits have relaxed the standard imposed on the FTC from the standard applicable to the DOJ. The Section noted that the standards applied in cases brought by the FTC differ from those in DOJ cases in other ways as well. The Section urged the FTC to adopt procedures “that will ensure that in merger cases it will seek injunctions only under the same equitable standard for a preliminary injunction as that applied to Division injunction cases.” Absent such procedures, the report urged the Administration “to seek legislative changes to Section 13(b) of the Federal Trade Commission Act that will make it consistent with traditional equitable standards for injunctive relief.”
- i. Will you commit to adopt procedures to ensure that the Commission only seeks preliminary injunctions under the same equitable standards that apply to DOJ actions?
 - ii. Would you support legislation to clarify that the FTC and the DOJ must satisfy identical standards to obtain a preliminary injunction?
 - iii. If you remain convinced that the differing standards applied to FTC and DOJ actions are “quite similar” and as a practical matter lead to little if any difference in outcome, what would be the harm in clarifying that the applicable standard is in fact the same or in establishing a unified standard?
4. A January 2013 policy statement from the Department of Justice and the Patent and Trademark Office noted that “the approach the [ITC] adopts in cases involving FRAND-encumbered patents that are essential to a standard will be important to the continued vitality of the voluntary consensus standards-setting process and thus to competitive conditions and consumers in the United States.” I agree, but worry that the DOJ/PTO statement provides little clarity as to whether an exclusion order is appropriate when a FRAND commitment has been made. For example, the statement embraces a seemingly vague and undefined concept of willingness.
- a. What more can Congress and the Department do to address this issue?
 - b. Do you believe there should be a legislative fix?
5. Some have expressed concern about the process by which the Department decides whether and when to file suit in merger cases. I’d like to clarify where, under your leadership, the Department stands on this issue.
- a. What is the Antitrust Division’s policy regarding giving prior notice to the parties of your intention to file suit to enjoin a merger?
 - b. What is the Antitrust Division’s recent practice in this regard? Have you provided such notice? How explicit is that notice? How far in advance is it given?
 - c. Have there been any recent exceptions to the Department’s policy or practice in this

regard? If so, why?

6. Advance notice to parties prior to litigation may improve the likelihood of resolving disputes, would provide greater transparency, and could improve perceptions in the business community that the process is open and fair.
 - a. Do you agree that it is reasonable to give parties at least 24-hour notice before you file suit against them?
 - b. What if anything would be lost by providing 24-hour notice?
 - c. Are there any circumstances in which you believe it would be appropriate for the Department not to provide parties such advance notice of intent to sue?

7. At our Subcommittee's hearing last week, in response to my question as to whether you were suggesting in your comments to the FCC that large carriers already have sufficient spectrum to meet their needs, you indicated that the Department urged the FCC "to take a close look at whether some of the spectrum that is already available to some of the carriers is being warehoused and not being put to effective use" and "to examine whether [the carriers] are using what they already have." In a March 16, 2011, speech, FCC Chairman Genachowski made the following comments regarding this idea of carriers warehousing spectrum:

Despite the increasing acceptance of the incentive auction idea, as with any new idea, there are misimpressions being floated by some who want to preserve the status quo even in this time when change is necessary for our economic future. Let me address them. First, there are some who say that the spectrum crunch is greatly exaggerated—indeed, that there is no crunch coming. They also suggest that there are large blocks of spectrum just lying around and that some licensees, such as cable and wireless companies, are just sitting on top of, or "hoarding," unused spectrum that could readily solve that problem. That's just not true. Let's look at the facts. Multiple expert sources expect that by 2014, demand for mobile broadband and the spectrum to fuel it, will be 35 times the levels it was in 2009. Cisco has projected a nearly 60X increase between 2009 and 2015. This compares to spectrum coming on-line for mobile broadband that represents less than a 3X increase in capacity. The looming spectrum shortage is real and it is the alleged hoarding that is illusory. It is not hoarding if a company paid millions or billions of dollars for spectrum at auction and is complying with the FCC's build-out rules. There is no evidence of non-compliance.

 - a. Do you disagree with Chairman Genachowski's analysis?
 - b. Beyond your comments at the hearing, do you have any evidence that carriers are in fact warehousing spectrum?

8. At our Subcommittee's hearing last week, when asked by Senator Blumenthal whether you thought the FCC "needs a policy like a spectrum screen or auction rules that specifically seek to encourage competition in the wireless marketplace," you responded: "The answer is yes. We believe that well-defined, competition-focused rules for putting spectrum, the newly

available spectrum, to use quickly and efficiently is the best way of promoting consumer welfare and that is why we have publicly filed comments, and in addition, we have spent a fair amount of time working very cooperatively, quietly with the Federal Communications Commission on these difficult policy choices.”

- a. Please describe what you meant by “working cooperatively, quietly” with the FCC on spectrum issues.
 - b. Did these cooperative and quiet discussions take place as part of an ongoing proceeding at the FCC?
 - i. If so, when specifically did these discussions take place?
 - c. Did the Department file appropriate ex parte filings summarizing these negotiations?
9. Many believe it important that the government remain “technologically neutral” in the rules it applies. That is, policymakers or regulators should not declare that, for example, iPhones are indispensable while Samsung tablets are not.
- a. Do you agree that the government ought not be picking winners and losers among competing technologies and platforms?
 - b. What specific measures do you believe the government should take to ensure that it is not taking sides in the so-called “Smartphone Wars”?
10. The Department and the Federal Trade Commission share enforcement of the antitrust laws, both in mergers and conduct investigations. It is not always clear to the parties involved who will review a transaction or business practice. In June 2011, then-Chairman Leibowitz told the Senate Commerce Committee: “It is true that there are occasional clearance disputes over which agency is in the better position to investigate a matter The FTC and DOJ have a process in place to resolve clearance disputes, which helps resolve the issue quickly.” Please provide the Subcommittee:
- a. The precise process(es) for resolving these disputes;
 - b. Examples of the types of agreements that the Commission and the Department have reached in merger and non-merger clearance disputes, including how the parties determine which agency will review a subsequent transaction involving the same company or industry and the duration of such agreements; and
 - c. The number of such disputes since January 2009 and the average length of time such disputes lasted.
11. Under your predecessor, the Department showed great leadership in supporting the development of transparency and procedural fairness norms internationally. That work has been done in the OECD and is now being conducted in the ICN. It has also been incorporated into the Trans-Pacific Partnership and there will be an opportunity to do so in the US-EU Transatlantic Trade and Investment Partnership.

- a. What do you think about the need for increased transparency and due process in antitrust proceedings globally?
- b. Do you plan to continue to work in a similar vein as your predecessors in bringing these issues to forefront of the international antitrust policy debate?

QUESTIONS SUBMITTED TO HON. EDITH RAMIREZ BY SENATOR LEE

**“Oversight of the Enforcement of the Antitrust Laws”
Senate Antitrust Subcommittee Hearing
April 16, 2013**

**Written Questions
Senator Michael S. Lee**

Questions for Chairwoman Ramirez

1. In 2008, the Department of Justice released a report on Section 2 of the Sherman Act. The report was later withdrawn. That report provided the business community with guidance on applicable principles in Section 2 enforcement actions.
 - a. Do you agree with the 2008 report’s findings and conclusions?
 - b. If not, with which specific findings and conclusions do you disagree?
 - c. Do you agree that it would be helpful for the business community to have formal guidance on the enforcement agencies’ approach to Section 2 enforcement?
 - d. Will you commit to work with Mr. Baer to develop and publish formal guidance on Section 2 enforcement?
2. The Federal Trade Commission, particularly under the previous Chairman, has been in the practice of reaching settlements in cases brought under Section 5 of the FTC Act. These settlements are not subsequently reviewed by a court to establish a clear record of Section 5 enforcement boundaries. At the same time, the Commission has yet to provide definitive guidance as to how Section 5 can be used to enforce unfair methods of competition beyond the traditional scope of antitrust laws.
 - a. Do you plan to continue the practice of enforcing Section 5 by means of settlements outside of court review?
 - b. How do you think a practice of open-ended enforcement might be perceived in foreign jurisdictions where basic rule of law principles are often lacking?
 - c. What formal guidance will you provide the business community regarding Section 5 enforcement?
3. At our Subcommittee’s hearing last week, in response to a question regarding Section 5 of the FTC Act, you stated that you believe the Commission “has been using its Section 5 authority very rigorously and very judiciously,” and that the agency is providing some measure of guidance through the pattern of its decisions.
 - a. If the Commission is applying Section 5 “cautiously” and wishes to provide useful enforcement guidance, why are you resistant to provide such guidance in a more comprehensive, published form upon which the business community and others can meaningfully rely?

4. Some have expressed concern that the Commission's approach to Section 5 enforcement has left many in the business community confused and uncertain as the contours of that provision and the breadth of possible enforcement actions.
 - a. Do you believe that the Commission may use Section 5 to create convergence with U.S. antitrust doctrine and that of international jurisdictions?
 - b. Do you believe the Commission may use Section 5 to place additional emphasis within U.S. competition policy on consumer choice as a touchstone of antitrust law?
 - c. Do you believe the Commission may use Section 5 to bring actions that increasingly incorporate analysis and assumptions based on behavioral economics?

5. At our Subcommittee's hearing last week, you stated that you believe the standards used by the FTC and the DOJ for obtaining a preliminary injunction are "quite similar" and that "as a practical matter what each agency needs to do is go before a judge and show and provide evidence that backs up the charges that are being made." You further stated that you "believe it would be difficult to point to a specific situation where...a case would have led to a different outcome had it been handled by a different agency."
 - a. In its 2007 Report and Recommendations, the Antitrust Modernization Commission wrote that the "FTC's ability to continue a merger case in administrative litigation also may lead companies whose transactions are investigated by the FTC to feel greater pressure to settle a matter than if they had been investigated by the DOJ."
 - i. Should companies face greater pressure to settle if their mergers are reviewed by the FTC rather than the DOJ?
 - ii. Do you agree that even the perception of a more lenient standard for FTC cases than those brought by the DOJ could result in a practical difference for litigants who must weigh litigation risk?
 - b. The 2007 Report further states that differences in the preliminary injunction standards faced by the FTC and the DOJ, whether real or perceived, "can undermine the public's confidence that the antitrust agencies are reviewing mergers efficiently and fairly and that it does not matter which agency reviews a given merger."
 - i. Do you agree that public confidence is important and can be affected by public perception of differing standards applied to identical issues?
 - ii. Do you agree that it would be problematic if the identity of the reviewing agency led to different outcomes due to the parties' perception that the FTC and the DOJ face different standards for obtaining a preliminary injunction?
 - iii. What measures do you believe appropriate to remedy any perceived or real inconsistency in the preliminary injunction standards faced by the agencies?
 - c. In *FTC v. CCC Holdings*, the district court granted the FTC's request for a

preliminary injunction. The judge noted that although the defendants' arguments might "ultimately win the day," under Section 13(b) the trial court needed only to determine that "the FTC had raised questions that are so 'serious, substantial, difficult and doubtful' that they are 'fair ground for thorough investigation, study, deliberation and determination by the FTC'" to conclude that a preliminary injunction should issue. Commentators have written that "[t]he importance of the CCC Holdings decision therefore is not merely academic, and the resulting agency divergence is not merely procedural. It may be outcome determinative in some cases."¹

- i. Do you believe the standard applied by the district court in *FTC v. CCC Holdings* was the same as the preliminary injunction standard applicable to the DOJ in a merger case?
 - ii. Do you agree that application of that lower standard may have had an impact on the outcome of the case, in the sense that the outcome may have been different if the DOJ standard had been applied?
- d. In the *Whole Foods* litigation, the FTC argued on appeal before the D.C. Circuit: "This Court has recognized, in keeping with the intent of Congress in creating the Commission and in enacting Section 13(b), that the Commission is not required to 'prove' any aspect of its case in order to secure a preliminary injunction in aid of its own adjudicative and remedial powers; rather, it need only show 'serious, substantial' questions requiring plenary administrative consideration. The district court's contrary approach ignores the statutory scheme, and effectively usurps the adjudicative role of the Commission."²
- i. Do you contend the standard the Commission advanced in the *Whole Foods* appeal was the same standard DOJ has to meet in order to obtain a preliminary injunction in a merger case?
- e. *FTC v. Libbey, Inc.*, 211 F. Supp.2d 34 (D.D.C. 2002), is another case in which a court applied a lower preliminary injunction standard to an FTC merger challenge than would have been applied if DOJ had brought the case.
- i. Do you agree that the standard applied in that instance may have had an impact on the outcome of the case?
- f. In February 2013, the Section of Antitrust Law of the American Bar Association issued a report entitled *Presidential Transition Report: The State of Antitrust Enforcement 2012*. The report commented that some circuits have relaxed the standard imposed on the FTC from the standard applicable to the DOJ. The Section noted that the standards applied in cases brought by the FTC differ from those in DOJ cases in other ways as well. The Section urged the FTC to adopt procedures "that will ensure that in merger cases it will seek injunctions only under the same equitable

¹ Peter Love and Ryan C. Thomas, *FTC v. CCC Holdings: Message Received*, GCP (April 2009) at 10.

² <http://www.ftc.gov/os/caselist/0710114/080114ftcwholefoodsproofbrief.pdf> at 27.

standard for a preliminary injunction as that applied to Division injunction cases.” Absent such procedures, the report urged the Administration “to seek legislative changes to Section 13(b) of the Federal Trade Commission Act that will make it consistent with traditional equitable standards for injunctive relief.”

- i. Will you commit to adopt procedures to ensure that the Commission only seeks preliminary injunctions under the same equitable standards that apply to DOJ actions?
 - ii. Would you support legislation to clarify that the FTC and the DOJ must satisfy identical standards to obtain a preliminary injunction?
 - iii. If you remain convinced that the differing standards applied to FTC and DOJ actions are “quite similar” and as a practical matter lead to little if any difference in outcome, what would be the harm in clarifying that the applicable standard is in fact the same or in establishing a unified standard?
6. At our Subcommittee’s hearing last week, you expressed concern that an acceptance by the Commission of voluntary commitments, as opposed to a consent order, would create confusion over its settlement practices. You suggested that the Commission’s acceptance of voluntary commitments by Google should not be considered precedent. Yet, other companies under investigation may believe they need not enter into binding consent decrees, instead asking to be treated by the Commission in the same manner as Google. In addition to an appearance of favoritism the Google agreement may create, I am concerned about informal and illegitimate regulatory creep when the Commission seeks to secure voluntary commitments from private companies. If a majority of commissioners finds a violation there should be a formal consent order. If a majority does not find a violation, the Commission has no authority to interfere in the market and should not pursue any enforcement action, whether voluntary or not.
- a. Now that the Commission has in fact negotiated and accepted a voluntary commitment in lieu of consent order, what specifically do you plan to do to correct perceptions and assumptions about future enforcement actions?
 - b. If the Commission does not plan to follow the standard of settlement practices used in this case ever again, how will you respond to assertions that Google received special treatment from the Commission?
7. At our Subcommittee’s hearing last week, you seemed to agree with me that voluntary commitments are an illegitimate approach for the Commission to use in seeking to resolve antitrust violations.
- a. Under your leadership, will the Commission move to correct this misstep and seek to embody Google’s voluntary commitments in a formal consent order?
8. At our Subcommittee’s hearing last week, you stated that if Google does not uphold and complete its voluntary commitments from the settlement, the Commission will take “appropriate action.”

