

**How the Federal Trade Commission
Works to Promote Competition and Benefit Consumers
in a Dynamic Economy**

**Prepared Statement of
the Federal Trade Commission**

**Before the
United States Senate
Committee on the Judiciary
Subcommittee on Antitrust, Competition Policy and Consumer Rights**

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increasingly difficult to halt pay-for-delay settlements through litigation, and such settlements have now become a common industry strategy.

These developments are extremely troubling. Delays in generic competition harm all those who pay for prescription drugs: individual consumers, the federal government (which purchases roughly one-third of all prescriptions), state governments struggling with the cost of providing access to health care, and American businesses striving to compete in a global economy. This year, a comprehensive FTC staff report studied this problem, and found:

- The number of these agreements is increasing, from zero in fiscal year 2004 to 19 in fiscal year 2009;
- These deals currently protect at least \$20 billion in sales of branded drugs from generic competition.
- On average, the deals delay the availability of cost-saving generics by 17 months; and
- If not stopped, pay-for-delay deals will, conservatively, cost consumers \$3.5 billion a year.²

In simple terms, these findings document how these sweetheart deals increase prescription drug costs for American consumers. 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 set-backs 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

² “Pay-for-Delay: How Drug Company Pay-Offs Cost Consumers Billions,” FTC Staff Study (Jan. 2010), www.ftc.gov/os/2010/01/100112payfordelayrpt.pdf. In addition, the Commission staff releases detailed annual summaries on the type of settlements brand and generic companies are entering. See www.ftc.gov/os/2010/01/100113mpdim2003rpt.pdf.

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.

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.

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

This update of the Guidelines is 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

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, or even a necessary starting point of merger analysis, but instead a tool to be used when it is useful to illuminate the potential competitive effects of the proposed merger. Another highlight is the increase in the Hirschmann-Herfindahl 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 guide 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, and we look forward to their further comments. Of course, we welcome any comments and questions from the Members of the Committee.

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

IV. News Media Workshops

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?” The expansion of electronic commerce and media is challenging conventional journalism business models. This sea change may have implications both for competition among media outlets and our democratic society. The Commission’s workshops have been designed to focus attention on this emerging concern, assess the range of economic and policy issues raised by the changes in the market, and explore how competition can be used to enhance consumer welfare.

The FTC held the first workshop in December 2009, and the opening session featured contributions from a diverse group of well-informed participants, from Rupert Murdoch to Arianna Huffington. Owners of news organizations, journalists, bloggers, technologists, economists, and other academics discussed the changing dynamics of the news business and considered what new journalism business models might evolve in the future. The workshops continued in March 2010, when experts in a variety of fields discussed the pros and cons of a number of proposals to increase the efficiency and profitability of journalism, including: more accessible and more manageable government data; possible changes to copyright law, various new business models, and collaborations among news organizations. The series of hearings will conclude later this month, when the Commission will hold a final public workshop to compare the policy options that have emerged during our study. The Commission will thoroughly evaluate the results of the workshops and assess the various issues raised and discussed, and plans to issue a report on this project in the fall.

⁹ 15 U.S.C. § 45.

¹⁰ 51 Cong. Rec. 12,454 (1914).

FTC v. Sperry & Hutchinson

¹² See, e.g., *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007); *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004); *State Oil Co. v. Khan*, 522 U.S. 3 (1997); *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1992); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Monsanto v. Spray-Rite Serv. Co.*, 465 U.S. 752 (1984); *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 465 U.S. 752 (1984)

clear harm to the competitive process and to consumers. We are confident that Section 5 will prove to be an effective mechanism to block anticompetitive behavior, and will allow the Commission to aggressively protect consumers without sparking concerns in the courts..

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), lubricant oils, natural gas, and natural gas liquids storage and transportation.

In addition, the Commission continues the “Gas Price Monitoring Project” that began in 2002. The monitoring project is a daily, in-depth review of retail and wholesale prices of gasoline and diesel fuel in 20 wholesale regions and approximately 360 retail areas across the United States. The project provides information that helps the Commission to investigate potentially anticompetitive conduct in fuel markets and serves as an early warning system.¹⁵

¹⁵ See Gasoline and Diesel Price Monitoring, www.ftc.gov/ftc/oilgas/gas_price.htm.

Last November, the Commission added another tool to its arsenal. Pursuant to authority granted by Congress under the Energy Independence and Security Act of 2007, the Commission issued the Petroleum Market Manipulation Rule, which prohibits fraud or deceit in wholesale energy markets.¹⁶ The agency conducted an extensive rulemaking proceeding to decide whether and how to craft such a rule, holding a public workshop with participants representing industry, government agencies, academics, and consumers; holding numerous meetings with consumer groups, trade associations, and businesses; and considering over 150 written comments from consumers and businesses. The Commission worked diligently on this issue for 16 months and promulgated a rule that measures

¹⁶ See FTC Press Release, New FTC Rule Prohibits Petroleum Market Manipulation (Aug. 6, 2009), www.ftc.gov/opa/2009/08/mmr.shtm; 74 Fed. Reg. 40686 (Aug. 12, 2009).

¹⁷ Guide to Complying with Petroleum Market Manipulation Regulations, www.ftc.gov/os/2009/11/091113mmrguide.pdf.

policymakers. For example, the Commission has submitted multiple comments to the Federal Energy Regulatory Commission (FERC) on a broad range of competition-related issues.¹⁸

The Commission will continue to utilize its expertise in all of these ways to promote competition in the energy sector and pursue potential illegal conduct that harms consumers.

VII. Consumer Protection

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¹⁸ See Comment of the Federal Trade Commission on *Control and Affiliation for Purposes of the Commission's Market-Based Rate Requirements Under Section 205 of the Federal Power Act and the Requirements of Section 203 of the Federal Power Act*, FERC Docket No. RM09-16-000 (Mar. 29, 2010); Comment of the Federal Trade Commission on *Control and Affiliation for Purposes of the Commission's Market-Based Rate Requirements Under Section 205 of the Federal Power Act and the Requirements of Section 203 of the Federal Power Act*, FERC Docket No. PL09-3-000 (Apr. 28, 2009); Reply Comment of the Federal Trade Commission on *Transmission Planning Processes Under Order No. 890*, FERC Docket No. AD09-8-000 (Dec. 3, 2009).

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.¹⁹ The Commission plans to release recommendations for public comment later this year.

The FTC vigorously enforces the rule prohibiting marketing calls to phone numbers on the National Do Not Call Registry, which soon will have more than 200 million unique phone numbers, and takes enforcement action against deceptive telemarketing. For example, during the past year, the Commission filed nine new actions that attack the use of harassing "robocalls" – the automated delivery of prerecorded messages – to deliver deceptive telemarketing pitches that promised extended auto warranties and credit card interest rate reduction services.²⁰

VIII. Conclusion

The Commission is active in a number of other areas that may be of interest to the Subcommittee, including Internet privacy, clinical integration of medical practices, and consideration of the use of Resale Price Maintenance policies in light of the recent Supreme Court decision in *Leegin*. I'd be pleased to discuss any of these topics, and any others of interest to the Subcommittee.

¹⁹ See generally FTC Exploring Privacy Website, www.ftc.gov/bcp/workshops/privacyroundtables/index.shtml.

²⁰ See, e.g., FTC Press Release FTC Sues to Stop Robocalls With Deceptive Credit Card Interest-Rate Reduction Claims (Dec. 8, 2009), www.ftc.gov/opa/2009/12/robocall.shtm.

Thank you for this opportunity to share highlights of the Commission's recent work to promote and protect competition in the marketplace. 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.