

**Prepared Statement of
the Federal Trade Commission**

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

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

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

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

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

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

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

Building a Better FTC to Combat 21st Century Challenges

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

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

⁷ See [Horizontal Merger Guidelines](#) available at [s://www.ftc.gov/pressroom/2015/07/horizontal-merger-guidelines-15072015](#)

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

To that same end, the Commission also has revised its rules governing administrative litigation to ensure that our process is not unduly time-consuming or burdensome. For example, the revised Rules hold respondents, complaint counsel, the administrative law judge, *and the Commission* to aggressive timelines for discovery, motions practice, trial, and adjudication.¹² The result is a faster-paced administrative process.¹³ And just last week, the Commission issued an opinion and final order in an administrative proceeding in record time – slightly over four months from the date of the respondent's notice of appeal.¹⁴

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

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

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

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

¹⁴ In the Matter of North Carolina Board of Dental Examiners, Dkt. No. 9343, <http://www.ftc.gov/os/adjpro/d9343/index.shtm>.

Viewpoint Survey,¹⁵ the FTC ranked second among all federal agencies in leadership and knowledge management, results-oriented performance culture, and talent management.

Promoting Competition in Health Care Markets

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

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a unanimous Commission found that the merger had resulted in dramatically higher prices for

health care costs,²⁷ the Commission is committed to preventing pharmaceutical and related

anticompetitive harm, while allowing ACOs the opportunity to integrate to achieve significant efficiencies. The Policy Statement (1) describes when the Agencies will apply rule of reason treatment to ACOs; (2) sets out an antitrust safety zone; (3) identifies potential ACO conduct that might raise competitive concerns and that ACOs should therefore avoid; and (4) provides additional antitrust guidance for ACOs that are outside the safety zone.³¹ Further, newly formed ACOs concerned that they may run afoul of the antitrust laws may take advantage of a voluntary expedited antitrust review process, which can provide specific guidance to ensure that the ACO's proposed conduct does not violate the antitrust laws.

Antitrust Oversight in Technology Industries

Some question how antitrust law can keep up with a rapidly evolving marketplace. But the antitrust laws have stood the test of time because they are rooted in fundamental principles: that competition among independent firms yields lower prices, better service, more choices, and the promise of better products tomorrow; and that business conduct that unreasonably impedes competition limits economic growth.³²

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

³¹ As indicated in footnote 9 above, however, the Policy Statement's safety zone does not comport with Commissioner Rosch's view of the governing case law, which requires that competing providers be financially as well as clinically integrated in order to contract jointly.

³² See also "How Enduring Competition Principles Enforced by the Federal Trade Commission Apply To Today's Dynamic Marketplace," testimony of the Federal Trade Commission presented before the House Committee on the Judiciary Subcommittee on Courts and Competition Policy, Sept. 16, 2010, available at <http://www.ftc.gov/os/testimony/100916digitalagetestimony.pdf>. The Commission has used its authority under Section 5 of the Federal Trade Commission Act to police unfair methods of competition in rapidly changing markets. Remedies available under the FTC Act are particularly well suited to deal with antitrust violations in new or dynamic markets especially because a finding of a Section 5 violation by the Commission should greatly limit treble damage

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

For example, in the 2009 FTC enforcement action against Intel Corporation, the Commission alleged, among other things, that Intel used “exclusive dealing” agreements that effectively punished companies wanting to utilize or distribute competing products.³³ This blocked rivals from successfully reaching consumers with their products, and thereby unlawfully maintained the company’s monopoly.

Another important high-tech matter resulted in no case being filed – the Commission’s May 2010 decision to close its investigation of the Google/AdMob merger.³⁴ There, near the conclusion of a thorough investigation, the Commission evaluated “late breaking news” that Apple was poised to challenge Google in the future in the mobile advertising space. Taking account of Apple’s anticipated entry into the market, the Commission determined that future competition in mobile advertising was not likely to be harmed by the merger. This reflects a balanced approach of focusing on the facts as they develop in real time, which helps the Commission assess what competition is likely to look like in the future, even in fast-paced technology industries.

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

³³ “FTC Settles Charges of Anticompetitive Conduct Against Intel,” News Release dated August 4, 2010, available at <http://www.ftc.gov/opa/2010/08/intel.shtm>. The case against Transitions, Inc. featured similar allegations. “FTC Bars Transitions Optical, Inc. from Using Anticompetitive Tactics to Maintain its Monopoly in Darkening Treatments for Eyeglass Lenses,” News Release dated March 2, 2010, available at <http://www.ftc.gov/opa/2010/03/optical.shtm>.

