

**OVERSIGHT OF THE ANTITRUST
ENFORCEMENT AGENCIES**

HEARING
BEFORE THE
SUBCOMMITTEE ON
INTELLECTUAL PROPERTY,
COMPETITION, AND THE INTERNET
OF THE
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HOUSE OF REPRESENTATIVES
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OVERSIGHT OF THE ANTITRUST ENFORCEMENT AGENCIES

WEDNESDAY, DECEMBER 7, 2011

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON INTELLECTUAL PROPERTY,
COMPETITION, AND THE INTERNET,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to call, at 10:04 a.m., in room 2141, Rayburn House Office Building, the Honorable Bob Goodlatte (Chairman of the Subcommittee) presiding.

Present: Representatives Goodlatte, Quayle, Sensenbrenner, Coble, Chabot, Issa, Jordan, Adams, Amodei, Watt, Conyers, Chu, Deutch, Lofgren, Jackson Lee, and Johnson.

Staff Present: (Majority) Holt Lackey, Counsel; Olivia Lee, Clerk; and (Minority) Stephanie Moore, Counsel.

Mr. GOODLATTE. Good morning. This hearing of the Subcommittee on Intellectual Property, Competition, and the Internet will come to order. This hearing will conduct oversight of the two agencies that share responsibility for enforcing America's antitrust laws, the Department of Justice Antitrust Division and the Federal Trade Commission's Bureau of Competition.

When applied in a predictable fashion based on sound economic principles, the antitrust laws preserve a free and competitive economy. Antitrust laws protect against monopolies, cartels, and combinations that would abuse market power to enrich themselves at the expense of competition and American consumers. If the antitrust laws go unenforced, competition and consumers will suffer. If they are over enforced, they can give unfair advantage to specific competitors and thwart pro-competitive practices that benefit consumers. But when applied correctly, the antitrust laws protect competition rather than competitors and intervene in our free market economy only to the extent necessary to preserve competition.

Thanks to an improved understanding of economics and the history of antitrust laws' original intent, antitrust case law and enforcement has become much clearer and more predictable over the past 40 years. Today's hearing is about Congress ensuring that the two Federal agencies charged with enforcing the antitrust laws, the Department of Justice and the FTC, continue to do so in the most balanced, clear, and predictable way as possible.

Particularly in this difficult economy, the antitrust laws must set clear rules of the road by which job creators and consumers can do business, and although antitrust is more predictable than it was 40

years ago, there are still areas of inefficiency and uncertainty that I hope to explore in today's hearing.

I am particularly concerned that merging companies are often uncertain about which agency will review their merger. The two antitrust agencies share responsibility for the merger review process and decide between themselves which agency will review any given merger by a process known as clearance. In many cases, clearance is reasonably clear because one agency or the other has expertise in the industry involved. However, jurisdiction may be hotly disputed in high profile matters or when neither or both agencies have relevant expertise.

The process by which the agencies resolve clearance disputes is opaque. There are stories which do not inspire confidence of clearance disputes being settled by coin tosses, jump ball arrows or back room deals. This uncertainty about clearance can affect Americans' ability to predict whether a given merger will be approved. Because of different rules that apply to the two agencies, it is widely believed that mergers that are reviewed by the Federal Trade Commission are less likely to win approval than mergers that are reviewed by the Department of Justice.

The first step in a merger challenge for both agencies is to apply in court for a preliminary injunction blocking the merger pending further proceedings, but courts apply a lower standard to preliminary injunction requests by the FTC than to the DOJ. After the preliminary injunction phase, the FTC may challenge the merger in an administrative proceeding while the DOJ must bring its challenge in Federal Court. This also makes it easier for the FTC to block a merger.

These disparities harm the predictability of the merger review system. That is why the prior Obama administration Assistant Attorney General for Antitrust, Christine Varney, said, and I quote, "I don't think we want to foster a system where the legal review, the result of your merger depends on which agency it's in front of. I would recommend to the Congress that they start to think about how to rationalize that." I would like to accept Ms. Varney's recommendation and invite today's witnesses to help this Committee think about how to rationalize these disparities.

There are a number of other oversight issues respecting the transparency, predictability, and fairness of the antitrust system that this Committee should explore today. These issues include but are not limited to the scope of the FTC's authority under Section 5 of the FTC Act, how the proposed closure of DOJ field offices will affect the budget, DOJ's increasing reliance on conduct remedies in merger cases, and whether the agency's recent guidance regarding the antitrust treatment of accountable care organizations will provide clarity and certainty to health care providers trying to adjust to the new health care law.

All of these issues are important to creating the clear and predictable rules for free market competition that are necessary to grow the economy.

I look forward to today's hearing, and it's now my pleasure to yield to the Ranking Member of the Subcommittee, the gentleman from North Carolina, Mr. Watt.

Mr. WATT. Thank you, Mr. Chairman, and I want to thank you for convening this hearing, and I want to enthusiastically welcome our witnesses today.

Since the beginning of this session of Congress, this Subcommittee and/or the full Judiciary Committee have held hearings on pending mergers before your agencies. We have evaluated, predicted, and sometimes second guessed how a particular proposal should be processed and investigated by you and your staffs. My philosophy in this context has always been to try to participate in the process to actively educate our constituents on complex matters that are in the process of being analyzed beyond the public eye. I appreciate the fact that we will never have access to all the facts and data on which you base your determinations of whether to approve or disapprove a given merger with or without conditions, and we are therefore ill equipped to pass definitive judgment on any pending proposal. So I am pleased that you are here today to provide us with insight on your leadership, collaboration, and approaches to enforcement of the laws within your respective and sometimes joint jurisdiction.

Your written submissions have certainly raised specific areas appropriate for congressional oversight. For example, what is the effectiveness of behavioral conditions imposed on approved mergers? Should Congress enact legislation prohibiting pay-to-delay settlements? How should we evaluate the intersection between patent protection and competition, and are there policy gaps for Congress to fill in that space? What challenges do we face in coordinating antitrust policy internationally?

I hope that some of my colleagues will explore some or all of these issues, but my interests are particularly dominated by one merger in particular, not with respect to the specifics of the merger but the debate it inspired within the FTC and in the academic literature. That merger is the Google/DoubleClick merger and the debate it has ignited about whether or to what extent privacy should be an element of antitrust enforcement, especially in the online environment. I believe that the prospect of compromising privacy is a price consumers pay for most online services. Simply by logging on to a computer, consumers surrender their privacy. Personal information is required, collected, shared, used, sold, tracked, and retained frequently without our knowledge.

Chairman Leibowitz, as you noted in your concurring statement approving the Google/DoubleClick merger, quote, "This rampant tracking of our online conduct as well as the resulting consumer profiling and targeting raises critical issues about the sufficiency of companies' disclosure, the depth of consumers' understanding and control of their personal information, and the security and confidentiality of the massive collection of sensitive personal data." And former Commissioner Pamela Jones Harbour in dissent noted that while, quote, "A minority of consumers will share their most intimate details with anyone on the Internet, on the radio or on national television, privacy principles should protect the majority of consumers who do care about their privacy and who would prefer greater transparency about the use of their personal information."

Various academics have also weighed in on these issues, posing the question whether traditional antitrust enforcement is currently

inadequate to protect privacy and whether the Department of Justice and the FTC should expand the scope of analysis to include privacy and other sociopolitical issues in the competition calculus. Because I am ever more convinced that one of the most important things we can do as policymakers is to preserve our privacy protections online, I'm very interested in your perspectives on the future of privacy and how it relates to or plays out under the antitrust laws.

Just yesterday we liberalized the prospect or the manner in which consumers can give up their privacy online, and I note also that you recently approved a privacy settlement involving Facebook, and if I have some time I may want to inquire into that further.

Mr. Chairman, I thank you for convening this hearing. I think it's a very important hearing, and I yield back the balance of my time.

Mr. GOODLATTE. I thank the gentleman, and it's now my pleasure to recognize the Ranking Member of the Judiciary Committee, the gentleman from Michigan, Mr. Conyers.

Mr. CONYERS. Thank you, Chairman Goodlatte. We welcome the witnesses. It's worth noting that both of your agencies have done more to enforce our antitrust laws than in previous years, but that doesn't give me much comfort. American and transnational conglomerates are getting away with incredible violations of the law. Companies—Google, Monsanto, Goldman Sachs—have acted repeatedly with impunity, engaging in unlawful, anticompetitive practices knowing that they can exploit the loopholes in a government system whose antitrust and criminal enforcement resources and commitment are not very strong.

So it's my hope that this is the first of a series of hearings that will go on in terms of antitrust enforcement. Strong antitrust enforcement is critical because free markets and competition, which are supposed to be the foundation of our system, can only thrive when there is a strong enforcement in this area of the law. Weak antitrust enforcement stifles job creation and weakens the economy. The previously accepted phrase "too big to fail" sums it all up. When companies like AIG, CitiGroup, and a number of Wall Street predators become so large that our entire economy depends on their continued success, which may incorporate unethical or illegal activity, then the economy has become too concentrated and too distorted.

Three years after the financial distress Wall Street has put us in, not one Wall Street CEO has been imprisoned. In each case when our Federal antitrust enforcers have stepped up, they have helped restore competition to the market and protect consumers. The challenge to block H&R Block and TaxACT merger, the ongoing suit to block the AT&T proposed acquisition of T-Mobile, the FTC last year settlement with Intel are all consumer wins. We wait to see what will happen with today's headlines, the Aetna-Blue Cross dispute in Michigan that the Justice Department has actively intervened into, the FTC's work on anticompetitive pay-for-delay agreements among pharmaceutical manufacturers that have so far frequently kept generic drugs off the market. Only action

will protect American consumers and jobs, and so I am aware of enforcement efforts have increased over the last couple years.

This year the Federal Trade Commission challenged 17 mergers believed to be anticompetitive, but it isn't enough. Google attempts to purchase Motorola, Verizon teams up with the new Comcast NBC Universal on shared service ventures, and as the whims of Wall Street investment firms wreak havoc on the global economy, we need antitrust to become a top priority for our law enforcement system.

I'll put the rest of my statement in the record, and I think you get my drift. Thank you, Mr. Chairman.

[The prepared statement of Mr. Conyers follows:]

Prepared Statement of the Honorable John Conyers, Jr., a Representative in Congress from the State of Michigan, Ranking Member, Committee on the Judiciary, and Member, Subcommittee on Intellectual Property, Competition, and the Internet

Thank you Chairman Goodlatte for convening this oversight hearing today.

Although it is worth noting that both of your agencies have done more to enforce our antitrust laws than the previous one, this gives me little comfort. American and transnational conglomerates get away with murder. Companies like Google, Monsanto, and Goldman Sachs often act with impunity when it comes to engaging in unlawful and anti-competitive practices because they know they can exploit gaping loopholes and a government whose antitrust and criminal enforcement resources and commitment are weak.

Strong antitrust enforcement is critical to our Nation. Free and competitive markets are the foundation of our economy.

Weak antitrust enforcement stifles job creation and brings weakness to the economy. The phrase "Too-big-to-fail" sums it all up: when companies like AIG, CitiGroup, and the Wall-Street-Robber-Barrons become so large that our entire economy depends on their success: the economy has become too concentrated and distorted. It is shocking that three years after Wall Street bludgeoned the US and world economy, not one Wall Street CEO has gone to prison.

In each case when our federal antitrust enforcers have stepped up, they have helped restore competition to the market to protect consumers. The Justice Department's successful challenge to block the H&R Block/TaxACT merger, ongoing suit to block AT&T's proposed acquisition of T-Mobile, and the FTC's 2010 settlement with Intel are wins for consumers. Promising developments may come with the Justice Department's challenge against Blue Cross Blue Shield's conduct in Michigan and the FTC's work on the anti-competitive pay-for-delay agreements among pharmaceutical manufacturers that keep generic drugs off the market.

Only action will protect American consumers and American jobs. Now I am aware that enforcement efforts have increased over the last two years. For example, during Fiscal Year 2011, the Federal Trade Commission challenged 17 mergers believed to be anti-competitive.

But this is not enough. As Google attempts to purchase Motorola, as Verizon teams up with the new Comcast-NBC-Universal on shared service ventures, and as the whims of Wall Street Investment firms wreak havoc on the global economy, we need consumer- and competition-oriented antitrust to become a top priority for our government.

Mr. GOODLATTE. I thank the gentleman, and the opening statements of other Members of the Committee will be placed in the record without objection.

Before I introduce the witnesses, as is the custom of the Committee, I would ask them to stand and be sworn.

Do you and each of you swear that the testimony you're about to give is the truth, the whole truth, and nothing but the truth, so help you God?

[Witnesses sworn.]

Mr. GOODLATTE. Thank you very much. Our first witness today is Federal Trade Commission Chairman Jon Leibowitz. Mr. Leibowitz was sworn in as an FTC Commissioner in 2004 and was designated Chairman by President Obama in 2009. Before joining the Commission, Chairman Leibowitz served in several capacities as Chief Counsel to Senator Herb Kohl from 1989 to 2000, including as Democratic Chief Counsel and Staff Director of the U.S. Senate Antitrust Subcommittee from 1997 to 2000. Leibowitz also worked for Senator Paul Simon from 1986 to 1987. Before joining the Commission, Mr. Leibowitz served most recently as Vice President for Congressional Affairs for the Motion Picture Association of America from 2000 to 2004. A Phi Beta Kappa graduate in American history from the University of Wisconsin, Leibowitz graduated from the New York University School of Law in 1984.

Our second witness is Acting Assistant Attorney General for Antitrust, Sharis Pozen. Ms. Pozen became the acting head of the Antitrust Division in August 2011 upon the resignation of Assistant Attorney General Christine Varney. Previously Ms. Pozen served as Chief of Staff and Counsel to Ms. Varney. Immediately prior to joining the Department, Ms. Pozen was a partner in the Washington, D.C. office of Hogan & Hartson, LLP, where she served as Director of the firm's Antitrust Practice Group. Prior to joining Hogan & Hartson in 1995, Ms. Pozen held several positions at the Federal Trade Commission, where she began her professional career in 1989. Ms. Pozen received her JD from Washington University Law School in St. Louis in 1989 and her BA from Connecticut College in 1986.

I want to welcome both of our witnesses, and Mr. Leibowitz, we'll begin with you.

TESTIMONY OF JON LEIBOWITZ, CHAIRMAN, FEDERAL TRADE COMMISSION

Mr. LEIBOWITZ. Thank you, Chairman Goodlatte, Ranking Member Watt, Mr. Conyers, Mr. Sensenbrenner, Mr. Deutch, and Ms. Lofgren for inviting me here to testify today on the FTC's current antitrust activities, and I'm happy to be here with my colleague Ms. Pozen.

Let me start with what I hope is modestly good news for the economy, premerger filings are up. In fact, there were twice as many filings this year as compared to 2 years ago. That means companies are beginning to feel more confident about the future, and it's also good news for consumers because the vast majority of mergers don't raise competitive issues, and indeed some may create benefits. Of course, we review merger filings to determine which ones may substantially lessen competition. That's our standard under the Clayton Act.

In fiscal year 2011 we brought, as Mr. Conyers noted, 17 merger enforcement actions. Most of the time that means we negotiated divestiture of assets to remedy a problem, and we let the rest of the acquisition go forward, but this year the FTC went to Federal Court four times to stop mergers, so it has been a busy year for us.

As this Committee knows, the FTC has jurisdiction over a wide swath of the economy. Mr. Watt noted that we spend a lot of time

thinking about and involved in privacy issues on our consumer protection side, and in both our consumer protection and our competition missions, we try to focus on sectors where our action will do the greatest good for the greatest number of people. It's a utilitarian approach, and these include energy technology and of course health care.

As spending on health care approaches 18 percent of our GDP, the FTC has redoubled its efforts to combat illegal pay-for-delay pharmaceutical settlements, prevent harmful consolidation, and formulate policies that will support innovative health care collaborations. One area of health care competition that has required particular attention this year is hospital mergers. Several years ago under Republican Chairman Tim Muris we conducted retrospective studies of consummated hospital mergers to examine their effects, and we found in some instances that prices had gone up substantially. That formed the basis of the Commission's challenge to a previously consummated hospital merger of two hospitals serving Evanston, Illinois. Since then the Commission has successfully challenged an impending hospital merger in Northern Virginia, and this year alone we have challenged three others, leading us to believe we might be witnessing the start of a wave of consolidation that could raise prices and reduce quality of care for American consumers and patients. Sometimes we've alleged these. Hospital mergers have used what we think is a misapplication of what's known as the State action doctrine as a fig leaf for their deals.

Another area of focus at the FTC is high tech industries. The proper application of competition principles in the high tech arena can be difficult, but it is critical. Antitrust enforcement can stop illegal conduct that chokes off avenues for new firms to challenge incumbents and that was the crux of our case against Intel, and we resolved it in a way that's good for consumers and also allowed Intel to continue to innovate going forward.

Sometimes, however, market facts suggest that the FTC take a wait-and-see approach, as we did when we determined not to challenge Google's purchase of AdMob. I think we made the right call here. Competition between Apple's iPhone and Google's Android platforms has led to an explosion of mobile applications. We will continue to pursue this balanced course, intervening only, as you mentioned, Chairman Goodlatte, when warranted to protect consumers and competition for the competitive process.

Energy markets continue to demand the Commission's attention. There's only so much that households can do to reduce their gasoline consumption, so higher fuel prices severely cut into a family's ability to buy other necessary goods or save for the future. Recently we opened an investigation when we observed unusual behavior among certain oil refiners. Their profit margins were going up while simultaneously their utilization rates were going down.

Let me also touch upon our authority under Section 5 to stop unfair methods of competition. As you know, Congress granted Section 5 authority to the FTC when it created our agency in 1914. Section 5 is a carefully balanced tool that allows us to go modestly beyond the ambit of the antitrust laws to stop anticompetitive conduct, but it limits the remedies we may apply, and it makes it more difficult to bring follow-on private class action lawsuits. We have

unanimous, bipartisan support within the Commission to use Section 5 in appropriate circumstances, circumstances in which competition itself is harmed.

For example, we used Section 5 to challenge invitations to collude most recently against U-Haul. This attempt to fix prices in the truck rental market in Florida couldn't be reached under the antitrust laws because there was no actual agreement or meeting of the minds about raising prices, but it is conduct that can and should be stopped.

Finally, let me mention our antitrust policy work. We are in the midst of what might be called an antitrust renaissance. The working partnership with our colleagues at the Antitrust Division has recently produced two significant policy documents, a revision to the horizontal merger guidelines and a statement of enforcement policy for accountable care organizations. These joint efforts help to bring clarity and consistency to the law, guidance that benefits the business community and law-abiding companies.

We look forward to continuing to work side by side with the Department of Justice as well as with State attorneys general to promote competition for the benefit of American consumers and businesses.

Thank you. Happy to take questions after Ms. Pozen speaks.
[The prepared statement of Mr. Leibowitz follows:]

**Prepared Statement of Jon Leibowitz, Chairman, Federal Trade
Commission**

**Prepared Statement of
the Federal Trade Commission**

**Before the
United States House of Representatives
Committee on the Judiciary
Subcommittee on Intellectual Property, Competition, and the Internet
Oversight of the Antitrust Enforcement Agencies**

**Washington, D.C.
December 7, 2011**

Introduction

Chairman Goodlatte, Ranking Member Watt, and Members of the Subcommittee, thank you for the opportunity to appear before you today. I am Jon Leibowitz, Chairman of the Federal Trade Commission, and I am pleased to testify on behalf of the Commission and discuss some of our current competition enforcement activities.¹

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

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

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

¹ The written statement represents the views of the Federal Trade Commission. My oral presentation and responses to questions are my own and do not necessarily reflect the views of the Commission or of any other Commissioner. Commissioner Rosch dissents from portions of the testimony, as explained in notes 6, 9 and 31.

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

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

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

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

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

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

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

⁶ The Commission's *Polypore* decision has been briefed and oral argument is scheduled for January, 2012 before the 11th Circuit (*Polypore v. Federal Trade Commission*, No. 11-10375-EE) available at <http://www.ftc.gov/os/caselist/0810131/index.shtm>. *FTC v. Phoebe Putney Health Systems, Inc.*, No. 11-12906-EE (11th Cir.) is on appeal before the Eleventh Circuit. See *infra* *nn.* 27, 28. <http://www.ftc.gov/os/caselist/1110067/index.shtm>.

The Eighth Circuit recently denied the Commission's petition for rehearing in *FTC v. Lundbeck Inc.*, No. 10-3458 (8th Cir. 2011). Commissioner Rosch dissents from the testimony as he considers the *Lundbeck* decisions issued by the district court and the Eighth Circuit to be one of the most important (and most erroneous) merger decisions issued this year, and therefore warrants more mention. He would file a petition for certiorari asking for review of the decision by the Supreme Court, which has not reviewed a merger case for many years.

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

Building a Better FTC to Combat 21st Century Challenges

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

In the same spirit, the Commission has fostered a productive partnership with our sister antitrust enforcer, the Antitrust Division of the Department of Justice. Our recent joint efforts have resulted in the publication of two significant policy statements – the revised Horizontal Merger Guidelines⁷ and the Antitrust Enforcement Policy Statement Regarding Accountable Care Organizations⁸ – that enhance the consistency, clarity, and transparency of U.S. antitrust policy and enforcement.⁹ The agencies also jointly revised the Hart-Scott-Rodino Antitrust Improvements Act Rules to reduce unnecessary burdens on merger filers.¹⁰ This is consistent

⁷ See U.S. Department of Justice and the Federal Trade Commission, *Horizontal Merger Guidelines*, August 19, 2010, available at <http://www.ftc.gov/os/2010/08/100819hmg.pdf>.

⁸ <http://www.ftc.gov/os/fedreg/2011/10/111020aco.pdf>.

⁹ Although he voted for the Antitrust Enforcement Policy Statement Regarding Accountable Care Organizations, Commissioner Rosch dissents from the assertion that the statement enhances “the consistency, clarity, [or] transparency” of U.S. antitrust policy and enforcement. To the contrary, in his view, accountable care organizations (ACOs) are a kind of joint venture in which the member providers are only clinically, not financially, integrated. Commissioner Rosch believes that under governing case law, a provider must be financially integrated in order safely to jointly contract with other providers. Thus, in his view, the Policy Statement does not provide that kind of protection, i.e., requiring that ACOs be financially integrated as well as clinically integrated, to either Medicare or private insurers.

¹⁰ 16 C.F.R. Part 803. See “FTC, DOJ Announce Changes to Streamline the Premerger Notification Form,” News Release dated July 7, 2011, available at <http://www.ftc.gov/opa/2011/07/hsrform.shtm>. The premerger notification form was trimmed from 15 pages down to 10 pages, and it no longer requires certain categories of documents and information that have proven not to be useful in an initial antitrust review.

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

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

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

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

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

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

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

Promoting Competition in Health Care Markets

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

➤ Ending Anticompetitive Pay-for-Delay Pharmaceutical Agreements

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

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

¹⁴ Results are available at <http://www.fedview.opm.gov/2011/Ranking/>.

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

➤ **Stopping Anticompetitive Health Care Mergers**

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

¹⁵ The Commission is actively pursuing two major pay-for-delay cases in federal courts: one against Solvay Pharmaceuticals regarding AndroGel, a testosterone replacement drug often used by victims of testicular cancer, and the other against Cephalon regarding the drug Provigil, a sleep disorder medication with nearly \$1 billion in annual U.S. sales. In addition, FTC staff continues to investigate new pay-for-delay agreements.

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

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

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

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

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

¹⁹ See cases cited in footnote 5 above.

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

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

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

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

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

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

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

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

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

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

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

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

In October, the FTC and DOJ issued a joint Statement of Antitrust Enforcement Policy²⁹ to make clear that the antitrust analysis of ACO applicants to the Medicare Shared Savings Program seeks to protect both Medicare beneficiaries and commercially insured patients from

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

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

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

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

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

Antitrust Oversight in Technology Industries

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

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

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

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

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

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

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

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

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

³³ See “FTC Closes its Investigation of Google AdMob Deal,” News Release dated May 21, 2010, available at <http://www.ftc.gov/opa/2010/05/ggladmob.shtm>

conduct by technology companies for undermining the standard-setting process.³⁴ In addition, the Commission previously issued two well-regarded reports on competition and patent law, in 2003 and 2007.³⁵ This year we issued another significant patent study, focusing on notice and remedies.³⁶ We held a workshop to learn more about licensing in the standard-setting context and how standard-setting organizations and their members have dealt with the risk of patent hold-up (whereby a firm is able to demand higher royalties after a standard is implemented than it could have obtained beforehand).³⁷ The Commission will continue to foster an on-going dialogue with stakeholders in this important area.

Monitoring Energy Markets

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

³⁴ Dell Computer Corp., 121 F.T.C. 616 (1996), available at [http://www.ftc.gov/os/dccisions/docs/vol121/FTC_VOLUME_DECISION_121_JANUARY_-_JUNE_1996\)PAGES_561-655.pdf#page=56](http://www.ftc.gov/os/dccisions/docs/vol121/FTC_VOLUME_DECISION_121_JANUARY_-_JUNE_1996)PAGES_561-655.pdf#page=56); Union Oil Co. of Cal., 140 F.T.C. 123 (2005), available at <http://www.ftc.gov/os/adjpro/d9305/index.shtml>; Rambus Inc., 2007 F.T.C. LEXIS 13 (2007), available at <http://www.ftc.gov/os/adjpro/d9302/070205finalorder.pdf>; Negotiated Data Solutions, LLC, 2008 F.T.C. LEXIS 120 (2008), available at <http://www.ftc.gov/os/caselist/0510094/080923ndsdc.pdf>; Dissenting Statement of Commissioner Kovacic, Negotiated Data Solutions, LLC 2008 F.T.C. LEXIS 9 (2008), available at <http://www.ftc.gov/os/caselist/0510094/080122kovacic.pdf>; Dissenting Statement of Chairman Majoras, Negotiated Data Solutions, LLC 2008 F.T.C. LEXIS 10 (2008), available at <http://www.ftc.gov/os/caselist/0510094/080122majoras.pdf>.

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

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

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

The FTC is conducting a publicly disclosed investigation of petroleum industry practices and pricing.³⁸ In response to allegations of increases in crude oil and refined petroleum product prices and profit margins accompanied by a reduction in refinery utilization rates, the Commission is investigating whether certain oil producers, refiners, transporters, marketers, physical or financial traders, or others (1) have engaged in practices, including manipulation, that have lessened or may lessen competition in the production, refining, transportation, distribution, or wholesale supply of crude oil or petroleum products; or (2) have provided false or misleading information related to the wholesale price of crude oil or petroleum products to a federal department or agency. Such acts or practices could violate Section 5 of the FTC Act,³⁹ the Commission's Prohibition of Energy Market Manipulation Rule,⁴⁰ or Section 811 or Section 812 of the Energy Independence and Security Act of 2007.⁴¹

The FTC and the Commodity Futures Trading Commission have concurrent law enforcement authority to challenge fraud-based manipulation of petroleum markets. In addition, the CFTC has exclusive jurisdiction to regulate exchanges, clearing organizations, and intermediaries in the U.S. futures industry. In April of this year, the Commission and the CFTC signed a Memorandum of Understanding⁴² to facilitate our sharing of non-public information relating to matters of common interest, such as evidence of possible manipulation of oil and gasoline markets, thereby enhancing the effectiveness of both our law enforcement efforts.

³⁸ Information To Be Publicly Disclosed Concerning the Commission Petroleum Industry Practices and Pricing Investigation, Statement by the Federal Trade Commission, File No. 111 0183 (June 20, 2011) available at <http://www.ftc.gov/os/2011/06/110620petroleuminvestigation.pdf>.

³⁹ 15 U.S.C. § 45.

⁴⁰ 16 C.F.R. 317.

⁴¹ 42 U.S.C. §§ 17301, 17302.

⁴² Memorandum of Understanding between the Commodity Futures Trading Commission and the Federal Trade Commission, effective April 6, 2011, available at <http://www.ftc.gov/os/2011/04/110412ftccftc-mou.pdf>.

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

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

International work

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

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

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

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

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

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

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

⁴⁶ The European Commission, together with the national competition authorities, directly enforces EU competition rules. Within the Commission, the Directorate-General (DG) for Competition is primarily responsible for investigation and enforcement of these rules.

http://ec.europa.eu/dgs/competition/index_en.htm.

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

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

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

Consumer Protection Highlights

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

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

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

Conclusion

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

Mr. GOODLATTE. Thank you, Mr. Leibowitz.
Ms. Pozen, welcome.

TESTIMONY OF SHARIS A. POZEN, ACTING ASSISTANT ATTORNEY GENERAL, DEPARTMENT OF JUSTICE ANTITRUST DIVISION

Ms. POZEN. Thank you and good morning. Is this on? Thank you and good morning, Chairman Goodlatte and Members of the Subcommittee, and thank you for the opportunity to appear before you. It's an honor to serve as Acting Assistant Attorney General and to work with the Department's leadership and the dedicated, talented division career staff, and our front office team.

When the Attorney General announced my appointment, he said it would be a seamless transition. That is my focus, continued, vigorous antitrust enforcement, transparency, and certainty for consumers and businesses.

Echoing what's been said this morning, competition drives our economy. Vigorous antitrust enforcement preserves competition and delivers American consumers lower prices, higher quality goods, and more innovation. We take a measured approach to the antitrust law enforcement and rely on sound competition and economic principles. We evaluate each matter carefully, thoroughly, and in light of the particular facts.

The division's major competition initiatives include civil merger and nonmerger enforcement, criminal enforcement, competition advocacy, and international activities. We have focused on mergers and conduct that harm consumers and stymie innovation in critical industries. Efficient and effective merger review and enforcement are among our core priorities.

When reviewing mergers, we quickly identify those transactions that raise no competitive issues and let them proceed, and fiscal year 2011 demonstrates that. We cleared 98 percent of the transactions we reviewed without requesting more information. For the remaining 2 percent we identified the transactions that required enforcement. In many of these the parties proposed remedies to resolve the competitive problems, and we entered into consent agreements. In other cases, when the parties did not propose effective remedies, we went to court.

As was noted, among these is our successful lawsuit to stop H&R Block from acquiring TaxACT, a transaction that would have left American taxpayers with only two major digital do-it-yourself tax preparation providers, leading to higher prices, lower quality products, and less innovation. The court agreed and blocked the proposed merger, which was an important victory on behalf of the 40 million American consumers who use this type of tax software.

We also sued AT&T regarding its proposed acquisition of T-Mobile. While I can't provide details of the pending court matter, I can say, as articulated in our complaint that was filed in court, this transaction, if consummated, would substantially reduce competition in mobile wireless telecommunications services across the United States, resulting in higher prices, less innovation, and lower quality services in an industry that is important to millions of American consumers and businesses.

In addition, we continually seek to improve our transparency in merger enforcement. The revised horizontal merger guidelines the Chairman referred to which were released with the FTC last year

and our updated policy guide on merger remedies have helped achieve this goal.

Our civil, nonmerger enforcement is an important way we vigilantly police the Nation's markets against anticompetitive conduct. For example, we have an ongoing court challenge to Blue Cross/Blue Shield of Michigan's use and enforcement of most favored nations clauses in its hospital contracts, which distort the competitive process. We also challenged a Texas hospital's use of exclusionary contracts with health insurers through which the hospital maintained its market power, and our litigation against American Express concerning merchant fees continues, and we are also investigating the electronic book industry along with the European Commission and with States attorneys generals.

Our criminal enforcement program continues to achieve remarkable successes. In fiscal year 2011 the division filed 90 criminal cases, which is up from 60 cases filed in fiscal year 2010. We obtained over \$520 million in criminal fines, we charged 27 corporations and 82 individuals, and courts imposed 21 jail terms, totaling more than 10,000 days of jail time. These cases were brought in a range of important industries, including real estate, auto parts, financial services, and the air transportation services.

One example is the division's ongoing international cartel investigation into price fixing and bid rigging in the auto parts industry. This has already resulted in one corporation and three individual guilty pleas, a \$200 million fine, and three separate jail terms for executives. This case involved hard core, pernicious price fixing that could only have resulted in inflated prices on the parts found in every American consumer's car.

Also thriving is our competition advocacy program. Our competition advocacy efforts focus on sectors important to Americans' everyday lives, such as health care, agriculture, and finance.

On the international front, we remain mindful of international issues in our day-to-day investigations and policy work, recognizing that our decisions can affect consumers and businesses elsewhere. We have looked to strengthen relations with emerging economies such as China and India. Last summer we, along with the Federal Trade Commission, signed a memorandum of understanding with all three Chinese competition agencies. We and the FTC expect to sign an MOU with India in 2012. We are a leader in international competition groups, and since 2009 we have led the global dialogue on procedural fairness and transparency issues in these organizations. The accomplishments I have highlighted today and my testimony depend on the dedication of our division career staff. I can tell you it is an honor and a privilege to serve with them.

Chairman Goodlatte, Ranking Member Watt, and Members of the Subcommittee and Committee, thank you again. I am pleased to answer your questions.

[The prepared statement of Ms. Pozen follows:]



Department of Justice

STATEMENT

OF

SHARIS A. POZEN
ACTING ASSISTANT ATTORNEY GENERAL
ANTITRUST DIVISION

BEFORE THE

SUBCOMMITTEE ON INTELLECTUAL PROPERTY, COMPETITION
AND THE INTERNET
COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

OVERSIGHT HEARING ON

THE FEDERAL TRADE COMMISSION'S BUREAU OF COMPETITION AND THE
U.S. DEPARTMENT OF JUSTICE'S ANTITRUST DIVISION

PRESENTED ON

DECEMBER 7, 2011

PREPARED STATEMENT OF SHARIS A. POZEN
ACTING ASSISTANT ATTORNEY GENERAL FOR THE ANTITRUST DIVISION
BEFORE THE UNITED STATES HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON INTELLECTUAL PROPERTY, COMPETITION, AND THE INTERNET
COMMITTEE ON THE JUDICIARY

DECEMBER 7, 2011

Good morning Chairman Goodlatte and members of the Subcommittee. It is a pleasure for me to appear before you today on behalf of the Department of Justice. I am honored to serve as Acting Assistant Attorney General for the Antitrust Division and to work with the talented Antitrust Division staff to ensure that consumers and businesses are protected from violations of the antitrust laws. When the Attorney General announced that he had selected me to lead the division, he said it would be a seamless transition, and that has been my focus—continued, vigorous enforcement of the antitrust laws, as well as transparency and certainty for consumers and business.

I thank you for this opportunity to highlight the Antitrust Division's accomplishments, answer your questions about our work, and listen to your views about enforcement of the antitrust laws. We appreciate this Committee's active interest in and strong support of our law enforcement mission.

Competition is an important cornerstone of our nation's economic foundation. Vigilant antitrust enforcement preserves and protects competition and delivers American consumers lower prices, higher quality goods, and more innovation. The Antitrust Division undertakes this vigilance using a measured approach that relies on sound competition and economic principles. We galvanize the tremendous skills of our lawyers and economists to evaluate each matter carefully, thoroughly, and in light of its particular facts.

The pillars of the division's work are civil merger and non-merger enforcement, criminal enforcement, competition advocacy, and international activities and we have been active in all those areas. Each is critical; and combined, they ensure consumers and businesses benefit from innovative, high-quality goods at low prices. Through its work, the division has addressed anticompetitive conduct that harms consumers and stymies innovation in industries of crucial importance, including transportation, communications, technology, health care, energy, and financial services, among others.

Merger Enforcement

Efficient and effective merger review and enforcement is a core priority for the Antitrust Division. Indeed, to many Americans merger enforcement is how they know the Antitrust Division. Since the last time the antitrust agencies appeared before this Subcommittee, the division increased its merger activity as

represented by investigations and concomitant enforcement actions. In Fiscal Year 2011, merging parties submitted 1,450 Hart-Scott-Rodino (HSR) filings to the Agencies, an increase of approximately 25% over Fiscal Year 2010, in which parties made 1,166 filings.

When we review HSR filings, the division identifies those transactions that raise no competitive issues and lets those proceed as quickly as possible. We then focus our resources on transactions that may harm competition. Just as consumers rely on us to protect them against harmful business combinations, businesses can rely on the division to get to the right decision quickly and efficiently, allowing them to move forward with lawful transactions.

Many proposed transactions do not pose a threat to competition and the division is able to determine quickly that no further action is currently warranted. Fiscal Year 2011 was no different in that regard; the division allowed 98% of the transactions it reviewed to clear its process without requesting any further information from the parties. In the remaining 2% of matters, the division identified potential competitive concerns and requested additional information from the parties to determine if the transaction posed a threat to competition.

From this limited group of transactions, the division identified those transactions that it determined required enforcement action. In many of these matters, the parties proposed remedies that the division agreed would solve the

competitive problem it had identified. In those cases, the division entered into a consent decree with the parties that will effectively preserve competition in the relevant markets while allowing the transaction to proceed. In other cases, in which the parties did not propose remedies that would effectively preserve competition, the division went to court to block the transaction. Indeed, our record since former Assistant Attorney General Christine Varney last appeared before the Subcommittee demonstrates the division's commitment to moving swiftly to bring enforcement actions against transactions that would harm competition when an effective remedy has not been offered by the parties.

Among these actions is the division's recent win of its first merger case litigated to a favorable court decision since 2003. The division filed a civil antitrust lawsuit on May 23, 2011, to prevent H&R Block from acquiring TaxACT, a digital, do-it-yourself tax preparation provider. The division alleged that TaxACT had competed aggressively with H&R Block and disrupted the relevant market through low pricing and product innovation. The transaction would have left American taxpayers with only two major digital, do-it-yourself tax preparation providers, likely leading to higher prices, lower quality products, and less innovation. The United States District Court for the District of Columbia agreed with the division's assessment of this deal, ruling in the division's favor on October 31 with a finding that the proposed transaction violated Section 7 of the

Clayton Act. The parties have since announced they would abandon their transaction and would not appeal the court's decision. This decision marks an important victory by the division on behalf of the American people.

Another notable case that remains in active litigation is our lawsuit to block AT&T Inc.'s proposed acquisition of T-Mobile USA Inc. The division filed its complaint in the U.S. District Court for the District of Columbia on August 31, 2011. While I cannot get into the details of this pending court matter, I can say that, as articulated in our complaint, this transaction, if consummated, would substantially reduce competition in mobile wireless telecommunications services across the United States, resulting in higher prices, less innovation, and lower-quality service in an industry important to millions of American consumers.

In May of this year, the division filed suit to block George's Incorporated's acquisition of a Tyson Foods poultry processing plant in Harrisonburg, Virginia. The division determined that the transaction would have had the anticompetitive effect of reducing the prices paid to Shenandoah Valley area farmers who raise chickens for processors such as George's and Tyson. After the division filed suit, George's proposed an acceptable settlement agreement, which requires George's to make capital improvements to the Harrisonburg plant which will enhance the competitive viability and increase the production of that poultry processing plant.

This competition translates into more opportunities for farmers to grow and process poultry.

The division also filed suit to block VeriFone Systems' acquisition of Hypercom, a transaction that would have harmed competition in the sale of point-of-sale terminals. The division moved to block this transaction after the parties proposed a divestiture to the only other significant provider of POS terminals, which we determined would not remedy the competitive concerns associated with the merger. Shortly after the filing of the lawsuit, on May 20, 2011, VeriFone and Hypercom entered into settlement negotiations with the division, and in August the parties reached a settlement that requires divestiture of Hypercom's U.S. point-of-sale terminals business to a buyer that preserves competition.

In many other matters that the division determined required enforcement action, the division and the parties avoided litigation through tailored remedies that the division agreed would solve the competitive problems it had identified. In those cases, the division entered into consent decrees with the parties that will effectively preserve competition in the relevant markets while allowing the transaction to proceed.

Just last month, the division settled a challenge to an agreement between Blue Cross Blue Shield of Montana and five of six Montana hospitals that own New West Health Services, a health insurer that competes with Blue Cross in

Montana. Under the agreement, Blue Cross had proposed to pay \$26 million to the hospital defendants in exchange for those hospitals agreeing collectively to stop purchasing health insurance from New West for their own employees and to purchase it instead exclusively from Blue Cross for a period of six years. The division determined that such an agreement would substantially reduce, and perhaps eliminate, New West's ability to compete in the sale of commercial health insurance by signaling that New West was likely to exit the market. The consent decree permits the defendants to proceed with their agreement, but requires both the divestiture of New West's commercial health insurance business and that the defendant hospitals contract with the buyer of the divested insurance business, as well as other injunctive relief. The division determined that this remedy will preserve competition in the sale of commercial health insurance in the affected Montana markets.

The division's settlement with Comcast and NBC Universal is another example. As proposed, this transaction would have blunted NBC's incentive to distribute programming to Comcast's video distribution rivals, and could have caused Comcast's rivals and their customers to face higher prices for that content. The division concluded that Comcast's rivals need access to NBC's content, including the NBC broadcast network, to compete effectively against Comcast. The Federal Communications Commission (FCC) also had jurisdiction to review

the transaction, and we coordinated closely with them throughout our investigation. Through this coordination, we worked closely with the FCC to reach an efficient and effective resolution to the transaction's competitive issues, and to achieve complementary results across the agencies that should yield consistent and thorough enforcement of pro-competitive decree conditions. For example, the FCC order requires the joint venture to license NBC content to Comcast's cable, satellite, and telephone competitors, making it unnecessary for the division to impose those same requirements.

