UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the General Counsel

September 11, 2013

Duffy Carolan
Davis, Wright, Tremaine LLP
505 Montgomery Street, Suite 800
San Francisco, CA 64111-6533

Re: Freedom of Information Act Appeal (FOIA Request Nos. 2013-00859/00860)

Dear Ms. Carolan:

This letter responds to your August 8, 2013 letter appealing the FTC's partial denials of FOIA Request Nos. 2013-00859/00860, submitted by your client Matthew Drange and the Center for Investigative Reporting/*The Bay Citizen*.

As reflected in a May 13, 2013 letter from Dione Stearns, Assistant General Counsel, Mr. Drange agreed to amend the underlying requests to focus only on FTC records "related solely to the Google 'search' investigation, FTC Matter Number 1110163." As amended, FOIA-2013-00859 sought internal FTC correspondence and external correspondence between the FTC and the Department of Justice regarding the FTC's recently-closed Google search investigation, while FOIA-2013-00860 sought internal FTC correspondence and external correspondence between the FTC and the Senate Judiciary Committee regarding the Google search investigation.

By later dated July 16, 2013, the FTC's FOIA Unit responded to FOIA-2013-00859. The Unit located 37 pages of responsive records and released some of them, while withholding others under the deliberative process privilege of FOIA Exemption 5, 5 U.S.C. § 552(b)(5). After the Unit located almost 1,200 pages of responsive records for FOIA-2013-00860, it responded over three letters dated May 28, July 9, and July 26, 2013. Again, the Unit released some of these records while withholding others, citing FOIA Exemptions 3, 5, 7(A), and 7(C), 5 U.S.C. §§ 552(b)(3), (b)(5), (b)(7)(A), (b)(7)(C). With respect to Exemptions 3 and 5, the FOIA Unit specifically cited section 21(f) of the FTC Act, 15 U.S.C. § 57b-2(f), and the deliberative process privilege. Your August 8 appeal letter requested that the FTC fully release these withheld or partially-withheld responsive documents.

Regarding FOIA-2013-00860, your appeal points out that FOIA Exemption 5 generally does not exempt communications with Congress, which is not an "agency" for purposes of the "intra-agency" and "inter-agency" communications protected under the exemption. I agree. The FTC has released, or will release, its responsive records of final communications with Congress, including Senate Judiciary Committee staff.

On the other hand, most of the material withheld under Exemption 5 pertained to entirely deliberative staff recommendations regarding how best to respond to official congressional inquiries ("Questions for the Record") about the agency's Google search investigation. While the FTC will release its final responses provided to Congress as well as some additional segregable factual material, it need not release the draft responses prepared by agency staff. *See, e.g., Judicial Watch, Inc. v. DOJ*, 800 F. Supp. 2d. 202, 218-219 (D.D.C. 2011) (deliberative process privilege protects records created in order to respond to Congressional inquiries related to the dismissal of a particular case); *Judicial Watch, Inc. v. DHS*, 736 F. Supp. 2d. 202, 208-09 (D.D.C. 2010) (deliberative process privilege protects agency staff's email recommendations and evaluations for responding to Congressional inquiries regarding a specific controversial case); *Judicial Watch, Inc. v. DOJ*, 306 F. Supp. 2d 58, 71-72 (D.D.C. 2004) (deliberative process privilege protects internal agency emails created to prepare upcoming congressional testimony). While some of these deliberations post-date the agency's decision to close the Google search investigation, they were "generated as part of a continuous process of agency decision making, viz., how to respond to on-going inquiries, [so] they are pre-decisional and, given their deliberative nature . . . , they were properly withheld under Exemption 5." *Judicial Watch*, 736 F. Supp. 2d. at 208. Therefore, the FTC will continue to withhold these deliberative records.

With respect to the withholding of other documents created *before* the close of the Commission's Google search investigation, many of these records concern the agency's internal discussions regarding the progress of the investigation. These records are clearly protected by the deliberative process privilege, and many are also protected by the attorney work product doctrine (and thus protected by Exemption 5), which applies to documents prepared by attorneys in contemplation of litigation, *Hickman v. Taylor*, 329 U.S. 495, 509-10 (1947), including documents prepared in connection with enforcement investigations. *See Exxon Corp. v. DOE*, 585 F. Supp. 690, 700 (D.D.C. 1983). For example, FOIA-2013-00859 requested FTC and Department of Justice attorney communications regarding specific administrative investigations and contemplated administrative litigation involving Google. While the deliberative process privilege does not protect segregable and non-deliberative factual material, the attorney work product doctrine "simply does not distinguish between factual and deliberative material." *Judicial Watch, Inc. v. DOJ*, 432 F.3d 366, 371 (D.C. Cir. 2005). However, I am directing the FOIA Unit to release some additional records that are neither deliberative nor created in contemplation of litigation.

Finally, your August 8 letter asserts that the FTC cannot continue to protect the identities of various entities under FOIA exemptions 3 or 7(C). Upon further reflection, I agree that Exemption 3 and section 21(f) of the FTC Act, 15 U.S.C. § 57b-2(f), do not protect the mere identities of the large corporate entities that submitted information to the FTC in this investigation. However, Exemption 7(D), 5 U.S.C. § 552(b)(7)(D), protects the identity of any confidential source (including corporate entities) that provided information to the agency in connection with an investigation. I am therefore directing the FOIA Unit to release records that identify Google (the publicly-identified target of this investigation) as a source of information, but the FTC will continue to withhold records that would identify other, confidential sources.

