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
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Committee on the Judiciary
Subcommittee on Antitrust, Competition Policy and Consumer Rights

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Introduction

Chairman Kohl, Ranking Member Hatch, 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 and to allow 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 the merger are likely to have adverse competitive effects, we negotiate remedies that address our concerns.

Of course, businesses engage in a range of other activities, some of which have implications for competition, and the Commission is always on the lookout for potentially anticompetitive conduct. This conduct may be unilateral – for example, when a monopolist requires exclusivity from its customers in a way that harms the ability of other suppliers to compete fairly for those customers. Or the conduct might be coordinated – for example, when a brand pharmaceutical company pays a generic pharmaceutical company to keep its product off the market.

Congress also has empowered the Commission to provide substantive policy analysis and guidance, and we focus significant resources on fulfilling our policy mission. The Commission analyzes a wide variety of competition issues via research, workshops, and hearings, and these efforts result in a steady stream of detailed and thoughtful reports, studies, advocacy filings, and *amicus* briefs.

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 enforcement actions – whether in large or small markets – that will benefit consumers and protect competition. Of course, it should go without saying that we are careful to avoid interfering with the kind of aggressive, rough and tumble competition that has long been the hallmark of our dynamic economy. At the same time, however, we will act against mergers and conduct that go over the line and threaten competition – even if those cases are difficult ones, and even when they involve some of our country's most successful companies.

I. Ending Pay-for-Delay Pharmaceutical Agreements

One of the Commission's top competition priorities is stopping "pay-for-delay" agreements between brand-name pharmaceutical companies and generic competitors that delay the entry of lower-priced generic drugs into the market. These are settlements of patent litigation in which the brand-name drug firm pays its potential generic competitor to abandon a patent challenge and delay entering the market. Such settlements, known as pay-for-delay, exclusion payments, or reverse payments, effectively buy more protection from competition than the assertion of the patent alone provides. And they do so at the expense of consumers, whose access to lower-priced, generic drugs is delayed, sometimes for many years.

Agreements to eliminate potential competition and share the resulting profits are at the core of what the antitrust laws proscribe, and for that reason the Commission believes strongly that these pay-for-delay settlements are prohibited under the antitrust laws. We are making some progress in our efforts to block these deals, but a number of obstacles remain and the legal environment remains unsettled. In 2005, several courts took, what is in our view, an unduly lenient approach to such agreements in drug patent settlements. As a result, it became 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.

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.

We have reason to believe that the tide may be turning. Just last month, an appellate panel in the Second Circuit, which previously had adopted a permissive approach on pay-for-delay settlements, took the extraordinary step of questioning its own standard and explicitly encouraged consumer plaintiffs to request the full court's 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] And, in March 2010, a federal

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[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.

[4] *See Ark. Carpenters Health & 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, Arkansas Carpenters Health and Welfare Fund v. Bayer, No. 05-2851-cv(L) (2d Cir. May 20, 2010); Brief of AARP et al. as Amici Curiae Supporting Appellants, Arkansas Carpenters Health and Welfare Fund v. Bayer, No. 05-2851-cv(L) (2d Cir. May 20, 2010); Brief of Consumers Union et al. as Amici Curiae Supporting Appellants, Arkansas Carpenters Health and Welfare Fund v. Bayer, No. 05-2851-cv(L) (2d Cir. May 20, 2010); Brief of 34 State Attorneys General as Amici Curiae Supporting Appellants, Arkansas Carpenters Health and Welfare Fund v. Bayer, No. 05-2851-cv(L) (2d Cir. May 20, 2010); Brief of 86 Law, Economics, Public Policy, and Business Professors as Amici Curiae Supporting Appellants, Arkansas Carpenters Health and Welfare Fund v. Bayer, No. 05-2851-cv(L) (2d Cir. May 20, 2010).

district court judge in Philadelphia denied a defense motion to dismiss the Commission's case against Cephalon.

Even as we fight against pay-for-delay settlements in the courts, we are working to help find a legislative solution to the problem. We are gratified that the Senate Judiciary Committee, the House, and the Administration support our efforts to stop pay-for-delay deals, and particularly grateful for the work of this Committee to approve legislation restricting the ability of pharmaceutical companies to engage in these anticompetitive agreements. The Commission continues to support congressional action to prohibit pay-for-delay settlements, and we look forward to working with Congress to address this issue. In the meantime, the agency will continue to aggressively pursue our investigations and enforcement actions.

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 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 half of fiscal year 2010, the Commission has brought 11 merger enforcement actions. These challenges covered a wide range of markets, including pharmaceuticals, fertilizer, the funeral services industry, and the chemical industry.

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

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.

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[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.

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[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.

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. Thus, under Section 5, while its remedies are somewhat limited, the Commission may reach conduct that undermines competition even if it does not violate 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 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."[10] This view of Section 5 has been confirmed by the U.S. Supreme Court,[11] but lower courts in the 1970s and 1980s struck down FTC efforts to use this authority.

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[9] 15 U.S.C. § 45.

[10] 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).

After those cases, until recently, the Commission had generally limited use of its Section 5 authority to conduct that would also violate the Sherman Act.

Since the 1970s, the Supreme Court has increasingly narrowed the scope of the Sherman Act, in part due to concerns that private class-action antitrust litigation and the impact of treble damage awards will tend to deter legitimate, competitive activity.[12] But whatever the reason, the result is that the antitrust agencies, as antitrust plaintiffs themselves, find themselves limited in their ability to challenge anticompetitive conduct that harms consumers – even though the Commission is not entitled to treble damages, and Section 5 does not provide for a private right of action. Thus, the use of Section 5 by the Commission should limit the remedial and follow-on litigation concerns that may be raised by the use of the Sherman Act.

Accordingly, the Commission is actively considering how it can best use Section 5 to enhance enforcement in a responsible and transparent manner. We have held a workshop[13] to assess the best uses of Section 5, and are planning to issue a report with our conclusions. We recently filed a case against Intel that included a free-standing unfair method of competition claim,[14] and we have other investigations in progress that may include similar claims. Of course, in using our Section 5 authority the Commission will focus on bringing cases where there is

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[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.*, 433 U.S. 36 (1977).

[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*, (Administrative Complaint Dec. 16, 2009), www.ftc.gov/os/adjpro/d9341/091216intelcmpt.pdf.

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 to alert our experts to unusual pricing activity.[15]

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[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 petroleum 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 meets the goal of Congress. Importantly, the rule prohibits statements that intentionally omit material information and that are likely to distort petroleum markets. Commission staff has prepared a compliance guide for businesses, which explains the rule in depth and provides examples of the type of actions that would violate it.[17] Examples of potential violations include: false public announcements of planned pricing or output decisions, false statistical or data reporting, and wash sales intended to disguise the actual liquidity of a market or the price of a particular product. The Market Manipulation Rule has only been in effect for a short time, and the agency plans to aggressively enforce the rule as needed.

In addition to these actions, Commission economists and attorneys issue reports on energy matters, including market statistics and trends for use by Congress and other

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[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

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 engaged in deceptive practices targeting financially-distressed consumers, and the agency is also engaged in rulemaking and consumer education efforts related to financial services. By working closely with state attorneys general, we have expanded the reach of these efforts through the filing of more than 200 enforcement actions by our state partners.

Privacy also remains a significant priority. 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

[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.

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[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.