

**Prepared Statement of
the Federal Trade Commission**

**Before the
United States House of Representatives
Committee on the Judiciary
Subcommittee on Courts and Competition Policy**

**Oversight of the Federal Trade Commission Bureau of Competition
and the Department of Justice Antitrust Division**

**Washington, D.C.
July 27, 2010**

Introduction

Chairman Johnson, Ranking Member Coble, and Members of the Subcommittee, thank you for the opportunity to appear before you today. I am Jon Leibowitz, Chairman of the Federal Trade Commission, and I am pleased to testify on behalf of the FTC to discuss our competition enforcement activities and the many important antitrust issues under your jurisdiction.¹ Today, this testimony will highlight several key areas of our competition agenda: ending pay-for-delay pharmaceutical agreements that cost consumers at least \$3.5 billion per year; blocking or modifying anticompetitive mergers; revising the Horizontal Merger Guidelines; developing policy guidance regarding the ongoing changes in news media markets; effectively using our enforcement authority under Section 5 of the Federal Trade Commission Act; and acting to promote competition in the energy sector.

As the Members of this Subcommittee know very well, free and open markets are the foundation of our economy, and competition is essential for those markets to function. Years of experience have proven that competitive markets work better than anything else to bring consumers lower prices, greater innovation, and choice among products and services. For that reason, one of the Commission's primary obligations is to remove the obstacles that impede competition, allowing its benefits to flow to consumers.

To meet that obligation, the Commission has an aggressive and active antitrust enforcement agenda. Our jurisdiction is broad, and we enforce the laws in a wide range of markets. In order to maximize the impact of our efforts we attempt to focus on areas that most

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

directly affect consumers and businesses, such as health care, energy, emerging technologies, real estate, and retail.

The Commission's competition agenda falls into three broad categories: merger review; investigations of anticompetitive unilateral and coordinated conduct; and competition policy analysis.

With regard to mergers, Commission staff reviews proposed and consummated deals to ensure that they do not "substantially lessen competition." As necessary, the Commission files complaints to enjoin anticompetitive mergers, or, if we have reason to believe that only some aspects of a merger are likely to have adverse competitive effects, we negotiate remedies that address those concerns.

Of course, businesses engage in a range of other activities, some of which have
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The Commission is gratified that we can now fulfill our broad range of responsibilities with a full Commission, including our two newest Commissioners, Julie Brill and Edith Ramirez. As a Commission, we are working together in a bipartisan manner to bring

“Pay-for-Delay: How Drug Company Pay-Off

more brand-generic settlements involving some sort of compensation – 21 – than in any prior full fiscal year. Those settlements protect \$9 billion in prescription drug sales. At the same time, the settlement filings confirm that brand and generic companies can settle their disputes without brand companies paying their generic competitors not to compete. Seventy-five percent of all final patent settlements – 63 – did not involve compensation from the brand company to the generic combined with a delay in generic entry.

Because of the inherently anticompetitive nature of these deals and the enormous consumer harm caused by pay-for-delay, the Commission continues to challenge them despite some earlier setbacks in the courts. For example, we are still actively pursuing two major pay-for-delay cases: one against Solvay Pharmaceuticals (owned by Abbott Laboratories) and generic manufacturers (Watson Pharmaceuticals, Par Pharmaceutical, and Paddock Laboratories) regarding AndroGel, a testosterone replacement drug often used by victims of testicular cancer, and the other against Cephalon regarding the drug Provigil, a sleep disorder medication with nearly \$1 billion in annual U.S. sales.³ In addition, Commission staff are continuing to initiate new investigations into other pay-for-delay agreements.