Under the settlement with the division, the Comcast/NBC Universal joint venture must make available to online video distributors (OVDs) the same package of broadcast and cable channels that it sells to traditional video programming distributors. In addition, the joint venture must offer OVDs broadcast, cable, and film content that is similar to, or better than, the content these distributors receive from any of the joint venture's programming peers, including NBC's broadcast competitors, the largest cable programmers, and the largest video production studios. In the event of a licensing dispute between the joint venture and an OVD, the division may seek court enforcement of the settlement or permit, in its sole discretion, the aggrieved OVD to pursue a commercial arbitration procedure established under the settlement. In addition, the decree prohibits Comcast from retaliating against any broadcast network, cable programmer, production studio, or

content licensee for licensing content to a competing cable, satellite, or telephone company or OVD. Further, Comcast must relinquish its management rights in Hulu, an OVD, and continue to make NBC content available to Hulu that is comparable to content Hulu obtains from Disney and News Corp. Finally, in accordance with recently established Open Internet requirements, the decree prohibits Comcast from unreasonably discriminating in the transmission of an OVD's lawful network traffic to a Comcast broadband customer.

Another example of a matter in which the division agreed to a tailored remedy that addressed its competitive concerns was Google's acquisition of ITA software. ITA's software powers airfare search engines for travel websites. The division was concerned that the proposed transaction would threaten competition among airfare comparison and booking websites. To safeguard competition in this arena, the decree requires that Google continue to license ITA's QPX software to airfare websites on commercially reasonable terms and continue to fund research and development of that product at least at levels similar to what ITA had invested in recent years. In addition, the decree requires that Google further develop and offer ITA's next generation InstaSearch product to travel websites. Further, Google must implement firewall restrictions within the company to prevent unauthorized use of competitively sensitive information and data gathered from ITA's customers. Google also is barred from entering into agreements with

airlines that would inappropriately restrict the airlines' right to share seat and booking class information with Google's competitors. The settlement establishes a formal reporting mechanism for complaints if Google acts unfairly.

A key component included in some of the NBCU/Comcast, Google/ITA and other settlements is compliance monitoring. For that we established, over a year ago, an Office of General Counsel, led by a long-term career attorney who has been a leader at the division. The Office of General Counsel, among other things, works closely with others around the division to ensure compliance with conduct provisions in division consent decrees.

While many of the matters in which the division identified a competitive problem were resolved with a tailored consent decree, in some instances the division's decision to pursue an enforcement action led the parties to abandon their transaction. For example, the NASDAQ OMX Group and IntercontinentalExchange abandoned their joint bid to acquire NYSE Euronext, which owns the New York Stock Exchange, after the division informed them that it planned to file suit to block the deal. The division's investigation showed that the transaction would have substantially eliminated competition for a number of important services, including corporate stock listing services.

As I noted, the division is committed to expeditiously assessing and closing investigations where we determine no further action is warranted. For instance, the

division closed its investigation into the merger of UAL Corporation, the parent of United, and Continental, after the parties announced an agreement to transfer 36 slots (*i.e.*, takeoff and landing rights) to low-cost carrier Southwest Airlines Co., which resolved the division's principal concerns with the merger and also created potential benefits to consumers on a number of routes where entry had been unlikely. After thorough investigations, the division also closed its investigations into Microsoft's acquisition of Skype and Southwest Airlines' acquisition of AirTran.

The division also seeks continually to improve transparency in merger enforcement. In June 2011, the division released an updated version of the Antitrust Division's Policy Guide to Merger Remedies. The policy guide is a tool for division staff to use in analyzing proposed remedies in its merger matters, and also provides clarity to the outside world as to the division's approach to merger remedies.

It has been just over a year since the division and the Federal Trade Commission (FTC) released their revised 2010 Horizontal Merger Guidelines, and that too has been a great help in making the agencies' processes more transparent for the benefit of merging parties, the antitrust community, and the general public. As the Guidelines explain, and as the division's cases over the past year and a quarter demonstrate, we continue to apply traditional merger analysis techniques to

our matters, including defining relevant markets, looking at all measures of market power, analyzing barriers to entry, and reviewing claimed transaction efficiencies. In addition, from the outset of every matter, the division is open with the parties about our theories of competitive harm, continually keeping parties aware of any concerns as investigations develop and are always willing to listen to the parties' theories about why a transaction should pass muster.

Civil Non-Merger Enforcement

Another important foundation is the division's civil non-merger enforcement efforts, through which we vigilantly police the nation's markets against the many types of conduct that threaten competition and harm American consumers. For example, the division sued the major credit card companies—Visa, MasterCard, and American Express—to challenge rules those companies imposed on merchants prevent merchants from offering discounts to consumers for using a particular brand of card and stifling inter-brand competition among card networks. The division settled that matter with Visa and MasterCard, which agreed to end their imposition of merchant restrictions. Our case against American Express is ongoing.

In another ongoing matter, the division has gone to court to stop Blue Cross Blue Shield of Michigan's use and enforcement of "most favored nations" clauses in its contracts with Michigan hospitals. We believe that these MFNs distort the

competitive process by ensuring that Blue Cross' competitors cannot obtain hospital services at prices comparable to what Blue Cross pays and by increasing the prices its competitors must pay for those services. The district court recently denied Blue Cross' motion to dismiss this case, issuing an opinion agreeing with the division's arguments opposing the motion. Blue Cross is seeking an interlocutory appeal of that decision to the Sixth Circuit, which we have opposed.

In another health care matter, the division challenged a Texas hospital's use of exclusionary contracts with health insurers to maintain market power in its local market. This marked the first case brought by the division since 1999 challenging a monopolist with engaging in traditional anticompetitive unilateral conduct. 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. After the division challenged these practices, United Regional agreed to enter into a consent decree that prohibits it from engaging in a range of contracting practices that unlawfully hinder its rivals' ability to compete.

Already, in Fiscal Year 2012, we have reached a settlement in another civil non-merger challenge, which, if approved, will require financial services company

Morgan Stanley to disgorge \$4.8 million to settle charges that it entered into an anticompetitive agreement with KeySpan Corporation that restrained competition in the New York City electricity capacity market. KeySpan paid \$12 million in disgorgement in an earlier settlement with the division that was approved by the court and that established that disgorgement is available as a remedy under the Sherman Act.

These cases demonstrate that the division is carefully monitoring business conduct across a range of critical industries and that, when we discover anticompetitive conduct, we are ready and willing to go to court to put a stop to it.

Criminal Antitrust Enforcement

Another key priority for the division is criminal enforcement of the antitrust laws. Our criminal enforcement program remains busy and successful. In Fiscal Year 2011 the division filed 90 criminal cases (up from 60 cases in FY 2010) and obtained over \$520 million dollars in criminal fines, which is roughly the same amount obtained as in FY 2010. In these cases, we charged 27 corporations and 82 individuals, and courts imposed 21 jail terms totaling 10,544 days of jail time. These cases and the underlying investigations were brought in a range of important industries, including real estate, auto parts, and financial services, to name a few.

For example, the division has been conducting an international cartel investigation into price-fixing and bid-rigging in the auto parts industry. This

investigation, which is ongoing, already has resulted in one corporate and three individual guilty pleas, \$200 million in fines, and three separate jail terms for executives involved in a conspiracy to rig bids and fix prices for automotive parts. As described in the information filed in this matter's Furukawa case, this was hard core, pernicious price fixing that could only have resulted in inflated prices on the parts that are found in every American consumer's car.

During the past year the division, along with other federal agencies, also has been investigating criminal conspiracies involving bid-rigging in the municipal bond investments market. As a result of that investigation, JPMorgan Chase entered into an agreement with the division to resolve its role in a conspiracy and agreed to pay a total of \$228 million in restitution, penalties, and disgorgement to federal and state agencies. Earlier in the year, UBS AG agreed to pay a total of \$160 million in restitution, penalties, and disgorgement as a result of this investigation, and Bank of America previously agreed to pay \$137.3 million. The investigation into the municipal bonds industry is ongoing and is being conducted by the division, the FBI and the Internal Revenue Service (IRS)-Criminal Investigation division. The division is coordinating this investigation with the Securities Exchange Commission (SEC), the IRS, the Office of the Comptroller of the Currency (OCC), the Federal Reserve Bank of New York, and 25 State Attorneys General.

In the real estate industry, the division continues its investigations into bid rigging conspiracies at public real estate foreclosure auctions and tax lien auctions. With the help of the FBI, we have ferreted out the ways participants were coordinating their bids in these auctions. For example, we have brought charges against a number of individuals who, at real estate foreclosures, conspired with other real estate speculators not to bid at certain auctions, with the purpose of suppressing and restraining competition and obtaining selected real estate at non-competitive prices. As a result of real estate foreclosure and tax lien investigations, to date, 32 defendants have pleaded guilty to conspiracies that suppress and restrain competition in ways that harm our communities and already-financially distressed homeowners.

The division's criminal investigations and cases have focused on a variety of other industries important to American businesses and consumers, including air transportation services, freight forwarding, and liquid crystal display (LCD) panels. The division's air transportation services investigation is an example of the division's focus on the investigation and prosecution of large international cartels that inflict massive harm on consumers and the American economy. Collusion in the air transportation industry affected billions of dollars of U.S. commerce and affected shipments for products used by businesses and consumers every day, including electronics, produce, medicines, textiles, and heavy equipment. As a

result of the division's efforts to date, a total of 22 airlines and 21 executives have been charged for their involvement in cartels in the air cargo and air passenger industries. More than \$1.8 billion in criminal fines have been imposed, and four executives have been sentenced to serve prison time. Charges are pending against 17 executives.

In a related industry, freight forwarding, the division's investigation is focused on illegal agreements to fix the various fees and surcharges imposed on consumers for shipments of goods to the United States from numerous foreign countries, including Germany, Switzerland, the United Kingdom, and China. The charges that were fixed include peak season surcharges imposed during the period before the Christmas holiday shopping season in the United States. The conspirators agreed to impose these peak season surcharges and agreed on the approximate amount and timing of the surcharges. The freight forwarding investigation has resulted in charges against 13 companies for price fixing on freight forwarding services on air cargo shipments. All 13 companies have agreed to plead and to pay criminal fines totaling nearly \$1 billion.

The division's LCD investigation involves collusion in yet another critical consumer industry, TFT-LCD panels. TFT-LCD panels are used in computer monitors and notebooks, televisions, mobile phones and other electronic devices. By the end of the period of the conspiracy under investigation by the division, the

worldwide market for sales of TFT-LCD panels was valued at \$70 billion. Companies directly affected by the LCD price-fixing conspiracy are some of the largest computer and television manufacturers in the world, including Apple, Dell and Hewlett Packard. As a result of the division's investigation to date, seven companies have pleaded guilty and have been sentenced to pay criminal fines totaling nearly \$900 million. Additionally, 22 executives have been charged to date, ten of whom have been sentenced to serve a total of more than seven years of prison.

The division's criminal investigations have put a stop to conduct that harmed competition in some of our most important industries and that hurt American municipalities and consumers. The Department thanks this Subcommittee for leading the effort to preserve incentives for corporations to self-report such criminal antitrust violations by extending the division's Leniency program's detrebling provisions through a ten-year reauthorization.

The Leniency Program has become one of the Department's most successful voluntary disclosure programs and the Antitrust Division's most effective criminal investigative tool, having led to the detection of numerous large international cartels that have targeted U.S. businesses and consumers. The division encourages firms to establish and maintain effective antitrust compliance programs, thoroughly

instructing employees about the requirements of the antitrust laws and setting up internal controls protecting against cartel activity.

The division's cartel cases demonstrate that the division's criminal matters continue to grow in size and complexity, both domestically and internationally. Larger teams of attorneys and support staff are needed to review and challenge matters that increasingly span the nation or the world. As our criminal workload evolves, the division intends to evolve with it and is seeking ways to harness more effectively and efficiently the division's criminal resources to meet these evolving challenges. The division fully expects to continue providing the government and American public with protection from civil and criminal antitrust violations, including maintaining its track record of annual criminal fines in the hundreds of millions of dollars.

As part of Attorney General Eric Holder's call for cost-cutting measures to streamline operations and reduce spending, the Department of Justice sent a proposal to Congress that would consolidate four of the division's field offices into our remaining offices. That proposal provides for jobs and moving expenses to our affected employees and up to a year's severance and health benefits to those, who for whatever reason, cannot move. The primary purpose of the reorganization is to realign the Division's field office structure to meet most efficiently and effectively the requirements of its evolving workload in a fiscally constrained

environment. Let me be clear—vigorous criminal antitrust enforcement both domestically and internationally will continue. The criminal program remains a priority in which we have and will continue to invest significant resources.

Competition Advocacy

The division promotes competition principles through its advocacy efforts. Our competition advocacy program increases awareness and understanding of the importance of competition and healthy markets among both federal and state governments and regulators, the courts, the antitrust bar, the business community, and international jurisdictions. As with our enforcement mission, we focus our advocacy efforts on industries and sectors that are important to American's everyday lives, such as health care, agriculture, and finance.

This past year has been an active one for our advocacy program. In the health-care arena, the division worked closely with the Federal Trade Commission (FTC), the U.S. Department of Health and Human Services, and other federal agencies to ensure that sound competition principles will help guide reform, encouraging innovation in health-care delivery systems while preserving competitive markets. As part of this effort, the division is working with the Center for Medicare and Medicaid Innovation and its parent entity, the Centers for Medicare and Medicaid Services, to ensure that the creation of Accountable Care Organizations (ACOs) or other innovative health care delivery systems does not

result in price-fixing or anticompetitive consolidation among providers. The division and the FTC released a joint Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations Participating in the Medicare Shared Savings Program, which provides valuable guidance to healthcare providers interested in forming procompetitive ACOs that participate in the Medicare and commercial markets.

As a key part of the division's work to protect competition in agriculture industries, the Department of Justice and the U.S. Department of Agriculture (USDA) conducted a successful series of workshops in 2010, held in locations around the United States, to discuss competition and regulatory issues in these industries. The joint competition workshops allowed officials from both agencies to listen and learn from farmers, ranchers, cooperatives, processors, and retailers while further solidifying a strong working relationship. Through new efforts such as the Agriculture Competition Joint Task Force, which consists of USDA staff and attorneys from DOJ's Antitrust and Civil division, USDA and DOJ have been able to explore new opportunities for harnessing each other's expertise and improving enforcement of laws designed to protect producers. By taking advantage of the resources available to each entity, the Task Force has already begun streamlining the process for considering producer complaints, has analyzed

possible legal theories to address producer concerns, and provided assistance to USDA on proposed regulations.

Thanks to the workshops, we gained a more complete and detailed understanding of the agriculture sector. This understanding will better ensure that farmers, processors, and consumers reap the benefits of competitive agricultural markets. This keener appreciation of the dynamics of agricultural markets has already proven valuable to the division's enforcement work, such as our challenge to the proposed acquisition by George's of a Tyson's processing plant and our merger challenge to Dean's acquisition of Foremost, which settled after a year of litigation. Going forward, the division will continue to build on this foundation to further improve its enforcement in the agriculture sector and to reap the benefits of increased cooperation with USDA.

In the financial services sector, the division filed comments in December 2010 on rules proposed by the (SEC) and the Commodity Futures Trading Commission regarding implementation of the derivatives title of the Dodd-Frank financial reform law, seeking to ensure that competition was safeguarded in this important sector.

Global Antitrust Enforcement and Policy

Not only is the division championing consumers and competition domestically, but we also are actively engaging with the global antitrust

community, which has increased as the scope of international business operations has grown. Today, roughly 120 competition agencies enforce competition laws, including new agencies in China and India, and it is becoming increasingly common for many agencies to investigate the same matter. We recognize that the decisions of one competition agency can affect consumers and businesses elsewhere and have sought to more fully integrate the consideration of international issues into the Antitrust Division's day-to-day investigation and policy work. This has meant intensifying the division's cooperative relationships with other competition agencies and encouraging our staffs to be mindful of the international implications of our actions from the start of an investigation through the remedial phase.

Cooperation with our international counterparts is at an all-time high on enforcement matters. Virtually every day the division is in close contact with its counterparts all around the world on a variety of matters, including both investigations and policy matters. For example, with waivers from the parties, the division worked closely with the German Federal Cartel Office on an investigation into the acquisition of certain patents and patent applications from Novell by CPTN, marking the first significant merger enforcement cooperation the division had with Germany in twenty years. And, leading up to the division's complaint and consent decree involving Unilever and Alberto-Culver Co., also with party

waivers, we were aided by discussions with our counterparts in Mexico, the United Kingdom, and South Africa about product markets and competitive issues that varied over the different jurisdictions affected by the merger. In addition, extensive international cooperation has taken place in our criminal investigations, including the on-going auto parts, refrigerant compressor, and liquid crystal display (LCD) global cartel investigations.

Other recent accomplishments include a Memorandum of Understanding (MOU) that the division and the FTC signed with all three competition agencies in China on July 27, 2011. The MOU outlines the commitment of these five agencies to work together when we can and creates a framework for enhanced cooperation among our agencies.

In October 2011, the division, FTC, and the European Commission issued an updated set of Best Practices on Cooperation in Merger Investigations for use in coordinating our merger reviews. October also marked the 20th anniversary of our bilateral cooperation agreement with the EC, an on-going success story marked by consistent enforcement policies directed at the goal of promoting consumer welfare.

The division is an active participant and leader in international competition groups, including the Organization for Economic Co-operation and Development (OECD), the International Competition Network (ICN), the United Nations

Conference on Trade and Development (UNCTAD), as well as international competition agencies, to promote competition and consumer interests across the globe. The division and the Italian and Irish Competition Authorities currently co-chair the ICN's Merger Working Group and the division is closely involved with all aspects of OECD's competition work.

Since 2009, the division has led the global dialogue on procedural fairness and transparency issues. The OECD Competition Committee's working party on enforcement and cooperation, of which I was elected chair in October, held a roundtable discussion in October focused on recent developments, highlighting concrete steps that many competition authorities around the world have taken to ensure the transparency of their investigations. The OECD's Competition Committee also has addressed a wide range of other important issues over the past year, such as the use of economic evidence in merger analysis, quantification of harm in antitrust cases, information exchanges, standard setting, bid rigging, and merger remedies. The division filed papers and commented actively in these and other discussions.

The Antitrust division continues to look for ways to deepen our collaboration with our counterparts. In November, a senior division attorney completed two weeks working in the European Commission's Directorate-General for Competition (DG Comp), and we currently are hosting a DG Comp attorney for

two weeks. The exchange is part of our new Visiting International Enforcers Program, which we call VIEP. This program builds on our existing relations and takes the division to a new phase of effective cooperation with the participating jurisdictions.

Conclusion

I emphasize in closing that none of what I have discussed could have been accomplished without the dedicated men and women of the Antitrust Division. It is because of their experience, talent, and dedication to the mission of protecting consumers that we have been able to achieve the successes we have. It is an honor and privilege to serve with them.

Given the important role we assign to competition in our nation's economy, the Antitrust division must be a vigorous, formidable, and effective enforcer of our laws to ensure that the competitive playing field is open and fair, giving consumers more and better choices. While I am pleased with all that we have accomplished thus far, the hallmark of any successful organization is continued improvement. In that regard I look forward to working with the members of this Subcommittee and your respective staff.

Mr. GOODLATTE. Thank you, Ms. Pozen. Chairman Leibowitz, I'm going to start with a question that does not relate to your antitrust jurisdiction but is an issue of concern to this Subcommittee. In fact, we've held a hearing on it, and that is related to ICANN, the Internet Corporation for Assigned Names and Numbers, which is about

to open an application window that could result in the creation of an unlimited number of new generic top level domains.

In the past, you have spoken about how difficult it is to identify the true owner of domain names and how that causes harm and hampers law enforcement efforts in the case of Internet fraud and consumer deception. Do you have an opinion, Mr. Chairman, about ICANN's plan to roll out hundreds, maybe even thousands of new gTLDs, and how would that impact consumers and the FTC's consumer protection mission?

Mr. LEIBOWITZ. So this is an area, of course, where your intellectual property jurisdiction and our consumer protection jurisdiction intersect, and I would say at the Commission we are very, very concerned that this rollout of new gTLDs has the potential to be a disaster for consumers and for businesses, and let me tell you briefly why we think that's true.

We bring a lot of Internet fraud cases, as do our sister law enforcement agencies around the world, as does the Criminal Division and CCIPS in the Department of Justice, and what we have found is that domain names are often registered under fraudulent or registered with using fraudulent names, using inaccurate contact information, and if you are a criminal or a scam artist, you want to do it that way because you want to make it harder for us to go after malefactors. We worry that if ICANN goes broadly and if it doesn't ensure accuracy in its Whois database, which is terribly inaccurate, again, when you're going after people engaged in ripping off consumers, this is going to be exponentially worse. And then there is also a burden on businesses.

Of course, businesses don't want to go up against phishing sites, and think about how many different ways you can spell the name Marriott and now multiply it by all these new domain names, domains, but they also will have to—at I think \$180,000 per new gTLD, businesses will have to defensively register all of their names, and so our sense is it's burdensome to businesses, it could be very harmful to businesses and their brands as well as to consumers. We see enormous costs here to consumers and businesses and not a lot of benefit, and so we are working with consumer protection agencies around the world who also have concerns, and we want to work with this Committee. I know Senator Rockefeller and the Senate Commerce Committee is holding a hearing tomorrow, and we want to work with you. It's a real problem unless they make some changes and ensure accuracy.

Mr. GOODLATTE. Thank you. I have got to get some other questions in here, but let me just ask you one follow-up.

Mr. LEIBOWITZ. Sure.

Mr. GOODLATTE. We share your concern. Have you expressed your concerns to the Secretary of Commerce and others in the Administration who have maybe the last chance to exercise some influence here to get this changed?

Mr. LEIBOWITZ. We have been talking to the Commerce Department. We'll continue that. And I think in the not-too-distant future, we will also be talking directly as a Commission to ICANN about this.

Mr. GOODLATTE. Thank you. And now to antitrust. The Antitrust Modernization Commission recommended that Congress enact leg-

isolation to require the agencies to clear all Hart-Scott-Rodino merger cases within a short period of time to prohibit the FTC from pursuing administrative litigation in Hart-Scott-Rodino merger cases and to ensure that the same standard for the grant of a preliminary injunction applies to both agencies. Would you both agree that if the goal is to put parties on an even footing, regardless of which agency reviews their merger, then these are reasonable steps? Mr. Leibowitz?

Mr. LEIBOWITZ. I would say that the system that Congress has designed, which has some procedural differences but results in the same standards, you have to show you're going to win on the merits is one that works pretty well. I know back when the Commission issued its report, which I read very closely, there was a lot of concern about clearances fees, but particularly about the timing of resolution of merger reviews. I don't think those problems exist anymore, so I understand their recommendation. I don't believe that was a unanimous recommendation, although I will get back to you, but I think when the heads of the FTC and the Antitrust Division act in the best public interest we get these disputes resolved. And I think ultimately the—

Mr. GOODLATTE. Do you disagree with the principle that companies should have equal rights regardless of whether the merger happens to clear to the FTC—

Mr. LEIBOWITZ. No, of course I agree with that, but I think—

Mr. GOODLATTE. FTC or the DOJ?

Mr. LEIBOWITZ. But I think that the different procedures, which again were set up by Congress, are ones that result in the same outcome. I don't think its outcome determinative whether you go to the FTC or whether you go to the Antitrust Division. We ask for a preliminary injunction and they ask for a permanent injunction. And in one of our last preliminary injunctions, by the way, the Commission got a preliminary injunction to block a hospital merger in Cleveland, Ohio, and the parties decided, as is their right, to come back and get a full trial before the FTC. So I agree with the baseline principle that parties deserve full, fair, and objective and speedy resolution by both the Commission and the Antitrust Division. They deserve the same standards. I think that they get them.

Mr. GOODLATTE. Let me ask Ms. Pozen to answer the same questions.

Ms. POZEN. No, sure, and many experts have reviewed this process, you know, the shared jurisdiction between our two organizations. I think that typically in the reports you're citing to and others, folks agree that if you had to build this from scratch you might not build it in the same way it is today, with the overlapping jurisdiction and the clearance.

Mr. GOODLATTE. What's the impediment to rebuilding it to attempt to achieve that kind of fairness?

Ms. POZEN. I would leave that in the hands of Congress, sir. It is in the hands of Congress.

Mr. GOODLATTE. And what would be your recommendation to us?

Ms. POZEN. Well, I don't know if I have a specific recommendation on that. You know, we work with the system as it exists, and we try to work efficiently and effectively to clear transactions, to make it clear to the parties right away which agency will be han-

dling that review. We each have expertise. There are times when our expertise—

Mr. GOODLATTE. Well, let me get back to my specific question at the outset. Do you think these specific recommendations of the Antitrust Modernization Commission are reasonable steps for the Congress to take?

Ms. POZEN. I think that there are reasonable steps that can be taken to ensure that clearance is done in a timely manner. We do the best we can with the system that exists. If you determine that you want to change and Congress wants to change that system, we would be happy to work with you on how to do that.

Mr. GOODLATTE. That's helpful, but not in terms of the advice about the merits of the underlying question. But I'll now turn to the gentleman from North Carolina, Mr. Watt.

Mr. WATT. Thank you, Mr. Chairman. Your questions remind me, I sit on the Financial Services Committee, too, and there's uniform agreement that the SEC and the CFTC should be merged, but we've got two Committees in Congress dealing with them, and they've got a history of existing, and nobody wants to undertake that. We didn't try to do it in Dodd-Frank because we knew it was a ballistic mine.

So, anyway, I raised some issues about privacy in my opening statement, and I want to pose three questions that I hope you will address in writing because I don't think we can really deal with them sufficiently in the 5 or 6-minute time frame.

First question, are the privacy concerns you, Mr. Leibowitz, and former Commissioner Harbour expressed in the Google/DoubleClick decision unique to online advertising or do they apply to the Internet generally?

Second question, is the current privacy framework and enforcement mechanism sufficient to meet the challenges online?

And, third, a similar question to the one Mr. Goodlatte asked, how would you integrate privacy protection into traditional anti-trust analysis and help us define the role of Congress in that space?

If you could respond to those off line and not take the time to do it this morning because I think it's far too complex to do, I would certainly appreciate it.

Mr. LEIBOWITZ. We will do that.

Mr. WATT. All right. I know I can't ask Ms. Pozen this question, but I know you have an extensive background in the Antitrust Division also, and I was thinking maybe you could express your opinion about whether the Department of Justice did the right decision to proceed to litigation in AT&T/T-Mobile merger, if you have one. I'm not trying to put you on the spot. Yes?

Mr. LEIBOWITZ. You know that Ms. Pozen can't talk about it.

Mr. WATT. Yeah, I know she can't talk about that, right.

Mr. LEIBOWITZ. I'll just say this, it is a—

Mr. WATT. Either you agree with it or you don't agree with it or you don't want to express—

Mr. LEIBOWITZ. Well, I don't think I can say I agree, but I certainly agree that it is a major merger, it has enormous effect on consumers, and we are very supportive of the work and the effort

that the Antitrust Division has put into this matter, and it will be resolved, and I don't think I can say much more than that.

Mr. WATT. Okay. All right.

Mr. LEIBOWITZ. So I think I'll stop there.

Mr. WATT. Well, you punted, okay. I'm interested in the process by which you get to these policy statements such as the horizontal merger agreement that you all have worked out. This strikes me, and maybe I'm missing something here, as similar to a rulemaking process. Is that the process you are going through? Are people, is the public allowed to comment publicly on these processes or should they be or how do you differentiate this from a rulemaking process?

And then the last question I'll have is about some concerns that were raised by Ms. Pozen about your hospital litigation because one of the concerns I'm having in my local community is that the hospitals have become pretty big operations, and they are now excluding physicians who have all of the qualifications to practice at, practice medicine from doing procedures in their hospitals because they have these exclusive agreements with a particular group of doctors, excluding all other doctors. It's an integrated operation up and down the line, but it seems to me that it has some policy implications. I'm wondering if you agree and, if so, what would be the appropriate process for a particular physician or somebody else calling your attention to this and getting a review of a particular situation?

So those are my questions. I'll leave the rest of the time for you all to answer.

Mr. LEIBOWITZ. All right. Let me take the first question on horizontal merger guidelines. It's not a rulemaking. We do occasionally do rulemakings, although we're more of an enforcement agency usually on the consumer protection guide. This is more guidance, and it's guidance to courts and practitioners, and the reason we do it is courts like to look at the guidelines as they go through a merger analysis, it's helpful to them, and stakeholders, going back to the certainty point that the Chairman mentioned, want to know how we look at mergers. And so what we did beforehand was we went out and we talked to all the stakeholders, including Jim Rill, who was the head of the Antitrust Division when the 1992 guidelines were issued, and we said is it appropriate after 18 years for us to come back and take another look? And I think there was—

Mr. WATT. How are you defining stakeholders in that context?

Mr. LEIBOWITZ. Stakeholders, businesses—

Mr. WATT. Okay. All right.

Mr. LEIBOWITZ. Consumer groups.

Mr. WATT. So you did get input?

Mr. LEIBOWITZ. We did. And then there was a general consensus that if we moved in an evolutionary and not a revolutionary way, that that would be a good thing for business certainty and a good thing for those who were involved in the merger process and ultimately also a good thing for consumers, and so there were some areas where there was a consensus to make some modest changes. One was to raise the HHIs for safe harbors because experience had told us that the old levels were too low and took some things out of safe harbors. Another was we wanted to have a little less em-

phasis on market shares. They're important, but they're not the be-all, the end-all. They're a starting point. And then——

Mr. WATT. I didn't want to go into the details, I was just trying to——

Mr. LEIBOWITZ. Right, right.

Mr. WATT. I was just trying to—I was discussing the process more than——

Mr. LEIBOWITZ. And then we had a vote. And then the only other point I would make is we had a vote, it was unanimous among Commissioners.

Ms. POZEN. Yeah, I would add that this was distinction, this was an attempt to update guidance that had been in existence for many years but hadn't been updated for 17 years, so to your question we did initiate a process. Our agencies formed a working group. We had workshops throughout the United States. They included anti-trust practitioners, corporations, international antitrust authorities as well participated in those. We took those comments back because our first question was should we update these? Should we spend our resources and time doing this? And we got a unanimous chorus from everyone out there saying yes, they should be updated. Then it was a careful process of updating. We did publish those actually on the FTC Web site for comment, and then took those comments into account to come out with what is our final 2010 Horizontal Merger Guidelines.

I would note that the H&R Block case I talked about in the court opinion, it's about an 80-page opinion, a thorough analysis of that merger. The judge relied heavily on the 2010 Horizontal Merger Guidelines in her analysis.

Mr. WATT. Should you——

Ms. POZEN. Do you want me to answer your question about the physicians?

Mr. WATT. You can do it in writing if you would prefer, if the Chairman would prefer. I'm well over my time.

Ms. POZEN. I'm happy to—I can make it quick if that helps. We both share jurisdiction in the health care markets. At the Department of Justice we have a group of experts who really know health care from both the insurance side and the provider side. As I mentioned, the Texas case, that was a hospital engaging in exclusive contracts with insurers. The kind of scenario that you're describing where you have physicians and you feel like they're being excluded, the process they would follow is to contact the chief of our Litigation 1 section, Josh Soven. The name is readily available on our Web site, and he would listen to any complaint and process it accordingly. So that's the process that someone would follow who has those issues.

Mr. WATT. And I will follow up in writing with the first three questions I outlined just so you don't have to try to remember them.

Mr. LEIBOWITZ. Thank you.

Mr. WATT. Thank you.

Mr. GOODLATTE. I thank the gentleman.

Mr. WATT. Yield back.

Mr. GOODLATTE. The gentleman from Arizona, Mr. Quayle, the Vice-Chairman of the Subcommittee, is recognized for 5 minutes.

Mr. QUAYLE. Thank you, Mr. Chairman. Thank the witnesses for being here. Ms. Pozen, when we had Attorney General Holder here in May, I asked him a question regarding the jurisdiction between the FTC and DOJ when sometimes it overlaps and there's no clear barrier in terms of who is going to actually have that jurisdiction, whether it be a merger, an enforcement action, and sometimes it's actually been reported that it results in a coin flip or trade bargains to actually see who actually has the jurisdiction.

Ms. POZEN. Uh-huh.

Mr. QUAYLE. And I just wanted to see if there was an update because Attorney General Holder said that, you know, they have been working to try to alleviate that, and I wanted to see how that is going. Are there a more clear path on when the FTC is going to have jurisdiction and when the DOJ is going to have jurisdiction, when they both have experience in that area?

Ms. POZEN. Well, and you're focused on exactly the first step. When a merger is notified, it's notified to both of our organizations. If it's in an industry where we do have overlapping expertise, because that is the starting point is expertise, we look to our staffs to try to articulate that expertise as it relates to the particular merger as quickly as possible. Our teams engage right away and start talking to each other about that expertise. If it ends up that it is equal, which is very, very rare—usually one agency has more expertise than the other, but there are, as I said, converging industries where just over time things have gotten blurred—I would work with the Chairman, and we have done so in the time since I've been Acting AAG, and we come to an agreement very quickly and effectively. So that's at least been my experience as Acting Assistant Attorney General.

Mr. LEIBOWITZ. So let me just follow up on your question, Mr. Vice Chairman, and Ms. Pozen's answer. If it comes up to our level, we are very unhappy because they need to resolve these issues and act like adults. We gave statistics I think last year to the Subcommittee, but I think in well over 95 percent of the cases these are resolved on the basis of expertise, and just going back to what Ms. Pozen said, and we've said this before, you might not design this process from scratch to have two antitrust agencies with some overlapping jurisdiction on civil. We have slightly broader authority on the antitrust unfair methods of competition, they have criminal jurisdiction, but it's a system that Congress designed, and as long as we're working in the public interest and we're acting like adults, you don't see any or you don't see many problems. I can assure you that this might have been a bigger problem in the early oughts and the late 1990's when I worked on the Senate Antitrust Subcommittee. You know, Congress had a lot of questions about this and there were hearings I believe on this topic alone. So we understand, we have to work with the system that's been given us, but we better do a good job.

Mr. QUAYLE. Okay, thanks. And, Ms. Pozen, I want to talk about the new remedy guide that was released on June 17th which changed previous policy to one which conduct or behavioral remedies are often used—

Ms. POZEN. Uh-huh.

Mr. QUAYLE [continuing]. To address merger concerns.

Ms. POZEN. Uh-huh.

Mr. QUAYLE. And an example of that was when DOJ approved Comcast, the NBC Universal merger that included a requirement that Comcast and NBC must abide by the net neutrality principles even if the FCC's regulation was struck down in court.

Ms. POZEN. Uh-huh.

Mr. QUAYLE. Do conduct or behavior remedies allow the DOJ to shift it from being a litigating agency to actually becoming a regulating agency, and could they require political policy or public policy of companies in order to actually approve of the merger?

Ms. POZEN. That's an excellent question. We still consider ourselves a law enforcement organization, and we really are focused on finding the most effective remedy for the case that's before us, and so we are looking very carefully and very thoroughly at the competitive concerns, and then the parties typically come forward with a resolution, and we analyze whether that will resolve those concerns. In certain mergers, including the one that you mentioned, NBC-Comcast, there you had what we call verticality, right? You had one company having an input into the other company, and we wanted to ensure that that input was available on equal terms to others so that they couldn't be foreclosed, others wouldn't be foreclosed from that same input. So we chose—

Mr. QUAYLE. Was there a history of that problem before with these companies or were you looking for a problem that didn't exist, solving a problem that didn't exist just because, hey, it could theoretically happen down the road?

Ms. POZEN. We're very concerned with industries that are evolving and changing quickly to ensure that there's an open and fair playing field, and that was what we were concerned about with that merger, and so we believe our remedy allowed that. It allowed the playing field to be open and fair, it established a process for doing that, and we felt fortunate that the judge in that case, Judge Leon, who we went through the Tunney Act proceeding, agreed with that.

Mr. QUAYLE. This actually goes to my final question, is this is something I asked the Attorney General, and he said he was going to get back to me, as to probably going to the Antitrust Division. I haven't heard back, but now since you're here I'm going to ask you the question which hopefully you can answer. I asked him if they've actually seen any activity of actual bottlenecks or gatekeepers on the Internet that are actually keeping content from consumers. So it kind of addresses a concern that you have. Have you actually seen that occur or is this a hypothetical of maybe it can occur, and we just want to stop it before it does?

Ms. POZEN. Well, in a technological market that is emerging and in the Internet, as business is evolving and emerging and using the Internet more and more, we're very conscious of ensuring that we are diligent in reviewing whether or not there are bottlenecks, and your question is have we found those bottlenecks? I can't comment on any ongoing investigations at this point, but all I can say is bottlenecks have to worry us. If there isn't access to the Internet or to information or products or services that are needed by other businesses and it is being done through an exercise of market

power and done in an illegal matter through some sort of agreement, then we are concerned and we will take action.

Mr. QUAYLE. But in a general sense you can't talk specifically about a specific case, but it was just kind of have you seen actual bottlenecks? Because that I don't think would be violating any sort of—I mean, we're not getting into specifics. Have you seen bottlenecks that are occurring now?

Ms. POZEN. Have I—there are bottlenecks that we have been alerted to that do exist, and when we are alerted to such, then we would investigate them thoroughly and carefully to determine, you know, whether or not, again, it is in violation of the Sherman Act, whether it's some sort of coordinated effort to create that bottleneck or, again, whether it's an exercise of market power in a way that violates the Sherman Act.

Mr. QUAYLE. Okay, thank you very much. Thank you, Mr. Chairman.

Mr. GOODLATTE. I thank the gentleman. The gentleman from Michigan, Mr. Conyers, is recognized for 5 minutes.

Mr. CONYERS. Thank you, Mr. Chairman. Now, I've been working with antitrust law for as long as you have or longer, and this hearing—and I'm very pleased that the Chairman called it and the Ranking Member, both for whom I have high regard—is very disturbing. You know, it's almost like a little chit-chat back and forth. Here are the top prosecutors of the Federal antitrust law sitting before us, and we're having little discussions, and so I'm going to be in touch with both of you in writing and maybe in person, but I wish that I could have sent you my statement before you wrote your statement because we're all talking off on—we're talking past each other.

Now, the first thing I would like to know is, is it correct for me to assume that our national and transnational conglomerates are getting away with a great deal of anticompetitive behavior?

Mr. LEIBOWITZ. National and transnational companies?

Mr. CONYERS. Companies.

Mr. LEIBOWITZ. Well, I would say, I think I can speak for both of us on this.

Mr. CONYERS. Well, you—

Mr. LEIBOWITZ. We go after—

Mr. CONYERS. You speak for yourself, I will talk with her later.

Mr. LEIBOWITZ. Congressman, you know—

Mr. CONYERS. Yes or no?

Mr. LEIBOWITZ. When we see a problem, we go after it. Are there companies that are getting away with antitrust violations? I am sure there are, but we do our best to go after malefactors wherever we find them, and we have big investigations going on, as you know, and we have tried to push the ball forward on behalf of consumers and competition. I think I'll stop there.

Mr. CONYERS. That's a totally unacceptable answer. I just want you to know that between us, and we'll be getting back to it later. Now could I ask you the same question, ma'am.

Ms. POZEN. Sure, and I have to tell you, I am astonished, like you, at what I see because we have a criminal antitrust program at the Department of Justice, and as our criminal Deputy Assistant Attorney General says whenever he is asked, we have given cor-

porations, international corporations one billion reasons not to violate the antitrust laws, and yet as I reported to you, we are still prosecuting international cartels.

So I am astonished in the level of pernicious behavior, because I view cartel behavior where people are still sitting in smoke-filled rooms deciding what prices are going to be, and the example I gave you is in the auto parts industry where we have prosecuted Furukawa and its executives for this kind of conduct.

Mr. CONYERS. Well, today's headline in some papers was that Aetna and BlueCross/BlueShield in Michigan are at it again, but the Department of Justice is on the case. I want to give you some compliment for that.

BlueCross/BlueShield has been before the courts in Michigan for so many times across the years that it seems to me that they regard that just as a part of doing business the way they want to, that you have got to go to court and somebody from law enforcement is going to tag you every now and then.

But what bothers me, Chairman Goodlatte, is the reopening just the door a small way on a massive problem that the Judiciary Committee has got to go into far more deeply. And I'm hoping that this will be the Subcommittee that does it, because this is just far too complicated and the stakes are far too high.

Let me just close with this one question. The Trinko decision. Is there anybody here that can justify what they did in suggesting that—the court suggesting that antitrust law is trumped by communications law? That decision is an impediment to antitrust enforcement of regulated industries, and that's something that maybe we can do something about. But do you feel hindered to any general as a result of that?

Ms. POZEN. We are very conscious of the Trinko decision and it causes us pause quite often. However, we have continued to move ahead. We work very closely and effectively with the Federal Communications Commission. The reference to our NBC-Comcast merger review, we worked with them. We came up with a solution that both agencies could endorse. And in the AT&T/T-Mobile merger, again we worked—they have a different system, a different process, but again we worked with them to ensure that we are mindful of each other's processes and jurisdiction, but that we can work together and that we can assert the antitrust laws forward.

Mr. LEIBOWITZ. And I would agree with that. I would say taken to its logical extreme or extent, Trinko could make it very difficult to bring antitrust cases. It is a somewhat opaque decision, as you know, Mr. Conyers. And part of the reasons why we have begun to use our unfair methods of competition authority is because by its nature it is not an antitrust statute. So it takes us out from under the limitations on plaintiffs more clearly. And, again, you know, we are out there trying to stop anticompetitive conduct and in Trinko can be an impediment, but it is less of a impediment when we use our broader jurisdiction.

Mr. CONYERS. Did both of your agencies put out annual reports of what happened and how much you have been able to accomplish and even what some of the impediments may have been?

Mr. LEIBOWITZ. We do, yes.

Mr. CONYERS. Okay, well, I'm going to start looking at them.

Thank you, Mr. Chairman.

Mr. GOODLATTE. I thank the gentleman. And I would note that both of the cases that Ms. Pozen referenced we have held hearings on in this Subcommittee and we are very interested in the aggressive enforcement of our antitrust laws. So we look forward to working with the gentleman from Michigan on other ideas he might have on these subjects.

