Antitrust in the Digital Age:
How Enduring Competition Principles
Enforced by the Federal Trade Commission
Apply to Today's Dynamic Marketplace

Prepared Statement of
The Federal Trade Commission

Before the
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Committee on the Judiciary
Subcommittee on Courts and Competition Policy

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Chairman Johnson, Ranking Member Coble, and members of the Subcommittee, I am Richard Feinstein, Director of the Bureau of Competition at the Federal Trade Commission ("FTC" or "Commission").[1] Thank you for inviting the Commission[2] to present its views on competition in the digital age, and for this opportunity to describe for you some of the agency's efforts to apply sound competition policy to dynamic markets.

The first federal antitrust statute, the Sherman Act, was enacted in 1890, a time of horses and buggies and kerosene lamps. Congress passed the Clayton and Federal Trade Commission Acts less than 25 years later, in 1914. Despite the profound changes in the American economy since then, at core our antitrust laws remain basically the same, and they have proven that they can still do the job. The antitrust laws have succeeded for so many years because they are rooted in fundamental market 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.

Some have argued that there should be different rules for markets characterized by rapid technological development, but Congress drafted the antitrust laws in general terms to accommodate changing markets and new products, and the laws are flexible enough to meet the challenges of the high-tech era. Moreover, the antitrust laws are not enforced and interpreted in a vacuum; Congress created the Commission specifically to

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

[2] Commissioner Kovacic is recused from Intel Corp, Docket 9341. Because this testimony is so intertwined with that case and the Commission has not issued its final order, he abstains from voting on this testimony.

guide competition policy through changing competitive environments, and since 1914 the Commission has used its competition policy tools to inform its enforcement agenda and to help it apply traditional antitrust concepts to new markets and changing business models. We hold public workshops, engage in economic research, and discuss competition issues with other policy makers, like the members of this Committee, to develop and refine our understanding of established and developing markets and to ensure that we are doing the right thing for American consumers and businesses—encouraging robust competition, spurring economic growth, and sweeping away impediments to competitive change.

The remainder of this testimony will focus on two of the areas in which the Commission is applying the tried and true principles of competition to markets characterized by technological change: unilateral conduct by firms with market power, and mergers.

Monopolies

There is a fundamental tension in antitrust law when dealing with unilateral conduct by a firm that is trying to obtain or maintain monopoly power. On the one hand, it is not illegal to have a monopoly, and many monopolists obtained their status by inventing new and highly desired products. On the other hand, competition policy generally relies on rivalry to discipline the behavior of firms in the market. The challenge is clear: the Commission must act to prevent unreasonable exclusionary and predatory conduct by firms with monopoly power while making sure not to limit their incentives to innovate and compete aggressively. As Judge Learned Hand put it nearly three quarters of a century ago, "[t]he successful competitor, having been urged to compete, must not be turned upon when he wins."[3]

This task is made more complex in a rapidly evolving marketplace, but the antitrust laws are flexible enough to meet the challenge, and the Commission is well-equipped to scrutinize conduct by dominant firms in dynamic markets because of its enforcement and policy expertise and because of its jurisdiction under the FTC Act. The FTC Act, which prohibits "unfair and deceptive acts and practices and … unfair methods of competition" "was designed to supplement and bolster the Sherman Act and the Clayton Act . . . to stop in their incipiency acts and practices which, when full blown, would violate those Acts . . . as well as to condemn as 'unfair methods of competition' existing violations" of those acts and practices.[4] In other words, although most of our enforcement actions involve conduct that violates either the Sherman or Clayton Acts, the FTC Act gives the Commission some additional leeway to block anticompetitive conduct that may not reach the level of a traditional antitrust violation. This authority is particularly useful in rapidly changing markets, where new technology and new business models may complicate the antitrust analysis.

In addition, the remedies available under the FTC Act are particularly well suited to deal with antitrust violations in new or dynamic markets. First, because the Commission lacks the authority to fine or penalize violators, Commission remedies limit

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[3] United States v. Aluminum Co. of Am. (Alcoa), 148 F.2d 416, 430 (2d Cir. 1945).

[4] F.T.C. v. Brown Shoe Co., 384 U.S. 316, 322 (1966) (quoting F.T.C. v. Motion Picture Adv. Serv. Co., 344 U.S. 392, 394-95 (1953)). See also F.T.C. v. Texaco, 393 U.S. 223, 225-26 (1968). Congressman Stevens of New Hampshire, who later became an FTC Commissioner, identified the "most important" reason for supporting the FTC Act as that "it will 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." 51 Cong. Rec. 13,118 (1914).

the potential for unduly harsh or punitive responses to what may be somewhat novel situations in new markets. Second, a finding of a Section 5 violation by the Commission should greatly limit treble damage liability in private litigation against the same defendant. Thus, the Commission can apply antitrust principles in new situations and dynamic markets with reduced risk of unduly chilling a leading firm's incentives to compete aggressively.