- a. Given that there is no Commission precedent for dealing with this type of voluntary commitment, what specifically would that appropriate action entail?
 - b. Would such action require the Commission to undergo another complex and lengthy investigative proceeding, which could allow harmful business practices to continue undeterred until there is a formal settlement?
9. The Commission's closing statement in the Google matter concluded: "Challenging Google's product design decisions in this case would require the Commission – or court – to second-guess a firm's product design decisions where plausible procompetitive justifications have been offered, and where those justifications are supported by ample evidence." Similarly, Chairman Leibowitz's opening remarks stated: "Google's primary reason for changing the look and feel of its search results to highlight its own products was to improve the user experience."
 - a. This approach appears to differ from the standard set forth in the Microsoft case and the standard that you said the Commission used to evaluate Google's conduct. Under the Microsoft decision, the Commission, or a court, must examine whether "the anticompetitive effect of the challenged action outweighs [any proffered justification for the product design change]." *United States v. Microsoft Corp.*, 253 F.3d 34, 67 (D.C. Cir. 2001). It would have required the Commission to apply a balancing test rather than concluding its analysis simply upon a finding that Google put forth a plausible business justification, as suggested by the Commission's closing statement and Chairman Leibowitz's remarks. Please explain this apparent inconsistency.
 - b. What standard will the Commission apply in the future to similar circumstances?
10. Several states have ongoing investigations of Google's conduct.
 - a. Did the Commission coordinate its legal and factual analysis with these states?
 - b. Did the Commission attempt to work with these states to obtain a coordinated settlement?
11. Google's practice of negotiating exclusionary syndication and distribution agreements was not addressed in the Commission's decision.
 - a. Did the Commission review this conduct?
 - b. If so, why was it not included in the Commission's final decision?
12. The Commission and the Department of Justice share enforcement of the antitrust laws, both in mergers and conduct investigations. It is not always clear to the parties involved who will review a transaction or business practice. In June 2011, then-Chairman Leibowitz told the Senate Commerce Committee: "It is true that there are occasional clearance disputes over which agency is in the better position to investigate a matter The FTC and DOJ have a process in place to resolve clearance disputes, which helps resolve the issue quickly." Please provide the Subcommittee:

- a. The precise process(es) for resolving these disputes;
 - b. Examples of the types of agreements that the Commission and the Department have reached in merger and non-merger clearance disputes, including how the parties determine which agency will review a subsequent transaction involving the same company or industry and the duration of such agreements; and
 - c. The number of such disputes since January 2009 and the average length of time such disputes lasted.
13. The Commission has issued two recent orders that address the meaning of commitments to license on fair, reasonable, and non-discriminatory (FRAND) terms. In *Bosch*, the Commission embraced an order and remedy that many believe represented progress on this issue. A month later, the Commission adopted a more complicated order and remedy in the Google matter, criticized by some as being weak and riddled with loopholes.
- a. Why did the Commission seek such a complicated (and potentially weakened) remedy in the Google matter?
 - b. Please explain your view of the *Bosch* decision.
 - i. Are you concerned about using a merger review process to require relief on unrelated conduct as a condition for clearing the deal?
14. In the debate over standard essential patents and FRAND commitments, much discussion has focused on the willingness of potential licensees to engage in negotiations.
- a. In your view, what does it mean to be a willing licensee?
 - b. Is a licensee unwilling simply because it refuses to accept a stated demand as FRAND or demands that the party demonstrate that its portfolio is composed of valid and infringed patents that have some value apart from its inclusion in the standard?
 - c. There has been comparatively little focus on the willingness of SEP holders to engage in good faith negotiations—that is, whether the SEP holder is a willing licensor. Would you agree that there is a burden on the SEP holder to demonstrate the value of its SEP portfolio, a burden that is generally not discharged by merely quoting a rate, particularly when the rate clearly exceeds traditional industry benchmarks?
15. The Commission statement accompanying its decision relating to Google’s abuse of certain standard essential patents indicated that “Google’s settlement with the Commission requires Google to withdraw its claims for injunctive relief on FRAND encumbered patents around the world.”
- a. How many of those claims for injunctive relief have been withdrawn and how many are still open?
 - b. What is the Commission doing to ensure compliance with its Order?

16. In testimony before our Committee last July, you expressed concerns about anticompetitive abuse of standard essential patents and stated that the Commission “believes that the ITC has the authority under its public interest obligations . . . to deny an exclusion order if the holder of the FRAND-encumbered SEP has not complied with its FRAND obligation.” You also suggested that if the ITC did not act appropriately, Congress should consider giving the ITC more flexibility to deny exclusion orders in such cases.
- a. In your view, has the ITC responded to the concerns you raised?
 - b. Do you worry about ITC decisions in cases involving FRAND-encumbered SEPs, given that the only available ITC remedy is an exclusion order?
 - c. Do you believe that enforcement action based on anticompetitive abuse of FRAND-encumbered SEPs could and should be pursued under Section 2 of the Sherman Act?
17. At our Subcommittee’s hearing last week, there was much discussion of legislation that would impose a presumption that all patent settlements between innovator pharmaceutical companies and generic companies are anticompetitive. By statute, the Commission is already entitled to receive notice of such settlements, so it has ample opportunity to review such settlements for any anticompetitive problems. Both federal statute and Supreme Court case law state that patents are presumed to be valid. 35 U.S.C. § 282; *Microsoft Corp. v. i4i Limited Partnership*, 131 S.Ct. 2238 (2011). Indeed, patent invalidity must be proved by the elevated standard of clear and convincing evidence. *Microsoft*, 131 S.Ct. at 2252. In addition, it is well-settled law that settlements of litigation are highly favored. Yet, your position on patent settlements legislation seems to contradict quite squarely these two well-settled, time-tested principles.
- a. How can you reconcile your position with these principles, particularly when the settlement occurs within the term of the patent?
 - b. Do you really believe that all such settlements are necessarily anticompetitive?
 - c. Under what conditions might such a settlement be procompetitive in its effect?
18. The Commission’s estimated cost savings associated with legislation providing the FTC with additional authorities to prevent parties from settling Hatch-Waxman patent litigation appears to differ from both Office of Management and Budget (OMB) numbers in the President’s FY 2014 proposal and previous Congressional Budget Office (CBO) cost savings figures. In fact, there appear to be three entirely different estimates of what, if any, savings there may be.
- a. In light of these discrepancies, what effort has the Commission taken to coordinate information sharing of studies, proposals, or assumptions with OMB and CBO to determine the accuracy and validity of estimated cost savings?
 - b. What information related to patent settlements has the Commission received from either CBO or OMB?

- c. Has the Commission received any data or information from other public or private organization on patent settlements upon which it has relied in making assumptions about savings from patent settlements? If so, which entities?
19. Many in the IP community are concerned by the growing number of instances in which established operating companies transfer their patents to patent assertion entities (PAEs), so that these entities can target the established company's competitors. Some reports suggest that the operating companies often retain a revenue interest in the assertion of the transferred patents, which have included patents that are subject to commitments to license on FRAND terms. Last week, the Commission's directors of both economics and competition said that they support the issuance of a Section 6(b) order to investigate the PAE industry.
- a. Would you support such an order? If not, why not?
20. Both China and India have draft guidelines or policies that would make it an abuse of intellectual property rights for a dominant company unconditionally and unilaterally to refuse to license its critical intellectual property rights to a competitor who needs access to those rights to compete and innovate. These initiatives are clearly inconsistent with the DOJ's and FTC's Antitrust Guidelines for the Licensing of Intellectual Property, as well as U.S. case law, and could significantly harm innovative American companies operating overseas by undermining their intellectual property.
- a. What is the Commission doing about these broad intellectual property abuse policies that are emerging in key foreign jurisdictions?
 - b. Because unconditional refusals to license strike at the heart of intellectual property rights, are you also working with USTR and the PTO to develop a holistic approach for influencing activities overseas?
 - c. Are you concerned that open-ended tests for abuse may allow foreign governments to use antitrust policy as a backdoor means for usurping the intellectual property rights of U.S. companies?
21. Some have expressed concern about consumer harm in the prescription eyeglass and contact lens industry. Requiring consumers to obtain a prescription prior to purchasing a product impedes free market forces. Circumstances in which the prescriber is also the retailer of the prescribed product presents a conflict of interest that may lead to anticompetitive behavior. This is especially true when the product is prescribed by brand, locking a consumer into purchasing the brand selected by the prescriber. The Commission has historically taken steps to promote consumer choice in such markets, such as by promulgating the Eye Glass Rule in the late 1970s and the Contact Lens Rule, which implemented the Fairness to Contact Lens Consumers Act, nearly a decade ago. Both of these rules guarantee that upon completion of an eye exam, a consumer has the automatic right to receive copies of his prescriptions without having to make a request, pay a fee, or sign a waiver. These rules provide consumers with the opportunity to exercise that choice when buying contact lenses or eyeglasses.

- a. Despite the requirement that patients receive eyeglass prescriptions including all “written specifications. . . necessary to obtain lenses for eyeglasses,”³ pupillary distance (P/D) measurement is instead typically taken at the store where the eyeglasses are purchased. Now that eyeglasses are available online, it is important that P/D is included in prescriptions given consumers—as required by law—allowing them freedom to purchase eyeglasses where they want, whether at a brick-and-mortar store or online. To help ensure that consumers have this choice, will the Commission issue guidance reminding prescribers of their legal obligation to include on prescriptions all parameters necessary to produce lenses, including the P/D?
22. Under your predecessor, the Commission showed leadership in supporting the development of transparency and procedural fairness norms internationally. That work has been done in the OECD and is now being conducted in the ICN. It has also been incorporated into the Trans-Pacific Partnership and there will be an opportunity to do so in the US-EU Transatlantic Trade and Investment Partnership.
 - a. What do you think about the need for increased transparency and due process in antitrust proceedings globally?
 - b. Do you plan to continue to work in a similar vein as your predecessors in bringing these issues to forefront of the international antitrust policy debate?
 23. Competition policy advocacy has traditionally been an important part of the Commission’s role. As part of this function, the Commission recently sent comments to the Colorado PUC to discourage potential taxi regulations that would have had a negative impact on apps like Uber. You recently said that you hope to make the Commission’s “research function” a priority during your term as Chair.
 - a. Will you commit to devote the Commission’s research and advocacy functions to support the development of new entrants to markets that bring competition to consumers and generally lower prices?

³ 16 CFR 456.1(g).

RESPONSES OF HON. EDITH RAMIREZ TO QUESTIONS SUBMITTED
BY SENATORS LEAHY, GRASSLEY, KLOBUCHAR, AND LEE

Questions for the Record for Chairwoman Edith Ramirez
Senator Patrick Leahy
Chairman, Senate Judiciary Committee

Hearing before the Senate Committee on the Judiciary
Subcommittee on Antitrust, Competition Policy and Consumer Rights
“Oversight of the Enforcement of the Antitrust Laws”
April 16, 2013

1. In 2012, the Government Accountability Office (GAO) issued a report concerning Federal oversight and self-regulation of Group Purchasing Organizations (GPOs). This area has long been of interest to the Judiciary Committee. After I raised concerns about the potential impact on patient costs of GPO contracting practices with the Justice Department in 2000, and the Department of Health and Human Services in 2001, the Antitrust Subcommittee held a series of hearings on GPO practices that culminated in a joint report by the Department of Justice and Federal Trade Commission in 2004. During the hearings, many expressed concern that fees paid by vendors to GPOs distort demand, resulting in higher prices for hospitals and consumers.

Although the Department of Justice and FTC have investigated complaints against various GPOs, since 2004 the Department has filed only one lawsuit against a GPO under the antitrust laws, and the FTC has filed none. The GAO’s 2012 report observed: “While the oversight of GPOs is conducted through the exercise of investigatory authorities of HHS, DOJ, and FTC... this oversight does not address other key questions that have previously been raised about GPOs’ activities. For example, inasmuch as the collection of contract administrative fees is permitted under the safe harbor provision to the Anti-Kickback statute and safe harbor regulation, this oversight cannot address whether or to what extent these fees create a financial incentive that is inconsistent with GPOs obtaining the lowest prices for their customers.”

Do you believe that the current legislative framework is sufficient to address the risk of undesirable conduct by GPOs that increases prices for consumers? Do you agree that the legal framework could be strengthened through other measures, such as revisiting the safe harbor for GPOs provided in the Anti-Kickback Statute?

The FTC has authority to take action against GPOs if they were to engage in anticompetitive conduct in violation of the antitrust laws. For example, Commission staff have investigated allegations by medical device manufacturers that GPO contracting practices unreasonably foreclosed competition among rival manufacturers, which may discourage innovation and create a disincentive for GPOs to negotiate the lowest prices. The FTC will continue to review GPO conduct on a case-by-case basis as part of our mission to promote competition in health care markets and take action when the factual circumstances warrant it.

As your question acknowledges, some concerns raised by various parties regarding GPOs fall outside of the scope of the antitrust laws, including the role of the safe harbor in the Anti-Kickback statute. As you know, these concerns often center on the potential for “agency problems” and corporate governance issues, whereby GPO management may be enticed to enter into contracts that are not in the best interests of their members, as distinct from the antitrust issues that are the Commission’s focus.

2. **Last year, I asked then-Commissioner Ramirez and the Acting Assistant Attorney General for Antitrust, Joseph Wayland, whether “patent trolling” behavior by certain patent-assertion entities could constitute an antitrust violation. Mr. Wayland responded: “Any effort by a patent owner to harm competition by improperly extending the exclusionary scope of its patent . . . may violate the antitrust laws, and allegations of such actions merit investigation.” I was pleased that your agencies recently held a joint workshop to further investigate this question. How do your agencies intend to follow up on the workshop?**

The FTC and Department of Justice received almost 70 public comments in connection with our Patent Assertion Entities (PAE) workshop. We have been actively considering those comments and applying our learning from the workshop to evaluate potential next steps. If the FTC finds potentially anticompetitive conduct, we will investigate it using our authority under Section 5 of the FTC Act. In addition, PAE activity may be a suitable focus for Commission policy studies and competition advocacy. For example, patent system issues related to notice and remedies may promote PAE harms. The FTC will continue to recommend improvements to the system of patent notice and remedies, as well as other appropriate reform to the patent system, to address these issues going forward.

3. **In your testimony, you stated that the FTC has heard reports of patent assertion entities making unsubstantiated claims relative to small businesses. Unfortunately, I continue to hear frequently about this problem from small businesses in Vermont and across the country. What steps can the FTC take to address this conduct through its consumer protection authority? Will you agree to monitor such activity and take appropriate action to address abusive behavior by patent trolls?**

Yes, the FTC will continue to monitor PAE activity and, when appropriate, we will use our competition and consumer protection enforcement authority to prevent harmful practices by PAEs.

4. **Earlier this year, the FTC concluded its investigation of Google’s search engine practices. A majority of Commissioners found that certain practices used by Google**

threatened competition and innovation, yet the FTC relied on voluntary commitments from Google to end those practices, instead of a consent order.

- a. **In your testimony, you expressed concern about the use of voluntary commitments to address anticompetitive violations. Can you please elaborate on that? What actions does the FTC intend to take to enforce Google's commitments?**

The voluntary commitments made by Google should not be considered a precedent, but were a good outcome for consumers under the specific circumstances of that case.

Our policy long has been – and under my leadership, will continue to be – that when a majority of Commissioners finds reason to believe that a law we enforce has been violated and enforcement would be in the public interest, any remedy should be embodied in a formal consent order or adjudicated order.

In the Google matter, three of the Commissioners – myself included – were concerned that some of Google's conduct had the potential to restrict competition. A Commission majority did not, however, support an enforcement action on any of the allegations under investigation. Therefore, the Commission was not in a position to accept a formal consent agreement.

In a public letter to then-Chairman Leibowitz, Google responded to the concerns of some Commissioners with voluntary commitments. We expect Google to honor its commitments. Google has stated publicly that material violations of its commitments would be actionable under the FTC Act, and Google will submit periodic compliance reports to the Commission. We will use this and other information to monitor Google's activities.

- b. **In discussing potential remedies, some commentators noted the challenges involved in overseeing a technologically complex business practice that is constantly being updated, such as a search engine algorithm. How is the Commission responding to the challenges of enforcement in an online world?**

As the Commission has demonstrated throughout its almost 100-year history, antitrust analysis is sufficiently flexible to accommodate the complexities of technological change in dynamic markets. To support our highly fact-based approach to antitrust enforcement, the Commission and its staff constantly strive to enhance our understanding of rapidly evolving technology markets. Staff's expertise deepens case-by-case, just as in other important markets. In addition, in 2010 the agency created a Chief Technologist position, which thus far has been filled by two notable academics with significant real-world experience. We also hire technical experts to work on staff or as consultants when needed.

- c. **In your testimony, you said that the FTC concluded that certain changes made by Google to its search engine algorithm were “pro-competitive” because they were “designed to improve the overall search experience for the user,” even though they had the effect of negatively impacting rivals. Would your analysis have come out differently if the FTC had focused on the harm experienced by Google’s other “users”; namely, the advertisers who pay to post ads on its site? How did the FTC determine its framework of analysis in assessing the procompetitive justifications of Google’s conduct?**

Our analysis focused on the impact of Google’s conduct on both consumers and advertisers because they are so closely intertwined. While Google focuses its search product on the search needs and buying preferences of consumers, it does so in order to attract advertisers. As discussed in the Commission’s statement, we carefully considered the potential long-term effects of Google’s conduct on so-called “vertical” websites, which might be viewed as current or potential rivals in markets for search and search advertising.

- d. **In light of the recent reports of action by your European counterpart authorities, is the FTC taking any further action in these matters?**

We have worked closely with the EC’s Directorate General for Competition (“DG Comp”) for many years, and our staffs cooperated extensively throughout the Google investigation as well. We do not anticipate any further FTC action on the Google search matter.

Questions for the Record for Chairwoman Edith Ramirez
Senator Chuck Grassley
Senate Judiciary Committee

Hearing before the Senate Committee on the Judiciary
Subcommittee on Antitrust, Competition Policy and Consumer Rights
“Oversight of the Enforcement of the Antitrust Laws”
April 16, 2013

1. As you know, I’ve 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. Senator Klobuchar and I have introduced a bill, the Preserve Access to Affordable Generics Act, 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. Former Chairman Jon Leibowitz was very supportive of our efforts to address this anti-competitive practice.

