ANTITRUST ENFORCEMENT AGENCIES

HEARING

BEFORE THE

SUBCOMMITTEE ON
REGULATORY REFORM,
COMMERCIAL AND ANTITRUST LAW

OF THE

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HOUSE OF REPRESENTATIVES

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ANTITRUST ENFORCEMENT AGENCIES

FRIDAY, NOVEMBER 15, 2013

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON REGULATORY REFORM,
COMMERCIAL AND ANTITRUST LAW
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to call, at 9:10 a.m., in room 2141, Rayburn House Office Building, the Honorable Spencer Bachus (Chairman of the Subcommittee) presiding.

Present: Representatives Bachus, Goodlatte, Farenthold, Marino, Collins, Smith, Cohen, Conyers, Johnson, DelBene, and Jeffries.

Staff Present: (Majority) Anthony Grossi, Counsel; Ashley Lewis, Clerk; Philip Swartzfager, Legislative Director for Mr. Bachus; Jennifer Lackey, Legislative Director for Mr. Collins; Justin Sok, Legislative Assistant for Mr. Smith; Jonathan Nabavi, Legislative Director for Mr. Holding; and (Minority) James Park, Minority Counsel.

Mr. BACHUS. Good morning. The Subcommittee on Regulatory Reform, Commercial and Antitrust Law hearing is called to order. We will first do our opening statements. My revisions have arrived just in time.

Today's oversight hearing is an example of this Subcommittee and the Congress exercising one of its fundamental responsibilities. Oversight is essential to promoting accountability and transparency, and it brings to light the checks and balances envisioned by our Founding Fathers. George Washington noted in his farewell address that, and I quote, "The necessity of reciprocal checks in the exercise of political power has been events by experiments ancient and modern. To preserve them must be necessary as to institute them."

Before us today are the two Federal antitrust enforcement agencies and their representatives, the Federal Trade Commission through its Bureau of Competition and the Department of Justice through its Antitrust Division. I welcome you, and I am glad that our agencies are back at work after a brief interruption.

These agencies are entrusted with protecting consumers and free markets from harmful anticompetitive conduct and practices. Their mission is best accomplished in a way that is transparent, fair, predictable, and reasonably stable. When enforcement is arbitrary and businesses are unclear about what the rules of the road really are,

competition can actually be impeded, and it is the consumer who ultimately suffers.

One area where there could be an improvement in transparency and predictability is the FTC's unfair methods of competition authority under Section 5 of the FTC Act. The FTC's failure to establish a clear standard for Section 5 has created uncertainty for businesses and resulted in costly litigation that could be avoided. And this is not a recent development. This has been over multiple Administrations. Concerns regarding the FTC's Section 5 authority have been raised by two of the four sitting Commissioners, as well as my colleagues in Congress. To this end, I recently joined Chairman Goodlatte, Vice Chairman Farenthold, Senator Grassley and Senator Lee and others in a letter urging FTC to issue guidance on its Section 5 authority. Today's hearing will provide an opportunity to explore this issue.

We will also use this opportunity to explore the rationale used by the DOJ when it decides to pursue injunctive relief to prevent a proposed transaction. The DOJ's recent settlement and indeed its original decision to file a lawsuit against the proposed American Airlines and US Airways merger raises questions about how it makes the determination to intervene in a proposed merger.

This matter raises questions for some of us in light of the fact that the Department has approved several similar or even more problematic airline mergers in the past. It appears to me to be the case of overcompensating for past omissions, and that is just my personal view. When an executive agency undertakes an action that appears to suddenly turn new ground, you wind up with confusion and uncertainty, and leave businesses wondering whether to expend significant time and resources pursuing a strategy that might be thwarted by the government for very unclear reasons.

There have also been concerns raised regarding the FTC's record and its administrative proceedings. In a recent column, the former Policy Director of the FTC, David Balto, found it troubling that since 1995 the agency has found a violation in every single case in which it has voted to issue a complaint. With this kind of record and unbeaten streak that Perry Mason would envy, a company might wonder whether it is worth putting up a defense at all in a system where the FTC brings the complaint, the case is tried before an administrative law judge at the FTC, and the FTC holds the authority to overturn a decision adverse to the agency. And I will add to that and does. My hope is that Chairman Ramirez will address my concerns about a process that appears to be very favorable to the FTC in all cases.

Today's hearing will allow for an open discourse on these and other issues, with the aim of ensuring that Federal antitrust authority is being properly exercised.

At this time I recognize the Ranking Member for his opening statement.

Mr. COHEN. Thank you, Mr. Chair.

The Supreme Court has referred to the Federal antitrust laws as the Magna Carta of free enterprise, saying that the comprehensive charter of economic liberty aimed at preserving free and unfettered competition is exactly what that is.

Effective antitrust enforcement is key to ensuring a vibrant competitive marketplace that rewards innovation and creativity and offers consumers greater choice and lower prices. In the absent of antitrust enforcement, companies have less incentive to compete, more incentive to maintain high profit margins at the expense of consumer welfare, just like Delta airlines in Memphis.

At the forefront of the effort to ensure that competition remains free and fair are the Nation's principal antitrust enforcement agencies, the Antitrust Division of the Department of Justice and the Federal Trade Commission's Bureau of Competition. Each agency has applied efforts to enforce Federal antitrust laws in recent years. The Justice Department won a near total victory in the issues with Apple and stopped it from conspiring with publishers to raise prices for consumers. Thanks to the Department's work, the consumers will enjoy e-books that are 40 percent cheaper than they might have been.

The Department has also successfully obtained criminal fines of more than a billion dollars and obtained prison sentences for 28 people for criminal antitrust violations, which are the most harmful types of anticompetitive behavior like price fixing and bid rigging. Similarly, the FTC has had a number of notable successes on behalf of consumers, including the victory before the Supreme Court in *FTC v. Actavis*, which found so-called pay-for-delay agreements to be subject to the antitrust laws.

Meanwhile, both agencies established the principle that holders of standard essential patents may not seek to exclude competitors who rely on the standard technology covered by such patents and must license such technology on reasonable and nondiscriminatory terms.

My constituents, those in Memphis, Tennessee, are all too well aware of the consequences of ineffective antitrust enforcement. As I noted back in February and I noted 2 minutes ago, the merger of Delta Airlines and Northwest Airlines has been nothing short of a disaster for Memphis after the merger. Before the merger they had 240-some-odd flights in and out of Memphis, or departing Memphis, I think. Now they have but about 40, although Mr. Anderson did come before this Committee and say it won't affect Memphis, we love Memphis, but we apparently love something else more.

Those promises in 2008, no hub closures, which just as I heard in the assurances for American and US Air, and hopefully they will be more fitting and they were tailored to 3 years, and Delta waited about 3 years before they finally put the lid on, that this merged airline would not make that difference. But Mr. Anderson said we would also have a flight, continue our flight to Amsterdam and may have a flight to Paris, and, wow, JFK was going to be in Memphis, the airline at least. Of course, none of that was true and the Amsterdam flight no longer exists.

There is a string of broken promises that could have been avoided if we wouldn't have permitted that merger. They did everything they could to hurt Memphis, and have. The results, my constituents are very hurt, very upset, a substantial loss of air service and a loss of jobs, an airport constructed and expanded for Delta as an economic hub, much of it is vestigal.

Protecting consumers from antitrust violations is important. In addition, though, I also hope that Mr. Baer will tell the Attorney General—and I know it is not your subject matter and it is not your job to be a messenger, that is not your job—but there are a lot of individuals in prison with unjust sentences for mandatory minimums and for people who are there for crack cocaine disparities, that when they went in prison they are 100 to 1, they are now 18 to 1. When we changed law it was called the fair sentencing law. The House passed it, the Senate passed it, the President signed it. That means it is the public policy of the United States.

There are people in prison for sentences that are void against the public policy of the United States. They should have commutations. There should be somebody heading up the Commutations Department whose job should be tomorrow, because there is no time that the fierce urgency of now is more urgent than people whose liberties are being deprived and for the taxpayers to spend $30,000-plus to keep these people incarcerated when it is void against public policy.

So I hope you will take my message back to my good friend Mr. Holder, who should not be impeached and should remain as a fine active Attorney General, that he does need to release some people from prison because they don't need to be there.

I look forward to hearing from our witnesses as to what efforts the antitrust enforcement agencies are currently undertaking to help ensure free and fair competition in all industries, and at some point today I will get on a Delta airplane and fly through Atlanta to go home.

And I yield back the balance of my time.

Mr. BACHUS. At this time I would like to recognize the Chairman of the full Committee, Chairman Goodlatte.

Mr. GOODLATTE. Thank you, Mr. Chairman.

The protection of our free markets is vital to the success of the American economy. By creating an environment in which companies are allowed to compete freely and consumers can select products without restriction, the allocation of resources is maximized in accordance with free market principles. Vigorous, intelligent and predictable antitrust enforcement promotes these principles by preventing the misuse of monopoly power. Further, as former Judiciary Committee Chairman Henry Hyde advocated, strong antitrust enforcement dissipates political pressure for government regulation.

This Committee has a long and robust effort of oversight of the antitrust laws and their enforcement agencies. I thank Chairman Bachus for continuing the tradition by holding today's hearing. The Committee's history includes legislation that was enacted into law in 2002 to form the bipartisan Antitrust Modernization Commission, the AMC. In 2007, after conducting a comprehensive review of the antitrust laws and their enforcement, which was done in coordination with leading antitrust experts and practitioners, the AMC issued a lengthy report detailing its recommendations for improving antitrust enforcement.

One of the recommendations contained in the AMC report focuses on removing the disparities contained in the merger review processes between the Department of Justice and the Federal

Trade Commission. As the AMC report states, parties to a proposed merger should receive comparable treatment and face similar burdens, regardless of whether the FTC or the DOJ reviews their merger.

A divergence undermines the public's trust that the antitrust agencies will review transactions sufficiently and fairly. More importantly, it creates the impression that the ultimate decision as to whether a merger may proceed depends in substantial part on which agency reviews the transaction. I believe this recommendation merits additional attention, and I look forward to examining this issue with Assistant Attorney General Baer and Chairwoman Ramirez.

Another area that deserves further examination is the FTC's involvement in looking into abusive patent litigation practices. On October 23, 2013, I introduced a bill with a number of my colleagues to address the growing problem of abusive patent litigation. I have been following the efforts by the DOJ and the FTC on this front as well, including the recent announcement by the FTC that it was seeking certain information from patent assertion entities. I would be interested to learn additional details about the FTC's plans regarding this information collection effort.

I look forward to hearing the testimony today from our witnesses of the agencies' antitrust enforcement efforts as well as on these other important issues.

And, Mr. Chairman, thank you and I yield back the balance of my time.

Mr. BACHUS. Thank you.

Mr. COHEN. Mr. Chair, if I can ask for unanimous consent——

Mr. BACHUS. Absolutely. Then I am going to recognize the former Chairman and Ranking Member of the full Committee.

Mr. COHEN. Unanimous consent to submit a letter from Ms. Laura Glading, who is the head of the professional flight attendants, and she is in love with Mr. Baer and says he did a great job.

Mr. BACHUS. Oh, she says he did a great job? Okay, yeah, we will introduce that for sure and get him a copy of it. Without objection, it is introduced into the record. Thank you.

[The information referred to follows:]

Association of Professional Flight Attendants

Proudly Representing the ***Flight Attendants*** *of American Airlines*

Office of the President

November 14, 2013

House Committee on Judiciary Subcommittee on
Regulatory Reform, Commercial and Antitrust Law
2138 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Bachus, Ranking Member Cohen, and members of the Subcommittee:

Nine months ago, I sent you a letter voicing my strong support of the then-proposed merger of my employer American Airlines, with its competitor US Airways. At the time, employees were very excited about the prospect of working for a new American that could compete effectively with legacy carriers United and Delta. In the intervening months, our hopes were temporarily dashed by a lawsuit filed by the Department of Justice Antitrust Division. Lead by Assistant Attorney General Bill Baer, the DOJ took an aggressive stance in its enforcement action against the merger at the eleventh hour. My colleagues and I felt blindsided and understandably devastated.

In the days that followed the lawsuit filing, employees of both airlines began to mobilize. Our goal was to generate political support for the merger by educating state and federal officials about its benefits. As the Association of Professional Flight Attendants' (APFA) members flooded the halls of Congress, we were welcomed by lawmakers of both parties who were eager to see American and its employees succeed. I appreciated the warm reception.

I was surprised, however, to be similarly received at the office of Assistant Attorney General Bill Baer. Just hours before a well-publicized rally at the U.S. Capitol, Mr. Baer and members of his staff hosted several labor representatives, including myself, at his office. He listened, he engaged with us, he asked questions, and he was genuinely interested in our position. Even as my colleagues gathered at the Capitol to loudly oppose him and his employer, Mr. Baer heard us out. I appreciated his willingness to listen.

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In the weeks that followed, Mr. Baer and his staff worked with the companies to craft a settlement. The end result is an arrangement that will allow the new American to succeed while preserving robust competition in the industry. Most importantly for me and my fellow flight attendants, the settlement will guarantee long-term job security.

Throughout this ordeal, Mr. Baer conducted himself as a true public servant in every sense of the term. The resolution he helped achieve is a win-win. On behalf of the APFA and all flight attendants at the new American, I would like to thank Mr. Baer for allowing us to complete the merger of American Airlines and US Airways, and for working with the parties in a cooperative and professional way.

Sincerely,

Laura Glading
President
Association of Professional Flight Attendants

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Tel: (817) 540-0108 • Fax: (817) 540-2077

Mr. BACHUS. And I will say I think that it was a successful conclusion, the merger. Obviously when everybody is not completely satisfied, that is probably a good result.

At this time I would like to introduce our two witnesses——

Mr. COHEN. Mr. Chairman?

Mr. BACHUS. Oh, I am sorry, that is right. I did a Barney Frank.

Mr. CONYERS. Thank you, Chairman Bachus.

Mr. BACHUS. Mr. Conyers is recognized.

Mr. CONYERS. Thank you very much.

Today's oversight hearing provides an excellent opportunity for us to focus on the critical purpose of antitrust law: to ensure that businesses do not behave in ways that injure markets and ultimately consumers. As to mergers, this means that any transaction that would result in a company obtaining an unfettered ability to raise prices or otherwise harm consumers is contrary to basic antitrust policy. So we should be especially skeptical about the potential detriment presented by a rapid succession of big mergers in a given industry, and, unfortunately, antitrust scrutiny of mergers has been woefully insufficient, in my view, over the past 30 years, until only recently.

The fact that many industries are now dominated by just a handful of very large firms attests to this failure of aggressive scrutiny. There has been a wave of mergers in industry after industry. I won't name all of the examples that come to mind, but in the banking industry alone there have been 47 mergers since 2001. Basic economics and common sense should tell us that a few dominant firms forces consumers to pay higher prices and to accept suboptimal products or services. This hands-off approach to antitrust merger enforcement reflects the misguided view that corporate power should trump other interests, including the public interest, and as a result the trend in antitrust law has been against the American consumer.

Fortunately, recent antitrust enforcement initiatives of both the Justice Department and the Federal Trade Commission appear to reflect a positive change from prior practice. I am heartened by the renewed vigor in antitrust enforcement that these agencies have exhibited in the past year or so. Under the Obama administration, the Justice Department has aggressively pursued litigation to block large, high profile, and potentially anticompetitive mergers, including lawsuits to block the proposed mergers of AT&T and T-Mobile, Anheuser-Busch, InBev and Grupo Modelo, and most recently American Airlines and US Airways. Such actions would for the most part have been unexpected in previous Administrations going back a generation.

Even more important is the fact that these suits have achieved pro-consumer results. AT&T and T-Mobile dropped their plans to merge, while Anheuser-Busch agreed to divest itself of all Grupo Modelo's U.S. business in response to the Department of Justice's lawsuit.

The FTC, meanwhile, was able to achieve an important victory for consumers before the United States Supreme Court this year in the *FTC v. Actavis* case, which held that agreements between brand name and generic drug manufacturers to delay the introduction of cheaper generic drugs can be subject to antitrust laws.

Such successes, however, do not necessarily mean further oversight is unnecessary. For instance, the Justice Department's tentative settlement agreement announced earlier this week with respect to the proposed American Airlines-US Airways presents some concerns. While this settlement agreement leaves consumers somewhat better off than they would have been had the merger gone through as proposed, I remain concerned that the new merged carrier, which would be the largest in the world, will result in only four domestic airlines controlling more than 80 percent of the market. As The New York Times noted in yesterday's editorial, the agreement simply ignores the central concern the Department of Justice expressed in its lawsuit. The four big airlines, United, Delta, Southwest, and the merged American, will have an even greater incentive to raise fares and fees because consumers will have fewer choices.

In closing, I note that strong antitrust enforcement is not possible without adequate resources, and as with other Federal agencies, the DOJ and FTC must have sufficient funding to pay for high caliber attorneys, economists, and other staff, and for vigorous and thorough investigations, and, when necessary, even litigation.

The continuing budget battles in Congress, including sequestration and the recent fight over a continuing resolution that led to the shutdown of the Federal Government, threaten to sap already limited resources for all of our Federal agencies. Some of the recent successes in antitrust enforcement would be undermined and future enforcement efforts could be compromised. That could return us to the bad old days of lax antitrust enforcement, with higher prices and fewer choices for consumers. I urge my colleagues to make every effort not to go down the road.

I thank the Chairman and return any balance of time I may have.

Mr. BACHUS. I thank the gentleman.

At this time I will introduce our two witnesses. We are very fortunate to have both of them here this morning. We appreciate your attendance. Both of them share a common accomplishment. Both of them were editors of their law reviews, at Stanford and Harvard. That is quite an accomplishment, and I commend both of you for being diligent students and obviously intelligent.

Mr. Baer was sworn in as an Assistant Attorney General for the Department of Justice Antitrust Division on January the 3rd, 2013. Prior to his appointment, he was a partner at Arnold & Porter, where he was head of the firm's antitrust practice group. Prior to his time at Arnold & Porter, he was the head of the FTC's Competition Bureau from 1995 to 1999. Mr. Baer received his JD from Stanford Law School in 1975 and served as editor of Stanford's Law Review. He received his BA from Lawrence University in 1972, and that is in Wisconsin, where he graduated cum laude and Phi Beta Kappa.

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

mirez graduated from Harvard Law School cum laude, where she served as an editor of the Harvard Law Review and holds an AB in history magna cum laude from Harvard University.

I welcome both our witnesses. I will go from tradition, left to right, by recognizing Mr. Baer for your opening statement.

THE HONORABLE WILLIAM J. BAER, ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION, UNITED STATES DEPARTMENT OF JUSTICE

Mr. BAER. Mr. Chairman, Ranking Member Cohen——

Mr. BACHUS. I think we will probably not have a clock, so if you need 6 minutes, 7 minutes, take that. I don't want you to rush through your remarks. But if you want 4 minutes, that is fine.

Mr. BAER. Right. Thank you, sir. It is not the Senate and we will try not to observe a filibuster approach to our statements.

It is a pleasure to be here. We thank you for the opportunity to discuss the work of the Antitrust Division. And I am very much honored to be here with Chairwoman Ramirez at the FTC. We for the last 10 months or so have been privileged to work together on behalf of American consumers.

Competition, as the Chairman and a number of other Members said in their opening remarks, is the cornerstone of our Nation's economic system. When markets work properly, consumers benefit from lower prices and higher quality goods and services. The antitrust laws serve to promote and protect a robust free market economy by prohibiting anticompetitive agreements, anticompetitive conduct, and anticompetitive mergers that have a potential to distort market outcomes and ultimately harm consumers.

Let me start with our efforts at the Antitrust Division to uncover and prosecute cartel behavior. Price fixers and bid riggers do serious and demonstrable harm to consumers and to our economy. It is a persistent problem. But we are making progress in getting at it. Our efforts have resulted in a dramatic increase in exposing the world's largest price-fixing cartels, involving such products as air transportation, liquid crystal displays that are used in flat panel TVs, iPads, computer screens, and the like, and, most recently, auto parts.

In the last fiscal year alone, the Division filed 50 criminal cases. We charged 21 corporations and 34 individuals for antitrust crimes that affected tens of billions of dollars of U.S. commerce. The Division obtained criminal fines totaling over $1 billion in the last fiscal year, and we sentenced, with the help of the courts, 28 individuals to jail terms that average more than 2 years per defendant.

Now, large monetary criminal penalties against corporations make cartel behavior less attractive, but the threat of jail time for senior company officials responsible for injuring the consumers is also in my experience a very powerful deterrent. Today, the average prison sentence for defendants charged with crimes by the Antitrust Division is 25 months, over 2 years in jail. That is three times the average jail sentence in the 1990's.

Taxpayers are well served by the vigorous prosecution of criminal cartels. The Antitrust Division continually produces results that more than justify its annual appropriation. In other words, we think we give your constituents, your taxpayers, a good return on

the scarce dollars you entrust to us. In the last 5 fiscal years we averaged $850 million in criminal penalties against an average direct appropriation of about $85 million.

Now, these dollars that come into the Treasury don't go to the Antitrust Division, regrettably. They go to the Crime Victims Fund, which actually helps victims of all types of crimes throughout the country in each and every State that Members represent on this Subcommittee.

Civil enforcement of the antitrust laws also protects competition and consumers by challenging conduct that shackles free competition and by going after anticompetitive mergers. For example, earlier this year a Federal court in New York held that executives at the highest levels of Apple orchestrated a conspiracy with five major book publishers to raise eBook prices and end eBook retailers' freedom to compete on price terms. This was a big win for U.S. consumers. Once our orders went into place against the book publishers and they were forced to compete with one another, the price of the average eBook bestseller, New York Times bestseller, has dropped from $11 on average down to just about $6 within a year. Once the illegal agreement stopped, consumers benefited from an open, free, competitive market.

In addition, the redress, the civil redress that the book publishers thus far have agreed to pay, will result in hundreds of millions of dollars being automatically credited to the accounts of consumers that went to iTunes to buy a book or bought a book elsewhere online.

Anticompetitive mergers are also important to consumers, and stopping them is another key part of our job. In January of this year, as Mr. Conyers mentioned, we filed suit to stop the merger of the largest and third-largest firms that sell beer in the United States. We ended up reaching a settlement that required InBev ABI, the old Anheuser-Busch, to divest the entire U.S. business of Grupo Modelo—those are the folks that make Corona and other beers—and create an independent, fully integrated and economically viable competitor, saving consumers from the risk of billions of dollars in increased prices.

Also, as has been mentioned, in August the Antitrust Division and several State attorneys general filed suit to block the proposed merger of US Airways and American Airlines. This deal, our complaint alleged, would have harmed competition for airline travel in local markets throughout the country.

Earlier this week we announced a proposed settlement with the carriers that if approved by the court would resolve our lawsuit challenging that merger. Under the agreement US and American will divest important facilities at seven key airports across the country. The settlement will enable low-cost carriers to buy those facilities and expand their presence all across the country, injecting a new form of competition into places that have never had it before.

The low-cost carriers have a tremendous price effect where they are able to fly today, but there are constraints, slots, gates at various airports, and by giving them access to those airports we have the potential to inject much more extensive competition into that marketplace.

At the same time, the settlement allows the new American, the combined American Airlines and US Airways, to retain all of the commuter slots that they currently have at Reagan National. Commuter slots are reserved for small jets and designed to serve small and medium-sized communities. We let the airline keep those slots because they weren't important to our remedy, but obviously the service is important to those communities. At the same time, the Department of Transportation secured a binding commitment from the new American that they will continue to use those airplanes to serve small and medium-sized communities.

Effective enforcement is critical to what we do, but close collaboration with other parts of the government also achieves positive results for American consumers. We work closely with the Patent and Trademark Office to address issues involving the International Trade Commission and standard essential patents subject to voluntary FRAND commitments.

Together with the FTC, we are examining whether there are legitimate antitrust concerns associated with the growth of these patent assertion entities. It is the subject of the legislation that the full Committee Chairman mentioned in his opening remarks. Together with the FTC, we engage very actively with foreign antitrust enforcers to promote cooperation, transparency, and evenhanded application of the antitrust laws around the world.

Now, while effective and efficient antitrust enforcement makes our markets more competitive and saves consumers money, we appreciate that antitrust enforcement itself has to be efficient and sensitive to the costs we may impose on the business community. We are working on that.