And now the Chair is pleased to recognize gentlewoman from Florida, Mrs. Adams, for 5 minutes.

Mrs. ADAMS. Thank you, Mr. Chair. I am going to ask some questions and if you would be succinct, because I have a few questions.

Chairman Leibowitz, earlier in your testimony you said briefly about the FTC's use of Section 5 in regards to collusion, I believe. Can you advise or share your views regarding the use of Section 5 authority and give us a sense of what you believe are the outer limits of Section 5.

Mr. LEIBOWITZ. Well, we can use Section 5 to bring a Sherman or Clayton Act case. We can go a little more broadly than that modestly to stop unfair methods of competition. The Congress gave us that authority in 1914 and we have used it in a couple of instances. So one in Florida, where you're from, where U-Haul engaged, we alleged, in an invitation to collude on trucking routes. Its executives called up their Budget executives and said let's raise prices and Budget said no, we're not going to do that. If they had said yes, we would have submitted it over to Department of Justice for criminal prosecution. But this is the kind of activity that is hard to bring an antitrust case on. That's why we use unfair methods of competition.

Mrs. ADAMS. Outer limits?

Mr. LEIBOWITZ. I'm sorry?

Mrs. ADAMS. Outer limits of Section 5?

Mr. LEIBOWITZ. The touchstone for Section 5 is always going to be harm to competition or harm to the competitive process. And we try—

Mrs. ADAMS. Let me do this then. Do you agree that it would improve the clarity and predictability of the law if FTC provided guidance about the bounds of Section 5 before investigating or proceeding against businesses on the sole basis of your Section 5 authority.

Mr. LEIBOWITZ. Well, we do.

Mrs. ADAMS. You do?

Mr. LEIBOWITZ. And so—we do. In our Intel decision, which was a unanimous, bipartisan decision, as are most matters of decision in our agency, and in our U-Haul decision we put out pretty clear guidance here. And—

Mrs. ADAMS. Can you provide that to me, please?

Mr. LEIBOWITZ. Excuse me?

Mrs. ADAMS. Can you provide that to me, please?

Mr. LEIBOWITZ. Of course we will.

[The information referred to follows:]

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: Jon Leibowitz, Chairman
Pamela Jones Harbour
William E. Kovacic
J. Thomas Rosch

In the Matter of)
)
INTEL CORPORATION,)
a corporation,)
_____)

DOCKET NO. 9341

COMPLAINT

Pursuant to Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (“FTC Act”) and by virtue of the authority vested in it by said Act, the Federal Trade Commission (“Commission”), having reason to believe that Intel Corporation (“Intel”), a corporation, hereinafter sometimes referred to as “Respondent,” has engaged in a course of conduct that, considered individually or collectively, violates the provisions of said Act, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint stating its charges in that respect as follows:

The Federal Trade Commission Act

1. The Federal Trade Commission Act “was designed to supplement and bolster the Sherman Act and the Clayton Act ... to stop in their incipency acts and practices which, when full blown, would violate those Acts ... as well as to condemn as ‘unfair methods of competition’ existing violations” of those acts and practices.¹ The Act gives the Commission a unique role in determining what constitutes unfair methods of competition. “[L]ike a court of equity, the Commission may consider public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws.”² Examples of conduct that fall within the scope of Section 5 include deceptive, collusive, coercive, predatory, unethical, or exclusionary conduct or any course of conduct that causes actual or incipient harm to competition. Moreover, where a respondent that has monopoly power

¹ *F.T.C. v. Brown Shoe Co.*, 384 U.S. 316, 322 (1966) (quoting *F.T.C. v. Motion Picture Adv. Serv. Co.*, 344 U.S. 392, 394-95 (1953)). See also *F.T.C. v. Texaco*, 393 U.S. 223, 225-26 (1968).
² *F.T.C. v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972). See also *F.T.C. v. Cement Inst.*, 333 U.S. 683, 693 (1948); *F.T.C. v. Brown Shoe Co.*, 384 U.S. 316, 321 (1966).

engages in a course of conduct tending to cripple rivals or prevent would-be rivals from constraining its exercise of that power, and where such conduct cumulatively or individually has anticompetitive effects or has a tendency to lead to such effects, that course of conduct falls within the scope of Section 5. Respondent may defend against such charges, however, by proving that any actual or incipient anticompetitive effects resulting from the Respondent's course of conduct are offset by procompetitive effects, and that engaging in that course of conduct was reasonably necessary to achieve those offsetting precompetitive effects. The conduct alleged in this complaint, if proven, falls within the scope of Section 5.

Nature of the Case

2. This antitrust case challenges Intel's unfair methods of competition and unfair acts or practices beginning in 1999 and continuing through today, and seeks to restore lost competition, remedy harm to consumers, and ensure freedom of choice for consumers in this critical segment of the nation's economy. Intel's conduct during this period was and is designed to maintain Intel's monopoly in the markets for Central Processing Units ("CPUs") and to create a monopoly for Intel in the markets for graphics processing units ("GPUs").

3. Intel holds monopoly power in the markets for personal computer and server CPUs, and has maintained a 75 to 85 percent unit share of these markets since 1999. Intel's share of the revenues in these markets has consistently exceeded 80 percent, and Intel is currently not sufficiently constrained by any other CPU manufacturers, including the two other manufacturers of x86 CPUs, Advanced Micro Devices ("AMD") and Via Technologies ("Via"), or the handful of non-x86 CPU manufacturers. A number of CPU manufacturers have exited the marketplace over the last decade. Due to both Intel's conduct and high barriers to entry in the CPU markets, new entry is unlikely.

4. In 1999 after AMD released its Athlon CPU and again in 2003 after AMD released its Opteron CPU, Intel lost its technological edge in various segments of the CPU markets. Original equipment manufacturers ("OEMs") recognized that AMD's new products had surpassed Intel in terms of performance and quality of the CPU.

5. Its monopoly threatened, Intel engaged in a number of unfair methods of competition and unfair practices to block or slow the adoption of competitive products and maintain its monopoly to the detriment of consumers. Among those practices were those that punished Intel's own customers – computer manufacturers – for using AMD or Via products. Intel also used its market presence and reputation to limit acceptance of AMD or Via products, and used deceptive practices to leave the impression that AMD or Via products did not perform as well as they actually did.

6. First, Intel entered into anticompetitive arrangements with the largest computer manufacturers that were designed to limit or foreclose the OEMs' use of competitors' relevant products. On the one hand, Intel threatened to and did increase prices, terminate product and technology collaborations, shut off supply, and reduce marketing support to OEMs that purchased too many products from Intel's competitors. On the other hand, some OEMs that purchased 100 percent or nearly 100 percent of their requirements from Intel were favored with guarantees of supply during shortages, indemnification from intellectual property litigation, or extra monies to be used in bidding situations against OEMs offering a non-Intel product.

7. Second, Intel offered market share or volume discounts selectively to OEMs to foreclose competition in the relevant CPU markets. In most cases, it did not make economic sense for any OEM to reject Intel's exclusionary pricing offers. Intel's offers had the practical effect of foreclosing rivals from all or substantially all of the purchases by an OEM.
8. Third, Intel used its position in complementary markets to help ward off competitive threats in the relevant CPU markets. For example, Intel redesigned its compiler and library software in or about 2003 to reduce the performance of competing CPUs. Many of Intel's design changes to its software had no legitimate technical benefit and were made only to reduce the performance of competing CPUs relative to Intel's CPUs.
9. Fourth, Intel paid or otherwise induced suppliers of complementary software and hardware products to eliminate or limit their support of non-Intel CPU products.
10. Fifth, Intel engaged in deceptive acts and practices that misled consumers and the public. For example, Intel failed to disclose material information about the effects of its redesigned compiler on the performance of non-Intel CPUs. Intel expressly or by implication falsely misrepresented that industry benchmarks reflected the performance of its CPUs relative to its competitors' products. Intel also pressured independent software vendors ("ISVs") to label their products as compatible with Intel and not to similarly label with competitor's products' names or logos, even though these competitor microprocessor products were compatible.
11. Intel's course of conduct over the last decade was designed to, and did, stall the widespread adoption of non-Intel products. That course of conduct has limited market adoption of non-Intel CPUs to the detriment of consumers, and allowed it to unlawfully maintain its monopoly in the relevant CPU markets.
12. Having succeeded in slowing market adoption of competing CPUs over the past decade until it could catch up with competitors, Intel once again finds itself behind competitors in the GPU markets and related markets.
13. Intel has engaged in unfair methods of competition in the relevant GPU markets. Intel's conduct is specifically intended to, and does, threaten to eliminate potential competition to the CPU from GPUs and maintain Intel's monopoly in the relevant CPU markets.
14. There is also a dangerous probability that Intel's unfair methods of competition could allow it to acquire a monopoly in the relevant GPU markets.
15. The GPU markets are highly concentrated and dominated by Intel. Intel currently lags behind its competitors in both quality and innovation for both discrete GPUs (GPUs used on separate graphics cards) and integrated GPUs (GPUs integrated into computer chipsets). Intel's market share in the GPU markets is in excess of 50 percent.
16. GPUs are a threat to Intel's monopoly in the relevant CPU markets. GPUs are adding more CPU functionality with each product generation. GPU manufacturers, such as Nvidia and AMD, through its affiliate, ATI, are developing General Purpose GPUs and programming interfaces that

threaten Intel's control over the computing platform. This General Purpose GPU computing ("GP GPU") platform has the potential to marginalize Intel's long-standing CPU-centric, x86-based strategy. Currently, both high-performance computing and mainstream applications and operating systems are beginning to adopt GP GPU computing functionality.

17. GPUs also could facilitate new entry or expansion in the relevant CPU markets by other firms, such as Nvidia, AMD, or Via. The need for high-end microprocessors may be reduced as more computing tasks are handled by the GPU. Some OEMs could get equivalent performance at a cheaper cost by using a lower-end CPU with a GPU microprocessor.

18. As it did in the CPU markets, Intel recognized the threat posed by GPUs and GP GPU computing and its technological inferiority in these markets and has taken a number of anticompetitive measures to combat it. These tactics include, among others, deception relating to competitors' efforts to enable their GPUs to interoperate with Intel's newest CPUs; adopting a new policy of denying interoperability for certain competitive GPUs; establishing various barriers to interoperability; degrading certain connections between GPUs and CPUs; making misleading statements to industry participants about the readiness of Intel's GPUs; and unlawful bundling or tying of Intel's GPUs with its CPUs resulting in below-cost pricing of relevant products. Although it is not a necessary element in a Section 5 case, because Intel is likely to achieve a monopoly in the relevant GPU markets and has a monopoly in the relevant CPU markets, it is likely to recoup in the future any losses it suffered as a result of selling relevant products at prices below an appropriate measure of cost.

19. These measures are intended to slow down developments in the relevant markets until Intel can catch up, and have had the effect of foreclosing competitive GPU products and slowing the development and widespread adoption of GP GPU computing.

20. Intel's efforts to deny interoperability between competitors' (e.g., Nvidia, AMD, and Via) GPUs and Intel's newest CPUs reflect a significant departure from Intel's previous course of dealing. Intel allowed, and indeed encouraged, other companies including Nvidia to develop products that interoperated in a nondiscriminatory manner with Intel's CPUs (and its chipsets and related connections) for the last ten years. The interoperability of these complementary products, along with the innovation and intellectual property contributions made by these companies to Intel in exchange for such interoperability, made Intel's CPUs more attractive to OEMs and customers. Indeed, Intel used other companies' technologies to enhance Intel's graphics capabilities and its monopoly power in CPUs.

21. Intel's conduct and representations created a duty to deal and cooperate with its competitors, such as Nvidia, AMD, and Via, to enhance competition and innovation for the benefit of consumers. These companies' reliance on Intel's original representations was reasonable.

22. Once Nvidia and other companies committed to working with Intel, and in some cases granted significant intellectual property to Intel, and were thus locked into Intel's strategy, Intel changed its position with these companies and used its power to harm competition.

23. Intel adopted these anticompetitive business practices when the GPU began to emerge as a potential challenge to Intel's monopoly over CPUs. Intel's refusal to allow Nvidia, AMD, and Via to interoperate freely, fully, and in a nondiscriminatory manner with its CPUs, chipsets, and related connections is an unfair method of competition and an unfair practice.
24. Intel also has bundled the price of its CPU and chipset with integrated graphics to foreclose Nvidia in some market segments, resulting in below-cost pricing of relevant products in circumstances in which Intel was likely to recoup in the future any losses that it suffered as a result of selling relevant products at prices below an appropriate measure of cost.
25. Intel's unfair methods of competition have harmed current and future competition in the relevant GPU and CPU markets.
26. These and other anticompetitive practices by Intel since 1999 allowed it to maintain its monopoly position in the relevant CPU markets and will create a dangerous possibility that Intel will obtain a monopoly in the relevant GPU markets. As a result, consumers today have fewer choices of CPU and GPU manufacturers than they had a decade ago, and fewer than they would have had absent this conduct.
27. The loss of price and innovation competition in the relevant markets will continue to have an adverse effect on competition and hence consumers. Absent the remedy provided herein, Intel will continue to maintain or even enhance its market power, consumers will have fewer choices, prices will be higher than they would be in competitive markets, and quality and innovation will be diminished.
28. The synergistic effect of all of Intel's wrongful conduct has and will continue to harm competition and consumers. Intel does not have legitimate or sufficient business justifications for its conduct.

Respondent

29. Respondent Intel is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 2200 Mission College Boulevard, Santa Clara, California 95052. Intel develops, manufactures, markets, and sells computer hardware and software products, including x86 CPUs. For the fiscal year that ended December 31, 2008, Intel reported revenues of approximately \$37 billion and profits of approximately \$5 billion. Intel's microprocessor business reported revenues in excess of \$27 billion in 2008.
30. At all times relevant herein, Intel has been, and is now, a corporation as "corporation" is defined in Section 4 of the FTC Act, 15 U.S.C. § 44. For the purposes of this Complaint, "Intel" also includes its subsidiaries and affiliates.

31. The acts and practices of Intel, including the acts and practices alleged herein, are in commerce or affect commerce in the United States, as “commerce” is defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

Relevant Markets

32. One set of relevant product markets are CPUs for use in desktop, notebook, netbook (or nettop) computers, servers, and narrower relevant markets contained therein, including without limitation:

- a. microprocessors for servers,
- b. microprocessors for desktop computers,
- c. microprocessors for laptop or notebook computers,
- d. microprocessors for netbook computers,
- e. any of the foregoing products in this paragraph that are based on an x86 architecture,
- f. any of the foregoing products in this paragraph as intended for particular end users or any category of end users, such as enterprise customers, and
- g. any of the foregoing products in this paragraph as distributed or resold by a particular class of OEMs or distributors.

33. A CPU is a type of microprocessor used in a computer system. A CPU is an integrated circuit chip that is often described as the “brains” of a computer system. The microprocessor performs the essential functions of processing system data and controlling other devices integral to the computer system.

34. A CPU requires a chipset to communicate with other parts of the computer. The chipset operates as the computer’s nervous system, sending data between the microprocessor and input, display, and storage devices, such as the keyboard, mouse, monitor, hard drive, and CD or DVD drive.

35. Intel, Via, and AMD are the only three firms that manufacture and sell x86 microprocessors -- the industry standard for CPUs used in personal computers and servers. The x86 microprocessor architecture is the only one capable of running either the Microsoft Windows operating system (e.g., Windows XP, Vista, or Windows 7) or Apple’s current Mac operating system natively for personal computers and servers. Most purchasers do not consider computers using non-x86 microprocessors

as acceptable substitutes because they cannot efficiently run the Windows operating system and compatible software.

36. A few firms produce microprocessors that are based on non-x86 microprocessor architecture. For example, IBM's Power and Sun's Sparc are used only in very high end servers and mainframes sold by those companies. These non-x86 microprocessors represent a small and diminishing niche of the relevant server CPU market. Another example of a non-x86 microprocessor architecture is ARM. ARM is used primarily in handheld devices and mobile phones. Non-x86 architectures are rarely used in mainstream personal computers or servers. Microprocessors built on non-x86 architectures do not significantly restrain Intel's monopoly power.

37. A second set of relevant product markets are GPUs (including all graphics processors, or chipsets with graphics processors regardless of industry nomenclature) for use in desktop, notebook, netbook (or nettop) computers, servers, and narrower relevant markets contained therein, including without limitation:

- a. GPUs integrated onto chipsets, and
- b. Discrete GPUs.

38. GPUs originated as specialized integrated circuits for processing of computer graphics, but as they have evolved they have taken on greater functionality. Computers may achieve faster performance by offloading other computationally intensive needs from CPUs to GPUs.

39. A GPU may either reside on a separate graphics card within a computer ("discrete GPUs") or be integrated onto the chipset. Integrated graphics solutions are usually cheaper to implement but are often less powerful than discrete GPUs.

40. The relevant geographic market is the world.

Intel Holds a Monopoly in the Relevant CPU Markets and It is Likely to Obtain a Monopoly in the Relevant GPU Markets

41. Intel possesses monopoly power in the relevant CPU markets. Intel's unit share in the relevant markets has exceeded 75 percent in each of the years since 1999. Its share of revenue in these markets has consistently exceeded 80 percent during that time.

42. There are significant barriers to entry in all the relevant markets. These barriers include, but are not limited to: (1) product development; (2) the cost and expertise to develop manufacturing capabilities; (3) intellectual property rights; (4) establishment of product reputation and compatibility; and (5) Intel's unfair methods of competition and efforts to maintain or obtain a monopoly position in the markets.

43. The development of a commercial product for a single segment of the market, such as servers, takes years of engineering work and several hundred million dollars in sunk capital. An entrant

would have to develop a product and ensure it was compatible with computer operating systems and applications software used by business and consumer users.

44. A supplier of a product in the relevant markets also requires access to cutting-edge manufacturing facilities capable of mass-producing products and of achieving the minimum scale required to operate efficiently and profitably. The cost of developing, building, and equipping a new facility is at least \$3 billion. In order to remain at the cutting-edge of process technology the manufacturer also would have to be prepared to invest another \$1 billion in each facility every two or three years. An entrant could not begin shipping products for four or more years after commencing construction of such a facility.

45. An entrant would have to avoid infringing the patents that apply to the relevant products.

46. An entrant would need to develop a reputation for reliability once it has a commercially ready CPU or GPU and production facilities. This is a multi-year project. Buyers of computer systems and microprocessor components demand highly reliable products.

Intel's Unfair Methods of Competition and Deceptive Practices Maintained and Strengthened Intel's Monopoly Position in the Relevant Markets

47. Intel has engaged in a course of conduct since 1999 that, considered individually or collectively, had the tendency to hamper and exclude rivals, and to maintain, create, or enhance Intel's monopoly power in the relevant markets.

48. Intel's unfair methods of competition harmed competition in the relevant markets. Intel's methods are coercive, oppressive, deceptive, unethical or exclusionary and caused injury to competition and consumers. Intel's conduct is likely to continue to harm competition absent the relief requested herein, and violates § 5 of the FTC Act.

A. Exclusionary Conduct with OEMs and Distributors.

49. Hewlett-Packard/Compaq, Dell, IBM, Lenovo, Toshiba, Acer/Gateway, Sun, Sony, NEC, Apple, and Fujitsu are the largest OEMs in the world ("Tier One OEMs"). Tier One OEMs account for over 60 percent of the computers with CPUs in the relevant markets. Intel has prevented or limited the sale of non-Intel CPUs to these Tier One OEMs.

50. Because of Intel's actions and threats, certain Tier One OEMs reasonably feared that purchasing too many non-Intel CPUs would expose their companies to retaliation from Intel. They were susceptible to retaliation because Intel is a "must have" or essential supplier for every Tier One OEM, for several reasons. Intel is the only firm with the CPU product breadth to meet all the requirements and be the sole supplier to a Tier One OEM. Intel is also the only CPU supplier with the current capability to supply all or nearly all of the requirements of the largest OEMs. As a result, the Tier One OEMs could not credibly threaten to shift all or even a majority of their CPU purchases away from Intel; to the contrary, Tier One OEMs needed Intel as a primary supplier.

51. Intel took advantage of its monopoly power and induced and/or coerced certain Tier One OEMs to forgo adoption or purchases of non-Intel CPUs, or to limit such purchases to a small percentage of the sales of certain computer products. In other cases, Intel paid Tier One OEMs not to sell computers with other CPUs, such as AMD's or Via's CPUs. Intel threatened OEMs that considered purchasing non-Intel CPUs with, among other things, increased prices on other Intel purchases, the loss of Intel's technical support, and/or the termination of joint development projects.

52. When Intel was unable to compel a Tier One OEM to forgo entirely the purchase of non-Intel CPUs, Intel's strategy was to induce and coerce the OEM to forgo marketing and distribution methods for computers that contained the non-Intel CPU (referred to herein as "restrictive dealing arrangements"). For example, Intel induced OEMs to forgo advertising, to forgo branding, to forgo certain distribution channels, and/or to forgo promotion of computers containing non-Intel CPUs. To secure these restrictive dealing arrangements with OEMs, Intel threatened to withhold rebates, to withhold technical support, to withhold supply, and/or to terminate joint development projects, among other things. Tier One OEMs reasonably feared that marketing computers that contained non-Intel x86 microprocessors would expose them to retaliation from Intel. Intel monitored the OEMs' compliance with these restrictions, and in some instances presented scorecards to the OEMs, evaluating their compliance.

53. Intel offered market share or volume discounts selectively to OEMs to foreclose competition in the relevant CPU markets. First, Intel taxed OEM purchases of non-Intel CPUs through the use of market share discounts. Second, Intel also offered its CPUs at prices below an appropriate measure of cost (in sales of CPUs or in kit prices of CPUs with chipsets), or volume discounts on CPU purchases that are effectively below cost (which for purposes of this complaint includes average variable cost plus an appropriate level of contribution towards sunk costs), in an effort to exclude its competitors and maintain its monopoly in the relevant CPU markets. Although it is not a necessary element under a Section 5 claim, Intel as a monopolist is likely to recoup any losses that it suffered as a result of selling any of its products to certain OEMs below cost. Third, Intel gave OEMs a choice between higher prices on both contested (meaning that another CPU manufacturer was selling that product) and uncontested CPUs, or, if the OEM refrained from purchasing certain volumes of CPUs from Intel's CPU competitors, Intel offered lower prices on certain volumes of both contested and uncontested CPUs.

54. Intel used OEMs that were exclusive to Intel to discipline and punish OEMs that chose to deal with Intel's competitors. Intel gave OEMs that agreed to buy CPUs exclusively from Intel the best pricing, supply guarantees in times of shortage, and indemnification from patent liability relating to the patent litigation initiated by Intergraph against several OEMs. Intel also offered these OEMs a slush fund of hundreds of millions of dollars to be used in bidding competitions against OEMs that offered non-Intel-based computers. These payments were contingent on the OEMs purchasing CPUs exclusively or nearly exclusively from Intel. Intel's disparate treatment of these different purchasers is not justified by any savings in Intel's costs of manufacture, delivery or sale between the favored and disfavored purchasers, or any differential services performed by the favored purchasers, but rather was another anticompetitive tactic to obtain and enforce exclusive or near exclusive dealing

respecting relevant products by OEMs with Intel, thus reinforcing and maintaining Intel's monopoly in the relevant CPU markets.

55. Intel's use of penalties, rebates, lump-sum and other payments across multiple products, differential pricing, and other conduct alleged in this Complaint maintained or is likely to maintain Intel's monopoly power to the detriment of competition, customers, and consumers. Intel would not have been able to continue charging comparably higher prices across its product lines but for its conduct, as alleged in this Complaint, that harmed competition.

B. Intel Redesigned its Software to Slow Software Performance on Non-Intel CPUs.

56. Intel sought to undercut the performance advantage of non-Intel x86 CPUs relative to Intel x86 CPUs when it redesigned and distributed software products, such as compilers and libraries.

57. A compiler is software that translates the "source code," programs written by programmers or software developers in high-level computer languages such as C++ or Fortran into "object code" (0's and 1's), the language understood by CPUs. Libraries are collections of code for performing certain functions that can be referred to by software programmers rather than rewriting the code each time the functions are performed.

58. For example, in response to AMD introduction of its Opteron CPU for servers in 2003, Intel became concerned about the competitive threat posed by Opteron processors. Intel then designed its compiler and libraries in or about 2003 to generate software that runs slower on non-Intel x86 CPUs, such as Opteron. This decrease in the efficiency of Opteron and other non-Intel x86 CPUs harmed competition in the relevant CPU markets.

59. To the public, OEMs, ISVs, and benchmarking organizations, the slower performance of non-Intel CPUs on Intel-compiled software applications appeared to be caused by the non-Intel CPUs rather than the Intel software. Intel failed to disclose the effects of the changes it made to its software in or about 2003 and later to its customers or the public. Intel also disseminated false or misleading documentation about its compiler and libraries. Intel represented to ISVs, OEMs, benchmarking organizations, and the public that programs inherently performed better on Intel CPUs than on competing CPUs. In truth and in fact, many differences were due largely or entirely to the Intel software. Intel's misleading or false statements and omissions about the performance of its software were material to ISVs, OEMs, benchmarking organizations, and the public in their purchase or use of CPUs. Therefore, Intel's representations that programs inherently performed better on Intel CPUs than on competing CPUs were, and are, false or misleading. Intel's failure to disclose that the differences were due largely to the Intel software, in light of the representations made, was, and is, a deceptive practice. Moreover, those misrepresentations and omissions were likely to harm the reputation of other x86 CPUs companies, and harmed competition.

60. Some ISVs requested information from Intel concerning the apparent variation in performance of identical software run on Intel and non-Intel CPUs. In response to such requests, on numerous occasions, Intel misrepresented, expressly or by implication, the source of the problem and whether it could be solved.

61. Intel's software design changes slowed the performance of non-Intel x86 CPUs and had no sufficiently justifiable technological benefit. Intel's deceptive conduct deprived consumers of an informed choice between Intel chips and rival chips, and between Intel software and rival software, and raised rivals' costs of competing in the relevant CPU markets. The loss of performance caused by the Intel compiler and libraries also directly harmed consumers that used non-Intel x86 CPUs.

C. Intel Misrepresented Industry Benchmarks to Favor its CPUs.

62. Benchmarking is the act of executing a computer program, or a set of programs, on different computer systems, in order to assess the relative performance of those computer systems. Consumers decide on purchases, OEMs select components, and CPU producers make pricing and model number designations, based on benchmark results; ISVs rely on benchmarks as well.

63. Intel failed to disclose the effects of its software redesign on non-Intel CPUs to benchmarking organizations, OEMs, ISVs, or consumers.

64. Several benchmarking organizations adopted benchmarks that measured performance of CPUs running software programs compiled using the Intel compiler or libraries. Intel's deception affected among others, the Business Applications Performance Corporation ("BAPCo"), Cinebench, and TPC benchmarks.

65. Intel disseminated or caused to be disseminated advertisements, including product labeling and other promotional materials, to induce consumers to purchase computers with Intel CPUs. In these advertisements, Intel promoted its systems' performance under various benchmarks, which Intel expressly or by implication represented to be accurate or realistic measures of typical or "real world" computer usage or performance.

66. In truth and in fact, the benchmarks Intel publicized were not accurate or realistic measures of typical computer usage or performance, because they did not simulate "real world" conditions, and/or overestimated the performance of Intel's product vis-à-vis non-Intel products. Therefore, the representations and omissions of material facts made by Intel as described in paragraphs 63 through 65 above, were and are false or misleading.

67. Intel publicized the results of the benchmarking to promote sales of products containing its x86 CPUs even though it knew the benchmarks were misleading. For example:

- a. On its website, Intel states: "Sysmark 2007 Preview [BAPCo's then-latest benchmark] features user-driven workloads." In truth and in fact, the workloads were not user-driven, in that they did not reflect a typical user experience, but instead were manipulated to make Intel processors perform better on the benchmark than AMD's.

- b. In its "Quick Reference Matrix Q3 2008," Intel stated that its x86 CPUs had a "27% faster productivity benchmark than the competition," based on a test against an AMD processor using SysMark 2007. In truth and in fact, the benchmark did not reliably measure productivity.
- c. Intel's website includes a White Paper called "Choosing the Right Client Computing Platform for Public Sector Organizations and Enterprises." In the document, Intel stated that the "SYSmark 2007 Preview is a benchmark test that measures the performance of client computing software when executing what is designed to measure real-life activities." In truth and in fact, the benchmark was not designed to measure "real life activities," but to favor Intel's CPUs.
- d. In the same White Paper (written to help governments write technical specifications to purchase computer systems) Intel wrote: "With regard to notebooks, Intel recommends the use of BAPCo MobileMark 2007 or later versions. This benchmark measures the performance of a computer system . . . by running relevant real-world computer programs typically used by business users." Intel further stated that this benchmark provides "a performance evaluation that reflects their typical day-to-day use by business users." In truth and in fact, the benchmark did not reflect typical or day-to-day use by business users.
- e. In its "Competitive Guide" on "Quad-Core Intel Xeon Processor-based Servers vs. AMD Opteron," Intel stated that its Quad-Core Intel Xeon 5300 Series Processor was 26 percent faster in digital content creation than AMD's Quad-Core Opteron 2300 Series Processor based on the Cinebench benchmark. Intel also stated that its Quad-Core Intel Xeon 5400 Series Processor was 34 percent faster in digital content creation than AMD's Quad-Core Opteron 2300 Series Processor based on the Cinebench benchmark. In truth and in fact, the benchmark did not reliably measure the speed of digital content creation.

Therefore, the representations set forth in subparagraphs (a) through (e) above were, and are, material and false or misleading.

68. Through the means described in paragraphs 63 through 65 and 67, above, Intel has represented, expressly or by implication, that:

- a. Benchmarks, such as SysMark2007 Preview, that Intel used to compare Intel CPUs to competitors' CPUs were accurate and realistic measures of typical computer usage or performance;
- b. Intel's x86 CPU works 27 percent faster under typical computer usage conditions than competitive CPUs, including the AMD processor;

- c. The BAPCo MobileMark 2007 benchmark and later versions provide a reliable performance evaluation of x86 CPUs against competitive brands based on typical day-to-day use by business users; and
- d. The Cinebench benchmark provides a reliable performance evaluation of x86 CPUs against competitive brands in performance of digital content creation.

69. Through the means described in paragraphs 63 through 65 and 67, Intel has represented, expressly or by implication, that it possessed and relied upon a reasonable basis to substantiate the representations set forth in paragraph 68, at the time the representations were made.

70. In truth and in fact, Intel did not possess and rely upon a reasonable basis that substantiated the representations set forth in paragraph 68 at the time the representations were made. Therefore, the representations set forth in paragraph 69 were and are false or misleading.

71. Intel's conduct as described in paragraphs 52 through 70, above, eroded the credibility and reliability of these benchmarks and the software compiled by Intel compilers to the detriment of consumers. Intel's conduct was misleading and had the purpose and effect of harming competition and thus enhancing Intel's monopoly power. Intel had a duty, arising from its conduct and statements, to disclose the complete truth, which would have eliminated most if not all of the harm to competition and consumers. Intel lacks a legitimate or sufficient business justification for its conduct.

D. Intel Induced OEMs and Companies in Complementary Markets to Eliminate or Limit Support of Competitive CPU Products.

72. Intel paid or otherwise induced OEMs and companies in complementary markets to eliminate or limit their support of competitive CPU products.

73. For example, Intel paid ISVs to change their software designs, including by switching to use of Intel's compilers and software, to favor Intel's CPUs. As a result of Intel's inducements, they also labeled their products as compatible with Intel but intentionally omitted that they were also compatible with non-Intel CPUs.

74. Intel also prevented ISVs from promoting or otherwise engaging in co-development or joint marketing with AMD and other CPU manufacturers, by causing those ISVs to fear that Intel would withdraw its support for their products. As a result, Intel created a false impression that the ISV software was incompatible with non-Intel CPUs because Intel required that only its name (versus including other CPU manufacturers as well) be listed on the product.

Intel's Unfair Methods of Competition in the Relevant GPU Markets

75. Intel, Nvidia, and ATI (a subsidiary of AMD) account for nearly all the sales of GPUs in the relevant markets. Intel holds approximately 50 percent of these markets through its sales of GPUs

integrated on chipsets, with the remainder of the markets split between Nvidia and ATI.

76. There are high barriers to entry in the relevant GPU markets.
77. GPUs allow OEMs to use lower-end CPUs or fewer microprocessors for a given level of performance.
78. Nvidia has developed GP GPUs and related programming tools that can perform many of the same functions as CPUs.
79. Nvidia's ongoing development of sophisticated GPUs and related tools poses a potential threat to Intel's monopoly position in the relevant CPU markets.
80. Manufacturers of complementary products, such as GPUs, rely on open interfaces (e.g., busses, connections, and related programming) between the CPU and the chipset, and between the chipset and the GPU. Intel dictates the interoperability of these interfaces, because it has monopoly power over the relevant CPUs.
81. These interfaces are essential for such complementary products to be used in a computer. For many years, Intel allowed unhindered accessibility to these interfaces and encouraged others to become reliant on that accessibility. However, after Nvidia, Via, AMD, OEMs, and consumers became dependent on the Intel-controlled interfaces, recently Intel has selectively cut off or hindered accessibility to enhance or obtain monopoly power in the relevant markets.
82. For example, Intel encouraged Nvidia to innovate on the Intel platform. Intel and Nvidia worked together for a number of years to ensure that Nvidia's GPUs could interoperate with Intel's CPU.
83. Intel licensed Nvidia to allow it to manufacture GPUs integrated on chipsets to be used with Intel's CPUs.
84. Intel's apparent willingness to allow Nvidia to interoperate with Intel's CPU has dissolved as it has begun to perceive Nvidia as a threat to its monopoly position in the relevant markets. Intel now has reversed its previous course of allowing Nvidia integrated GPU chipsets to interoperate with Intel CPUs, thereby foreclosing Nvidia's integrated GPU chipsets from connecting to Intel's future CPU platforms.
85. Before expressly refusing to deal with Nvidia on integrated GPU chipsets for its new family of CPUs, Intel engaged in deception by misleading Nvidia on Intel's CPU roadmaps, thereby greatly increasing its competitor's costs and further delaying the development of other products that would have accelerated the adoption of GP GPU computing. Intel also took steps to create technological barriers to interoperability to preclude the possibility that integrated CPU chipsets could interconnect with future Intel CPUs.

86. For discrete GPUs, Intel has created several interoperability problems, including reductions of speed and encryption, that have had the effect of degrading the industry standard interconnection with Intel's CPUs. Some of this conduct appears to have been specifically targeted at crippling GP GPU computing functionality.

87. Intel has sought to ensure that its own x86-based GP GPU computing programming tools and interfaces will become the industry standard. In order to accomplish this, Intel has disparaged non-Intel programming tools and interfaces and made misleading promises to the industry about the readiness of Intel's GP GPU hardware and programming tools.

88. Intel also bundles its CPUs with its own GPU chipsets and then prices the bundle to deter OEMs from pairing Intel CPUs with non-Intel GPUs. Intel's bundling scheme has led to significant loss of consumer choice and has no legitimate justification except to exclude competition. Moreover, it has resulted in below-cost pricing by Intel in circumstances in which Intel is likely to recoup in the future any losses that it suffered as a result of below-cost pricing.

89. Intel sells its Atom CPU bundled with a graphics chipset. Some OEMs purchased the bundle from Intel, discarded Intel's inferior graphics chipset and chose instead to use Intel's Atom CPU with the Nvidia graphics chipset. To combat this competition, Intel charged those OEMs significantly higher prices because they used a non-Intel graphics chipset or GPU. Intel would offer the bundled pricing only to OEMs that would then use the Intel chipset in the end-product and not use a competitive product.

90. Intel's unfair methods of competition in the relevant GPU markets have specifically been used to enhance and have enhanced its monopoly position in the relevant CPU markets.

91. Intel's wrongful conduct also creates a dangerous probability that it will acquire a monopoly in the GPU markets. Intel's conduct has no legitimate or sufficient business justification and has and will continue to harm competition, innovation, and consumers, unless it is enjoined.

Intel's Unfair Methods of Competition in Industry Standards

92. Intel's course of anticompetitive and unfair conduct extends to its control of industry standards to hinder innovation by its CPU competitors and to maintain its monopoly power in the CPU markets. Using its dominant CPU position, Intel has manipulated the content and timing of many industry standards to advantage its own products and prevent competitors from introducing standards-compliant products prior to product introduction by Intel. Two examples of such anticompetitive conduct relate to the Universal Serial Bus host controller specification and the High Definition Content Protection ("HDCP") standard for use in DisplayPort connections between computers and display devices such as monitors and televisions. In these instances, Intel encouraged the industry to rely on standards that Intel controlled and represented that the standards would be fairly accessible. But Intel has delayed accessibility to the standards for its competitors so that Intel can gain a head start with its own products and wrongfully restrain competition. Intel's conduct has no offsetting, legitimate or sufficient procompetitive efficiencies but instead deters competition and enhances Intel's monopoly power in CPUs.

Anticompetitive Effects of Intel's Conduct

93. The acts and practices of Intel as alleged herein have the purpose, capacity, tendency, and effect of harming competition and consumers in the relevant CPU markets. As a result, Intel's rivals and potential rivals incur higher distribution costs, face diminished sales opportunities, and secure lower revenues. Intel's conduct reasonably appears capable of making a significant contribution to the maintenance of its monopoly power or enabling it to achieve monopoly power in the relevant markets. Intel's monopoly power also has been buttressed by various unjustified restraints it places on licensees of its x86 intellectual property.

94. Intel's conduct adversely affects competition and consumers by, including but not limited to:

- a. causing higher prices of CPUs and GPUs and the products containing microprocessors;
- b. reducing competition to innovate in the relevant CPU and GPU markets by Intel and others;
- c. inhibiting Intel's competitors from effectively marketing their products to customers;
- d. reducing output of CPUs, GPUs, and the products containing them;
- e. raising rivals' costs of distribution of CPUs and GPUs;
- f. harming choice and competition at the OEM level and hence depriving consumers of their choice of CPUs and GPUs;
- g. reducing the incentive and ability of OEMs to innovate and differentiate their products in ways that would appeal to customers; and
- h. reducing the quality of industry benchmarking relied upon by OEMs and consumers in purchasing computers.

95. The acts and practices of Intel as alleged herein have the purpose, capacity, tendency, and effect to restrain competition unreasonably and to maintain Intel's monopoly power in the relevant markets. In addition, Intel's conduct is an illegal attempt to monopolize the relevant markets, and Intel has a dangerous probability of achieving a monopoly in these markets absent appropriate relief. Absent such relief, for OEMs and consumers of the relevant products, the consequences have been and likely will continue to be supracompetitive prices, reduced quality, and less innovation.

96. Intel's course of unfair methods of competition, considered individually or collectively, has harmed competition and consumers in the relevant markets. Intel's conduct has no legitimate or sufficient efficiency justification that would outweigh the anticompetitive effects of its conduct. Moreover, Intel has not used a least restrictive means to advance any legitimate goals, if any, to minimize anticompetitive effects.

First Violation Alleged

97. The allegations in paragraphs 1 through 96 above are herein incorporated by reference. Intel's acts and practices, considered individually or collectively, constitute unfair methods of competition in or affecting commerce, in violation of Section 5 of the FTC Act.

98. Such acts and practices, or the effects thereof, will continue or recur in the absence of appropriate relief.

Second Violation Alleged

99. The allegations in paragraphs 1 through 96 above are herein incorporated by reference. Intel has willfully engaged in anticompetitive and exclusionary acts and practices to acquire, enhance or maintain its monopoly power in the relevant markets, constituting unfair methods of competition in or affecting commerce, in violation of Section 5 of the FTC Act.

100. Such acts and practices, or the effects thereof, will continue or recur in the absence of appropriate relief.

Third Violation Alleged

101. The allegations in paragraphs 1 through 96 above are herein incorporated by reference. Intel has willfully engaged in anticompetitive and exclusionary acts and practices, with the specific intent to monopolize or maintain a monopoly in the relevant markets, resulting, at a minimum, in a dangerous probability of monopolization in the relevant markets, constituting unfair methods of competition in or affecting commerce, in violation of Section 5 of the FTC Act.

102. Such acts and practices, or the effects thereof, will continue or recur in the absence of appropriate relief.

Fourth Violation Alleged

103. The allegations in paragraphs 56 through 96 above are herein incorporated by reference. The acts and practices of Intel, as alleged herein, constitute deceptive acts or practices in or affecting commerce, in violation of Section 5 of the FTC Act.

104. Such acts and practices, or the effects thereof, will continue or recur in the absence of appropriate relief.

Fifth Violation Alleged

105. The allegations in paragraphs 1 through 96 above are herein incorporated by reference. The acts and practices of Intel, as alleged herein, constitute unfair acts or practices in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act.

106. Such acts and practices, or the effects thereof, will continue or recur in the absence of appropriate relief.

NOTICE

Notice is hereby given to the Respondent that September 15, 2010, at 10:00 a.m., or such earlier date as is determined by an Administrative Law Judge of the Federal Trade Commission, is hereby fixed as the time, and the Federal Trade Commission offices, 600 Pennsylvania Avenue, N.W., Room 532, Washington, DC 20580, as the place, when and where a hearing will be held before an Administrative Law Judge of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under the Federal Trade Commission and Clayton Acts to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in the complaint.

Due to the nature of the complaint, the Commission finds good cause under § 3.41(b) of the Commission's Rules of Practice for Adjudicative Proceedings to extend the timed hearing to no more than 322 hours. Each side shall be allotted no more than half of the 322 hours within which to present its (i) opening statements, (ii) in limine motions, (iii) all arguments excluding the closing argument, (iv) direct or cross examinations in either party's case, or (v) other evidence that is presented live at the hearing. Counsel supporting the complaint and Respondent's counsel shall report jointly to the Administrative Law Judge each day as to the time each party has used each hearing day.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the fourteenth day after service of it upon you. An answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have been admitted.