- a. Do you agree that these “pay for delay” agreements harm consumers?

Yes, pay-for-delay agreements pose a substantial threat to consumers. Agreements in which generic drug companies are paid to delay market entry of their products deprive consumers of the ability to choose lower cost medications – often for many years – and impose considerable costs on consumers and the government. FTC economists analyzed data from settlements reported to the FTC during 2004-2009 and calculated, using conservative assumptions, that pay-for-delay patent litigation settlements cost drug purchasers roughly \$3.5 billion a year.¹

- b. Do you agree that these kinds of agreements are still a problem?

I do, and it seems the agreements are a growing problem. FTC staff analyzed settlements filed pursuant to the provisions of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA). The results show a steady increase in the number of agreements containing both a restriction on market entry by the generic drug manufacturer and compensation from the branded drug firm to the generic drug company, from zero in FY 2004 to forty in FY 2012.²

¹ Federal Trade Commission Staff, *Pay for Delay: How Drug Company Pay-Offs Cost Consumers Billions* (January 2010), at 8-10.

² Federal Trade Commission Staff, *Agreements Filed with the Federal Trade Commission under the Medicare Prescription Drug, Improvement, and Modernization Act* (FY 2012), <http://www.ftc.gov/os/2013/01/130117mmareport.pdf>.

c. **What is the FTC doing to prevent these kinds of agreements?**

The FTC currently has two law enforcement actions challenging pay-for-delay agreements. *FTC v. Actavis* is currently pending before the U.S. Supreme Court, with a decision expected to issue by the end of June. In the *Cephalon* case, the U.S. District Court for the Eastern District of Pennsylvania is awaiting the Supreme Court decision in *Actavis* before moving forward. Additionally, FTC staff continue to review every agreement reported to the agency pursuant to the MMA and have opened additional non-public investigations.

d. **Do you believe that the Klobuchar/Grassley legislation would help preserve generic drug competition and ensure that more affordable drugs get to consumers as expeditiously as possible?**

I do, and I strongly support this legislation. By declaring that pay-for-delay arrangements are presumptively illegal and requiring clear and convincing evidence to overcome that presumption, the Klobuchar/Grassley bill should help to protect consumers by deterring drug companies from entering into anticompetitive patent settlements.

Questions for the Record for Chairwoman Edith Ramirez
Senator Amy Klobuchar
Senate Judiciary Committee

Hearing before the Senate Committee on the Judiciary
Subcommittee on Antitrust, Competition Policy and Consumer Rights
“Oversight of the Enforcement of the Antitrust Laws”
April 16, 2013

1. **In these tough budget times, we’re asking every agency to do more with less. Can you explain to us the value that you think antitrust enforcement brings to consumers and the economy as a whole?**

Vigorous competition is a fundamental organizing principle of the U.S. economy. During financially troubled times, conscientious antitrust enforcement remains a good investment for the American people because it helps to support and strengthen our economy. Competitive markets yield lower prices, improved quality, and other benefits for consumers, including both individuals and businesses. Competition also promotes innovation, providing incentives and opportunities for the development of new goods and services.

The Commission, with its highly professional and dedicated staff, strives to be a good steward of the resources entrusted to us. As one example of the value we deliver to consumers, in FY 2012 the FTC’s efforts to prevent anticompetitive mergers saved consumers approximately thirteen times the amount of resources devoted to the agency’s merger enforcement program.³

2. **The Antitrust Division and the Federal Trade Commission share responsibility for government enforcement of the federal antitrust laws. Sometimes this leads to 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.**
 - a. **What is your agency doing to resolve clearance disputes in a more effective way? Are you working with the Antitrust Division/FTC, as the Antitrust Modernization Commission suggested in 2007, to develop a new merger clearance agreement?**

Clearance disputes are rare, and there is a process in place to resolve, in a timely and professional way, the few that arise. Staff at both agencies are alert to the

³ Federal Trade Commission, Performance and Accountability Report, FY 2012, at 14, available at <http://www.ftc.gov/opp/gpra/2012parreport.pdf>.

time-sensitivity of clearance and HSR review. We are all working to minimize clearance disputes and associated delays, and the recent ABA Antitrust Section Transition Report released in February finds that “delays due to clearance battles have been reduced.”⁴ Nonetheless, we can always do better, and Assistant Attorney General Bill Baer and I have agreed that we will both make this issue a priority.

3. **Recently, standard essential patents have been the subject of several cases filed at the International Trade Commission (ITC). We can all agree that standardization of technology and standard essential patents have been critical to the development of a competitive market for smartphones and tablets. But recently, concerns have been raised about the practice of bringing standard essential patents cases to the ITC seeking an exclusion order to prevent products with the patents from being imported into the U.S. Some worry that the ITC exclusion orders related to standard essential patents could gravely harm competition.**
 - a. **What sorts of negative effects might the use of exclusion orders regarding standard essential patents have on competition and consumer welfare in general?**

I am concerned that a patentee might voluntarily commit to license its intellectual property on fair, reasonable, and non-discriminatory (FRAND) terms as part of the standard-setting process, and then escape that licensing obligation by seeking an exclusion order for infringement of the FRAND-encumbered standard essential patent (SEP). The threat of the exclusion order undercuts the procompetitive goals of the FRAND commitment and the standard-setting process. A potential licensee is likely to accept an unreasonable royalty demand if the alternative is an order that blocks its products from the market. Even a relatively small risk of that disruptive outcome can force an implementer to accept licensing terms that far exceed what it would have paid to license the patent before the standard was adopted.

More broadly, unexpectedly high costs undermine the competitive value of the standard-setting process. And the uncertainty associated with the threat of an injunction can have the long-term impact of discouraging firms from investing to implement the standard, or to invest in standard-compliant products more generally.

⁴ American Bar Association, Section of Antitrust Law, *Presidential Transition Report: The State of Antitrust Enforcement 2012* (Feb. 2013), at 12, available at http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/at_comments_presidential_201302.authcheckdam.pdf.

b. Is there any justification for the use of exclusion orders in the context of standard essential patents?

While injunctive relief in most cases should be unavailable for infringement of a SEP covered by a FRAND commitment, this should not be a blanket rule in all cases. One likely exception would cover foreign manufacturers with an insufficient presence in the United States to support federal court jurisdiction. In that instance, a patent holder could not obtain damages for infringement of a valid patent in a U.S. district court, and an ITC exclusion order might be warranted.

**Questions for the Record for Chairwoman Edith Ramirez
Senator Michael S. Lee
Senate Judiciary Committee**

**Hearing before the Senate Committee on the Judiciary
Subcommittee on Antitrust, Competition Policy and Consumer Rights
“Oversight of the Enforcement of the Antitrust Laws”
April 16, 2013**

1. **In 2008, the Department of Justice released a report on Section 2 of the Sherman Act. The report was later withdrawn. That report provided the business community with guidance on applicable principles in Section 2 enforcement actions.**
 - a. **Do you agree with the 2008 report’s findings and conclusions?**
 - b. **If not, with which specific findings and conclusions do you disagree?**
 - c. **Do you agree that it would be helpful for the business community to have formal guidance on the enforcement agencies’ approach to Section 2 enforcement?**
 - d. **Will you commit to work with Mr. Baer to develop and publish formal guidance on Section 2 enforcement?**

The Commission did not join or endorse the Section 2 Report when it was released by the Department of Justice, and various Commissioners issued statements explaining their concerns. I was not a Commissioner at the time, but I share the concerns of the Commissioners who declined to endorse the Report.

The two agencies’ extensive joint hearings that provided the foundation for the Report, along with the statements of the then-Commissioners, made an important contribution to the development of antitrust law. The hearings brought together experts with a wide range of views to discuss important doctrinal and policy questions related to single firm conduct. The record of these hearings (available on the FTC website) and several posted FTC staff working papers continue to provide guidance for businesses and their counsel on various types of conduct.

In addition, as Assistant Attorney General Bill Baer testified at the hearing, a series of U.S. Supreme Court and D.C. Circuit court opinions provide valuable guidance about how to apply Section 2. As courts continue to apply these analytical approaches to different sets of facts, the law will continue to evolve.

The antitrust laws should not be applied in ways that might impose liability on firms for achieving marketplace success as a result of their superior products, services, or business models. Likewise, we should not tolerate market power

achieved or maintained via conduct that does not reflect competition on the merits and impairs competition or the competitive process.

Striking the appropriate balance, based on specific factual circumstances and sound economic theory, will help to ensure that markets operate efficiently, that innovation is promoted, and that all firms are encouraged to compete on the merits. We can most effectively satisfy these goals by continuing on our present course: first, to develop sound and predictable principles through case-by-case enforcement; and second, to engage in advocacy (such as amicus briefs) to support competition on the merits and oppose conduct that poses a significant threat of harm to competition or the competitive process.

2. **The Federal Trade Commission, particularly under the previous Chairman, has been in the practice of reaching settlements in cases brought under Section 5 of the FTC Act. These settlements are not subsequently reviewed by a court to establish a clear record of Section 5 enforcement boundaries. At the same time, the Commission has yet to provide definitive guidance as to how Section 5 can be used to enforce unfair methods of competition beyond the traditional scope of antitrust laws.**
 - a. **Do you plan to continue the practice of enforcing Section 5 by means of settlements outside of court review?**
 - b. **How do you think a practice of open-ended enforcement might be perceived in foreign jurisdictions where basic rule of law principles are often lacking?**
 - c. **What formal guidance will you provide the business community regarding Section 5 enforcement?**

As with the Sherman Act and the Clayton Act, Section 5 of the FTC Act has been developed over time, case-by-case, in the manner of common law. These precedents provide the Commission and the business community with important guidance regarding the appropriate scope and use of the FTC's Section 5 authority.

For various reasons, including resource constraints, the Commission may – and often does – decide that it is in the public interest to settle a case, in exchange for a binding agreement to stop the allegedly harmful conduct. Parties before the agency, too, often prefer to settle cases for a variety of business reasons. Importantly, the possibility of settlement does not affect the rigor that we apply in choosing appropriate Section 5 enforcement actions, and the documents typically made public at the time of settlement provide significant guidance regarding the Commission's theory of harm.

3. **At our Subcommittee’s hearing last week, in response to a question regarding Section 5 of the FTC Act, you stated that you believe the Commission “has been using its Section 5 authority very rigorously and very judiciously,” and that the agency is providing some measure of guidance through the pattern of its decisions.**

a. **If the Commission is applying Section 5 “cautiously” and wishes to provide useful enforcement guidance, why are you resistant to provide such guidance in a more comprehensive, published form upon which the business community and others can meaningfully rely?**

Case-specific guidance, grounded in detailed facts and sound economic theory, is likely the most useful form of guidance for the business community and lawyers advising the business community. Due to the fact-based nature of antitrust cases, as well as our need to retain flexibility to use Section 5 to protect competition and consumers as markets and economic learning evolve, any non-case-specific guidance document would necessarily be far more general, and thus less useful.

However, we can always strive to be more transparent regarding our enforcement philosophy and case selection priorities. I will continue to engage in a dialogue with my fellow Commissioners and the business community in pursuit of that goal.

4. **Some have expressed concern that the Commission’s approach to Section 5 enforcement has left many in the business community confused and uncertain as the contours of that provision and the breadth of possible enforcement actions.**

a. **Do you believe that the Commission may use Section 5 to create convergence with U.S. antitrust doctrine and that of international jurisdictions?**

b. **Do you believe the Commission may use Section 5 to place additional emphasis within U.S. competition policy on consumer choice as a touchstone of antitrust law?**

c. **Do you believe the Commission may use Section 5 to bring actions that increasingly incorporate analysis and assumptions based on behavioral economics?**

In my view, the Agency’s work on international convergence should focus on the promotion of fair processes and transparency in all jurisdictions, along with efforts to develop and share rigorous analytical tools and common approaches to difficult antitrust issues. As we already have seen in recent years, continued international convergence generates substantial benefits for businesses and consumers. While convergence may tend to lead to similar outcomes, convergence neither contemplates nor requires identical rules of decision or identical outcomes. I do not intend to use Section 5 as a mechanism to create

international convergence with respect to substantive outcomes. The FTC will continue to enforce U.S. laws, applying U.S. legal standards.

In our application of Section 5, as in our application of the antitrust laws generally, we work to use, but not go beyond, state-of-the-art economic techniques that are rigorous and well-accepted for identifying competitive effects and efficiencies. The range of recognized harms and benefits from mergers or other competitive conduct may of course include non-price effects, such as those related to product quality or innovation.

5. **At our Subcommittee's hearing last week, you stated that you believe the standards used by the FTC and the DOJ for obtaining a preliminary injunction are "quite similar" and that "as a practical matter what each agency needs to do is go before a judge and show and provide evidence that backs up the charges that are being made." You further stated that you "believe it would be difficult to point to a specific situation where...a case would have led to a different outcome had it been handled by a different agency."**
 - a. **In its 2007 Report and Recommendations, the Antitrust Modernization Commission wrote that the "FTC's ability to continue a merger case in administrative litigation also may lead companies whose transactions are investigated by the FTC to feel greater pressure to settle a matter than if they had been investigated by the DOJ."**
 - i. **Should companies face greater pressure to settle if their mergers are reviewed by the FTC rather than the DOJ?**
 - ii. **Do you agree that even the perception of a more lenient standard for FTC cases than those brought by the DOJ could result in a practical difference for litigants who must weigh litigation risk?.**
 - b. **The 2007 Report further states that differences in the preliminary injunction standards faced by the FTC and the DOJ, whether real or perceived, "can undermine the public's confidence that the antitrust agencies are reviewing mergers efficiently and fairly and that it does not matter which agency reviews a given merger."**
 - i. **Do you agree that public confidence is important and can be affected by public perception of differing standards applied to identical issues?**
 - ii. **Do you agree that it would be problematic if the identity of the reviewing agency led to different outcomes due to the parties' perception that the FTC and the DOJ face different standards for obtaining a preliminary injunction?**

iii. **What measures do you believe appropriate to remedy any perceived or real inconsistency in the preliminary injunction standards faced by the agencies?**

Although some in the antitrust community perceive that the FTC and Department of Justice Antitrust Division face different preliminary injunction standards to enjoin pending mergers, as Assistant Attorney General Baer and I both testified, this has not been our experience. While the wording may differ, there appears to be no evidence that the substantive standard varies, or that any perceived difference has influenced the outcome of any specific case.

Public confidence in the agency is important, and the FTC has sought to address the perception that any procedural differences between the two agencies could affect outcomes. Since the Antitrust Modernization Commission issued its 2007 report, the Commission has revised its administrative adjudicative process to, among other things, impose significantly shorter deadlines. As a result, while the litigation process may differ between the two agencies, the time frames from complaint to final resolution in merger matters are now, on average, about the same for a federal district court decision in an Antitrust Division matter and an FTC adjudicative decision. Furthermore, the same substantive Clayton Act Section 7 legal standards apply regardless of whether the adjudicator is the Commission or a federal district court.

- e. **In *FTC v. CCC Holdings*, the district court granted the FTC’s request for a preliminary injunction. The judge noted that although the defendants’ arguments might “ultimately win the day,” under Section 13(b) the trial court needed only to determine that “the FTC had raised questions that are so ‘serious, substantial, difficult and doubtful’ that they are ‘fair ground for thorough investigation, study, deliberation and determination by the FTC’” to conclude that a preliminary injunction should issue. Commentators have written that “[t]he importance of the *CCC Holdings* decision therefore is not merely academic, and the resulting agency divergence is not merely procedural. It may be outcome determinative in some cases.”⁵**
- i. **Do you believe the standard applied by the district court in *FTC v. CCC Holdings* was the same as the preliminary injunction standard applicable to the DOJ in a merger case?**
- ii. **Do you agree that application of that lower standard may have had an impact on the outcome of the case, in the sense that the outcome may have been different if the DOJ standard had been applied?**

⁵ Peter Love & Ryan C. Thomas, *FTC v. CCC Holdings: Message Received*, GCP (April 2009), at 10.

- d. In the *Whole Foods* litigation, the FTC argued on appeal before the D.C. Circuit: “This Court has recognized, in keeping with the intent of Congress in creating the Commission and in enacting Section 13(b), that the Commission is not required to ‘prove’ any aspect of its case in order to secure a preliminary injunction in aid of its own adjudicative and remedial powers; rather, it need only show ‘serious, substantial’ questions requiring plenary administrative consideration. The district court’s contrary approach ignores the statutory scheme, and effectively usurps the adjudicative role of the Commission.”⁶
- i. Do you contend the standard the Commission advanced in the *Whole Foods* appeal was the same standard DOJ has to meet in order to obtain a preliminary injunction in a merger case?
- e. *FTC v. Libbey, Inc.*, 211 F. Supp.2d 34 (D.D.C. 2002), is another case in which a court applied a lower preliminary injunction standard to an FTC merger challenge than would have been applied if DOJ had brought the case.
- i. Do you agree that the standard applied in that instance may have had an impact on the outcome of the case?