For example, at the Antitrust Division we have been a pioneer among government agencies in the use of predictive coding methods in large volume document productions. I have only learned about this in the last few months. But it is essentially allowing search, like Google search terms, to have companies under investigation, whether it is a merger or a cartel, to more efficiently identify the documents that are responsive to us. We have used that in mergers this year. One law firm told me that we saved their client $2 million by working together with them on getting efficient production of the information we need to do our jobs.

Finally, the Antitrust Division, sir, has a longstanding, consistent, and nonpartisan commitment to American consumers. We are committed to ensuring that companies adhere to the antitrust laws so that consumers benefit from lower prices and higher quality goods and services. I am honored to be part of the hard-working Antitrust Division team, all of whom are glad to be back at work. And these dedicated public servants are fulfilling a law enforcement mission that is delivering every day real benefits to American consumers. Thank you, sir.

Mr. BACHUS. Thank you.

[The prepared statement of Mr. Baer follows:]

Department of Justice

STATEMENT

OF

WILLIAM J. BAER
ASSISTANT ATTORNEY GENERAL
ANTITRUST DIVISION

BEFORE THE

SUBCOMMITTEE ON REGULATORY REFORM,
COMMERCIAL AND ANTITRUST LAW
COMMITTEE ON THE JUDICIARY
U.S. HOUSE OF REPRESENTATIVES

HEARING ON

"OVERSIGHT OF THE ANTITRUST
ENFORCEMENT AGENCIES"

PRESENTED ON

NOVEMBER 15, 2013

STATEMENT
OF
WILLIAM J. BAER
ASSISTANT ATTORNEY GENERAL
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BEFORE THE
SUBCOMMITTEE ON REGULATORY REFORM,
COMMERCIAL AND ANTITRUST LAW
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HEARING ENTITLED
"OVERSIGHT OF THE ANTITRUST ENFORCEMENT AGENCIES"
PRESENTED ON
NOVEMBER 15, 2013

Chairman Bachus, Ranking Member Cohen, Vice-Chairman Farenthold, and distinguished members of the Committee, thank you for inviting me to appear before you today to discuss the work of the Antitrust Division. I am honored to be here and to be part of the proud and successful tradition of antitrust enforcement at the Department of Justice. I am also pleased to be appearing with Federal Trade Commission Chairwoman Ramirez. She is an exceptional public servant and a friend. We are privileged to be able to work together on behalf of American consumers and to promote fair and effective antitrust enforcement both here and abroad.

We at the Antitrust Division appreciate this subcommittee's support of our enforcement efforts. Competition is the cornerstone of our nation's economic system. When markets are working properly, consumers benefit from lower prices and higher quality goods and services. The antitrust laws serve to promote and protect a robust free-market economy by prohibiting anticompetitive agreements, conduct, and mergers that distort market outcomes and harm consumers.

The division devotes substantial attention to the goods and services that consumers use every day—the items we buy at the grocery store, media and entertainment, communications, consumer electronics, and new technologies—as well as other goods and services that have a significant impact on our nation's economy, including health care, agriculture, transportation, energy, and financial services.

We fulfill our competition mission in several distinct ways:

- detecting and prosecuting hardcore criminal antitrust violations—price fixing, bid rigging, market allocation, and other cartel behavior;
- halting or restructuring mergers that would raise prices and harm quality and innovation, and challenging unilateral (single-firm) conduct that would do the same;
- challenging illegal coordination/collusion by companies that result in serious harm to consumers; and
- cooperating with colleagues at the FTC, other federal agencies, and state and international authorities to promote free markets and consumer interests.

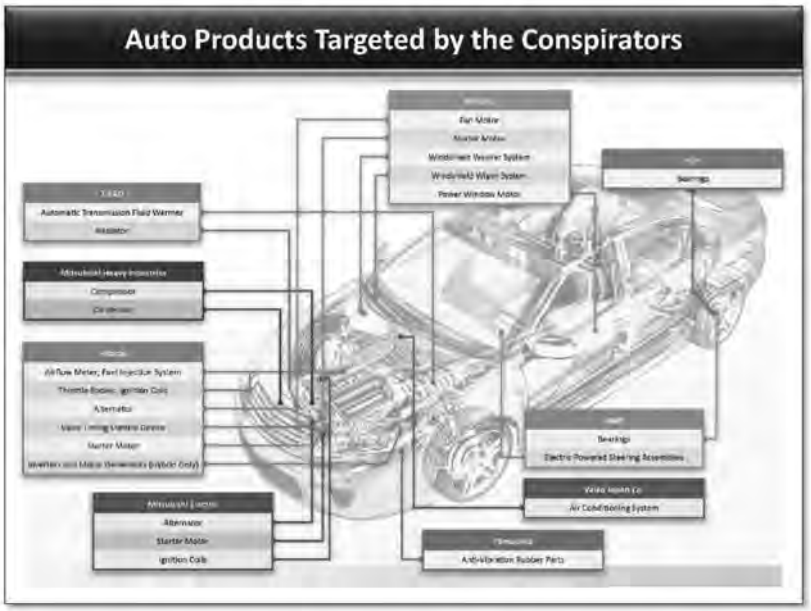
We appreciate that fiscal resources are limited. The division uses the scarce resources entrusted to us by Congress to provide the biggest return for American consumers, businesses, and taxpayers. In criminal prosecutions alone, the division regularly brings in more than 10 times its annual direct appropriation. Those fines are deposited pursuant to statute into the Crime Victims Fund, a major source of funding for assistance to victims of crime throughout the country. And, our civil and criminal enforcement efforts protect, preserve, and restore competition in markets across the entire U.S. economy, ensuring lower prices and more innovation and choices to American consumers.

Cartel Enforcement

Let me start with our efforts to uncover and prosecute cartel behavior. Price fixers and bid riggers do serious and demonstrable harm to consumers and the economy. We target cartels that rob consumers of their hard-earned dollars. We pursue both corporate and individual wrongdoers, foreign and domestic. In Fiscal Year 2013 alone, the division filed 50 criminal cases. We charged 21 corporations and 34 individuals for crimes affecting tens of billions of dollars of commerce in U.S. markets. The division obtained criminal fines totaling over $1 billion and courts sentenced 28 individuals to jail terms that average more than 2 years per defendant.

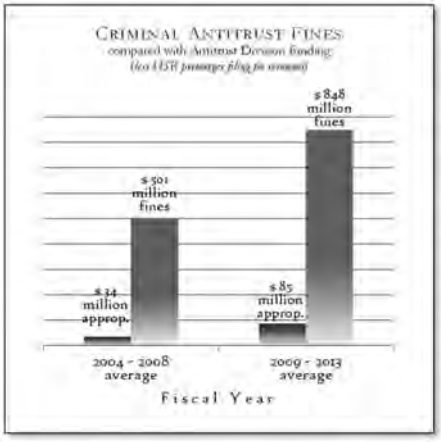
Aggressively pursuing cartel participants benefits consumers in multiple ways. Not only is the illegal conduct stopped, but other wrongdoers are put on notice that they should halt their illegal conduct, and those contemplating collusion are deterred from committing the crime in the first instance.

For example, a few weeks ago, Attorney General Holder announced major developments in our ongoing investigation of auto parts cartels and noted that this is "the largest criminal investigation the Antitrust Division has ever pursued, both in terms of its scope and the commerce affected by the illegal conduct." The investigation uncovered more than a dozen separate conspiracies spanning more than a decade and involving numerous auto parts suppliers around the globe that, as the Attorney General noted, "all had one thing in common—they targeted U.S. manufacturing, U.S. businesses and U.S. consumers." Companies rigged bids and fixed prices for critical parts of cars sold in the U.S.—including seatbelts, airbags, steering wheels, antilock brake systems, instrument panel clusters, and electric wire harnesses.



These illegal actions harmed American automobile manufacturers as well as American consumers who bought or leased a car. It serves as a prime example of how antitrust enforcement protects both businesses and consumers. Thus far, 21 companies and 21 executives have been charged and have agreed to pay more than

$1.6 billion in criminal fines, and 17 executives have been sentenced to serve time in U.S. prisons or have entered into plea agreements calling for significant prison sentences. The cases filed to date involve conduct affecting over $8 billion in auto parts sold to car manufacturers in the U.S. and parts used in more than 25 million cars purchased by American consumers. The investigation continues.



Consumers are well-served by the vigorous prosecution of criminal cartels because enforcement delivers to them the benefit of more competitive markets. Taxpayers are well-served too, as the division continually produces results that more than justify its annual appropriation. In the last ten fiscal years, the division has obtained criminal fines averaging nearly $675 million per year. That is more than 10 times our average annual appropriation of $60 million (net of the division's share of offsetting collections of Hart-Scott-Rodino fees). In the last five fiscal years we averaged nearly $850 million in criminal fines versus an average appropriation of about $85 million (again, net of HSR fees). These fines do not go to the Antitrust Division, but rather are contributed to the Crime Victims Fund, which helps victims of all types of crime throughout the country. They are provided assistance with medical and counseling expenses, assistance in the form of shelter, crisis intervention, and justice advocacy, and money for state and local services to crime victims.

Civil Enforcement

The Antitrust Division's civil enforcement record sends a strong message to companies that if they engage in conduct that shackles free competition or try to gain a competitive advantage through anticompetitive mergers, the division will act to protect competition and consumers. Here too we focus our resources where they will have the greatest bottom-line impact to the economy and create tangible and lasting gains for American consumers.

For example, earlier this year a federal court held that executives at the highest levels of Apple, Inc. orchestrated a conspiracy with five major book publishers to raise e-book prices and end e-book retailers' freedom to compete on price. The court issued an order requiring Apple to modify its existing agreements with the five publishers to restore price competition at retail and to eliminate the collusion that led to higher e-book prices. Reintroducing competition for e-books has greatly benefited U.S. consumers. In the last year, the average price of e-book bestsellers has already fallen from a little over $11 to closer to $6. Consumers are being compensated for past unlawful overcharges. The average refund for the bestsellers purchased during the time of the conspiracy is estimated by the claims administrator to be over $3, thanks to our state co-plaintiffs and private plaintiffs who to date have obtained over $160 million for a consumer fund from the settling publishers. The court found Apple's antitrust compliance culture to be sub-optimal. To deter Apple from engaging in similar collusive conduct in the future, the court ordered the appointment of an external monitor, whose salary and expenses will be paid by Apple, to work with a new, full-time internal antitrust compliance officer on observance of the Final Judgment and compliance with the antitrust laws generally. All around this is a big win for U.S. consumers.

This subcommittee recently held a hearing on competition in health care and the role antitrust enforcement plays in protecting competition in health care provider and insurance markets. The Antitrust Division has been working to eliminate anticompetitive conduct through which health care insurers and providers acquire or expand market power, raising health care costs. One focus for us is most favored nation clauses (MFNs). Such provisions potentially distort the competitive process by raising the costs of health insurance and hospital services, preventing other insurers from entering the market, and discouraging discounts. In 2010, the Antitrust Division filed a lawsuit challenging Blue Cross Blue Shield of Michigan's (BCBSM) use and enforcement of MFNs in its contracts with Michigan hospitals. These provisions required hospitals to charge BCBSM no more than they charge its competitors or to charge competitors more than they charge BCBSM, making it harder for its rivals to compete and survive. In addition to this lawsuit, in 2012 the division and the FTC held a workshop on MFN clauses that examined how MFNs can present competitive concerns in health insurance markets and in a number of other industries. This combination of enforcement and public discussion has shined a spotlight on the problems MFNs can cause, leading a number of states to take a hard look at these practices. In March of this year, Michigan enacted a statute to ban the use of MFNs in health care provider

contracts, becoming the latest in a growing list of over a dozen states that statutorily restrict or prohibit such provisions.

Anticompetitive mergers also have the potential to harm consumers. In January of this year, the division filed suit to stop Anheuser-Busch InBev's (ABI) proposed acquisition of Grupo Modelo, the largest and third-largest firms selling beer in the United States. The division reached a settlement that required the companies to divest Modelo's entire U.S. business, which created an independent, fully integrated and economically viable competitor. Since U.S. consumers spend tens of billions of dollars annually on beer, even small price increases would have resulted in sizeable harm to consumers. If preserving competition in this market makes just a one percent difference in prices, U.S. consumers will save almost $1 billion a year.

We have a number of matters in active litigation as well:

- In August of this year, the division and several state attorneys general filed a lawsuit to block the proposed merger of US Airways and American Airlines, a deal that would result in the creation of the world's largest airline and substantially lessen competition for airline travel in local markets throughout the United States. On November 12, 2013, the division reached a proposed settlement with the parties that, if approved by the court, will resolve the division's competitive concerns and the lawsuit.
- Trial just recently ended in the division's challenge to Bazaarvoice Inc.'s acquisition of PowerReviews Inc., a merger of the only two significant U.S. providers of ratings and reviews software. Consumer-generated product ratings and reviews are a ubiquitous part of the online shopping experience and are displayed on retailers' and manufacturers' websites.
- The division continues to litigate against American Express (Amex), challenging its rules that limit merchants' ability to promote competition among credit card networks by offering discounts to consumers who use certain payment methods offered by Amex's competitors, and that effectively foreclose lower cost payment methods, holding merchants' costs higher and potentially influencing the prices of all goods.
- In November 2012, the division filed suit against eBay, Inc., challenging an agreement not to competitively recruit employees, which hurt employees by lowering the salaries and benefits they might have received and by depriving them of job opportunities.

- And finally, in December 2012, the division challenged a joint venture between Coach USA Inc. and City Sights LLC, alleging that the joint venture, known as Twin America LLC, has resulted in higher prices for hop-on, hop-off bus tours in New York City.

These actions reflect the division's consistent commitment to American consumers. The division's focus is to ensure that companies adhere to the antitrust laws so consumers benefit from lower prices and higher quality goods and services.

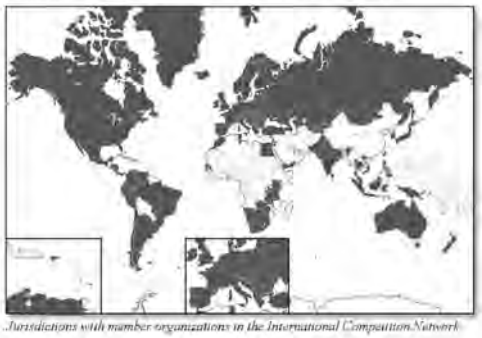
Advocacy, Interagency Collaboration, and Public Workshops

Effective enforcement is central to the division's mission, but we can achieve positive results for American consumers in other ways as well, often in close collaboration with other parts of the government. For example, the department and the U.S. Patent and Trademark Office jointly issued a Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments, which concluded that in many circumstances it would be inappropriate for a patent holder to seek injunctive relief in a judicial proceeding or seek an exclusion order if it has promised to license the patent on fair, reasonable and non-discriminatory terms. The Policy Statement was referenced by the U.S. Trade Representative in overturning a recent ITC exclusion order involving smartphones. In 2012, the division and the FTC jointly conducted a workshop to study the growth of and competitive implications associated with patent assertion entity (PAE) activities. Workshops such as this provide a forum for open discussion on what are among the most challenging and cutting-edge competition issues of the day.

Consumers and businesses also benefit from the division's effective and increasing coordination with foreign competition authorities. The division regularly cooperates on civil matters with competition agencies in Australia, Brazil, Canada, Chile, Colombia, the European Union (EU), Germany, Japan, Mexico, South Africa, and the United Kingdom, among others. International case cooperation is particularly important to our criminal enforcement program. It allows for coordinated raids in international cartel investigations, helping to preserve crucial evidence. Recent criminal investigations where we have worked with international enforcers include our auto parts investigation, where we are cooperating with our counterparts in Japan, the EU, and Canada, among others, and our air cargo cases, where we worked with the Australian Competition and Consumer Commission, the

European Commission, the New Zealand Commerce Commission, the U.K. Office of Fair Trading, and other agencies.

Additionally, the division participates, along with more than 100 other antitrust agencies, in the International Competition Network (ICN). The ICN's most recent conference highlighted cartel enforcement, including work on an Anti-Cartel Enforcement Manual, a reference tool for antitrust agencies around the world. The division also is an active participant and leader in the global dialogue on procedural fairness and transparency issues through the Organization for Economic Co-operation and Development (OECD), a key international forum for in-depth discussion of technical antitrust matters and competition policy issues.



Jurisdictions with member organizations in the International Competition Network

Reducing Burden on Business

While active antitrust enforcement makes our markets more competitive and saves consumers money, we appreciate that dealing with antitrust enforcers can be expensive and time consuming for the business community. The Antitrust Division appreciates that it needs to make enforcement as efficient as possible, without compromising our mission.

Improving electronic discovery is one promising avenue for reducing the burdens our investigations can impose. For example, our website includes a model civil electronic production letter that shows how the division structures its demands for electronic productions. This transparency helps parties understand and plan for productions to the division, making the process more predictable and less burdensome.

Further, the division has been a pioneer among government agencies in experimenting with the use of predictive coding methods in large volume document productions. Predictive coding is a type of technology-assisted document review that more quickly and accurately identifies relevant documents in a large collection, saving the parties time and money, while providing the division the

documents it needs to effectively conduct its investigations. Law firms have told us that use of predictive coding for document production to the division saved them and their clients millions of dollars—indeed, one firm issued a statement detailing how it saved over $2 million in a single production to the division.

The division is always looking for ways to make our investigations more efficient. With that goal in mind, we are also increasing our efforts to review our investigations post hoc. By understanding what we have done well and where we might have fallen short, we strive to create division-wide best practices, which should result in more efficient and cost-effective investigations and get parties through our processes more quickly and at lower cost.

Conclusion

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

Mr. BACHUS. And I was going to actually wait until the end, but let me say this. I do want to express just personally as a Member of Congress that I was somewhat embarrassed that the government did shut down, and I feel like it was a failure of the Article I body to do what needed to be done. So there were many of us that were quite disappointed that that happened. So I personally believe an apology is in order and I do want to say that, and I hope that we will avoid that in the future.

At this time I will recognize Chairman Ramirez. Yeah, another Barney Frank thing.

TESTIMONY OF THE HONORABLE EDITH RAMIREZ, CHAIRWOMAN, FEDERAL TRADE COMMISSION

Ms. RAMIREZ. Thank you. Chairman Bachus, Ranking Member Cohen, and Members of the Subcommittee, I appreciate the opportunity to testify today regarding the Federal Trade Commission's current antitrust and competition policy efforts.

I want to begin by thanking the Members of this Subcommittee for the support you have given the FTC. As you know, competition promotes economic growth and overall consumer welfare by keeping prices competitive, expanding output and choices, and promoting innovation. The FTC works closely with the Department of Justice's Antitrust Division to ensure that the American economy remains competitive through vigorous antitrust enforcement, and I am grateful for the excellent working relationship that we have with Assistant Attorney General Bill Baer and his colleagues at the Antitrust Division. We are going to continue to work closely with the Antitrust Division, as well as with our counterparts in the States, to enhance antitrust consistency, clarity, and transparency.

One of the agency's principal responsibilities is to prevent mergers that may substantially lessen competition. In fiscal year 2013, we challenged 23 mergers that were likely to have anticompetitive effects. In most of these cases, we negotiated a divestiture or other remedy that allowed the transaction to go forward, but in five instances we went to Federal court to stop the merger.

We also seek to identify and stop anticompetitive business conduct. Last year we brought four enforcement actions to stop harmful conduct such as unlawful exclusive dealing and improper information sharing among competitors.

In an effort to be most effective with limited resources, we pay particular attention to sectors where our action will provide the greatest benefit to the largest number of consumers. Chief among those are the healthcare and technology sectors.

Anticompetitive mergers and conduct can threaten to undermine efforts to control healthcare costs. It is therefore critical that the Commission preserve and promote healthcare competition, including in healthcare provider and pharmaceutical markets. The FTC has been at the forefront of these issues, preventing proposed mergers that threaten higher costs without related improvements in quality of care. We have recently successfully litigated three hospital mergers, and parties abandoned a number of deals after the FTC threatened a challenge, resulting in significant benefits to consumers.

We also continue to target efforts by brand name drug companies to stifle generic competition. As has been mentioned, in June we achieved a significant victory for consumers when the Supreme Court overturned the so-called scope of the patent test, which virtually immunized pay-for-delay settlements from antitrust scrutiny. Now we are in a much stronger position to protect consumers from anticompetitive drug patent settlements resulting in higher drug costs.

Given its increasing importance to consumers' lives, the Commission also seeks to ensure robust competition and innovation in the technology sector. Among other things, the Commission has sought to preserve the integrity of the standard-setting process. The Commission will continue to engage in an ongoing dialogue with stakeholders in this important area and bring enforcement actions when necessary to prevent the distortion of the standard-setting process.

The Commission applies a fact-based approach to enforcement in markets with new technologies or evolving business models. Sometimes a changing competitive landscape will lead the Commission to conclude that a proposed merger is likely to harm competition now or in the future, as it did recently when challenging Nielsen's proposed acquisition of Arbitron.

Other times the evidence leads the Commission to close an investigation without taking action. This was the case in the Commission's recent decision to close the investigation of Office Depot's acquisition of rival OfficeMax. Back in 1997, the Commission stopped the merger of Staples and Office Depot based on evidence that office supply superstores mainly competed with each other. But today office supply superstores face competition from other types of retailers, including big box and online merchants. This led the Commission to conclude that the transaction should be allowed to proceed.

These examples demonstrate the enduring vitality of the antitrust laws. Markets can and do change, but the antitrust laws remain a powerful tool to protect consumers and to promote competition.

The Commission also remains active in research and policy. We recently announced that we will conduct an in-depth study of the impact of patent assertion entities on technology markets. Our aim is to expand the information that is currently available about PAEs and how they operate in order to shed light on the likely costs and benefits of PAE activity. We believe this research will help inform the ongoing policy debate about PAEs.

Thank you, and I am happy to respond to any questions that you may have.

Mr. BACHUS. Thank you, Chairwoman Ramirez.

[The prepared statement of Ms. Ramirez follows:]

Prepared Statement of
the Federal Trade Commission

Before the
United States House of Representatives
Committee on the Judiciary
Subcommittee on Regulatory Reform, Commercial and Antitrust Law

"Oversight of the Enforcement of the Antitrust Laws"

Washington, D.C.
November 15, 2013

Chairman Bachus, Ranking Member Cohen, Vice-Chairman Farenthold, and Members of the Subcommittee, thank you for the opportunity to appear before you today. I am Edith Ramirez, Chairwoman of the Federal Trade Commission, and I am pleased to testify on behalf of the Commission and discuss some of our current competition enforcement activities.[1]

As the members of this Subcommittee know, competitive markets are the foundation of our economy, and effective antitrust enforcement is essential for those markets to function well. Vigorous competition promotes economic growth and overall consumer welfare by keeping prices competitive, expanding output, and promoting innovation.

As a small agency with a big mission, the FTC works to ensure that American markets are open, vibrant, and unencumbered by unreasonable private or public restraints. For nearly 100 years, the FTC has fulfilled its mission of protecting American consumers by enforcing the antitrust laws. It has done this despite vast changes in the American economy, such as the explosive growth in technology, and increasing globalization. Because Congress created the FTC to be an independent expert agency, we also study evolving marketplaces and advance antitrust policy through bipartisan, consensus-based decision making.

I. The FTC's Competition Enforcement Work

The Commission seeks to promote and protect competition through an evidenced-based, balanced approach to law enforcement. The FTC has jurisdiction over a wide swath of the economy and focuses its enforcement efforts on sectors that most directly affect consumers, such as health care, technology, and energy. The agency shares primary jurisdiction with the Department of Justice in enforcing the nation's antitrust laws.

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

One of the agency's principal responsibilities is to prevent mergers that may substantially lessen competition. Premerger filings under the Hart-Scott-Rodino Act have recovered from recessionary levels—indeed, both FY 2012 and FY 2013 saw about twice as many filings as FY 2009.[2] Agency staff reviews the filings, and the vast majority of transactions are allowed to proceed without further inquiry. In a small number of instances, the proposed mergers require additional investigation to determine whether they are likely to violate Section 7 of the Clayton Act. During FY 2013, the Commission challenged 23 mergers after the evidence showed that they would likely be anticompetitive.[3]

The Commission also maintains a robust program to identify and stop anticompetitive business conduct.[4] For example, recent enforcement actions have put an end to harmful exclusive dealing arrangements,[5] illegal joint fee negotiation,[6] and information sharing between competitors that could lead to explicit or tacit coordination on price or other aspects of competition.[7] These actions also provide guidance to other businesses to help them comply with antitrust standards.