If you elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all of the material allegations to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint, and together with the complaint will provide a record basis on which the Commission shall issue a final decision containing appropriate findings and conclusions and a final order disposing of the proceeding. In such answer, you may, however, reserve the right to submit proposed findings and conclusions under § 3.46 of the Commission's Rules of Practice for Adjudicative Proceedings.

Failure to file an answer within the time provided above shall be deemed to constitute a waiver of your right to appear and to contest the allegations of the complaint, and shall authorize the Commission, without further notice to you, to find the facts to be as alleged in the complaint and to enter a final decision containing appropriate findings and conclusions and a final order disposing of the proceeding.

The Administrative Law Judge will schedule an initial pre-hearing scheduling conference to be held not later than ten days after the answer is filed. The scheduling conference and further proceedings will take place at the Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Room 532, Washington, DC 20580. Rule 3.21(a) requires a meeting of the parties' counsel as early as practicable before the pre-hearing scheduling conference (and in any event no later than five days after the answer is filed by the last answering respondent). Rule 3.31(b) obligates counsel for each party, within five days of receiving a respondent's answer, to make certain initial disclosures without awaiting a discovery request.

NOTICE OF CONTEMPLATED RELIEF

Should the Commission conclude from the record developed in any adjudicative proceedings in this matter that the Respondent has violated or is violating Section 5 of the FTC Act, as amended, as alleged in the Complaint, the Commission may order such relief against Intel as is supported by the record and is necessary and appropriate, including, but not limited to:

1. Ordering Intel to cease and desist from the conduct alleged in the Complaint, and to take all such measures as are appropriate to correct or remedy, or to prevent the recurrence of, the anticompetitive practices engaged in by Intel.
2. An order that limits the manner in which Intel uses threats, bundled prices, quantity discounts, and other offers to encourage exclusivity or to deter competition or unfairly raise the price of its microprocessors or GPUs (including pricing conditioned on Intel getting so much of a resellers' purchases that that condition has the practical effect of foreclosing rivals from all or substantially all of that resellers' purchases, provided that pricing based purchases exceeding 60% of a resellers' historical purchases during the period the pricing is offered will be presumed to have that effect); such order may, among other things, include a prohibition against Intel from directly or indirectly requiring its customers to:
 - a. purchase only microprocessors or GPUs that have been manufactured by Intel;
 - b. purchase a minimum or fixed volume or percentage of the customer's overall CPU or GPU requirements from Intel (regardless of whether such fixed percentage relates to a product line for customers with multiple product lines or on a company-wide basis);
 - c. not purchase CPUs or GPUs manufactured by a company, or by companies, other than Intel;

- d. purchase a maximum or fixed number of CPUs or GPUs manufactured by a company, or by companies, other than Intel (regardless of whether such maximum or fixed number relates to a product line for customers with multiple product lines or on a company-wide basis);
 - e. purchase a maximum or fixed percentage of the customer's GPU requirements from a company, or from companies, other than Intel (regardless of whether such maximum or fixed percentage relates to a product line for customers with multiple product lines or on a company-wide basis); or
 - f. comply with restraints on the manner in which customers market, advertise, promote, distribute, or sell any products containing microprocessors that have not been manufactured by Intel.
3. Prohibiting Intel from inducing, or attempting to induce, OEMs or other third parties (i.e., ISVs) to adhere to, or agree to, any of the above requirements (as listed in Paragraphs 2.a. through 2.f. of this notice) by discriminating, or threatening to discriminate, against OEMs or other third parties that fail to adhere to, or agree to, such requirements, including, but not limited to, inducing or attempting to induce OEMs or other third parties to adhere to, or agree to, any of such requirements by engaging in, or threatening to engage in, the following:
- a. charging OEMs or other third parties lower or higher prices for CPUs or GPUs in the relevant markets (inclusive of rebates, allowances, discounts and any other adjustment to price, including anything of value that has the same practical effect as pricing, rebates, or discounts as a means of discrimination) when such price is contingent upon a specific Intel market share or if the OEM does not use a competitive product;
 - b. withholding payments and/or other compensation to OEMs unless they are exclusive or near exclusive to Intel in the relevant markets;
 - c. withholding research and development funds from OEMs unless they are exclusive or near exclusive to Intel in the relevant markets;
 - d. allocating OEMs or other third parties fewer CPUs during periods of shortage (actual or manufactured) depending on whether they are exclusive or near exclusive to Intel in the relevant markets;
 - e. providing OEMs reduced monetary or in-kind support to market, advertise, promote, or distribute products manufactured by Intel unless they are exclusive or near exclusive to Intel in the relevant markets;

- f. giving OEMs less technical support with respect to microprocessors or GPUs unless they are exclusive or near exclusive to Intel in the relevant markets;
- g. giving OEMs less access to technical information/specifications regarding microprocessors or GPUs unless they are exclusive or near exclusive to Intel in the relevant markets; and
- h. prioritizing the supply of microprocessors or GPUs to OEMs that are exclusive or near exclusive to Intel in the relevant markets.

4. With respect to an OEM that purchases a greater percentage share of Intel microprocessors (versus the percentage share of microprocessors bought by that OEM from another microprocessor supplier), Intel is prohibited from giving to that OEM more advantageous terms or conditions than those that are offered to another OEM whose percentage share is not as favorable to Intel. Intel is also prohibited from enforcing any terms or conditions in a way that favors a greater percentage share of microprocessors from Intel. For purposes of this paragraph, terms and conditions expressly include but are not limited to contracts, pricing, or purchase terms and conditions, and all actions described in Paragraphs 3 a. through 3.h. of this notice. Provided, however, it should not be a violation for Intel to offer, or its customers to accept, discounts or lower prices based solely on volume (provided that the same are in accordance with the law).

5. Prohibiting Intel from producing or distributing software or hardware that has the purpose or effect of unreasonably excluding or inhibiting competitive microprocessor or GPU products or complementary products.

6. Prohibiting Intel from pricing its microprocessors so that the incremental price to a customer of microprocessors or GPUs sold in competition with another competitor is below cost when such price includes all rebates, payments, or other price decreases on other products not in competition. Pricing will be presumed to be below cost even if it exceeds Intel's average variable cost but does not contribute to its fixed sunk costs in an appropriate multiple of that average variable cost. Pricing or sale of kit or bundled products will be presumed to be above "cost" if the "kit" or "bundle" includes an x86 product or, if it does, if, after all discounts have attributed to the competitive product(s) in the bundle, the resulting pricing is well above Intel's average variable cost plus a contribution to Intel's fixed sunk costs in an appropriate multiple of that average variable cost.

7. Requiring that, with respect to those Intel customers that purchased from Intel a software compiler that had or has the design or effect of impairing the actual or apparent performance of microprocessors not manufactured by Intel ("Defective Compiler"), as described in the Complaint:

- a. Intel provide them, at no additional charge, a substitute compiler that is not a Defective Compiler;
- b. Intel compensate them for the cost of recompiling the software they had compiled on the Defective Compiler and of substituting, and distributing to their

own customers, the recompiled software for software compiled on a Defective Compiler; and

- c. Intel give public notice and warning, in a manner likely to be communicated to persons that have purchased software compiled on Defective Compilers purchased from Intel, of the possible need to replace that software.
8. Prohibiting Intel from manufacturing or distributing computer software, hardware, or other products that impair the performance, or apparent performance, of non-Intel microprocessors or GPUs.
 9. Prohibiting Intel from inducing or coercing others to design, manufacture, or sell products that impair the actual or apparent performance of non-Intel microprocessors GPUs.
 10. Prohibiting Intel from making deceptive or misleading statements and omissions concerning anything (including, but not limited to, performance, roadmaps, or plans) related to the manufacturing or sale of any x86 or related product, including CPUs, GPUs, chipsets, compilers, libraries, software.
 11. Requiring Intel to correct the deceptive or misleading statements and omissions it has made in the past.
 12. Prohibiting Intel from coercing or influencing benchmarking organizations to adopt benchmarks that are deceptive or misleading.
 13. Prohibiting Intel from improperly inducing or coercing customers not to use a competing GPU or graphics chipset.
 14. Prohibiting Intel from designing or bundling together its own software or hardware so that they unfairly discriminate between Intel and non-Intel GPUs or graphics chip or related products.
 15. Prohibiting Intel from directly or indirectly, expressly or by implication or effect, conditioning any discount, rebate, or other kind of consideration or benefit in connection with an OEM's purchase of Intel microprocessors on the condition that the OEM purchase another Intel product.
 16. Prohibiting Intel from charging a higher price, or directly or indirectly conditioning any discount, rebate, or any other kind of consideration or benefit based solely on the inclusion, configuration, or type of software, operating system, or other component(s) used in any product into which an Intel microprocessor is to be incorporated or on the class of customers to whom the OEM's products containing Intel components will be marketed.
 17. Requiring Intel to make available technology (including whatever is necessary to interoperate with Intel's CPUs or chipsets) to others, via licensing or other means, upon such terms and conditions as the Commission may order, including but not limited to extensions of terms of current licenses.

18. Prohibiting Intel from including or enforcing terms in its x86 licensing agreements that restrict the ability of licensees to change ownership, to obtain investments or financing, to outsource production of x86 microprocessors, or to otherwise partner with third parties to expand output.
19. Requiring that, for a period of time, Intel provide prior notice to the Commission of acquisitions, mergers, consolidations, or any other combinations of assets, including but not limited to intellectual property, in the relevant microprocessor markets and complementary software and hardware products.
20. Requiring that Intel, directly or through any person, corporation, partnership, subsidiary, division, trade name, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product, in or affecting commerce, shall not make any representation, in any manner, directly or by implication, including through the use of a product name, endorsement, depiction, or illustration, about the efficacy or performance of any product unless the representation is not deceptive or misleading and, at the time the representation is made, Intel possesses and relies upon competent and reliable scientific evidence that substantiates the representation.
21. Requiring that for a period of time after the last date of dissemination of any representation covered by any ordered relief in this matter, Intel shall maintain and upon request make available to the Federal Trade Commission for inspection and copying:
 - a. All advertisements and promotional materials containing the representation;
 - b. All materials that were relied upon in disseminating the representation;
 - c. All tests, reports, studies, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question such representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations; and
 - d. All other documents supporting compliance with the Commission's order.
22. Prohibiting Intel from entering into, implementing, continuing, or enforcing a Contract with any Customer that requires the Customer to disclose to Respondent any plans the Customer may have to sell, or offer for sale, Computer Products containing a Competing Relevant Product.
23. Prohibiting Intel from suing or threatening to sue its competitors' third-party fabricators.
24. Requiring that Intel's compliance with the order be monitored for the full term of the order at Intel's expense by an independent monitor appointed by the Commission.
25. Requiring that Intel file periodic compliance reports with the Commission.
26. Any other relief appropriate to correct or remedy the anticompetitive effects in their incipiency of any or all of the conduct alleged in the complaint.

IN WITNESS WHEREOF, the Federal Trade Commission has caused this complaint to be signed by its Secretary and its official seal to be hereto affixed, at Washington, DC, this sixteenth day of December, 2009.

By the Commission, Commissioner Kovacic recused.

SEAL

Donald S. Clark
Secretary

**ANALYSIS OF PROPOSED CONSENT
ORDER TO AID PUBLIC COMMENT**

In the Matter of Intel Corporation, Docket No. 9341

The Federal Trade Commission (“Commission” or “FTC”) accepted for public comment an Agreement Containing Consent Order (“Proposed Consent Order”) with Intel Corporation (“Intel”) to resolve an Administrative Complaint issued by the Commission on December 16, 2009.¹ The Complaint alleged that Intel unlawfully maintained its monopoly in the relevant CPU markets, and sought to acquire a second monopoly in the relevant graphics markets, using a variety of unfair methods of competition. Consumers were harmed by Intel’s conduct, which resulted in higher prices, less innovation, and less consumer choice in the relevant markets. Consumers were also harmed by Intel’s deceptive disclosures related to its compilers, which violated both competition and consumer protection principles. The Proposed Consent Order will bring immediate relief in the relevant markets and puts Intel under Commission Order.

As described in detail below, the Proposed Consent Order has two fundamental goals. First, it seeks to undo the effects of Intel’s past restraints on competition by enhancing the ability of AMD, NVIDIA, Via, and others to compete effectively with Intel. To that end, the Proposed Consent Order seeks: 1) to make it easier for AMD, NVIDIA, and Via to use third-party foundries to manufacture products (to enable them to better match Intel’s manufacturing advantages) (Section III.A.); 2) to give AMD, NVIDIA, and Via flexibility to secure modifications of change of control provisions in their Licensing Agreements with Intel (Section III.B); 3) to extend Via’s intellectual property license (Section III.C); and 4) to provide assurances to manufacturers of complementary and peripheral products that they will be able to connect their devices to Intel’s CPUs (Section II). These provisions compel Intel to make certain offers; they do not compel a third party to accept them. The goal is to require Intel to open the door to renewed competition, not to force a third party to take any particular action.

Second, the Proposed Consent Order is designed to protect the ability of customers and existing and future Intel competitors to engage in mutually beneficial trade, while prohibiting Intel from using certain practices to deter or thwart such trade. The Proposed Consent Order therefore prohibits Intel from engaging in: 1) certain pricing practices that could allow Intel to exclude competitors while maintaining high prices to consumers (Section IV.A.); 2) predatory design that disadvantages competing products without providing a performance benefit to the Intel product (Section V); and 3) deception related to its product road maps, its compilers, and product benchmarking (Sections VI, VII, and VIII).

¹ The Complaint was brought under Section 5 of the Federal Trade Commission Act, which “was designed to supplement and bolster the Sherman Act and the Clayton Act ... to stop in their incipency acts and practices which, when full blown, would violate those Acts ... as well as to condemn as ‘unfair methods of competition’ existing violations” of those acts and practices. *F.T.C. v. Brown Shoe Co.*, 384 U.S. 316, 322 (1966) (quoting *F.T.C. v. Motion Picture Adv. Serv. Co.*, 344 U.S. 392, 394-95 (1953)); see also *F.T.C. v. Indiana Fed’n of Dentists*, 476 U.S. 447, 454 (1986). In addition, the Commission has the jurisdiction under Section 5 to challenge “unfair or deceptive acts or practices in or affecting commerce . . .”

The Proposed Consent Order is for settlement purposes only and is tailored to remedy the effects of Intel's specific conduct in the market context in which that conduct took place. The purpose of the Commission's Order is not punitive but rather remedial.² Intel's adherence to the specific provisions will not insulate it from future Commission scrutiny or enforcement action if its conduct otherwise violates the antitrust laws. That is, the Proposed Consent Order does not operate as a safe harbor for Intel. The Commission can not only challenge (and seek civil fines for) Order violations, but also has authority to challenge any practice not prohibited by the Proposed Consent Order (including, but not limited to, any pricing practice or design change that harms competition) in a potential future legal challenge. The prohibitions and standards utilized in the Proposed Consent Order do not necessarily reflect the applicable legal standards under the Sherman Act, Clayton Act, or the FTC Act; indeed, the legal standards applicable to some of these practices remain unsettled by the Supreme Court and the federal courts of appeal. The Commission expressly reserves the right to challenge Intel's future anticompetitive conduct if it has reason to believe that, considered in context, the effect of Intel's conduct is to enable it to increase or maintain power over price, output, or non-price competition in any market in which it is a participant. Furthermore, the Commission has the authority to monitor and determine whether the Commission has reason to believe that Intel has not strictly complied with all of the provisions of this Proposed Consent Order (including, but not limited to, the obligation to negotiate a license in good faith after a change of control of AMD, NVIDIA, or Via). The Commission expressly reserves its right to exercise this authority as well.

The Proposed Consent Order has been placed on the public record for 30 days for comments. Comments received during this period will become part of the public record. After 30 days, the Commission will review the Proposed Consent Order and comments received and will decide whether it should withdraw from the Proposed Consent Order or make final the Order contained in the Agreement. The purpose of this analysis is to invite and facilitate public comment concerning the Proposed Consent Order.

I. The Commission's Complaint

The Federal Trade Commission voted 3-0 to issue an Administrative Complaint against Intel on December 16, 2009. Intel is a Delaware corporation with its principal place of business in Santa Clara, California. Intel develops, manufactures, markets, and sells computer hardware and software products, including x86 CPUs and graphics processors. The Complaint alleged that Intel engaged in a course of conduct over a ten-year period that was designed to, and did, stall the widespread adoption of non-Intel products. That course of conduct allowed Intel to unlawfully maintain its monopoly in the relevant CPU markets through means other than competition on the merits and created a dangerous probability that Intel would acquire a monopoly in the relevant GPU markets.

First, the Complaint alleges that Intel maintained its monopoly in the markets for x86 CPUs for desktops, notebooks, and servers, as well as smaller relevant markets, by engaging in a course of conduct that foreclosed or limited the adoption of non-Intel x86 CPUs. The CPU of a

² As a general rule, the Commission's statutory authority is designed to remedy conduct going forward as opposed to punishing past conduct. For example, the Commission does not have the authority to levy fines for antitrust violations.

computer system processes data and controls other devices in the system, acting as the computer's "brains." The x86 CPU architecture and instruction set is the industry standard for CPUs used in notebooks, desktops, workstations, and volume servers.³ The Complaint alleges a variety of relevant markets tied to the x86 CPU architecture including an overall x86 market. The non-x86 CPU alternatives did not constrain Intel's monopoly during the relevant time period.

Intel's only significant competitor in the relevant x86 CPU markets is AMD, based in Sunnyvale, California. AMD mounted serious challenges to Intel's position in 1999 when it released its Athlon x86 CPU and again in 2003 when it released its Opteron x86 CPU. The only other firm that sells x86 CPUs is a small Taiwanese firm, Via Technologies. A fourth firm, Transmeta, sold a small number of x86 CPUs in the notebook market but exited the market in 2006.

Over the last decade, Intel's share of the overall x86 CPU market (desktop, notebook, and server) has consistently exceeded 65 percent; its share of the x86 CPU desktop market has consistently exceeded 70 percent; and its share of the x86 CPU notebook market has consistently exceeded 80 percent. Intel's monopoly position in these markets is partially protected by significant barriers to entry, including reputation, scale economies, intellectual property rights, costs associated with building and operating large manufacturing facilities, and research and development costs. These legitimate barriers to entry make vigorous enforcement of the competition laws all the more important. The Proposed Order is designed to ensure that Intel cannot blunt entry and expansion by raising barriers in the relevant markets using means other than competition on the merits.

Second, the Complaint also challenges Intel's unfair methods of competition in the Graphics Processing Unit ("GPU", also referred to as "graphics") markets. GPUs originated as specialized processors for generating computer graphics. In recent years, GPUs have become increasingly sophisticated as computing graphics have grown in importance. GPUs have also evolved to take on more functionality. GPUs are increasingly performing computations traditionally performed by the CPU, allowing OEMs to use lower-end CPUs or fewer microprocessors for a given level of performance. As a result, GPUs are creating better products at lower prices for consumers.

The graphics market is highly concentrated with high barriers to entry. Intel competes in the graphics market with NVIDIA and AMD/ATI. Intel makes and sells graphics processors that are either integrated into chipsets or directly onto the CPU. NVIDIA and AMD/ATI sell both graphics processors integrated into chipsets as well as discrete graphics cards. NVIDIA has been at the forefront of developing GPU functionality beyond merely graphics applications. The growth of NVIDIA's General Purpose GPU ("GP-GPU") computing allegedly threatened to undermine Intel's x86 CPU monopoly. The Complaint alleges that Intel engaged in behavior, other than competition on the merits, to marginalize NVIDIA and slow the adoption of GP-GPU computing.

³ There are a handful of alternative CPU architectures that are used in very high-end servers or handheld devices. However, these alternatives did not compete in the notebook, desktop, workstation, or volume server x86 CPU markets during the relevant time period.

A. Unfair and Exclusionary Commercial Practices in the Relevant CPU Markets

The Complaint alleges that Intel engaged in a variety of unfair methods of competition to foreclose or limit the adoption of non-Intel x86 CPUs by the world's largest original equipment manufacturers ("OEMs"). The largest original equipment manufacturers ("Tier One OEMs") include Hewlett-Packard/Compaq, Dell, IBM, Lenovo, Toshiba, Acer/Gateway, Sun, Sony, NEC, Apple, and Fujitsu, which combined account for more than 60 percent of all personal computer sales and are the only suppliers qualified to fulfill certain needs of large business buyers. Tier One OEMs provide a crucial distribution channel for any manufacturer of CPUs, chipsets or GPUs. Tier One OEMs supply high volume sales with the concomitant substantially reduced distribution cost. In three respects, Intel's conduct foreclosed significantly non-Intel x86 CPU suppliers from selling product to Tier One OEMs.

First, Intel induced certain Tier One OEMs to forgo adoption or purchases of non-Intel CPUs. When Intel failed to prevent an OEM from adopting non-Intel CPUs, it sought to limit such purchases to a small percentage of the sales of certain computer products. The Complaint alleges, for example, that Intel entered into *de facto* exclusive dealing arrangements and market-share deals with those Tier One OEMs that agreed to limit their purchases of AMD or Via products. Tier One OEMs that purchased all or nearly all of their CPU requirements from Intel received large rebates and lump-sum payments from Intel, as well as guarantees of supply during supply shortages. In other cases, Intel paid Tier One OEMs not to sell computers with non-Intel CPUs, such as AMD's, Transmeta's or Via's CPUs. The Complaint alleges that these arrangements did not represent competition on the merits, were designed to minimize pass-through of rebates to consumers, and that Intel entered into these arrangements to block or slow the adoption of competitive products by the Tier One OEMs and thereby maintain its monopoly.

Second, Intel threatened OEMs that considered purchasing non-Intel CPUs with, among other things, increased prices on other Intel purchases, the loss of Intel's technical support, and/or the termination of joint development projects.

Third, Intel sought to induce OEMs to limit advertising and branding, and to forgo advantageous channels of distribution for computers that contained non-Intel CPUs. For example, Intel induced OEMs to forgo advertising, branding, certain distribution channels, and/or promotion of computers containing non-Intel CPUs. To secure these restrictive dealing arrangements with OEMs, Intel threatened to withhold rebates, technical support, supply, and/or to terminate joint development projects, among other things.

These practices severely limited the number of instances in which OEMs selling non-Intel-based PCs competed directly against OEMs selling Intel-based PCs, especially in servers and in commercial desktops and notebooks. When an OEM selling Intel-based PCs competed against OEMs selling AMD-based PCs, Intel often had to sell CPUs at competitive prices. When such competition was eliminated, Intel could sell CPUs at supra-competitive prices. Consequently, it was able simultaneously to charge above-competitive prices and at the same time to exclude its rivals, resulting in both higher prices and fewer choices for consumers. In addition, Intel's retroactive quantity discounts were of a type that could readily disguise effective

below-cost pricing, which would, under the circumstances, present a strong risk of predatory effects.

This effectively allowed Intel to compete by raising the effective prices of AMD's and Via's products rather than lowering the effective prices of its own. It did this by effectively imposing a penalty on any customers who purchased from Intel's rivals. Intel's market share discounts and retaliatory practices described above all had this effect, constituting an effective increase to the rival's price. The end result was that Intel could make a rival's actual low prices look very costly to customers without Intel's needing to reduce its own prices or expand its own output.

B. Compiler and Benchmark Deception

The Complaint alleges that Intel's failure to fully disclose the changes it made to its compilers and libraries beginning in 2003 violated both competition and consumer protection provisions of Section 5 of the FTC Act.

A compiler is a tool used by software developers to write software. The compiler translates the "source code" written in high-level computer languages into 0's and 1's that can be run as software on consumers' computers. Intel's compilers compete with Microsoft's compilers, open-source compilers, and others. Intel's compiler is used by developers of high-performance applications.

The Complaint alleges that AMD's Athlon CPU, released in 1999, and its Opteron CPU, released in 2003, equaled, and in some segments surpassed, Intel's technology. Intel introduced a new version of its compiler shortly before AMD released its Opteron CPU. The compiler features introduced by Intel in 2003 effectively slowed the performance of software written using Intel's compilers on non-Intel x86 CPUs such as Opteron. To the unknowing public, OEMs, and software vendors, the slower performance of non-Intel-based computers when running certain software applications was mistakenly attributed to the performance of non-Intel CPUs.

The Complaint also alleges that the direct impact of Intel's deceptive disclosures was on independent software vendors and developers that used Intel's compiler to write software. They were unaware of the changes in the Intel compiler that would impact the performance of their software when it ran on non-Intel-based computers. The Complaint alleges Intel intentionally misrepresented the cause of the performance differences and whether it could be solved.

Intel's deceptive disclosures related to its compiler redesign were compounded by the adoption of industry standard benchmarks that included software compiled using Intel's compiler. Benchmarks are performance tests that compare attributes of competing CPUs. Industry standard benchmarks are used by OEMs and consumers to judge performance of competing CPUs. Intel failed to disclose to benchmarking organizations the effects of its compiler redesign on non-Intel CPUs. Several benchmarking organizations adopted benchmarks that measured performance of CPUs by running software programs compiled using the Intel compiler. The software compiled using Intel's compiler skewed the performance results in Intel's favor. Intel promoted its systems' performance under such benchmarks as realistic measures of typical or

“real world” computer performance. The benchmarks were not accurate or realistic measures of typical computer performance and they overstated the performance of Intel’s products as compared to non-Intel products.

The Complaint alleges Intel’s deceptive disclosures related to its compiler contributed to Intel’s maintenance of its monopoly power. For example, AMD’s CPU performance advantages were muted by Intel’s compiler. Intel’s deception distorted the competitive dynamic and harmed consumers. The Complaint also alleges that Intel’s failure to disclose was a deceptive act or practice.

Among the harms to consumers caused by Intel’s deceptive conduct was the harm to the credibility and reliability of industry benchmarks. Industry benchmarks are important tools for consumers to make informed purchasing choices. Informed consumer choice is a basic building block of competition.

C. Unfair and Exclusionary Conduct to Suppress GPU Competition

Intel worked with NVIDIA for a number of years to ensure that NVIDIA’s GPUs could interoperate with Intel CPUs, and licensed NVIDIA to allow it to manufacture Intel-compatible chipsets with integrated graphics (also referred to as “chipsets with integrated GPUs”). The Complaint alleges that Intel began to perceive NVIDIA as a threat in both the market for chipsets with integrated graphics and the market for CPUs. The Complaint further alleges that Intel took a number of actions to blunt the competitive threat posed by NVIDIA. For example, Intel denied NVIDIA the ability to produce integrated chipsets that would be compatible with Intel’s next generation CPUs. In doing so, the Complaint alleges that Intel misled NVIDIA on Intel’s “roadmaps” or product plans, causing NVIDIA to waste resources and crucial time researching and designing integrated chipsets when, in fact, Intel allegedly had no intention of permitting NVIDIA integrated chipsets to interoperate with Intel’s next generation of x86 microprocessors. This increased NVIDIA’s costs and delayed the development of other products that would have increased competition in both the market for chipsets and the market for CPUs. The Complaint also alleges that Intel took steps to create technological barriers to preclude non-Intel integrated chipsets from interconnecting with future Intel CPUs. The Complaint further alleges that Intel bundled its CPUs with its own integrated chipsets and then priced the bundle to punish OEMs for buying non-Intel integrated chipsets.

II. Terms of the Proposed Consent Order

The touchstone of the Proposed Consent Order is the protection of consumers and competition. Thus, the Proposed Consent Order provides structural relief designed to restore the competition lost as a result of Intel’s past conduct, and injunctive relief that prevents Intel from engaging in future unfair methods of competition. The injunctive relief would prohibit Intel, when faced with new competitive threats, from engaging in the exclusionary and unfair conduct alleged in the Complaint. These provisions are designed to open the door to fair and vigorous competition in the relevant markets, leading to lower prices, more innovation, and more choice for consumers. The immediacy of this relief is particularly important in these rapidly changing markets.

The Complaint did not seek to strip Intel of its x86 monopoly, which was in large measure gained by innovation and associated intellectual property rights. Rather, the Proposed Consent Order is designed to undo the effects of Intel's anticompetitive conduct and prevent its recurrence, by restoring as much as possible the competitive conditions that would have prevailed absent the anticompetitive behavior and by ensuring that the doors to competition remain open. The Proposed Consent Order clarifies and extends AMD's and Via's rights to the x86 technology. The injunctive relief in the Proposed Consent Order is thus particularly important today to ensure that AMD's new CPU products can have a fair test in the marketplace on the merits and that Via more quickly has the clear path it needs to design and produce its next generation of CPU products. The Complaint did not seek to fine or penalize Intel for its conduct because the Commission lacks that authority for violations of the antitrust laws.

A. Section II of the Proposed Consent Order

Section II of the Proposed Consent Order requires Intel to maintain an open PCI Express ("PCIe") Bus Interface on all of its CPU platforms for six years. The PCIe bus is an industry standard bus used to connect peripheral products such as discrete GPUs to the CPU. A bus is a connection point between different components on a computer motherboard. The PCIe bus serves a critical function on the Intel platform. Intel's commitment to maintain an open PCIe bus will provide discrete graphics manufacturers, such as NVIDIA and AMD/ATI, and manufacturers of other peripheral products, assurances that their products will remain viable and thus maintain their incentives to innovate -- including the continued development of alternative computing architectures such as General Purpose GPU computing. Intel's commitment extends to high performance computing platforms that have been at the forefront of General Purpose GPU computing. The Commission recognizes the importance of the continued development of this potential alternative computing architecture.

The Commission recognizes that it may be difficult to forecast the future of innovation in these markets. The CPU and GPU markets are dynamic, and technology may be very different in three or four years. The Commission has the authority to reduce the number of years Intel must maintain the PCIe bus on any of its CPU platforms. For example, the Commission may reduce the commitment if the market has moved away from PCIe and it no longer serves a gateway function to Intel's CPU.

Section II.C of the Proposed Consent Order prohibits Intel from limiting the performance of the PCIe bus in a manner that would hamper graphics performance or GP-GPU compute functionality of discrete GPUs. The provision would assure NVIDIA, AMD/ATI, and other potential manufacturers of products that would use the PCIe bus that they will be able to connect to Intel CPUs in both mainstream and high-performance computers in the future, and that the performance of their products will not be degraded by Intel. These assurances will also allow NVIDIA and others to continue developing GP-GPU computing as a complement to the processing power of the CPU.

B. Intel Assurances on Third Party Foundry Rights

Section III.A of the Proposed Consent Order would require Intel to allow AMD, NVIDIA, and Via to disclose relevant “have made” rights under their respective licensing agreements with Intel to foundries and customers. The Proposed Consent Order would further require Intel to confirm to any foundry or customer that AMD, NVIDIA, and Via licenses confer such “have made” rights. “Have made” rights allow AMD, NVIDIA, and Via to contract out manufacturing to third parties. Absent Intel’s assurances and disclosures, customers and foundries might be deterred from making or selling the products of these competitors when they are, in fact, licensed, based upon unwarranted fear of being sued by Intel for infringement. These disclosures will help eliminate any uncertainty surrounding the rights of AMD, NVIDIA, and Via to use third party foundries to manufacture x86 microprocessors or other products under their respective cross licenses.

C. Change of Control Modifications to Current License Agreements with AMD, NVIDIA, and Via

Section III.B of the Proposed Consent Order would require Intel to offer to modify the change of control terms in Intel’s intellectual property licenses with AMD, NVIDIA, and Via. The Commission is concerned that Intel’s past conduct has weakened AMD and Via – Intel’s only x86 competitors. This provision seeks to ensure that these existing competitors can partner with third parties to create a more formidable competitor to Intel.

The existing change of control terms in licensing agreements potentially limit the ability of AMD, NVIDIA, and Via to take part in a merger or joint venture, or to raise capital. The provisions in the Proposed Consent Order are designed to allow AMD, NVIDIA, and Via to enter into a merger or joint venture with a third party, or to otherwise raise capital, without exposing itself to an immediate patent infringement suit by Intel. In the event that AMD, NVIDIA, or Via undergo a change of control, these provisions prohibit Intel from suing for patent infringement for 30 days. Furthermore, Intel must offer a one-year standstill agreement during which the acquiring party and Intel would not sue each other for patent infringement while both parties enter into good faith negotiations over a new license agreement.

The Commission takes seriously Intel’s commitment under these provisions in the Proposed Consent Order. The Commission has authority under the Order to evaluate and determine whether Intel in fact engages in good faith negotiations and the Commission will be able to enforce the Proposed Consent Order if Intel does not negotiate in good faith. In the event the change of control terms are invoked, the Commission will carefully scrutinize Intel’s conduct and take action, if appropriate.

D. Via x86 Licensing Agreement Extension and Assurances

Section III.C of the Proposed Consent Order requires Intel to offer a five year extension to its cross-license with Via. The extension of the cross license guarantees that Via has the opportunity to continue competing in the x86 CPU market until at least 2018. Section III.C also requires Intel to confirm that Via may lawfully make, sell, and import x86 products without

violating the Intel license. This disclosure is designed to eliminate uncertainty surrounding Via's right to compete in the relevant x86 CPU markets through 2018.

The extension of the Via license agreement, coupled with the modifications to the change-of-control provisions in Section III.B, open the door to a potential joint venture or acquisition of Via and its x86 license by a strong and well financed entrant to the x86 markets.

E. Commercial Practices Provisions

The prohibitions in Section IV.A of the Proposed Consent Order address Intel's commercial practices. These provisions are specifically designed to protect competition, not any one competitor. The Proposed Consent Order protects competition in the markets for CPUs (including CPUs with integrated graphics), chipsets, and GPUs. In contrast, Intel's settlement with AMD in November 2009 only protected AMD from certain exclusionary practices and did not extend to GPUs or chipsets.

The rationale for extending the prohibitions to all chipsets is two-fold. First, Intel's CPUs and chipsets are sold on a one-to-one basis. That is, an Intel chipset will only work with an Intel CPU. Thus, an agreement to purchase chipsets exclusively from Intel means that an OEM must purchase CPUs exclusively from Intel. Likewise, an OEM's agreement to purchase 95 percent of its chipsets from Intel means that an OEM will purchase at least 95 percent of its CPUs from Intel. Second, extending the Proposed Consent Order to chipsets also protects competition in the market for chipsets. The Commission recognizes that chipsets still play an important role in platform innovation. The provisions are designed to protect the development of new competitive options that may emerge from this market.

1. Prohibitions on Commercial Practices

The Proposed Consent Order prohibits Intel from engaging in seven enumerated sales practices in the CPU, chipset, and GPU markets. Section IV.A prohibits Intel from offering benefits to OEMs, original design manufacturer ("ODMs"), or End Users in exchange for assurances that the customers will refrain from dealing with Intel's competitors. "Benefit" is broadly defined and includes not only monetary consideration but also encompasses access to technical information, supply, and technical and engineering support. Section IV.A also prohibits Intel from punishing its customers by withholding benefits from those that purchase from non-Intel suppliers of CPUs, chipsets, and GPUs.

Section IV.A.1 would prohibit Intel from conditioning a benefit on an OEM's, ODM's, or End User's agreement to purchase a CPU, chipset, and/or GPU exclusively from Intel in any geographic area (e.g., the United States), market segment (e.g., servers, workstations, commercial desktops, etc.), product segment (e.g., multi-processor servers, high-end desktops, etc.), or distribution channel. For example, the Proposed Consent Order would prohibit Intel from conditioning a benefit on an OEM's agreement to purchase CPUs for servers exclusively from Intel.

Section IV.A.2 would prohibit Intel from conditioning a benefit on an OEM's, ODM's, or End User's agreement to limit, delay, or refuse to purchase a CPU, chipset, and/or GPU from a non-Intel supplier. For example, Intel would be prohibited from conditioning a benefit to an OEM on that OEM's agreement to delay the introduction of a computer product incorporating a non-Intel product.

Sections IV.A.3 and IV.A.4 address threats to retaliate against an OEM, ODM, or End User for doing business with a non-Intel supplier. Section IV.A.3 would prohibit Intel from conditioning a benefit on whether an OEM, ODM, or End User purchases, sells, or launches a CPU, chipset, and/or GPU from a non-Intel supplier. For example, Intel could not condition a benefit on an OEM's agreement to cancel a launch of a Personal Computer that includes a non-Intel GPU. Section IV.A.4 prohibits Intel from withholding a benefit from an OEM, ODM, or End User if it designs, manufactures, distributes, or promotes a product incorporating a non-Intel CPU, chipset, and/or GPU. For example, Intel could not withhold a benefit from an OEM because that OEM participated in an AMD launch event.

Section IV.A.5 would prohibit Intel from directly or indirectly conditioning a benefit on the share of CPUs, chipsets, and/or GPUs that the OEM or End User purchases from Intel. For example, Intel could not condition a benefit on an OEM's agreement to purchase at least 95 percent of its CPU requirements for commercial desktops from Intel. Nor could Intel condition a benefit on an OEM's agreement to purchase no more than 5 percent of its CPU requirements for commercial desktops from a non-Intel supplier. In a market such as this one, where the most realistic mode of competition by competitors to a monopolist involves their selling initially modest quantities to direct buyers who also buy large quantities from the monopolist, such conditioning can amount to a tax on the growth of such competition, and can enable the monopolist to sustain high prices at the same time as it limits competition and decreases consumer choice.

Section IV.A.6 would prohibit Intel from bundling the sales of its CPUs with its chipsets when the effective selling price of either piece of the bundle is below Intel's Product Cost. Intel's Product Cost is based on data maintained in the ordinary course of business by Intel, is represented to be used by Intel for business decisions, and is significantly higher than its average variable cost. The provision is based on the standard articulated by the Ninth Circuit in *PeaceHealth* and is administrable using that standard and the Product Cost data. This provision is designed to target specific conduct alleged in the Complaint. For example, the Complaint alleges that Intel bundled the sale of its Atom x86 CPU and chipset in such a way that the effective selling price of the chipset was below cost, in an effort to foreclose third party vendors of chipsets. The provision does not reflect an endorsement or adoption of *PeaceHealth* by the Commission as the applicable legal test for bundling practices. The Commission expressly retains the right to pursue independent claims against Intel or any alleged monopolist under Section 2 of the Sherman Act or Section 5 of the FTC Act based on a different legal standard such as (by way of example), the standard articulated by the *en banc* decision in the Third Circuit's *LePage's* case.⁴

⁴ Compare *LePage's, Inc. v. 3M Co.*, 324 F.3d 141, 155, 162 (3d Cir. 2003) (en banc) with *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883 (9th Cir. 2008).

Section IV.A.7 would prohibit Intel from offering lump sum payments to an OEM, ODM, or End User for reaching a particular threshold of purchases from Intel. For example, Intel would be prohibited from offering an OEM a \$100 million rebate once it purchases 5 million x86 CPUs. The retroactive nature of these payment structures can disguise implicitly below-cost pricing that can unfairly exclude equally efficient competitors and smaller entrants, resulting in a loss of competition and harm to consumers. Intel, however, would not be precluded from offering volume discounts on incremental purchases above a particular threshold. For example, Intel could offer an OEM a price of \$100 for each CPU up to 1 million units and a price of \$90 for each CPU in excess of 1 million units. However, Intel would not be permitted to offer a price below Product Cost for the excess units. The Commission will carefully scrutinize Intel's implementation of this provision to ensure it does not price its products in such a way that forecloses competition.

2. Exceptions to the Commercial Practices Prohibitions

The exceptions to the prohibitions in Section IV.A are designed to allow Intel to offer competitive pricing and enter into other procompetitive deals with OEMs, ODMs, and End Users. These exceptions permit conduct that may truly benefit consumers while still preventing Intel from engaging in the type of anticompetitive behavior identified in the Complaint. Nothing in these exceptions, however, would prevent the Commission from pursuing independent claims against Intel under Section 2 of the Sherman Act or Section 5 of the FTC Act if Intel engages in practices that do not violate the Proposed Consent Order but are nonetheless exclusionary or unfair and result in harm to consumers.

Under Section IV.B.1, Intel is not prohibited from conditioning a Benefit on sales terms that are not expressly prohibited by the Order. For example, Intel could offer a discount to an OEM for a CPU with the condition that it is used in a laptop with a screen size of less than 9 inches.

Under Section IV.B.2, Intel is not prohibited from agreeing with an OEM, ODM, or End User customer that the customer will use distinct model numbers for Intel and non-Intel-based products. Similarly, Intel can agree with its customers that the customer will not falsely label a product based on non-Intel parts as based on Intel parts. The provision allows Intel and OEMs to use naming schemes that are intended to avoid customer confusion. For example, Intel could agree with an OEM that a specific laptop model would be branded Laptop-100A if it uses an AMD CPU and Laptop-100B if it uses an Intel CPU. However, this provision would not allow Intel to condition benefits on an OEM's agreement not to market or brand a product, which is explicitly prohibited by IV.A.3 and IV.A.4.

Under Section IV.B.3, Intel is not prohibited from meeting terms or benefits it "reasonably believes" are being offered by a rival supplier. This section does not immunize the offering of more favorable terms and conditions than those offered by the competitor, *i.e.*, predatory pricing. In addition, this exception is limited in that Intel's offer must be limited to the quantity of the competitive offer; it cannot be conditioned on exclusivity or share of the OEM's or end user's business, and it must be limited to less than a year. Intel may condition its bid upon the purchase of a minimum number of units. For example, if Intel reasonably believes that a

rival supplier is offering to sell 10,000 CPUs for \$90 to an OEM, it can offer to meet that price so long as the OEM agrees to purchase at least 9,000 CPUs.