Although various courts considering the appropriate standard have stated it in different ways, the core focus of the preliminary injunction standard for both agencies is the same: a strong evidentiary presentation by the agency, which a defendant fails to rebut. *See, e.g., FTC v. H.J. Heinz Co.*, 246 F.3d 708, 714 (D.C. Cir. 2001) (recognizing that government agencies bear a different preliminary injunction burden than private parties when enforcing federal laws). In addition, as the joint Horizontal Merger Guidelines indicate, the two agencies apply the same analytical framework to merger review. Any differences in merger challenge outcomes are a consequence of specific underlying facts and the strength of the evidence in individual cases. They do not result from a difference (real or perceived) in preliminary injunction standards, and they are not agency-dependent.

With regard to the specific cases you raise, I do not believe that the courts applied a more lenient preliminary injunction standard or that outcomes were affected as a result. For example, in *FTC v. CCC Holdings*, the court relied on *Heinz* for the relevant standard applicable to a FTC preliminary injunction, *i.e.*, that governmental plaintiffs like the FTC face a lower standard than private parties, and emphasized that “ultimate success” requires a showing that the effect of a merger “may be substantially to lessen competition, or tend to create a monopoly” – the same test that applies to the Antitrust Division. 605 F. Supp. 2d 26, 30 (D.D.C. 2009).

⁶ <http://www.ftc.gov/os/caselist/0710114/080114ftcwholefoodsproofbrief.pdf> at 27.

It is also important to recognize that the language used in *CCC Holdings* regarding the sufficiency of showing a likelihood of success by raising serious, substantial questions is a formulation adopted by many courts beginning in the late 1970s. See, e.g., *FTC v. Beatrice Foods Co.*, 587 F.2d 1225, 1229 (D.C. Cir. 1978) (statement of Judges MacKinnon and Robb); *FTC v. Nat'l Tea Co.*, 603 F.2d 694, 698 (8th Cir. 1979); *FTC v. Warner Commc'ns Inc.*, 742 F.2d 1156, 1162 (9th Cir. 1984); *FTC v. Univ. Health*, 938 F.2d 1206, 1218 (11th Cir. 1991); *Heinz*, 246 F.3d at 714-15. In all of these cases, the FTC was required to make a persuasive evidentiary showing of a prima facie case that withstood the defendant's rebuttal. Where the FTC has not made such a showing, the agency's motion for a preliminary injunction has been denied. See, e.g., *FTC v. Laboratory Corp. of Am.*, No. SACV 10-1873 AG, 2011 WL 3100372 (C.D. Cal. Mar. 11, 2011); *FTC v. Foster*, No. CIV 07-352 JBACT, 2007 WL 1793441 (D.N.M. May 29, 2007); *FTC v. ArchCoal Corp.*, 329 F. Supp. 2d 109 (D.D.C. 2004). With regard to the language you quote from the FTC's brief in the *Whole Foods* appeal, the FTC was merely clarifying that the court should not impose, in evaluating a preliminary injunction request, a requirement that the FTC prove the ultimate success of its case, which is the proper standard for a *permanent*, not a *preliminary*, injunction.

- f. **In February 2013, the Section of Antitrust Law of the American Bar Association issued a report entitled *Presidential Transition Report: The State of Antitrust Enforcement 2012*. The report commented that some circuits have relaxed the standard imposed on the FTC from the standard applicable to the DOJ. The Section noted that the standards applied in cases brought by the FTC differ from those in DOJ cases in other ways as well. The Section urged the FTC to adopt procedures “that will ensure that in merger cases it will seek injunctions only under the same equitable standard for a preliminary injunction as that applied to Division injunction cases.” Absent such procedures, the report urged the Administration “to seek legislative changes to Section 13(b) of the Federal Trade Commission Act that will make it consistent with traditional equitable standards for injunctive relief.”**
- i. **Will you commit to adopt procedures to ensure that the Commission only seeks preliminary injunctions under the same equitable standards that apply to DOJ actions?**
 - ii. **Would you support legislation to clarify that the FTC and the DOJ must satisfy identical standards to obtain a preliminary injunction?**
 - iii. **If you remain convinced that the differing standards applied to FTC and DOJ actions are “quite similar” and as a practical matter lead to little if any difference in outcome, what would be the harm in**

clarifying that the applicable standard is in fact the same or in establishing a unified standard?

In light of the fact that courts already apply what amounts to the same legal standard to preliminary injunction requests by both FTC and Antitrust Division, I do not believe the FTC needs to change its procedures. For the same reason, I do not believe there is any need for legislation altering the FTC standard.

6. **At our Subcommittee's hearing last week, you expressed concern that an acceptance by the Commission of voluntary commitments, as opposed to a consent order, would create confusion over its settlement practices. You suggested that the Commission's acceptance of voluntary commitments by Google should not be considered precedent. Yet, other companies under investigation may believe they need not enter into binding consent decrees, instead asking to be treated by the Commission in the same manner as Google. In addition to an appearance of favoritism the Google agreement may create, I am concerned about informal and illegitimate regulatory creep when the Commission seeks to secure voluntary commitments from private companies. If a majority of commissioners finds a violation there should be a formal consent order. If a majority does not find a violation, the Commission has no authority to interfere in the market and should not pursue any enforcement action, whether voluntary or not.**
- a. **Now that the Commission has in fact negotiated and accepted a voluntary commitment in lieu of consent order, what specifically do you plan to do to correct perceptions and assumptions about future enforcement actions?**
- b. **If the Commission does not plan to follow the standard of settlement practices used in this case ever again, how will you respond to assertions that Google received special treatment from the Commission?**

The voluntary commitments made by Google should not be considered a precedent, but were a good outcome for consumers under the specific circumstances of that case.

Our policy long has been – and under my leadership, will continue to be – that when a majority of Commissioners finds reason to believe a law we enforce has been violated, and enforcement would be in the public interest, any remedy should be embodied in a formal consent order or adjudicated order.

In the Google search matter, three of the Commissioners – myself included – were concerned that some of Google's conduct had the potential to restrict competition. A Commission majority did not, however, support an enforcement action on any of the allegations under investigation. Therefore, the Commission was not in a position to accept a formal consent agreement. Google received no special

treatment. Indeed, Google faced an extremely comprehensive inquiry as the Commission and its staff collected and analyzed a broad and complex set of facts under the reason to believe standard. Ultimately, in a letter to then-Chairman Leibowitz, Google responded to concerns about some of their business practices with voluntary commitments, a step that will likely benefit consumers.

7. **At our Subcommittee's hearing last week, you seemed to agree with me that voluntary commitments are an illegitimate approach for the Commission to use in seeking to resolve antitrust violations.**

- a. **Under your leadership, will the Commission move to correct this misstep and seek to embody Google's voluntary commitments in a formal consent order?**

Whenever a Commission majority finds reason to believe that violation of the law has occurred, and an enforcement action is in the public interest, I will make every effort to pursue formal agency action. Formal action through an enforcement proceeding or a consent decree is the most effective way for the Commission to enforce the antitrust laws. As noted above, however, the Commission was not in a position to accept a formal consent in the Google matter.

We nonetheless expect Google to honor its commitments. Google has stated publicly that material violations of its commitments would be actionable under the FTC Act, and Google will submit periodic compliance reports to the Commission. We will use this and other information to monitor Google's activities, and will take appropriate action if Google does not abide by its commitments.

8. **At our Subcommittee's hearing last week, you stated that if Google does not uphold and complete its voluntary commitments from the settlement, the Commission will take "appropriate action."**

- a. **Given that there is no Commission precedent for dealing with this type of voluntary commitment, what specifically would that appropriate action entail?**
- b. **Would such action require the Commission to undergo another complex and lengthy investigative proceeding, which could allow harmful business practices to continue undeterred until there is a formal settlement?**

As part of its commitments, Google not only agreed to stop the troubling conduct, but also stated publicly that material violations of the commitments would be actionable under the FTC Act for a period of at least five years. The Commission will make every effort to hold Google to those commitments.

9. The Commission's closing statement in the Google matter concluded: "Challenging Google's product design decisions in this case would require the Commission – or court – to second-guess a firm's product design decisions where plausible procompetitive justifications have been offered, and where those justifications are supported by ample evidence." Similarly, Chairman Leibowitz's opening remarks stated: "Google's primary reason for changing the look and feel of its search results to highlight its own products was to improve the user experience."

- a. This approach appears to differ from the standard set forth in the Microsoft case and the standard that you said the Commission used to evaluate Google's conduct. Under the Microsoft decision, the Commission, or a court, must examine whether "the anticompetitive effect of the challenged action outweighs [any proffered justification for the product design change]." *United States v. Microsoft Corp.*, 253 F.3d 34, 67 (D.C. Cir. 2001). It would have required the Commission to apply a balancing test rather than concluding its analysis simply upon a finding that Google put forth a plausible business justification, as suggested by the Commission's closing statement and Chairman Leibowitz's remarks. Please explain this apparent inconsistency.
- b. What standard will the Commission apply in the future to similar circumstances?

The Commission's Google investigation was guided by the precedent established in the D.C. Circuit's *Microsoft* decision, along with the existing, well-developed body of federal case law governing monopolization and product design. We carefully investigated whether Google's conduct harmed the competitive process. A majority of the Commission concluded, based on ample evidence, that Google's design changes were procompetitive because they improved the overall search experience for the user – even though the conduct also had some negative impact on competing search engines.

The Commission will continue to follow *Microsoft* and related case law when assessing allegations of harm from unilateral conduct. The Commission will carefully review and assess any actual or probable harm to competition and the competitive process, on the one hand, and the likely consumer benefits of the challenged conduct, on the other. In my view, a monopolist cannot escape antitrust liability simply by putting forward any plausible explanation for its exclusionary conduct.

10. Several states have ongoing investigations of Google's conduct.

- a. **Did the Commission coordinate its legal and factual analysis with these states?**
- b. **Did the Commission attempt to work with these states to obtain a coordinated settlement?**

The Commission frequently coordinates its investigations with state enforcers, sharing resources and information, and we did so during our investigation of Google's conduct. Among other things, state enforcement personnel attended investigational hearings with Google executives and participated in conference calls and meetings where complainants provided us with information. FTC staff also regularly briefed state personnel on the progress and direction of our investigation, and these discussions enhanced the Commission's review.

In many cases, our cooperation with state enforcers culminates in a coordinated settlement that resolves both Commission and states' concerns. In the end, however, each public enforcer must make its own enforcement and settlement decisions. As a matter of prosecutorial discretion, and in the interest of conserving scarce investigative resources, the Commission unanimously determined to close our investigation.

11. Google's practice of negotiating exclusionary syndication and distribution agreements was not addressed in the Commission's decision.

- a. **Did the Commission review this conduct?**
- b. **If so, why was it not included in the Commission's final decision?**

The Commission extensively investigated these issues, but in the end determined an enforcement action was not warranted. The Commission does not routinely comment publicly on decisions to close investigations. In this case, the Commission determined that a closing statement focused mainly on the search bias allegations would provide useful transparency and guidance to the public and the antitrust bar, due to the novel nature of the claims and the exceptionally high level of public interest.

12. The Commission and the Department of Justice share enforcement of the antitrust laws, both in mergers and conduct investigations. It is not always clear to the parties involved who will review a transaction or business practice. In June 2011, then-Chairman Leibowitz told the Senate Commerce Committee: "It is true that there are occasional clearance disputes over which agency is in the better position to investigate a matter The FTC and DOJ have a process in place to resolve clearance disputes, which helps resolve the issue quickly." Please provide the Subcommittee:

- a. **The precise process(es) for resolving these disputes;**
- b. **Examples of the types of agreements that the Commission and the Department have reached in merger and non-merger clearance disputes, including how the parties determine which agency will review a subsequent transaction involving the same company or industry and the duration of such agreements; and**
- c. **The number of such disputes since January 2009 and the average length of time such disputes lasted.**

Due to the shared antitrust jurisdiction of the FTC and the Department of Justice Antitrust Division, all proposed merger and conduct investigations are formally submitted to the other agency as a "clearance request" through a shared database. Until the other agency approves or "clears" the request, no formal investigation may commence and no parties or third parties may be contacted. Most investigations are submitted and cleared within two business days. When both agencies make a request to investigate the same merger transaction or conduct, this is called a "contested matter."

I understand that since January 2009, there have been 90 instances in which both the Antitrust Division and the FTC were interested in reviewing the same Hart-Scott-Rodino notified transaction. In those instances, it took an average of five business days for the agencies to agree which agency should handle the investigation.

Most of the time, clearance contests are resolved through an informal exchange of information regarding each agency's expertise. This is done by the designated Clearance Officers at each agency, working with investigative staff, by e-mail or telephone. The Clearance Officers are career staff with knowledge of the agency's work. If the Clearance Officers cannot resolve a matter informally, each agency prepares a clearance "claim," a memorandum explaining why it has the better expertise, gained from past investigations, to investigate the particular matter.

If clearance cannot be resolved by the agencies' Clearance Officers, it is escalated to the Deputy Director of the Bureau of Competition at the FTC and the Director of Civil Enforcement at the Antitrust Division for resolution, and if still unresolved, to the heads of the agencies. This level of escalation is extremely rare.

We are all working to minimize clearance disputes and associated delays. The recent ABA Antitrust Section Transition Report released in February found that "delays due to clearance battles have been reduced." Nonetheless, we can always do better. Assistant Attorney General Bill Baer and I have spoken about this issue

recently, and we both agree that one of our priorities is to continue to minimize such disputes to ensure that the clearance process is both fair and efficient.

13. **The Commission has issued two recent orders that address the meaning of commitments to license on fair, reasonable, and non-discriminatory (FRAND) terms. In *Bosch*, the Commission embraced an order and remedy that many believe represented progress on this issue. A month later, the Commission adopted a more complicated order and remedy in the Google matter, criticized by some as being weak and riddled with loopholes.**

- a. **Why did the Commission seek such a complicated (and potentially weakened) remedy in the Google matter?**

The FTC's *Bosch* and *Google* consent orders continue the Commission's longstanding commitment to safeguard the integrity of the standard-setting process. Standard setting can deliver substantial benefits to American consumers, promoting innovation, competition, and consumer choice. But standard setting by its nature also creates the risk of harm to the competitive process and to consumers. Because standard setting often displaces the normal competitive process with the collective decision-making of competitors, preserving the integrity of the standard-setting process is central to ensuring that standard setting works to the benefit of, rather than against, consumers.

Although the proposed Google order differs from the *Bosch* order, I respectfully disagree with those who believe that the relief is weak or unduly complicated. Consent orders remedy violations arising out of specific factual situations, reflecting the Commission's assessment of the market and the conduct involved, and each is by nature different. The Google order is not yet final, and is still under consideration by the Commission. However, in January, I voted to issue the proposed order because I believed it remedied Google's alleged anticompetitive conduct resulting from breaches by Google and its subsidiary Motorola of Motorola's commitments to license its standard essential patents (SEPs) on FRAND terms.

- b. **Please explain your view of the *Bosch* decision.**

As alleged in the Complaint, before its acquisition by Robert Bosch GmbH ("Bosch"), SPX Services ("SPX") reneged on a licensing commitment made to two standard-setting bodies to license its SEPs on FRAND terms, by seeking injunctions against willing licensees of those SEPs. Together with a majority of the Commission, I had reason to believe that this conduct tended to impair competition in the market for automobile air conditioning servicing devices.

- i. **Are you concerned about using a merger review process to require relief on unrelated conduct as a condition for clearing the deal?**

I would be concerned about using the FTC's merger review process to require relief that was not reasonably related to an underlying violation of law, but that was not the case in the Commission's agreement with *Bosch*. If a party decides to settle an adjudicative challenge, then the FTC will consider various settlement options, including the potential to settle merger and conduct challenges concurrently.

14. In the debate over standard essential patents and FRAND commitments, much discussion has focused on the willingness of potential licensees to engage in negotiations.

a. In your view, what does it mean to be a willing licensee?

In this context, a willing licensee is a potential licensee who is engaged in good-faith negotiation to obtain a FRAND license to a standard essential patent and is capable of complying with the terms of a license.

b. Is a licensee unwilling simply because it refuses to accept a stated demand as FRAND or demands that the party demonstrate that its portfolio is composed of valid and infringed patents that have some value apart from its inclusion in the standard?

A potential licensee is not unwilling simply because it refuses to accept a stated demand as FRAND. When negotiating FRAND royalties, both the potential licensor and the potential licensee have a duty to negotiate in good faith.

c. There has been comparatively little focus on the willingness of SEP holders to engage in good faith negotiations—that is, whether the SEP holder is a willing licensor. Would you agree that there is a burden on the SEP holder to demonstrate the value of its SEP portfolio, a burden that is generally not discharged by merely quoting a rate, particularly when the rate clearly exceeds traditional industry benchmarks?

In my view, the potential licensor of a FRAND-encumbered SEP does not discharge its duty to negotiate in good faith by merely quoting a rate.