The Commission's recent administrative suit against Intel Corporation demonstrates how antitrust principles can be applied to remedy abusive conduct of an innovative company that simply went too far. The Commission's complaint challenged Intel's unfair methods of competition and unfair acts or practices dating back to 1999.[5] Our proposed consent order with Intel, which has now received public comment and is being considered for possible final approval by the Commission, settles these charges and seeks to restore lost competition, remedy harm to consumers, and ensure freedom of choice for consumers in this critical segment of the nation's economy.[6]

According to the Commission's complaint, Intel's conduct was designed to maintain its monopoly in the markets for computer chips (also known as Central Processing Units, or "CPUs") and to create a monopoly for Intel in the markets for graphics processing units. The complaint alleges that Intel engaged in unfair methods of competition and unfair practices to block or slow the adoption of competitive products and maintain its monopoly to the detriment of consumers. Some of those practices punished Intel's own customers – computer manufacturers – for using non-Intel products.

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[5] *FTC Challenges Intel's Dominance of Worldwide Microprocessor Markets*, news released dated December 16, 2009, available at http://www.ftc.gov/opa/2009/12/intel.shtm.

[6] Intel Corporation, Docket No. 9341, available at http://www.ftc.gov/os/adjpro/d9341/index.shtm.

Some of those practices deceived purchasers by leading them to believe that the chips sold by Intel's competitors were less capable than Intel chips, when in fact those chips were sometimes superior to Intel chips. According to the Commission, Intel's course of conduct over the last decade stalled the widespread adoption of non-Intel products, and limited market adoption of non-Intel CPUs to the detriment of consumers, allowing it to unlawfully maintain its monopoly in the relevant CPU markets, and keep prices higher to consumers than they would otherwise be.

The Commission's proposed settlement aims to prevent the recurrence of Intel's unreasonable exclusionary and deceptive conduct without stifling its ability to continue to innovate and compete fairly. Notably, the proposed settlement does not seek to strip Intel of its chip monopoly, which was in large measure gained through innovation and the development of associated intellectual property. Rather, it provides structural relief designed to restore the competition lost as a result of Intel's past conduct, coupled with provisions that prevent Intel from engaging in similar conduct in the future. The order aims to open the door to fair and vigorous competition in chip markets, leading to lower prices, more innovation, and more choice for consumers.

Mergers

Section 7 of the Clayton Act outlaws mergers whose effect *may be* substantially to lessen competition or tend to create a monopoly. So merger analysis is, by nature, normally forward-looking because it focuses on what level of competition is likely to occur in the future, in a post-merger world. As noted in the recently-released Horizontal Merger Guidelines issued jointly by the Commission and the Department of Justice, "[m]ost merger analysis is necessarily predictive, requiring an assessment of what will likely happen if a merger proceeds as compared to what will likely happen if it does not."[7] Using the fact-specific approach laid out in the Guidelines, the Commission uses its extensive experience and applies a range of analytical tools to the evidence to evaluate the likely competitive effects of a merger. As part of this process, we ask: will this merger reduce competition in the future, or will new or existing competitors emerge to challenge the merged firm so that customers will receive the benefits of competition going forward?

One particular challenge when examining markets characterized by rapid technological change is that market facts can be hard to pin down. In most merger investigations, we ask questions about competition that has occurred in the past, in order to understand how market participants have interacted, historically, and we use that information to help us assess how market participants are likely to interact when the acquired firm ceases to be an independent competitor. In markets with emerging technologies or rapidly changing product offerings or suppliers, there may not be a track record of past competition, or that track record may not be relevant to predicting future competition. Often there is greater uncertainty about the future path of competition and market shares of leading companies may be less durable in these markets.[8] Just as in other markets, we must search out those market facts that shape the competitive interaction of firms currently in the market, and identify and assess the likely significance

[7] *Horizontal Merger Guidelines* issued by the Federal Trade Commission and the Department of Justice (August 19, 2010) 1.0 available at http://ftc.gov/os/2010/08/100819hmg.pdf.

[8] On the other hand, it is also true that monopolies obtained in these markets are sometimes especially durable. In such instances, efforts to police the market against monopolistic conduct are particularly important.

of other firms and products that will likely shape future competition as well, taking note of facts that develop as we are investigating.

A good example is the Commission's recent investigation of Google's acquisition of AdMob. Initially the Commission had concerns that the loss of head-to-head competition between the two leading mobile advertising networks would harm competition. However, this was a dynamic market, and our initial concerns ultimately were overshadowed by two subsequent developments: (1) Apple's December 2009 acquisition of the third largest mobile ad network, Quattro Wireless, and (2) Apple's introduction of its own mobile advertising network, iAd, as part of its iPhone applications package. Because of these changing circumstances, the Commission found reason to believe that Apple quickly would become a strong mobile advertising network. The timing and impact of Apple's entry in the market led the Commission to conclude that AdMob's success to date on the iPhone platform was unlikely to be an accurate predictor of AdMob's competitive significance going forward, whether AdMob was owned by Google or not. Accordingly, in May the Commission unanimously voted to close its investigation without taking action against the merger. [9]

Merger analysis will continue to take into account all market facts, with a focus on how competition is likely to take place in the future. While that task may be slightly more challenging in markets that are experiencing rapid change, the Commission relies on time-tested tools of investigation and analysis to protect consumers from

[9] *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.

anticompetitive mergers, and promote competitive markets where innovation and change can occur.

Conclusion

Our competition laws have served America well. They have proven adaptable to changes in markets and business models across a span of more than 100 years. The Commission's work enforcing the antitrust laws will continue to be an important part of our national success in preventing competitive harm in new and dynamic markets while fostering and rewarding innovation and entrepreneurship.