STATEMENT OF

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SUBCOMMITTEE ON COURTS AND COMPETITION POLICY
COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

CONCERNING

THE IMPACT OF CHINA'S ANTITRUST LAW AND OTHER COMPETITION POLICIES ON U.S. COMPANIES

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I. Introduction

Mr. Chairman, thank you for the opportunity to address the House Judiciary Subcommittee on Courts and Competition Policy regarding issues faced by U.S. businesses in China under the new Antimonopoly Law ("AML"). At the most basic level, U.S. businesses should applaud the enactment of the AML. The AML represents a critical step on the road toward introducing market competition into the Chinese economy. Competition laws provide a backstop that enables governments to deregulate sectors of the economy. This evolution promises tremendous benefits for all participants in the Chinese economy, including Chinese consumers, all companies doing business in China, and consumers in the U.S. and around the world. In other words, the AML has the potential to provide a win-win-win situation.

At the same time, however, a competition law regime can cause more harm than good. If the law includes overbroad, rigid prohibitions, for example, it can prevent beneficial economic growth. Similarly, selective enforcement of the law can inhibit competition by creating barriers to entry and undermining incentives to compete. Competition laws need to be appropriately structured and enforced to prohibit only conduct that is likely to cause significant harm to the competitive process. They should not be enforced to protect individual competitors. This focus helps to ensure that the law enhances -- rather than harms -- economic growth and consumer welfare. Achieving this goal is a fundamental challenge that applies as much in China as it does in the United States and elsewhere.

From this perspective, China has taken significant positive steps forward by adopting a well-consider competition law regime that generally comports with international norms. It is, however, too early to draw conclusions on the implementation process. Our focus in the U.S.

should be on helping the Chinese agencies to implement the law in a principled and effective manner that will spur economic growth, which also should have the effect of opening opportunities for U.S. and other businesses operating in China.

II. The Benefits and Risks of a Competition Law Regime

As our Supreme Court has explained:

> "[Our competition law] rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions."[2]

Thus, the adoption of a competition law regime in China should be viewed in the broader context of the transformation of the Chinese economy from a centrally directed to a market-based economy. As markets become less regulated, they generally become more efficient and produce better quality products and services at lower prices for all those who participate in these markets. Such markets also tend to be more open with greater opportunities for entry by new firms. As the U.S. Antitrust Modernization Commission ("AMC") has explained, regulation can be "the 'antithesis' of competition, tending to preserve monopolies and other non-competitive market structures by restricting entry, controlling price, skewing investment, and limiting or delaying innovation."[3]

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[2] *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958).

[3] Antitrust Modernization Commission Report (April 2007) at 357, available at http://govinfo.library.unt.edu/amc/report_recommendation/toc.htm. Indeed, the AMC cites empirical estimates "that the U.S. economy has gained $36-$46 billion *annually* (in 1990 dollars) from deregulation . . .." *Id*. at 334. The AMC was a bipartisan commission established by Congress -- with the leadership of this Committee -- to study the U.S. antitrutst laws.

Importantly for purposes of this hearing, by reducing barriers to entry and encouraging investment and innovation, the AML and the market-oriented approach that it represents should provide greater opportunites for U.S. businesses in China.

At the same time, however, competition laws can inhibit economic growth if they are not structured or enforced appropriately. Laws with rigid, per se prohibitions can prohibit beneficial conduct, such as mergers that would generate cost savings or price cutting that would lower costs to consumers. Even with a carefully structured law, enforcement requires the evaluation of sometimes complex legal and economic issues. To take just one example, Article 55 of the AML clarifies that the law does not prohibit companies from excercising their intellectual property rights. The same section, however, indicates that the AML may prohibit restrictions on competition from an "abuse" of intellectual property rights. Determining what is a lawful exercise of an IP right and what is an abuse presents significant challenges.

More generally, a lack of transparency and predictability can create uncertainty that will deter businesses from making beneficial investments. Thus, while it is important to make the right substantive decisions, the administrative process for investigating and making decisions is critical as well.

III. The Antimonpoly Law in China

The Chinese government deserves great credit for carefully studying competition law regimes and experience from around the world and adopting a law in the AML that generally conforms with internation norms. Various components of the Chinese government spent more than a decade evaluating the issues and drafting the AML that became effective on August 1, 2008. The U.S. Department of Justice and Federal Trade Commission played important roles in this deliberative process. Both agencies sent and received delegations to exchange ideas with the

Chinese officials drafting the AML and with the agencies that would enforce the law after its adoption. And the consultations made a difference. The various iterations of the draft AML incorporated comments received from the U.S. as well as other jurisdictions and improved the final product.

Thus, the AML is a world class competition law. In this regard, it contains key elements including the following:

- A purpose of promoting economic efficiency and consumer welfare (AML at Article 1);
- A recognition that agreements among competitors, although potentially harmful, also can promote cost reductions and product innovation (Article 15);
- A clear prohibition on price fixing and other cartel activities (Article 13);
- A more nuanced standard for assessing mergers and single firm conduct (Articles 17 and 28);
- A definition of dominance that is not based solely on market definition (Articles 18 and 19);
- A recognitiion of the importance and legitimacy of intellectual property rights Article 55;
- A premerger review process that limits the time for review and that has a filing requirement that is triggered only if there is a nexus between the transaction and the Chinese economy) (Article 26); and
- A provision calling for the issuance of guidelines to enhance compliance with the AML (Article 9).

The AML deserves particular commendation for its inclusion of a prohibiton on the use of administrative powers to create a monopoly or restrict competition.[4] Our experience in the U.S. has shown that governmentally imposed or sanctioned restrictions on competition can be

[4] *See, e.g.*, Chapter Five of the AML (Articles 32-37).

some of the most enduring and harmful.[5] At the same time, it can raise significant political sensitivities for a broad range of governmental entities to be required to comply with a particular law. Accordingly, China should be applauded for specifically providing for the application of the AML to governmental administrative entities.