15. The Commission statement accompanying its decision relating to Google's abuse of certain standard essential patents indicated that "Google's settlement with the Commission requires Google to withdraw its claims for injunctive relief on FRAND encumbered patents around the world."

a. How many of those claims for injunctive relief have been withdrawn and how many are still open?

b. What is the Commission doing to ensure compliance with its Order?

Under the terms of the order, Google cannot seek any new injunctions on FRAND-encumbered standard essential patents unless and until it follows the processes set out in the order. In addition, the order prohibits Google from obtaining or enforcing any injunctions in current actions without first following the processes set out in the order. Since the proposed order was accepted for public comment, Google has not obtained or enforced any injunctions on standard essential patents and many of those actions have been resolved. To our knowledge, Google is currently complying with the terms of the order, even though at this point the order is not final. When the order becomes final, the Commission will monitor and enforce the order as it does any other order.

16. **In testimony before our Committee last July, you expressed concerns about anticompetitive abuse of standard essential patents and stated that the Commission “believes that the ITC has the authority under its public interest obligations . . . to deny an exclusion order if the holder of the FRAND-encumbered SEP has not complied with its FRAND obligation.” You also suggested that if the ITC did not act appropriately, Congress should consider giving the ITC more flexibility to deny exclusion orders in such cases.**

a. In your view, has the ITC responded to the concerns you raised?

Yes. The ITC issued Notices of Review in several investigations involving FRAND-encumbered SEPs in which it sought briefing from the public and the parties on a wide range of FRAND topics. For example, in an investigation involving Apple products, it asked the parties whether: (1) “the mere existence of a [F]RAND obligation preclude[s] issuance of an exclusion order[;]” (2) a patent owner that has refused to offer or negotiate a license on [F]RAND terms should be able to obtain an exclusion order; and (3) a patent owner should be able to obtain an exclusion order if it has offered a [F]RAND license, and that license has been rejected by the alleged infringer.⁷ The ITC’s actions demonstrate that it is taking seriously competitive concerns about exclusion orders for FRAND-encumbered SEPs.

b. Do you worry about ITC decisions in cases involving FRAND-encumbered SEPs, given that the only available ITC remedy is an exclusion order?

Yes. I am concerned that a patentee might voluntarily commit to license its intellectual property on FRAND terms as part of the standard-setting process, and then escape that licensing obligation by seeking an exclusion order for

⁷ *In re Certain Wireless Communication Devices*, Inv. No. 337-TA-745, Notice of Commission Decision to Review in Part a Final Initial Determination Finding a Violation of Section 337 at 4-5 (June 2012).

infringement of the FRAND-encumbered SEP. The threat of the exclusion order undercuts the pro-competitive goals of the FRAND commitment. A potential licensee is likely to accept an unreasonable royalty demand if the alternative is an order that blocks its products from the market. Even a relatively small risk of that disruptive outcome can force an implementer to accept licensing terms that far exceed what it would have paid to license the patent before the standard was adopted. More broadly, unexpectedly high costs undermine the competitive value of the standard-setting process. And the uncertainty associated with the threat of an injunction can discourage firms from investing to implement the standard.

- c. **Do you believe that enforcement action based on anticompetitive abuse of FRAND-encumbered SEPs could and should be pursued under Section 2 of the Sherman Act?**

The FTC does not have direct authority to enforce the provisions of Section 2 of the Sherman Act. Section 5 of the FTC Act, however, is understood to incorporate conduct that violates Section 2, and it can reach more broadly. Enforcement actions based on anticompetitive abuses of FRAND-encumbered SEPs are highly fact-specific and the FTC will use all of its enforcement tools to address these abuses, where appropriate.

17. **At our Subcommittee's hearing last week, there was much discussion of legislation that would impose a presumption that all patent settlements between innovator pharmaceutical companies and generic companies are anticompetitive. By statute, the Commission is already entitled to receive notice of such settlements, so it has ample opportunity to review such settlements for any anticompetitive problems. Both federal statute and Supreme Court case law state that patents are presumed to be valid. 35 U.S.C. § 282; *Microsoft Corp. v. i4i Limited Partnership*, 131 S.Ct. 2238 (2011). Indeed, patent invalidity must be proved by the elevated standard of clear and convincing evidence. *Microsoft*, 131 S.Ct. at 2252. In addition, it is well-settled law that settlements of litigation are highly favored. Yet, your position on patent settlements legislation seems to contradict quite squarely these two well-settled, time-tested principles.**

- a. **How can you reconcile your position with these principles, particularly when the settlement occurs within the term of the patent?**
- b. **Do you really believe that all such settlements are necessarily anticompetitive?**
- c. **Under what conditions might such a settlement be procompetitive in its effect?**

I do not understand the bill introduced by Senators Klobuchar and Grassley to impose the broad presumption you describe. Instead, the proposed legislation

addresses what are known as “pay-for-delay” agreements, in which the brand-name-drug firm pays its would-be generic rival and the generic drug firm agrees to abandon its Hatch-Waxman patent challenge and forgo entry for a period of time, often several years. The vast majority of brand-generic settlements do not involve compensation to the generic patent challenger.⁸ Thus, most Hatch-Waxman patent settlements would not be affected by the bill.

I do not believe that all patent settlements between brand-name drug manufacturers and generic drug companies should be treated as presumptively anticompetitive or that all such settlements are necessarily anticompetitive. I do believe, however, that treating pay-for-delay agreements as presumptively anticompetitive is sound antitrust policy. As the Commission’s brief to the Supreme Court in *FTC v. Actavis* explains, a settlement in which the brand-name drug firm pays the generic patent challenger and the generic agrees to refrain from competing inherently aligns the generic firm’s interest with the brand’s interest in extending its monopoly. This aligning of the parties’ incentives means the generic will accept a later entry date than it otherwise would accept based on its expectations about the likely outcome of the patent suit. As a result, the parties share a pool of profits that is made larger by their agreement not to compete. Such treaties between competitors, actual or potential, are at the core of what the antitrust laws proscribe. In contrast, the other ways that drug companies settle patent suits, such as with royalty payments by the allegedly infringing generic or waivers of accrued damage claims, do not have this inherent tendency to harm competition and consumers.

A legal rule that recognizes the inherent risk of harm from pay-for-delay agreements does not conflict with the statutory presumption of validity. The Supreme Court has never suggested that the presumption of validity gives the patent holder the right to share monopoly profits to induce potential competitors to abandon their efforts to compete. Moreover, the rationale for treating pay-for-delay settlements as presumptively anticompetitive does not rest on any assumption that the patent at issue is necessarily invalid or not infringed. Rather, such agreements are problematic because it is the payment, not the strength of the patent, which thwarts the competitive process that would otherwise operate to protect consumers.

The public policy favoring settlements is important, but it does not trump the important public values embodied in the antitrust laws. Were the law otherwise, private parties could use settlements to shield a wide range of anticompetitive activity. No one, however, suggests that parties who chose to settle their litigation by means of a price fixing agreement could avoid liability on the ground that public policy favors settlement. Moreover, arguments that limiting the use of payments will make it impossible to settle Hatch-Waxman patent cases are not

⁸ 2012 Annual Report at 2 (noting that more than 70% of brand-generic settlements are resolved without compensation to the generic).

borne out by the evidence noted above, which shows the vast majority of such settlements do not involve payment to the generic.

Under a legal rule that treats pay-for-delay settlements as presumptively anticompetitive, defendants may seek to rebut the presumption. The Commission's brief to the Supreme Court describes some general ways that parties might do so: showing that the compensation to the generic firm was for something other than delay; showing that the payment merely reflected litigation costs avoided by the settlement; or identifying some unusual business circumstance such that the payment creates an offsetting competitive benefit. As the brief notes, however, lower courts have had little opportunity to date to consider possible countervailing procompetitive justifications and evidence supporting any such rebuttals is likely to be in the possession of the defendants. Consequently, the specific conditions under which a presumptively anticompetitive settlement might be deemed on balance procompetitive would be a subject for further development in the courts.

- 18. The Commission's estimated cost savings associated with legislation providing the FTC with additional authorities to prevent parties from settling Hatch-Waxman patent litigation appears to differ from both Office of Management and Budget (OMB) numbers in the President's FY 2014 proposal and previous Congressional Budget Office (CBO) cost savings figures. In fact, there appear to be three entirely different estimates of what, if any, savings there may be.**

- a. In light of these discrepancies, what effort has the Commission taken to coordinate information sharing of studies, proposals, or assumptions with OMB and CBO to determine the accuracy and validity of estimated cost savings?**

FTC staff have had numerous discussions with OMB and CBO about various estimates of the financial impact of pay-for-delay settlements (as noted in response to Question 17, the proposed legislation would not prevent parties from settling Hatch-Waxman patent litigation without compensation). While we cannot be certain of the exact methodology underlying the CBO and OMB estimates, it appears that the discrepancies are largely due to differing objectives. The FTC staff focused on predicting the harm to consumers from existing and anticipated future anticompetitive settlements that delay the entry of lower cost generic drugs.

CBO has produced estimates of the likely budgetary impact of several pieces of legislation related to these settlements. These estimates were prospective, generally predicting the amount of future harm that a law prohibiting pay-for-delay settlements could prevent. The FTC's studies have been retrospective, assessing the current and ongoing costs of settlements that already have been reached. A second difference is that CBO's primary goal was to estimate the

impact of proposed legislation on government expenditures, whereas the FTC's estimate was of the cost to all drug purchasers, private and public.

Like CBO, OMB also estimated the impact on government spending from future pay-for-delay settlements that would be prevented by legislation. But unlike CBO, this estimate included spending both on small molecule (or chemical) and large molecule (or biologic) drugs. Due to data limitations, the FTC's analysis was limited to small molecule drugs.

Consistent with the FTC's analysis, however, both CBO and OMB concluded that these agreements delay competition and significantly harm consumers.

b. What information related to patent settlements has the Commission received from either CBO or OMB?

We have had informal discussions with both CBO and OMB about techniques to estimate the impact of these settlements, but have not received any specific information from them related to patent settlements.

c. Has the Commission received any data or information from other public or private organization on patent settlements upon which it has relied in making assumptions about savings from patent settlements? If so, which entities?

The FTC staff's analysis relied on information from a variety of sources. The most important data came from our review of the settlements themselves, which companies are required to file with the FTC and the Antitrust Division under a provision of the MMA. The settlement data was supplemented with information from the FDA about Paragraph IV challenges by potential generic competitors, and information on the patents covered by the settlements, which is publicly available. The FTC also licensed commercially available sales data from IMS Health on the timing and market consequences of generic entry, as well as the level of expenditures impacted by the settlements.⁹

19. Many in the IP community are concerned by the growing number of instances in which established operating companies transfer their patents to patent assertion entities (PAEs), so that these entities can target the established company's competitors. Some reports suggest that the operating companies often retain a revenue interest in the assertion of the transferred patents, which have included patents that are subject to commitments to license on FRAND terms. Last week, the Commission's directors of both economics and competition said that they support the issuance of a Section 6(b) order to investigate the PAE industry.

⁹ See, e.g., C. Scott Hemphill & Bhaven Sampat, *Drug Patents in the Supreme Court*, 339 SCIENCE 1386 (2013) (reporting results of study of the adverse consequences of pay-for-delay settlements).

a. **Would you support such an order? If not, why not?**

The Commission's Section 6(b) authority is an investigative tool that allows the FTC to conduct studies to support our enforcement and policy missions. The increased litigation activity of PAEs raises a number of difficult questions and a well-designed 6(b) study may be a useful mechanism to explore the harms and efficiencies of PAE activity.

This is an important issue and one that I will be considering and discussing with my fellow Commissioners.

20. **Both China and India have draft guidelines or policies that would make it an abuse of intellectual property rights for a dominant company unconditionally and unilaterally to refuse to license its critical intellectual property rights to a competitor who needs access to those rights to compete and innovate. These initiatives are clearly inconsistent with the DOJ's and FTC's Antitrust Guidelines for the Licensing of Intellectual Property, as well as U.S. case law, and could significantly harm innovative American companies operating overseas by undermining their intellectual property.**

- a. **What is the Commission doing about these broad intellectual property abuse policies that are emerging in key foreign jurisdictions?**
- b. **Because unconditional refusals to license strike at the heart of intellectual property rights, are you also working with USTR and the PTO to develop a holistic approach for influencing activities overseas?**
- c. **Are you concerned that open-ended tests for abuse may allow foreign governments to use antitrust policy as a backdoor means for usurping the intellectual property rights of U.S. companies?**

The Commission regularly engages with our counterpart agencies in both India (the Competition Commission of India) and China (MOFCOM, NDRC, and SAIC) on antitrust policy and implementation matters, including with regard to intellectual property-related antitrust issues. In our dialogues with the Chinese and Indian agencies, we have regularly emphasized the importance of intellectual property rights to innovation, competition, and consumer welfare, and encouraged them to avoid applying antitrust law as a tool to constrain the legitimate exercise of intellectual property rights.

Intellectual property laws and antitrust laws can work together to promote innovation. We have been advancing this message through a number of mechanisms. The FTC, along with the Department of Justice Antitrust Division, entered into a Memorandum of Understanding with the three Chinese antitrust agencies in 2011 and with India's agency (as well as its parent Ministry) in 2012.

These MOUs confirm our joint commitment to an ongoing dialogue on antitrust matters as well as other cooperative activities related to antitrust enforcement and competition policy, such as the provision of technical assistance. We expect that the MOUs will provide for increased opportunities for engagement on issues involving intellectual property and antitrust.

We, along with the Antitrust Division, have conducted numerous technical assistance workshops in both China and India on antitrust matters, including workshops for China's agencies in 2010 and 2012 on how the United States antitrust agencies apply U.S. antitrust law to conduct involving intellectual property. In addition, we have commented on draft competition laws and regulations in both countries, including those relating to the application of antitrust law to intellectual property.

The FTC also participates regularly in U.S. government inter-agency dialogues involving the USTR and the PTO, as well as the Department of Commerce, the State Department, and others, providing our input and experience regarding competition and intellectual property issues and helping to build a coordinated U.S. government position on intellectual property and antitrust issues in other countries.

21. **Some have expressed concern about consumer harm in the prescription eyeglass and contact lens industry. Requiring consumers to obtain a prescription prior to purchasing a product impedes free market forces. Circumstances in which the prescriber is also the retailer of the prescribed product presents a conflict of interest that may lead to anticompetitive behavior. This is especially true when the product is prescribed by brand, locking a consumer into purchasing the brand selected by the prescriber. The Commission has historically taken steps to promote consumer choice in such markets, such as by promulgating the Eye Glass Rule in the late 1970s and the Contact Lens Rule, which implemented the Fairness to Contact Lens Consumers Act, nearly a decade ago. Both of these rules guarantee that upon completion of an eye exam, a consumer has the automatic right to receive copies of his prescriptions without having to make a request, pay a fee, or sign a waiver. These rules provide consumers with the opportunity to exercise that choice when buying contact lenses or eyeglasses.**
 - a. **Despite the requirement that patients receive eyeglass prescriptions including all "written specifications. . . necessary to obtain lenses for eyeglasses,"¹⁰ pupillary distance (P/D) measurement is instead typically taken at the store where the eyeglasses are purchased. Now that eyeglasses are available online, it is important that P/D is included in prescriptions given consumers—as required by law—allowing them freedom to purchase eyeglasses where they want, whether at a brick-and-mortar store or online. To help ensure that consumers have this choice, will the Commission issue**

¹⁰ 16 CFR 456.1(g).

guidance reminding prescribers of their legal obligation to include on prescriptions all parameters necessary to produce lenses, including the P/D?

I agree that prescription portability gives consumers the ability to comparison shop for optical goods, thereby promoting competition and helping to make markets more responsive to consumer needs and preferences. We remain committed to protecting optical goods consumers by enforcing the Eyeglass Rule, the Fairness to Contact Lens Consumers Act (FCLCA), the Contact Lens Rule, and the FTC Act.

We continue to monitor compliance with these laws and regulations, and to educate businesses and consumers about prescriber obligations and consumer rights, including the requirement that prescriptions include all of the information and parameters necessary to obtain the right lenses. While a substantial amount of guidance already exists regarding the optical goods rules, we will consider the need for additional guidance, especially as the optical goods marketplace evolves and online sales continue to grow.

22. **Under your predecessor, the Commission showed leadership in supporting the development of transparency and procedural fairness norms internationally. That work has been done in the OECD and is now being conducted in the ICN. It has also been incorporated into the Trans-Pacific Partnership and there will be an opportunity to do so in the US-EU Transatlantic Trade and Investment Partnership.**
- a. **What do you think about the need for increased transparency and due process in antitrust proceedings globally?**
- b. **Do you plan to continue to work in a similar vein as your predecessors in bringing these issues to forefront of the international antitrust policy debate?**

Transparency and due process are essential elements of antitrust agencies' investigative processes. There is increasing recognition at the international level that fair, predictable, and transparent processes facilitate effective agency enforcement. Recognizing the concerns regarding the levels of transparency and due process internationally, promoting the discussion of these issues among antitrust agencies is a priority for the FTC. We will continue to play a key role in supporting and advancing opportunities for such dialogue in our bilateral and multilateral work.