Sections IV.B.4 and IV.B.5 simply make explicit what is already implicit in the Proposed Consent Order. Under Section IV.B.4., Intel would not violate the Proposed Consent Order merely because it wins all of an OEM's business, so long as it has not engaged in other conduct prohibited by the Order. The fact that an OEM purchases a Relevant Product or Chipset exclusively from Intel would not automatically support a violation of the Proposed Consent Order. Under Section IV.B.5, Intel would not violate the Proposed Consent Order if it engaged in conduct not explicitly prohibited by the Proposed Consent Order.

Under Section IV.B.6, Intel is not prohibited from offering volume discounts directly to purchasers of computers in bidding situations. Intel's offers must be in writing and must be responsive only to single bids and not contingent on future purchases.

Section IV.B.7 would permit Intel to make supply allocation decisions during times of shortage so long as it does not use that process to retaliate against an OEM that is using non-Intel CPUs, chipsets, or GPUs. For example, Intel could not withhold chipset supply from an OEM to punish that OEM for using AMD CPUs.

Section IV.B.8 would allow Intel to enter into no more than ten exclusive agreements over the next ten years when it provides an OEM with "extraordinary assistance" under certain circumstances. The Commission recognizes that Intel has worked with OEMs and other customers to create innovative products that have benefitted consumers. The Commission wants to ensure that Intel has the opportunity to continue to invest monies in projects with OEMs and other customers to support future innovations. Intel, like any other firm, will only invest in research and development if it achieves a return on that investment. Section IV.B.8 recognizes that in "extraordinary" circumstances Intel should be able to negotiate exclusivity for a specific product in which it has invested research and development resources with an OEM or other customer. At the same time, the Commission is wary of creating a loophole to the Proposed Consent Order that can be exploited by Intel to eviscerate the prohibitions in Section IV.A. Thus, this provision is carefully limited.

First, Intel's "extraordinary assistance" to an OEM must be valued at greater than \$50 million and must not be made generally available to all customers. For example, the payment cannot simply take the form of marketing funds that are given to several OEMs but instead must be a unique offer to a particular OEM. Second, the "extraordinary assistance" must be intended to enable a customer to develop new and innovative products or sponsor an OEM's entry into a new market segment where the OEM did not previously compete. For example, a payment of \$50 million to an OEM in return for that OEM's agreement to use Intel's newest CPU in its laptop lines would not qualify as "extraordinary assistance." Third, in return for investing in new product development with a particular OEM, Intel may ask for a period of limited exclusivity of no more than 30 months to recoup its investment. Fourth, Intel would only be able to seek exclusivity for the specific segment or specific product in which it has offered the "extraordinary assistance." For example, if Intel offered "extraordinary assistance" to an OEM to develop a new server it could only seek exclusivity for that particular product line, it could not

seek exclusivity for other servers or other computer products manufactured by that OEM. Fifth, any agreement regarding “extraordinary assistance” must be in writing and include the terms of the assistance, investment, and exclusivity. Finally, Intel would not be permitted to enter into more than 10 arrangements that meet this limited exception over the 10-year duration of the Proposed Consent Order. Exclusive dealing is harmful to the extent that it forecloses an important distribution channel; well-justified exclusive dealing with (on average) just one or two of the Tier 1 OEMs is unlikely to do so.

Section IV.B.9 allows Intel to insist that a Customer maintain the confidentiality of Intel’s confidential business information.

Section IV.B.10 allows Intel to offer buy ten, get one free promotions to its smaller customers. The exception is literally limited to sales of fewer than 11 products. For example, Intel would not be allowed to multiply such an offer a thousand-fold. Thus, this exception would not allow Intel to offer an OEM the opportunity to buy 10,000 units and get 1,000 free.

F. Prohibition on Explicit Predatory Design

Section V of the Proposed Order would prohibit Intel from designing or engineering its CPU or GPU products to solely disadvantage competitive or complementary products. This provision addresses allegations in the Complaint that Intel engaged in predatory innovation by cutting off competitors’ access to its CPUs and slowing down various connections to the CPU. The Proposed Consent Order would be violated if a design change degrades performance of a competitive or complementary product and Intel fails to demonstrate an actual benefit to the Intel product at issue. For example, Intel could not introduce a design change in its CPU that degrades the performance of a competitive GPU unless it could demonstrate that the design change resulted in an *actual* benefit to Intel’s CPU. The benefit must be real – not simply a theoretical benefit. Nor can the benefit to Intel be simply the fact that the competitive product is rendered less attractive by the design change (and thus enhances the competitive position of Intel’s product).

The burden is on Intel to demonstrate that any engineering or design change complies with the terms of Section V. However, Section V does not require proof that a design change was made to intentionally harm competitive or complementary products, or was otherwise anticompetitive, nor does Section V require a balancing test that would weigh the anticompetitive harms against the benefits of a particular Intel design change; it is sufficient that there be actual benefits. A balancing test would be appropriate in a legal challenge to an Intel design change under Section 5 of the FTC Act or Section 2 of the Sherman Act. As noted earlier, the Commission retains the authority to challenge any Intel design changes that are not prohibited by this provision of the Proposed Consent Order.

G. Assurances on the Accuracy of Intel Roadmaps

The provisions in Section VI address allegations in the Complaint that Intel misrepresented its roadmap to the detriment of competition. Section VI.A would prohibit Intel from disclosing inaccurate or misleading roadmaps for the 10-year duration of the Proposed Consent Order and would require Intel to respond, and do so truthfully, to any inquiries regarding potential roadmap changes for one year after it discloses its roadmap. Section VI.A does not require that Intel disclose its roadmap in the first instance; rather, it places conditions on disclosure in the event that Intel does so. Section VI.B would require Intel to disclose to NVIDIA, on an annual interval, what bus interfaces its platforms will use through 2015.

Together, these provisions address allegations in the Complaint that Intel misled third parties concerning its interface roadmap. Reliable disclosure of Intel's interface roadmap will help to eliminate uncertainty about the availability of connections and interoperability with Intel platforms. With reliable roadmap information, competitors that design, manufacture, or sell products that rely on interconnections with Intel platforms will be able to make informed and confident decisions about resource allocation and research and development efforts. Similarly, Intel customers that receive Intel roadmaps will be able to count on the continuing accuracy of those roadmaps and develop products based on combinations of Intel and non-Intel parts. The provisions would help give NVIDIA, AMD/ATI, and other potential manufacturers of products that would interconnect with Intel's platform, assurances that they will be able to connect with the CPU in the future and will also allow continuing development of GP-GPU computing.

H. Compiler Disclosures

Section VII would require Intel to take steps to prevent future misrepresentations related to its compilers and libraries, which are used by software developers to write software and make it work efficiently. Intel's compilers and libraries, however, may generate different software code depending on the vendor of the CPU on which software is running. For example, when the software code runs on an Intel-based computer, it may use certain optimizations such as advanced instruction sets or faster algorithms. However, when that same software code runs on a non-Intel-based computer that has the same optimizations, it may not use those optimizations. Intel's compilers and libraries thus may disable functionality and performance available on non-Intel CPUs. The disclosure requirements in Section VII provide software developers with non-misleading information regarding the extent to which Intel's compilers and libraries optimize differently for different vendors' CPUs. These disclosures allow software developers to make more informed decisions about their use of Intel compilers and libraries, such as whether to investigate the types of optimizations disabled on non-Intel CPUs, whether to use any methods to override the code dispatch mechanisms in Intel compilers and libraries, and whether to use Intel compilers and libraries at all.

Section VII applies to Intel "Compilers," which includes all Intel compilers, runtime libraries supplied with those compilers, and other libraries supplied by Intel for use with Intel and non-Intel compilers. Libraries are pre-compiled code or sample code provided to software developers for use in their programs. Because Intel could implement CPU vendor-based code

dispatching in either compilers or in libraries, the disclosures required in Section VII must apply to both.

Section VII.C of the Proposed Order requires Intel to inform its customers when and how its compilers and libraries optimize for Intel processors but not for non-Intel processors that are capable of using such optimizations. If Intel's compilers or libraries optimize for a standard instruction, such as SSE3, only for Intel CPUs but not for compatible AMD or Via CPUs, even in some circumstances, Intel must clearly and prominently disclose the extent to which the standard instruction set is not used and which instruction set is used instead. Section VII.C would also require Intel to disclose when its compiler performs other optimizations only on Intel CPUs but disables the same features on other CPUs that support the features.⁵

Intel also would be required under Section VII.D to notify its customers and implement an Intel Compiler Reimbursement Program that includes a \$10 million reimbursement fund from which Intel would reimburse customers who relied on Intel's statements regarding its compilers or libraries for the costs associated with recompiling their software using non-Intel compiler or library products. A customer seeking to use the Intel Compiler Reimbursement program must describe an Intel statement on which it relied to ensure that the program is used by customers who were misled by Intel's disclosures.

Section VII.E of the Proposed Consent Order prevents Intel from making claims about the performance of its compiler unless Intel has substantiated that those claims are true and accurate using accepted analytical methods. This prohibition seeks to prevent Intel from claiming, without substantiation, that its compiler and libraries are superior to other available compilers and libraries. Intel may not claim to have superior compilers and libraries for AMD CPUs, when other products, such as the GNU C Compiler (GCC) or AMD's Core Math Library (ACML) have better performance in some circumstances. This prohibition is particularly important regarding Intel's representations about performance of its compilers on non-Intel CPUs. This section ensures that Intel will provide the appropriate disclosures when it makes performance claims about its compilers and libraries.

I. Benchmark Disclosures

Section VIII would require Intel to make disclosures concerning the reliability and relevance of performance claims based on benchmarks. The provision requires Intel to notify any customers, whether hardware manufacturers or end consumers, that the performance tests may have been optimized only for Intel CPUs. Intel must make disclosures whenever it makes performance claims comparing its CPUs to competitors' processors and whenever it relies on a benchmark. The provision requires disclosures in all advertising or marketing materials that include performance claims, including presentations, audio-visual advertisements, and in prominent locations regarding performance on Intel's web site. The required disclosure will inform consumers and OEMs that certain benchmarks may not provide accurate performance comparisons with non-Intel CPUs. The provision will encourage consumers and OEMs to use benchmark results carefully and rely on multiple benchmarks in order to get accurate

⁵ Although compiler users will not know which precise optimizations are not available on non-Intel CPUs, they will be on notice that their compiler will not fully optimize for non-Intel CPUs.

performance information about CPUs. The provision will thus help provide for more informed purchasing decisions.

J. Compliance Terms

Sections IX through XIII of the Proposed Consent Order contain reporting, access, and notification provisions that are common in the Commission's orders, and are designed to allow the Commission to monitor compliance with the Proposed Consent Order. Section IX permits the Commission to appoint Technical Consultants to assist in assessing Intel's compliance with several provisions of the Proposed Consent. Such consultants are warranted in light of the technical nature of the products at issue and the potential complexity of some compliance issues, including cost accounting, microprocessor design, and software design. Intel would be required to pay for the Technical Consultants, up to a total of \$2 million during the ten-year period of the Proposed Consent Order.

Section X would require Intel to submit to the Commission a written plan explaining what Intel has done and will do to ensure compliance with the Proposed Consent Order. Intel would also be required to submit annual reports for six years explaining how it has complied with the Proposed Consent Order. Intel would be required, in these reports, to submit to the Commission any communications Intel receives from its customers regarding compliance with the Proposed Consent Order, including complaints that it is violating the Proposed Consent Order.

Sections XI and XII would require Intel, for the next five years, to retain its written sales contracts and to allow the Commission access to Intel's records and employees. Section XIII would require Intel to notify the Commission at least thirty days prior to changes in corporate structure that would impact Intel's compliance provisions, such as Intel being purchased by another company or Intel creating or purchasing corporate subsidiaries.

Paragraph XIV provides that the Proposed Consent Order shall terminate ten (10) years after the date it becomes final.

0810157

**UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION**

In the Matter of

**U-Haul International, Inc.
a corporation, and**

**AMERCO
a corporation.**

DOCKET NO. C-

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. § 41, *et seq.*, and by virtue of the authority vested in it by said Act, the Federal Trade Commission ("Commission"), having reason to believe that U-Haul International, Inc., and AMERCO (hereinafter sometimes collectively referred to as "Respondents" or "U-Haul"), have violated the provisions of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this Complaint stating its charges as follows:

NATURE OF THE CASE

1. U-Haul is the largest consumer truck rental company in the United States. On multiple occasions, U-Haul invited its closest competitor, Avis Budget Group, Inc. ("Budget"), to join with U-Haul in a collusive scheme to raise rates for one-way truck rentals. U-Haul invited collusion employing both private communications and public statements. These actions endanger competition, and violate Section 5 of the FTC Act.

PRELIMINARY ALLEGATIONS

2. Respondent AMERCO is a corporation organized, existing, and doing business under and by virtue of the laws of Nevada, with its corporate headquarters located at 1325 Airmotive Way, Ste. 100, Reno, Nevada 89502.
3. Respondent U-Haul International, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of Nevada, with its corporate headquarters located at 2727 North Central Avenue, Phoenix, Arizona 85004. U-Haul International, Inc. is a direct subsidiary of AMERCO.

4. Edward J. Shoen serves as Chairman, President, and Director of AMERCO, and as Chief Executive Officer and Chairman of U-Haul International, Inc.
5. The primary business of U-Haul is renting trucks to consumers for use in “do-it-yourself” moves, typically of household goods. U-Haul has a fleet of over 100,000 trucks, and operates a network of approximately 1,450 company-operated moving centers and 14,000 independent U-Haul dealerships located throughout the United States.
6. U-Haul offers customers the option of a “one-way move,” meaning that the customer may pick up a truck at one U-Haul location and drop the truck off at a different U-Haul location. Any person may visit the U-Haul web-site, input a town of origin and town of destination, and secure a computer-generated rate quote.
7. AMERCO is a publicly traded corporation, and holds conference calls with securities analysts on a quarterly basis. Any person may listen to the call live over the internet, or obtain a transcript of the call. During these “earnings conference calls,” U-Haul executives provide information and answer questions about recent business developments.

JURISDICTION

8. At all times relevant herein, respondents U-Haul International, Inc. and AMERCO, have been, and are now, corporations as “corporation” is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.
9. The acts and practices of Respondents, including the acts and practices alleged herein, are in commerce or affect commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

LINE OF COMMERCE

10. U-Haul is the largest competitor in the one-way truck rental business in the United States – the company with the most trucks, the most truck rental locations, the greatest revenues, and the highest market share. U-Haul’s closest competitor, and the principal competitive constraint upon U-Haul’s pricing power, is the next largest truck rental company, Budget. U-Haul and Budget together account for 70 percent of one-way truck rental transactions in the United States. Acting together, U-Haul and Budget could profitably impose higher prices upon consumers.

PRIVATELY COMMUNICATED ATTEMPTS TO COLLUDE

11. Edward J. Shoen is the Chairman of both AMERCO and U-Haul International, Inc. Over several years up to and including 2006, Shoen was aware that price competition from Budget was forcing U-Haul to lower its rates for one-way truck rentals.

12. In 2006, Shoen developed two complementary strategies to eliminate this competition and thereby to secure higher rates. U-Haul regional managers and dealers were instructed by Shoen to implement these strategies.
- a. The U-Haul regional manager should raise one-way rates. Then, the regional manager should contact Budget, inform Budget of U-Haul's conditional rate increase, and encourage Budget to follow - lest U-Haul's rates be reduced to the original level.
 - b. An alternative, pre-collusion strategy was available if the U-Haul regional manager judged that Budget would not presently follow a U-Haul rate increase. In this circumstance, the U-Haul regional manager should lower his one-way rates - below those of Budget. Then, the regional manager should contact Budget and inform Budget of this rate reduction. In this way, U-Haul would teach Budget that its low-price policy was fated to be ineffective. This would prepare the ground for the future implementation by U-Haul of the basic, collusive strategy.
13. In October 2006 and November 2006, U-Haul instructed its regional managers to implement one or the other of the above-described strategies. This plan was described in memoranda authored by Shoen and distributed to the regional managers:

Budget continues in some markets to undercut us on One-Way rates. Either get below them or go up to a fair rate. Whatever you do, LET BUDGET KNOW. Contact a large Budget Dealer and tell them. Contact their company store and let the manager know. Rates of 20¢ a mile One-Way, do not even cover the cost of the truck, let alone, repair, maintenance, license, insurance and Dealer commissions. Either get under their BS rate or get up in a cents per mile range where you might make a profit. . . .

We have been up on transactions and down on gross two months in a row. We are either matching stupid rates or we are above them, but not enough to make a profit.

My direction is either get up to a fair rate or get down below the competitor. EITHER WAY, LET THEM KNOW.

(Emphasis in original).

14. In addition, in October 2006, November 2006, and December 2006, Shoen instructed local U-Haul dealers to communicate with their counterparts at Budget and Penske, re-enforcing the message that: (i) U-Haul has raised its rates, and (ii) competitors' rates should now be raised to match the U-Haul rates. Shoen's memoranda offer U-Haul dealers a script for these inter-firm conversations:

We are successfully meeting or beating our Budget and Penske competitors. However, their rates are WAY TOO LOW. When you and your MCP [regional manager] decide it is time to bring some One-Way rates back up above a money losing [sic] 35¢ mile, have your Dealers let the Budget and Penske Dealers know. Try "Are you tired of renting 500 miles for \$149 and a \$28 commission? Then, tell your Budget/Penske rep that U-Haul is up and they should be too." Dealers know how to have this conversation and who to call to have it . . . [W]e should be able to exercise some price leadership and get a rate that better reflects our costs.

(Emphasis in original).

15. In late 2006 and thereafter, U-Haul representatives contacted Budget and invited price collusion as instructed by Shoen.
16. Robert Magyar is U-Haul's regional manager for the Tampa, Florida area. In October 2006, Magyar received from Shoen, his boss, the instructions described in Paragraphs 13 and 14, above.
17. In response to Shoen's directive, in October 2006, Magyar increased U-Haul's rates for one-way truck rentals commencing in the Tampa area. Next, Magyar telephoned Budget and communicated to Budget representatives that U-Haul had raised its rates in Tampa and that the new rates could be viewed on the U-Haul web-site. Implicit in the conversation, and intended by Shoen and Magyar, was the message that if Budget did not raise its rates, then U-Haul would lower its rates to their original level.
18. Later that month, Magyar sent an email to Shoen describing his communication with Budget representatives. Shoen responded by instructing Magyar to contact Budget again before lowering rates.
19. One year later, in October 2007, Magyar again contacted local Budget locations. Magyar communicated to Budget that U-Haul had increased its one-way truck rental rates, and that Budget should increase its rates as well. In an e-mail message addressed to U-Haul's most senior executives, Magyar related the conversations:

I have also called 3 major Budget locations in Tampa and told them who I am, I spoke about the .40 per mile rates to SE Florida and told them I was killing them on rentals to that area and I am setting new rates to the area to increase revenue per rental. I encouraged them to monitor my rates and to move their rates up. And they did.

PUBLICLY COMMUNICATED ATTEMPT TO COLLUDE

20. In late 2007, Shoen determined that U-Haul should attempt to lead an increase in rates for one-way truck rentals across the United States. Shoen understood that this rate increase could be sustained only if Budget followed.
21. On November 19, 2007, Shoen instructed U-Haul regional managers to raise prices:

Stop **setting** MCO [regional] rates based on Budget's rate. Set the correct rate . . . Budget will come up. Let them.

(Emphasis in original).
22. Budget did not immediately match U-Haul's higher rates. U-Haul instructed its regional managers to maintain the new, higher rates for a while longer – in case Budget should take note and decide to follow.
23. U-Haul held its third quarter fiscal year 2008 earnings conference call on February 7, 2008. Shoen was aware that Budget representatives would monitor the call. (A complete transcript of the earnings conference call is annexed hereto as Exhibit A.)
24. Shoen opened the earnings conference call with a short statement noting, *inter alia*, U-Haul's efforts "to show price leadership." When asked for additional information on industry pricing, Shoen made the following points:
 - a. U-Haul is acting as the industry price leader. The company has recently raised its rates, and competitors should do the same.

[W]e're very, very much trying to function a price leader and not give away share And even in several corridor markets that are highly competitive, I'm trying to exhibit some price leadership because, as I think you have found on your own, there are markets that are being priced well below the cost of providing the service. And I don't really believe the customer wants us to do that on any consistent basis So we've been trying to force prices

So we're pushing for it we're going to continue to push for it. I believe the customer wants us to push for it.

And so by, as I talked about earlier, me trying to get us to exercise price leadership every time we get what we consider to be an opportunity, it's another indicator to them [Budget] as to, hey, don't throw the money away. Price at cost at least.

- b. To date, Budget has not taken notice of, and has not matched, U-Haul's higher rates. This is unfortunate for the entire industry.

I think our competitors have a hard time seeing what we do just because the pricing matrix is so vast and any one decision-maker who does some pricing analysis has a hard time really saying in a way that they could fairly represent to their company the trend is up or the trend is down or more likely U-Haul is holding the line, we don't need to just cut, cut, cut. As a strategy I believe the Budget Truck Rental Company is trying to take U-Haul's price in every single corridor and drop it 1 or 2 or 3 or 4, whatever number they can, percent so that they can just price off of us but down.

Budget appears to be continuing as undercut as their sole pricing strategy

And of course classically this is an industry with three major competitors, the one-way truck businesses, Budget, Penske and U-Haul. Classically you get some price leadership and it manages itself okay. It's when somebody decides they have to gain share from somebody that you get this kind of turbulence that results in no economic gain for the group, in fact probably economic loss. So I remain encouraged and the official position of Budget is that they're not doing this. I didn't listen in on their most recent conference calls, but over the last year I'm sure I listened to two or three of them and their official position is they're not doing this. But many a slip between the cup and the lip If they cave on prices the net effect is we got less money.

- c. U-Haul will wait a while longer for Budget to respond appropriately.

[F]or the last 90 days, I've encouraged everybody who has rate setting authority in the Company to give in more time and see if you can't get it to stabilize. In other words, hold the line at a little higher.

And if they [Budget] perceive that we'll let them come up a little bit, I remain optimistic they'll come up, and it has a profound affect on us.

- d. In order to keep U-Haul from dropping its rates, Budget does not have to match U-Haul's rates precisely. U-Haul will tolerate a small price differential, but only a small price differential. Specifically, a 3 to 5 percent price difference is acceptable.

I'm focusing my people on the overall customer service issues. Okay, what can we do to justify a price difference given that in many cases we're going to be above them? But it's not that hard in the economy to justify 3 or 5% with service in my belief. Now you have to really do it, but I believe we have it and I believe we can really do it. And so that's where I'm driving my people who are delivering the product. I'm not driving them hard on match, match, match.

- c. For U-Haul, market share is more important than price. U-Haul will not permit Budget to gain market share at U-Haul's expense.

[I]f it starts to affect share I'm going to respond, that's all. If the customer doesn't care -- if it's \$10 and the customer doesn't care. But on the other hand, the only reason they do it is if they thought it affected share. So in a way I'm kind of forced to respond

So if we stand still on that they will make share, Budget is a legitimate company. They own lots of facilities and have lots of employees and I'm sure they're fine people if you knew them. But we're not going to just stand still and let that go through.

25. U-Haul acted with the specific intent to facilitate collusion and to achieve market power.
26. Each and all of U-Haul's invitations to collude, if accepted by Budget, would likely result in higher one-way truck rental rates and reduced output.

VIOLATION CHARGED

27. As set forth in Paragraphs 11 through 26 above, U-Haul invited its competitor to collude with U-Haul in violation of Section 5 of the Federal Trade Commission Act, as amended.
28. The acts, policies and practices of Respondents, as alleged herein, constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended. Such acts, policies and practices of Respondents will continue or recur in the absence of appropriate relief.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this day of , 2010, issues its complaint against respondents.

By the Commission.

Donald S. Clark
Secretary

SEAL

**ANALYSIS OF AGREEMENT CONTAINING
CONSENT ORDER TO AID PUBLIC COMMENT**
In the Matter of U-Haul International, Inc. and AMERCO, File No. 081 0157

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a proposed consent order with U-Haul International, Inc. and its parent company AMERCO (collectively referred to as "U-Haul" or "Respondents"). The agreement settles charges that U-Haul violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by inviting its closest competitor in the consumer truck rental industry to join with U-Haul in a collusive scheme to raise rates. The proposed consent order has been placed on the public record for 30 days to receive comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make the proposed order final.

The purpose of this analysis is to facilitate comment on the proposed order. The analysis does not constitute an official interpretation of the agreement and proposed order, and does not modify their terms in any way. Further, the proposed consent order has been entered into for settlement purposes only, and does not constitute an admission by Respondents that it violated the law or that the facts alleged in the complaint (other than jurisdictional facts) are true.

I. The Complaint

The allegations of the complaint are summarized below:

U-Haul is the largest consumer truck rental company in the United States. Edward J. Shoen is the Chairman, President and Director of AMERCO, and the Chief Executive Officer and Chairman of U-Haul International, Inc. U-Haul's primary competitors in the truck rental industry are Avis Budget Group, Inc. ("Budget") and Penske Truck Leasing Co., L.P. ("Penske").

A. Private Communications

For several years leading up to 2006, Mr. Shoen was aware that price competition from Budget was forcing U-Haul to lower its rates for one-way truck rentals. In 2006, Mr. Shoen developed a strategy in an attempt to eliminate this competition and thereby secure higher rates. Mr. Shoen instructed U-Haul regional managers to raise rates for truck rentals, and then contact Budget to inform Budget of U-Haul's conditional rate increase and encourage Budget to follow, or U-Haul's rates would be reduced to the original level.

At about the same time, Mr. Shoen also instructed local U-Haul dealers to communicate with their counterparts at Budget and Penske, with the purpose of re-enforcing the message that U-Haul had raised its rates, and competitors' rates should be raised to match the increased U-Haul rates.

In late 2006 and thereafter, U-Haul representatives contacted Budget and invited price collusion as instructed by Mr. Shoen. The complaint includes specific allegations regarding the U-Haul operation in Tampa, Florida.

U-Haul's regional manager for the Tampa area is Robert Magyar. In October 2006, Mr. Magyar received from Mr. Shoen the instructions described above. In response to Mr. Shoen's directive, Mr. Magyar increased U-Haul's rates for one-way truck rentals commencing in the Tampa area. Next, Mr. Magyar telephoned Budget and communicated to Budget representatives that U-Haul had raised its rates in Tampa, and that the new rates could be viewed on the U-Haul web-site.

One year later, in October 2007, Mr. Magyar again contacted several local Budget locations. Mr. Magyar communicated to Budget that U-Haul had increased its one-way truck rental rates, and that Budget should increase its rates as well. In an e-mail message addressed to U-Haul's most senior executives, Mr. Magyar related the conversations, as follows:

I have also called 3 major Budget locations in Tampa and told them who I am, I spoke about the .40 per mile rates to SE Florida and told them I was killing them on rentals to that area and I am setting new rates to the area to increase revenue per rental. I encouraged them to monitor my rates and to move their rates up. And they did.

B. Public Communications

In late 2007, Mr. Shoen decided that U-Haul should attempt to lead an increase in rates for one-way truck rentals across the United States. Mr. Shoen understood that this rate increase could be sustained only if Budget followed. On November 19, 2007, Mr. Shoen instructed U-Haul regional managers to raise prices. His expectation was that Budget would follow this rate increase.

However, Budget did not immediately match U-Haul's higher rates. U-Haul instructed its regional managers to maintain the new, higher rates for a while longer, in case Budget should take note and decide to follow.

U-Haul held an earnings conference call on February 7, 2008. Mr. Shoen was aware that Budget representatives would monitor the call. Mr. Shoen opened the earnings conference call with a short statement, noting U-Haul's efforts "to show price leadership."¹ When asked for additional information on industry pricing, Mr. Shoen made the following points:

¹ A complete transcript of the earnings conference call is annexed to the complaint as Exhibit A.

1. U-Haul is acting as the industry price leader. The company has recently raised its rates, and competitors should do the same.
2. To date, Budget has not matched U-Haul's higher rates. This is unfortunate for the entire industry.
3. U-Haul will wait a while longer for Budget to respond appropriately, otherwise it will drop its rates.
4. In order to keep U-Haul from dropping its rates, Budget does not have to match U-Haul's rates precisely. U-Haul will tolerate a small price differential, but only a small price differential. Specifically, a 3 to 5 percent price difference is acceptable.
5. For U-Haul, market share is more important than price. U-Haul will not permit Budget to gain market share at U-Haul's expense.

With regard to both the private and public communications, U-Haul acted with the specific intent to facilitate collusion and increase the prices it could charge for truck rentals.

II. Analysis

The term "invitation to collude" describes an improper communication from a firm to an actual or potential competitor that the firm is ready and willing to coordinate on price or output. Such invitations to collude increase the risk of anticompetitive harm to consumers, and as such, can violate Section 5 of the FTC Act.²

If the invitation is accepted and the two firms reach an agreement, the Commission will allege collusion and refer the matter to the Department of Justice for a criminal investigation. In this case, the complaint does not allege that U-Haul and Budget reached an agreement, despite Mr. Magyar's report to his bosses that he privately encouraged Budget to raise its rates "and they did." See Complaint Paragraph 19.

² *In the Matter of Valassis Communications, Inc.*, 141 F.T.C. ____ (C-4160) (2006); *In the Matter of MacDermid, Inc.*, 129 F.T.C. ____ (C-3911) (2000); *In the Matter of Stone Container Corp.*, 125 F.T.C. 853 (1998); *In the Matter of Precision Moulding Co.*, 122 F.T.C. 104 (1996); *In the Matter of YKK (USA) Inc.*, 116 F.T.C. 628 (1993); *In the Matter of A.E. Clevite, Inc.*, 116 F.T.C. 389 (1993); *In the Matter of Quality Trailer Products Corp.*, 115 F.T.C. 944 (1992). In addition, invitations to collude may be violations of Section 2 of the Sherman Act as acts of attempted monopolization (*United States v. American Airlines*, 743 F.2d 1114 (5th Cir. 1984), *cert. dismissed*, 474 U.S. 1001 (1985)); as well as violations under the federal wire and mail fraud statutes, (*United States v. Ames Sintering Co.*, 927 F.2d 232 (6th Cir. 1990)).

Even if no agreement was reached it does not necessarily mean that no competitive harm was done.³ An unaccepted invitation to collude may facilitate coordinated interaction by disclosing the solicitor's intentions and preferences. For example, in this case Budget learned from Mr. Magyar that if Budget raised its rates U-Haul would not undercut Budget. Thus, the improper communication from U-Haul could have encouraged Budget to raise rates. Similarly, the public statements made by the CEO of U-Haul could have encouraged competitors to raise rates.

Although this case involves particularly egregious conduct, it is possible that less egregious conduct may result in Section 5 liability. It is not essential that the Commission find repeated misconduct attributable to senior executives, or define a market, or show market power, or establish substantial competitive harm, or even find that the terms of the desired agreement have been communicated with precision.

III. The Proposed Consent Order

U-Haul has signed a consent agreement containing the proposed consent order. The proposed consent order consists of seven sections that work together to enjoin U-Haul from inviting collusion and from entering into or implementing a collusive scheme.

Section II, Paragraph A of the proposed consent order enjoins U-Haul from inviting a competitor to divide markets, to allocate customers, or to fix prices. Section II, Paragraph C prohibits U-Haul from entering into, participating in, maintaining, organizing, implementing, enforcing, inviting, offering or soliciting an agreement with any competitor to divide markets, to allocate customers, or to fix prices. Section II, Paragraph B bars U-Haul from discussing rates with its competitors, with a proviso permitting legitimate market research.

The proviso in Section II, Paragraph D prevents the proposed order from interfering with U-Haul's efforts to negotiate prices with prospective customers, and it would permit U-Haul to provide investors with considerable information about company strategy. This proviso also permits U-Haul to communicate publicly any information required by the federal securities laws.

³ The Commission has previously explained that there are several legal and economic reasons to punish firms that invite collusion even when acceptance cannot be proven. First, it may be difficult to determine whether a particular solicitation has or has not been accepted. Second, the conduct may be harmful and serves no legitimate business purpose. Third, even an unaccepted solicitation may facilitate coordinated interaction by disclosing the intentions or preferences of the party issuing the invitation. *In the Matter of Valassis Communications, Inc.*, Analysis of Agreement Containing Consent Order To Aid Public Comment, 71 Fed. Reg. 13976, 13978-79 (Mar. 20, 2006). See generally P. Areeda & H. Hovenkamp, VI ANTITRUST LAW ¶1419 (2003).

Sections III, IV, V, and VI of the proposed order include several terms that are common to many Commission orders, facilitating the Commission's efforts to monitor respondents' compliance with the order. Section IV, Paragraph A requires a periodic submission to the Commission of unredacted copies of certain internal U-Haul documents. This provision is necessary because U-Haul impeded the Federal Trade Commission's investigation of this matter. Specifically, U-Haul submitted to the Commission, in response to a *subpoena duces tecum*, documents authored by Mr. Shoen, from which were redacted many of the sentences quoted in the complaint. In the Commission's view, there was no justification for the redaction. The proposed order should deter repetition of this conduct.

Finally, Section VII provides that the proposed order will expire in 20 years.

**Statement of Chairman Leibowitz,
Commissioner Kovacic, and Commissioner Rosch**

In the Matter of U-Haul Int'l, Inc. and AMERCO

FTC File No. 081-0157

June 9, 2010

The Commission today has entered into a consent agreement with U-Haul and its parent company, AMERCO, resolving the Commission's allegation that they attempted to collude on truck rental prices. The parties have settled an invitation-to-collude case and not a Sherman Antitrust Act Section 1 conspiracy case. Put differently, the complaint in this case alleges an unfair method of competition in violation of Section 5 of the FTC Act that does not also constitute an antitrust violation.

Invitations to collude are the quintessential example of the kind of conduct that should be – and has been – challenged as a violation of Section 5 of the Federal Trade Commission Act,¹ which may limit follow-on private treble damage litigation from Commission action while still stopping inappropriate conduct. In contrast to conspiracy claims that would violate Section 1, invitations to collude do not require proof of an agreement; nor do they require proof of an anticompetitive effect. The Commission has not alleged that Respondents entered into an agreement with Budget or any other competitors in violation of Section 1. Today's Commission action is instead based on evidence that Respondents unilaterally attempted to enter into such an agreement. The Commission therefore has reason to believe that Respondents engaged in conduct that is within Section 5's reach.

¹ *In re Valassis Comme'ns, Inc.*, F.T.C. File No. 051-008, 2006 FTC LEXIS 25 (April 19, 2006) (Complaint); *In re MacDermid, Inc.*, F.T.C. File No. 991-0167, 1999 FTC LEXIS 191 (Feb. 4, 2000) (Complaint, Decision and Order); *In re Stone Container Corp.*, 125 F.T.C. 853 (1998) (June 3, 1998) (Complaint, Decision and Order); *In re Precision Moulding Co.*, 122 F.T.C. 104 (Sept. 3, 1996) (Complaint, Decision and Order); *In re YKK (USA) Inc.*, 116 F.T.C. 628 (July 1, 1993) (Complaint); *In re A.E. Clevite, Inc.*, 116 F.T.C. 389 (June 8, 1993) (Complaint); *In re Quality Trailer Products Corp.*, 115 F.T.C. 944 (Nov. 5, 1992) (Complaint).

0510094

**UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION**

COMMISSIONERS: **Deborah Platt Majoras, Chairman**
 Pamela Jones Harbour
 Jon Leibowitz
 William E. Kovacic
 J. Thomas Rosch

In the Matter of
NEGOTIATED DATA SOLUTIONS LLC,
a limited liability company.

Docket No. C-

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. § 41 et seq., and by virtue of the authority vested in it by said Act, the Federal Trade Commission (“Commission”), having reason to believe that Negotiated Data Solutions LLC (hereinafter referred to as “Respondent”) has violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this Complaint stating its charges as follows:

NATURE OF THE CASE

1. Through this action, the Commission challenges a course of conduct whereby Respondent, and its predecessor in interest, Vertical Networks, Inc. (“Vertical”), engaged in unfair acts or practices and unfair methods of competition through which it sought to break a licensing commitment that its predecessor, National Semiconductor (“National”), made to the Institute of Electrical and Electronics Engineers (“IEEE”), a standard setting organization, in 1994. The relevant standard, which included the technology subject to the licensing commitment, was subsequently adopted by the industry.
2. The conduct at issue in this action has caused or threatened to cause substantial harm to competition and to consumers, and will in the future cause or threaten to cause further substantial injury to competition and to consumers, absent the issuance of appropriate relief in the manner set forth below.

RESPONDENT

3. Respondent is a limited liability company organized, existing, and doing business under and by virtue of the laws of the State of Illinois, with its office and principal place of business located at 1550 N. Lake Shore Drive, No. L6C, Chicago, Illinois 60610.
4. Respondent is engaged in the business of licensing patents that it has acquired. Respondent does not produce or manufacture tangible products.
5. Respondent is, and at all relevant times has been, a person, partnership, or corporation within the meaning of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and at all times relevant herein, Respondent has been, and is now, engaged in commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

THE DEVELOPMENT OF THE FAST ETHERNET STANDARD

6. In or about 1983, the IEEE published the first 802.3 standard, the Ethernet standard, which allowed computer equipment attached to a local area network ("LAN") to transmit data across a copper wire at a rate of 10 megabits per second ("Mbps"). Computer equipment manufacturers subsequently adopted the Ethernet standard which ensured that their equipment would be interoperable.
7. In or about 1993, the IEEE authorized the 802.3 Working Group to develop a new standard based on the Ethernet standard to meet the demand for higher data transmission rates. Employees of National were members of and active participants in the 802.3 Working Group.
8. The new standard, commonly referred to as "Fast Ethernet," would allow equipment attached to a LAN to transmit data across a copper wire at 100 Mbps.
9. The 802.3 Working Group wanted Fast Ethernet equipment to be compatible, to the extent possible, with then-existing LANs based on the original Ethernet standard, which operated at substantially slower data transmission rates. The terms "autodetection" and "autonegotiation" were used to refer to technology that would permit such compatibility by enabling two devices at opposing ends of a network link to exchange information and automatically configure themselves to optimize their communication.
10. In 1994, National proposed that the 802.3 Working Group incorporate an autonegotiation technology developed by National, and referred to as "NWay," into the Fast Ethernet standard. National had filed a patent application for that technology, Ser. No. 07/971,018, in 1992.

11. The 802.3 Working Group considered several alternative technologies to National's "NWay" technology prior to the adoption of the Fast Ethernet standard. It also considered adopting a Fast Ethernet standard without an autonegotiation feature.
12. At IEEE meetings to determine which autodetection technology to include in the 802.3 standard, one or more representatives of National publicly announced that if NWay technology were chosen, National would license NWay to any requesting party for a one-time fee of one thousand dollars (\$1,000). National made that assurance fully knowing that, as a result, it could be forgoing significant licensing revenues.
13. In a subsequent letter dated June 7, 1994, and addressed to the Chair of the 802.3 Working Group of IEEE, National wrote:

National Semiconductor Corporation ("National") is pleased to be a contributing member of the IEEE 802.3 Working Group responsible for developing an autodetection standard based upon National's architecture informally known as "NWay." To further demonstrate its support for this effort, National would like to make clear its position with respect to prospective licensing of National's intellectual property rights in its NWay technology.

In the event that the IEEE adopts an autodetection standard based upon National's NWay technology, National will offer to license its NWay technology to any requesting party for the purpose of making and selling products which implement the IEEE standard. Such a license will be made available on a nondiscriminatory basis and will be paid-up and royalty-free after payment of a one-time fee of one thousand dollars (\$1,000.00).
14. The IEEE adopted a Fast Ethernet standard with an autodetection feature based upon the NWay technology after National made its licensing commitment. National's one thousand dollar licensing commitment was a significant factor contributing to the incorporation of NWay technology into the 802.3 standard. For example, various IEEE members were aware of and relied upon National's one thousand dollar licensing commitment when they voted to include NWay as the autodetection technology in the 802.3 standard.
15. National benefited financially from its licensing assurance. The assurance accelerated sales of National products that conformed to the Fast Ethernet standard by (a) speeding completion of the standard by allaying concerns about the future costs of autonegotiation, and (b) increasing the demand for Fast Ethernet products by making them backward compatible with Ethernet equipment already installed on existing LANs.

INDUSTRY ADOPTION OF THE FAST ETHERNET STANDARD

16. IEEE published the Fast Ethernet standard with National's NWay autonegotiation technology in 1995. By that time, Ethernet was the dominant standard for wired LANs and there were millions of Ethernet ports installed in the United States.
17. Inclusion of autonegotiation technology in the Fast Ethernet standard enabled owners of existing Ethernet-based LANs to purchase and install multi-speed, Fast Ethernet-capable equipment on a piecemeal basis without having to upgrade the entire LAN at once or buy extra bridging equipment.
18. Since 1995, dozens of manufacturers, including many of whom did not participate in the standard setting process, incorporated the Fast Ethernet standard with the NWay technology into hundreds of millions of computer devices such as personal computers, switches, routers, DSL and cable modems, wireless LAN access points, IP phones, and other equipment. Several of these firms were aware of National's commitment to license NWay technology for a one-time fee of one thousand dollars. Standardizing on a single autonegotiation technology allowed Fast Ethernet devices made by different manufacturers to work with one another and with legacy Ethernet equipment.
19. By 2001, there were no commercially viable alternative autonegotiation technologies for Ethernet. The inclusion of NWay in the Fast Ethernet standard and the subsequent adoption of that standard by the industry eliminated viable autonegotiation technology alternatives from the marketplace.
20. The Fast Ethernet standard with the NWay technology became the industry standard after its publication. The standard and the technology have been integrated into hundreds of millions of computer devices and equipment. NWay is the only autonegotiation technology that works with this installed base of wired Ethernet and Fast Ethernet equipment. As a result the industry has been locked into using NWay technology since at least 2001.
21. The inclusion of NWay technology into the Fast Ethernet standard and the subsequent adoption of that standard by the industry conferred monopoly power which otherwise would not have existed.