And we have reason to believe that the tide may be turning, both in the courts and in Congress. A few months ago, an appellate panel in the Second Circuit, which previously had adopted a permissive approach to pay-for-delay settlements, took the extraordinary step of questioning its own standard and explicitly encouraged consumer plaintiffs to request the court's

³ *In re AndroGel Antitrust Litig.* (No. II), 1:09-MD-2084-TWT (N.D. Ga. Feb. 22, 2010) (granting defendants' motion to dismiss); *FTC v. Cephalon, Inc.*, No. 2:08-cv-2141 (E.D. Pa. Mar. 29, 2010) (denying motion to dismiss), www.ftc.gov/os/caselist/0610182/index.shtm.

en banc re-consideration of the pay-for-delay issue.⁴ Both the Federal Trade Commission and the Department of Justice filed briefs with the Second Circuit advocating that the full court revisit this issue.⁵ In another promising development, in March 2010, a federal district court judge in Philadelphia denied a defense motion to dismiss the Commission's case against Cephalon. That case is now in the discovery phase.

Solving this problem through the courts, however, will take time, and American consumers will suffer higher costs for prescription drugs. Therefore, even as we fight against pay-for-delay settlements in the courts, we are working to help find a legislative solution to the problem. Legislation would be the most effective way to stop these deals. We know the Administration supports a legislative fix as a critical part of President Obama's health care plan, and the Commission will continue to work with Congress to address this issue. In the meantime, the agency will continue to aggressively pursue our investigations and enforcement actions.

⁴ See *Arkansas Carpenters Health and Welfare Fund v. Bayer AG*, Nos. 05-2851-cv(L), 05-2852-cv(CON) (2d Cir. Apr. 29, 2010) (affirming summary judgment for defendants but inviting plaintiffs to petition for rehearing *en banc*).

⁵ Consumer organizations; state attorneys general; and law, economics, and business professors also submitted strong amici briefs advocating for a full court review. See Brief of American Antitrust Institute as Amicus Curiae Supporting Appellants; Brief of AARP et al. as Amici Curiae Supporting Appellants; Brief of Consumers Union et al. as Amici Curiae Supporting Appellants; Brief of 34 State Attorneys General as Amici Curiae Supporting Appellants; Brief of 86 Law, Economics, Public Policy, and Business Professors as Amici Curiae Supporting Appellants, *Arkansas Carpenters Health and Welfare Fund v. Bayer AG*, Nos. 05-2851-cv(L), 05-2852-cv(CON) (2d Cir. May 20, 2010).

II. Stopping Anticompetitive Mergers

The Commission's merger review program is critical to maintaining competitive markets. Merger filings have rebounded over the last year, and the Commission continues to carefully review transactions for potential anticompetitive effects, and to challenge mergers in appropriate circumstances. During fiscal year 2009, the Commission challenged 19 mergers. In nine of those cases the parties agreed to a consent order, in three they abandoned the deal, and in a record seven cases we authorized staff to file a complaint in federal district court or in an administrative proceeding.⁶ Additionally, through the first three-quarters of fiscal year 2010, the Commission has brought 14 merger enforcement actions. These challenges covered a wide range of markets, including pharmaceuticals and medical devices, truck stops, fertilizer, marketing databases, the funeral services industry, and the chemical industry.

Just as important, when after a thorough investigation we determine that a deal is not anticompetitive, we do not hesitate to close the investigation and allow the parties to move forward with their transaction. This happens as a matter of course on a wide range of mergers, but one prominent recent example is the Google/Admob deal, where the Commission also issued a statement explaining why it closed the investigation. We will continue to employ our resources effectively by focusing our efforts on deals that have a significant potential to lessen competition and harm consumers.

⁶ See FTC Competition Enforcement Database, Merger Enforcement Actions, www.ftc.gov/bc/caselist/merger/index.shtml.

III. Proposed Revisions to the Horizontal Merger Guidelines

In April, the Commission, in conjunction with the Antitrust Division of the Department of Justice, released for public comment a proposed update of the Horizontal Merger Guidelines.⁷ The Guidelines outline for courts and practitioners how the federal antitrust agencies evaluate the likely competitive impact of mergers and whether those mergers comply with U.S. antitrust law. The last major revision to the Guidelines was in 1992, and they have been widely used and quoted in the intervening years. Advances in economic understanding and additional experience, however, have gradually modified the way that the agencies evaluate and investigate mergers. As a result, the 1992 Guidelines no longer offer an entirely accurate representation of agency practices. To ensure that the Guidelines remain a useful tool, the Commission and the Antitrust Division have worked together to revise the Guidelines to more accurately reflect the way the FTC and DOJ currently conduct merger reviews. These proposed Guidelines will assist the business community and antitrust practitioners by increasing the transparency of the analytical process underlying the agencies' enforcement decisions.