In 2010 and 2011, the OECD's Competition Committee held three roundtable discussions on transparency and procedural fairness. The FTC, together with the Antitrust Division, made written submissions and contributed to the discussions. The OECD summary of the key points from the discussions highlighted examples

of steps that many countries have taken to improve transparency and procedural fairness.

In 2012, the International Competition Network initiated a multi-year project on competition agencies' investigative processes. The FTC, along with the Directorate General for Competition of the European Commission, co-chairs the project, which involves agencies from over 40 jurisdictions along with leading representatives of the business community. The investigative process project addresses: the investigative tools that agencies use to obtain evidence; transparency and predictability; the ability of parties to present evidence and views during an investigation; agencies' internal checks and balances; the role of third parties; and confidentiality and legal privileges. Through this project, ICN member agencies and non-governmental advisors share experiences regarding agency powers and investigational procedures, with an eye towards developing guidance or recommendations. In 2013, the project delivered reports on investigative tools and transparency practices, highlighting common principles and effective practices across many jurisdictions. The FTC led a panel discussion on agency transparency practices at the recent ICN annual conference.

The FTC believes that transparent, predictable, and fair processes are not only beneficial to parties but also lead to better enforcement, informed by substantive input from parties. We will continue to promote the values of fairness, open dialogue with parties, and sound decision-making with our international counterparts and to keep these issues at the forefront of the international antitrust policy agenda.

23. **Competition policy advocacy has traditionally been an important part of the Commission's role. As part of this function, the Commission recently sent comments to the Colorado PUC to discourage potential taxi regulations that would have had a negative impact on apps like Uber. You recently said that you hope to make the Commission's "research function" a priority during your term as Chair.**
- a. **Will you commit to devote the Commission's research and advocacy functions to support the development of new entrants to markets that bring competition to consumers and generally lower prices?**

Pursuant to our authority under Sections 6(a) and (f) of the FTC Act, the Commission regularly gathers and compiles information concerning certain business activity in order to better promote competition. One of the Commission's primary activities in this area is competition advocacy. This advocacy takes the form of submitting filings in support of competition principles to state legislatures, regulatory boards, and officials; state and federal courts; other federal agencies; and professional organizations. The Commission also organizes public workshops and issues reports on current competition topics.

This kind of research and advocacy is a critical component of the Commission's competition mission, and one that I support.

RESPONSES OF HON. WILLIAM J. BAER TO QUESTIONS SUBMITTED
BY SENATORS KLOBUCHAR, BLUMENTHAL, GRASSLEY, LEAHY, AND LEE

Senator Klobuchar's Questions for the Record
Subcommittee on Antitrust, Competition Policy and Consumer Rights
"Oversight of the Enforcement of the Antitrust Laws"

For Assistant Attorney General Baer:

1. In these tough budget times, we're asking every agency to do more with less. Can you explain to us the value that you think antitrust enforcement brings to consumers and the economy as a whole?

Answer:

Vigorous enforcement of the antitrust laws ensures that consumers reap the benefits of competitive markets. Companies that illegally insulate themselves from competitive pressures gain the ability to raise prices, reduce output, and limit investments. Competition leads to better-quality products and services, lower prices, and higher levels of innovation.

The Antitrust Division works hard to make every taxpayer dollar count. The available data suggests that the American taxpayer is getting real value for those dollars. In just the last five fiscal years, the division has obtained criminal fines averaging nearly \$785 million per year. That is roughly 10 times our average annual net appropriation of \$79 million (full appropriation minus Hart-Scott-Rodino filing fees). These fines do not go to the Antitrust Division, but rather are contributed to the Crime Victims Fund, helping those victimized by crimes throughout our country. We can point to a similar track record of success with regard to civil enforcement. The division protects consumers by stopping anticompetitive mergers and by attacking conduct that harms competition, raises prices, lowers the quality of goods, and hampers innovation. One example is our recent e-books enforcement action. Our lawsuit caused publishers to abandon illegal agreements that kept e-book prices high. In a matter of months since our settlement, the average price for e-book best sellers has dropped by \$3, from \$11 to \$8 a book. In short, effective enforcement of the antitrust laws saves consumers money.

2. The Antitrust Division and the Federal Trade Commission share responsibility for government enforcement of the federal antitrust laws. Sometimes this leads to 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 is your agency doing to resolve clearance disputes in a more effective way? Are you working with the Antitrust Division/FTC, as the

Antitrust Modernization Commission suggested in 2007, to develop a new merger clearance agreement?

Answer:

The two antitrust enforcement agencies are focused on making the clearance process as efficient and effective as possible. During Fiscal Years 2009-2012 there was only one Hart-Scott-Rodino clearance discussion that took longer than 15 days to resolve. And in FY 2012, only 2 clearance discussions between the two agencies lasted longer than 7 days. Chairwoman Ramirez and I are committed to ensuring this level of cooperation continues.

3. Recently, standard essential patents have been the subject of several cases filed at the International Trade Commission (ITC). We can all agree that standardization of technology and standard essential patents have been critical to the development of a competitive market for smartphones and tablets. But recently, concerns have been raised about the practice of bringing standard essential patents cases to the ITC seeking an exclusion order to prevent products with the patents from being imported into the U.S. Some worry that the ITC exclusion orders related to standard essential patents could gravely harm competition.
 - What sorts of negative effects might the use of exclusion orders regarding standard essential patents have on competition and consumer welfare in general?

Answer:

An ITC exclusion order potentially precludes United States sales of an imported product incorporating the technology subject to the order. That can have a significant effect on competition and consumers. That is why, in January 2013, the division and the U.S. Patent and Trademark Office jointly issued a Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments, which concluded that in most circumstances it would be inappropriate for an exclusion order to issue in an ITC proceeding if a patent holder has promised to license the patent on fair, reasonable, and non-discriminatory terms. For additional analysis of the use of ITC exclusion orders, please see the next answer.

- Is there any justification for the use of exclusion orders in the context of standard essential patents?

Answer:

The ITC determines the appropriate circumstances for issuing exclusion orders in its matters. The recent joint DOJ/PTO Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments concluded that in most circumstances it would be inappropriate for an exclusion order to issue if a patent holder has promised to

license the patent on fair, reasonable, and non-discriminatory terms. However, the joint Policy Statement also noted that there may be limited circumstances in which a standard essential patent holder who has made a RAND commitment may be justified in seeking an exclusion order, including, for example, where a licensee or someone using a technology refuses to participate in a reasonable negotiation or may not be subject to the jurisdiction of the U.S. courts.

4. You made assurances to the Committee during your confirmation hearing that effective local and regional enforcement would be a priority for you despite the planned closing for four regional offices Atlanta, Dallas, Cleveland and Philadelphia. News reports have indicated that very few attorneys opted to take the offer made to move to another Antitrust Division office. For example, the Division lost 14 of its 15 lawyers that had been in the Philadelphia office.
 - How are you ensuring that the work of these lawyers is being picked up either at main justice or another regional office?
 - What policies or procedures have you put in place to ensure that local and regional price fixing and other anticompetitive conduct is investigated and charged?

Answer:

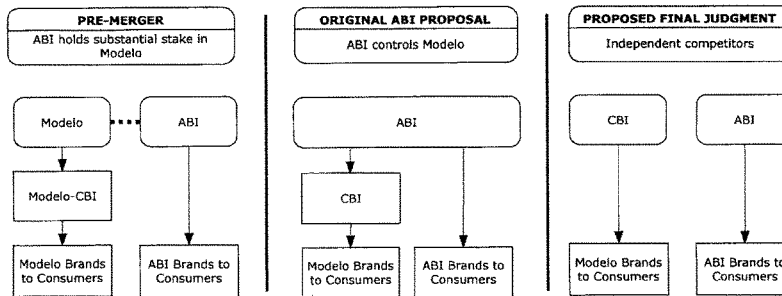
The 2012 reorganization of the Antitrust Division's field office structure was designed to help the division ensure effective management of its resources in a fiscally constrained environment. The division has committed to helping all affected employees either relocate to other division offices at their current salaries and at division expense or find alternative employment in their local commuting area. So far, 72% of affected employees have stayed with the federal government and 58% of the affected attorneys have remained with the division.

The division is committed to continuing to protect the American public from criminal antitrust misconduct, whether international, domestic, regional, or local in scope and effect. Over the years, the division has pursued many cases in states and regions where we did not have the physical presence of an office. That work will continue.

5. The Justice Department recently settled its suit to block InBev's acquisition of Grupo Modelo. As part of the settlement, in order to resolve the Department's concerns, InBev's will have to sell all of Grupo Modelo's interest in the U.S. to a rival distributor, Constellation. Your settlement indicates that you're sure Constellation will be a vigorous competitor to InBev in the way that Grupo Modelo had been.
 - How will you monitor competition and what action could you take if it Constellation does not or is not able to compete effectively?

Answer:

We sued to block the Anheuser Busch-InBev (ABI)/Grupo Modelo merger, which would have combined the largest and third-largest brewers of beer sold in the United States. That merger, combining these two large brewers of beer, would have harmed competition by eliminating a vigorous competitor that had thwarted ABI's attempts to lead industry prices higher. As a condition of settling our lawsuit, the division required a remedy that protects competition in the United States beer market. As shown in the diagram below, the settlement creates an independent horizontal competitor in the United States. This new competitor not only will have the brewery assets and intellectual property rights to fully replicate Modelo's existing competitive position in the United States, it will also have the rights to brew and sell three additional Modelo beer brands. The settlement will preserve competition in the beer market in the United States.



The division will monitor the settlement and act swiftly if it determines the parties are violating the settlement's terms. To aid in this effort, the proposed settlement requires appointment of a Monitoring Trustee, paid for by the defendants, who will oversee implementation of the settlement.

- It has been reported that ABI is pursuing a policy of pressuring its distributors to carry only ABI aligned brands and to cease distributing other brands like those of craft brewers. During the course of your investigation of the ABI/Modelo transaction, did you inquire about this policy and would approval of this transaction as proposed increase the leverage of ABI to effectuate this policy? Will your settlement address this problem in any way?

Answer:

The division recognized the importance of distribution to competition in the market for beer. The proposed settlement with ABI specifically addresses distribution issues,

including by imposing requirements on ABI regarding its distribution network that are designed to limit ABI's ability to interfere with Constellation's effective distribution of Modelo brand beer. These requirements ensure that Constellation can avoid discrimination at the hands of ABI-owned distributors, in recognition of the influence ABI already exercises in the concentrated beer distribution markets.

Senator Blumenthal questions for the record: "Oversight of the Enforcement of the Antitrust Laws"

Video Marketplace

According to FCC data, the cost of cable has been steadily increasing multiple times the rate of inflation for over a decade.

Cable distributors complain content owners are bundling programming together and charging supra-competitive rates.

Broadcasters and other major content owners argue they need the leverage of blacking out a channel in order to negotiate a fair rate for their programming.

Independent content owners argue that they are restricted from distributing their content more broadly online, due to contractual obligations with cable and satellite distributors.

Sometimes industry disagreement results in programming blackouts, blocking subscribers from watching their favorite team play, or their favorite program.

Caught in the middle of all of this are consumers, who are not able to vote with their wallets. I hear from constituents in Connecticut all the time upset about their run-away cable bills, or upset about the violence and language they see on television. They want lower prices and more choices to drop the channels they find offensive.

It seems to me there may be a big problem in this market. Consumers are forced to swallow price increases and sign up for unwanted bundles, and there is significant disagreement in the industry about what's fair.

- Assistant Attorney General Baer, if the Antitrust Division were to find market power being abused in the rising costs of cable service, or the increasing frequency of programming blackouts, do you have sufficient legal tools and resources to ensure this market works better for consumers?
- Specifically, if you were to find abuse of market-power in this industry what kinds of actions could the DOJ take to address issues of product tying, or contractual restraints on trade?

Answer:

The antitrust laws provide the tools necessary to prohibit abuse of monopoly power or other anticompetitive conduct that injures competition and consumers. The division will bring enforcement actions under the Sherman Act against any such unlawful practices, including those involving anticompetitive product tying or contractual restraints on trade.

The Market for Special Access and Consumer Broadband Rates

Consumer demand for broadband services is growing at a breakneck pace, especially in the mobile market. I am concerned about reports on the lack of competition in the special access market, and the impact this may have on prices paid for access to these connections, and ultimately on the prices consumers pay for broadband access.

As you know, every time a consumer accesses the Internet to download a movie, complete a banking transaction online, or make a VoIP phone call, their content is transmitted across an ecosystem of broadband infrastructure. Known as the “on-ramps” to the Internet, dedicated special access telecommunication lines are needed to carry a subscribers’ Internet traffic.

There have been widespread reports about market power abuse and anticompetitive conduct in the special access market. For example, incumbent carriers have been accused of requiring “loyalty provisions” in service contracts to qualify for any rate that is not cost prohibitive.

Customers of these services have complained to the FCC that these contracts effectively (but not explicitly) require a customer to purchase a large proportion of their services from a given seller, de facto forcing the customer to purchase only from the seller. These reports describe incumbent providers leveraging access to their networks in markets where they are the sole provider, to make it cost prohibitive for their customers to seek a competitor’s service elsewhere.

In 2006, the GAO reported on the subject, “Unless the competitor can meet the customer’s entire demand, the customer has an incentive to stay with the incumbent and purchase additional circuits from the incumbent, rather than switch to a competitor or purchase a portion of their demand from a competitor –even if the competitor is less expensive.”

These practices may artificially inflate the cost of broadband service and contribute to rising costs for consumers.

- Assistant Attorney General Baer, what kind of criteria does the Antitrust Division use to assess possible competitive harm in contracting arrangements?
- Has the Antitrust Division pursued cases where customers have been forced into contracts through tying and / or loyalty requirements?

Answer:

The Antitrust Division uses the criteria in the relevant case law in assessing possible competitive harm in contracting arrangements. One example was *United States v. Dentsply International, Inc.* Dentsply’s anticompetitive actions precluded many dealers selling Dentsply’s teeth from supplementing their product lines by adding competing tooth brands, even in response to the requests of their dental lab customers. The Final Judgment enjoins Dentsply from preventing distributors from adding competitors’ products to their offerings, conditioning the sale of its teeth or other products to any dealer on the dealer’s sale of competing brands or its consideration of whether to sell competing brands, and

coercing dealers to drop competing tooth brands in order to become authorized Dentsply tooth dealers.

Most-favored-nations clauses are another type of contracting arrangement that can harm competition and consumers. The most commonly used MFN provisions guarantee a customer that it will receive prices that are at least as favorable as those provided to other buyers of the same seller, for the same products or services. MFNs can, under certain circumstances, raise competitive concerns because they may raise other buyers' costs or foreclose would-be competitors from accessing the market. In addition, MFNs can facilitate collusion and stabilize coordinated pricing among sellers. In 2010, the division sued Blue Cross Blue Shield of Michigan, challenging its use of MFNs in its contracts with hospitals. Our concern was that these provisions raised the price of health care and health insurance for Michigan consumers. Recently, Michigan enacted legislation prohibiting the use of MFNs in contracts between insurers and hospitals. This new law is a victory for Michigan residents and has allowed the division to dismiss its lawsuit.

Finally I note that in September 2012, the division and the FTC jointly held a public workshop on MFNs, which focused on the circumstances under which MFNs can harm competition across the economy.

**Written Questions of Senator Chuck Grassley for Judiciary Antitrust Subcommittee
Hearing "Oversight of the Enforcement of the Antitrust Laws", April 16, 2013**

Questions for Assistant Attorney General Baer

1. As you know, I'm concerned about increased consolidation in agriculture and possible anti-competitive and abusive practices in the industry.
 - a. What has the Antitrust Division been doing with respect to competition issues in agriculture since you've taken the helm?
 - b. Has the Antitrust Division made any changes to its policy, practices or procedures when looking at agriculture competition issues since the issuance of the DOJ-USDA agriculture workshop report?
 - c. 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?
 - d. Will the Justice Department be more pro-active in policing anti-competitive behavior in agriculture? What kind of assurances can you personally give me that the Antitrust Division is taking competition concerns in the agriculture sector seriously?

Answer:

In 2010, the Department of Justice and the Department of Agriculture held a series of public workshops to explore competition issues in the agriculture industry. Those workshops helped the division improve its understanding and knowledge of agricultural markets, fostered a closer working relationship with the Department of Agriculture on issues relating to competition and improved our working relationships with farm organizations and state attorneys general on issues of antitrust concern in the agricultural sector.