ASSIGNMENT OF THE PATENTS TO VERTICAL NETWORKS

22. National was issued U.S. Patent No. 5,617,418 ("the '418 Patent") on April 1, 1997, and U.S. Patent No. 5,687,174 ("the '174 Patent") on November 11, 1997. Both patents arose from a common parent application, Ser. No. 07/971,018, which National had filed on November 2, 1992. National later received equivalent counterpart patents issued by certain foreign governments. Hereinafter, the '174, the '418, and the equivalent counterpart foreign patents are

collectively referred to as “the Patents.” The ’174 and ’418 Patents expire in 2014.

23. On or about June 30, 1998, National assigned to Vertical all rights, titles and interests in nine U.S. patents and their foreign counterparts. The Patents were included in that assignment.
24. Prior to the assignment of the Patents, National gave Vertical a copy of the June 7, 1994 letter. Vertical acknowledged at the time that it had been informed “that several of the patents may be ‘encumbered’ by whatever actions [National] may have taken in the past with respect to the IEEE standards.” The final agreement between Vertical and National stated that the assignment is “subject to any existing licenses and other encumbrances that [National] may have granted.” It further provided, “Existing licenses shall include. . . [p]atents that may be encumbered under standards such as an IEEE standard.”

BREACH OF THE LICENSING COMMITMENT

25. Vertical was struggling financially by late 2001 in the wake of the “dot com” bust and the shakeout of the telecommunications industry. Vertical sought to generate new revenue streams by licensing its patents and enforcing its rights against third parties it believed might infringe those patents.
26. In Spring 2002, Vertical also sought to alter the terms of National’s licensing commitment to the IEEE in an effort to increase the prices it could charge those companies that implemented the Fast Ethernet standard and NWay.
27. In a March 27, 2002 letter to the IEEE, Vertical asserted that one or more of the Patents “may be applicable to portions and/or amendments of” IEEE standard 802.3. In that same letter, Vertical promised to make available to any party a non-exclusive license under the Patents “on a non-discriminatory basis and on reasonable terms and conditions including its then current royalty rates.” The March 27, 2002 letter referred to the June 7, 1994 letter, although it did not describe the terms of that letter. In particular, Vertical did not mention that National had committed to license NWay for a one-time fee of one thousand dollars. The 2002 letter concluded by claiming that “the assurances provided in this letter supersede any assurances provided by National Semiconductor Corporation relevant to the above-identified patents.”
28. At or around the same time it sent the letter to the IEEE, Vertical identified approximately sixty-four “Target Companies.” Vertical subsequently sent letters to many of the “Target Companies” demanding licensing fees on a per unit basis for “802.3-compliant auto-negotiating products.” Those demands represent a substantial increase over National’s commitment to license the NWay technology for a one-time fee of one thousand dollars.

29. Vertical made a “conservative estimate” that the Patents cover at least seventy percent of Ethernet port shipments worldwide. Based on market data, Vertical projected that the Patents would generate more than \$20 million a year in licensing revenue.
30. Several companies sought to accept the original licensing offer and tendered \$1,000 in accordance with the June 7, 1994 letter. Vertical rejected those acceptances.
31. Vertical threatened or initiated legal actions against companies that refused to pay the royalties it demanded. As a result of that effort, several companies entered into licensing agreements that have produced licensing fees for the Patents far in excess of \$1,000 per company.
32. Companies are locked into using NWay given the installed base of Ethernet and Fast Ethernet computer equipment, the incompatibility of NWay with alternative autonegotiation technologies, and the significant costs associated with a decision to abandon autonegotiation altogether.
33. On or about November 14, 2003, Vertical assigned the Patents to Respondent. Subsequently, Vertical sold its remaining business assets and ceased operations.
34. Respondent possessed a copy of, and was familiar with the June 7, 1994 letter of assurance when it received assignment of the Patents from Vertical. A principal of Respondent had represented Vertical in the negotiations in 1998 that led to National’s agreement assigning the Patents to Vertical.
35. Respondent has asserted and continues to assert that making, using, selling, offering for sale, or importing things that employ NWay autonegotiation technology infringes the Patents.

HARM TO COMPETITION & CONSUMERS

36. The acts and practices of Respondent, as herein alleged, were and are to the prejudice and injury of consumers, are continuing and will continue in the absence of the relief herein requested. The injury to consumers of NWay technology include, but are not limited to, the following:
 - a. increased royalties (or other payments) associated with the manufacture, sale, use or importation of products that implement an IEEE standard enabling autonegotiation by or with 802.3 compliant products; and
 - b. increases in price and/or reductions in the use or output of products that implement an IEEE standard enabling autonegotiation by or with 802.3 compliant products.

37. The threatened or actual anticompetitive effects of Respondent's conduct include, but are not limited to, the following:
- a. increased royalties (or other payments) associated with the manufacture, sale, use or importation of products that implement an IEEE standard enabling autonegotiation by or with 802.3 compliant products;
 - b. increases in price and/or reductions in the use or output of products that implement an IEEE standard enabling autonegotiation by or with 802.3 compliant products;
 - c. decreased incentives on the part of semiconductor chip and LAN equipment manufacturers to produce products that implement IEEE standards enabling autonegotiation by or with 802.3 compliant products;
 - d. decreased incentives on the part of semiconductor chip and LAN equipment manufacturers and others to participate in IEEE or other standard setting activities; and
 - e. both within and outside the semiconductor chip and LAN equipment industries decreased reliance, or willingness to rely, on standards established by industry standard setting organizations.

VIOLATIONS ALLEGED

38. The acts and practices of Respondent, as described in Paragraphs 1-38 above, incorporated herein by reference, constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.
39. Respondent's course of conduct has caused and is likely to continue to cause substantial injury to consumers of NWay technology that could not reasonably be avoided and is not outweighed by countervailing benefits to consumers or competition. Therefore, Respondent's conduct, as described in paragraphs 1-37 above, incorporated herein by reference, constitute unfair acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this __ day of _____, 2008, issues its complaint against Respondent.

By the Commission.

Donald S. Clark
Secretary

SEAL:

**ANALYSIS OF PROPOSED CONSENT
ORDER TO AID PUBLIC COMMENT**

In the Matter of Negotiated Data Solutions LLC, File No. 051 0094

The Federal Trade Commission (“Commission”) has accepted, subject to final approval, an Agreement Containing Consent Order (“Agreement”) with Negotiated Data Solutions LLC (“N-Data”), a limited liability company whose sole activity is to collect royalties in connection with a number of patents. The Agreement settles allegations that N-Data has violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by engaging in unfair methods of competition and unfair acts or practices relating to the Ethernet standard for local area networks. Pursuant to the Agreement, N-Data has agreed to be bound by a proposed consent order (“Proposed Consent Order”).

The Proposed Consent Order has been placed on the public record for thirty (30) days for comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the Agreement and the comments received and will decide whether it should withdraw from the Agreement or make final the Agreement’s Proposed Consent Order.

The purpose of this analysis is to facilitate comment on the Proposed Consent Order. This analysis does not constitute an official interpretation of the Proposed Consent Order, and does not modify its terms in any way. The Agreement has been entered into for settlement purposes only, and does not constitute an admission by N-Data that the law has been violated as alleged or that the facts alleged, other than jurisdictional facts, are true.

Background

The Institute of Electrical and Electronics Engineers (“IEEE”) is a standard-setting organization active in a number of different industries. IEEE standards often enhance the interoperability of communications products. One important example, which is at issue here, is the 802 series of networking standards. Many of the standards in the 802 series allow users to reliably access and share information over communications systems by interconnecting many compatible products manufactured by different producers.

The IEEE 802.3 standard, first published in 1983, and commonly referred to as “Ethernet,” applies to local area networks (“LANs”) built on copper, and more recently fiber optic, cables. That standard initially accommodated a maximum data transmission rate of 10 megabits per second (10 Mbps) between networked devices. By 1994, the 802.3 Working Group was developing a new 802.3 standard for “Fast Ethernet,” which would transmit data across a copper wire at 100 Mbps. The Working Group determined that it would be desirable for Fast Ethernet equipment to be compatible, to the extent possible, with existing LAN equipment and with future generations of equipment. A technology, variously known as “autodetection” and “autonegotiation,” was developed that would permit such compatibility.

Employees of National Semiconductor Corporation (“National”) were members and active participants in the 802.3 Working Group. In 1994, National proposed that the 802.3 Working Group adopt its autonegotiation technology, referred to as “NWay,” into the Fast Ethernet standard. At the time, National disclosed to the Working Group that it had already filed for patent protection for the technology. Several other participants also had developed competing technologies and the Working Group considered several alternatives, each having advantages and disadvantages compared to NWay. The 802.3 Working Group also considered adopting the Fast Ethernet standard without any autonegotiation feature.

At IEEE meetings to determine which autonegotiation technology to include in 802.3, one or more representatives of National publicly announced that if NWay technology were chosen, National would license NWay to any requesting party for a one-time fee of \$1,000. In a subsequent letter dated June 7, 1994, and addressed to the Chair of the 802.3 Working Group of IEEE, National wrote:

In the event that the IEEE adopts an autodetection standard based upon National’s NWay technology, National will offer to license its NWay technology to any requesting party for the purpose of making and selling products which implement the IEEE standard. Such a license will be made available on a nondiscriminatory basis and will be paid-up and royalty-free after payment of a one-time fee of one thousand dollars (\$1,000).

Based on National’s licensing assurance, and following its normal balloting and voting procedures, IEEE incorporated NWay technology into the Fast Ethernet standard, which IEEE published in final form in July 1995. To maintain compatibility with the installed base of Ethernet and Fast Ethernet equipment, subsequent revisions of the 802.3 standard also have incorporated NWay autonegotiation technology. The “Fast Ethernet” standard became the dominant standard for LANs, and users are now locked in to using NWay technology due to network effects and high switching costs. Therefore, today, autonegotiation technologies other than NWay are not attractive alternatives to NWay for manufacturers who want to include inter-generational compatibility in their Ethernet products.

NWay contributed to the success of Fast Ethernet technology in the marketplace. An installed base of millions of Ethernet ports operating at 10 Mbps already existed when IEEE published the Fast Ethernet standard. The autonegotiation technology in the Fast Ethernet standard allowed owners of existing Ethernet-based LANs to purchase and install multi-speed, Fast Ethernet-capable equipment on a piecemeal basis without having to upgrade the entire LAN at once or buy extra equipment to ensure compatibility.

National benefitted financially from its licensing assurance. The assurance accelerated sales of National products that conformed to the Fast Ethernet standard by first, allaying concerns about the future costs of autonegotiation, and so speeding completion of the standard, and second, making Fast Ethernet-compatible products backward compatible with Ethernet

equipment already installed on existing LANs, increasing the demand for Fast Ethernet products by those with existing systems.

In 1997, the United States Patent and Trademark Office issued U.S. Patent Nos. 5,617,418 and 5,687,174 (the '418 and '174 Patents) to National. Both patents arose from the patent application that National disclosed to the IEEE in 1994. National later received equivalent patents in other countries.

In 1998, National assigned a number of patents, including the '418 and the '174 Patents, to Vertical Networks ("Vertical"), a telecommunications start-up company founded by former National employees. Before the assignment, National gave Vertical a copy of the June 7, 1994 letter to the 802.3 Working Group. Vertical's outside patent counsel, Mr. Alan Loudermilk, acknowledged in writing that National had informed him "that several of the patents may be 'encumbered'" by actions National had taken with respect to the IEEE standards. The final agreement between Vertical and National stated that the assignment was "subject to any existing licenses that [National] may have granted." It further provided, "Existing licenses shall include ... [p]atents that may be encumbered under standards such as an IEEE standard"

In 2001, Vertical turned to its intellectual property portfolio in an effort to generate new revenues by licensing its technology to third parties. One aspect of this strategy was Vertical's effort to repudiate the \$1,000 licensing term contained in National's 1994 letter of assurance to the IEEE. On March 27, 2002, Vertical sent a letter to the IEEE that purported to "supersede" any previous licensing assurances provided by National. Vertical identified nine U.S. patents assigned to it by National, including the '174 and '418 patents, and promised to make available to any party a non-exclusive license "on a non-discriminatory basis and on reasonable terms and conditions including its then current royalty rates."

In the Spring of 2002, Vertical developed a list of "target companies" that practiced the IEEE 802.3 standard and which it believed infringed on the '174 and '418 patents. Vertical sought to enforce the new licensing terms on these companies. These companies, which included many large computer hardware manufacturers, represented a substantial majority of all producers of 802.3 ports. Vertical's patent counsel, Mr. Loudermilk, sent letters to most of these companies between 2002 and 2004 offering a license for patents covering aspects of "the auto-negotiation functionality" in networking products, including products compliant with IEEE 802.3. Vertical also filed suit against a number of companies alleging that "switches, hubs, routers, print servers, network adapters and networking kits" having autonegotiating compatibility, infringed its '174 and '418 patents. Vertical entered into several licensing agreements producing licensing fees far in excess of \$1,000 from each licensed company.

In late 2003, Vertical assigned some of its patent portfolio, including the '174 and '418 patents, to N-Data, a company owned and operated by Mr. Loudermilk.¹ N-Data was aware of National's June 7, 1994 letter of assurance to the IEEE when Vertical assigned those patents to N-Data. Yet it rejected requests from companies to license NWay technology for a one-time fee of \$1,000. Instead, N-Data threatened to initiate, and in some cases prosecuted, legal actions against companies refusing to pay its royalty demands, which are far in excess of that amount.

The Proposed Complaint

Vertical and N-Data sought to exploit the fact that NWay had been incorporated into the 802.3 standard, and had been adopted by the industry for a number of years, by renegeing on a known commitment made by their predecessor in interest. Even if their actions do not constitute a violation of the Sherman Act, they threatened to raise prices for an entire industry and to subvert the IEEE decisional process in a manner that could cast doubt on the viability of developing standards at the IEEE and elsewhere. The threatened or actual effects of N-Data's conduct have been to increase the cost of practicing the IEEE standards, and potentially to reduce output of products incorporating the standards.² N-Data's conduct also threatens to reduce the incentive for firms to participate in IEEE and in other standard-setting activities, and to rely on standards established by standard-setting organizations.

The Proposed Complaint alleges that this conduct violates Section 5 of the FTC Act in two ways: first, N-Data engaged in an unfair method of competition; and second, N-Data engaged in an unfair act or practice.

1. Unfair Method of Competition

N-Data's conduct constitutes an unfair method of competition. The Supreme Court in *FTC v. Sperry & Hutchinson Co.* endorsed an expansive reading of the "unfair method of competition" prong of Section 5, stating that the Commission is empowered to "define and proscribe an unfair competitive practice, even though the practice does not infringe either the letter or spirit of the antitrust laws" and to "proscribe practices as unfair . . . in their effect on

¹ Vertical subsequently sold its remaining business assets and ceased operations.

² The conduct by Vertical and N-Data has led to, or threatened to lead to, increased prices in the markets for autonegotiation technology (1) used in 802.3 compliant products and (2) used in products that implement an IEEE standard enabling autonegotiation with 802.3 compliant products.

competition.”³ That description of the scope of Section 5 accords with the legislative history of Section 5.⁴

Notwithstanding that broad description, the unfair method of competition prong of Section 5 is subject to limiting principles. The first relates to the nature of the conduct. In *OAG*, the Second Circuit held that such a violation could not be found where the respondent “does not act coercively.”⁵ Similarly, in *Ethyl* the Second Circuit held that “at least some indicia of oppressiveness must exist”⁶ This requirement is met here, given N-Data’s efforts to exploit the power it enjoys over those practicing the Fast Ethernet standard and lacking any practical alternatives. This form of patent hold-up is inherently “coercive” and “oppressive” with respect to firms that are, as a practical matter, locked into a standard.

The second limiting principle relates to the effects of the conduct. Although the Supreme Court has made it clear that the respondent’s conduct need not violate the letter (or even the spirit) of the antitrust laws to fall under Section 5, that does not mean that conduct can be considered an unfair method of competition if it has no adverse effect at all on competition. That requirement, however, is also satisfied here, given the conduct’s adverse impact on prices for autonegotiation technology and the threat that such conduct poses to standard-setting at IEEE and elsewhere.

Respondent’s conduct here is particularly appropriate for Section 5 review. IEEE’s determination to include National’s technology in its standard rested on National’s commitment to limit royalties to \$1,000. That commitment had substantial competitive significance because it extended not to a single firm, but rather to an industry-wide standard-setting organization. Indeed, in the standard-setting context with numerous, injured third parties who lack privity

³ *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 239 (1972); see also *FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447, 454 (1986). See generally Concurring Opinion of Commissioner Jon Leibowitz, *In re Rambus, Inc.*, Docket No. 9302, available at <http://www.ftc.gov/os/adjpro/d9302/060802rambusconcurringopinionofcommissionerleibowitz.pdf>; Statement of Commissioner J. Thomas Rosch, “Perspectives on Three Recent Votes: the Closing of the Adelpia Communications Investigation, the Issuance of the Valassis Complaint & the Weyerhaeuser Amicus Brief,” before the National Economic Research Associates 2006 Antitrust & Trade Regulation Seminar, Santa Fe, New Mexico (July 6, 2006) at 5-12, available at <http://www.ftc.gov/speeches/rosch/Rosch-NERA-Speech-July6-2006.pdf>.

⁴ See, e.g., Cong. Rec. 12,153 (1914) (statement of Sen. Robinson) (“unjust, inequitable or dishonest competition” proscribed), 51 Cong. Rec. 12,154 (1914) (statement of Sen. Newlands) (conduct that is “contrary to good morals” proscribed).

⁵ *Official Airline Guides v. FTC*, 630 F.2d 920, 927 (2d Cir. 1980) (“*OAG*”).

⁶ *E.I. Du Pont v. de Nemours & Co. v. FTC*, 729 F.2d 128, 139-40 (2d Cir. 1984) (“*Ethyl*”).

with patentees and with the mixed incentives generated when members may be positioned to pass on royalties that raise costs market-wide—contract remedies may prove ineffective, and Section 5 intervention may serve an unusually important role.

N-Data's conduct, if allowed, would reduce the value of standard-setting by raising the possibility of opportunistic lawsuits or threats arising from the incorporation of patented technologies into the standard after a commitment by the patent holder. As a result, firms may be less likely to rely on standards, even standards that already exist. In the creation of new standards, standard-setting organizations may seek to avoid intellectual property entirely, potentially reducing the technical merit of those standards as well as their ultimate value to consumers.

A mere departure from a previous licensing commitment is unlikely to constitute an unfair method of competition under Section 5. The commitment here was in the context of standard-setting. The Supreme Court repeatedly has recognized the procompetitive potential of standard-setting activities. However, because a standard may displace the normal give and take of competition, the Court has not hesitated to impose antitrust liability on conduct that threatens to undermine the standard-setting process or to render it anticompetitive.⁷ The conduct of N-Data (and Vertical) at issue here clearly has that potential.⁸

2. Unfair Act or Practice

N-Data's efforts to unilaterally change the terms of the licensing commitment also constitute unfair acts or practices under Section 5 of the FTC Act. The FTC Act states that "unfair or deceptive acts or practices in or affecting commerce[] are . . . unlawful." An unfairness claim under this part of Section 5 must meet the following statutory criteria:

The Commission shall have no authority . . . to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably

⁷ See *Standard Sanitary Mfg. Co. v. United States*, 226 U.S. 20, 41 (1912); *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500 (1989); *Am. Soc'y of Mech. Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 571 (1982).

⁸ It is worth noting that, because the proposed complaint alleges stand-alone violations of Section 5 rather than violations of Section 5 that are premised on violations of the Sherman Act, this action is not likely to lead to well-founded treble damage antitrust claims in federal court. See Herbert Hovenkamp, *Federal Antitrust Policy* at 588 (2d ed. 1999).

avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.⁹

The Commission may consider established public policies as evidence to be considered with all other evidence, though not as a primary basis for a determination of unfairness.¹⁰ As the Eleventh Circuit emphasized in *Orkin Exterminating Co. v. FTC*,¹¹ the Commission has applied limiting principles requiring a showing that (1) the conduct caused “substantial consumer injury,” (2) that injury is “not . . . outweighed by any countervailing benefits to consumers or competition that the practice produces,” and (3) it is an injury that “consumers themselves could not reasonably have avoided.”¹²

This Section 5 claim against the efforts of Vertical and N-Data to unilaterally increase the price for the relevant technology by knowingly renegeing on National’s commitment meets these statutory criteria, and thus constitutes a violation of Section 5’s prohibition of unfair acts and practices. NWay was chosen for the standard on the basis of the assurances made by National to the IEEE 802.3 Working Group. Further, the industry relied, at least indirectly, on National’s assurances regarding pricing, and made substantial and potentially irreversible investments premised on those representations. After the standard became successful, and it became difficult, if not impossible, for the industry to switch away from the standard, Vertical and then N-Data took advantage of the investments made by these firms by renegeing on National’s commitment. Because it is now no longer feasible for the industry to remove the technologies, the value that N-Data was able to extract from market participants was due to the opportunistic nature of its conduct rather than the value of the patents.¹³

Accordingly, an action against this conduct meets the criteria set forth in the statute and in *Orkin*. First, N-Data’s renegeing on its pricing commitments here involved “substantial consumer

⁹ 15 U.S.C. § 45(n) (1992).

¹⁰ *Id.*

¹¹ *Orkin Exterminating Co. v. FTC*, 849 F.2d 1354, 1364 (11th Cir. 1988).

¹² See Letter from Federal Trade Commission to Senators Ford and Danforth (Dec. 17, 1980), reprinted in H.R. Rep. No. 156, Pt. 1, 98th Cong., 1st Sess. 33-40 (1983) available at <http://www.ftc.gov/bcp/policystmt/ad-unfair.htm>, appended to the Commission’s decision in *International Harvester*, 104 F.T.C. at 949, 1061 (1984), and subsequently codified by Congress at 15 U.S.C. § 45(n).

¹³ The IEEE designed its rules to avoid just such a result. IEEE’s stated purpose for requesting letters of assurance was to avoid giving “undue preferred status to a company” and to ensure that the adoption of a technology would not be “prohibitively costly or noncompetitive to a substantial part of the industry.” 1994 *IEEE Standards Operations Manual* §6.3.

injury.” The increase in royalties demanded by Vertical Networks and later N-Data could result in millions of dollars in excess payments from those practicing the standard, not to mention the legal fees those firms might spend defending lawsuits.¹⁴ In addition, often in market-wide standard-setting contexts, the licensees have an incentive to pass along higher costs to the ultimate consumers who purchase the products.¹⁵ Thus, these end consumers who purchase products using N-Data’s technology may face increased prices due to the higher royalties. Further, those demands also have no apparent “countervailing benefit” to those upon whom demands have been made, ultimate consumers, or to competition – so the second requirement is also met. With respect to the third requirement, both the Commission and the Eleventh Circuit in *Orkin* stated that consumers “may act to avoid injury before it occurs if they have reason to anticipate the impending harm and the means to avoid it, or they may seek to mitigate the damage afterward if they are aware of potential avenues to that end.”¹⁶ Here, those who created the standard had no way to anticipate the repudiation of the price commitment before it occurred and, apart from expensive litigation, those locked into the standard had no way to avoid the threatened injury posed by the demands that they faced. Thus, those practicing the standard were locked in to even a greater extent than the consumers in *Orkin*. Put simply, this is a form of what has been described as “patent hold-up.”

The facts alleged in the complaint here are similar to those found in the Commission’s decision in *Orkin*, which was affirmed by the Eleventh Circuit.¹⁷ In that case, the respondent signed contracts with consumers to supply lifetime extermination services at a fixed annual renewal fee. Years later, the respondent unilaterally increased these fees. Consumers needing extermination services had no reason to anticipate Orkin’s unilateral price increase and there was no evidence that they could contract with Orkin’s competitors on terms similar to Orkin’s initial terms. The Commission held, and the Eleventh Circuit agreed, that Orkin’s unilateral price increase was an unfair act or practice under Section 5. Similarly, National made non-expiring royalty commitments that Vertical and N-Data later repudiated with unilateral increases, which

¹⁴ The Commission has a “longstanding position that the statutory prohibition against ‘unfair or deceptive acts or practices’ includes practices that victimize businesspersons as well as those who purchase products for their own personal or household use,” given that businesses “clearly do consume goods and services that may be marketed by means of deception and unfairness.” Brief of Federal Trade Commission as Amicus Curiae at 3-4, 8-9, *Vermont v. International Collection Service, Inc.*, 594 A.2d 426 (Vt. 1991) (citing cases); see also, e.g., 16 C.F.R. § 436.1 (FTC rule protecting franchisees); *United States Retail Credit Ass’n v. FTC*, 300 F.2d 212 (4th Cir. 1962) (deception involving business clients); *United States Ass’n of Credit Bureaus, Inc. v. FTC*, 299 F.2d 220 (4th Cir. 1962) (same).

¹⁵ Susan A. Creighton, *Cheap Exclusion*, 72 ANTITRUST L.J. 975, 994 (2005).

¹⁶ *Orkin*, 849 F.2d at 1365.

¹⁷ *In re Orkin Exterminating Co.*, 108 F.T.C. 263 (1986), *aff’d*, 849 F.2d 1354 (11th Cir. 1988).

the industry could not have reasonably anticipated before the market wide adoption of the standard and which consumers had no chance of avoiding due to network effects and lock-in.

Clearly, merely breaching a prior commitment is not enough to constitute an unfair act or practice under Section 5. The standard-setting context in which National made its commitment is critical to the legal analysis. As described above, the lock-in effect resulting from adoption of the NWay patent in the standard and its widespread use are important factors in this case. In addition, the established public policy of supporting efficient standard-setting activities is an important consideration in this case.¹⁸ Similarly, it must be stressed that not all breaches of commitments made by owners of intellectual property during a standard-setting process will constitute an unfair act or practice under Section 5. For example, if the commitment were immaterial to the adoption of the standard or if those practicing the standard could exercise countermeasures to avoid injury from the breach, the statutory requirements most likely would not be met. Finally, it needs to be emphasized that not all departures from those commitments will be treated as a breach. The *Orkin* court suggested that there might be a distinction between an open-ended commitment and a contract having a fixed duration.¹⁹ That distinction does not apply here because the context of the commitment made it plain that it was for the duration of National's patents. However, most such commitments, including the one here, are simply to offer the terms specified. Indeed, those principles are reflected in the remedy set forth in the consent decree.

The Proposed Consent Order

The Proposed Consent Order prohibits N-Data from enforcing the Relevant Patents, defined in the order, unless it has first offered to license them on terms specified by the order. The terms of that license follow from those promised by National Semiconductor in its letter of June 7, 1994, to the IEEE. Specifically, N-Data must offer a paid-up, royalty-free license to the Relevant Patents in the Licensed Field of Use in exchange for a one-time fee of \$1,000. The form of this license is attached as Appendix C to the order. The Licensed Field of Use is defined in the license as the "use of NWay Technology to implement an IEEE Standard," and this includes "optimization and enhancement features" that are consistent with such use. NWay Technology is defined in the license to have the same meaning as it did in the June 7, 1994 letter, and the license gives examples of documents describing the use of NWay Technology.

The Commission recognizes that some firms may inadvertently allow the \$1,000 offer from N-Data to languish. Therefore, if an offeree has failed to accept such an offer within 120

¹⁸ See *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500-01 (1998) (regarding the potential procompetitive advantages of private associations promulgating safety standards).

¹⁹ *Orkin*, 849 F.2d at 1361.

days, the Proposed Consent Order allows N-Data to sue to enforce the Relevant Patents. At the time N-Data files suit, however, it must make a second offer. This second offer provides a prospective licensee with an opportunity to accept the patent license specified by the order in return for a payment of thirty-five thousand dollars (\$35,000). The requirement that the second offer be delivered in the context of litigation gives N-Data an incentive to pursue patent enforcement only against companies over which it has a reasonable likelihood of prevailing in court. It will also ensure that the second offer will receive the full attention of knowledgeable counsel for the offeree. A \$35,000 license fee will offset some of N-Data's costs of litigation, and it will discourage recipients of an initial offer from simply waiting to be sued, and then accepting the first offer. The offeree's time to accept the second offer expires with the time to file a responsive pleading to the filing that accompanies the second offer. After that, the amount that N-Data can collect from an accused infringer is not limited by the order.

The Proposed Consent Order requires N-Data to distribute copies of the complaint and the Proposed Consent Order to specified persons. It also prohibits N-Data from transferring any of the Relevant Patents, except to a single person who has agreed to be bound by the Proposed Consent Order and by the patent licenses formed thereunder. The Proposed Consent Order also contains standard reporting, notification and access provisions designed to allow the Commission to monitor compliance. It terminates twenty (20) years after the date it becomes final.

STATEMENT OF THE FEDERAL TRADE COMMISSION
In the Matter of Negotiated Data Solutions LLC
File No. 0510094

The Federal Trade Commission (“Commission”) has voted to issue a Complaint against Negotiated Data Solutions LLC (“N-Data”) and to accept the proposed consent agreement settling it.¹ The Complaint in this matter alleges that N-Data reneged on a prior licensing commitment to a standard-setting body and thereby was able to increase the price of an Ethernet technology used by almost every American consumer who owns a computer. Based on the facts developed by staff during the investigation, we find reason to believe that this conduct violated Section 5 of the FTC Act.²

The impact of Respondent’s alleged actions, if not stopped, could be enormously harmful to standard-setting.³ Standard-setting organization participants have long worried about the impact of firms failing to disclose their intellectual property until after industry lock-in. Many standard-setting organizations have begun to develop policies to deal with that problem. But if N-Data’s conduct became the accepted way of doing business, even the most diligent standard-setting organizations would not be able to rely on the good faith assurances of respected companies. The possibility exists that those companies would exit the business, and that their patent portfolios would make their way to others who are less interested in honoring commitments than in exploiting industry lock-in.⁴ Congress created the Commission precisely to challenge just this sort of conduct.

To prohibit such unacceptable behavior, the Commission today accepts a proposed consent agreement premised on a Complaint that identifies two separate violations. First, we find that N-Data’s alleged conduct is an unfair method of competition. Second, we find that this conduct is also an unfair act or practice.

There is little doubt that N-Data’s conduct constitutes an unfair method of competition.⁵ The legislative history from the debate regarding the creation of the

¹ Commissioners Harbour, Leibowitz, and Rosch support the issuance of the Complaint and proposed consent agreement and join in this statement.

² Section 5 of the FTC Act prohibits “unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce.” 15 USC § 45(a)(1).

³ One dissent recites a different set of facts than those alleged in the Complaint. We do not agree with that version of the facts. Rather, we believe that staff’s investigation, as described in the Analysis to Aid Public Comment, accurately depicts the facts in this case.

⁴ See generally Fed. Trade Comm’n, *To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy* ch. 2 at 31, n. 220; ch. 3 at 38-41, available at <http://www.ftc.gov/os/2003/10/innovationrpt.pdf> (2003) (conduct by “non-producing entities” – sometimes referred to as ‘patent trolls’ – may harm consumers when such firms force manufacturers to agree to licenses after the manufacturers have sunk substantial investments into technologies).

⁵ See, e.g., *E.I. du Pont de Nemours & Co. v. FTC*, 729 F.2d 128 (2d Cir. 1984) (“*Ethyl*”); *Official Airline Guides v. FTC*, 630 F.2d 920 (2d Cir. 1980). The conduct falls squarely within the parameters of cases like *Ethyl*. One dissent quotes a passage from the *Ethyl* decision; even that excerpt

Commission is replete with references to the types of conduct that Congress intended the Commission to challenge. *See, e.g.*, 51 Cong. Rec. 12,153 (1914) (statement of Sen. Robinson) (“unjust, inequitable or dishonest competition”), 51 Cong. Rec. 12,154 (1914) (statement of Sen. Newlands) (conduct that is “contrary to good morals”). The Supreme Court apparently agrees as it has found that the standard for “unfairness” under the FTC Act is “by necessity, an elusive one, encompassing not only practices that violate the Sherman Act and the other antitrust laws, but also practices that the Commission determines are against public policy for other reasons.” *F.T.C. v. Ind. Fed’n of Dentists*, 476 U.S. 477, 454 (1986); *see also F.T.C. v. Sperry & Hutchinson Co.*, 405 U.S. 233, 242 (1972) (FTC has authority to constrain, among other things “deception, bad faith, fraud or oppression”).

We also have no doubt that the type of behavior engaged in by N-Data harms consumers. The process of establishing a standard displaces competition; therefore, bad faith or deceptive behavior that undermines the process may also undermine competition in an entire industry, raise prices to consumers, and reduce choices.⁶ We have previously

makes clear that a Section 5 violation can be found when there are “some indicia of oppressiveness” such as “coercive...conduct.” For the reasons stated in the Analysis to Aid Public Comment, we find reason to believe that Respondent engaged in conduct that was both oppressive and coercive when it engaged in efforts to exploit licensees that were locked into a technology by the adoption of a standard. We believe the Analysis to Aid Public comment adequately describes the limiting principles applicable here. *See generally* Statement of Commissioner J. Thomas Rosch, *Perspectives on Three Recent Votes: the Closing of the Adelphia Communications Investigation, the Issuance of the Valassis Complaint & the Weyerhaeuser Amicus Brief*, before the National Economic Research Associates 2006 Antitrust & Trade Regulation Seminar, Santa Fe, New Mexico (July 6, 2006) at 5-12, available at <http://www.ftc.gov/speeches/rosch/Rosch-NEEA-Speech-July6-2006.pdf>; Concurring Opinion of Commissioner Jon Leibowitz, *In re Rambus, Inc.*, Docket No. 9302, available at <http://www.ftc.gov/os/adjpro/d9302/060802rambusconcurringopinionofcommissionerleibowitz.pdf>.

One dissent cites the Areeda and Hovenkamp antitrust treatise as well as several other sources to mistakenly suggest that there is a “scholarly consensus” that an unfair method of competition cannot be found under Section 5 unless there is liability under the antitrust laws. Most of the sources cited by the dissent, however, actually support the Analysis to Aid Public Comment, which notes that, although Section 5 extends beyond the antitrust laws, there are limitations on its reach. Indeed, Professor Hovenkamp has explicitly acknowledged that there is a lack of consensus on the scope and application of Section 5. *See* HERBERT HOVENKAMP, *FEDERAL ANTI-TRUST POLICY* at 596-97 (3d ed. 2005). Professor Hovenkamp states that “[i]f there are two views about the wisdom of the FTC’s use of Section 5” and goes on to discuss “[A]n alternative view, perfectly consistent with the proposition that the FTC’s antitrust concern should be limited to identifying practices that are economically anticompetitive.” Under that alternative view, it is appropriate to apply “the FTC Act to practices that do not violate the other antitrust laws . . . when (1) the practice seems anticompetitive but is not technically covered by the antitrust laws; and (2) the social cost of an error seems to be relatively small.” The social cost of an error here is small given the nature of the remedy and the low likelihood that a Commission consent order will be followed by a valid antitrust-based class action suit. *See id.* (“Findings of violations of the FTC Act that are not also antitrust violations will not support subsequent private actions for treble damages”). We nevertheless recognize Commissioner Kovacic’s concern that FTC “unfair methods” cases may support private actions based on state law, and join him in encouraging comment on that issue.

⁶ *See Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500 (1989); *Am. Soc’y of Mech. Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 571 (1982); *Standard Sanitary Mfg. Co. v. United States*, 226 U.S. 20, 41 (1912). *See generally* *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 310-314 (3d Cir. 2007).

noted that “[i]ndustry standards are widely acknowledged to be one of the engines driving the modern economy.”⁷ Conduct like N-Data’s – which undermines standard-setting – threatens to stall that engine to the detriment of all consumers.

N-Data’s conduct is also an unfair act or practice under Section 5(n) of the FTC Act and *Orkin Exterminating Co.*, 108 F.T.C. 263 (1986), *aff’d*, 849 F.2d 1354 (11th Cir. 1988). This Commission – *unanimously* – has often found an unfair act or practice proscribed by Section 5 in conduct that victimizes businesses (as well as individuals) who are consumers. The dissent would distinguish those cases on the ground that the businesses here are all “large, sophisticated computer manufacturers” who are able to protect themselves. There is no basis for that distinction in Section 5. In any event, moreover, there is no basis in the record of this investigation for describing all of the “locked in” licensees that way. Similarly, as discussed in detail in the Analysis to Aid Public Comment, no meaningful distinction can be drawn between the circumstances in *Orkin*, where the respondent sought to exploit consumers who were “locked into” long term contracts, and the unique circumstances of this case, where licensees are “locked into” the standard containing technology controlled by this Respondent.

We recognize that some may criticize the Commission for broadly (but appropriately) applying our unfairness authority to stop the conduct alleged in this Complaint. But the cost of ignoring this particularly pernicious problem is too high. Using our statutory authority to its fullest extent is not only consistent with the Commission’s obligations, but also essential to preserving a free and dynamic marketplace.

⁷ U.S. Dep’t of Justice & Fed. Trade Comm’n, *Antitrust Enforcement And Intellectual Property Rights: Promoting Innovation And Competition* 33, available at <http://www.ftc.gov/reports/innovation/P040101PromotingInnovationandCompetitionrpt0704.pdf> (2007).

Dissenting Statement of Chairman Majoras
In the Matter of Negotiated Data Solutions LLC, File No. 0510094

I respectfully dissent from the decision to lodge a Complaint in this matter and to accept the settlement described in the majority's *Analysis of Proposed Consent Order to Aid Public Comment* ("Analysis"). The facts do not support a determination of antitrust liability. The preconditions for use of stand-alone Section 5 authority to find an "unfair method of competition" are not present. And the novel use of our consumer protection authority to protect large corporate members of a standard-setting organization ("SSO") is insupportable.

This case presents issues that appear on first inspection to resemble those in our line of standard-setting "hold up" challenges, including *Unocal*,¹ *Dell*,² and *Rambus*.³ As we and the Justice Department have explained jointly, "multiple technologies may compete to be incorporated into the standard under consideration"⁴ by an SSO. Once a technology has been selected and the standard that incorporates the technology has been specified, however, the standard's adopters often will face significant relative costs in switching to an alternative standard. "[T]he chosen technology may lack effective substitutes precisely because the SSO chose it as the standard. Thus, . . . the owner of a patented technology necessary to implement the standard may have the power to extract higher royalties or other licensing terms that reflect the absence of competitive alternatives. Consumers of the products using the standard would be harmed if those higher royalties were passed on in the form of higher prices."⁵ In an effort to avoid the hold-up problem, some SSOs take measures to protect their members, such as imposing patent disclosure rules or securing agreement on licensing terms.⁶

¹ *In re Union Oil Company of California*, 2004 FTC LEXIS 115 (FTC 2004) ("Unocal"), available at <http://www.ftc.gov/os/adjpro/d9305/040706commissionopinion.pdf>.

² *In re Dell*, 121 F.T.C. 616 (1996).

³ *In re Rambus*, FTC Dkt. No. 9302 (Liability Opinion, July 31, 2006), *appeal pending*, Docket Nos. 07-1086, 07-1124 (D.C. Cir. 2007).

⁴ U.S. Department of Justice and Federal Trade Commission, ANTI-TRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION (April 2007) at 35-36 [hereinafter "DOJ/FTC Intellectual Property Report"], available at <http://www.ftc.gov/reports/innovation/P040101PromotingInnovationandCompetitionrpt0704.pdf>.

⁵ *Id.* at 36. See also Chairman Deborah Platt Majoras, *Recognizing the Procompetitive Potential of Royalty Discussions in Standard Setting*, Remarks before the Stanford University Conference on Standardization and the Law: Developing the Golden Mean for Global Trade (September 2005), available at <http://www.ftc.gov/speeches/majoras/050923stanford.pdf>.

⁶ DOJ/FTC Intellectual Property Report, *supra* note 4, at 36.

This case departs materially from the prior line, however, in that there is no allegation that National engaged in improper or exclusionary conduct to induce IEEE to specify its NWay technology in the 802.3u standard. No one contends that National deceived SSO members at the time of its initial licensing offer in 1994. Further, from the time National submitted its letter of assurance in 1994 and at least until 2002, some patent holders changed or clarified the terms of their letters of assurance – even after the relevant standard was approved. And although a new IEEE bylaw, passed in January 2002, purported to make patent letters irrevocable, it did not address whether it was to apply retroactively. When Vertical submitted its 2002 proposal under which it would offer its entire patent portfolio that originated with National for license on reasonable and nondiscriminatory terms, the IEEE’s Patent Administrator did not object to the departure from the \$1,000 commitment, even while requesting and securing specific changes to Vertical’s proposal. The IEEE then appeared to have accepted the revised proposal by posting Vertical’s letter on its web site along with National’s June 7, 1994 letter.

There is also a substantial question as to whether N-Data enjoyed measurable market power, even with the adoption of the IEEE standard. Under the terms of the standard, the NWay technology was an optional technique. Although National in 1994 had offered to grant a paid-up, royalty-free license to the technology for \$1,000 to anyone seeking to practice the standard, no company had sought to accept the offer until after publication of the 2002 revision on the IEEE web site. And despite ongoing licensing efforts by National’s successors, Vertical and N-Data, only one company paid materially more than the originally-quoted \$1,000 for rights to the NWay technology.⁷ Most users evidently have preferred to infringe, running the risk of presumably minimal patent damages that they might face at the outcome of litigation.

Thus, the facts do not support antitrust liability here.

The majority evidently agrees that respondent’s conduct does not amount to improper acquisition or maintenance of monopoly power so as to fall within the ambit of Section 2 of the Sherman Act. Instead, the majority seeks to find liability purely under Section 5 of the FTC Act. This is not advisable as a matter of policy or prosecutorial discretion.