The AML does have some provisions for which there is not the same international consensus, such as the following:

- Assignment of enforcement responsibility to three different agencies: The Ministry of Commerce for merger review, the State Adminstration for Industry and Commerce for non-price-related conduct, and the National Development and Reform Commission for pricing-related conduct. This structure can create inefficiencies and potentially even conflicting standards.[6] The three agencies therefore need to coordinate their actions to increase transparency and consistency of enforcement standards and to reduce the burden on economic activity from the operation of multiple enforcement entities.

- Prohibitions on dominant firms charging too high a price or from paying too low a price (Article 17). While China is not the only country with such a competition law provision, the U.S. has learned that trying to regulate price levels -- as opposed to the competitive process -- can be adminsitratively burdensome and counterproductive, such as by preventing beneficial price cutting.

IV. Enforcement

Having adopted a competition law that generally comports with international norms, China now joins the U.S. and other countries in the challenge of enforcing its competition law in a manner that will promote economic growth and enhance consumer welfare. This challenge

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[5] "State Intervention/State Action – A U.S. Perspective," Remarks of Timothy J. Muris before Fordham Annual Conference on International Antitrust Law & Policy (October 24, 2003) ("In many ways, public restraints are far more effective and efficient at restraining competition.").

[6] See AMC Report at iv-v (providing recommendations for reducing inefficiencies from dual enforcement by the U.S. DOJ and FTC).

should not be underestimated. The United States has had over 100 years of experience in enforcing the Sherman Act, and we are still engaged in vigorous discussions about the best approaches. While China can draw upon the collective competition enforcement experience around the world, the AML has been in effect for only two years, and the Chinese agencies are still trying to determine how best to enforce the AML in many significant respects.

Accordingly, we should be focusing on continuing to engage with the Chinese agencies to exchange ideas and best practices. There are a range of useful topics to be addressed, such as the following:

- How best to define objective standards that are based on enhancing economic efficiency and consumer welfare;
- How to ensure that targets of investigations receive due process;[7]
- The importance of transparency in the decisionmaking process and the issuance of substantive explanations for decisions to enforce -- or not enforce -- the law in particular situations;
- How to meet the competition agencies' objectives while reducing the burden on commerce imposed by administration of the AML;
- The advisability of pursuing non-competitoin goals through competition laws; and

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[7] The current Assistant Attorney General for Antitrust, Christine Varney, has said it well:

> "Regardless of the substantive outcome of a government investigation, it is important that parties involved know that the process used to reach that outcome was fair. The two concerns—substance and process—go hand in hand. Complaints about process lead to concern that substantive results are flawed, whereas a fair, predictable, and transparent process bolsters the legitimacy of the substantive outcome."

"Procedural Fairness," Remarks before the 13th Annual Competition Conference of the International Bar Association (September 12, 2009) available at http://www.justice.gov/atr/public/speeches/249974.htm.

- How to avoid inconsistent decisions across jurisdictions.

V. Recommendations for the U.S.

A key issue for the U.S. -- both the governmental and private sector -- is how to engage the Chinese agencies. We should encourage them to enforce the AML in a manner that promotes economic efficiency. We do not want them to cause harm to the competitive process by, for example, creating artificial barriers for foreign firms doing business in China. Here are a number of observations to help in this regard:

1. The U.S. agencies should continue to exchange ideas and best practices with the Chinese agencies, both in general and in specific enforcement matters.

Chinese officials have been open to exchanging ideas with the U.S. Department of Justice and the U.S. Federal Trade Commission regarding the drafting of the AML and general enforcement policy. These exchanges have been taking place on a bilateral basis both here and in China, at the level of senior management and operational staff, in public, and in private. The dialogue proved useful during the drafting of the AML and should be continued with a focus on implementation. Indeed, the exchange of ideas is beneficial to all of the participants.

A key focus of future exchanges should be on helping to educate the individuals who enforce the AML on economic concepts, the analytical tools that are available, and the kinds of problems that arise in practice in enforcing a competition law.

2. Private businesses operating in China need to ensure their compliance with the AML, but also should participate in the policy discussions.

The AML is new and many of the details of how it will be enforced are only beginning to emerge. Accordingly, businesses need to ensure that they understand what guidance is available so that they can pursue opportunities in a manner that comports with the law. At the same time,

the agencies in China are learning how to enforce AML. They will benefit from businesses engaging them in a constructive dialogue about legal standards and practices that are working well and those that could be improved. Business should therefore seek opportunities to offer feedback to the agencies in this regard.

3. Encourage further agency guidance

The AML expressly provides for the issuance of guidance, and the agencies already have responded. The Ministry of Commerce has issue draft regulations on merger review while the State Administration for Industry and Commerce has issued draft guidance on abuse of dominance for administrative agencies, monopolies, and private abuse of dominance. The National Development and Reform Commission has issued guidance for pricing practices. These efforts should be applauded, and further efforts should be encouraged.

In this regard, we should encourage the Chinese competition agencies to provide an opportunity for public comment on guidelines and other regulations before they are issued in final form. As discussed above, the business community and other interested parties can provide useful feedback that can help the agencies do their jobs more efficiently and effectively.

4. Encourage participation by Chinese enforcement agencies in the International Competition Network and other international competition organizations.

There is a robust dialogue among competition agencies around the world, and the U.S. should encourage China to participate. Every agency has a valuable perspective and experience to bring to bear on the issues, and the Chinese agencies can both contribute to and learn from the dialogue.

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Mr. Chairman, thank you for the opportunity to participate in this hearing. I look forward to answering any questions.