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 athttp://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 athttp://www.ftc.gov/opa/2012/12/idexx.shtm.

[6] Press Release, Eight Puerto Rico Kidney Doctor

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 discove

1. Stopping Anticompetitive Health Care Mergers

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.

raising prices on needed medications. For instance, in the last two years alone the Commission required divestitures to remedy competitiv 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

[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/caselist/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 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

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 (

encumbered SEP holder and an implementer are una

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*

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/pae/.

[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 th7 -1.1,ounter113892 0 TD-.0013 Tc.2018 Tw[u(obcigation of m)1wt gnifhe gidardidcoidaad

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 athttp://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.