Agriculture is an important part of the nation's economy. I am committed to preventing anticompetitive mergers or conduct from harming our agricultural markets. The division has attorneys and economists who focus on agricultural matters, including mergers and conduct aimed at acquiring or exercising market power. In addition, the division has a dedicated Special Counsel for Agriculture, who engages in outreach with the agricultural community to uncover potential anticompetitive activity, and who works with the litigating sections to evaluate and investigate complaints.

I believe that the current antitrust laws provide the antitrust division with the authority needed to protect competition in the nation's markets, including agricultural markets. I

am committed to ensuring that the division remains vigilant in policing anticompetitive mergers and conduct in those markets.

2. American Airlines and US Airways recently announced that the two companies would be merging. I want to make sure that air service to Iowa is not adversely impacted. Consumers in smaller communities and rural areas are often the hardest hit by these mergers.
 - a. Can you assure me that the Antitrust Division is taking a hard look at this proposed transaction to ensure that it does not lead to higher prices and reduced choices for Iowans?

Answer:

While the Antitrust Division cannot comment on ongoing investigations, I can assure you that the division will conduct a thorough investigation of the proposed transaction with the goal of ensuring consumers benefit from a competitive marketplace.

- b. How does the Justice Department evaluate consumer benefits created by airlines whose business models are based on a hub and spoke approach as compared to airlines whose business models are geared toward point-to-point service? When the Justice Department looks at hubs, either in the context of a merger or an investigation, how does it account for the potential benefits hub operations can bring to smaller communities?

Answer:

The Antitrust Division evaluates mergers pursuant to the joint Department of Justice/FTC Horizontal Merger Guidelines. In its analysis the division takes into account the extent to which a particular business model benefits consumers, including, for example, whether a hub-and-spoke approach potentially enables consumers in smaller communities to reach more destinations more efficiently than a point-to-point approach.

- c. How does the Justice Department look at the impact of divestiture of slots on service to smaller communities?

Answer:

The division evaluates the competitive implications of any remedial relief being considered in any investigation. That would include the possibility of slot divestitures in its analysis of airline mergers.

**Questions for the Record Of Senator Patrick Leahy (D-Vt.),
Chairman, Senate Judiciary Committee
Hearing before the Senate Committee on the Judiciary
Subcommittee on Antitrust, Competition Policy and Consumer Rights
on "Oversight of the Enforcement of the Antitrust Laws"
April 16, 2013**

Questions for Assistant Attorney General Baer

1) In 2012, the Government Accountability Office (GAO) issued a report concerning Federal oversight and self-regulation of Group Purchasing Organizations (GPOs). This area has long been of interest to the Judiciary Committee. After I raised concerns about the potential impact on patient costs of GPO contracting practices with the Justice Department in 2000, and the Department of Health and Human Services in 2001, the Antitrust Subcommittee held a series of hearings on GPO practices that culminated in a joint report by the Department of Justice and Federal Trade Commission in 2004. During the hearings, many expressed concern that fees paid by vendors to GPOs distort demand, resulting in higher prices for hospitals and consumers.

Although the Department of Justice and FTC have investigated complaints against various GPOs, since 2004 the Department has filed only one lawsuit against a GPO under the antitrust laws, and the FTC has filed none. The GAO's 2012 report observed: "While the oversight of GPOs is conducted through the exercise of investigatory authorities of HHS, DOJ, and FTC... this oversight does not address other key questions that have previously been raised about GPOs' activities. For example, inasmuch as the collection of contract administrative fees is permitted under the safe harbor provision to the Anti-Kickback statute and safe harbor regulation, this oversight cannot address whether or to what extent these fees create a financial incentive that is inconsistent with GPOs obtaining the lowest prices for their customers."

Do you believe that the current legislative framework is sufficient to address the risk of undesirable conduct by GPOs that increases prices for consumers? Do you agree that the legal framework could be strengthened through other measures, such as revisiting the safe harbor for GPOs provided in the Anti-Kickback Statute?

Answer:

The antitrust laws provide both the division and the Federal Trade Commission with the tools to address anticompetitive actions by Group Purchasing Organizations (GPOs). The Antitrust Division is committed to investigating potential violations of the antitrust laws by GPOs and bringing enforcement actions when supported by the facts and law.

I have alerted my colleagues in the Department of Justice's Civil Division about your concerns regarding the Anti-Kickback Statute.

2) Last year, I asked then-Commissioner Ramirez and the Acting Assistant Attorney General for Antitrust, Joseph Wayland, whether "patent trolling" behavior by certain patent-assertion entities could constitute an antitrust violation. Mr. Wayland responded: "Any effort by

a patent owner to harm competition by improperly extending the exclusionary scope of its patent . . . may violate the antitrust laws, and allegations of such actions merit investigation.” I was pleased that your agencies recently held a joint workshop to further investigate this question. How do your agencies intend to follow up on the workshop?

Answer:

In December 2012, the Division and the FTC hosted a public workshop on patent-assertion entity (PAE) activities. The workshop brought together outside attorneys, economists, and industry representatives to address the competition implications of PAEs. The Department of Justice and the FTC invited the public to submit written comments to the agencies by April 5, 2013. The agencies now are reviewing the workshop record and the numerous comments we received, which are available at www.justice.gov/atr/public/workshops/pae/#comments, and after that review, will determine the appropriate next steps.

**“Oversight of the Enforcement of the Antitrust Laws”
Senate Antitrust Subcommittee Hearing
April 16, 2013**

**Written Questions
Senator Michael S. Lee**

Questions for Assistant Attorney General Baer

1. At our Subcommittee’s hearing last week, you stated that you believed the report on Section 2 of the Sherman Act issued by the Department in 2008 and retracted by your predecessor, Ms. Varney, may have “been going too far too fast.”
 - a. On the Antitrust Division’s website, the Section 2 report is still listed under “Reports.”
 - i. What function does the “Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act” report play in antitrust guidance?
 - ii. Should those in the business community rely on the report?
 - iii. If not, why is it on the website?
 - iv. Should the business community assume that any of the report’s findings and conclusions are incorrect, and if so, which findings and conclusions?

Answer:

Upon withdrawing the Section 2 Report, former Assistant Attorney General Varney stated, “I do believe the hearings and the report provided a valuable discussion of the enforcement issues involving single firm conduct.” I agree. The Section 2 Report provides a comprehensive history and analysis of the case law and scholarship relating to monopolization offenses as they have developed since the Sherman Act’s passage. It is a valuable resource for antitrust lawyers, businesses, and the general public. Like my predecessor, however, I believe that the Report’s conclusions do not reflect well-settled positions on Section 2 enforcement. Thus, the Report’s conclusions should not be relied upon as an indication of the division’s enforcement intentions. The website containing the Report makes that point explicitly.

- b. You also stated that you were concerned about the 2008 report because the FTC had not joined in the guidance and you worried over having guidance not fully adopted by both enforcement agencies. But, in the absence of the report, the business community has little formal guidance as to the boundaries of

Section 2 enforcement.

- i. Do the FTC and DOJ Antitrust Division agree on the proper boundaries of Section 2 enforcement?
- ii. If not, on which issues do the agencies disagree?
- iii. If the agencies agree on the proper boundaries of enforcement, why not publish joint guidance on Section 2 enforcement so that the business community can rely on formal guidance?
- iv. Will you commit to work with Ms. Ramirez to develop and publish guidance on Section 2 of the Sherman Act?

Answer:

The Antitrust Division works closely with the FTC on a range of antitrust issues, including the proper scope of single-firm enforcement. My experience, both as a private practitioner and an antitrust enforcer at both the division and the FTC, leads me to believe that the agencies approach Section 2 enforcement in similar fashion. Moreover, I support the development of formal guidelines, like the Horizontal Merger Guidelines, where there is both a well-developed body of case law and extensive agency experience with recurring factual and legal issues. Here we lack the data points that typically would serve as the basis for formal agency guidelines. I will commit to working with the FTC and Chairwoman Ramirez on issues relating to the proper enforcement of Section 2.

- c. At our Subcommittee's hearing last week, you stated that you fear any formal or official guidance on Section 2 enforcement "would be so qualified that the business community wouldn't get the benefit of it."
 - i. Is it your view that there are no areas of Section 2 enforcement that are sufficiently clear and unqualified that guidance in those areas could be of use to the business community?
 - ii. Will you commit to releasing a Section 2 report that outlines, at a minimum, those areas of law on which there is sufficient clarity that guidance on the issues will be helpful to the business community?

Answer:

My work in private practice convinces me of the value of agency guidance to the business community and the public. But guidance can be provided in many forms. In a complex area like Section 2 helpful guidance can best be provided by articulating the factual and legal basis for enforcement actions (including in complaints, briefs and competitive impact statements), by issuing closing statements in appropriate circumstances that explain a decision not to pursue a particular action, and by discussing these issues in speeches and other public appearances.

- d. The Section 2 Report states: “[T]here is a significant risk of long-run harm to consumers from antitrust intervention against unilateral, unconditional refusals to deal with rivals, particularly considering the effects of economy-wide disincentives and remedial difficulties.”
- i. Do you agree with this statement? If not, why not?

Answer:

When evaluating any antitrust enforcement action, the division considers any competitive effects and will continue to account for effects on competition, including any potential economy-wide disincentives. The division also will continue to take into account potential remedial difficulties in its enforcement matters.

- e. The Section 2 Report concludes that “antitrust liability for unilateral, unconditional refusals to deal with rivals should not play a meaningful part in section 2 enforcement.”
- i. Do you agree with this conclusion? If not, why not?

Answer:

Section 2 enforcement is appropriate where there is demonstrable competitive harm that is not outweighed by cognizable efficiencies. A review of the division’s enforcement actions over many years demonstrates that we take a judicious approach to enforcement in matters involving unilateral, unconditional refusals to deal. I intend to continue that approach.

- f. The Section 2 Report states that “the essential-facilities doctrine is a flawed means of deciding whether a unilateral, unconditional refusal to deal harms competition.”
- i. Do you agree with this statement? If not, why not?
- ii. What is your view of the proper boundaries of this doctrine for current antitrust enforcement?

Answer:

The division’s approach in matters involving alleged essential facilities is both careful and deliberate. Many commentators have criticized the essential-facilities doctrine, but the Supreme Court has not provided definitive guidance on the doctrine. Therefore, the division will apply its general Section 2 approach of examining whether there is demonstrable competitive harm from a particular fact pattern that is not outweighed by cognizable efficiencies.

- g. Some criticized the Section 2 Report’s conclusions regarding unilateral, unconditional refusals to deal with rivals as creating a divergence from

foreign jurisdictions.

- i. Do you believe the enforcement agencies should increase enforcement of these doctrines in the United States so as to create greater uniformity with foreign jurisdictions in this area of law?

Answer:

U.S. consumers and the public interest are best served by applying the most up-to-date legal and economic thinking and techniques to antitrust enforcement. We will continue to ensure that division antitrust enforcement is consistent with economic theory and U.S. case law. In addition, we will work closely with our international enforcement counterparts to ensure that they understand and appreciate our approach to enforcement and the rationale underlying that approach.

- h. The Section 2 Report states: “Compelling access to inputs, property rights, or resources undoubtedly can enhance short-term price competition, but doing so can do more harm than good to the competitive process over the long term.”
 - i. Do you agree with this statement? If not, why not?

Answer:

The division is mindful of the long-term impact its enforcement and approach to remedies might have on research and development and on innovation. It takes that impact into account in determining whether enforcement action is warranted.

- i. The Section 2 Report concludes that “antitrust liability for mere unilateral, unconditional refusals to deal with rivals should not play a meaningful role in section 2 enforcement.”
 - i. Do you agree with this conclusion? If not, why not?

Answer:

Please see answer to 1(e), above.

- j. The Section 2 Report concludes that “a rule of per se illegality for tying is misguided because tying has the potential to help consumers and cannot be said with any confidence to be anticompetitive in almost all circumstances.”
 - i. Do you agree with this conclusion? If not, why not?

Answer:

The strong weight of legal authority and commentary suggests that tying arrangements are best assessed under the rule of reason. I am sympathetic to that view.

2. In 2011, the Department released an updated policy guide to merger remedies, entitled "Remedies Guide." The 2011 Guide places greater emphasis on behavioral remedies than did the 2004 Remedies Guide. For example, the 2011 Guide replaces statements evidencing a strong preference for structural remedies and instead states that in some circumstances, "behavioral relief may be the best choice."
 - a. Do you agree that the Department's 2011 guidance provides for a greater role for behavioral remedies relative to the role outlined in the 2004 Guide?
 - b. If so, do you agree with the increased emphasis on behavioral remedies?
 - c. What in your view is the proper balance between the use of structural and behavioral remedies by the Department?

Answer:

The Antitrust Division's Policy Guide to Merger Remedies states that the division will pursue a structural remedy in "the vast majority of cases involving horizontal mergers." I believe structural remedies are well suited to protect competition in merger cases and support their use in horizontal merger matters. There can be situations, particularly in connection with vertical mergers, where a conduct remedy may adequately protect consumers while enabling the merging parties to realize a transaction's pro-consumer efficiencies.

3. At our Subcommittee's hearing last week, you stated that you agreed with Chairwoman Ramirez's statement that "the standards used by the two agencies for obtaining a preliminary injunction are quite similar." You further agreed that "it would be difficult to point to a specific situation where...a case would have led to a different outcome had it been handled by a different agency." You seemed to suggest that you do not believe the differing standards faced by the FTC and DOJ to obtain a preliminary injunction result in a practical problem that Congress needs to address.
 - a. In its 2007 Report and Recommendations, the Antitrust Modernization Commission wrote that the "FTC's ability to continue a merger case in administrative litigation also may lead companies whose transactions are investigated by the FTC to feel greater pressure to settle a matter than if they had been investigated by the DOJ."
 - i. Should companies face greater pressure to settle if their mergers are reviewed by the FTC rather than the DOJ?

- ii. Do you agree that even the perception of a more lenient standard for FTC cases than those brought by the DOJ could result in a practical difference for litigants who must weigh litigation risk?

Answer:

The language under which the courts evaluate the two agency’s merger injunction requests is not identical. I have not, however, in my experience seen a situation where I thought that the difference in language has been outcome determinative. As a practical matter, any effort to seek a federal court injunction against a proposed merger requires the FTC or the division to present a convincing factual and legal basis for competitive concern in order to secure appropriate relief.

- b. The 2007 Report further states that differences in the preliminary injunction standards faced by the FTC and the DOJ, whether real or perceived, “can undermine the public’s confidence that the antitrust agencies are reviewing mergers efficiently and fairly and that it does not matter which agency reviews a given merger.”
 - i. Do you agree that public confidence is important and can be affected by public perception of differing standards applied to identical issues?
 - ii. Do you agree that it would be problematic if the identity of the reviewing agency led to different outcomes due to the parties’ perception that the FTC and the DOJ face different standards for obtaining a preliminary injunction?
 - iii. What measures do you believe appropriate to remedy any perceived or real inconsistency in the preliminary injunction standards faced by the agencies?

Answer:

As I noted above, I do not believe that there is a real-world difference in the factual showing the agencies must make to secure injunctive relief in the federal courts. Indeed, the joint Horizontal Merger Guidelines make clear that the antitrust agencies will apply the same analytical framework to merger review.

- c. In *FTC v. CCC Holdings*, the district court granted the FTC’s request for a preliminary injunction. The judge noted that although the defendants’ arguments might “ultimately win the day,” under Section 13(b) the trial court needed only to determine that “the FTC had raised questions that are so ‘serious, substantial, difficult and doubtful’ that they are ‘fair ground for thorough investigation, study, deliberation and determination by the FTC’” to conclude that a preliminary injunction should issue. Commentators have written that “[t]he importance of the CCC Holdings decision therefore is not

merely academic, and the resulting agency divergence is not merely procedural. It may be outcome determinative in some cases.”¹

- i. Do you believe the standard applied by the district court in *FTC v. CCC Holdings* was the same as the preliminary injunction standard applicable to the DOJ in a merger case?
 - ii. Do you agree that application of that lower standard may have had an impact on the outcome of the case, in the sense that the outcome may have been different if the DOJ standard had been applied?
- d. In the *Whole Foods* litigation, the FTC argued on appeal before the D.C. Circuit: “This Court has recognized, in keeping with the intent of Congress in creating the Commission and in enacting Section 13(b), that the Commission is not required to ‘prove’ any aspect of its case in order to secure a preliminary injunction in aid of its own adjudicative and remedial powers; rather, it need only show ‘serious, substantial’ questions requiring plenary administrative consideration. The district court’s contrary approach ignores the statutory scheme, and effectively usurps the adjudicative role of the Commission.”²
- i. Do you contend the standard the Commission advanced in the *Whole Foods* appeal was the same standard DOJ has to meet in order to obtain a preliminary injunction in a merger case?
- e. *FTC v. Libbey, Inc.*, 211 F. Supp.2d 34 (D.D.C. 2002), is another case in which a court applied a lower preliminary injunction standard to an FTC merger challenge than would have been applied if DOJ had brought the case.
- i. Do you agree that the standard applied in that instance may have had an impact on the outcome of the case?

