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

Office of the Chairman

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

Dear Chairman Leahy:

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

Questions from the Honorable Herb Kohl

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Answer 7: The vast majority of matters resolved through the clearance process are handled in a timely and efficient manner and, to the best of my knowledge, concerns about clearance problems by the antitrust defense bar appear to be a thing of the past. In most instances, one or the other agency will have the greater expertise in the industry of potential concern, and clearance is quickly given to that agency. Nevertheless, the agencies continue to work to update clearance procedures and policies to be more efficient and effective. For example, the agencies have reduced the layers of review to which a contested matter is subjected. As a result of this and other reforms, matters are more readily resolved without resource-intensive high-level review, and remaining contested matters are brought to the ultimate decision-makers more quickly and efficiently.

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

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

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

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

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

Answer 9: The Guidelines have always reflected the Congressional intent that competitive problems be addressed in their incipiency, and the revised Guidelines will continue to reflect that intent. Mergers that likely will injure competition should be prevented or undone without waiting for competitive harm to be fully realized. Indeed, the agencies devote substantial resources to preventing the consummation of mergers that may substantially injure competition, even though that competitive harm may occur at some time in the future.

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

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

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

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

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

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

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

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

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

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

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

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

[8] *Id.*

Questions from the Honorable Russell D. Feingold

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

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

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

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

The FTC has, however, issued its own order against Ticketmaster to settle charges that Ticketmaster and its affiliates used deceptive bait-and-switch tactics to sell event tickets to consumers. Ticketmaster has agreed to pay refunds to consumers who bought tickets for 14 Bruce Springsteen concerts in 2009 through its ticket resale Web site TicketsNow.com, and has also agreed to other order provisions designed to protect consumers. For example, the order prohibits Ticketmaster from failing to disclose that a consumer is being redirected to a resale Web site or that the tickets on the resale Web site often exceed the original ticket price, and from misrepresenting the status of tickets on a resale Web site (i.e., if the ticket is in-hand and ready for delivery or whether the reseller is making an offer to procure the ticket for the consumer). The FTC will take action to enforce this order if needed, and to protect consumers in the ticketing and concert market against unfair or deceptive acts and practices. To that end, FTC staff has sent warning letters to a number of other ticket resale companies discussing the Ticketmaster settlement and the FTC's concerns about specific ticketing practices. In the letter the FTC strongly recommends "that you review your own company's Web site to ensure that you are not making any misleading statements or failing to provide material information to prospective purchasers of tickets listed on your site."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

property rights protection in presentations overseas.

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

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

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

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

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

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

Questions from the Honorable Charles E. Grassley

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

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

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

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

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

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

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

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

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

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

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

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

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

Questions from the Honorable John Cornyn

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

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

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

18 *Id*. at 1.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

when it will bring a Section 5 case.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> **19(b):** Do you agree with the ABA Section on Antitrust that "it would be more consistent…to make clear that market definition remains a necessary element of merger analysis"?
>
> **19(c):** Can you commit to revising the proposed guidelines to require the definition of markets as a necessary step in merger analysis?

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

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

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

Answer 20: The agencies have never followed a fixed, unbending order of analysis when reviewing mergers. As the FTC and DOJ explained in our 2006 Commentary on the Horizontal Merger Guidelines, "the Agencies do not apply the Guidelines as a linear, step-by-step progression that invariably starts with market definition and ends with efficiencies or failing assets." Rather, "the Agencies' analysis of proposed mergers . . . is part of an integrated approach." This "integrated process is a tool that allows the Agency to answer the ultimate inquiry in merger analysis: whether the merger is likely to create or enhance market power or facilitate its exercise." Commentary at 2. There is a broad consensus that the 1992 Guidelines have functioned well in assisting the antitrust bar and the business community to understand how the agencies evaluate mergers. I can assure you that a goal of any revisions to the Guidelines will be to maintain that high level of assistance, and that the rigorous analysis that the agencies historically have brought to bear in analysis of mergers is continuing and will continue following revision of the Guidelines.