This update of the Guidelines is also notable for the transparency of the process. The proposed revisions were issued after consideration of public comments and input received during a series of five joint FTC/DOJ workshops held over the past six months, which were open to the public and attended by attorneys, academics, economists, consumer groups, and businesses.⁸

⁷ Horizontal Merger Guidelines For Public Comment (Apr. 20, 2010), www.ftc.gov/opa/2010/04/hmg.shtm.

⁸ Horizontal Merger Guidelines Review Project Website, www.ftc.gov/bc/workshops/hmg/index.shtml.

The result is a revised version of the Guidelines that more closely reflects the current practice of the antitrust agencies. One of the key differences is that the proposed Guidelines clarify that merger analysis does not use a single methodology, but is instead a fact-specific process, using a variety of tools to analyze the evidence. The Guidelines also explain that market definition is not an end in and of itself, nor always the starting point of merger analysis, but instead a tool used to illuminate the potential competitive effects of the proposed merger. Another highlight is the increase in the Herfindahl-Hirschmann Index (“HHI”) concentration levels likely to warrant either further scrutiny or challenge from the agencies; again, this update more accurately reflects current agency practice, and provides a more useful benchmark for businesses considering potential deals.

We have been gratified by the reaction from the legal and business community. The Guidelines have been warmly received by a wide range of practitioners, consumer groups, businesses and academics. We received 31 comments on the proposed revisions and are currently considering those viewpoints as the Commission and the DOJ work to finalize the new Horizontal Merger Guidelines. Of course, we welcome any comments and questions from the Members of the Committee.

IV. Policy Projects

The Commission continues to pursue an active policy and research agenda, and as a part of these efforts the FTC regularly holds hearings and workshops to examine important economic and competition issues affecting businesses and consumers. A recent example is a series of workshops entitled “How Will Journalism Survive the Internet Age?” We are holding this series of workshops because the expansion of electronic commerce and media is challenging

V. Section 5 of the Federal Trade Commission Act

As the Members of this Committee are well aware, the Federal Trade Commission has enforcement authority beyond that of the Sherman and Clayton Acts. When Congress created the FTC in 1914, it empowered the agency to prevent “unfair methods of competition” through Section 5 of the Federal Trade Commission Act.⁹ Congress was dissatisfied with the state of antitrust enforcement at that time, and its goal was to create an agency with broader jurisdiction than the Department of Justice. At the same time, Congress sought to balance that broader jurisdiction with a limitation on the actions that may be taken under the new law. Specifically, the Commission is not entitled to treble damages, and Section 5 does not provide for a private right of action. Thus Section 5 provides somewhat limited remedies but allows the Commission to reach a broader range of anticompetitive conduct – such as conduct that undermines competition without necessarily violating the Sherman Act.

This broad authority is clear in the legislative history of the FTC Act, which shows that Section 5 was not enacted merely to mirror the Sherman Act. Rather, as Congressman Stevens of New Hampshire, who later became an FTC Commissioner, stated, a principal impetus behind the Act was that “it [would] give to this commission the power of preventing in their conception and in their beginning some of these unfair processes in competition which have been the chief source of monopoly.”¹⁰ The Supreme Court subsequently has confirmed a broad view of Section

⁹ 15 U.S.C. § 45.

¹⁰ 51 Cong. Rec. 13,118 (1914). Senator Cummins, one of the bill’s main proponents, squarely stated on the Senate floor: “[t]hat is the only purpose of Section 5 – to make some things punishable, to prevent some things, that can not [sic] be punished or prevented under the antitrust law.” 51 Cong. Rec. 12,454 (1914).