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[2] In FY 2012 and FY 2013, the Agencies received notice regarding 1,400 and approximately 1,300 proposed transactions, respectively. In 2009, the Agencies received notice of 684 proposed transactions.

[3] During FY 2013, the FTC filed complaints in federal court to stop five mergers pending a full administrative trial, resolved competition concerns with fifteen proposed mergers through consent orders, and the parties abandoned two mergers in response to FTC concerns. See case summaries in the FTC's Competition Enforcement Database, *available at* http://www.ftc.gov/bc/caselist/merger/total/2013.pdf.

[4] During FY 2013, the FTC entered into consent agreements resolving four conduct investigations.

[5] Press Release, FTC Settlement with IDEXX Restores Competition in the Market for Diagnostic Testing Products Used by Pet Veterinarians (Dec. 21, 2012), *available at* http://www.ftc.gov/opa/2012/12/idexx.shtm.

[6] Press Release, Eight Puerto Rico Kidney Doctors Settle FTC Price-Fixing Charges (Feb. 28, 2013), *available at* http://www.ftc.gov/opa/2013/02/prnephrologists.shtm.

[7] Press Release, Bosley, Inc. Settles FTC Charges That It Illegally Exchanged Competitively Sensitive Business Information With Rival Firm, Hair Club, Inc. (Apr. 8, 2013), *available at* http://www.ftc.gov/opa/2013/04/bosley.shtm.

The FTC has made significant progress in its ongoing efforts to review and update rules, regulations, and guidelines periodically so that they remain current, effective, and not unduly burdensome.[8] For instance, the Commission has revised its rules governing administrative litigation to hold respondents, complaint counsel, the administrative law judge, and the Commission to aggressive timelines for discovery, motions practice, trial, and adjudication.[9] The result is a faster-paced administrative process that is comparable to, or even faster than, federal court timelines for similar actions.

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

A. Promoting Competition in Health Care Markets

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

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

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

1. Stopping Anticompetitive Health Care Mergers

A number of FTC merger enforcement actions in the past several years have involved companies in health care markets: hospitals, pharmacies, medical device and pharmaceutical manufacturers, and other market participants.[10]

In particular, we have focused on health care provider consolidation. Although much of the debate on lowering health care provider costs has focused on waste and inefficiencies, there is a growing body of evidence suggesting that provider consolidation is a key factor affecting clinical quality and increasing America's health care costs.[11] The FTC has been at the forefront of identifying and combating this issue, preventing proposed mergers that threatened to lead to higher costs without related improvements in quality of care. We have recently successfully litigated three hospital mergers[12] and parties have abandoned several proposed hospital transactions after the FTC threatened a challenge,[13] resulting in significant benefits for consumers.

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[10] For a complete list of FTC enforcement actions relating to health care, *see* Overview of FTC Antitrust Actions in Health Care Services and Products (March 2013), *available at* http://www.ftc.gov/bc/healthcare/antitrust/hcupdate.pdf and *Overview of FTC Antitrust Actions in Pharmaceutical Services and Products* (March 2013), *available at* http://www.ftc.gov/bc/healthcare/antitrust/rxupdate.pdf.

[11] *See, e.g.*, Patrick S. Roman & David J. Balan, *A Retrospective Analysis of the Clinical Quality Effects of the Acquisition of Highland Park Hospital by Evanston Northwestern Healthcare* (FTC Bureau of Econ., Working Paper No. 307, Nov. 2010), *available at* http://www.ftc.gov/bc/workpapers/wp307.pdf; William B. Vogt and Robert Town, *How Has Provider Consolidation Affected the Price and Quality of Hospital Care?* (Robert Wood Johnson Foundation, Synthesis Project No. 9, Feb. 2006) *available at* http://www.rwjf.org/content/dam/farm/reports/issue_briefs/2006/rwjf12056/subassets/rwjf12056_1.

[12] Opinion of the Commission, *ProMedica Health Sys., Inc.*, Docket No. 9346 (June 25, 2012), *available at* http://www.ftc.gov/os/adjpro/d9346/120625promedicaopinion.pdf; *FTC v. OSF Healthcare System*, 852 F. Supp. 2d 1069, 1095 (N.D. Ill. 2012); Opinion of the Commission, *Evanston Northwestern Healthcare Corp.*, Docket No. 9315, (Aug. 6, 2007), *available at* http://www.ftc.gov/os/adjpro/d9315/index.shtm.

[13] *See, e.g.*, Statement of FTC Competition Director Richard Feinstein on Today's Announcement by Capella Healthcare That it Will Abandon its Plan to Acquire Mercy Hot Springs (June 27, 2013), *available at* http://www.ftc.gov/opa/2013/06/capella.shtm; Order Dismissing Compl., *Reading Health Sys.*, Docket No. 9353 (December 7, 2012), *available at* http://www.ftc.gov/os/adjpro/d9353/121207readingsircmpt.pdf; Order Dismissing Compl., *Inova Health Sys. Found.*, Docket No. 9326 (June 17, 2008), *available at* http://www.ftc.gov/os/adjpro/d9326/080617orderdismisscmpt.pdf.

Additionally, in February, the Supreme Court unanimously revived the Commission's challenge to a hospital merger that created a monopoly for inpatient services in the Albany, Georgia area and rejected the hospitals' argument that the state action doctrine exempted their acquisition from federal antitrust scrutiny.[14] The Court's decision is a clear victory for consumers in reining in the overbroad application of state action immunity that denies consumers the benefits of a competitive market.[15]

In addition to mergers between competing hospitals, the Commission is also increasingly concerned about the effect of combinations involving other health care providers. Much like hospital mergers, these transactions can lead to higher health care costs. For example, earlier this month, Commission staff, in conjunction with the Idaho Attorney General, concluded a trial to prevent Idaho's dominant hospital system, which already employed a large number of physicians, from raising health care costs through its acquisition of the state's largest multi-specialty physician group.[16] While the Commission has concerns about consolidation among health care providers, we do not stand in the way of provider collaboration where there is evidence that the deal will reduce costs, improve the quality of care, and provide net benefits to consumers.

The Commission also continues to review mergers between pharmaceutical manufacturers to prevent transactions that may allow companies to exercise market power by

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

[15] Despite this victory, because the parties had consummated the transaction, while the appeal was pending Georgia's Certificate of Need laws (CON) precluded the Commission from requiring a divestiture of an independent hospital to restore competition lost from the merger. Therefore, in August, the Commission accepted a proposed settlement that would require the hospitals to provide notice of any future hospital acquisitions, and would prevent them from opposing any future CON application for a new facility in the area. Press Release, Hospital Authority and Phoebe Putney Health System Settle FTC Charges That Acquisition of Palmyra Park Hospital Violated U.S. Antitrust Laws (Aug. 22, 2013), *available at* http://www.ftc.gov/opa/2013/08/phoebe.shtm.

[16] Press Release, FTC and Idaho Attorney General Challenge St. Luke's Health System's Acquisition of Saltzer Medical Group as Anticompetitive (Mar. 12, 2013), *available at* http://www.ftc.gov/opa/2013/03/stluke.shtm.

raising prices on needed medications. For instance, in the last two years alone the Commission required divestitures to remedy competitive concerns stemming from seven proposed transactions involving drug makers, preserving competition in the sale of over 48 drugs used to treat a variety of conditions, from hypertension and diabetes to cancer.[17]

2. Combating Efforts to Stifle Generic Competition

A top priority for the Commission over the past decade has been ending anticompetitive "pay-for-delay" agreements: settlements of patent litigation in which the brand-name drug firm pays its potential generic competitor to abandon a patent challenge and delay entering the market with a lower cost, generic product. As the Supreme Court recently explained earlier this year in *FTC v. Actavis, Inc.*, "there is reason for concern that settlements taking this form tend to have significant adverse effects on competition."[18] The agreements can profit both the branded manufacturers, who continue to charge monopoly prices, and the generic manufacturers, who receive substantial compensation for agreeing not to compete—all at substantial cost to consumers, federal and state governments, and other purchasers of prescription drugs, all of which are already struggling to contain increasing healthcare costs.[19]

The Supreme Court's decision in *Actavis* was an important victory for consumers and a vindication of basic antitrust and free market principles. With it, the Commission achieved one

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[17] Press Release, FTC Settles Charges That Actavis's Proposed $8.5 Billion Acquisition of Warner Chilcott Would be Anticompetitive (Sept. 27, 2013), *available at* http://www.ftc.gov/opa/2013/09/actavis.shtm ; Press Release, FTC Puts Conditions on Mylan's Proposed Acquisition of Agila from Strides (Sept. 26, 2013), *available at* http://www.ftc.gov/opa/2013/09/mylan.shtm; *Watson Pharms.*, Docket No. C-4373 (Dec. 14, 2012) (consent order), *available* at http://www.ftc.gov/os/caselist/1210132/index.shtm; *Novartis AG*, Docket No. C-4364 (Sept. 5, 2012) (consent order), *available at* http://www.ftc.gov/os/caselist/1210144/index.shtm; *Valeant Pharm. Int'l, Inc.*, Docket No. C-4342 (Feb. 22, 2012) (consent order), *available at* http://www.ftc.gov/opa/2012/02/valeant.shtm; *Teva Pharm., Inc.*, Docket No. C-4335 (July 2, 2012) (consent order), *available at* http://www.ftc.gov/os/caselist/1110166/index.shtm.

[18] *Federal Trade Commission v. Actavis, Inc.*, No. 12-416, 579 U.S. __ (2013), slip op. at 8.

[19] Fed. Trade Comm'n, Pay For Delay: How Drug Company Pay-Offs Cost Consumers Billions (Jan. 2010), *available at* http://www.ftc.gov/os/20 10/011100 112payfordelayrpt.pdf.

of its top competition priorities: overturning the so-called "scope-of-the-patent" test, which had been adopted by some courts and virtually immunized pay-for-delay settlements from antitrust scrutiny. Because of the decision, we are in a much stronger position to protect consumers from anticompetitive drug-patent settlements that result in higher drug costs.[20] We will continue to pursue our two current pay-for-delay litigations, *Actavis* and *FTC v. Cephalon*,[21] with a goal to resolve these pending matters as quickly as possible and to show that these settlements violate the antitrust laws. We also continue to pursue and assess other open pay-for-delay investigations, and review pharmaceutical patent settlements that companies are required to file with the FTC and DOJ following the 2003 Medicare Modernization Act.

Additionally, we recently filed an amicus brief helping to clarify that patent litigation settlements containing a "no-authorized-generic" commitment, in which the brand-name drug firm agrees not to launch its own authorized generic when the first generic company begins to compete, raise the same issues addressed by the Supreme Court in *Actavis*.[22] Even though no cash payments are involved, the companies still share profits by agreeing to avoid competing, which can result in delayed generic entry and harm to consumers. The Commission remains united in its determination to end anticompetitive pay-for-delay agreements.

In addition to pay-for-delay, the Commission continues to monitor other strategies adopted by branded pharmaceutical companies that may have the effect of delaying or preventing generic entry. For example, we recently filed amicus briefs in private antitrust

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

[21] *FTC v. Cephalon, Inc.*, No. 08-cv-2141 (E.D. Pa. complaint filed Feb. 13, 2008), *available at* http://www2.ftc.gov/os/casclist/0610182/080213complaint.pdf.

[22] Fed. Trade Comm'n, Brief as Amicus Curiae, *In re Effexor XR Antitrust Litigation*, No. 3:11-cv-05479 (D.N.J. Aug. 14, 2013), *available at* http://www.ftc.gov/os/2013/08/130816effexoramicusbrief.pdf.

litigation involving two of these strategies. One addressed the potentially anticompetitive abuses of safety protocols known as Risk Evaluation and Mitigation Strategies (REMS) to prevent a generic manufacturer from being able to access samples of brand products to begin the bioequivalence testing process required by the Hatch-Waxman Act.[23] The court recently adopted the position that we had urged.[24] The second involves "product hopping," which occurs when brand companies, facing a threat of generic competition, make minor non-therapeutic changes to their products.[25] While these changes may offer little or no benefit to patients, they may enable the brand to preserve its monopoly by shifting physician prescribing patterns to the newer, patent-protected version of the drug. This prevents generic substitution at the pharmacy level, a key to competition in the pharmaceutical industry.

B. Antitrust Oversight in Technology Markets

The Commission takes a balanced and fact-based approach to enforcement in fast-paced technology markets. In some cases, the evidence supports a finding of competitive harm that requires Commission action. For instance, the Commission recently challenged a proposed merger between rival scan engine manufacturers, Honeywell International Inc. and Intermec.[26] Scan engines are used in products such as two-dimensional (2D) retail bar code scanners to translate an image (often a UPC barcode) into a digital format that can be interpreted and analyzed by a computer. Honeywell, Intermec, and a third competitor, Motorola, are the only 2D scan engine makers in the United States that have broad enough intellectual property portfolios

[23] Fed. Trade Comm'n, Brief as Amicus Curiae, *Actelion Pharms. Ltd., v. Apotex Inc.*, No. 12-05743 (D.N.J. Mar. 11, 2013), *available at* http://www.ftc.gov/os/2013/03/130311actelionamicusbrief.pdf.

[24] Transcript of Oral Argument at 114-18, *Actelion Pharms.*, No. 12-05743 (D.N.J. Oct. 17, 2013).

[25] Fed. Trade Comm'n, Brief as Amicus Curiae, *Mylan Pharms., Inc. v. Warner Chilcott Pub. Ltd. Co.*, No. 12-3824 (E.D. Pa. Nov. 21, 2012), *available at* http://www.ftc.gov/os/2012/11/121127doryxamicusbrief.pdf.

[26] Press Release, FTC Puts Conditions on Honeywell's Acquisition of Scan Engine Manufacturer Intermec (Sept. 13, 2013), *available at* http://www.ftc.gov/opa/2013/09/honeywell.shtm.

to insulate them, and their customers, from potential patent-infringement lawsuits. Accordingly, entry into the market by other technology firms was unlikely to replace the competition lost through the merger. The proposed FTC consent order preserves competition in the market for 2D scan engines by requiring Honeywell to license its and Intermec's patents for 2D scan engines to a company that developed 2D scan engines but lacked the patent rights to compete affecting in the U.S. Although divestiture of assets is the preferred remedy in merger cases, licensing requirements can preserve competition in markets where access to needed technology is the main barrier to entry.

The Commission's work in the technology sector necessarily involves complex issues at the intersection of antitrust and intellectual property law, issues pertaining to innovation, standard setting, and patents, that have been of interest to the Commission for over two decades.[27] In addition to several seminal reports on competition and patent law,[28] the Commission has focused in particular on the problem of patent hold-up. The threat of patent hold-up arises from changes in the relative costs of technologies as a result of the standard setting process.[29] Before a standard is adopted, multiple technologies, with similar attributes, may compete for selection into the standard. Once a standard is adopted, an entire industry

[27] *See, e.g.*, *Dell Computer Corp.*, 121 FTC 616 (1996); *Union Oil Co. of Cal.*, 140 FTC 123 (2005); *Rambus Inc.*, 2007 FTC LEXIS 13 (2007); *Negotiated Data Solutions, LLC*, 2008 FTC LEXIS 120 (2008).

[28] Fed. Trade Comm'n and Dep't of Justice, Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition (2007) (2007 FTC/DOJ Report), *available at* http://www.ftc.gov/reports/innovation/P040101PromotingInnovationandCompetitionrpt0704.pdf; Fed. Trade Comm'n, To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy (2003), *available at* http://www.ftc.gov/os/2003/10/innovationrpt.pdf; Fed. Trade Comm'n, The Evolving IP Marketplace: Aligning Patent Notice and Remedies with Competition (2011 Report), *available at* http://www.ftc.gov/os/2011/03/110307patentreport.pdf.

[29] *See* 2007 FTC/DOJ Report at 35-36; *see also* Joseph Farrell et al., Standard Setting, Patents and Hold-Up, 74 ANTITRUST L.J. 603, 607-08 (2007); *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 310-14 (3d Cir. 2007); *Microsoft Corp. v. Motorola, Inc.*, No. C10-1823JLR, 2013 WL 2111217, at *10 (W.D. Wash., Apr. 25, 2013) ("The threat of hold-up increases as the standard becomes more widely implemented and firms make sunk cost investments that cannot be recovered if they are forced to forego implementation of the standard or the standard is changed.").

begins to make investments tied to the standard. At that time, it may not be feasible to deviate from the standard unless all or most other participants in the industry agree to do so in compatible ways. Because all of these participants may face substantial switching costs in abandoning initial designs and substituting a different technology, an entire industry may become locked into practicing a standardized technology.

In this situation, a firm with a patent essential to the standard (a standard essential patent or SEP) has the ability to demand royalty payments, and other favorable licensing terms, based not only on the market value of the patented invention before it was included in the standard, but also on the costs and delays of switching away from the standardized technology. In other words, as Judge Posner noted, "once a patent becomes essential to a standard, the patentee's bargaining power surges because a prospective licensee has no alternative to licensing the patent; he is at the patentee's mercy."[30]

The Commission acknowledges that several market-based factors may mitigate the risk of hold-up, and this understanding informs our enforcement activity in this complex field.[31] For example, patent holders that are frequent participants in standard-setting activities may incur reputational and business costs that could be sufficiently large to deter fraudulent behavior. A patent holder may also enjoy a first-mover advantage if its technology is adopted as the standard. As a result, patent holders manufacturing products using the standardized technology "may find it more profitable to offer attractive licensing terms in order to promote the adoption of the product using the standard, increasing demand for its product rather than extracting high

[30] *Apple, Inc. v. Motorola, Inc.*, 869 F. Supp. 2d 901, 913 (N.D. Ill. 2012).

[31] *See* 2007 FTC/DOJ Report at 40-41.

royalties."[32] Finally, patent holders that have broad cross-licensing agreements with the SEP-owner may be protected from hold-up.[33]

Nevertheless, standard-setting organizations (SSOs) commonly seek to mitigate the threat of patent hold-up by seeking commitments from participants to license SEPs on RAND terms, often as a *quid pro quo* for the inclusion of the patent(s) in the standard.[34] A RAND commitment can make it easier to adopt a standard, but the potential for hold-up remains if the RAND commitment is later disregarded, because the royalty rate often is negotiated after the standard is adopted.[35] Commenters have noted that a RAND commitment does not provide clear guidance on the parameters of a reasonable and nondiscriminatory license.[36] In the event that a RAND-

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[32] *Id.* at 41 ("As one panelist put it, 'if you in fact have your technology accepted as a standard you have a tremendous competitive advantage . . . because you are the first mover, you are the most competent.'") (citation omitted).

[33] *Id.* This protection, however, is not available to firms who have little IP to offer in cross-licensing deals. *Id.*

[34] 2007 FTC/DOJ Report at 46-47; *see also Microsoft Corp.*, 2013 WL 2111217, at *6 ("In order to reduce the likelihood that owners of [standard] essential patents will abuse their market power, many standard setting organizations, including the IEEE [Institute of Electrical and Electronic Engineers] and ITU [International Telecommunication Union], have adopted rules relating to the disclosure and licensing of essential patents. The policies often require or encourage members of the standards setting organizations to identify patents that are essential to a proposed standard and to agree to license their essential patents on reasonable and non-discriminatory ('RAND') terms to anyone who requests a license. Such rules help to ensure that standards do not allow essential patent owners to extort their competitors or prevent competitors from entering the marketplace."), *see also Broadcom Corp.*, 501 F.3d at 313-14 (citing Daniel G. Swanson & William J. Baumol, *Reasonable and Nondiscriminatory (RAND) Royalties, Standards Selection, and Control of Market Power*, 73 ANTITRUST L.J. 1, 5, 10-11 (2005)) (commenting that lock-in creates the potential for anticompetitive effects and that "[i]t is in such circumstances that measures such as []RAND commitments become important safeguards against monopoly power.").

[35] Some SSOs have clarified their IP rights policies to bind successors-in-interest to RAND commitments made by prior owners of RAND-encumbered SEPs. *See, e.g.*, European Telecommunications Standards Institute (ETSI) Rules of Procedure 6.1bis, "Transfer of ownership of ESSENIAL IPR," *available at* http://portal.etsi.org/directives/31_ directives_apr_2013.pdf.

[36] *See* 2007 FTC/DOJ Report at 47 (citing some panelists attribution of the "potential inadequacy of a RAND commitment to the difficulty of defining the terms 'reasonable' and 'nondiscriminatory.' Few SSOs give 'much explanation of what those terms mean or how licensing disputes [are to] be resolved,' and courts may be reluctant to determine what is a 'reasonable' price. The meaning of 'nondiscriminatory' may be similarly unclear." (citations omitted). In addition, Commissioners Ohlhausen and Wright believe it is well-documented that RAND commitments often are ambiguous or undefined. Unclear commitments of this kind generally should not be interpreted or implied to prohibit the pursuit of injunctive relief by a SEP holder, including any conduct reasonably ancillary to pursuing such relief, unless the prohibition is expressly provided for in a RAND commitment or clearly acknowledged by a SEP holder. Certain circumstances calling for a prohibition on a SEP holder's conduct may exist

encumbered SEP holder and an implementer are unable to negotiate the royalty rate and other licensing terms, the SEP holder sometimes seeks an injunction from a district court, or an exclusion order from the ITC for infringement of the RAND-encumbered SEP.[37] An injunction or exclusion order could put a substantial portion of the implementers' business at risk. As a result, the threat of an injunction or exclusion order, combined with high switching costs, could allow a patent holder to obtain unreasonable licensing terms that reflect the hold-up value of its patent despite its RAND commitment.[38] As mentioned above, this can raise prices to consumers, distort incentives to innovate, and undermine the standard setting process. Of course, the hold-up value that the threat of an injunction or exclusion order can create depends on a number of factors,[39] including the likelihood that litigation will be successful and an injunction will issue, relative litigation costs for the parties, as well as the cost of an injunction to the implementer.[40]

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where the SEP holder's conduct otherwise violates the antitrust or competition laws and falls within an established exception to Constitutional, patent law or other legal protection.

[37] *Apple, Inc. v. Motorola Mobility, Inc.*, 2012 WL 5416941, at *15 (W.D. Wis. Oct. 29, 2012) (agreeing "that from a policy and economic standpoint, it makes sense that in most situations owners of declared essential patents that have made licensing commitments to standards-setting organizations should be precluded from obtaining an injunction or exclusionary order that would bar a company from practicing the patents," but noting that the ETSI and IEEE policies at issue did not preclude a RAND-encumbered SEP holder from "pursuing an injunction or other relief as a remedy for infringement.").

[38] *See Apple, Inc.*, 869 F. Supp. 2d at 914 (endorsing the FTC's explanation of the potential economic and competitive impact of injunctive relief on disputes involving SEPs).

[39] *See generally* Mark Lemley & Carl Shapiro, *Patent Hold-Up and Royalty Stacking*, 85 TEX. L. REV. 1991 (2007).

[40] Commissioners Wright and Ohlhausen believe it is important to recognize that a predictable threat of injunction can create a significant deterrent to infringement and can promote licensing that allows the SEP holder to obtain the full market value for the patent without costly litigation. *See e.g.*, 2011 Report at 143-44, 224-25. Removing the threat of injunction therefore potentially can undermine the incentives to innovate and to commercialize innovation provided by the patent system, impair investments in R&D, and result in fewer new products and services for consumers. Moreover, private licensing agreements are generally preferable to court fashioned rates because the parties will have better information about the appropriate terms of a license than would a court, and more flexibility in fashioning efficient agreements. *See id.* at 225.

Taking these considerations into account, the FTC has pursued enforcement actions related to standard setting activity.[41] Recently, the Commission has focused on patent holders who seek injunctive relief or exclusion orders for alleged infringement of their RAND-encumbered SEPs.

In *In the Matter of Motorola Mobility, LLC*, the Commission alleged that "Motorola breached its []RAND obligations by seeking to enjoin and exclude implementers of its SEPs, including some of its competitors, from marketing products compliant with some or all of the [relevant standards]," and "Google continued Motorola's exclusionary campaign after acquiring Motorola."[42] The Commission further alleged that this conduct constituted an unfair method of competition in violation of Section 5 of the FTC Act.[43] As a remedy, the Commission issued a Final Order[44] that, among other things: (1) prohibits Google from "revoking or rescinding any []RAND commitment," except in very limited circumstances including that all RAND patents covered by the RAND commitment are expired or unenforceable; (2) outlines specific negotiation and dispute resolution procedures intended to protect the interests of potential willing

[41] *See Dell Computer*, 128 FTC 151 (1999); *Union Oil Co. of Cal.*, 140 FTC 123 (2005); *Rambus*, 2007 FTC LEXIS 13 (2007); *Rambus Inc. v. FTC*, 522 F.3d 456 (D.C. Cir. 2008); *Negotiated Data Solutions*, 2008 FTC LEXIS 120 (2008).