Answer to 3(c)-(e):

As noted above, the language under which the courts evaluate the two agency’s merger injunction requests is not identical. I have not, however, in my experience seen a situation where I thought that the difference in language has been outcome determinative. As a practical matter any decision to seek a federal court injunction against a proposed merger requires the FTC or the division to present a convincing factual and legal basis for competitive concern in order to secure appropriate relief.

- f. In February 2013, the Section of Antitrust Law of the American Bar Association issued a report entitled *Presidential Transition Report: The State of Antitrust Enforcement 2012*. The report commented that some circuits have

¹ Peter Love and Ryan C. Thomas, *FTC v. CCC Holdings: Message Received*, GCP (April 2009) at 10.

² <http://www.ftc.gov/os/caselist/0710114/080114ftcwholefoodsproofbrief.pdf> at 27.

relaxed the standard imposed on the FTC from the standard applicable to the DOJ. The Section noted that the standards applied in cases brought by the FTC differ from those in DOJ cases in other ways as well. The Section urged the FTC to adopt procedures “that will ensure that in merger cases it will seek injunctions only under the same equitable standard for a preliminary injunction as that applied to Division injunction cases.” Absent such procedures, the report urged the Administration “to seek legislative changes to Section 13(b) of the Federal Trade Commission Act that will make it consistent with traditional equitable standards for injunctive relief.”

- i. Will you commit to adopt procedures to ensure that the Commission only seeks preliminary injunctions under the same equitable standards that apply to DOJ actions?

Answer:

I believe this question is directed at the FTC.

- ii. Would you support legislation to clarify that the FTC and the DOJ must satisfy identical standards to obtain a preliminary injunction?

Answer:

The Administration does not have a position on any such proposed legislation.

- iii. If you remain convinced that the differing standards applied to FTC and DOJ actions are “quite similar” and as a practical matter lead to little if any difference in outcome, what would be the harm in clarifying that the applicable standard is in fact the same or in establishing a unified standard?

Answer:

The Administration does not have a position on any such proposed legislation.

4. A January 2013 policy statement from the Department of Justice and the Patent and Trademark Office noted that “the approach the [ITC] adopts in cases involving FRAND-encumbered patents that are essential to a standard will be important to the continued vitality of the voluntary consensus standards-setting process and thus to competitive conditions and consumers in the United States.” I agree, but worry that the DOJ/PTO statement provides little clarity as to whether an exclusion order is appropriate when a FRAND commitment has been made. For example, the statement embraces a seemingly vague and undefined concept of willingness.
 - a. What more can Congress and the Department do to address this issue?

- b. Do you believe there should be a legislative fix?

Answer:

The policy statement issued jointly by the Department and the PTO provided an appropriate analytical framework for the ITC to consider whether an exclusion order is appropriate in a given case. That statement noted that making a RAND commitment under an SSO's policies would appear to be at odds with seeking an ITC exclusion order, although it also acknowledged that there may be some circumstances in which an SEP holder who has made a RAND commitment may be justified in seeking an exclusion order from the ITC, including where a licensee or someone using a technology refuses to participate in a reasonable negotiation or may not be subject to the jurisdiction of the U.S. courts.

The Administration has not proposed any legislation regarding this issue at this time.

5. Some have expressed concern about the process by which the Department decides whether and when to file suit in merger cases. I'd like to clarify where, under your leadership, the Department stands on this issue.
- a. What is the Antitrust Division's policy regarding giving prior notice to the parties of your intention to file suit to enjoin a merger?
 - b. What is the Antitrust Division's recent practice in this regard? Have you provided such notice? How explicit is that notice? How far in advance is it given?
 - c. Have there been any recent exceptions to the Department's policy or practice in this regard? If so, why?

Answer:

The division encourages open and active engagement with parties during the merger review process. We inform parties as early as practicable about the issues we are considering; we invite both written and oral presentations by the parties concerning the issues we have identified, and we are in close contact with them throughout the merger review process. I intend to continue that practice. Without going into the specific facts of any individual cases, we believe parties understand our enforcement considerations, our legal and factual concerns, and timing during this process.

6. Advance notice to parties prior to litigation may improve the likelihood of resolving disputes, would provide greater transparency, and could improve perceptions in the business community that the process is open and fair.
- a. Do you agree that it is reasonable to give parties at least 24-hour notice before you file suit against them?

- b. What if anything would be lost by providing 24-hour notice?
- c. Are there any circumstances in which you believe it would be appropriate for the Department not to provide parties such advance notice of intent to sue?

Answer:

As noted, the division is committed to making parties aware of its concerns throughout the merger review process. I believe that it is important that there be a candid dialogue between enforcers and merging parties. To the extent we have identified concerns with a given transaction, and the parties are interested in discussing alternatives to litigating, we expect the parties to come forward with proposals to address those concerns. If we determine that the parties are not prepared to address our concerns within a reasonable time frame, we must be prepared to act promptly to sue to block the transaction and protect consumers.

- 7. At our Subcommittee's hearing last week, in response to my question as to whether you were suggesting in your comments to the FCC that large carriers already have sufficient spectrum to meet their needs, you indicated that the Department urged the FCC "to take a close look at whether some of the spectrum that is already available to some of the carriers is being warehoused and not being put to effective use" and "to examine whether [the carriers] are using what they already have." In a March 16, 2011, speech, FCC Chairman Genachowski made the following comments regarding this idea of carriers warehousing spectrum:

Despite the increasing acceptance of the incentive auction idea, as with any new idea, there are misimpressions being floated by some who want to preserve the status quo even in this time when change is necessary for our economic future. Let me address them. First, there are some who say that the spectrum crunch is greatly exaggerated—indeed, that there is no crunch coming. They also suggest that there are large blocks of spectrum just lying around and that some licensees, such as cable and wireless companies, are just sitting on top of, or "hoarding," unused spectrum that could readily solve that problem. That's just not true. Let's look at the facts. Multiple expert sources expect that by 2014, demand for mobile broadband and the spectrum to fuel it, will be 35 times the levels it was in 2009. Cisco has projected a nearly 60X increase between 2009 and 2015. This compares to spectrum coming on-line for mobile broadband that represents less than a 3X increase in capacity. The looming spectrum shortage is real and it is the alleged hoarding that is illusory. It is not hoarding if a company paid millions or billions of dollars for spectrum at auction and is complying with the FCC's build-out rules. There is no evidence of non-compliance.

- a. Do you disagree with Chairman Genachowski's analysis?
- b. Beyond your comments at the hearing, do you have any evidence that carriers are in fact warehousing spectrum?

Answer:

I agree with former Chairman Genachowski that we need to be concerned about spectrum shortages. Our comment to the FCC urges the Commission to take into account competition in its spectrum auction proceeding. One issue the division believes the FCC should consider in any spectrum auction is whether carriers may have an incentive to acquire spectrum and not put it to efficient use.

8. At our Subcommittee's hearing last week, when asked by Senator Blumenthal whether you thought the FCC "needs a policy like a spectrum screen or auction rules that specifically seek to encourage competition in the wireless marketplace," you responded: "The answer is yes. We believe that well-defined, competition-focused rules for putting spectrum, the newly available spectrum, to use quickly and efficiently is the best way of promoting consumer welfare and that is why we have publicly filed comments, and in addition, we have spent a fair amount of time working very cooperatively, quietly with the Federal Communications Commission on these difficult policy choices."
- a. Please describe what you meant by "working cooperatively, quietly" with the FCC on spectrum issues.
 - b. Did these cooperative and quiet discussions take place as part of an ongoing proceeding at the FCC?
 - i. If so, when specifically did these discussions take place?
 - c. Did the Department file appropriate ex parte filings summarizing these negotiations?

Answer:

The FCC and the division have a shared interest in ensuring that consumers benefit from a competitive telecom marketplace. Pursuant to that shared commitment, the agencies' staffs regularly discuss issues that may be relevant to competition and consumers. In any such discussions, we adhere to the FCC's regulations regarding ex parte communications.

9. Many believe it important that the government remain "technologically neutral" in the rules it applies. That is, policymakers or regulators should not declare that, for example, iPhones are indispensable while Samsung tablets are not.
- a. Do you agree that the government ought not be picking winners and losers among competing technologies and platforms?
 - b. What specific measures do you believe the government should take to ensure that it is not taking sides in the so-called "Smartphone Wars"?

Answer:

The Supreme Court has stated that the antitrust laws “were enacted for ‘the protection of *competition*, not *competitors*.’” (*Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)) (emphasis in original). We follow that guiding principle. As the Antitrust Division’s Policy Guide to Merger Remedies states, “The Division’s central goal is preserving competition, not determining outcomes or picking winners and losers.” The most effective measure for ensuring that the division is not taking sides in any industry is for it to maintain its focus on promoting and protecting competition. This approach ensures that the consumer is always the winner.

10. The Department and the Federal Trade Commission share enforcement of the antitrust laws, both in mergers and conduct investigations. It is not always clear to the parties involved who will review a transaction or business practice. In June 2011, then-Chairman Leibowitz told the Senate Commerce Committee: “It is true that there are occasional clearance disputes over which agency is in the better position to investigate a matter The FTC and DOJ have a process in place to resolve clearance disputes, which helps resolve the issue quickly.” Please provide the Subcommittee:

- a. The precise process(es) for resolving these disputes;

Answer:

The process by which the Department and the Federal Trade Commission agree on which agency will review a particular transaction or conduct is governed by a 1993 agreement, which sets forth a mechanism for determining as quickly as possible which agency will be “cleared” to open an investigation. That agreement provides that the agencies carefully consider the product expertise at each agency so that the agency with the most relevant expertise will conduct a particular investigation. For the few situations in which that mechanism proves insufficient, senior leadership in the two agencies consult and agree on a path forward.

- b. Examples of the types of agreements that the Commission and the Department have reached in merger and non-merger clearance disputes, including how the parties determine which agency will review a subsequent transaction involving the same company or industry and the duration of such agreements; and

Answer:

In a limited number of product areas where each has relevant expertise, the two agencies have reached understandings that expedite the clearance of certain potentially problematic mergers or conduct investigations. Generally, these situations are industry-specific and arise when a sector of the economy is

undergoing technological change and previously existing products or lines of business converge.

- c. The number of such disputes since January 2009 and the average length of time such disputes lasted.

Answer:

I am advised that since January 2009, there have been 90 instances where both the division and the FTC were interested in reviewing the same Hart-Scott-Rodino notified transaction. In those instances, it took an average of five business days for the agencies to agree which agency should handle the investigation.

11. Under your predecessor, the Department showed great leadership in supporting the development of transparency and procedural fairness norms internationally. That work has been done in the OECD and is now being conducted in the ICN. It has also been incorporated into the Trans-Pacific Partnership and there will be an opportunity to do so in the US-EU Transatlantic Trade and Investment Partnership.
 - a. What do you think about the need for increased transparency and due process in antitrust proceedings globally?
 - b. Do you plan to continue to work in a similar vein as your predecessors in bringing these issues to forefront of the international antitrust policy debate?

Answer:

I agree with my predecessors that transparency and due process in antitrust proceedings are important goals. The division is and will remain actively engaged in promoting those values and explaining why they matter in our discussions with competition enforcers around the world.

140

SUBMISSION FOR THE RECORD

ADA American Dental Association®

**STATEMENT OF THE
AMERICAN DENTAL ASSOCIATION
TO THE
SUBCOMMITTEE ON ANTITRUST, COMPETITION POLICY AND
CONSUMER RIGHTS
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
ON
OVERSIGHT OF THE ENFORCEMENT OF THE ANTITRUST LAWS**

APRIL 16, 2013

Washington Office: 1111 14th Street NW Washington DC 20005 (202) 898-2400

The American Dental Association (ADA) is pleased to submit this written testimony for inclusion in the record of the Subcommittee on Antitrust, Competition Policy and Consumer Rights' hearing on "Oversight of the Enforcement of the Antitrust Laws" held on April 16, 2013.

The ADA believes it is important to restore application of the full range of federal antitrust laws to the business of health insurance in order to encourage competition and protect consumers. Specifically, the ADA supports the approach to reform taken in legislation introduced in the House of Representatives by Rep. Paul Gosar (R-AZ) titled the "Competitive Health Insurance Reform Act of 2013," H.R. 911. The Association requests support from members of the subcommittee for introduction of a companion bill to H.R. 911 in the Senate.

The ADA is America's leading advocate for oral health. Established in 1859, the ADA today represents approximately 157,000 licensed dentists in the United States. Through its numerous initiatives, the ADA supports programs to improve access to high quality dental care for all Americans and to inform all Americans about their oral health. Consequently, the ADA has a real and abiding interest in promoting a robustly competitive market for health insurance.

The McCarran-Ferguson Act's antitrust exemption extends to all conduct that constitutes the "business of insurance," not merely the activities of health insurers. Nevertheless, the repeal of the exemption within the health insurance industry is particularly important. H. R. 911 would amend the McCarran-Ferguson Act with respect to the business of health insurance, including dental benefit plans. The current debate regarding rising health care costs requires serious consideration of any and all means to introduce competition and make health insurance affordable for all Americans. An important step toward achieving these objectives is eliminating the unwarranted antitrust exemption that grants health insurers special status, and permits them to ignore the competitive rules that apply to every other business in the United States.

Repeal of the McCarran-Ferguson Act should substantially improve the problem of one-sided federal antitrust enforcement. A 2012 American Medical Association (AMA) study found that anticompetitive market conditions are common among managed care plans, concluding that a significant absence of health insurer competition is present in 70 percent of the metropolitan areas and that in over 65 percent of the metropolitan areas one HMO or one PPO had a 50 percent or greater share of the market. The study points to increased premiums, watered-down benefits and insurers' growing profitability as evidence that highly concentrated markets harm patients and physicians.¹ If health insurance companies have to observe federal antitrust laws to the same extent as U. S. business does generally, they would have to compete more aggressively for purchasers of large group policies by keeping premiums comparatively low and benefits high. Enhanced competition when designing coverage would likely provide for greater selection of treatment options, as well.

Yet, currently, consumers, payers, physicians, and dentists facing health plans with monopoly power have little recourse. If individual providers or practices band together to increase their negotiating clout, they are likely to trigger an antitrust investigation, if not an enforcement action. For decades, however, when health care providers have brought antitrust concerns regarding insurers to the attention of federal enforcers, agency staff has been reluctant to proceed for fear of crossing the line that McCarran-Ferguson draws. Repeal of the Act would enable both the Department of Justice and the Federal Trade Commission to focus their attention on specific anticompetitive practices by insurers that may adversely affect patients and providers, thereby leveling the playing field and ensuring that providers and health plans are abiding by the same set of competitive rules.

Furthermore, the McCarran-Ferguson Act, by severely limiting federal antitrust enforcement in the insurance industry, places virtually all of the oversight responsibility on state regulators. This allocation of responsibility functions relatively more effectively in those states having better developed and funded regulatory structures, and decidedly less well in the ones that do not. Consequently, repeal of McCarran-Ferguson will lead not only to better, but also to more consistent, antitrust enforcement, as health insurer conduct that is currently subjected to antitrust scrutiny in only some states will be subjected to equivalent scrutiny nationwide.

¹ <http://www.ama-assn.org/ama/pub/news/news/2012-11-28-study-finds-anticompetitive-market-conditions-common.page>.

At the time of its passage in 1945, the McCarran-Ferguson Act was intended to resolve a perceived conflict between state and federal regulation of the insurance industry. Prior to the Supreme Court's decision in *United States v. South-Eastern Underwriters Ass'n*,² regulation of the insurance industry was regarded as the exclusive province of the states. In *South-Eastern Underwriters*, however, the Court concluded that the insurance industry was within the regulatory reach of the federal government. In response to insurance industry lobbying, Congress subsequently passed the McCarran-Ferguson Act to return exclusive regulatory authority to the states. This precluded for the decades that followed much of the important federal antitrust scrutiny that has been so highly effective in combating anticompetitive conduct in other industrial sectors. Whatever justification there may have been for the McCarran-Ferguson Act exemption originally, it serves no legitimate purpose today, especially because the insurance industry will be able to avail itself of the same "safe harbors" that have been developed over the years and that are utilized by other businesses that are subject to the federal antitrust laws.

Conclusion

The ADA appreciates the opportunity to participate in the "Oversight of the Enforcement of the Antitrust Laws" hearing by submitting this written testimony. We look forward to the opportunity to work with the subcommittee's members and staff to address the important issues raised by the hearing. As stated above, the ADA supports the approach to reform taken in legislation introduced in the House of Representatives by Rep. Paul Gosar (R-AZ) titled the "Competitive Health Insurance Reform Act of 2013," H.R. 911, as it narrowly targets the health insurance industry. The Association requests support from members of the subcommittee for introduction of a companion bill to H.R. 911 in the Senate.

² 322 U.S. 533 (1944).