¹¹ *FTC v. Sperry & Hutchinson*, 405 U.S. 233, 240 (1972). Also, the Supreme Court observed in *Indiana Federation of Dentists* that the “standard of ‘unfairness’ under the FTC Act is, by necessity, an elusive one, encompassing not only practices that violate the Sherman Act and the other antitrust laws but also practices that the Commission determines are against public policy for other reasons.” *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 454 (1986).

¹² See, e.g., *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007); *Verizon U.S. 300*
Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004), St 00000 TD(na)Tj12.000

¹³ “Section 5 of the FTC Act as a Competition Statute,” Workshop Website, www.ftc.gov/bc/workshops/section5/index.shtml.

¹⁴ *In the Matter of Intel Corporation*, Dkt. No. 9341 (issued Dec. 16, 2009), www.ftc.gov/os/adjpro/d9341/091216intelcmpt.pdf.

¹⁵ FTC Press Release, “U-Haul and its Parent Company Settle FTC Charges That They Invited Competitors to Fix Prices on Truck Rentals,” (June 30, 2010) <http://www.ftc.gov/opa/2010/06/uhaul.shtm>

VI. Energy

The petroleum industry plays a crucial role in our economy, and few issues are more important to consumers and businesses than the prices they pay for gasoline and energy to heat and light their homes and businesses. Because of this, the Commission carefully monitors energy markets and devotes significant resources to maintain and protect competition across a wide range of industry activities. This work is undertaken by a large number of economists and attorneys who specialize in the energy sector.

Merger review is an essential part of this effort, and in 2009 the Commission reviewed proposed acquisitions involving refined petroleum products, pipelines and terminals, liquefied petroleum gas (propane)

¹⁶ *See* Gasoline and Diesel Price Monitoring, www.ftc.gov/ftc/oilgas/gas_price.htm.

See FTC Press Release, New FTC Rule Prohibi

¹⁹ In Working Paper No. 300, entitled *Petroleum Mergers and Competition in the Northeast United States*, the Bureau reported on a retrospective evaluation of two consummated transactions – Sunoco’s 2004 acquisition of El Paso’s New Jersey petroleum refinery and Valero’s 2005 acquisition of Premcor’s Delaware refinery. Working Paper No. 302, *Asymmetric Pass-Through in U.S. Gasoline Prices*, presented new evidence that upward cost shocks are passed through more quickly than downward cost shocks in United States gasoline prices. Working Paper No. 303, *Edgeworth Price Cycles in Gasoline: Evidence from the U.S.*, used multiple methods to identify price cycles in retail gasoline and diesel price. The reports are available

VII. Consumer Protection

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 law enforcement agencies to further the reach of our initiatives. In particular, the FTC has increased its emphasis on protecting consumers in financial distress. Since January 2009, the FTC has brought 40 law enforcement actions against defendants who engaged in unfair or deceptive practices against financially-distressed consumers, and the agency continues its rulemaking and consumer education efforts related to financial services. By working closely and ther/u00 0.00

²¹ *See, e.g.*, FTC Press Release, At FTC's Request, Court Halts Massive Robocall Operation (June 10, 2010), <http://www.ftc.gov/opa/2010/06/asiapacific.shtm>.

challenge of keeping personal information private, and reported that the FTC is the second-most trusted agency for privacy protection (behind only the U.S. Postal Service).²² But there is still work to be done, and the Commission will continue to lead the way in developing and promoting policies and practices that safeguard consumers' privacy. In addition to the agency's 29 enforcement actions against businesses that failed to protect consumers' personal information, the FTC is actively engaged in an effort to examine privacy issues more broadly. FTC staff convened three public roundtables to explore concerns about consumer privacy and ensure that the Commission's approach to privacy keeps pace with the latest technologies and emerging business models.²³ The Commission plans to release recommendations for public comment later this year.

VIII. Conclusion

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²² <http://www.ponemon.org/news-2/32>

²³ *See generally* FTC Exploring Privacy Website, www.ftc.gov/bcp/workshops/privacyroundtables/index.shtml.