[42] Complaint, *Motorola Mobility*, FTC File No. 121-0120 (July 22, 2013) at 5, *available at* http://ftc.gov/os/caselist/1210120/130724googlemotorolacmpt.pdf. Commissioner Ohlhausen dissented, and Commissioner Wright was recused.

[43] *Id.* at 6.

[44] Decision and Order, *Motorola Mobility*, FTC File No. 121-0120 (July 22, 2013), *available at* http://ftc.gov/os/caselist/1210120/130724googlemotorolado.pdf. Commissioner Ohlhausen also voted against accepting the proposed consent agreement. Dissenting Statement of Commissioner Maureen K. Ohlhausen, *Motorola Mobility*, FTC File No. 121-0120 (January 3, 2013), *available at* http://www.ftc.gov/os/caselist/1210120/130103googlemotorolaohlhausenstmt.pdf.

licensees; and (3) allows Google to seek injunctive relief or exclusion orders only in narrowly-defined circumstances.[45]

Similarly, in *In the Matter of Robert Bosch GmbH* the Commission alleged that, before its acquisition by Bosch, SPX reneged on voluntary commitments to two SSOs to license its SEPs on RAND terms, by continuing injunction actions against competitors using those patents.[46] As in *Motorola Mobility*, the Commission found reason to believe that SPX's suit for injunctive relief against implementers of the standard constituted a failure to abide by the terms of its RAND commitments, and was an unfair method of competition under Section 5 of the FTC Act.

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

Finally, some have raised concerns about the rise of the patent assertion entity (PAE) business model, which the FTC first examined in its 2011 Report, "The Evolving IP Marketplace: Aligning Patent Notice and Remedies with Competition."[47] In that report, the

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[45] These circumstances are: "(1) when the potential licensee is not subject to United States jurisdiction; (2) the potential licensee has stated in writing or in sworn testimony that it will not accept a license for Google's []RAND-encumbered SEPs on any terms; (3) the potential licensee refuses to enter a license agreement for Google's []RAND-encumbered SEPs on terms set for the parties by a court or through binding arbitration; or (4) the potential licensee fails to assure Google that it is willing to accept a license on []RAND terms." Analysis of Proposed Consent Order to Aid Public Comment, *Motorola Mobility*, FTC File No. 121-0120 7 (January 3, 2013), *available at* http://www.ftc.gov/os/caselist/1210120/130103googlemotorolaanalysis.pdf.

[46] Commissioner Ohlhausen voted against accepting the proposed consent agreement. Dissenting Statement of Commissioner Maureen K. Ohlhausen, *Robert Bosch*, FTC File No. 121-0081 (Nov. 26, 2012), *available at* http://www.ftc.gov/os/caselist/1210081/121126boschohlhausenstatement.pdf. Commissioner Wright was not a member of the Commission when the matter was decided.

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

Commission defined a PAE as a firm with a business model focused primarily on purchasing patents and then attempting to generate revenue by asserting the intellectual property against persons who are already practicing the patented technology. The Commission distinguishes PAEs from other non-practicing entities or NPEs that primarily seek to develop and transfer technology, such as universities, research entities and design firms.

Last December, the FTC and the Department of Justice held a joint workshop to discuss the activities of patent assertion entities.[48] While workshop panelists and commenters provided anecdotal evidence of potential harms and efficiencies of PAE activity, many stressed the lack of more comprehensive empirical evidence. In an attempt to collect such data, last month the Commission invited public comment on a proposed study using its authority under Section 6(b) of the Federal Trade Commission Act, 15 U.S.C. § 46(b), to gather qualitative and quantitative information on PAE acquisition, litigation, and licensing practices.[49] The Commission hopes to develop a fuller and more accurate picture of PAE activity, which it can then share with Congress, other government agencies, academics, and industry.

C. Preserving Competition in 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 FTC works to maintain competition in energy industries, invoking all the powers at its disposal—including monitoring industry activities, investigating possible antitrust violations, prosecuting cases, and conducting studies—to protect consumers from anticompetitive conduct in the industry.

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[48] The workshop materials are available at the following link: http://www.ftc.gov/opp/workshops/pac/.

[49] Press Release, FTC Seeks to Examine Patent Assertion Entities and Their Impact on Innovation, Competition (Sept. 26, 2013), *available at* http://www.ftc.gov/opa/2013/09/paestudy.shtm.

Mergers can significantly affect competition in energy markets, and the Commission's review of proposed mergers among energy firms is essential to preserving competition in these markets. Recently, for example, the FTC required oil refiner Tesoro Corporation to sell a light petroleum products terminal in Boise, Idaho to settle charges that its $335 million acquisition of pipeline and terminal assets from Chevron Corporation would be anticompetitive. Without the divestitures required by the FTC, the deal would have given Tesoro ownership of two of the three full service light petroleum terminals in Boise, significantly reducing competition for local terminal services.[50] In another action, the FTC issued a consent order requiring that AmeriGas L.P. amend its proposed acquisition of Energy Transfer Partners' Heritage Propane business. AmeriGas and Heritage are two of the nation's largest propane distributors, and the FTC charged that the acquisition would reduce competition and raise prices in the market for propane exchange cylinders that consumers use to fuel barbeque grills and patio heaters.[51]

Additionally, the FTC continues to monitor daily retail and wholesale prices of gasoline and diesel fuel in 20 wholesale regions and approximately 360 retail areas across the United States. This daily monitoring serves as an early-warning system to alert our experts to unusual pricing activity, and provides useful information to assist in investigations of potentially anticompetitive conduct.[52] We also use the data generated by the monitoring project in

[50] Press Release, FTC Requires Tesoro to Sell Petroleum Terminal as a Condition for Acquiring Chevron Assets (June 17, 2013), *available at* http://www.ftc.gov/opa/2013/06/tesoro.shtm

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

[52] Information regarding FTC gasoline and diesel price monitoring is available at http://www.ftc.gov/ftc/oilgas/gas_price.htm.

conducting periodic studies of the factors that influence the prices that consumers pay for gasoline.[53]

II. Cooperation with Other Antitrust Enforcers

Over the years, the Commission has fostered partnerships with other antitrust enforcers, most notably, the Antitrust Division of the Department of Justice. Joint efforts enhance the consistency, clarity, and transparency of U.S. antitrust policy and enforcement.[54] The Commission understands the special obligation of the federal antitrust enforcement agencies to speak with one voice whenever possible in important areas of U.S. antitrust policy, and to work in tandem to promote the interests of American consumers.[55]

Now that antitrust enforcement has gone global with some 130 jurisdictions enforcing a variety of competition laws, it is also crucial for the U.S. antitrust agencies to cooperate with our counterparts worldwide to ensure that competition laws function coherently and effectively, benefitting not only our domestic work, but also U.S. business and consumers. The FTC has developed strong relationships with many of our sister agencies, and we work with our foreign counterparts in multilateral fora to promote cooperation and convergence toward sound competition policy.

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[53] A 2011 report by the staff of the Commission's Bureau of Economics concludes that while a broad range of factors influence the price of gasoline, worldwide crude oil prices continue to be the main driver of what Americans pay at the pump. *See* Fed. Trade Comm'n, Bureau of Economics, Gasoline Price Changes and the Petroleum Industry: An Update (2011), *available at* http://www.ftc.gov/os/2011/09/110901gasolinepricereport.pdf.

[54] Recent joint efforts resulted in the publication of two significant policy statements—the revised Horizontal Merger Guidelines and the Antitrust Enforcement Policy Statement Regarding Accountable Care Organizations. U.S. Dep't of Justice & Federal Trade Comm'n, Horizontal Merger Guidelines (Aug. 2010), *available at* http://www.ftc.gov/os/2010/08/100819hmg.pdf; U.S. Dep't of Justice & Federal Trade Comm'n, "Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations Participating in the Medicare Shared Savings Program," 76 Fed. Reg. 67,026 (2011). The agencies also co-host workshops on important areas of antitrust law. *See, e.g.*, Press Release, FTC and Department of Justice to Hold Workshop on "Most-Favored-Nation" Clauses (Aug. 17, 2012), *available at* http://www.ftc.gov/opa/2012/08/mfn.shtm.

[55] The FTC also routinely coordinates on law enforcement efforts with state attorneys general. *See, e.g.*, Press Release, FTC and Idaho Attorney General Challenge St. Luke's Health System's Acquisition of Saltzer Medical Group as Anticompetitive (Mar. 12, 2013), *available at* http://www.ftc.gov/opa/2013/03/stluke.shtm.

The past few years have seen some important milestones for our international cooperation and convergence efforts. For example, following the FTC and DOJ 2011 Memorandum of Understanding (MOU) with the three Chinese antitrust agencies,[56] we have cooperated with MOFCOM on mergers under parallel review, held our first high-level antitrust joint dialogue between the U.S. and Chinese competition agencies, and furthered cooperation and communication through our continued provision of technical assistance and comments on relevant proposed Chinese rules and guidelines. Similarly, since signing a landmark MOU with antitrust enforcers in India last fall,[57] we have continued an extensive capacity building program for the Competition Commission of India (CCI), including a series of workshops on merger notification and review, and the three-week placement of an FTC economist in the CCI to train staff on economic theories of harm while working with them on their investigations.

In addition, we continue to promote cooperation and convergence by directly engaging our counterparts on both general policy as well as individual enforcement matters. We hold high-level meetings with key sister agencies, including recent bilateral consultations with senior officials from the European Commission, and the Japan Fair Trade Commission. With regard to individual matters, in FY 2012, the FTC had 51 substantive contacts in 26 enforcement matters with counterpart agencies around the world.[58] The reviewing agencies reached compatible outcomes in the 15 cases that were completed within the fiscal year.

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

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

[58] Fed. Trade Comm'n, Performance and Accountability Report FY 2012 80, *available at* http://www.ftc.gov/opp/gpra/2012parreport.pdf.

To further enforcement cooperation, in late September, the FTC and DOJ issued an updated joint model waiver of confidentiality for individuals and companies to use in merger and civil non-merger matters involving concurrent review by either agency and non-U.S. competition authorities.[59] A party or third party to an investigation can voluntarily provide a waiver of confidentiality, which allows for the sharing of confidential information among agencies listed in the waiver. By permitting cooperating agencies to discuss or otherwise exchange confidential information, a waiver enables agencies to make more informed, consistent decisions and to coordinate more effectively, often expediting the review. The model is designed to streamline the waiver process to significantly reduce the burden on individuals, companies, and the agencies in negotiating waivers.

The FTC also continues to lead multilateral efforts to promote convergence toward sound and effective antitrust enforcement internationally. We play a leading role in the International Competition Network (ICN), where we are a longstanding member of the ICN's Steering Group, help to lead its Agency Effectiveness Working Group, and co-lead a project on agency investigative process. We also pursue policy convergence in other key multilateral fora, such as OECD, UNCTAD, and APEC.

In a world where commerce knows no borders, international cooperation has proven to be a critical component of effective U.S. antitrust enforcement.

[59] Press Release, Federal Trade Commission and Justice Department Issue Updated Model Waiver of Confidentiality for International Civil Matters and Accompanying FAQ (Sept. 25, 2013) *available at* http://www.ftc.gov/opa/2013/09/jointwaiver.shtm.

III. 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. BACHUS. At this time, in lieu of me asking questions, I am going to recognize the gentleman from Georgia, Mr. Collins, for 5 minutes.

Mr. COLLINS. Thank you, Mr. Chairman. I appreciate that.

Thanks for being here this morning on this early Friday morning.

I appreciate what has been said on the airline mergers. I would just, however, continue to remember, as we look at monitoring that for all players in the market, not just a single set called low-cost markets, all the players in that, as well as I would encourage you to do that.

Also one of the things, Ms. Ramirez, you just brought up was health care, and this is something for me this morning as I was thinking about this hearing, it was something that has come across. And you spoke of drug costs, and I read about your decision, especially in the opening statements in oversight. What concerned me however was the attention to the drug and the drug costs and the issue that you just brought up.

But the really disappointment in my opinion on the drug delivery side, and that is where I am going to focus a little bit this morning, is that I believe there are legitimate concerns about the conduct of PBMs in the pharmaceutical arena. I was disappointed by the FTC statement on the ESI-Medco merger. In my opinion it didn't sufficiently protect the customers and pharmacy competition. The concerns of independent pharmacists didn't appear to hold much weight in the statement, which seemed to be focused more on the effects on entry into the PBM market and the anticompetitive behavior in regards to plan sponsors.

There was little mention of the leverage that ESI-Medco could and I believe will have over pharmacists and pharmacies. Since the FTC did not act to address the negative impact to pharmacies that would result from the ESI-Medco merger, there doesn't seem to be any recourse other than Congress stepping in and passing legislation to protect the pharmacies and the consumers.

Just to give everyone here a snapshot of what type of behavior PBM engaged in, between 2004 and 2008 three major PBMs were subject to six major Federal or multidistrict cases over allegations such as fraud, misrepresentation, and failure to meet ethical and safety standards, just to name a few. These cases have resulted in over $371 million in damages. I have heard from consumers that the merger has led to higher prices and that they have been forced into mail order. This is a very significant problem for consumers who need specialty drugs.

My question, and I want to sort of preface it, is will the FTC look into this situation and the problems that are developed, and we can hold that for just a second, but I am also very concerned about patients who have critical conditions and need specialty drugs. It is my understanding through a good bit of discussion that the major PBMs forced them into receive these drugs through mail order, which endanger their health. And what I would like to have is assurances, a commitment to look into this situation. This is a particular concern for me in rural northeast Georgia where I am from.

I understand that some PBMs force consumes to use only this PBM's mail order. Many of my constituents view this as negative

because they rely so heavily on their community pharmacist, who is often the most accessible healthcare professional and provides invaluable support to them.

In looking at this, like I said, I applaud both of you for what your work is, this one is a concern to me, and especially when you look at some of the things that I have just mentioned that have come across in the last few years to give basically a, not necessarily a pass, but a lack of scrutiny to this delivery system, is what I will call it, that is disparately impacting community pharmacists and also rural neighborhoods.

Basically I am not asking for an in-depth answer. I am just wanting that you would take more of a look at the impact not just on that, but the whole healthcare delivery system that we have a problem with. And, Ms. Ramirez, I would love for you to speak to that, and from the processes before on the prosecutions and other things in that case, I would love just to hear briefly, and just say that I want to know if my concerns are going to be taken seriously.

Ms. RAMIREZ. Yes, absolutely, Congressman. We certainly understand the concerns that have been expressed by independent pharmacies when it comes to the PBM market. It is an area that the agency has looked at very closely in a number of different settings. Most recently we did examine the merger between ESI and Medco, and I will say that we looked very closely at three main aspects of that transaction and what effects they would have. That included looking on the seller side whether the transaction would allow the merged entity to exploit market power in the delivery of services to employers; but we also looked at the impact on the buyer's side, what impact would it have on the ability of the merged entity to negotiate with pharmacies. And we also examined——

Mr. COLLINS. I apologize for interrupting, but one of the concerns I have there, and I appreciate you bringing this up, is there is not a lot of negotiating going on. It is we are going to do it this way, you will conform to us, or we are just going to send you to our preferred provider care and we are shutting out the independent market altogether, and that has been a concern.

What I would like to do in the short time we have, and I don't want to take any, is I would love for my office to begin an open dialogue on further issues that we can see some resolve here, because I believe that the Congress is going to have to step in here because undoubtedly we are not getting that I feel support at this time outside of that. So I appreciate your answer. And I apologize, I just wanted to make sure that we could have that dialogue, and that is what I would like to see.

Ms. RAMIREZ. Let me just say that I am aware of the concerns and I will assure you that the Federal Trade Commission will continue to be vigilant in this area.

Mr. COLLINS. Thank you.

Mr. Chairman, I yield back.

Mr. BACHUS. I thank the gentleman.

At this I recognize Mr. Cohen for 5 minutes.

Mr. COHEN. Thank you, Mr. Chair.

Mr. Baer, the stewardess folk said you were most courteous and saw them personally and they were most appreciative. And the American Airlines folk I know were very interested and the flight

attendants were very happy about the merger. I hope it works out well, and I hope it works out well for Memphis. American has limited service out of Memphis, US Air has some.

But we saw disastrous effects with Delta and Northwest. While Justice didn't examine that merger as this one was examined and require certain slots to be given maybe to Southwest or AirTran at the time or whatever, The New York Times was fairly excoriating on the decision to allow the merger to go forth. I am going to give you 1 minute to respond to The New York Times.

Mr. BAER. I think I managed in 24 hours to get negative editorials out of The New York Times and The Wall Street Journal, so I don't know what that says.

Mr. COHEN. One of them is a good thing and one of them is a bad thing.

Mr. BAER. Okay. And depending on where you sit.

This settlement we ended up concluding was actually better than a full-stop injunction. Why would I say such a thing? It is because a full-stop injunction would have kept the legacy carriers in their current position, which was already pretty cozy. We did not see lots of meaningful competition on price, on service, on ancillary fares like baggage fees. And where there was significant competition and expansion of seats, of planes being flown from here to there, it was where the low-cost carriers over the last 10 or 15 years have begun to establish a presence.

But the problem is the low-cost carriers don't fly everywhere today, and one reason they don't is that they can't get access to key airports like LaGuardia, like National. You open up those airports just a little bit. When the United-Continental merger concluded, United had to give up all of its slots at Newark, and within a year they had added nonstop service to six different cities and driven prices way down. But in addition they could then connect one stop to other cities all around the country and there were within a year 60 more cities benefiting from low-cost service from Southwest.

That is why we thought this settlement, opening up service and getting rid of capacity constraints at seven major airports, not only was going to benefit the nonstop travel between those airports, but there is then the next stop for Southwest or for AirTran, which still is flying under its name a little bit, JetBlue, Virgin America. So we think there is real opportunity here to positively change the competitive dynamic.

Mr. COHEN. Well, I appreciate that you did something. I mean, the Justice Department did nothing but allow the Delta-Northwest to go forth. Of course, the statements made, we would have thought it was going to be fine. You said that the hubs, I think in your agreement they had to stay open for 3 years, is that right, or a minimum of 3 years?

Mr. BAER. There was agreement with the States which provided that they had to keep their hubs open for an extended period of time. It didn't mean they couldn't reduce some service, though.

Mr. COHEN. Yeah, which may happen.

Let me ask you this. I read a story in The New York Times, and it was published elsewhere, I guess, about several big banks, including Goldman Sachs, having consolidated ownership of aluminum warehouses, and they are possibly conspiring to prop up

aluminum prices and shifting these around. This affects a lot of consumer goods, cars and beer and other cans and others that are aluminum products, soda cans, so it has an impact on consumers. Are you aware of this particular issue and is your Division investigating these concerns?

Mr. BAER. Well, I can't comment on any details. I will tell you that this is a matter we are looking at.

Mr. COHEN. I would ask unanimous consent to submit this article entitled "A Shuffle of Aluminum, but to Banks, Pure Gold."

Mr. BACHUS. Without objection.

[The information referred to follows:]

The New York Times

July 20, 2013

A Shuffle of Aluminum, but to Banks, Pure Gold

By DAVID KOCIENIEWSKI

MOUNT CLEMENS, Mich. — Hundreds of millions of times a day, thirsty Americans open a can of soda, beer or juice. And every time they do it, they pay a fraction of a penny more because of a shrewd maneuver by Goldman Sachs and other financial players that ultimately costs consumers billions of dollars.

The story of how this works begins in 27 industrial warehouses in the Detroit area where a Goldman subsidiary stores customers' aluminum. Each day, a fleet of trucks shuffles 1,500-pound bars of the metal among the warehouses. Two or three times a day, sometimes more, the drivers make the same circuits. They load in one warehouse. They unload in another. And then they do it again.

This industrial dance has been choreographed by Goldman to exploit pricing regulations set up by an overseas commodities exchange, an investigation by The New York Times has found. The back-and-forth lengthens the storage time. And that adds many millions a year to the coffers of Goldman, which owns the warehouses and charges rent to store the metal. It also increases prices paid by manufacturers and consumers across the country.

Tyler Clay, a forklift driver who worked at the Goldman warehouses until early this year, called the process "a merry-go-round of metal."

Only a tenth of a cent or so of an aluminum can's purchase price can be traced back to the strategy. But multiply that amount by the 90 billion aluminum cans consumed in the United States each year — and add the tons of aluminum used in things like cars, electronics and house siding — and the efforts by Goldman and other financial players has cost American consumers more than $5 billion over the last three years, say former industry executives, analysts and consultants.

The inflated aluminum pricing is just one way that Wall Street is flexing its financial muscle and capitalizing on loosened federal regulations to sway a variety of commodities markets, according to financial records, regulatory documents and interviews with people involved in the activities.

The maneuvering in markets for oil, wheat, cotton, coffee and more have brought billions in profits to investment banks like Goldman, JPMorgan Chase and Morgan Stanley, while forcing consumers to pay more every time they fill up a gas tank, flick on a light switch, open a beer or buy a cellphone. In the last year, federal authorities have accused three banks, including JPMorgan, of rigging electricity prices, and last week JPMorgan was trying to reach a settlement that could cost it $500 million.

Using special exemptions granted by the Federal Reserve Bank and relaxed regulations approved by Congress, the banks have bought huge swaths of infrastructure used to store commodities and deliver them to consumers — from pipelines and refineries in Oklahoma, Louisiana and Texas; to fleets of more than 100 double-hulled oil tankers at sea around the globe; to companies that control operations at major ports like Oakland, Calif., and Seattle.

In the case of aluminum, Goldman bought Metro International Trade Services, one of the country's biggest storers of the metal. More than a quarter of the supply of aluminum available on the market is kept in the company's Detroit-area warehouses.

Before Goldman bought Metro International three years ago, warehouse customers used to wait an average of six weeks for their purchases to be located, retrieved by forklift and delivered to factories. But now that Goldman owns the company, the wait has grown more than tenfold — to more than 16 months, according to industry records.

Longer waits might be written off as an aggravation, but they also make aluminum more expensive nearly everywhere in the country because of the arcane formula used to determine the cost of the metal on the spot market. The delays are so acute that Coca-Cola and many other manufacturers avoid buying aluminum stored here. Nonetheless, they still pay the higher price.

Goldman Sachs says it complies with all industry standards, which are set by the London Metal Exchange, and there is no suggestion that these activities violate any laws or regulations. Metro International, which declined to comment for this article, in the past has attributed the delays to logistical problems, including a shortage of trucks and forklift drivers, and the administrative complications of tracking so much metal. But interviews with several current and former Metro employees, as well as someone with direct knowledge of the company's business plan, suggest the longer waiting times are part of the company's strategy and help Goldman increase its profits from the warehouses.

Metro International holds nearly 1.5 million tons of aluminum in its Detroit facilities, but industry rules require that all that metal cannot simply sit in a warehouse forever. At least 3,000 tons of that metal must be moved out each day. But nearly all of the metal that Metro

moves is not delivered to customers, according to the interviews. Instead, it is shuttled from one warehouse to another.

Because Metro International charges rent each day for the stored metal, the long queues caused by shifting aluminum among its facilities means larger profits for Goldman. And because storage cost is a major component of the "premium" added to the price of all aluminum sold on the spot market, the delays mean higher prices for nearly everyone, even though most of the metal never passes through one of Goldman's warehouses.

Aluminum industry analysts say that the lengthy delays at Metro International since Goldman took over are a major reason the premium on all aluminum sold in the spot market has doubled since 2010. The result is an additional cost of about $2 for the 35 pounds of aluminum used to manufacture 1,000 beverage cans, investment analysts say, and about $12 for the 200 pounds of aluminum in the average American-made car.

"It's a totally artificial cost," said one of them, Jorge Vazquez, managing director at Harbor Aluminum Intelligence, a commodities consulting firm. "It's a drag on the economy. Everyone pays for it."

Metro officials have said they are simply reacting to market forces, and on the company Web site describe their role as "bringing together metal producers, traders and end users," and helping the exchange "create and maintain stability."