The majority’s first theory is that N-Data engaged in an unfair method of competition. Although Section 5 enables the Commission to reach conduct that is not actionable under the Sherman or Clayton Acts, we have largely limited ourselves to matters in which respondents took actions short of a fully consummated Section 1 violation (but with clear potential to harm

⁷ Paragraph 31 of the Complaint alleges that “several companies” entered into license agreements that have produced fees “far in excess” of \$1,000 per company. In fact, three companies entered into license agreements (with Vertical) for the patents. N-Data has never received royalties or fees from those agreements, nor, as I understand it, has it collected any royalties for the relevant patents on terms inconsistent with those offered in the 1994 letter. N-Data itself has initiated suit against one company, with which it had a dispute involving numerous patents other than those at issue in this case.

competition), such as invitations to collude.⁸ This limitation is partly self-imposed, reflecting the Commission's recognition of the scholarly consensus that finds the Sherman and Clayton Acts, as currently interpreted, to be sufficiently encompassing to address nearly all matters that properly warrant competition policy enforcement.⁹ But the limitation also reflects the insistence of the appellate courts that the Commission's discretion is bounded and must adhere to limiting principles. In *E.I. du Pont de Nemours & Co. v. FTC*, for example, the Second Circuit stated: "[w]hen a business practice is challenged by the Commission, even though, as here, it does not violate the antitrust or other laws and is not collusive, coercive, predatory or exclusionary in character, standards for determining whether it is 'unfair' within the meaning of § 5 must be formulated to discriminate between normally acceptable business behavior and conduct that is unreasonable or unacceptable."¹⁰ Writing in the context of a challenge to parallel conduct that

⁸ See, e.g., *In re Valassis Communications, Inc.*, Docket No. C-4160, FTC File No. 051 008 (Complaint), available at <http://www.ftc.gov/os/caselist/0510008/0510008c4160ValassisComplaint.pdf>. In its *Analysis*, the Commission explained that competition would not be adequately protected if antitrust enforcement were directed only at consummated cartel agreements. The Commission further explicated the several legal (including precedent) and economic justifications that support the imposition of liability upon firms that communicate an invitation to collude where acceptance cannot be proven. Prior to the *Valassis* case, the Commission entered into consent agreements in several cases alleging that an invitation to collude – though unaccepted by the competitor – violated Section 5 of the FTC Act. *MacDermid, Inc.*, Docket No. C-3911, FTC File No. 991 0167 (Decision & Order), available at <http://www.ftc.gov/os/2000/02/macdermid.do.htm>; *Stone Container Corp.*, 125 F.T.C. 853 (1998); *Precision Moulding Co.*, 122 F.T.C. 104 (1996); *YKK (USA) Inc.*, 116 F.T.C. 628 (1993); *A.E. Clevite, Inc.*, 116 F.T.C. 389 (1993); *Quality Trailer Products Corp.*, 115 F.T.C. 944 (1992).

⁹ See, e.g., 5 JULIAN O. VON KALINOWSKI, PETER SULLIVAN & MAUREEN MCGUIRL, ANTI-TRUST LAWS AND TRADE REGULATION, § 77.02 at 77-3 (2007) ("the prevailing view is that there are limitations on Section 5's applicability to conduct which stretches beyond the letter of [the Sherman or Clayton Acts]."); 2 PHILIP AREEDA & HERBERT HOVENKAMP, ANTI-TRUST LAW ¶ 302(h) (2006) ("Apart from possible historical anachronisms in the application of those statutes, the Sherman and Clayton Acts are broad enough to cover any anti-competitive agreement or monopolistic situation that ought to be attacked whether 'completely full blown or not.');" Richard A. Posner, *The Federal Trade Commission: A Retrospective*, 72 ANTI-TRUST L.J. 761, 766 (2005) ("It used to be thought that 'unfair methods of competition' swept further than the practices forbidden by the Sherman and Clayton Acts, and you find this point repeated occasionally even today, but it is no longer tenable. The Sherman and Clayton Acts have been interpreted so broadly that they no longer contain gaps that a broad interpretation of Section 5 of the FTC Act might be needed to fill."); John F. Graybeal, *Unfair Trade Practices, Antitrust And Consumer Welfare In North Carolina*, 80 N.C. L. REV. 1927, 1949 (2002) ("Undoubtedly, the FTC today will proceed with great caution under section 5 to claim as an unfair method of competition any conduct that does not violate the Sherman or Clayton Acts."). See also ABA SECTION OF ANTI-TRUST LAW, ANTI-TRUST LAW DEVELOPMENTS (6th ed. 2007) ("FTC decisions have been overturned despite proof of anticompetitive effect where the courts have concluded that the agency's legal standard did not draw a sound distinction between conduct that should be proscribed and conduct that should not.").

¹⁰ 729 F.2d 128, 138 (2d Cir. 1984).

did not arise from an agreement but that facilitated oligopolistic coordination, the Second Circuit adopted this test:

In our view, before business conduct in an oligopolistic industry may be labelled “unfair” within the meaning of § 5 a minimum standard demands that, absent a tacit agreement, at least some indicia of oppressiveness must exist such as (1) evidence of anticompetitive intent or purpose on the part of the producer charged, or (2) the absence of an independent legitimate business reason for its conduct. . . . In short, in the absence of proof of a violation of the antitrust laws or evidence of collusive, coercive, predatory, or exclusionary conduct, business practices are not “unfair” in violation of § 5 unless those practices either have an anticompetitive purpose or cannot be supported by an independent legitimate reason.¹¹

In its *Analysis*, the majority extends the *du Pont* formulation to the monopolization family, asserting that respondent’s conduct was “coercive” and “oppressive” and had an “adverse impact on prices for autonegotiation technology[.]”¹² These assertions are impossible to prove on the evidence we have. N-Data asserts that its renegotiation of its licensing terms was motivated by nothing other than an independent, business reason – that is, the aim of collecting royalties for a new bundle of intellectual property rights on reasonable and non-discriminatory terms. Even if N-Data were motivated by a desire to strike a better bargain than National made several years earlier, that alone should not be considered a competition-related offense. If the majority’s theory is that the evasion of contractual price constraints triggers liability under Section 5 without a concurrent determination that the conduct violates the Sherman Act, then we are headed down a slippery slope, and I take no comfort from the majority’s representation to the contrary. Parties often enter into contractual commitments involving asset-specific investments, creating the potential for opportunism. The majority has not identified a meaningful limiting principle that indicates when an action – taken in the standard-setting context or otherwise – will be considered an “unfair method of competition.”

Pursuing a second theory, the majority invokes consumer protection doctrine to find that respondent has engaged in an “unfair act or practice” in violation of Sections 5(a) and (n) of the FTC Act.¹³ Section 5(n) provides a clear limitation of the Commission’s authority: “[t]he

¹¹ *Id.* at 139-140.

¹² *Analysis* at 5.

¹³ In *Rambus*, the Commission drew upon its experience with the law regarding deceptive acts or practices, which has been developed largely in consumer protection contexts, to inform our analysis of deception before an SSO as part of an exclusionary course of conduct. *Rambus*, *supra* note 3, at 29-30. We did so, however, within a framework based on Sherman Act jurisprudence, recognizing, *inter alia*, the need to examine competitive effects. *Id.* at 28-31. The majority’s extension of our authority over unfair acts or practices, which Congress has specifically limited in Section 5(n), raises altogether different issues.

Commission shall have no authority under this section or section 57a of this title to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.”¹⁴ The evidence simply does not support the requisite findings.

In particular, finding “substantial consumer injury” here requires the majority to treat large, sophisticated computer manufacturers as “consumers.” I do not agree with such a characterization, and I have serious policy concerns about using our consumer protection authority to intervene in a commercial transaction to protect the alleged “victims” here. The *Analysis* accurately states that the FTC has used its authority under Section 5 to protect small businesses against unfair acts and practices. We have taken care to exercise this authority judiciously, however, to protect small businesses, non-profits, churches, and “mom and pop” operations¹⁵ that lack the resources and, in some cases, the experience or understanding to defend themselves adequately against fraud. Indeed, certain of these small business owners, non-profit volunteers, and clergy had personally guaranteed the contracts at issue. There is a clear qualitative difference between these entities and the computer manufacturers that the majority treats as injured consumers in this matter.¹⁶

¹⁴ 15 U.S.C. § 45(n) (2000). See also *International Harvester Co.*, 104 F.T.C. 949, 1061 (1984).

¹⁵ See, e.g., *FTC v. Websource Media, LLC*, No. H-06-1980 (S.D. Tex. filed June 12, 2006) (unfair practice of “cramming” unauthorized charges onto the telephone bills of small businesses); *FTC v. Certified Merchant Services, Ltd.*, No. 4:02CV44 (E.D. Tex. filed February 11, 2002) (unfair practice of unilaterally inserting additional pages that describe substantial, undisclosed charges into credit card processing contracts with small business merchants); *FTC v. IFC Credit Corp.*, No. 07C3155 (N.D. Ill. filed June 6, 2007) (unfair practice of accepting and collecting on invalid, fraudulently induced equipment contracts with small businesses and religious and other nonprofit organizations). The majority cites to the Franchise Rule as another example of the Commission using its Section 5 consumer protection authority to protect small businesses from deceptive practices. While the Franchise Rule, which requires certain disclosures prior to the sale of a franchise, sometimes protects businesses, it typically protects individual consumers that are purchasing franchises rather than sophisticated corporations. In adopting amendments to the Franchise Rule earlier this year, the Commission exempted from the Rule’s coverage several categories of sophisticated investors. 16 C.F.R. § 436.8(a).

¹⁶ Some may argue that the Commission has already made the policy decision to treat businesses as consumers, and that there is no rational distinction between the companies we have protected and large corporations. I disagree. Although it is important to draw lines, there is such a vast difference between sophisticated corporations, on the one hand, and storefront shops, on the other, that we do not need to draw a bright line to distinguish this matter from previous cases the Commission has brought to protect small businesses.

As I stated above, I am not convinced that any party was injured. And certainly the evidence does not support the finding that the alleged injury here was “not reasonably avoidable” (assuming, of course, that injury can be made out at all). The membership of IEEE includes computer networking equipment manufacturers and telecommunications companies. IEEE knew that its members sometimes made or attempted to make changes in patent commitment letters, and it could have acted sooner to protect its members from potentially adverse changes to commitment letters. IEEE also could have objected to Vertical’s revisions, but instead it accepted and published them without objection. Moreover, any individual company could have entered into a binding agreement with National, but none sought timely to accept the 1994 royalty offer.

In re Orkin Exterminating Co., Inc.,¹⁷ on which the majority relies, is fundamentally different from the instant matter. Orkin unilaterally increased its fees for more than 200,000 consumers, all of whom had signed written contracts that could readily be understood to be binding and that committed to a lifetime fee structure that would not increase.¹⁸ If consumers paid the amount specified in their contracts, Orkin’s policy was to return the payments. Thus, unlike the situation here, *Orkin* involved both (a) large numbers of individual consumers, and (b) widespread injury that the consumers could not reasonably avoid.

For all of these reasons, I respectfully dissent.

¹⁷ 108 F.T.C. 263 (1986), *aff’d*, *FTC v. Orkin*, 849 F.2d 1354 (11th Cir. 1988).

¹⁸ Orkin pamphlets echoed this commitment, promising that the annual fee would “never increase.” 108 F.T.C. at 356.

DISSENTING STATEMENT OF COMMISSIONER WILLIAM E. KOVACIC**In the Matter of****Negotiated Data Solutions, LLC, File No. 051-0094**

I oppose the Commission's decision to accept for comment the settlement described in the Analysis to Aid Public Comment ("Analysis"). Like Chairman Majoras,¹ I would not find that the Respondent engaged in an unfair method of competition or an unfair act or practice within the meaning of Section 5 of the Federal Trade Commission Act. Below I discuss two of the considerations that have influenced my thinking about this matter. These can serve as focal points for public comment before the Commission votes on whether to make the provisional settlement final.

Effect on Private Rights of Action

The Commission concludes that the respondent did not violate the Sherman Act or the Clayton Act. The Commission finds that the respondent violated Section 5 of the Federal Trade Commission Act because its conduct constituted both an unfair method of competition and an unfair act or deceptive practice. One reason the Commission gives for basing liability on Section 5 alone is that, unlike liability theories premised on infringements of the Sherman or Clayton Acts, private parties cannot use FTC intervention premised on Section 5 alone to support claims for treble damages in subsequent federal antitrust suits. The Commission's assumption that a pure Section 5 theory will have no spillover effects seems to be important to the result it reaches. Footnote 8 of the Analysis says:

It is worth noting that, because the proposed complaint alleges stand-alone violations of Section 5 rather than violations of Section 5 that are premised on violations of the Sherman Act, this action is not likely to lead to well-founded treble damage antitrust claims in federal court.

If the absence of spillover effects in private litigation is important to the Commission's decision, then the proposed settlement must account for the impact of FTC decisions upon the prosecution of claims based on state, as well as federal, causes of action.

¹Dissenting Statement of Chairman Majoras, In the Matter of Negotiated Data Solutions LLC, File No. 0510094.

The Commission overlooks how the proposed settlement could affect the application of state statutes that are modeled on the FTC Act and prohibit unfair methods of competition (“UMC”) or unfair acts or practices (“UAP”). The federal and state UMC and UAP systems do not operate in watertight compartments. As commentators have documented, the federal and state regimes are interdependent. See, e.g., Dee Pridgen, *Consumer Protection and the Law* 214-22 (2007 Edition) (discussing use of FTC precedent to interpret state consumer protection statutes); Lawrence Fullerton et al., *Reliance on FTC Consumer Protection Law Precedents in Other Legal Forums* (American Bar Association, Section of Antitrust Law, Working Paper No. 1, July 1988) (describing how FTC consumer protection actions inform application of state law). By statute or judicial decision, courts in many states interpret the state UMC and UAP laws in light of FTC decisions, including orders. As a consequence, such states might incorporate the theories of liability in the settlement and order proposed here into their own UMC or UAP jurisprudence. A number of states that employ this incorporation principle have authorized private parties to enforce their UMC and UAP statutes in suits that permit the court to impose treble damages for infringements.

If the Commission desires to deny the reasoning of its approach to private treble damage litigants, the proposed settlement does not necessarily do so. If the Commission’s assumption of no spillover effects is important to its decision, a rethink of the proposed settlement and order seems unavoidable.

The Basis of Liability

The proposed settlement treats the Respondent’s conduct as both an unfair method of competition and an unfair act or practice. When a public agency pleads alternative theories of liability, especially in a settlement with a party that appears to lack the means to threaten credibly to litigate, it should specify the distinctive contributions of each theory to the prosecution of the matter. Suppose that an agency comfortably could premise its allegation of infringement upon theory A. If the agency decides to premise liability upon theory B as well as theory A, it is good practice for the agency to explain what theory B adds to the mix.

The Analysis here does not discuss why the Commission endorses separate UMC and UAP claims. The Analysis does not integrate the two theories of liability. A fuller effort to explain the relationship between the theories of liability in the Analysis would have led the Commission to confront anomalies in its exposition of the decision to prosecute. For example, the framework that the Analysis presents for analyzing the challenged conduct as an unfair act or practice would appear to encompass all behavior that could be called a UMC or a violation of the Sherman or Clayton Acts. The Commission’s discussion of the UAP liability standard accepts the view that all business enterprises – including large companies – fall within the class of consumers whose injury is a worthy subject of unfairness scrutiny. If UAP coverage extends to the full range of business-to-business transactions, it would seem that the three-factor test prescribed for UAP analysis would capture all actionable conduct within the UMC prohibition and the proscriptions of the Sherman and Clayton Acts. Well-conceived antitrust cases (or UMC cases) typically

address instances of substantial actual or likely harm to consumers. The FTC ordinarily would not prosecute behavior whose adverse effects could readily be avoided by the potential victims – either business entities or natural persons. And the balancing of harm against legitimate business justifications would encompass the assessment of procompetitive rationales that is a core element of a rule of reason analysis in cases arising under competition law.

The prospect of a settlement can lead one to relax the analytical standards that ordinarily would discipline the decision to prosecute if the litigation of asserted claims was certain or likely. This is particularly the case when, as in this matter, the respondent has indicated during negotiations that, for various reasons, it will not litigate and will accept a settlement. If the Commission had in mind specific analytical grounds for including both theories of liability (for example, because each theory standing alone contained weaknesses as foundations for the settlement), the Analysis omits them. In the logic of the Analysis, the UAP theory subsumes the UMC standard and makes the UMC provision superfluous. If the UAP concept is so broad, it is not evident what reasoning in this case supports the parallel inclusion of the UMC claim. More generally, it seems that the Commission's view of unfairness would permit the FTC in the future to plead all of what would have been seen as competition-related infringements as constituting unfair acts or practices.

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of

Valassis Communications, Inc.,
a corporation

DOCKET NO. C-

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. § 41 *et seq.*, and by virtue of the authority vested in it by said Act, the Federal Trade Commission (“Commission”), having reason to believe that Valassis Communications, Inc., a corporation, has violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this Complaint stating its charges in that respect as follows:

Preliminary Allegations

1. Respondent Valassis Communications, Inc. (“Valassis” or “respondent”) is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 19975 Victor Parkway, Livonia, Michigan 48152.
2. The line of commerce relevant to assessing respondent’s anticompetitive conduct is the production and distribution in the United States of cooperative free-standing inserts (“FSI’s”). FSI’s are multi-page booklets containing discount coupons for the products of various firms; these booklets are inserted into newspapers for distribution to consumers. For manufacturers of consumer packaged goods and others, FSI’s are a uniquely efficient means of distributing coupons on a mass scale. Entry into the relevant market is difficult and is not likely to deter or counteract the competitive harm described below.
3. For over a decade, there have been only two U.S. publishers of FSI’s: Valassis and News America Marketing (“News America”). On a typical Sunday, both the Valassis FSI and the News America FSI are distributed by hundreds of newspapers to over 50 million households.

4. Valassis is a publicly traded corporation, and holds a conference call with securities analysts on a quarterly basis. Any person may listen to the call live over the internet, or obtain a transcript of the call from the Valassis website. During these “earnings conference calls,” Valassis executives provide information and answer questions about recent business developments.
5. As detailed below, during the course of an earnings conference call in July 2004, Valassis invited its competitor News America to join with Valassis in a scheme to allocate FSI customers and to fix FSI prices. Valassis intended thereby to bring an end to the price war being waged in the FSI industry.

The FSI Price War

6. Between 1998 and 2001, Valassis and News America each published approximately fifty percent of FSI industry pages. Valassis’ minimum price or “floor price” during this period was \$6 per full page per thousand booklets.
7. In June 2001, Valassis notified its clients of a five percent price increase. On all future contracts, Valassis’ FSI floor price would be \$6.30 for a full page. Valassis anticipated that News America would follow its FSI price increase.
8. News America did not follow the Valassis price move. As a result, News America captured additional customers and built up a substantial market share lead.
9. Valassis largely adhered to its \$6.30 floor price for eight months. In February 2002, Valassis determined that the company had waited as long as it could for a favorable signal from News America, and rolled back the price increase.
10. Over a three year period (2001-2004), FSI prices fell by nearly 20 percent due to competition between Valassis and News America. By 2004, FSI prices were below \$5 per full page. Valassis’ strategic objective, announced publicly on numerous occasions, was to regain a 50 percent share of the FSI market.

Valassis Invites its Competitor to Collude

11. In mid-2004, Valassis determined that its aggressive pursuit of greater market share was no longer serving the company’s interests. Company executives developed a new strategy. Valassis would communicate to News America its readiness to cease challenging for News America customers, provided that News America ceased competing for Valassis customers. This would enable each firm to raise FSI prices within its uncontested domain.

12. Valassis held its second quarter 2004 earnings conference call on July 22, 2004. Valassis executives were aware that News America representatives would be monitoring the call. A complete transcript of the earnings conference call is annexed hereto as Exhibit A.
13. The President and Chief Executive Officer of Valassis, Alan Schultz, opened the earnings conference call by detailing the company's new strategy for increasing FSI prices. Specifically, the following program was announced:
 - a. Valassis will abandon its 50 percent market share goal. The company will be content to maintain its current share (mid-40s). "[W]e can achieve our 2005 target for pages produced with no further shifts in co-op FSI market share." Exhibit A at 3.
 - b. As necessary, Valassis will aggressively defend its existing customers and its existing market share. "[W]e will defend our customers and market share and use whatever pricing is necessary to protect our share." *Id.* at 4.
 - c. But with regard to customers with expiring contracts with News America, Valassis will submit bids at a level substantially above current prices. Effective July 26, 2004, "we will quote all News America first right of refusal customers at the floor price which was effective in May of 2001; hence our net price after ancillary price discounts, rebates, et cetera, will not go below \$6 [per thousand] for a full page and \$3.90 [per thousand] for a half page." *Id.* at 3-4.
 - d. With regard to the small number of customers that divide their FSI business between Valassis and News America, Valassis will seek to retain its current share of each customer's business, but not to encroach upon News America's position. "For Valassis/News America shared accounts we'll price our share at whatever price is necessary to retain our share of the business. If the client wants us to take more than our previous year's share, we will quote the new floor price [\$6 per thousand] on that portion of the business." *Id.* at 4.
 - e. For a limited time, Valassis will continue to honor its outstanding bids to News America customers at market prices. "We have proposals currently outstanding to four News America customers where we have previously quoted lower than the 6 and 3.90 floor. We will notify these four clients that the price quotes in these previously delivered proposals will expire on August 1, 2004. Thereafter, after August 1, 2004, all News America customers or market share will be quoted at our new floor price." *Id.* at 4.
 - f. Finally, Valassis will monitor News America's response to this overture. If News America competes for Valassis customers, then the price war will

resume. "In the recent past News America has been quick to make their intentions known. We don't expect to read the tea leaves. We expect that concrete evidence of News America's intentions will be available in the marketplace in short order. If News continues to pursue our customers and market share then we will go back to our previous strategy." *Id.* at 4.

14. Valassis acted with the intent to facilitate collusion and without a legitimate business purpose.
15. Valassis' invitation to collude, if accepted by News America, would likely have resulted in higher FSI prices and reduced output.
16. The acts and practices of Valassis, including the acts and practices alleged herein, are in commerce or affect commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

Violation Alleged

17. As set forth in Paragraphs 11 through 16 above, Valassis invited its competitor to collude with Valassis in violation of Section 5 of the Federal Trade Commission Act, as amended.
18. The acts and practices of respondent, as alleged herein, constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45. Such acts and practices will continue or recur in the absence of appropriate relief.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this ____ day of _____, 2006 issues its complaint against respondent.

By the Commission.

Donald S. Clark
Secretary

SEAL:

**ANALYSIS OF AGREEMENT CONTAINING
CONSENT ORDER TO AID PUBLIC COMMENT
*In the Matter of Valassis Communications, Inc., File No. 051 0008***

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a proposed consent order with Valassis Communications, Inc. (“Valassis” or “Respondent”), a publisher of co-operative free-standing inserts (“FSIs”) with its principal place of business located at 19975 Victor Parkway, Livonia, Michigan 48152. The agreement settles charges that Valassis violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by inviting its only FSI rival to collude so as to eliminate competition. The proposed consent order has been placed on the public record for 30 days to receive comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make the proposed order final.

The purpose of this analysis is to facilitate comment on the proposed order. The analysis does not constitute an official interpretation of the agreement and proposed order, and does not modify their terms in any way. Further, the proposed consent order has been entered into for settlement purposes only, and does not constitute an admission by Respondent that it violated the law or that the facts alleged in the complaint (other than jurisdictional facts) are true.

I. The Complaint

The allegations of the complaint are summarized below:

FSIs are multi-page coupon booklets commonly found in Sunday newspapers across the country. FSIs are an efficient means for consumer packaged goods manufacturers and other firms to distribute coupons on a mass scale. For more than a decade, there have been only two U.S. publishers of FSIs: Valassis and News America Marketing (“News America”). On a typical Sunday, both Valassis FSIs and News America FSIs are distributed by hundreds of newspapers to over 50 million households.

A. The FSI Price War

Between 1998 and 2001, Valassis and News America each published approximately 50 percent of FSI pages. In June 2001, Valassis notified its clients of a five percent price increase, bringing Valassis’ floor price from \$6.00 for a full page per thousand inserts to \$6.30. News America did not follow the Valassis price move. As a result, News America captured additional customers and built a substantial market share lead. In February 2002, Valassis abandoned its efforts to increase prices and sought to regain a 50 percent share of FSI pages, leading to FSI prices falling below \$5.00 per page by 2004.

B. Valassis Invites its Competitor to Collude

In mid-2004, Valassis determined that its aggressive pursuit of greater market share was no longer serving the company's interests. Company executives developed a new strategy. Valassis decided to communicate to News America an offer to cease competing for News America customers, provided that News America ceased competing for Valassis customers. Valassis intended this offer to enable the firms to raise FSI prices within their respective uncontested domains and to end the FSI price war.

As a publicly traded corporation, Valassis holds a conference call with securities analysts on a quarterly basis. Any person may listen to the call live over the Internet or obtain a transcript of the call from the Valassis website. Valassis held its second quarter analyst call on July 22, 2004.¹ Valassis executives were aware that News America representatives would be monitoring the call, and they determined to use this conference call as the vehicle to communicate Valassis' offer to News America. To ensure that News America clearly understood the terms of the Valassis offer, including what Valassis expected in return from News America, the President and Chief Executive Officer of Valassis, Alan Schultz, opened the earnings conference call by proposing the following:

1. Valassis would abandon its 50 percent market share goal. The company would be content to maintain the share (mid-40s percent) that it then held.
2. Valassis would aggressively defend its existing customers and price at whatever level was necessary to retain its existing market share.
3. With regard to customers with expiring contracts with News America, effective July 26, 2004, Valassis would observe a floor price of \$6.00 per page and \$3.90 per half page. This was the floor price that had been in effect prior to the price war. That meant that for News America's historical customers, Valassis would submit bids at a level substantially above prevailing market prices.
4. With regard to the small number of customers that divide their FSI business between Valassis and News America, Valassis would price its share at whatever level was necessary to retain its historical share of that customer's business. If the customer wanted Valassis to take more than its historical share, however, Valassis would price that portion of the business at the new (\$6.00) price floor.
5. As to four bids that Valassis already had outstanding to News America customers, Valassis would honor those bids only until August 1, 2004, and thereafter all News America customers would be quoted at the new higher price.

¹ A transcript of the earnings conference call is annexed to the complaint as Exhibit A.

6. Finally, Valassis would monitor News America's response to this invitation, looking for "concrete evidence" of reciprocity in "short order." If News America continued to compete for Valassis customers and market share, then Valassis would return to its previous pricing strategy, and the price war would resume.

According to the allegations of the complaint, Valassis made the foregoing proposal with the intent to facilitate collusion and without a legitimate business purpose. Although the proposal was made in the context of an analyst call, Valassis' statements provided information that would not ordinarily have been disclosed to the securities community, and the company would not have made the statements except in the expectation that its sole competitor would be listening. Far from being normal guidance to its investors or the marketplace with respect to the company's future business plans, Valassis' statements described with precision the terms of its invitation to collude to News America. If the invitation had been accepted by News America, the result likely would have been higher FSI prices and reduced output.²

II. Legal Analysis of Invitations to Collude

Invitations to collude have been judged unlawful under Section 2 of the Sherman Act as acts of attempted monopolization,³ as well as under the federal wire and mail fraud statutes.⁴ In addition, the Commission has entered into consent agreements in several cases alleging that an invitation to collude – though unaccepted by the competitor – violated Section 5 of the FTC Act.⁵

The preceding line of authority rejects the proposition that competition would be adequately protected if antitrust enforcement were directed only at consummated cartel agreements. Several legal and economic justifications support the imposition of liability upon firms that communicate an invitation to collude where acceptance cannot be proven. First, it may be difficult to determine whether a particular solicitation has or has not been accepted. Second, even an unaccepted solicitation may facilitate coordinated interaction by disclosing the solicitor's

² Evidence reviewed in the course of the Commission's investigation did not support a charge that the anticompetitive agreement proposed by Valassis was consummated.

³ *United States v. American Airlines*, 743 F.2d 1114 (5th Cir. 1984), *cert. dismissed*, 474 U.S. 1001 (1985).

⁴ *United States v. Ames Sintering Co.*, 927 F.2d 232 (6th Cir. 1990).

⁵ *MacDermid, Inc.*, ___ F.T.C. ___ (C-3911) (1999); *Stone Container Corp.*, 125 F.T.C. 853 (1998); *Precision Moulding Co.*, 122 F.T.C. 104 (1996); *YKK (USA) Inc.*, 116 F.T.C. 628 (1993); *A.E. Clevite, Inc.*, 116 F.T.C. 389 (1993); *Quality Trailer Products Corp.*, 115 F.T.C. 944 (1992).

intentions or preferences. Third, the anti-solicitation doctrine serves as a useful deterrent against conduct that is potentially harmful and that serves no legitimate business purpose.⁶

Previous FTC actions challenging invitations to collude generally have addressed private conversations between the respondent and its competitor.⁷ The complaint here alleges that Valassis chose to communicate its offer through a public means. The Commission has concluded that the fact of public communication should not, without more, constitute a defense to an invitation to collude, particularly where market conditions suggest that collusion, if attempted, likely would be successful (here, a durable duopoly). Private negotiation – in a proverbial smoke-filled room – may well be the most efficient route for would-be cartellists wishing to reach an accommodation. But it is clear that anticompetitive coordination also can be arranged through public signals and public communications, including speeches, press releases, trade association meetings and the like.⁸ Given the obligation under the securities laws not to make false and misleading statements with regard to material facts, Valassis' invitation to collude, made in the context of a conference call with analysts, may have been viewed by News America as even more credible than a private communication. If such public invitations to collude were per se lawful, then covert invitations to collude would be unnecessary.

In evaluating cartels, antitrust law does not afford immunity to agreements that are brokered in public; courts recognize that a public venue does not necessarily mitigate the threat to competition.⁹ The same approach should govern invitations to collude. Liability should depend upon the substance and context of the communication, including issues of intent, likely effect, and business justification, and should not turn solely on the arena in which the communication occurs.

In its earnings call, Valassis communicated to rival News America proposed terms of coordination for the FSI market, a longstanding duopoly, and did so with extraordinary specificity: Valassis would cease competing for News America customers, provided that News America likewise ceased competing for Valassis customers. In addition, Valassis proposed that prices should be restored by both firms to the pre-price war level of \$6.00 per page and \$3.90 per half page per thousand booklets and described how business with shared customers and

⁶ See generally P. Areeda & H. Hovenkamp, VI ANTITRUST LAW ¶1419 (2003).

⁷ In *Stone Container Corp.*, 125 F.T.C. 853 (1998), the Commission alleged that an invitation to collude consisting of both public and private communications was illegal.

⁸ See, e.g., David F. Lean, Jonathan D. Ogur, and Robert P. Rogers, *Does Collusion Pay . . . Does Antitrust Work?*, 51 SOUTHERN JOURNAL OF ECONOMICS 828, 839 (1985).

⁹ See *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990); *In re Petroleum Products Antitrust Litig.*, 906 F.2d 432 (9th Cir. 1990); *San Juan Racing Assoc. v. Asociacion de Jinetes, Inc.*, 590 F.2d 31, 32 (1st Cir. 1979).

outstanding bids to News America's customers would be handled. Much of this information would not have been publicly communicated, even to investors and analysts interested in Valassis' business strategy, but for Valassis' effort to induce collusion. Under such limited circumstances, the Commission may challenge an invitation to collude under Section 5 of the FTC Act even where the conduct did not result in competitive harm.

Corporations have many obvious and important reasons for discussing business strategies and financial results with shareholders, securities analysts, and others. For this reason, the Commission is extremely sensitive to the fact that antitrust intervention involving a corporation's public communications must take great care not to unduly chill legitimate speech.¹⁰

In this case, the public statements made by Valassis went far beyond a legitimate business disclosure and presented substantial danger of competitive harm. The Commission's complaint alleges that Valassis made a strategic decision to use and did use its analyst call to communicate to News America information that was essential for News America to understand how Valassis proposed to divide up the market and how it proposed to transition from competition to coordination. For example, Valassis specified how it proposed to split the business of those customers it shared with News America and explained what its pricing would be with regard to pending bids to four News America customers. Valassis historically had not provided information of this type to the securities community, analysts had no need for the information and did not report it, and Valassis had no legitimate business justification to disclose the information. Valassis would not have disclosed the detailed information except in the expectation that News America would be monitoring the call and except for the purpose of conveying its proposal to News America.

III. The Proposed Consent Order

Valassis has signed a consent agreement containing the proposed consent order. The proposed consent order enjoins Valassis from inviting collusion and from actually entering into or implementing a collusive scheme.

More specifically, Valassis would be enjoined from inviting an FSI competitor to divide markets, to allocate customers, or to fix prices. The proposed consent order also prohibits Valassis from entering into, participating in, implementing, or otherwise facilitating an agreement with any FSI competitor to divide markets, to allocate customers, or to fix prices.

The proposed order would not interfere with Valassis' efforts to negotiate prices with prospective customers, and it would permit Valassis to provide investors with considerable

¹⁰ For example, the Commission would likely not interfere with a public communication that is required by the securities laws. Here, the Commission has been cited to no other instance where a corporation disclosed publicly in securities filings or other fora the detailed descriptions of its future pricing plans and business strategies alleged in this complaint.

information about company strategy. The proposed order also includes a safe harbor provision permitting Valassis to communicate publicly any information the public disclosure of which is required by the federal securities laws.

The proposed order will expire in 20 years.

Mrs. ADAMS. In the past the FTC has promised to promulgate a Section 5 report clarifying the balance of your Section 5 authority. Why haven't you provided that report? And when can we expect one?

Mr. LEIBOWITZ. Well, we did a workshop under former Chairman—

Mrs. ADAMS. No, I asked you why haven't you provided that report and when can we expect one? I don't want—I'm just asking very specific questions.

Mr. LEIBOWITZ. What we have said as a Commission is that we were going to provide guidance and we have done that in specific cases.

Mrs. ADAMS. Okay. When can we expect one?

Mr. LEIBOWITZ. Well, I think what I said again is that we will provide guidance—

Mrs. ADAMS. Mr. Leibowitz, I believe that you had testified that we were going to be expecting one. I'm just asking you when can we expect it?

Mr. LEIBOWITZ. At a time, if and when the Commission decides it will issue a report, the Commission will do that. I'm sure that will be bipartisan and consensus driven.

Mrs. ADAMS. So you haven't gotten a report together yet and so—

Mr. LEIBOWITZ. We sometimes write reports—

Mrs. ADAMS. I will move on.

Mr. LEIBOWITZ. Let me just say this. We sometimes write reports after workshops; sometimes we do not. And again it is a decision of the Commission.

Mrs. ADAMS. Well, I believe that you said that you were going to provide one in the past. So I am looking forward to seeing one, should one ever come about.

Ms. POZEN, I was listening intently when you were asked some questions from my colleague, Mr. Quayle, and one of them that caught my interest because of my law enforcement background was the whole issue of will you remain also a Criminal Division and not just a Civil and become party to political issues. So I guess my question to you is because traditionally DOJ antitrust has devoted roughly equal resources to criminal antitrust enforcement and civil antitrust enforcement, it appears that civil enforcement has generally been concentrated in the offices that are remaining opened while other offices that are being closed focused primarily on your criminal prosecution enforcement. Will the DOJ Antitrust Division remain a 50-50 civil-criminal agency?

Ms. POZEN. Yes, we will. I can talk more about the realignment and the office closures if you would like, but our plan is certainly to continue a vigorous enforcement of criminal parts of the antitrust law.

Mrs. ADAMS. I kind of would like that. I mean, recently you announced a plan to close the field offices in Atlanta, Dallas, Cleveland, and Philadelphia and transfer those positions to divisions in Washington, New York, Chicago, and San Francisco offices. You projected this move would save \$8 million rental costs of the closed offices. Did you calculate similar dollar value estimates of other figures that are necessary to determine whether this move will actu-

ally result in net increase or decrease to the Federal deficit, such as the cost of additional office space for transferred employees in the high rent cities for which the division will retain those offices, the impact of the move on the division's ability to generate criminal fines payable to the crime victims fund, and if not, how can we be confident that this move will not increase the deficit?

Ms. POZEN. All questions and considerations that we have taken into account as we made what I can only characterize as a very difficult decision. As you said, we have seven criminal field offices. We are proposing closing four of those offices. There will be three remaining field offices, one in San Francisco, Chicago, and Philadelphia. And this was as I think about it, a three fold analysis that we undertook. First of all, I think—

Mrs. ADAMS. Is it possible for me to see that analysis?

Ms. POZEN. Sure, I'm happy to provide that to you.

As I said it was a threefold analysis that we undertook. First of all, we looked at what we all are facing here in Washington and, in general, an economy that is requiring a shrinking of the Federal Government, and Congress has requested that we do that and so we have taken that very seriously. And the Attorney General announced a number of changes to streamline and have cost savings at the Department of Justice, one of which was the closure of our field offices. So one was being conscious of the budget and trying to reduce our budget effectively.

The second—

Mrs. ADAMS. While maintaining your ability as a law enforcement agency; correct?

Ms. POZEN. Exactly. That is the second one I was getting to. Exactly. We have to maintain our program. We have had great successes in our program trying to ensure that we are as efficient and effective with the resources that we have.

And the third, and again of equal importance, are our employees. The employees in those offices, the lawyers and the support staff, are terrific and they are an asset to our division and to the Department of Justice.

So trying to thread the needle through all of these three we came up with the proposal to close the four field offices. In that process, we are able to guarantee jobs for all the employees in those offices and guarantee moving expenses. Certainly recognize that some people are not going to be able to move. And it ends up we can offer severance pay and insurance for up to 1 year as well as preference for Federal jobs in those localities.

Again, we are very mindful of our law enforcement program. We are very mindful of the significant fines that we have collected. I was just reporting the \$520 million for last year.

Mrs. ADAMS. I think my time has expired. But I do have more questions. You said you were offering a severance pay for a year?

Ms. POZEN. Yes.

Mrs. ADAMS. One year's pay?

Ms. POZEN. Yes, up to one year.

Mrs. ADAMS. I yield back.

Mr. QUAYLE. [Presiding.] I thank the gentlelady. The Chair recognizes the gentlelady from California, Ms. Lofgren, for 5 minutes.

Ms. LOFGREN. Thank you, Mr. Chairman. You know, I just wanted to make a brief comment on the ICANN issue that the Chairman raised. Because we focus on IP, we focus on IP. I mean, and I certainly would not discount the trademark issues that have been raised.

On the other hand, there are broader issues which is that China is clearly on the move to try and take over governance of the Internet. And the concern about phishing will hopefully be somewhat addressed by the rollout of DNSSEC that is happening here for authentication, but it won't take care of China's ambition to actually supplant the international effort. I'm not defending ICANN's every decision, but it certainly in my judgment is preferable to China running the Internet.

How as an FTC commission will—your job is antitrust; ours is IP. How do you go about incorporating that other type of issue that is in—

Mr. LEIBOWITZ. That's a very good question. And I don't mean to disparage ICANN itself. I think they do a lot of good things and Internet governance has a lot of difference dimensions as you point out. Our concern on our consumer protection side is that it's going to lead, if there is a major rollout of gTLDs without accurate information required in the—

Ms. LOFGREN. That's not my question. There are legitimate issues. I am not discounting that. The question is as a process question, how do you go about incorporating the fact that we are in a faceoff, Western world to China, on Internet governance?

Mr. LEIBOWITZ. Well, I think we have to be mindful of those other atmospherics, those other variables that are important. At the same time we are a consumer protection antitrust agency and so we talk to all the stakeholders and we have our voice.

Ms. LOFGREN. I am just thinking ahead. Consumer protection is not going to be optimized if China controls the Internet.

Mr. LEIBOWITZ. Certainly will not be optimized. Again, what we are hoping is that the Internet remains under appropriate governance. And I think that you and I agree that ICANN generally does a good job. And two is that they tighten up these rules.

Ms. LOFGREN. Let me ask you, maybe both of you, we recently adopted a patent bill and at the same week that happened—I come from Silicon Valley, I mean companies are madly trying to buy other companies, not because of what they do, just to buy up their patent portfolios. I mean, there is a patent war that is going on that is unbelievable. And our certainly antitrust law is to break up monopolies; patent law is to grant monopolies.

And the question is how do you approach these two issues that are at odds with each other? Should antitrust law ever constrain the use of IP rights by owners? And if so, how would that happen? Do you ever constrain the unilateral enforcement of valid patents or licensing agreements between two or more companies? I think this is a huge emerging issue in the tech sector and maybe others.

Mr. LEIBOWITZ. Congresswoman, you are absolutely right. And there is at some level a tension between antitrust and patents. Now, we like to think that they can work well together in a very complementary way. We wrote a report, before I came to the Commission, on the patent system in 2003. It has been cited by Mem-

bers of this Committee, including Mr. Berman, as one of the bases for the patent legislation that Congress enacted and by the Supreme Court. So it is a complex interaction when you deal with things like standards setting and patent pools.

Ms. LOFGREN. We relied on that study very heavily in our many years of looking at that.

Mr. LEIBOWITZ. Right. So we try to work with stakeholders, understand the issues, do a lot of workshops, and hopefully we get this issue generally right.

Ms. LOFGREN. Maybe Ms. Pozen can address this.

Ms. POZEN. Sure. I would only add to it this intersection, just as you identified it, the intersection of the rights holders versus anti-trust. And I think where we find the rub is when there is abuse. And that is the standard the courts have applied, when there is an abuse of those patent rights, extending them in a way or using them in a way that is anticompetitive. We look at every case separately. We look at every case before us carefully and try to find that right balance. It is a challenge, I'll admit. But so far, so good.