³⁴ See “FTC Closes its Investigation of Google AdMob Deal,” News Release dated May 21, 2010, available at <http://www.ftc.gov/opa/2010/05/ggladmob.shtm>

conduct by technology companies for undermining the standard-setting process.³⁵ In addition, the Commission previously issued two well-regarded reports on competition and patent law, in 2003 and 2007.³⁶ This year we issued another significant patent study, focusing on notice and remedies.³⁷ We held a workshop to learn more about licensing in the standard-setting context and how standard-setting organizations and their members have dealt with the risk of patent hold-up (whereby a firm is able to demand higher r

The FTC is conducting a publicly disclosed investigation of petroleum industry practices and pricing.³⁹ In response to allegations of increases in crude oil and refined petroleum product prices and profit margins accompanied by a reduction in refinery utilization rates, the Commission is investigating whether certain oil producers, refiners, transporters, marketers, physical or financial traders, or others (1) have engaged in practices, including manipulation, that have lessened or may lessen competition in the production, refining, transportation, distribution, or wholesale supply of crude oil or petroleum products; or (2) have provided false or misleading information related to the wholesale price of crude oil or petroleum products to a federal department or agency. Such acts or practices could violate Section 5 of the FTC Act,⁴⁰ the Commission's Prohibition of Energy Market Manipulation Rule,⁴¹ or Section 811 or Section 812 of the Energy Independence and Security Act of 2007.⁴²

The FTC and the Commodity Futures Trading Commission have concurrent law enforcement authority to challenge fraud-based manipulation of petroleum markets. In addition, the CFTC has exclusive jurisdiction to regulate exchanges, clearing organizations, and intermediaries in the U.S. futures industry. In April of this year, the Commission and the CFTC signed a Memorandum of Understanding⁴³ to facilitate our sharing of non-public information relating to matters of common interest, such as evidence of

Additionally, the Commission continues to monitor daily retail and wholesale prices of gasoline and diesel fuel in 20 wholesale regions and approximately 360 retail areas across the United States. This daily monitoring serves as an early-warning system to alert our experts to unusual pricing activity, and helps the Commission to find appropriate targets for further investigation of potentially anticompetitive conduct.⁴⁴ We also use the data generated by the monitoring project in conducting periodic studies of the factors that influence the prices that consumers pay for gasoline.⁴⁵

Mergers also can significantly affect competition in energy markets, so the Commission's review of proposed mergers is essential to preserving competition in those markets. This year, the Commission challenged Irving Oil Terminals Inc.'s acquisition of certain assets from ExxonMobil. To preserve competition in gasoline and distillates terminaling services markets in the South Portland and Bangor/Penobscot Bay areas of Maine, the Commission entered a Consent Order requiring Irving Oil to relinquish its rights to acquire the Maine terminal and pipeline assets.⁴⁶ The settlement resolves the FTC's charges that the acquisition as proposed was anticompetitive, and likely would have resulted in higher gasoline and diesel prices for Maine consumers.

International work

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

⁴⁴ See Gasoline and Diesel Price Monitoring, www.ftc.gov/ftc/oilgas/gas_price.htm.

⁴⁵ A recent report by the staff of the Commission's Bureau of Economics concludes that while a broad range of factors influence the price of gasoline, worldwide crude oil prices continue to be the main driver of what Americans pay at the pump. See "FTC Issues New Report on Gasoline Prices and the Petroleum Industry," News Release dated Sept. 1, 2011, available at <http://www.ftc.gov/opa/2011/09/gasprices.shtm>.

⁴⁶ Irving Oil Ltd., Dkt. C-4328 (consent order) available at <http://www.ftc.gov/os/caselist/1010021/index.shtm>.

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

Bilaterally, we continue to strengthen our cooperation and coordination with our counterpart foreign agencies, such as those in the EU and its member states, Canada, and Japan, with whom we cooperate on cases of mutual interest and discuss policies of common concern. For example, at our recent annual bilateral consultations with the EC's DG COMP,⁴⁷ we issued revised Best Practices on Cooperation in Merger Investigations.⁴⁸ In addition, we have developed our ties with newer agencies from key jurisdictions, such as China and India, through our technical assistance program and through participation in our International Fellows program. Notably, earlier this summer, we entered into a Memorandum of Understanding with the three Chinese antitrust agencies aimed at promoting greater communication and cooperation among the antitrust agencies in our two countries,⁴⁹ and hope to enter into a similar MOU with our counterparts in India shortly.

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

⁴⁷ The European Commission, together with the national competition authorities, directly enforces EU competition rules. Within the Commission, the Directorate-General (DG) for Competition is primarily responsible for investigation and enforcement of these rules.
http://ec.europa.eu/dgs/competition/index_en.htm.

⁴⁸ "United States and European Union Antitrust Agencies Issue Revised Best Practices for Coordinating Merger Reviews," News Release dated October 14, 2011, *available at* <http://www.ftc.gov/opa/2011/10/eumerger.shtm>.

⁴⁹ "Federal Trade Commission and Department of Justice Sign Antitrust Memorandum of Understanding With Chinese Antitrust Agencies," News Release dated July 27, 2011, *available at* <http://www.ftc.gov/opa/2011/07/chinamou.shtm>.

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

Consumer Protection Highlights

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

Consumer privacy also remains a significant priority. Ever-evolving technologies, such as mobile devices, open up the riches of the Internet but also pose new threats. The FTC has responded by bringing almost 100 spam and spyware cases, more than 30 data security cases, and nearly 80 cases for violations of Do Not Call in the past decade. Last December, we issued a preliminary staff report requesting comment on proposals to inform policymakers as they develop solutions, policies, and potential laws governing privacy and to guide industry as it develops more robust and effective best practices and self-regulatory guidelines.⁵⁰

⁵⁰ A Preliminary FTC Staff Report on Protecting Consumer Privacy in an Era of Rapid Change: A Proposed Framework for Businesses and Policymakers is available at <http://www.ftc.gov/bureaufairandopen/privacy/20121218preliminaryreport.shtml>.

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.