But the London Metal Exchange, which oversees 719 warehouses around the globe, has not always been an impartial arbiter — it receives 1 percent of the rent collected by its warehouses worldwide. Until last year, it was owned by members, including Goldman, Barclays and Citigroup. Many of its regulations were drawn up by the exchange's warehouse committee, which is made up of executives of various banks, trading companies and storage companies — including the president of Goldman's Metro International — as well as representatives of powerful trading firms in Europe. The exchange was sold last year to a group of Hong Kong investors and this month it proposed regulations that would take effect in April 2014 intended to reduce the bottlenecks at Metro.

All of this could come to an end if the Federal Reserve Board declines to extend the exemptions that allowed Goldman and Morgan Stanley to make major investments in nonfinancial businesses — although there are indications in Washington that the Fed will let the arrangement stand. Wall Street banks, meanwhile, have focused their attention on another commodity. After a sustained lobbying effort, the Securities and Exchange Commission late last year approved a plan that will allow JPMorgan Chase, Goldman and BlackRock to buy up to 80 percent of the copper available on the market.

In filings with the S.E.C., Goldman has said it plans by early next year to store copper in the same Detroit-area warehouses where it now stockpiles aluminum. On Saturday, however, Michael DuVally, a Goldman spokesman, said the company had decided not to participate in the copper venture, though it had not disclosed that publicly. He declined to elaborate.

Banks as Traders

For much of the last century, Congress tried to keep a wall between banking and commerce. Banks were forbidden from owning nonfinancial businesses (and vice versa) to minimize the risks they take and, ultimately, to protect depositors. Congress strengthened those regulations in the 1950s, but by the 1980s, a wave of deregulation began to build and banks have in some cases been transformed into merchants, according to Saule T. Omarova, a law professor at the University of North Carolina and expert in regulation of financial institutions. Goldman and other firms won regulatory approval to buy companies that traded in oil and other commodities. Other restrictions were weakened or eliminated during the 1990s, when some banks were allowed to expand into storing and transporting commodities.

Over the past decade, a handful of bank holding companies have sought and received approval from the Federal Reserve to buy physical commodity trading assets.

According to public documents in an application filed by JPMorgan Chase, the Fed said such arrangements would be approved only if they posed no risk to the banking system and could "reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices."

By controlling warehouses, pipelines and ports, banks gain valuable market intelligence, investment analysts say. That, in turn, can give them an edge when trading commodities. In the stock market, such an arrangement might be seen as a conflict of interest — or even insider trading. But in the commodities market, it is perfectly legal.

"Information is worth money in the trading world and in commodities, the only way you get it is by being in the physical market," said Jason Schenker, president and chief economist at Prestige Economics in Austin, Tex. "So financial institutions that engage in commodities trading have a huge advantage because their ownership of physical assets gives them insight in physical flows of commodities."

Some investors and analysts say that the banks have helped consumers by spurring investment and making markets more efficient. But even banks have, at times, acknowledged that Wall Street's activities in the commodities market during the last decade have contributed to some price increases.

In 2011, for instance, an internal Goldman memo suggested that speculation by investors accounted for about a third of the price of a barrel of oil. A commissioner at the Commodity Futures Trading Commission, the federal regulator, subsequently used that estimate to calculate that speculation added about $10 per fill-up for the average American driver. Other experts have put the total, combined cost at $200 billion a year.

High Premiums

The entrance to one of Metro International's main aluminum warehouses here in suburban Detroit is unmarked except for one toppling sign that displays two words: Mount Clemens, the town's name.

Most days, there are just a handful of cars in the parking lot during the day shift, and by 5 p.m., both the parking lot and guard station often appear empty, neighbors say. Yet inside the two cavernous blue warehouses are rows and rows of huge metal bars, weighing more than half a ton each, stacked 15 feet high.

After Goldman bought the company in 2010, Metro International began to attract a stockpile. It actually began paying a hefty incentive to traders who stored their aluminum in the warehouses. As the hoard of aluminum grew — from 50,000 tons in 2008 to 850,000 in 2010 to nearly 1.5 million currently — so did the wait times to retrieve metal and the premium added to the base price. By the summer of 2011, the price spikes prompted Coca-Cola to complain to the industry overseer, the London Metal Exchange, that Metro's delays were to blame.

Martin Abbott, the head of the exchange, said at the time that he did not believe that the warehouse delays were causing the problem. But the group tried to quiet the furor by imposing new regulations that doubled the amount of metal that the warehouses are required to ship each day — from 1,500 tons to 3,000 tons. But few metal traders or manufacturers believed that the move would settle the issue.

"The move is too little and too late to have a material effect in the near-term on an already very tight physical market, particularly in the U.S.," Morgan Stanley analysts said in a note to investors that summer.

Still, the wait times at Metro have grown, causing the premium to rise further. Current and former employees at Metro say those delays are by design.

Industry analysts and company insiders say that the vast majority of the aluminum being moved around Metro's warehouses is owned not by manufacturers or wholesalers, but by banks, hedge funds and traders. They buy caches of aluminum in financing deals. Once those deals end and their metal makes it through the queue, the owners can choose to renew them, a process known as rewarranting.

To encourage aluminum speculators to renew their leases, Metro offers some clients incentives of up to $230 a ton, and usually moves their metal from one warehouse to another, according to industry analysts and current and former company employees.

To metal owners, the incentives mean cash upfront and the chance to make more profit if the premiums increase. To Metro, it keeps the delays long, allowing the company to continue charging a daily rent of 48 cents a ton. Goldman bought the company for $550 million in 2010 and at current rates could collect about a quarter-billion dollars a year in rent.

Metro officials declined to discuss specifics about its lease renewals or incentive policies.

But metal analysts, like Mr. Vazquez at Harbor Aluminum Intelligence, estimate that 90 percent or more of the metal moved at Metro each day goes to another warehouse to play the same game. That figure was confirmed by current and former employees familiar with Metro's books, who spoke on condition of anonymity because of company policy.

Goldman Sachs declined to discuss details of its operations. Mr. DuVally, the Goldman spokesman, pointed out that the London Metal Exchange prohibits warehouse companies from owning metal, so all of the aluminum being loaded and unloaded by Metro was being stored and shipped for other owners.

"In fact," he said, "L.M.E. warehouses are actually prohibited from trading all L.M.E. products."

As the delays have grown, many manufacturers have turned elsewhere to buy their aluminum, often buying it directly from mining or refining companies and bypassing the warehouses completely. Even then, though, the warehouse delays add to manufacturers' costs, because they increase the premium that is added to the price of all aluminum sold on the open market.

The Warehouse Dance

On the warehouse floor, the arrangement makes for a peculiar workday, employees say.

Despite the persistent backlogs, many Metro warehouses operate only one shift and usually sit idle 12 or more hours a day. In a town like Detroit, where factories routinely operate round the clock when necessary, warehouse workers say that low-key pace is uncommon.

When they do work, forklift drivers say, there is much more urgency moving aluminum into, and among, the warehouses than shipping it out. Mr. Clay, the forklift driver, who worked at the Mount Clemens warehouse until February, said that while aluminum was delivered in huge loads by rail car, it left in a relative trickle by truck.

"They'd keep loading up the warehouses and every now and then, when one was totally full they'd shut it down and send the drivers over here to try and fill another one up," said Mr. Clay, 23.

Because much of the aluminum is simply moved from one Metro facility to another, warehouse workers said they routinely saw the same truck drivers making three or more round trips each day. Anthony Stuart, a forklift team leader at the Mount Clemens warehouse until 2012, said he and his nephew — who worked at a Metro warehouse about six miles away in Chesterfield Township — occasionally asked drivers to pass messages back and forth between them.

"Sometimes I'd talk to my nephew on the weekend, and we'd joke about it," Mr. Stuart said. "I'd ask him 'Did you get all that metal we sent you?' And he'd tell; me 'Yep. Did you get all that stuff we sent you?' "

Mr. Stuart said he also scoffed at Metro's contention that a major cause for the monthslong delays is the difficulty in locating each customer's store of metal and moving the other huge bars of aluminum to get at it. When he arrived at work each day, Mr. Stuart's job was to locate and retrieve specific batches of aluminum from the vast stores in the warehouse and set them out to be loaded onto trucks.

"It's all in rows," he said. "You can find and get anything in a day if you want. And if you're in a hurry, a couple of hours at the very most."

When the London Metal Exchange was sold to a Hong Kong company for $2.2 billion last year, its chief executive promised to take "a bazooka" to the problem of long wait times.

But the new owner of the exchange has balked at adopting a remedy raised by a consultant hired to study the problem in 2010: limit the rent warehouses can collect during the

backlogs. The exchange receives 1 percent of the rent collected by the warehouses, so such a step would cost it millions in revenue.

Other aluminum users have pressed the exchange to prohibit warehouses from providing incentives to those that are simply stockpiling the metal, but the exchange has not done so.

Last month, however, after complaints by a consortium of beer brewers, the exchange proposed new rules that would require warehouses to ship more metal than they take in. But some financial firms have raised objections to those new regulations, which they contend may hurt traders and aluminum producers. The exchange board will vote on the proposal in October and, if approved, it would not take effect until April 2014.

Nick Madden, chief procurement officer for one of the nation's largest aluminum purchasers, Novelis, said the situation illustrated the perils of allowing industries to regulate themselves. Mr. Madden said that the exchange had for years tolerated delays and high premiums, so its new proposals, while encouraging, were still a long way from solving the problem. "We're relieved that the L.M.E. is finally taking an action that ultimately will help the market and normalize," he said. "However, we're going to take another year of inflated premiums and supply chain risk."

In the meantime, the Federal Reserve, which regulates Goldman Sachs, Morgan Stanley and other banks, is reviewing the exemptions that have let banks make major investments in commodities. Some of those exemptions are set to expire, but the Fed appears to have no plans to require the banks to sell their storage facilities and other commodity infrastructure assets, according to people briefed on the issue.

A Fed spokeswoman, Barbara Hagenbaugh, provided the following statement: "The Federal Reserve regularly monitors the commodity activities of supervised firms and is reviewing the 2003 determination that certain commodity activities are complementary to financial activities and thus permissible for bank holding companies."

Senator Sherrod Brown, who is sponsoring Congressional hearings on Tuesday on Wall Street's ownership of warehouses, pipelines and other commodity-related assets, says he hopes the Fed reins in the banks.

"Banks should be banks, not oil companies," said Mr. Brown, Democrat of Ohio. "They should make loans, not manipulate the markets to drive up prices for manufacturers and expose our entire financial system to undue risk."

Next Up: Copper

As Goldman has benefited from its wildly lucrative foray into the aluminum market, JPMorgan has been moving ahead with plans to establish its own profit center involving an even more crucial metal: copper, an industrial commodity that is so widely used in homes, electronics, cars and other products that many economists track it as a barometer for the global economy.

In 2010, JPMorgan quietly embarked on a huge buying spree in the copper market. Within weeks — by the time it had been identified as the mystery buyer — the bank had amassed $1.5 billion in copper, more than half of the available amount held in all of the warehouses on the exchange. Copper prices spiked in response.

At the same time, JPMorgan, which also controls metal warehouses, began seeking approval of a plan that would ultimately allow it, Goldman Sachs and BlackRock, a large money management firm, to buy 80 percent of the copper available on the market on behalf of investors and hold it in warehouses. The firms have told regulators that these stockpiles, which would be used to back new copper exchange-traded funds, would not affect copper prices. But manufacturers and copper wholesalers warned that the arrangement would squeeze the market and send prices soaring. They asked the S.E.C. to reject the proposal.

After an intensive lobbying campaign by the banks, Mary L. Schapiro, the S.E.C.'s chairwoman, approved the new copper funds last December, during her final days in office. S.E.C. officials said they believed the funds would track the price of copper, not propel it, and concurred with the firms' contention — disputed by some economists — that reducing the amount of copper on the market would not drive up prices.

Others now fear that Wall Street banks will repeat or revise the tactics that have run up prices in the aluminum market. Such an outcome, they caution, would ripple through the economy. Consumers would end up paying more for goods as varied as home plumbing equipment, autos, cellphones and flat-screen televisions.

Robert Bernstein, a lawyer at Eaton & Van Winkle, who represents companies that use copper, said that his clients were fearful of "an investor-financed squeeze" of the copper market. "We think the S.E.C. missed the evidence," he said.

Gretchen Morgenson contributed reporting from New York. Alain Delaquérière contributed research from New York.

This article has been revised to reflect the following correction:

Correction: July 20, 2013

An earlier version of this article misstated one of the financial institutions that received approval to buy up to 80 percent of the copper available on the market. It is BlackRock, not the Blackstone Group.

This article has been revised to reflect the following correction:

Correction: July 28, 2013

An article last Sunday about big banks' exploitation of commodities pricing regulations to increase storage fees for aluminum held in bank-owned warehouses misstated the increase in customer waiting time for purchases to be retrieved from a warehouse purchased three years ago by Goldman Sachs. The wait has increased about tenfold, to 16 months from six weeks — not twentyfold.

Mr. COHEN. Thank you, sir.

Ms. Ramirez, I sometimes get a little confused on where your jurisdiction lies and General Baer's. But are there areas that you think there is legislation needed to give either you or General Baer, to give you all more authority?

Ms. RAMIREZ. Generally speaking I think our authority is appropriate. There are small areas where we think we should have more jurisdiction. One issue that comes up periodically has to do with our ability to litigate independently when we are seeking civil penalties. Right now we have to refer those particular matters to the Department of Justice. There are also certain other areas, such as antitrust exemptions, that both antitrust agencies, and I certainly, think should be removed, for example McCarran-Ferguson. But for the most part I think the authority that the agency has is appropriate for the work that we are doing.

Mr. COHEN. My red light has gone off, but if the Chairman would indulge me with one last question, and it is somewhat like I guess Cato the Elder, but I want to come back to the sentences. You said that these folks that you convict, 25 months is the average sentence. These folks are mostly business people, predominantly White, white collar?

Mr. BAER. Yes, sir.

Mr. COHEN. If they had had a gram or two grams of crack, they might have gotten a life sentence. Don't you just think that is just unconscionable, that people who rip off the American consumer and price fixing, et cetera, get 25 months, and a couple of grams of crack gets you life?

Mr. BAER. Mr. Congressman, I made a note about the message you wanted me to convey to Attorney General Holder, and I am going to convey that message.

Mr. COHEN. I appreciate it very much. Because if you read Nick Kristof yesterday, ACLU just had a report and cited some cases that are just awful, and there are lots of them.

Mr. MARINO. Would the gentleman yield for a moment, please?

Mr. COHEN. Sure.

Mr. MARINO. First of all, I agree with my colleague that The Wall Street Journal was right. And, number two, that——

Mr. COHEN. They are always on the right.

Mr. MARINO. And number two, I couldn't agree with him more. As a prosecutor for 18 years, a DAUS attorney, it is appalling to me what white-collar criminals get away with and how much they have caused financial drain on our economy, but, more importantly, our seniors and middle class working people who invest the little money that they have into these businesses that they are hoping that at least generate a little return on their investment.

So I would insist that the Attorney General's office with a vengeance go after these individuals, take everything that they have, follow the money, and then put their tails in prison for as long as they can.

Mr. BAER. Message received, sir.

Mr. COHEN. Thank you, Mr. Chairman.

And thank you, Mr. Baer.

Mr. BACHUS. They told you that they don't expect you to be a messenger, but then they have sent messages back with you.

At this time Mr. Farenthold is recognized. He actually, I mentioned before you got here, that you joined several of us on a letter expressing some concerns with Section 5 and maybe a lack of guidance.

Mr. FARENTHOLD. Thank you very much, Mr. Chairman.

And, Chairwoman Ramirez, as you are aware, this Committee has been following the patent troll issue pretty closely, or actually the entire Committee is working through the Innovation Act to solve some of the problems that we see with the litigation process. Congresswoman Chu and I sent letters to you in June of this year, we had 18 Members signing on to this.

And without objection, Mr. Chairman, I would like to make that letter a part of the record.

Mr. BACHUS. Without objection.

[The information referred to follows:]

Congress of the United States
Washington, DC 20515

June 6, 2013

Chairwoman Edith Ramirez
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Dear Chairwoman Ramirez:

As Members of Congress, we are closely following the troubling practices carried out by patent assertion entities, commonly known as patent trolls, throughout the country. We are most concerned about practices that target end users who are the downstream users of technology. These end users include individual consumers, non-profits, local governments, and small to large businesses. End users are facing unforeseen consequences after rightfully purchasing products or services in the marketplace. We believe that some practices performed by patent assertion entities may warrant the Commission's review through its Section 5 authority.

For example, public safety units of local governments received letters in which a patent troll claimed that the government's 9-1-1 system service provider was infringing on a patent held by the troll. One of the provider's customers put a project on hold after receiving the letter. End users such as coffee shops, hotels and restaurant chains received letters from patent assertion entities who claimed that the end users infringed on their patent because they provided wireless Internet access on their property. Thirteen thousand letters were sent to various end users and they were told to pay $2,000 or $3,000 per location or they would be sued. A famous Texas food chain, Whataburger, opted to postpone putting Wi-Fi in its restaurants after assessing the potential litigation for purchasing off-the-shelf wireless routers. These actions indicate that patent trolls are using a business model that seeks to extract money from end users who must make the difficult choice to settle in order to continue investing in their businesses, rather than pursue potentially frivolous litigation.

Recently, the Attorney General of Vermont filed suit against MPHJ Technology Investments, LLC. The suit alleges that MPHJ Technology violated the Vermont Consumer Protection Act by engaging in unfair and deceptive acts in which they sent a series of threatening letters to many small businesses and non-profit organizations in Vermont, and demanded about $1,000 per employee for the patent infringement. The letter states that the patent troll has a combination of issued patents and patents pending which cover the end users' ability to scan a document and transmit it as a PDF attachment directly to an employee's email account. The complaint further alleges that MPHJ Technology, "performed little, if any, due diligence to confirm that the targeted businesses were actually infringing its patents prior to sending these letters." Vermont's

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Attorney General states that hundreds or thousands of other businesses outside of Vermont also received such letters.

As our nation's agency that protects consumers from fraud, deception, and unfair business practices, we urge the Commission to examine the practices of patent assertion entities that wrongfully target end users and to utilize the authority it has under Section 5 of the Federal Trade Commission Act if any deceptive and unfair practices are found. Thank you for your attention to this important issue.

Judy Chu (D-CA)

Blake Farenthold (R-TX)

Jim Sensenbrenner (R-WI)

Zoe Lofgren (D-CA)

Steve Chabot (R-OH)

Hank Johnson, Jr. (D-GA)

Darrell Issa (R-CA)

Jason Chaffetz (R-UT)

Trent Franks (R-AZ)

Peter DeFazio (D-OR)

Jared Polis (D-CO)

Pete Olson (R-TX)

Andy Harris (R-MD)

Jared Huffman (D-CA)

Dave Loebsack (D-IA)

Grace Napolitano (D-CA)

Juan Vargas (D-CA)

Suzanne Bonamici (D-OR)

Mr. FARENTHOLD. So we were urging you to use your Section 5 authority to help end-users of technologies who are facing patent troll litigation for purchasing products off the shelf. I know you are now conducting a Section 6(b) study to investigate the patent troll problem. But in response to the letter you said most PAE activity is likely to lend itself to antitrust or consumer protection law enforcement. Therefore, I am wondering what you are hoping to accomplish with this study and what does the FTC plan to do with the collected information?

Ms. RAMIREZ. This is an area that the Federal Trade Commission has been looking at for some time, and most recently. last year we cohosted a workshop with the Department of Justice to examine PAE activity. What came out of that workshop mainly were two things. One, that there is an increasing concern about PAE activity. It appears that PAEs are engaging in activities that now reach a number of different sectors rather than just the IT sector, and we are, of course, aware of concerns about——

Mr. FARENTHOLD. We have had some State attorneys general actually filing lawsuits against patent control. Do you think maybe we could get the FTC to take a little bit more aggressive approach to protecting consumers in this area?

Ms. RAMIREZ. I can't talk about any details about investigations, but what I can tell you is that we are aware of the issue. We are looking at it closely. If we find that there is either anticompetitive conduct by PAEs or conduct that comes within our consumer protection authority under Section 5, deceptive or unfair practices, we will take action.

Mr. FARENTHOLD. Thank you very much.

Mr. Baer, I would like to talk a little bit about the American Airlines merger as well. I think I made a comment in another hearing, I don't remember if it was in this Committee or Transportation, that approvals between United and Continental and between Delta and Northwest had been approved and it seemed only fair that American be allowed the opportunity to grow its network as well. And I am happy to see that you have gotten to that point and reached a settlement.

I do want to ask about the gate divestitures, particularly at DCA and LaGuardia. My question is, it seems like we are giving a preference to low-cost carriers. I have got to be careful here because I am a big fan of Southwest Airlines and they have done a real good job keeping the fares down in my hometown of Corpus Christi.

At what point is it appropriate for the government to pick winners and losers there, and do we actually have a three-tier system of the legacy carriers that have merged and the Southwest-type carriers that are established and becoming more like legacy carriers every day, and then you move into the ultra low-cost carriers who basically get all their revenue from ancillary fees, charge you for a carry-on bag, and the next thing you know they will be charging you for a seatbelt.

Mr. BAER. Thanks for the question, sir.

In crafting this remedy and requiring these divestitures, our job, and we do this in any merger settlement where we require divestitures, we sit down with the merging parties and make sure

that the buyers of those assets are the people that are going to compete those assets most aggressively for the American consumer.

Mr. BAER. And we will have a process——

Mr. FARENTHOLD. But is it fair to American to require testimony to sell to a certain person if they are not, say, the highest bidder?

Mr. BAER. They have agreed to it, and I think it is fair because this is a settlement designed to avoid future competitive problems in an industry. The alternative, which American and US Air had available to them, was to go to court and ask the judge——

Mr. FARENTHOLD. I am almost out of time. I just want to follow up. You made a point that you consider it adequate service to have a one-connection flight between two cities. That is kind of out of joint with some of the ideals we have with DCA, Reagan National trying to get nonstop services to as many cities as possible. How do you reconcile that desire with perhaps the more cost-effective one-stop hub-and-spoke system that even to some degree Southwest is adopting these days?

Mr. BAER. All we are trying to do is to make sure that consumers get the benefit of competition wherever possible. And there are many airports where competition is limited because there are slots that aren't sold, can't be bought, or that there are gates, O'Hare is a good example, where carriers can't get in there because there is just not enough room. So by freeing up some opportunity and letting competition flourish more than it is able to flourish today, we think we are going to get a good result for the American consumer.

Mr. FARENTHOLD. I see my time has expired. So thank you very much, Mr. Chairman.

Mr. BACHUS. Thank you, Vice Chair.

At this time I recognize my friend and colleague Mr. John Conyers.

Mr. CONYERS. Thank you, Chairman Bachus.

Mr. Baer, can you give any examples offhand about how sequestration has affected the Department of Justice? I understand it has been pretty severe.

Mr. BAER. We had within the Antitrust Division, because of the rules limiting who could come to work, we had at any one time, only had about 20 or 25 percent of our employees in able to do work. And what effect did that have? It meant on mergers, where we were trying to move mergers along as part of our responsibility to the business community, we could not do our job. We could not get back to the lawyers and tell them what questions we had. There was a delay for the business community.

On matters of litigation, we had to ask the court to stay things. That slowed things down for us, very inefficient, it slowed things down for the defendant, and it delayed the day we get the outcomes and we think that is poor for the consumers.

But, Mr. Conyers, for me it was the fact that I had to tell people that I did not know if they were going to get paid for the time they were at home. This was a decision Congress had not made yet. And we had one pay period where people only got about 50 percent of their pay for that pay period. It got made up. But if you were living paycheck to paycheck, that was a very, very serious consequence to the individual.

So it was a slowdown in our ability to do the job you asked us to do. But it hurt innocent people. And that is part of what we all felt and felt badly about.

Mr. CONYERS. Thank you so much.

Chairwoman Ramirez, critics, including the Chamber of Commerce, contend that the FTC's use of its authority under Section 5 of the FTC Act has been inappropriate to the extent that it reaches conduct that doesn't violate the Sherman or the Clayton Acts, and they contend that the FTC's failure to issue guidelines on its use of section 5 has created uncertainty and is simply unfair.

Can you comment on that position that they have asserted?