Mr. LEIBOWITZ. If I may just follow-up. One of the areas where we found an abuse is in what we call pay-for-delay pharmaceutical settlements, where—this Committee has held hearings on it—where the brand literally makes a payment to the generic competitor and the generic stays out longer. So consumers are left footing the bill or holding the bag. We estimate that that is \$3.5 billion a year in harm to consumers and to the Federal Government. I think the CBO scored the Senate legislation at almost \$5 billion in savings for the government because the government buys generic drugs.

Ms. LOFGREN. Thank you very much, Mr. Chairman. My time has expired.

Mr. QUAYLE. I thank the gentlelady. The Chair now recognizes the gentleman from North Carolina, Mr. Coble, for 5 minutes.

Mr. COBLE. Thank you, Mr. Chairman. I arrived belatedly. I had another hearing. That is why I showed up late. Good to have you all with us.

Ms. Pozen, define bottlenecks for me.

Ms. POZEN. Define bottleneck?

Mr. COBLE. Yes.

Ms. POZEN. A bottleneck is a term that is very loosely used, but in the context in which I was talking about it earlier was the context of the Internet where one Web site or some type of actor in the Internet space has access into or onto another place in the Internet and has a way of shutting off that access to other competitors to benefit itself. So that's how I would define a bottleneck in that context.

Mr. COBLE. That probably would be anticompetitive, would it not?

Ms. POZEN. Yes, when you—when it's an exercise of market power, if you have dominance in a given area and you are exercising it in a way that forecloses your competitors, that can be a violation of the Sherman Act.

Mr. COBLE. Did you want to weigh in? Looks like you were—

Mr. LEIBOWITZ. Well, I generally agree that that is a definition of—appropriate definition of bottlenecks. We see it sometimes in

generic entry in pharmaceuticals. We see it from time to time in the broadband space. And we work our best to try to respond to those bottlenecks if they violate the law and in the event we see them.

Mr. COBLE. I thank you both. Ms. Pozen, I want to talk about the Google-ITA transaction a minute. As I understand it, part of that agreement was that a Web site would be set up in which competitors could file complaints about whether Google was complying with the conditions of the consent decree. I was told recently that the consent decree allows Google to administer that Web site. Is this true?

Ms. POZEN. As part of the consent agreement in Google-ITA we did require that they set up a Web site to obtain the complaints that came in and then they are obligated to report those to us. We will get our first report in April.

Mr. COBLE. Well, I may be missing something here, you may have to throw me a rescue line, but it seems to me this would discourage smaller competitors from availing themselves of the ability of going to the Web site. Am I right or wrong?

Ms. POZEN. Well, I would say in this instance you can utilize that Web site that Google has set up, but we accept complaints directly at the Justice Department. We have a General Counsel's Office that is overseeing the implementation of that remedy and if folks have issues that they want to call to our attention, they should get in touch with Bob Kramer, who is our General Counsel in the Antitrust Division. He is charged with overseeing that remedy to ensure that it is effective.

Mr. COBLE. I am not trying to gang up on Google but at first blush that seemed a little irregular, but I guess not?

Ms. POZEN. It was what we thought was the right solution in this instance, sir.

Mr. COBLE. Good to have you both with us. I yield back, Mr. Chairman.

Mr. GOODLATTE. I thank the gentleman. The Chair now recognizes the gentleman from Florida, Mr. Deutch, for 5 minutes.

Mr. DEUTCH. Thank you, Mr. Chairman. Thank you both for being here. In my State of Florida the agriculture industry has really been devastated by invasive insect pests that have profound negative implications on the farmers and consumers as well. And as you are aware, one method to protect crops from those pests involves the development of new seeds containing traits that are resistant to the insects. I am concerned with the business practices in the industry. Specifically it has been brought to my attention the lack of competition in the generically modified seed industry. And so I would like to commend the Department of Justice and the Antitrust Division for investigating the business practices of Monsanto in this area, given the dominant role that they play.

I would ask if you could speak to the actions that could be taken to ensure that there is a strong innovation component and competition in the generically modified seed industry.

Ms. POZEN. The industry you are referring to is actually interesting in the sense that it is the intersection of intellectual property, antitrust, and agriculture. And it is something that we have taken a very hard look at. As you know, we held workshops around

the United States on agriculture, including these specific issues that you cited to. I can't comment on ongoing investigations but I can assure you that your concerns have been voiced by others and we are looking into that.

Mr. DEUTCH. I appreciate that. Going back to some comments that both of you have made, Mr. Leibowitz, I think you spoke about the importance of competition. You used the Google Android and iPhone area. Ms. Pozen, you spoke about competition advocacy that you do at Justice.

So the question that I have is given that the Internet marketplace is where there is so much economic development and growth in the coming years, we obviously want to do everything we can to support competition and encourage start-ups. So I am worried about market dominance in the Internet search arena. Recently Ask.com exited the search market, cutting 130 engineering jobs, stopping work on new algorithmic technology. The president of the company cited Google's dominance in the market as the reason for their exit. Google, as I understand it, controls more than 79 percent of the search market in the U.S. and over 90 percent in Europe.

I know that the FTC, Mr. Leibowitz, is investigating these issues and I think it is an important investigation. If you could, to the extent that you are free to talk about this, generally at least, if you could address the issues of market dominance and the potential negative effect on Internet innovation and, more broadly, what impact that will have on future innovation in the Internet economy?

Mr. LEIBOWITZ. Well, I guess I would say this. As you know, we are conducting an investigation of Google. We are using both our consumer protection and our competition authority. We are moving forward on that mostly collecting documents and asking questions at this point. As a general matter, putting Google aside, whenever you see a dominant company, you wonder, if they are engaging in types of exclusionary or bad conduct, whether they are using that to stifle innovation and harm consumers in violation of the anti-trust laws or in a way that is an unfair method of competition.

So it is a critically important issue in the Internet space where there has been so much dynamism and so many benefits to consumers and you want that to continue. It is an important question to ask across different industries as well.

Mr. DEUTCH. If I could follow up on the specific issue of exclusionary conduct in the Internet space. If you could speak to that in a little more detail.

Mr. LEIBOWITZ. I think I probably have gone about as far as I should involving exclusionary conduct in the Internet space, given our pending investigation. It is a fair question. It is fair for me to avoid answering it.

Mr. DEUTCH. I was asking only in the broadest possible terms.

Ms. POZEN. And I am happy to help if I can.

Mr. DEUTCH. Please do.

Ms. POZEN. Recently we reviewed Google's acquisition of Admeld and concluded that it didn't raise competitive concerns for a variety of reasons outlined in a statement that we issued. I believe that was last week.

And in that statement we did say we are keeping a watchful eye on the space you have articulated to ensure that we look at trans-

actions and other activities there to ensure that there is anti-competitive conduct that we take action. And we work extensively with the FTC on these kinds of issues.

Mr. DEUTCH. I guess without going into detail, then, the idea of looking at exclusionary conduct in the Internet space specifically, is there a history of that analysis at the FTC or at Justice?

Ms. POZEN. Well, at the Department of Justice I would cite you to our Microsoft case. It wasn't the Internet, but it was technology. And there we took action alleging that Microsoft had dominance in the operating system and was using that dominance in a variety of predatory ways that harmed competition.

Mr. DEUTCH. I appreciate it.

Mr. LEIBOWITZ. This is an area we are constantly looking at because we think it is so important to consumers and we have seen so many benefits. We want to make sure that continues and so we have other investigations and sometimes we do quick looks when competitors come in or others come in and raise concerns. It's what we do.

Mr. DEUTCH. Mr. Chairman, my time has expired. Thank you very much.

Mr. QUAYLE. I thank the gentleman. The Chair now recognizes the gentleman from Georgia, Mr. Johnson, for 5 minutes.

Mr. JOHNSON. Thank you, Mr. Chairman. Mr. Chairman, I'm concerned about the fact that in this country, in this day and time we have more and more opportunities for big business to engage in action that actually results in higher costs to consumers. Our free enterprise system is a system that requires, in order for it to function most effectively, competition. So I viewed the activities of the Department of Justice to be critical in the maintenance of our free market system and how it enables businesses to develop. That's one of the things that makes our country great.

And so we must make sure that we don't have a situation where enterprises feel like they can do a lot of price fixing, bid rigging, territorial and customer allocation, bribery, subverting the competitive process and other things. These things send people to jail and people—when you start getting in people's pocketbooks that's one thing. But when you take the whole pocketbook from them and lock them up in jail, that is a sobering reality that many don't want to face if we have vigorous enforcement.

But here we are talking about closing down four of the seven antitrust field offices throughout America, leaving the whole Southeast without any office of enforcement. We are doing this just simply to save money, are we not?

Ms. POZEN. We are doing this to save money and to hopefully be more efficient in our law enforcement as well. It is twofold.

Mr. JOHNSON. Well, you know in terms of efficiency, we have got, what, 90-plus experienced attorneys and staffers who are going to be asked to move to a new location, the other three office, Chicago, New York, and San Francisco.

Ms. POZEN. Yes. I misspoke earlier. I said Philadelphia, not New York. Thank you for clarifying that.

Mr. JOHNSON. And those locations have higher living costs so the people who move there would have to be compensated in accordance with those higher prices. So you're going to be looking at, as-

suming that everybody actually was able to move, relocate, you'd be looking at increased labor costs as opposed to less labor costs; is that correct?

Ms. POZEN. When we announced——

Mr. JOHNSON. And if you could——

Ms. POZEN. Provide some background? Would that be helpful?

Mr. JOHNSON. Well, I don't want any background. I just want you to answer yes or no if you could.

Ms. POZEN. Sure. We believe that the realignment that we've set forth, which again was very difficult to come to—we are in difficult budgetary times at the Department of Justice, and it is not my preferred activities as acting AAG to do this at all, nor anyone at the Department of Justice. But when the Attorney General announced a number of office closures and realignments and streamlining, we were among those and the notification process was started for our closure.

Mr. JOHNSON. But the Antitrust Division is actually an income generator; right?

Ms. POZEN. Right, we are. We are——

Mr. JOHNSON. So you are actually generating income for the use of the Department—or any other department, by the way, because it can be allocated to another department's use—we are actually raising revenue without raising taxes?

Ms. POZEN. Right. In making this decision we considered all that you are raising.

Mr. JOHNSON. So if we have got an office that is—the Atlanta office alone—responsible over the last 10 years for about 200—about a quarter of a billion dollars worth of fines and forfeitures and penalties that have been collected and if we cut that ability by cutting the office and the people who staff the office who know the industry that are potential targets, they know the local bar, they know the regional court systems, if we cut that efficiency and then place it in the hands of some newly hired lawyers that don't have the litigation experience, the legal experience of the attorneys and staffers who are currently working and who would not be able to relocate, then we are cutting the efficiency of the Department's law enforcement efforts. And that, I think, is a tragedy.

I think at this point with the consolidation of industry and the effect that it has on prices for consumers, I think this is the wrong time to be shutting down for alleged cost cutting reasons. You are cutting the nose to spite your face really. I think it is a bad time to close down four of seven regional offices. It seems like what we are trying to do around here is just cut government and we are not really thinking about the effect of the cuts.

Now, I know that big business wants to have an environment where they would not have any regulatory control over them so that they could make money hand over foot, quarter after quarter, and it increases dramatically year by year, but there's only so much that the American people can pay. And we'll get to a point where that will ruin the capitalist system. And so I want to protect our system. I want to protect the capitalist system. But it requires competition. And it requires the government to make sure that the little people are treated fairly because we can't rely on the fox to guard the hen house.

And so I think it is a tragedy that we would talk about cutting antitrust enforcement. The criminal side is the first one that would suffer the most. The regulatory side. You can get some inexperienced lawyers to come in and having read law books and getting a little guidance from some senior folks they can make certain decisions but to actually prosecute.

Mr. AMODEI. [Presiding.] If I might to my colleague from Georgia, I want the record to reflect that he asked for and has received a minute of extra time which has expired. So the gentleman's time has expired. And I appreciate, Ms. Pozen, please feel free to get directly with Mr. Johnson on those things.

Mr. JOHNSON. I'd like to have a bipartisan inquiry. Really a hearing.

Mr. WATT. If the gentleman would yield, Mrs. Adams actually asked a lot of the same questions and she agreed to follow up with some specific written guidance that they applied in this context.

Mr. JOHNSON. Well, I think we need a hearing on this very specific issue alone because it is of such gravity.

Mr. AMODEI. And that will be part of our record today for that request.

Mr. JOHNSON. Thank you, Mr. Chairman.

Mr. AMODEI. The Chair now recognizes the lady from the Golden State, Ms. Chu, for 5 minutes.

Ms. CHU. Thank you, Mr. Chair. I have a few questions that I'd like you to address. First for chairman Leibowitz. My constituents have expressed numerous concerns regarding the competitiveness of the PBM market, the pharmacy benefit manager market. They are concerned that the consolidation of the current marketplace harms patients by reducing choice, decreasing access to pharmacy services, and ultimately this could lead to higher prescription drug costs paid by plan sponsors and consumers. And I'm certainly concerned about patient well being and quality pharmacy care for my constituents as well as rising health care costs. How are you evaluating and addressing the concerns of patients and community pharmacies as it relates to the ongoing consolidation of this market?

Mr. LEIBOWITZ. Well, as you know, we are reviewing two matters now, and I can say this publicly because the companies have acknowledged that. One is Express Scripts-Medco, a major merger. We're collecting documents. We are asking questions and we will apply the law which says that if the agreement may substantially lessen competition, then we will challenge it in court.

The other matter that we are looking at is CVS-Caremark, which is a consummated merger and we have an investigation going on. And so I think I need to leave it at that. Except to say that I have certainly met with community pharmacists and my father-in-law was a professor of pharmacology and my mother was a pharmacist, so I am intimately aware of the concerns of community pharmacists who provide enormous value.

And I guess I would mention one other thing, which is that we look at price effects when we are reviewing a merger. But you can also look at nonprice effects like service and convenience. So I will leave it at that.

Ms. CHU. I thank you for that. I want to turn to criminal issues. Ms. Pozen, in your testimony you mentioned that last year the

Antitrust Division in DOJ filed 90 criminal cases, up from 60 cases in 2010, and obtained over \$520 million in criminal fines. And you state that in those cases you charged 27 corporations, 82 individuals and the court imposed 21 jail terms.

Can you explain the cause behind the recent rise in criminal antitrust enforcement and give us some examples?

Ms. POZEN. Sure, we—again, the cases that come to our attention or that we learn about we pursue vigorously on the criminal and civil side. In particular on the criminal side we see ebbs and flows in terms of activities and I don't know if there is any particular reason for the uptick other than we have continued to be vigilant and continue to prosecute where we thought it was necessary.

We have some significant cartel matters that have been ongoing for some time and that continue. As I mentioned in my written statement—in my oral statement, the auto parts industry. We have announced a prosecution of Furukawa and a \$200 million fine there. That investigation is ongoing. It is a large and significant investigation.

We have others going in the air cargo industry, in the LCD industry, and also in muni bonds. That is we have had several agreements that we have reached with significant large banks ranging from \$130 million to over \$200 million in fines and restitution and we are working toward now—the trials are starting after the first of the year—prosecuting the brokers involved in those muni bond bid rigging and price fixing schemes. We are just continuing to be the cop on the beat. As I said earlier, I continue to be astonished that businesses continue to violate the law. But we continue to work to prosecute where we need to.

Ms. CHU. Okay. And finally I wanted to ask about the global economy. Today we have about 120 antitrust agencies around the world, including new agencies in China and India, and it is becoming increasingly common and important for agencies to investigate the same matter. I understand your Antitrust Division has been cooperating with international counterparts and there was some example recently with the German Federal Cartel Office on this merger issue regarding patent applications for Novell by CPTN.

What are you doing to form international partnerships and coordinate your efforts on these types of matters?

Ms. POZEN. We continue to really work with our international counterparts around the world through a variety of means. We engage with them in international organizations like the OECD and like the International Competition Network. Those are great forums of different natures where we are active participants.

We have also sought to, with the FTC, to engage with emerging economies, as you mentioned. We signed a memorandum of understanding with Russia first and then recently with the Chinese antitrust authorities in July and are planning on signing one with India in 2012. Those MOUs set out in very simple terms efforts that both or all agencies—in China it is a five-way agreement—are going to work together to have regularized meetings to comment on each other's guidelines and laws.

And in addition to, I would note, we just celebrated our 20th anniversary of our cooperation agreement with the EC. That is an enduring relationship that we were celebrating in Brussels in October

and as part of that we updated our best practices—our merger best practices guidelines which we use in those forums as well. It is a variety of means that we engage. We do it on investigations specifically, and have a great working relationship on a number of investigations today with a number of authorities and then more broadly as I described.

Mr. LEIBOWITZ. Just to follow up and Ms. Pozen is exactly right. We spend a lot of time thinking about the international dimension. And the more you have law enforcement authorities in other countries that work at the same time frames and where the law has generally converged, and we encourage that convergence, it is just better for American businesses and better really for American consumers and consumers in those country as well. So it is something we spend a lot of time on at both our agencies and we work really well together on it.

Ms. CHU. Thank you. I yield back.

Mr. AMODEI. Thank you. The Chair recognizes the gentlelady from Texas, Ms. Jackson Lee.

Ms. JACKSON LEE. I thank both the Chair and the Ranking Member and I thank the witnesses as well. Let me just ask a pointed question for both of you. I heard my colleague, Congressman Johnson, raising a line of questioning about the return from your agencies in terms of making dollars for the U.S. Treasury. Tell me very quickly—to both the Chairman of the FTC and to the Department of Justice—what major budget cutting will do to your efforts on balancing the oversight over necessary antitrust issues.

Mr. Chairman? And I've got a series of questions. I would like a quick answer on that financial part.

Mr. LEIBOWITZ. You know, knock on wood we might—we should be okay or we may be okay in our appropriations but if we have to cut personnel, it means that completing investigations rapidly, which every company deserves, will be a little bit harder. It means that other things that we do that are important like our international work will be tougher to do. And so an 8 percent budget cut which is what we get under sequestration would be very, very problematic. And not for us, but for the consumers we are supposed to protect.

Ms. POZEN. I faced a \$3 million budget cut in 2012 that I am starting to manage toward today. And part of our efforts in anticipation of that cut was the realignment of our field offices, trying to preserve the jobs for those 97 individuals in those four offices. Because I'm concerned if I waited any longer that I wouldn't be able to offer them jobs and moving expenses. So it has an impact. We are trying to do the same with less. We are trying to do the best that we can. We are trying to be more efficient and effective.

Ms. JACKSON LEE. We have a concept with our banks: Too big to fail. And it draw obviously a great concern by the public. They want to know what happened in terms of some issues that is probably more addressed to the Criminal Division but the question of too big to fail comes from the origins of our first breaking up of monopolies under Teddy Roosevelt.

So let me ask these questions to both of you quickly so I can get answers from the two of you. I don't think we should be attacking bigness for bigness sake as much as we should be providing over-

sight. And I raise that question on the merger that has already been approved between United and Continental. And now the growing pains are being experienced. But in particular I'm interested in AT&T and T-Mobile. One, I'm interested because I really want to create jobs and there is a very strong argument that that creates jobs. And what I would argue is that there may be a valid—this is obviously something that is either behind us, we hear that it may be in front of us, it maybe in some engagement. But I'm wondering is there a concept of intense oversight while also protecting the American brand so that we can create these jobs and we can enhance the opportunities for a stronger entity?

I would raise that came question with Google. I want to make sure that we have competitiveness, but I don't think we should have a particular company under the gun simply because it is big. I would like to give you the resources to intensify your oversight but to recognize that there is value in intellectual property, in inventiveness, in what largeness brings about. We have had largeness before. We need to be able to regulate.

So speak to me about your regulatory aspects so that we are not killing jobs by going after companies who have innovative ideas about mergers and can actually be effective.

And just quickly to Assistant Secretary Pozen, tell me about the victory that you have gotten with H&R Block coming up on the tax season by acquiring TaxACT and the regulation of that. So if you could answer those questions so that we can create jobs here in America.

Ms. POZEN. Sure. I will start with H&R Block. That was in the digital do-it-yourself tax preparation software that was a merger of H&R Block with TaxACT. I think we filed our lawsuit in May and proceeded to court very quickly, had our trial in September, October, and the judge issued a decision at the end of October. That decision is an 80-page decision. And for us antitrust wonks or nerds or whatever you want to call it, it was incredibly written and detailed and really was an accumulation and a great resource I think to folks going forward of the state of the law in this circuit on merger and merger analysis.

So we are very proud of that. It was our first successful merger challenge since 2004. So it has been a long time so it felt very good for lots of reasons. But I think it advanced antitrust jurisprudence significantly.

In terms of your question about jobs, as you noted and I agree with you, it is competition that we are focused on. And with competition comes innovation, and with innovation comes expansion of our economy, and with that comes jobs. And so that is the way we analyze and look at those issues. If you build a better mouse trap in the United States, if you did it through legitimate means, you don't suffer antitrust consequences. It's how you use that market power. Or if you try to build it just that much too big that raise competitive concerns without countervailing efficiencies where we get involved.

Mr. LEIBOWITZ. Yes, and following up on that, being big alone is not an antitrust violation. But the antitrust laws I think are generally calibrated to promote job growth, to promote innovation. So the merger standard under the Clayton Act—Chairman Clayton

was the Chairman of this Committee in 1914 when Clayton was passed—says we challenge deals when they may substantially lessen competition. As we know, competition drives innovation, it drives job growth, it drives a lot of different things.

And then when you look at the conduct standards, monopolization alone is not a violation. If you achieve a monopoly status by virtue of your excellent work or the way you market your product, that is not a problem. It is when you combine that with bad acts either to get to your monopoly status or to maintain it, that it is in violation of the law.

So it is a ready good question and it is one that we ponder both in specific cases and at a general level all the time in our agencies.

Ms. JACKSON LEE. Well, thank you. I don't want us to be in the business of because something is big, created major jobs—the auto industry was big in years past and probably still competitive, that bigness alone. I would like to have the kind of oversight and regulation addressing the question of competitiveness, but remember we are also competing worldwide. And so some of these issues relate to how we can compete worldwide and sometimes bigness requires that. As long as we are following the rules, I would hope that that would be part of our structure in dealing with some of the companies that are so much larger than others.

Mr. AMODEI. Would the gentlelady for Texas like to be recognized for an additional minute for purposes of wrapping up?

Ms. JACKSON LEE. How kind of the gentleman. Yes, I would. I would ask unanimous consent. I apologize for not—

Mr. AMODEI. Without objection, so ordered. Please proceed.

Ms. JACKSON LEE. The Chairman looked like he was trying to reach out and say something. I'm not sure.

Mr. LEIBOWITZ. I think I have said enough probably. But if you have another question I would be happy to answer it.

Ms. JACKSON LEE. I just will end on the note of the way I framed it, is that we are in this tight job market and we are in this tight creation market. I want to find room for competitiveness and I also find room for bigness. My initial premise is that people are mad at the finance industry because they believe that it wasn't regulated, there wasn't oversight, and I want to make sure we have oversight but we allow growth and opportunity. Is that my sense of antitrust effectiveness?

Mr. LEIBOWITZ. Agreed. Yes, I think that's well put.

Ms. JACKSON LEE. Madam Secretary—Madam Attorney General?

Ms. POZEN. Yes, I agree that we are constantly being vigilant in the markets that we oversee to ensure that those companies that are large aren't abusing that dominance and again that those companies who engage in mergers that are legitimate and don't raise significant concerns, we let those go forward. But if a merger does raise a competitive concern and doesn't have countervailing efficiencies to overcome that, we do challenge them.

Ms. JACKSON LEE. I thank the Chairman for his courtesy.

Mr. AMODEI. Thank you. I'd like to thank the witnesses, Mr. Chairman, Madam Assistant Attorney General. I appreciate that on behalf of the Ranking Member and the Chairman, neither of which I am.

Without objection, all Members will have 5 legislative days to submit to the Chair additional questions for witnesses, which we will forward and ask the witnesses to respond as promptly—I know Mr. Johnson had some other questions perhaps—as they can and get their answers back and they will be made a part of the record.

Also, Representative Michael Grimm has asked that his written statement be included in the record. Without objection, it will be made a part of the record for this hearing day.

[The prepared statement of Mr. Grimm follows:]

**Prepared Statement of the Honorable Michael Grimm,
a Representative in Congress from the State of New York**

The increasing consolidation of hospital markets, and the federal antitrust response to those consolidations has been and will continue to be an issue that not only Staten Islanders face, but is an issue that is of significant community interest across the country. Changes in both public and private sector reimbursement systems as state budgets constrict, and dramatic transformation of health care markets take place due to the recently enacted health care law, will likely prompt unprecedented consolidation in the hospital industry and cause Congress and the Administration to reassess exactly how they approach hospital consolidation, and competition in the health care market.

The substantial and persistent increases in the cost of health care services that began when Medicare was first established in the late 1960s and have continued since then, have led directly to the changing market realities for hospitals. These market realities also call into question exactly how hospital mergers fit into traditional antitrust litigation, and how these mergers and acquisitions translate into a competitive marketplace for affordable and accessible health care services.

Between the high cost of delivering any service in New York City, and the high cost of delivering health care services, New York hospital systems struggle to find a stable flow of capital, and forces these entities into an increased pace of hospital consolidation and/or sponsorship. By any criteria, the law concerning hospital market definition is in shambles. Common sense suggests that all health care is local. People want to be hospitalized near their families and homes, in hospitals in which their own—local—doctors have hospital privileges. However, various court decisions have stretched the geographic boundaries of markets into a fluid definition, which in many cases fails to heed the warnings of a failed institution, and allows the Department of Justice to pick winners and losers in the hospital market, not based on policy or community specific logistics, but based on the expertise of the litigators themselves.

A fluid definition of market power and geographic boundaries allows a unique place, like Staten Island, to fall victim to the exact policy decisions the Federal Trade Commission seeks avoid on antitrust law. Medical antitrust law follows the same pattern as the law governing contracts between manufacturers and distributors of branded goods in other industries. The intricacies of the health care industry requires industry-specific policy that takes industry and community dynamics into context. Staten Island, as part of New York City is subject to extensive New York City taxes, but is often treated as a separate municipality. The ambiguous antitrust policies stemming from the Administration have resulted in the Federal Trade Commission and the Department of Justice to deny Staten Island a fair evaluation as a part of New York City in total. Absent of industry-specific policy changes, communities like Staten Island will be casualties of an anticompetitive market and will end up paying more for services and time spent traveling to another hospital in New York City or across state lines to New Jersey. In the end, this costs taxpayers more money, and is completely counter-intuitive if lawmakers plan on ensuring a vibrant, competitive, health care industry alive in all of New York City, and the country.

These circumstances has resulted in limited hospital access on the Island, and forces Staten Island residents to become purchasers of high cost, less efficient care than other New York City residents. As our “anchor hospitals” begin to feel the financial burden of payment cuts from the state and federal level, institutions will likely fail, leaving the hard working residents of Staten Island a de-facto anticompetitive market place for essential health services. Medical antitrust reform must be expedited in order to avoid the acceleration of hospital mergers and acquisitions that are likely to occur as the health care law goes into effect.

The combination of these extenuating circumstances call on the need for federal legislators to concretely define the product market, geographic market, and market

concentration and competitive effects based on the specific dynamics of the health care industry. By doing so, the FTC will be forced to analyze cases on the basis of an elastic health care industry and an evolving community-specific market rather than outdated and inconsistent logic that has been the Achilles' heel of medical anti-trust law.

Mr. AMODEI. And without objection, all Members will have 5 legislative days to submit any additional materials for inclusion in the record. And with that, again I want to thank the witnesses and my colleagues and the hearing is adjourned.

[Whereupon, at 11:55 a.m., the Subcommittee was adjourned.]

A P P E N D I X

MATERIAL SUBMITTED FOR THE HEARING RECORD

**Response to Post-Hearing Questions from Jon Leibowitz,
Chairman, Federal Trade Commission**

U.S. House of Representatives
"Oversight of Antitrust Enforcement Agencies"
Hearing December 7, 2011
FTC Responses to Questions for the Record

The Honorable Steve Chabot

Q1: *Medical Anti-trust*

I am disturbed by the recent trend of FTC intervention into the state-based regulation of medicine and dentistry.

As you surely know state medical boards are official agencies made up of health care professionals entrusted to utilize their expertise to ensure patient safety. These men and women are experts in their fields and they are the professionals we should be looking to for health policy recommendations.

And when the FTC disapproves of a state medical board's decision they are interjecting themselves into a discussion which is not only outside their jurisdiction, but clearly outside their realm of expertise, and I believe that this intervention may very well compromise patient safety.

It's my understanding that the FTC is primarily staffed with lawyers, economists, and bureaucrats, and in my view, we should not be yielding patient safety decisions to anyone but medical experts.

Mr. Chairman, please explain to me who at the FTC knows more than medical experts about the most appropriate and effective methods of treating patients. Please explain to me why the FTC is involving itself in the delivery of health care in the first place.

A: I appreciate the concerns that you have raised. The work the FTC does to protect and promote competition in health care markets is important and we always want to make sure that we are getting it right. In fact, agency staff members are in the midst of discussions with physician organizations, and I have met with the American Medical Association, to discuss similar issues. The FTC is committed to ensuring that competition brings down health care costs for all Americans. I welcome the dialogue with these groups and expect it will be productive.

The Commission's expertise is in competition and consumer protection matters. Indeed, it has over three decades of experience investigating competition in health care markets. I can assure you, however, that the FTC does not claim expertise in patient care or patient safety, nor does it seek to usurp the role of the states in determining such matters.

The FTC has long been committed to maintaining competitive health care markets, because competition can yield substantial benefits for consumers—including greater access to quality care at lower prices. Most of these efforts are law enforcement actions that challenge price-fixing, other anticompetitive conduct, and anticompetitive mergers. The agency also has a competition advocacy program, which is designed to assist federal and state regulators by bringing attention to the potential impact on competition of proposed laws and regulations. The advocacy program is a bipartisan effort, expanded in recent years by Chairman Timothy Muris. Almost all of the Commission's votes on the advocacy efforts have been unanimous.

It is well understood that the creation or maintenance of unnecessary statutory or regulatory barriers to competition in health care delivery can reduce access to and efficiency and quality of care, and increase its cost. Thus, when asked to comment on state legislative or regulatory proposals, FTC staff encourages policymakers to incorporate competition considerations into their analysis. For example, some comments have observed that the effect of the proposed regulation might be to reduce access to or raise costs of health care for underserved or uniquely vulnerable populations such as children, seniors, and members of rural communities. At the same time, we recognize the role that considerations of patient safety play in the decisions that state legislators and regulators make regarding the delivery of health care. In all of these efforts, the FTC's goal is to provide information and analysis to assist policymakers in their decisions.

Q2: *Anti-trust Oversight - Unclear regulation*

Mr. Leibowitz, I believe Section 5 of the FTC Act which prohibits entities from engaging in unfair or deceptive acts or practices in interstate commerce is a necessary check on anticompetitive practices in this country. However, I think that the guidelines need to be more transparent and they need to be enforced consistently. It is this kind of government regulation that is making it difficult for companies to conduct business and plan for the future.

Chairman Leibowitz, don't you agree that it would improve the clarity and predictability of the law if the FTC provided advance guidance about the bounds of Section 5 before investigating or proceeding against businesses on the sole basis of your Section 5 authority?

Chairman Leibowitz, in the past the FTC has promised to promulgate a Section 5 report clarifying the bounds of your Section 5 authority. Why haven't you provided such a report yet, and when can we expect one?

A: We agree that businesses and consumers benefit whenever we are able to improve the clarity and predictability of the laws we enforce, including Section 5 of the FTC Act. My fellow Commissioners and I continue to consider the best way to further clarify the bounds of our Section 5 authority, be it through a report, a

policy statement, or some other approach. This will remain a high priority, and a bipartisan one, during the remainder of my term as Chairman.

It should also be noted that Supreme Court case law and our past complaints and consent agreements identify the types of conduct to which the FTC has applied its stand-alone Section 5 authority in the past. Recent cases, including *Intel*, *U-Haul*, and *N-Data*, further illuminate the types of conduct the Commission has challenged as unfair methods of competition under Section 5.

Of course, even though the Commission has broad authority under Section 5, the Commission is well aware of its duty to enforce Section 5 responsibly. We take seriously our mandate to find a violation of Section 5 only when it is proven that the conduct at issue has not only been unfair to rivals in the market but, more important, is likely to harm consumers, taking into account any efficiency justifications for the conduct in question. Although Section 5 is clearly broader than the antitrust laws, it is not without boundaries, and the Commission has used its Section 5 authority judiciously in the recent past, consistent with the concerns you have raised regarding the desire of businesses for clarity and predictability. The absence of any private right of action or treble damages remedy also limits the effective reach of Section 5. We have also had and will continue with bipartisan discussions with state Attorneys General regarding the scope of Section 5 and its state law analogues, including Ohio Attorney General Mike DeWine.

Response to Post-Hearing Questions from Sharis A. Pozen, Acting Assistant Attorney General, Department of Justice Antitrust Division

**Questions for the Record submitted to
Sharis Pozen, Acting Assistant Attorney General
Antitrust Division, U.S. Department of Justice**

**from Representative Sandy Adams,
Committee on the Judiciary
U.S. House of Representatives**

1. Please provide the three-fold analysis you mentioned when deciding to close four of the seven criminal field offices.

Answer: The analysis that forms the basis for the Department's decision to realign its field offices is contained in the reorganization proposal letter the Department sent to the chairs and ranking members of the appropriate subcommittees of the House and Senate appropriations committees, dated October 4, 2011. A copy of that letter is attached. The analysis for the field office realignment and other changes in the Antitrust Division is directed at three goals: maintaining an effective and efficient criminal program, obtaining cost savings, and preserving jobs for affected staff including, among other options, by offering positions in the remaining field offices.

2. Ms. Pozen said in her testimony the Department offers a year's severance pay and insurance to those employees who choose not to relocate to another field office.

a. What funds are the severance payments and insurance premiums offered to these employees paid from?

Answer: The Department of Justice budget appropriation contains a separate line item for the Antitrust Division labeled "Salaries and Expenses, Antitrust Division." Payments related to a reduction-in-force, should employees opt to separate from the Division due to the reorganization, would be made from this line item using funds appropriated in the applicable fiscal year.

b. How many employees have the Department offered this option to?

Answer: All eligible employees (approximately 32) in the four field offices that are slated for closure (Atlanta, Cleveland, Dallas and Philadelphia) will be offered up to one year of severance and government health insurance without charge to the employee for 31 days after separation.

c. Have any accepted? If so, how many?

Answer: At this time, the Division has not yet implemented this proposal.

d. What are the requirements for an employee to qualify for this option?

Answer: Eligible employees who choose not to relocate or transfer within the agency, and who are not eligible for retirement, will be provided with access to a range of employee services, include counseling and severance pay through a formal Reduction in Force process. Employees who have been receiving health insurance but are not eligible for retirement can continue their government health insurance without charge to the employee for 31 days after separation. In order to qualify for severance pay and insurance, employees must:

- be removed from the Federal service by involuntary separation;
- be serving on appointments without time limitation while on a full or part-time tour of duty;
- have at least 12 months of continuous service immediately prior to separation;
- must not be receiving injury compensation from the Office of Workers' Compensation; and
- have not declined a reasonable offer (written offer of a position in the same agency and commuting areas, with the same tenure and work schedule).



U.S. Department of Justice

Washington, D.C. 20530

OCT 04 2011

The Honorable Frank R. Wolf
Chairman
Subcommittee on Commerce, Justice,
Science, and Related Agencies
Committee on Appropriations
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

In a February 2011 memorandum to Department component heads, the Deputy Attorney General directed components to seek operational and programmatic efficiencies to ensure sufficient funding for the Department's essential public safety missions, including protecting Americans against terrorism and threats to national security and protecting against violent crimes. As part of this effort, the Department is working to realign functions in various offices, lower lease costs by consolidating or reducing office space, and seek ways to more effectively utilize the department's resources. Reducing the Department's nationwide physical footprint is a key piece of the Attorney General's overall cost saving initiative. Several Department components, including the U.S. Attorneys, the U.S. Trustees and the Federal Bureau of Investigation, have proposed consolidations of field office and sub-regional office space, of which you have already been notified. Moreover, consolidating and eliminating office space complies with the President's memorandum to Agency heads directing the disposal of unneeded federal real estate to save taxpayer dollars.

As part of this effort, this letter is to notify you of an Antitrust Division (ATR) reorganization that would reduce the number of the Division's field offices from seven to three by closing four offices located in Atlanta, Cleveland, Dallas, and Philadelphia. Other significant changes approved by the Attorney General include: changing the title of the Deputy Assistant Attorney General (DAAG) International position to DAAG Operations and realigning under that position the Office of Operations, the Appellate Section, and the Legal Policy Section; changing the titles of the two Civil Program DAAGs to clarify that one focuses on civil investigations and the other on litigation anticipated, or derived, from those investigations; and changing the names of three of the Division's Washington D.C. civil sections – Network and Technology; Telecommunication and Media; and Transportation Energy and Agriculture – to Civil I, Civil II, and Civil III.

The primary purpose of the reorganization is to realign the Division's field office structure to meet most efficiently and effectively the requirements of its evolving workload in a fiscally constrained

environment. This involves closing the four field offices in Atlanta, Cleveland, Dallas, and Philadelphia. The remaining three field offices in Chicago, New York, and San Francisco and the Division's Washington, D.C. section would absorb approximately 50 percent of the staffing resources currently allocated to the four offices proposed for elimination. The realigned workflow will proceed as follows: San Francisco would absorb workload currently covered by ATR's Dallas office, Chicago would absorb Cleveland's workload, New York City would absorb Philadelphia's work, and the Washington D.C. criminal section would absorb Atlanta's workload.

ATR will become more efficient by concentrating its field office staffing and resources in three key geographic areas, instead of maintaining the more diffuse field office structure currently in place. Under the expanded field office structure, ATR assigned matters to field locations based on staffing levels, workload, and staff expertise. However, with the advent of larger, multinational investigations, many matters are now too large to be handled in only one office. To maximize effectiveness, the Division needs to realign its field office workforce to be more responsive to today's working environment.

The result of this part of the reorganization proposal is ATR's physical presence in the field will be maintained in important and centrally-located cities. Also, these cities house a large number of other government entities with which ATR interacts frequently, including the Federal Bureau of Investigation, the Internal Revenue Service, and the U.S. Attorney Offices. In summary, by consolidating from seven field offices to three, ATR will be in a position to more effectively support critical matters, both civil and criminal and by industry and geographic location, and at the same time improve its overall efficiency.

The other changes in this proposal will improve the reporting structure to best support the Division's pursuit of its mission. Changing the title of the DAAG International position to DAAG Operations reflects the reality that ATR's enforcement work has a broad focus and frequently involves combinations of national and international entities. In addition, the DAAG Operations would assume supervision over the realigned Office of Operations, the Appellate Section, and the Legal Policy Section, consistent with ATR's decision to streamline its structure and more equitably distribute workload. As reflected by its proposed position on the chart, the Office of Operations oversees the flow of critical matter recommendations and associated paperwork to all the Division's DAAGs and the Assistant Attorney General.

The proposed title changes of the Division's two Civil Program DAAGs will clarify the point that both DAAGs are jointly responsible for the Division's merger and other civil reviews. It will also make the point that the work of one DAAG focuses on conducting civil investigations while the work of the other DAAG focuses on litigation anticipated, or derived, from the Division's civil investigations. The proposal also changes the names of three of the Division's Washington D.C. civil sections – Network and Technology Section; Telecommunication and Media Section; and Transportation Energy and Agriculture Section – to Civil I, Civil II, and Civil III. This allows the Division improved flexibility to assign investigations to these sections based upon staff expertise and workload. Finally, the National Criminal Enforcement Section (NCES) would be renamed

The Honorable Frank R. Wolf

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“Washington D.C.” to be consistent with the geographic naming structure associated with the Division’s criminal program offices.

Resources and Timeframe for Implementation: Following completion of the external notification process, implementation of this proposal would begin during fiscal year 2012. Anticipated savings in fiscal year 2012 will be offset by shut down costs, estimated to be \$8.7 million. After all closing-related costs are met, substantial cost avoidances are anticipated (currently estimated at almost \$8 million for fiscal year 2013). These resources would then be made available to support other critical program needs, including the acquisition of an expanded computer data analysis capability and translation tools in support of ATR investigations. The three field offices slated to remain open should experience some moderate increases in resources to assure more efficient and effective investigation and prosecution of antitrust matters.

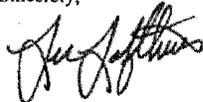
Impact on Personnel: Staff at the four field offices proposed for closure would be notified and given the opportunity to apply for transfer to one of the three remaining field offices, and in limited cases, to the Division’s NCES and Civil Program offices in Washington D.C. Employees selected for openings in the remaining field offices and Washington D.C. would be relocated at Division expense. Those who choose not to transfer would be subject to Federal government reduction-in-force (RIF) procedures, including severance pay and preference in Federal hiring for other positions. Active cases and matters would be reassigned to remaining Division offices. Territorial assignments would be realigned and staffing resources reallocated among the remaining three field offices and Washington D.C.

In addition, the Senior Executive Service positions would be abolished in the four offices to be closed. Office space in the San Francisco, Chicago, and New York offices would be expanded or realigned to accommodate additional staff allocated to these offices. Existing equipment and furniture would be relocated to these remaining offices to the extent possible. All RIF-related costs would be met, most likely during the fiscal year 2012 implementation period.

Copies of the current and the new organization charts are enclosed for your review.

The Office of Management and Budget has approved transmittal of this notification. Should you have any questions, please do not hesitate to contact me.

Sincerely,



Lee J. Lofthus
Assistant Attorney General
for Administration

Enclosures