Ms. RAMIREZ. Certainly. And you will not be surprised to hear that I disagree with that position. Number one, Congress very deliberately granted the FTC authority to go beyond the literal scope of the antitrust laws under its Section 5 authority. The agency in its recent history has used that authority in a very limited and restrained way. The vast majority of the enforcement actions that we bring are, in fact, brought under either the Sherman Act or the Clayton Act, and it is only in very limited situations that we have used what we refer to as our stand-alone Section 5 authority.

I also don't believe that the way we have used it has created uncertainty to the extent that it limits pro-competitive behavior on the part of businesses. I think we have acted appropriately in the times that we have used it, and I also believe that we have provided appropriate guidance about what motivates our use of Section 5—which ultimately is harm to competition or harm to the competitive process—the times that we have used it.

Mr. CONYERS. Thank you.

Mr. Baer, is there or are there occasions in which mergers could be good for consumers.

Mr. BAER. The answer I think is yes, sir. In situations where markets are not all that concentrated merging parties sometimes can become more efficient and offer a broader range of products and services.

We issue joint merger guidelines, guidance to the business community and the American public jointly with the FTC. We recently updated those, 2 years ago, and we talked about the standards we employ, how we look at mergers, when we think we might have a problem, and what level of concentration in the market could be a warning sign. So we work very hard to be up front about what we are looking at, and we recognize that some mergers, particularly mergers where it is not two competitors getting together, are likely to have no competition issues and have the potential, actually, to produce more efficient companies.

Mr. CONYERS. Can I ask you, my last question to both of you, just a yes or no, do you believe that the McCarran-Ferguson Act should be repealed with respect to health insurers?

Ms. RAMIREZ. I do.

Mr. CONYERS. Thank you.

Mr. BAER. The Administration, I think in 2010, communicated that view to the Congress as a Statement of Administration Policy.

Mr. CONYERS. Very good. Thank you both.

I yield back, Mr. Chairman.

Mr. BACHUS. Thank you.

Mr. Marino is recognized for 5 minutes.

Mr. MARINO. Thank you, Chairman.

I thank the two of you for being here. I want to get right to the point. I have three questions I want to bring, three issues. The first one is search engines, the big companies. The second one is going to be addressing the issue of patent troll letters. And the third one is going to be the merger of Express Scripts and Medco merger.

So let's get into search engines. In the past, the FTC has addressed concerns about the manner in which certain major search engines are aggregating information. Do you see or do you feel that these major companies are currently adhering to the best practices of the way search engines should be operating?

Ms. RAMIREZ. Well, Congressman, as you know, earlier this year, we, the Commission, issued a unanimous decision closing its search investigation of Google, and we outlined the reasons for that decision in a closing statement. But what I can tell you is that we are going to continue to monitor the marketplace, and if we see that a company, whether it is a company that engages in search or any other company, engages in anticompetitive activities, we are going to take action.

Mr. MARINO. Is there a time or is there an area where you are watching as to whether the percentage of the market that a particular search engine group or entities in combination would control that market? Is that a factor?

Ms. RAMIREZ. Sure. When we are evaluating whether there is a violation of the Sherman Act and specifically Section 2 of the Sherman Act, we would be looking at the issue of dominance, and that would be a factor in our analysis.

Mr. MARINO. General, as an attorney and as a U.S. attorney I know you can't get into the details or give an opinion, but what are you looking for in the computer tech age now with companies that dominate a major portion of the market? And I am not indicating in any way that I think that is always bad.

Mr. BAER. Thank you, sir. What we look for, similar to the FTC, is where somebody has not just been successful, because you don't want to penalize success—companies get big because they are better, they are more efficient, they price lower, and we don't want to deter that behavior at all—but sometimes people get big and they start pulling up the ladder or grease the ladder so nobody else can get up.

It really is the behavior on top of being successful, when you are using your elbows a little bit to muscle people out of the way, that in sort of plain talk is where we start to get interested.

Mr. MARINO. Please keep an eye there. Okay.

Chairwoman, let's switch to patent trolls. What, if anything, is FTC doing concerning patent troll letters? Have you been actually reading patent troll letters? Do you have any suggestions as to what can be done with them?

As far as I am concerned the information—the demand letters are really vague. We don't know who really is pursuing this. And can you tell me any plans you may have concerning patent troll letters?

Ms. RAMIREZ. So I think there are two main areas where the agency can be of assistance when it comes to this issue about the activities of patent assertion entities.

One is that we can be vigilant in monitoring the marketplace to ensure that there is no violation of the antitrust laws, and also under our consumer protection authority under Section 5. And we are doing that. I can't comment on any details of investigations, but I can tell you that we are aware of the issue, and where there has been deceptive conduct we would be in a position to take action.

At the same time, we aren't an agency that is evaluating the strength of particular IP, so there are limitations in what we can do in addressing some of the issues that are raised by PAE activity.

Mr. MARINO. Okay. What do you think of this idea: What do you think of making it mandatory that whoever is sending a patent patent troll letter out has to state boldly on that letter that you are not required by law to respond to this letter?

Ms. RAMIREZ. Let me say that I would have to think more about it. I have heard about this idea and I would need to get more details and be able to study it. But I——

Mr. MARINO. I am pushing this. This is an aspect that I am pushing on these letters.

Ms. RAMIREZ. I understand. I am supportive of efforts that are being made to reform the patent system to weed out weak IP and also efforts to allow companies to defend against frivolous litigation.

Mr. MARINO. My last question is to Express Scripts and Medco mergers. Is the commission planning to take any steps to look into the anticompetitive behavior currently that I am seeing and could you speak on that about the anticompetitive behavior in this merger that I feel has taken place?

Ms. RAMIREZ. As you know, we did decide to close the investigation and allow the merger to go forward last year. We issued a very detailed closing statement outlining the areas that we examined and the reasons why we felt that it was appropriate to close the investigation. There hasn't been much time that has elapsed. I am not aware of any evidence——

Mr. MARINO. Okay.

Ms. RAMIREZ [continuing]. Of their being anticompetitive conduct that has transpired since the merger. But I am happy——

Mr. MARINO. I am sorry. I see my time is running out. But I would ask unanimous consent, I would like to submit some other questions to our distinguished panel——

Mr. BACHUS. Without objection.

Mr. MARINO [continuing]. And expanding on the questions that I did ask. So it will be in detail. And thank you very much. I yield back.

Mr. BACHUS. And all Members will be given an additional 5 days to do that.

At this time, I recognize Mr. Johnson for 5 minutes.

Mr. JOHNSON. And I will yield to Ranking Member Conyers for a second.

Mr. CONYERS. I would just like permission to put into my statement the New York Times editorial of yesterday commenting on the unwise airline merger.

Thank you very much.

Mr. BACHUS. Thank you.

[The information referred to follows:]

The New York Times

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November 13, 2013

An Unwise Airline Merger

By THE EDITORIAL BOARD

In August, the Justice Department's antitrust division filed a lawsuit to block the merger of American Airlines and US Airways, which would create the world's largest airline and concentrate 80 percent of the domestic air-travel business in the hands of four companies.

This week, the department dropped its opposition after the companies agreed to give up some space at a few airports — hardly sufficient to ensure the vigorous competition in the airline industry needed to keep fares down.

In agreeing to the merger, the department seems to have forgotten the crucial arguments it made in its suit. It said that competition would decline significantly on more than 1,000 routes where the two companies currently compete head-to-head. And it said that the new combined American Airlines would control 69 percent of the limited takeoff and landing slots at Ronald Reagan National Airport near Washington, giving it a near-monopoly there.

Under the proposed deal, which is subject to public comment and has to be approved by a federal judge, the two airlines will divest 15 percent of the takeoff and landing slots they control at Reagan National Airport and 7 percent of the slots they control at La Guardia Airport in New York to low-cost airlines like JetBlue. This would give travelers at those airports more choice and possibly lower fares, but the change may not be significant.

The combined airline would also have to give up two gates at Boston Logan International, Miami International, Chicago O'Hare International, Los Angeles International and Dallas Love Field. With the exception of Love Field, where American has just two gates, the two airlines control many gates at those airports and relinquishing two at each will not make a big difference.

These steps do virtually nothing to address the issue of reduced competition in dozens of other markets and on routes where the two airlines currently compete for customers. In some cities like Phoenix, Charlotte and Philadelphia, the merged airline will have such a dominant position that its competitors will have a very hard time challenging it.

The antitrust division asserts the settlement is better than blocking the merger because it

gives new, lower-cost airlines a chance to enter some airports by making gates or takeoff and landing slots available. The division assumes that the smaller airlines like JetBlue, which has a much more limited network, will ensure stronger price competition. But US Airways, which has an extensive network and aggressive business tactics, already offers lower fares than American in many markets.

Furthermore, the agreement simply ignores the central concern the Justice Department expressed in its lawsuit: the four big airlines — United, Delta, Southwest and the merged American — will have an even greater incentive to raise fares and fees because consumers will have fewer choices.

Meet The New York Times's Editorial Board »

Mr. BACHUS. Mr. Johnson.

Mr. JOHNSON. And I also would like to submit for the record with unanimous consent a letter from the flight attendants of American Airlines——

Mr. BACHUS. Without objection.

Mr. JOHNSON [continuing]. Voicing their strong support for the merger.*

Mr. BACHUS. Their strong support for the merger?

Mr. JOHNSON. Yes.

Mr. BACHUS. Okay.

Mr. JOHNSON. Between American Airlines and US Airways.

Mr. COHEN. And their love of Mr. Baer.

Mr. JOHNSON. Well, no comment on that.

Mr. BACHUS. Something for everything in these submissions.

Mr. JOHNSON. But I would take us back to the days of Ronald Reagan coming in. Ronald Reagan said that government is not the solution, government is the problem. He said government is the problem, not the solution.

And that kind of was in keeping with a wave going across the American economy, a wave, a Milton Friedman economic wave of laissez-faire capitalism. Let the fox guard the henhouse basically is what that economic philosophy holds. And we have been following that for the last, what, 30 years? And we have been incessantly and sometimes drunkenly cutting the Federal budget and trying to make government smaller, downsizing, privatizing, you know, making government so small that you could drown it in a bathtub. That is what Grover Norquist has advocated. And, in fact, many Members of Congress have signed on that pledge and have adhered to it.

What impact does this historical shredding of government's capacity to enforce antitrust laws, what impact has it had on your ability to guard the henhouse, government's ability to guard the henhouse, as opposed to turning it over to the private sector to guard themselves and then let everything trickle down, it is going to work out according to the free market principles? Where are we as far as that is concerned.

Mr. BAER. Thank you for the question.

In our prepared statements, both of us talked about the fact that as antitrust enforcers, we are actually policing the free market so that the business community can compete aggressively and deliver better products, better service at lower prices. So we obviously are committed to the view that there is tremendous value added.

In my prepared remarks, I noted that in criminal penalties alone against corporations for price fixing and bid rigging, and we have unveiled serious conspiracies involving international companies, we are generating an average of $850 million in criminal penalties.

Mr. JOHNSON. But my question is, I know that the work is effective and that it inures to the benefit of consumers, as well as the competition in the business community, small businesses versus larger businesses. But what is the impact of the incessant and drunken budget cutting that has been taking place over the last 30 years?

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*Material previously submitted, see page 6.

Mr. BAER. We are privileged, I think, as antitrust enforcers—I am not dodging the question—but we have actually had fairly good bipartisan support for antitrust enforcement over the years. That hasn't always translated into dollars.

Mr. JOHNSON. How has this impacted your ability to carry out your mission, the budget cuts?

Mr. BAER. Let me give you good examples, sir. Because of the current sequester, I have been unable to hire the criminal prosecutors that I need to return the sorts of criminal penalties I referred to earlier in my statement. We are down from about 125 criminal prosecutors to 85 right now.

If the budget situation resolves itself, the Justice Department is going to hire those people and get them back on. But when the uncertainty is hanging over us all, there is a hiring freeze that has had to be imposed. So there is a real world example of how uncertainty can affect our ability to get the troops we need to go out and do a good job for the American consumer.

Mr. JOHNSON. All right. Thank you. And that affects our overall ability to be competitive with other Nations, companies in other Nations around the world.

So I do want to thank also you both for working with my office on the APPS Act and also arbitration fairness. But now arbitration fairness with this recent U.S. Supreme Court ruling, *American Express v. The Italian Colors Restaurant*, wherein it was ruled that arbitration, a mandatory or forced arbitration agreement can trump the antitrust laws. What is your analysis——

Mr. BACHUS. You can briefly answer.

Mr. JOHNSON. Thank you, Mr. Chairman.

Mr. BAER. What I will do is get you an answer for the record, sir, because when I was at a private law firm I represented some credit card companies. That is one area where other people do the thinking and do the communicating for me.

Mr. JOHNSON. All right. How about you, Ms. Ramirez?

Mr. BACHUS. Thank you.

Mr. Smith from Missouri.

Mr. JOHNSON. Could I have an answer from Ms. Ramirez to that question, Mr. Chairman?

Mr. BACHUS. Yes. I am sorry.

Mr. JOHNSON. Thank you.

Ms. RAMIREZ. Let me just say that we, the Federal Trade Commission, I believe this general view is also shared by the Department of Justice, are concerned when private litigants aren't permitted to enforce the antitrust laws. We believe that that is an important component and complement to the public enforcement that we engage in which we believe is quite vital to ensure that there is a fair and level marketplace.

Mr. JOHNSON. Thank you.

Mr. BACHUS. Mr. Smith.

Mr. JOHNSON. Thank you, Mr. Chairman.

Mr. SMITH. Thank you Mr. Chairman.

Madam Chairwoman, my question, over the last two decades the Commission ruled in its own favor in every single case it has brought in its internal court, even when its administrative law judges ruled in favor of the defendant.

Can you comment on the Commission's record and inform the Committee whether there are any actions at the FTC plans to take to address this imbalance?

Ms. RAMIREZ. Let me say first that I believe that is too narrow a lens with which to examine concerns about whether or not the procedures under the FTC's administrative processes are fair and efficient. I believe that they are. There have been instances both where the administrative law judge has disagreed with the FTC staff that is litigating the matter before them, what we refer to as complaint counsel. There have also been instances when the Commission has in turn ruled against complaint counsel.

But I think the question to be asked here really is to look more broadly and to look at the process as a whole. And when you take into account the fact that there is a very thorough investigation that is performed by FTC staff, before even proceeding with an enforcement action, then you have a bipartisan expert commission who is examining the matter and making a determination about whether to proceed, then at that point in time we are able to proceed either by going to Federal court or administratively, when we go administratively, the matter is tried before an administrative law judge. It can then be appealed to the Commission and we would, at that point in time, look at the whole trial record before making a determination. And then that, in turn, can be appealed to the court of appeals.

So I think when you examine the process as a whole, in my view, it is quite clear that the process is fair.

In addition, I will note that there had been concerns expressed about delays in that process. We took those to heart, and in 2009 the Commission streamlined its administrative processes. And I believe that now the time that it takes to litigate under our process is comparable to the time that it would take to litigate in Federal court.

So when looking at the process as a whole, I do believe that the agency approaches matters and makes decisions on a fair and equitable basis.

Mr. SMITH. You know, I read here that Commissioner Wright before he joined the Commission published in a report saying the Commission has reversed at a rate that is four times that of a general Federal judge. To me that seems like that is an imbalance. Do you not agree with that statement?

Ms. RAMIREZ. A court of appeals is obviously going to be examining issues that the agency looks at and may have a different view of what the law is.

Just by way of example, I will note that in the pay-for-delay arena, the FTC lost before the courts a number of different times, but ultimately made its way to the U.S. Supreme Court, and the Supreme Court ended up agreeing with our view that reverse payment settlements ought to be subjected to antitrust scrutiny.

So sometimes we need to be persistent in pursuing the development of antitrust doctrine when we believe that there is anticompetitive conduct at issue. I recognize that we have been reversed on occasion, but I think we look at these matters very closely and proceed only when we believe there is harm to competition or harm to the competitive process.

Mr. SMITH. I do think that it is something you need to look into being that two decades is a long time. That is 20 years. I am 33 years old. So in 20 years the Commission has found every case on their side. I think that is an imbalance and I think that is something you all need to look at.

Mr. BACHUS. Thank you.

Ms. DelBene.

Ms. DELBENE. Thank you very much, Mr. Chair. You are working on pronouncing my name.

Mr. BACHUS. That is right.

Ms. DELBENE. You did a great job.

I thank both of you for taking the time to be here today.

Mr. Baer, I am on the Agriculture Committee as well as this Committee, and my district has many farmers, dairy and berry farmers, specialty crop farmers. And I understand that the Department of Justice and the Department of Agriculture corroborated in 2010 on a series of hearings on competition issues which affected the agricultural sector. And I know that farmers and producers all across our country and as well as consumers of our Nation's food supply rely on the benefits of a competitive and fair marketplace.

So how have the 2010 hearings influenced the DOJ's enforcement strategy in this area? What are your plans to ensure fair, open, and equitable markets for our Nation's farmers?

Mr. BAER. Thank you for the question.

Those hearings resulted in a report which we sent to both this Committee and the Senate Judiciary Committee laying out our findings. We have used that report to work together with the State Attorneys General, who sometimes are a little closer to the ground in terms of being able to communicate with farmers, producers, including livestock producers, for example, who have issues.

We have a team of lawyers and economists who specialize in agricultural antitrust, agricultural economics. And we have had some investigations. We continue to look at this matter. We realize that this is an important part of our ongoing antitrust responsibility.

Ms. DELBENE. Thank you.

I also had a question, I know last year The Wall Street Journal reported that the DOJ was investigating whether cable companies were acting improperly to stifle competition from online video services. And to the extent that you can discuss this, I was interested in why you looked into this matter and any feedback you have for us.

Mr. BAER. I can't get into the details, other than to say in any industry if there are agreements being made that injure consumers unfairly, inappropriately, part of our mission is to take a look at them. And where those issues crop up, whether it be in the cable industry on delivery of programming or anywhere else, our job is to go in as fast as we can and determine whether or not there is a problem that requires attention.

Ms. DELBENE. Thank you. I know we are short on time so I will yield back.

Mr. BACHUS. I appreciate that.

Mr. Jeffries, I am going to go ahead and let you go next and then I will wrap up. An d they can tell me how much time I have.

Mr. JEFFRIES. Okay. Thank you very much, Mr. Chairman.

And thank you to the two witnesses. And I will try to expedite my questioning given the calling of votes.

Let me start with Chairwoman Ramirez. So the FTC I guess announced on September 30 that you are going to move forward with a 6(b) study of the PAE problem. Is that correct?

Ms. RAMIREZ. About PAE activity, yes.

Mr. JEFFRIES. What is your understanding of the nature of the issue and/or problem, if you would characterize it as such, that you will be studying?

Ms. RAMIREZ. So let me clarify what it is that we are doing. And, again, what we are doing with this study that we have just recently announced is to build on the prior work that the agency has done in connection with patent assertion entities, and that includes discussion and inquiry that we had and we addressed in a report we issued back in 2011. Then last year we had a joint workshop with the Department of Justice. And two things emanated from that workshop. One is that this is an area of growing concern. But secondly, we also found that there is very limited data about what PAEs are actually doing, what the business model is, what type of patents they hold.

So we felt that it was appropriate to use our research function and our authority under 6(b) of the FTC Act to gather more information. So I want to make sure that it is clear that what we are doing is really information gathering and what we hope to do is shed light on what the costs and benefits are of PAE activity.

There are supporters of what PAEs are doing who argue that PAEs allow particularly small inventors to monetize their patents. And then there are critics who say that this activity is really creating a burden and imposing undue costs on business. And so we are trying to examine and shed light on that broader policy question.

Mr. JEFFRIES. Thank you. And when do you expect to complete that study?

Ms. RAMIREZ. Studies that are analogous to this one in the past have taken approximately a year and a half to 2 years. We are going to move as quickly as we can, but that gives you a general idea about the possible timing.

Mr. JEFFRIES. Thank you.

And, Mr. Baer, the proposed settlement between American Airlines and US Air, in my understanding, requires that the combined airlines divest approximately 7 percent of their slots from LaGuardia Airport. Is that correct?

Mr. BAER. I think that is correct, yes, sir.

Mr. JEFFRIES. And how did the DOJ arrive at that 7 percent number?

Mr. BAER. We asked them to divest certain slots that were already being leased to Southwest and that were actually producing significant consumer benefits. If the merger went forward, those slots would have reverted back to the new American. So we were able to maintain that competitive presence.

There was a total of 34 slots. I believe that was the number of slots that American brought to the table, that we were basically saying that there cannot be growth on the part of the combined airline in terms of slots in and out of LaGuardia. That was certainly

our position at National Airport here. I believe it was the same as to La Guardia.

Mr. JEFFRIES. After the divestiture, will those 34 slots be held by Southwest Airlines or will they be open to a process by which other airlines will have an opportunity to secure them?

Mr. BAER. Certain of the slots that are currently leased to Southwest, they will have the right of first refusal to come in and get those. The rest we will open up to other air carriers to come in and persuade us that they are going to compete those assets aggressively on behalf of the American consumer.

Mr. JEFFRIES. Thank you.

Thank you Mr. Chair. I yield back.

Mr. BACHUS. Thank you.

I will now ask some questions, and at the end of that that will be the end of our hearing.

I want to start with what I consider maybe the most important point, and that Mr. Smith brought up, and I know Ms. Ramirez, or Chairwoman, you responded that you think the process is fair. So I want to ask you to keep an open mind.

As he said, every time that the FTC has decided to bring an action and it goes to the administrative law judge, in a certain number of those cases the administrative law judge rules in favor of the company that action is being brought against. But in all of those cases over the last 20 years when it went back to the Commission, there was a vote to proceed. So that was actually against the administrative law judge. And then when you proceeded with the case and it was appealed by the defendant and it went to a Federal district court, the Commission was reversed at four times the rate that Federal district judges normally reverse cases.

So it does appear, I mean over the last 20 years, and I know that is, you know, you say, well, that is 20 cases, but it appears as if the Commission always proceeds, I mean, even if the administrative law judge says I have got serious questions. And I know some of those decisions by the administrative law judge have been 20 or 30 pages of saying, no, this isn't the case, and then the Commission decides to proceed.

And then in a number of those cases where the company then appeals to the Article 3 courts, the Article 3 courts decide that the FTC has erred. And it at least in calling balls and strikes, it does appear as if it is somewhat stacked against the defendant. So I am not going to—I know you have already responded.

And one thing, we said maybe what would clear this up is if you could issue guidance. And I know we got a letter back from you that the Senators and I, we wrote, saying that you didn't feel like you—instead of issuing guidance on the FTC's Section 5 authority, you ought to just look at the cases. You have issued guidance on consumer unfairness. I am just going to urge you again to reconsider.

Ms. RAMIREZ. So if I may very briefly say a couple of things. One is, in terms of the statistics, I think it is a more nuanced picture than has been described. And I am happy to provide more detail——

Mr. BACHUS. Sure, and I would love that. Let's start with that.

Ms. RAMIREZ. But let me just say that I haven't examined the statistics that Commissioner Wright mentions.

Mr. Bachus. Sure. And even, you know, not only two of the Commissioners, two of the four Commissioners have said they don't believe it is fair, but also the editorial. And he testified before this Congress, Mr. Balto, who was a policy director at the FTC, even he, you know, he says that there needs to be some changes, that it hadn't been fair. And what I am saying, you know, it is very costly when these cases are brought.

Now, I want to say in that regard, I want to commend the Department of Justice for what you have done on discovery to lighten the cost. Because, as you know, and I am a former litigator, companies, you know, I represented the railroad, sometimes you settled just because the discovery is so expensive. And I commend that, that you have lessened that. I think that in and of itself makes a fairer system.

But I am just saying to you, let's continue this dialogue. I note, you know, you appear to be sort of dug in on this issue.

Ms. RAMIREZ. No.

Mr. BACHUS. And I understand you have looked at it. But let's continue to talk. Maybe what you do is you just give some clearer guidance if you could.

Ms. RAMIREZ. If I may just take a minute to respond very briefly. I want to separate the two questions that you asked, one that relates to Section 5 guidance and the other about the concerns about our administrative process.

I think they are separate because the issue that you raised and the issue that some of my fellow Commissioners have raised about Section 5 guidance relates to a very narrow, limited number of cases in which the agency has acted beyond the literal scope of the antitrust laws.

Mr. BACHUS. But in most cases, it is unanimous.

Ms. RAMIREZ. So the broader question about——

Mr. BACHUS. It is not? Okay.

Ms. RAMIREZ [continuing]. Those involve the Sherman Act. I want to clarify that the Section 5 issue about guidance really does relate to a small number of cases, and I am happy to provide you with additional information.

And let me also say that I take your concerns very seriously and I am open to and we are going to continue to have an internal dialogue about that Section 5 issue.

Mr. BACHUS. That is all I ask for.

The airline merger. You answered my most serious concern, Assistant Attorney General, when you said that you asked US Air and American to preserve those flights to smaller cities and towns, the commuter flights, and that is what a lot of our concern was, will those flights go away? Because I have even had Members of Congress come up to me and say, hey, they are now flying to Bangor. They have never done that. They are now flying to Knoxville, a direct flight. So I really appreciate that.

I do wonder if, and two or three others mentioned the legacy carriers where you have kind of carved out the low-cost carriers, and I understand the benefit where that brings down the cost between Chicago and Washington and different large cities and Washington.

But the legacy carriers also have the small commuter planes. For instance, Dallas, Love Field, there is a monopoly by Southwest there. And I join everybody else, Southwest brought down fares in Birmingham, they halved the fares.

I do want to say I looked at this editorial and the third paragraph, I would never say The New York Times would mislead someone, but it says that competition would decline significantly on more than a thousand routes where the two companies currently compete head to head. They don't really compete effectively head to head. And there is only overlapping routes.

I don't consider if you have to fly from here to Dallas and then back to Birmingham over an 8-hour period that that is head to head with a direct flight from here. So I think that is a little bit of a—it doesn't tell the complete story.

And then it says that they would control 69 percent of the takeoffs at Reagan. Well, they control more than that now. So it is not like you made that decision.

But do you have any further comment? But I do appreciate what you said about commuter airlines.

Mr. BAER. Thank you, sir. And I think by the divestitures we are requiring at National we will ensure that not all of those slots—that it will be closer to about 56 percent of the slots—that new American will hold, and the rest of those slots we are going to make sure go out to folks who are going to provide more opportunity to go more places out of National Airport.

Mr. BACHUS. All right. Thank you.

I want to quickly say that there are a lot of concerns among Members about the hospital mergers, which were brought up, and also the community pharmacist issue. And I appreciate, I know you all moved and took some action on a hospital merger, and I think that is a concern, so I appreciate your vigilance on that. And you have also said to other Members that you are aware of the importance of community and local pharmacists and the role they sometimes play on advising people, that ability to go in and talk to your local pharmacist.

With that, I would just say Rachel at Card Services, you know, we get more calls on that than anything else. And that is a criminal enterprise. And I just urge you to make that a priority because Card Services, this so-called Card Services harasses millions of Americans. You know, their phone rings 18 hours a day. And I know we have discussed that and you all are trying to innovative, and this is a sophisticated criminal enterprises. But they totally flaunt the law. Their arrogance is stunning.

Let me close by saying what other Members have said, and Attorney General Holder I know is concerned about this issue and is addressing it. But we imprison more young Black men between the ages of 20 and 34 in this country than South Africa under apartheid, which was considered a very regressive regime against our black citizens and actually racist. And it is a national tragedy. It really is. And when the Bureau of Prisons says we are manufacturing prisoners, not reforming them, manufacturing criminals.

Violence has dropped since 1980 by a third. In 1980 if you looked at the racial makeup of our Federal prisons there was very little demographic variant. Since 1980 suddenly young Black men, if you

were to look at the statistics, have suddenly turned into hardened criminals. And I don't think that is the case. And a lot of it is the crack cocaine differential and we have moved against that.

But I think we have a lot of work yet to be done. And even in certain regulations I think we are overcriminalizing, taking regulations that should be civil penalties. And I know you mentioned there are some that shouldn't and have to be careful.

I am on a task force, in fact I was at the Supreme Court last night with the new members of the Sentencing Commission were being sworn in, and the Justices there know there is a real problem, they are looking for the Congress. I talked to two of the Justices.

There is a bipartisan realization in the House and Senate that it is a very broken system. And I think it is a civil rights and a human rights issue and that it is not your Department. But it is, I think, one of the real human rights issues of our age.

I actually know one Federal judge, a lady, whose husband, because of the story she tells him, goes to the Federal penitentiary in Alabama and visits prisoners every Monday. And I encourage the Administration to speak out on this.

The American people don't understand it. I think they just say, well, you know let's—but these are not violent criminals or if they are, we have turned them into that by ago taking a young 19-year-old who might have been a mule. A lot of these people their mental capacity, they are actually retarded, and they have been taken advantage of. And they are not, once they come out of prison, sometimes their chances of advancing have pretty much, in many cases, dissipated.

I think it is, and I have talked to Senator Leahy, the Senate is going to move legislation, and it is going to come over to the House. And it is going to have Rand Paul, Mike Lee, Barbara Mikulski. And how do you get people on opposite ends? And here, Mr. Cohen and I and Chairman Goodlatte, we are all committed, Raul Labrador. This is something that we need to address. And I know that Governor Perry in Texas has talked about need for change.

So I don't think anything else we have discussed today affects as many people so dramatically. China has four and a half times more population, I think, than we are. We have more people in prison than China. We are giving the longest sentences today in the history of our country.

So that concludes our hearing. Thank you very much.

This is just for the record. You all can go ahead. This concludes today's hearing. Thanks to all our witnesses for attending. Without objection, all Members will have 5 legislative days to submit additional written questions for the witnesses or additional materials for the record.

This hearing is adjourned.

[Whereupon, at 10:54 a.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

Prepared Statement of the Honorable Steve Cohen, a Representative in Congress from the State of Tennessee, and Ranking Member, Subcommittee on Regulatory Reform, Commercial and Antitrust Law

The U.S. Supreme Court has referred to the federal antitrust laws as "the Magna Carta of free enterprise," declaring them "a comprehensive charter of economic liberty aimed at preserving free and unfettered competition."

Effective antitrust enforcement is key to ensuring a vibrant, competitive marketplace that rewards innovation and creativity and offers consumers greater choice and lower prices. In the absence of antitrust enforcement, companies have less incentive to compete, and more incentive to maintain high profit margins at the expense of consumer welfare.

At the forefront of the effort to ensure that competition remains free and fair are the Nation's principal antitrust enforcement agencies, the Antitrust Division of the Department of Justice and the Federal Trade Commission's Bureau of Competition.

I applaud both agencies for their vigorous efforts to enforce federal antitrust laws in recent years. For example, the Justice Department won a total victory against Apple and stopped it from conspiring with publishers to raise prices for consumers. Thanks to the Department's work, consumers will enjoy e-books that are 40% cheaper than they might have been.

The Department has also successfully obtained criminal fines of more than $1 billion and obtained prison sentences for 28 people for criminal antitrust violations, which are the most harmful types of anti-competitive behavior like price-fixing and bid-rigging.

Similarly, the FTC has had a number of notable successes on behalf of consumers, including its victory before the Supreme Court in *FTC v. Actavis,* which found so-called pay-for-delay agreements to be subject to the antitrust laws.

Meanwhile, both agencies have established the principle that holders of standard essential patents may not seek to exclude competitors who rely on the standard technology covered by such patents and must license such technology on reasonable and non-discriminatory terms.

My constituents are all too aware of the consequences of lax antitrust enforcement. As I noted back in February, the merger of Delta Airlines and Northwest Airlines has been nothing short of disastrous for Memphis.

Richard Anderson, Delta's CEO, promised me in this very room back in 2008 that there would be "no hub closures" and that the merged airline would maintain the international flight to Amsterdam. At a meeting in Memphis, he pledged to city leadership that the Northwest/Delta merger would be one of addition, not subtraction.

Since then, there has been a string of broken promises. Delta cut the international flight, repeatedly cut service to Memphis and, this year, closed its Memphis hub. Service has been cut from 240 flights a day to 40.

The result was that my constituents were hurt, with a substantial loss of air service and jobs, which ultimately harms Memphis's competitiveness as a business destination with other cities.

Protecting consumers from antitrust violations is important. In addition, though, I also hope that Mr. Baer will tell the Attorney General that we also need to protect individuals from unjust sentences, as I outlined in a June 18, 2013 letter to the President, for which I am still awaiting a response.

I look forward to hearing from our witnesses as to what efforts the antitrust enforcement agencies are currently undertaking to help ensure free and fair competition in all industries.

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

Today's oversight hearing on the Department of Justice's Antitrust Division and the Federal Trade Commission's Bureau of Competition, provides an excellent opportunity for us to focus on the critical purpose of antitrust law: to ensure that businesses do not behave in ways that injures markets, and, ultimately, consumers.

As to mergers, this means that any transaction that would result in a company obtaining an unfettered ability to raise prices or otherwise harm consumers is contrary to basic antitrust policy.

Thus, we should be especially skeptical about the potential detriment presented by a rapid succession of big mergers in a given industry.

Unfortunately, antitrust scrutiny of mergers has been woefully insufficient over the past 30 years until only recently.

The very fact that many industries are now dominated by just a handful of very large firms attests to this failure of aggressive scrutiny.

There has been a wave of mergers in industry after industry. Just a few examples include the Whirlpool-Maytag, AT&T-BellSouth, AOL-Time Warner, and JPMorganChase-BankOne mergers. In the banking industry alone there have been 47 mergers since 2001.

Basic economics and common sense should tell us that a few dominant firms forces consumers to pay higher prices and to accept suboptimal products or services.

This hands-off approach to antitrust merger enforcement reflects the misguided view that corporate power should trump other interests, including the public interest. As a result, the trend in antitrust law has been against the American consumer.

Fortunately, recent antitrust enforcement initiatives of both the Justice Department and the Federal Trade Commission appear to reflect a positive change from prior practice.

I am very heartened by the renewed vigor in antitrust enforcement that these agencies have exhibited in the past year or so.

Under the Obama Administration, the Justice Department has aggressively pursued litigation to block large, high-profile, and potentially anticompetitive mergers, including lawsuits to block the proposed mergers of AT&T and T-Mobile, Anheuser-Busch InBev and Grupo Modelo and, most recently, American Airlines and US Airways.

Such actions would, for the most part, have been unexpected in previous Administrations going back a generation.

Even more important is the fact that these suits have achieved pro-consumer results.

AT&T and T-Mobile dropped their plans to merge, while Anheuser Busch agreed to divest itself of all of Grupo Modelo's U.S. business in response to the DOJ's lawsuit.

The FTC, meanwhile, was able to achieve an important victory for consumers before the U.S. Supreme Court this year in the *FTC v. Actavis* case, which held that agreements between brand-name and generic drug manufacturers to delay introduction of cheaper generic drugs can be subject to antitrust laws.

Such successes, however, do not necessarily mean further oversight is unnecessary. For instance, the Justice Department's tentative settlement agreement announced earlier this week with respect to the proposed American Airlines and US Airways presents some concerns.

While this settlement agreement leaves consumers somewhat better off than they would have been had the merger gone through as proposed, I remain concerned that the new merged carrier—which would be the largest in the world—will result in only four domestic airlines controlling more than 80% of the market.

As the *New York Times* noted in an editorial yesterday, "the agreement simply ignores the central concern the Justice Department expressed in its lawsuit: the four big airlines—United, Delta, Southwest and the merged American—will have an even greater incentive to raise fares and fees because consumers will have fewer choices."

In closing, I note that strong antitrust enforcement is not possible without adequate resources.

As with other federal agencies, the DOJ and the FTC must have sufficient funding to pay for high-caliber attorneys, economists, and other staff and for vigorous and thorough investigations and, when necessary, litigation.

The continuing budget battles in Congress, including sequestration and the recent fight over a continuing resolution that led to the shutdown of the federal government, threaten to sap already limited resources for all of our federal agencies.

Some of the recent successes in antitrust enforcement would be undermined, and future enforcement efforts could be compromised. That could return us to the bad old days of lax antitrust enforcement, with higher prices and fewer choices for consumers. I urge my colleagues to make every effort not to go down that road.

Response to Questions for the Record from the Honorable William J. Baer, Assistant Attorney General, Antitrust Division, United States Department of Justice

Questions for the Record from
Chairman Spencer Bachus
for the Hearing on "Oversight Hearing for the Antitrust Enforcement Agencies"

November 15, 2013

Questions for Assistant Attorney General Baer

1. The DOJ filed comments with the Federal Communications Commission (the "FCC") in connection with the FCC's spectrum holding proceedings. Can you explain how the FCC spectrum auction rules can be designed to achieve a competitive result? Additionally, has the DOJ been coordinating with the FCC to ensure that final auction rules result in a competitive auction?

Answer: Well-defined, competition-focused rules for spectrum auction acquisitions would serve the dual goals of putting spectrum to use quickly and efficiently and protecting competition in wireless markets. A key point in the Department of Justice's comments to the FCC is that different bands of spectrum have different competitive significance. For example, the propagation characteristics of lower frequency spectrum permit better coverage in both rural areas and building interiors, so a carrier's low-frequency spectrum holdings may determine its ability to compete in offering a broad service area, including its ability to provide coverage efficiently in rural areas. The comments advocate that the FCC should enable the smaller nationwide networks, which hold comparatively little low-frequency spectrum, to have the opportunity to acquire such spectrum because such acquisitions could improve the competitive dynamic among nationwide carriers. In addition, the comments advocate that, in designing spectrum auctions, the FCC should consider the potential for anticompetitive foreclosure, which can cause harm to competition and innovation. The wireless industry has characteristics that make it susceptible to foreclosure, such as relatively high concentration, high margins, and dependence on scarce spectrum as a critical input. The department stands ready to provide any further assistance the FCC deems appropriate.

2. Recently, there have been a number of cases initiated against companies that fall below the Hart-Scott-Rodino statutory thresholds. How does the DOJ determine whether to pursue below-threshold transactions, and how do you obtain information regarding the transactions?

Answer: The Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR Act") requires companies that meet the statutory thresholds to notify and provide information to the Antitrust Division and the Federal Trade Commission before consummating certain acquisitions. While these notifications are the most important means for learning of mergers and acquisitions that may violate the Clayton Act, the division may find out about such transactions in other ways, including in the media or trade press, from concerned customers, from the parties themselves, or in the course of investigating other transactions or conduct. In the division's recent successful court challenge to the consummated Bazaarvoice-PowerReviews acquisition, the court made clear that since both proposed mergers and consummated mergers can threaten competition, both are subject to the same analysis under the Clayton Act. *See* Memorandum Opinion *in re U.S. v. Bazaarvoice* at 138-40, Civil Action No. 13-cv-00133-WHO (N.D. Cal. 2014). The division investigates transactions that pose a significant threat to competition regardless of how we find

out about them and regardless of whether they were subject to the pre-notification requirements of the HSR Act. Once we open an investigation, we have available the tools contained in the Antitrust Civil Process Act, including civil investigative demands, to obtain information.

3. As part of the settlement with American and U.S. Airways, a number of slots will be divested at Reagan and La Guardia airports. You stated on a conference call regarding these divestures that the slots will be purchased by low-cost carriers. What will be the metric by which you evaluate whether the decision to prohibit network carriers from obtaining these slots was correct?

Answer: The Proposed Final Judgment obligates the Department of Justice to oversee divestiture of slots, gates and other assets to buyers who will remedy the harms alleged in the complaint. The complaint identifies harm from, among other factors, a lack of aggressive competition among the legacy airlines. An important factor in the divestiture, as stated in the Competitive Impact Statement, is to "impede the industry's evolution toward a tighter oligopoly." The divestitures at La Guardia and Reagan National that have already been announced will lower barriers to entry—providing additional carriers with the incentive and ability to invest in new capacity and permitting them to compete more extensively nationwide, to the benefit of airline travelers throughout the United States.

4. Is there a risk that if the slots go solely to the low-cost carriers, that these carriers will not be equipped to fly the rural and small community routes that are not included within the maintenance requirement made of the new American?

Answer: First, the Proposed Final Judgment provides for the merged firm to retain American's commuter slots at Reagan National Airport, increasing the number of commuter slots New American will hold, relative to what US Airways currently holds. This provision was included to increase the likelihood that service to small and medium communities from Reagan National would be maintained. In addition, the parties' agreement with the Department of Transportation requires New American to use its commuter slots at Reagan National Airport to serve Small Hub, Medium Hub, and Non-Hub airports. Second, the objective of the Proposed Final Judgment is to put slots and facilities in the hands of carriers that will increase competition and competitive options for all airline consumers. The Antitrust Division is committed to protecting competition across the national airspace system, including competition for connecting service and service to smaller communities and rural states and regions. The proposed remedy will provide consumers with more choices and more competitive airfares throughout the country. While the Antitrust Division has no authority to direct where airlines will fly, it should be noted that many low-cost carriers offer service to small and medium airports across the United States.

5. One of the goals of the settlement was to promote increased competition, yet as a result of the settlement, one carrier will control 90% of the gates at Dallas Love Field. Is that true? Why are other carriers not able to bid on the Love Field slots?

Answer: The settlement only addresses assets controlled by the merging parties. In determining whether to approve any proposed successor to the gates at Love Field currently leased by American, the Antitrust Division will apply the criteria set forth in the Proposed Final Judgment and associated Competitive Impact Statement. Specifically, the divestitures at Love Field and

other key airports should impede the industry's move toward a tighter oligopoly and permit the entry or expansion of potentially disruptive competitors at these strategically important airports. At Love Field, an airport near American's largest hub at Dallas-Fort Worth International Airport (DFW), the divestitures will allow the purchaser of those assets to provide competition to the New American's nonstop and connecting service out of DFW. The process of divesting those assets to an appropriate purchaser is ongoing.

Questions for the Record from
Ranking Member Steve Cohen

6. In both your comments to the Federal Communications Commission regarding the upcoming wireless spectrum auction as well as the Justice Department's suit filed to block the American Airlines-US Airways merger, the Antitrust Division has advanced the idea of national competitors. Does this mark a shift in the way that antitrust markets are being defined?

Answer: The Antitrust Division's approach in those two matters does not reflect a change in the way the division defines relevant markets. The relevant market definitions in those two cases were appropriate to the specific facts of those cases. Under the Horizontal Merger Guidelines, most recently updated in 2010, the Antitrust Division (and the FTC) will identify one or more relevant markets in which the merger may substantially lessen competition in order to help inform our determination of the likely competitive effects of a transaction. The relevant markets may be local, regional, national, or even international, depending on the facts.

7. In discussing standard essential patents, FTC Chairwoman Ramirez noted the dangers of exclusion orders from the International Trade Commission (ITC) for infringement of a RAND-encumbered standard essential patent (SEP). Are you concerned that the ITC may not share your view and the FTC's view that unreasonable licensing terms for SEPs harm competition? While the President can overturn an exclusion order, should there be additional checks? If so, what should Congress do to address the situation?

Answer: Together with the U.S. Patent and Trademark Office (PTO), the Antitrust Division has encouraged the ITC to examine closely requests for exclusionary relief relating to alleged infringement of FRAND-encumbered SEPs, particularly if the complainant would be unlikely to obtain such relief in U.S. federal district court. In January 2013, the department and the PTO explained in a Joint Policy Statement that, except in limited circumstances, exclusionary relief at the ITC to remedy such infringement may cause competitive harm by facilitating patent hold-up and, therefore, may run counter to the public interest. (The Joint Policy Statement is available at www.justice.gov/atr/public/guidelines/290994.pdf.) This position is consistent with a patent holder's voluntary FRAND licensing commitment, which demonstrates that compensation is usually the appropriate remedy for FRAND-encumbered SEPs.

In August 2013, the U.S. Trade Representative (USTR) relied on the Joint Policy Statement to disapprove an ITC exclusion order that barred certain Apple 3G iPhones and iPads from the U.S. market based on infringement of such a patent owned by Samsung. The USTR encouraged the ITC to find facts and evaluate the public interest consistent with the Joint Policy Statement in future investigations. We expect that the ITC will find the Administration's guidance helpful in this regard, and that exclusion orders based on infringement of FRAND-encumbered SEPs will be rare.

The division is also working on this issue through its sustained competition advocacy activities. For example, we have called on standards bodies to make their IP Policies more procompetitive by requiring the licensing of SEPs on FRAND terms. *See* Renata Hesse, Assistant Att'y Gen.,

Antitrust Div., U.S. Department of Justice, The Art of Persuasion: Competition Advocacy at the Intersection of Antitrust and Intellectual Property, Remarks as Prepared for the Washington State Bar Association, 30th Annual Antitrust, Consumer Protection and Unfair Business Practices Seminar (Nov. 8, 2013), *available at* www.justice.gov/atr/public/speeches/301596.pdf.

8. What role does the Antitrust Division play with respect to international harmonization of antitrust law and policy?

Answer: International engagement is critical to the Antitrust Division's mission. The division endeavors to promote international convergence on competition issues based on sound antitrust principles, transparency, procedural fairness, and enforcement cooperation. The division participates extensively in a number of multilateral organizations, such as the International Competition Network (ICN), the Competition Committee of the Organisation for Economic Co-Operation and Development (OECD), the United Nations' Conference on Trade and Development (UNCTAD), and the Asia-Pacific Economic Cooperation (APEC). The Antitrust Division is a founding member of the ICN, a forum with membership of over 130 antitrust agencies worldwide. We are a member of the ICN Steering Group, and we co-chair the Cartels Working Group. In addition, I serve as the Chair of the OECD's Working Party 3 on enforcement and cooperation, where the division has taken a leading role in major OECD projects on cooperation, transparency, and procedural fairness. Further, the division consults bilaterally with a number of international jurisdictions on issues including adopting new antitrust laws, drafting merger guidelines, intellectual-property licensing, and cooperation on international investigations and enforcement actions. For example, in January the division and the Federal Trade Commission held a bilateral meeting with Chinese competition authorities. The division's efforts have contributed to increased international convergence, both substantively and procedurally.

9. Are there any additional legislative tools or revisions to existing law that would help the Division's enforcement efforts?

Answer: The Antitrust Division appreciates this Subcommittee's longstanding, bipartisan support of, and interest in, the Antitrust Division's enforcement capabilities. The division uses the resources entrusted to us by Congress to provide benefits for American consumers, businesses, and taxpayers. As my written testimony points out, the division continually produces results that more than justify its annual appropriation: In the last ten fiscal years the division averaged criminal fines more than ten times its average annual appropriation (net of Hart-Scott-Rodino fees). The division is engaged in a number of activities to enhance its analytical tools and ability to identify and pursue anticompetitive conduct, and the division will continue to work with the FBI to ensure that antitrust enforcement remains a priority. The division is not currently pursuing any legislative revisions to its tools or existing law.

10. The joint Justice Department/FTC Healthcare Guidelines provide an "antitrust safety zone" that provides group purchasing organizations (GPOs) with wide latitude in their operations with limited governmental antitrust scrutiny. Critics of the GPO industry argue that this antitrust safety zone harms antitrust enforcement of GPOs' potentially anticompetitive practices, and is outmoded today due significant changes in the marketplace since the Guidelines were first promulgated two decades ago. Do you think these guidelines need to be reexamined by the antitrust enforcement agencies?

Answer: I do not think that reexamining Statement 7 of the Healthcare Guidelines, dealing with joint purchasing, is necessary at this time. The Antitrust Division and the FTC conducted joint hearings on healthcare that included a reexamination of Statement 7, and in the report issued after the hearings, in 2004, the division and the FTC concluded that no revision was needed because the Statement 7 safety zone does not shield anticompetitive GPO contracting practices. (This report is available at www.justice.gov/atr/public/health_care/204694.htm.) The division has worked with and supported Congress's actions regarding GPO-related competition issues, and I believe that these actions were key to getting GPOs to change their codes of conduct to address potential anticompetitive practices. The division and the FTC recognize ongoing concerns with various GPOs' behavior, and you have my assurance that the antitrust agencies will examine thoroughly allegations of potential violations of the antitrust laws by GPOs to ensure that hospitals and, ultimately, patients and payors receive competitive prices in the health care industry.

Questions for the Record from
Judiciary Committee Ranking Member John Conyers, Jr.

11. In light of the settlement agreement that the Justice Department reached in its lawsuit to block the American Airlines-US Airways merger, the airlines have indicated that they intend to consummate the merger next month.

- Is it appropriate that the parties seek to consummate their merger next month notwithstanding the Tunney Act, which requires, among other things, a 60-day public comment period and, ultimately, a judicial determination that the proposed settlement agreement is consistent with the public interest?

Answer: The courts have interpreted the purpose of the Tunney Act as providing for review of consent decrees independent of the Executive Branch to ensure their scope and sufficiency are made in good faith. *See* Memorandum Opinion *In re U.S. v. Microsoft* at 24-25, Civil Action No. 94-1564 (D.D.C., Feb. 14, 1995). Once the department's competitive concerns are resolved, it is our common practice not to object if the parties wish to move forward with their transaction before the Tunney Act process runs its course. This practice is fully consistent with the Tunney Act. Indeed, once the parties have agreed to resolve the department's concerns as necessary to protect competition and consumers, prolonged delay in moving forward with the non-problematic aspects of the merger can harm competition and consumers: The business operations to be merged remain in a state of limbo and the marketplace is deprived of whatever efficiencies the merger will generate. The assets to be divested are also at risk of deteriorating in usefulness and value if they are left idle for too long. When it is impractical for divestitures to be completed before the merger is consummated, the consent decree puts the parties on record as agreeing to those divestitures and gives the department the ability to obtain expedited relief if the parties do not carry them out in a timely fashion. However, as the parties understand, the government retains full authority pursuant to its settlement agreement with the parties in this case (as in other cases) to revise the relief it seeks during the Tunney Act process in light of comments received from the public or from the court, or for any other reason. The department has done so in the past, and will do so when appropriate in the future.

Response to Questions for the Record from the Honorable Edith Ramirez, Chairwoman, Federal Trade Commission

Questions for the Record from
Chairman Spencer Bachus
for the Hearing on "Oversight Hearing for the Antitrust Enforcement Agencies"

November 15, 2013

Questions for Chairwoman Ramirez

1. **In your letter responding to a number of leading Republicans on both the House and Senate Judiciary Committees calling for Section 5 guidance, you stated that the business community can gain sufficient guidance from the pleadings and settlements surrounding standalone Section 5 prosecutions. What is the basis for your confidence in this position, particularly since these lawsuits rarely reach the federal judiciary and often result in settlements?**

   Even when the parties agree to settle "standalone" Section 5 charges, Federal Trade Commission documents associated with the settlement identify the conduct of concern and disclose the Commission's analysis of the relevant legal standard and its application to the facts. For instance, last June, the Commission issued a final order against Bosley, Inc., the nation's largest manager of medical and surgical hair restoration procedures, settling charges that it illegally exchanged competitively sensitive, nonpublic information about its business practices with one of its competitors, HC (USA), Inc.[1] From the public documents associated with that order, businesses could learn about the type of information exchanged between the competitors that created the competitive concern and the likely harm to competition caused by this conduct. As important, the Commission's order contains restrictions on Bosley's conduct needed to remedy the law violation, but specifically does not interfere with Respondent's ability to compete or prevent participation in legitimate industry practices, such as ordinary trade association or medical society activity. The Commission's statements and enforcement documents in each of our recent settlements of standalone Section 5 claims provide similar factually-grounded guidance as to how businesses can adjust their own behavior to comply with the law.[2]

2. **The FTC issued guidance on its authority regarding "consumer unfairness." Why wouldn't issuing Section 5 "unfair methods of competition" guidance be consistent with this precedent?**

   The Commission has defined the contours of its Section 5 unfair methods of competition authority through its enforcement actions. Antitrust doctrine has always evolved through a common-law approach, particularly in complex areas where it is difficult to predict in advance the particular form that anticompetitive conduct may take.

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[1] *Bosley, Inc.*, No. C-4404 (F.T.C. June 5, 2013), *available at* http://www.ftc.gov/sites/default/files/documents/cases/2013/06/130605aderansregisdo.pdf

[2] *See, e.g.*, *Motorola Mobility LLC*, No. C- 4410 (F.T.C. July 24, 2013), *available at* http://www.ftc.gov/sites/default/files/documents/cases/2013/07/130724googlemotorolado.pdf; *Negotiated Data Solutions LLC*, No. C-4234 (F.T.C Sept. 23, 2008), *available at* http://www.ftc.gov/sites/default/files/documents/cases/2008/09/080923ndsdo.pdf.

Under these circumstances, case-specific guidance, grounded in facts and sound economic theory, is the most useful form of guidance for the business community and its lawyers that is consistent with our mandate to protect consumers from unfair methods of competition. This common law approach is also consistent with the development of doctrine under other broad antitrust statutes such as the Sherman Act.

3. **Why did the FTC accept a non-binding agreement in the Google search case, in what circumstances will it accept such an agreement in the future, and does the deviation from customary practice have a precedential impact on future negotiations with parties?**

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

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

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

4. **The number of independent physician practices is declining. Has the FTC examined whether this decline is associated with anti-competitive behavior occurring in the health care marketplace?**

There have been a number of physician practice consolidations in recent years, including acquisitions of independent physician practices. Such acquisitions can be procompetitive in certain instances and may result in cost efficiencies from, among other things, increased scale and risk sharing arrangements. In addition, certain physician practice acquisitions may improve quality of care – something that the Commission takes seriously when analyzing physician acquisitions. However, in some markets, acquisitions of physician practices can be anticompetitive. If a physician acquisition results in increased market power, for instance, by giving the new group undue leverage vis-à-vis health plans, the acquisition may increase prices to health care consumers.

The Commission has challenged acquisitions of providers where evidence demonstrated that the combination was likely to substantially lessen competition. For example, in August 2012, the Commission challenged Renown Health's acquisition of the two largest cardiology practices in the Reno, Nevada area. To settle FTC charges that the acquisitions reduced competition for adult cardiology services in the area, Renown agreed to release its staff cardiologists from "non-compete" contract clauses, allowing up to 10 of them to join competing cardiology practices. Similarly, just last week in a case brought by the Commission and the Idaho Attorney General, the District Court of Idaho

granted a permanent injunction to block St. Luke's Health System, Ltd.'s acquisition of Idaho's largest independent, multi-specialty physician practice group, Saltzer Medical Group P.A. According to the court, the combination of St. Luke's and Saltzer made St. Luke's the dominant provider in the Nampa area for primary care, giving it significant bargaining leverage to demand higher rates for health care services from health insurance plans. The Commission will continue to be vigilant, consistent with its mission, to prevent acquisitions among health care providers that threaten competition.

5. **As part of the FTC's Section 6(b) study of patent assertion entities and their impact on innovation and competition, will the Commission look into entities that offer litigation protection against patent assertion entities? Such companies seek a fee for membership with the promise that they will license patents to members and essentially protect them from litigation brought by patent assertion entities. Does the Commission plan to look into any potential business relationship between patent assertion entities and companies that offer "protection" against such entities?**

In September 2013, the Commission unanimously voted to issue a Federal Register Notice seeking public comment on a proposed study of PAE activity pursuant to the Commission's authority under Section 6(b) of the FTC Act. The Commission proposed this study, in part, because numerous studies demonstrate that PAEs are playing an increasing role in litigation. Litigation, however, is only part of the picture. Understanding what happens outside the courtroom, and inside PAE activity, would contribute substantially to the empirical landscape. The Commission received almost 70 comments in response to the Federal Register Notice. We are using these comments and our understanding of PAE activity to determine the appropriate subjects for the study. The Commission has not decided on the specific subjects of its 6(b) study, but is considering relevant aspects of patent assertion entity (PAE) activity.

6. **Recently, there have been a number of cases initiated against companies that fall below the Hart-Scott-Rodino statutory thresholds. How does the FTC determine whether to pursue below-threshold transactions, and how do you obtain information regarding the transactions?**

In passing the HSR Act, Congress determined not to require premerger notification for all mergers, believing that the burden of complying with the file-and-wait requirements was not justified for small deals or small parties. Nevertheless, even transactions that are not subject to the HSR reporting requirement can raise meaningful competitive concerns. HSR filing thresholds do not operate as an exemption from Section 7 of the Clayton Act, and both the FTC and the Department of Justice continue to identify and challenge unreported acquisitions that harm competition.

For non-reportable transactions, Commission staff learns of potentially problematic transactions through avenues such as media reports and customer and competitor complaints. The Commission has the tools it needs, including the power to issue subpoenas and CIDs, to investigate whether those transactions violate the antitrust laws, much as we learn of and investigate other kinds of conduct that may violate the laws we enforce.

7. **Is the FTC examining the competitive impacts of hospital "group purchasing organizations" or "GPOs"? Has the FTC examined whether there are any anticompetitive incentives created by GPOs being paid by suppliers and manufacturers?**

While I cannot discuss the details of any non-public investigations, the Commission is well aware of the concerns raised about the conduct of GPOs and has on a number of occasions examined complaints about GPO conduct. Determining whether any specific conduct is anticompetitive is a fact-specific inquiry requiring a careful examination of market circumstances. To date, the Commission has not charged a GPO with a violation of the laws we enforce.

As I noted during my testimony, certain complaints about conduct by GPOs appear to present problems that are not antitrust issues, such as concerns about possible conflicts of interest and the adequacy of the "anti-kickback" laws.

8. **Does the FTC intend to reevaluate the joint FTC/DOJ guidelines with respect to GPOs, since these guidelines were first issued nearly two decades ago? In particular, does the FTC intend to examine whether the "antitrust safety zone" created by the guidelines requires reevaluation?**

The FTC/DOJ Health Care Statements articulate and apply well-established principles developed by courts for the assessment of various types of conduct by competitors, principles that remain in force today. The antitrust safety zone contained in Statement 7 on Joint Purchasing Arrangements addresses only the formation of joint purchasing arrangements among health care providers. It does not prevent the FTC or DOJ from challenging anticompetitive conduct – such as exclusionary contracting practices – should they occur in connection with GPOs.

9. **On November 28, 2013, the Wall Street Journal published an article entitled "Strassel: Piano Sonata in FTC Minor" discussing the FTC's enforcement action against a group of piano teachers. How did the FTC prioritization of its enforcement actions result in the pursuit of an action against a group of piano teachers with few resources and ostensibly little impact on the overall economy? Have there been other actions instituted against similarly situated entities?**

On December 16, 2013, the Commission unanimously accepted for public comment consent agreements with two professional associations to address provisions in their code of ethics that inhibited competition among their members. The FTC has a long history of challenging these types of agreements among competitors that restrain trade and can lead to higher prices and reduced quality and choice.[3]

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[3] *See, e.g.*, *Inst. of Store Planners*, No. C-4080 (F.T.C. May 30, 2013), *available at* http://www.ftc.gov/sites/default/files/documents/cases/2003/05/ispcomplaint.pdf (challenging restraints on price competition); *Nat'l Acad. of Arbitrators*, No. C-4070 (F.T.C. May 30, 2013), *available at* http://www.ftc.gov/sites/default/files/documents/cases/2003/05/ispdo.pdf (restraints on solicitation and advertising); *Am. Inst. for Conservation of Historic & Artistic Works*, No. C-4065 (F.T.C Nov. 1, 2002), *available at* http://www.ftc.gov/sites/default/files/documents/cases/2002/11/aicdo.pdf (restraints on price competition); *Cmty.*

The Music Teachers National Association (MTNA) is an association that represents over 20,000 music teachers nationwide. The Commission charged that the MTNA and its members restrained competition through a code provision that made it an ethical violation for members to solicit students from rival music teachers. The MTNA did not provide the Commission with any credible evidence that the restriction had any offsetting procompetitive or efficiency enhancing value. The Commission's proposed order requires the association to stop restricting competition for students by declaring it unethical for its members to solicit teaching work from other music teachers. The order also requires the association to maintain an antitrust compliance program, and to stop affiliating with any association that it knows is restricting solicitation, advertising, or price-related competition among its members.

The second settlement was with the California Association of Legal Support Professionals (CALSPro), a professional association that represents 350 companies and individuals that provide legal support services in California. The Commission alleged that the CALSPro code of ethics contained provisions that unreasonably restrained competition by, among other things, prohibiting its members from offering discounted rates to rivals' clients, engaging in certain comparative advertising, and recruiting employees of competitors without first notifying the competitor. The proposed order requires that CALSPro cease and desist from restraining its members from engaging in price competition, solicitation of employees, or advertising, remove any statements inconsistent with the order from its organizational documents and implement an antitrust compliance program.

As with all Commission enforcement activity, our goal in these actions was to remedy any anticompetitive effects associated with the challenged behavior and to provide antitrust guidance in order to deter other professional trade organizations from imposing unjustified limits on competition. The Commission recognizes that professional associations like MTNA and CALSPro serve many important and procompetitive functions, including adopting rules governing the conduct of their members that benefit competition and consumers. But because trade organizations are pervasive throughout our economy, and are by their nature collaborations among competitors, the Commission believes enforcement activity in this area is important for consumers. The Commission will continue to be concerned with anticompetitive restraints imposed by such organizations under the guise of codes of ethical conduct.

Ass'ns Inst., 117 F.T.C. 787 (1994) (restraints on solicitation); *Nat'l Soc'y of Prof'l Eng'rs*, 116 F.T.C. 787 (1993) (restraints on advertising); *Nat'l Ass'n of Social Workers*, 116 F.T.C. 140 (1993) (restraints on solicitation and advertising); *Am. Psychological Ass'n*, 115 F.T.C. 993 (1992) (same).

Questions for the Record from
Ranking Member Steve Cohen

10. **There is increasing concern about the use of consumer data by data brokers, especially given that consumers typically have no direct interaction with these companies. Data brokers are compiling profiles with detailed personal information for specific, identifiable individuals – and some have expressed concern that these profiles could be used to deny consumers insurance, financial credit, educational opportunities, or jobs based on what could be inaccurate or incomplete data. Currently, the Commission is studying the data broker industry through its 6(b) authority. When can we expect the results of this study, and does the Commission have the resources it needs to continue focusing on this industry?**

The Commission has deployed significant resources to address privacy issues raised by the data broker industry, which operates with minimal consumer awareness. In recent years, we have brought enforcement actions against data brokers[4] and issued a privacy report advocating a range of best practices by the data broker industry. In our report, we also urged Congress to enact legislation to improve the transparency of data broker practices, including, for example, by ensuring that consumers can opt out of having data brokers sell their information for marketing purposes.[5]

As you note, we are also conducting a study of the data broker industry. Pursuant to our authority under Section 6(b) of the FTC Act, the Commission issued orders requiring nine data brokers to provide information regarding the nature and sources of consumer data they collect, how they use, maintain, and disseminate the information, and the extent to which the data brokers allow consumers to access and correct their information or to opt out of having their personal information sold. The Commission is working on completing its report; we expect to release it in the coming months.

11. **In discussing standard essential patents, you noted the dangers of exclusion orders from the International Trade Commission (ITC) for infringement of a RAND-encumbered standard essential patent (SEP). Are you concerned that the ITC may not share your view and the view of Justice Department and the Patent and Trademark Office that unreasonable licensing terms for SEPs harm competition? While the President can overturn an exclusion order, should there be additional checks? If so, what should Congress do to address the situation?**

As the Commission has testified in the past, the threat of an ITC exclusion order for infringement of a standard-essential patent can lead to patent hold-up, which distorts incentives to innovate and compete in markets for standard-compliant products and

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[4] *See, e.g.*, *Equifax Info. Servs. LLC*, No. C-4387 (F.T.C. Mar. 15, 2013) (consent order); *United States v. Spokeo, Inc.*, No. CV12-05001 (C.D. Cal. June 12, 2012) (stipulated final order); *United States Search, Inc.*, No. C-4317 (F.T.C. Mar. 14, 2011) (consent order).

[5] *See* FED. TRADE COMM'N, PROTECTING CONSUMERS IN AN ERA OF RAPID CHANGE 64-70 (Mar. 2012), *available at* http://www.ftc.gov/os/2012/03/120326privacyreport.pdf.

technologies.[6] Consequently, I do not believe an exclusion order is appropriate for infringement of a F/RAND-encumbered patent except in limited circumstances, such as where the putative licensee is unwilling or unable to accept a F/RAND license.

Last June, the ITC issued a limited exclusion order and a cease and desist order against Apple for infringement of a Samsung F/RAND-encumbered SEP without first finding that Apple was an unwilling licensee. Over Commissioner Dean Pinkert's dissent, the ITC concluded that an exclusion order was not contrary to the public interest and was instead required by statute and relevant precedent given the factual record. In August, the USTR, acting as the President's designee, overturned the ITC's decision based on policy considerations related to "competitive conditions in the U.S. economy and the effect on U.S. consumers."

I believe that the USTR's decision serves the interests of competition and consumers. I also continue to believe that the ITC can use its public interest authority to deny exclusion orders for SEPs in appropriate circumstances. In light of the recent USTR veto, I expect the ITC will give this issue serious additional consideration going forward. But if the ITC continues to conclude that it does not have the flexibility to apply the appropriate analysis, Congress may wish to consider whether legislation to provide that flexibility is warranted.

12. **What role does the FTC play with respect to international harmonization of antitrust law and policy?**

The FTC plays a leading role in promoting convergence towards international best practices in antitrust law enforcement and policy. Approximately 130 jurisdictions enforce a variety of competition laws, and the FTC works closely with our foreign counterparts in multilateral fora to promote cooperation and convergence on sound competition policy across jurisdictions. Consistency of approaches to competition law, policy, and procedures increases the predictability and the effectiveness of antitrust enforcement and lowers the costs of doing business in the global economy. The FTC uses all available opportunities to facilitate dialogue and convergence toward sound, economically-based competition policy and enforcement.

Bilaterally, the FTC promotes convergence through formal and informal bilateral working arrangements, high-level consultations, and our technical assistance program. In FY 2013, the FTC provided policy advice to foreign competition agencies and in multilateral fora in over 100 instances through consultations, written submissions, or comments. The FTC's policy advice is highly regarded and sought after by new and more experienced competition agencies. We also held bilateral consultations with senior officials from several competition agencies during the past year and will hold a trilateral meeting with the heads of the Canadian and Mexican agencies in mid-February.

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[6] *See* Prepared Statement of the FTC, *Oversight of the Impact on Competition of Exclusion Orders to Enforce Standard-Essential Patents: Hearing before the S. Comm. On the Judiciary,* 112th Cong. (July 11, 2012), *available at* http://www.ftc.gov/sites/default/files/documents/public_statements/prepared-statement-federal-trade-commission-concerning-oversight-impact-competition-exclusion-orders/120711standardpatents.pdf.

Cooperation on cases under concurrent review not only reduces the cost and uncertainty of global enforcement for business, it provides the agencies with additional opportunities to move towards convergence on key policy and procedural issues.

The FTC also has developed working relationships with important new competition agencies in countries such as China and India. Early this year I participated in a high-level meeting with China's three competition agencies as part of a joint FTC and DOJ delegation, at which we addressed antitrust policy and practice issues, including transparency and procedural fairness in antitrust investigations, merger review timing and remedies, and antitrust issues that involve intellectual property rights. We plan to follow up with additional exchanges, visits, and seminars with our Chinese counterparts. Recognizing that differences in the economic and legal contexts impact the extent to which we can achieve convergence, we stress the value of independent competition enforcement based on consumer welfare rather than other social and industrial policies. The FTC conducts its competition work in China in consultation with other interested U.S. agencies.

Similarly, in November 2013, I joined FTC and DOJ staff for a bilateral meeting with the Competition Commission of India and representatives of the Ministry of Corporate Affairs. We also met with members of the local bar and the Indian Institute for Corporate Affairs, among others. Officials and the local competition community are very interested in learning more about how the U.S. antitrust agencies apply U.S. antitrust laws and in furthering the development of sound antitrust laws and enforcement in India. FTC staff also conducted a training session on analyzing competition in high tech sectors for the CCI as well as a workshop with the Indian Institute for Corporate Affairs in December, and expects to hold additional workshops later this year.

The FTC's work toward international convergence benefits American consumers and businesses through more effective and efficient competition law enforcement, both domestically and abroad. The FTC remains committed to working towards even greater convergence of competition law and policies.

13. **According to a GAO study on group purchasing organizations (GPOs), "in 2007, the six largest GPOs by reported purchasing volume together accounted for almost 90 percent of all hospital purchases nationwide made through GPO contracts." Allegations have been raised regarding GPOs engaging in anticompetitive conduct that has prevented innovative medical device technologies from accessing the market, harmed competition, and increased prices for medical technology. Commentators have expressed concerns that the fact that GPOs are paid by the suppliers and manufacturers create an inherent conflict of interest in which GPOs are incentivized to contract with the largest suppliers who will pay them the largest fees, rather than contracting for the best products at the lowest price.**

What is your view of the competitive effects of hospital GPOs? Do you agree with those who believe that their practices often harm competition by making it difficult for innovative, non-incumbent hospital suppliers and manufacturers to enter the market? Are you concerned with the potential conflict of interest created by GPOs

being paid by suppliers and manufacturers? Do the joint FTC/DOJ healthcare guidelines need reexamination with respect to GPOs?

The Commission is well aware of the concerns raised about the conduct of GPOs and has on a number of occasions examined complaints about their conduct. Determining whether any specific conduct is anticompetitive is a fact-specific inquiry requiring a careful examination of market circumstances. To date, the Commission has not charged a GPO with a violation of the laws we enforce.

As I noted in my testimony, certain complaints about conduct by GPOs appear to present problems that are not antitrust issues, such as concerns about potential conflicts of interest and the adequacy of the "anti-kickback" laws.

The FTC/DOJ Health Care Statements articulate and apply well-established principles developed by courts for the assessment of various types of conduct by competitors, principles that remain in force today. The antitrust safety zone contained in Statement 7 on Joint Purchasing Arrangements addresses only the formation of joint purchasing arrangements among health care providers. It does not prevent the FTC or DOJ from challenging anticompetitive conduct – such as exclusionary contracting practices – should they occur in connection with GPOs.

14. **My colleague, Representative Chris Van Hollen, has raised concern that the proposed $1.4 billion merger between Steward Enterprises - the Nation's largest funeral home chain - and Service Corporation International (SCI) - the second largest - may threaten to eliminate competition in the funeral services market in the Washington, D.C. area. He is particularly concerned that the impact on the Greater Washington Jewish community could be devastating because the combined company would control all Jewish funeral businesses in the area except one.**

SCI, which charges $6,256 on average for funerals excluding casket and cemetery plot, owns Jewish funeral homes Danzansky-Goldberg Memorial Chapel and Sagel Funeral Direction. Stewart Enterprises owns Hines Rinaldi Funeral Home, which provides the only price competition to the SCI homes. The Silver Spring, MD-based Hines Rinaldi has a contract with the Jewish Funeral Practices Committee of Greater Washington, a group composed of 48 local synagogues, pursuant to which it provides traditional Jewish funerals for less than $2,000. There is concern that a merger between these two funeral home owners will result in no low-priced alternative for Jewish funerals in the Washington area.

Some have proposed that one option would be to require the divestment of the Hines Rinaldi home as part of the merger in order to preserve competition and consumer choice.

The proposed merger may seriously harm Representative Van Hollen's constituents. While I understand that the FTC's review of the proposed merger is ongoing, would such divestment be a reasonable possibility?

On December 23, 2013, the Commission voted unanimously to accept a proposed consent order requiring SCI to divest 53 funeral homes and 38 cemeteries to resolve concerns that its proposed acquisition of Stewart is likely to substantially lessen competition for funeral and cemetery services in 59 communities. As part of its investigation, the Commission also examined whether, in certain local markets, funeral homes and cemetery-service locations cater to specific populations by focusing on the customs and rituals of a particular religious, ethnic, or cultural heritage group, such that the provision of funeral or cemetery services targeted to such populations would constitute a distinct market. As one example, the Commission found that the provision of funeral home services to Jewish families in the Washington D.C./Maryland suburbs was one such local market, and the proposed order requires SCI to divest funeral home assets to preserve competition in this market.

Under the terms of the proposed consent agreement, SCI is required to hold separate the assets to be divested and maintain the viability of those assets as competitive operations until each facility is transferred to a Commission-approved buyer. The proposed order also contains a number of provisions to ensure that competition continues until a new buyer takes over the operations and can quickly and fully replicate the competition that would have been eliminated by the merger.

Questions for the Record from
Judiciary Committee Ranking Member John Conyers, Jr.

15. **In closing its investigation earlier this year into allegations that Google engaged in anticompetitive conduct, the FTC concluded that there was at least some evidence that Google engaged in anticompetitive behavior - including, in this case, misappropriating or "scraping" content from rival websites and placing certain restrictions on advertisers. Notwithstanding this conclusion, the FTC accepted a set of non-binding and non-enforceable promises from Google to change its business practices.**

- **Why did the FTC choose to accept non-binding commitments from Google in this case?**

- **Generally speaking, what are the circumstances that would justify entering such an agreement as opposed to pursuing a consent order?**

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

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

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

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