In addition, individual submitters' (and some FTC staff members') identities will continue to be withheld under Exemption 7(C) Although your letter complained that "the agency

must balance privacy interests with the public interest when deciding whether to redact a document under Exemption 7(C)," the courts have "consistently supported nondisclosure of names or other information identifying individuals appearing in law enforcement records, including investigators, suspects, witnesses, and informants. . . . [W]e [have] adopted a *categorical rule* permitting an agency to withhold information identifying private citizens mentioned in law enforcement records, unless disclosure is 'necessary in order to confirm or refute compelling evidence that the agency is engaged in illegal activity.'" *Schrecker v. DOJ*, 349 F.3d 657, 661 (D.C. Cir. 2003) (emphasis added). In this case, there is no evidence or allegation that any agency staff members have engaged in illegal activity. Moreover, even if there were such allegations, they would not apply to *private individuals* who have cooperated with the FTC's investigation. The FTC will continue to withhold these individuals' identities.

After receiving this remand determination, the FOIA Unit will continue to process your request and will complete its review as quickly as possible. If you are not satisfied with the FOIA Unit's final response, you may appeal once again by writing to Freedom of Information Act Appeal, Office of the General Counsel, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington D.C. 20580, within 30 days of receiving the FOIA Unit's response. If you do submit another appeal, please enclose a copy of your original request and appeal, and a copy of this letter.

Sincerely,

David C. Shonka
Acting General Counsel

United States of America
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Matthew Drange
The Bay Citizen
2130 Center St. Suite 103
Berkley, CA 94704

SEP 25 2013

Re: FOIA-2013-00860
Google correspondence

Dear Mr. Drange:

This is in response to your request dated May 6, 2013, under the Freedom of Information Act seeking access to correspondence between the FTC and the Senate Judiciary Committee relating to the Google antitrust case, matter number 1110163, as well as any internal communications relating to this correspondence. In accordance with the FOIA and agency policy, we have searched our records as of May 7, 2013, the date we received your request in our FOIA office.

We have issued three responses to this request, dated May 28, July 9, and July 26. On August 13, 2013, we received an appeal from Duffy Carolan on your behalf. On September 11, 2013 your appeal was granted in part and the request was remanded to the FOIA office for further review. On further review of the responsive records, we have determined that 106 additional pages should be released in part under the FOIA. Portions of these pages fall within the exemptions to the FOIA's disclosure requirements, as explained below.

Some responsive records contain staff analyses, opinions, and recommendations. Those portions are deliberative and pre-decisional and are an integral part of the agency's decision-making process. They are exempt from the FOIA's disclosure requirements by FOIA Exemption 5.5 U.S.C. § 552(b)(5). *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975). Additionally, some records contain information prepared by an attorney in contemplation of litigation, which is exempt under the attorney work-product privilege. *See Hickman v. Taylor*, 329 U.S. 495, 509-10 (1947).

Additionally, one email contains an attorney's personal cell phone number. This information is exempt from release under FOIA Exemption 6, 5 U.S.C. § 552(b)(6), because individuals' right to privacy outweighs the general public's interest in seeing personal identifying information. *See The Lakin Law Firm v. FTC*, 352 F.3d 1122 (7th Cir. 2003).

Portions of these records are exempt from disclosure under FOIA Exemption 7(A), 5 U.S.C. § 552(b)(7)(A), because disclosure of that material could reasonably be expected to interfere with the conduct of the Commission's law enforcement activities. *See Robbins Tire & Rubber Co. v. NLRB,* 437 U.S. 214 (1978).

Some of the records contain personal identifying information compiled for law enforcement purposes. This information is exempt for release under FOIA Exemption 7(C), 5 U.S.C. § 552(b)(7)(C), because individuals' right to privacy outweighs the general public's interest in seeing personal identifying information.

Some of the records were obtained on the condition that the agency keep the source of the information confidential and are exempt from disclosure under FOIA Exemption 7(D), 5 U.S.C. § 552(b)(7)(D). That exemption is intended to ensure that "confidential sources are not lost because of retaliation against the sources for past disclosures or because of the sources' fear of future disclosures." *Brant Constr. Co. v. EPA, 778 F.2d 1258, 1262* (7th Cir. 1985).

If you are not satisfied with this response to your request, you may appeal by writing to Freedom of Information Act Appeal, Office of the General Counsel, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington D.C. 20580, within 30 days of the date of this letter. Please enclose a copy of your original request and a copy of this response. If you believe that we should choose to disclose additional materials beyond what the FOIA requires, please explain why this would be in the public interest.

If you have any questions about the way we handled your request or about the FOIA regulations or procedures, please contact Andrea Kelly at (202) 326-2836.

Sincerely,

Dione J. Stearns
Assistant General Counsel

Enclosed: 106 pages

----- Original Message -----
From: JDL [mailto:JDL@ftc.gov]
Sent: Sunday, January 06, 2013 09:08 PM Eastern Standard Time
To: Cohen, Bruce (Judiciary-Dem)
Subject: Hi Bruce,

Hope you had a wonderful recess and new year's.
Congrats, as well, that Chairman Leahy is staying on Judiciary. (Good for our Democracy and good for our Bruce Cohen!)
Two quick items:
1) on Google, I saw that PJL had put out a balanced statement but one that expressed "disappointment" for not codifying certain problematic practices in an order. I agree you almost always want orders but there was a reason we couldn't get one here--staff is briefing Aaron but let me know if you want me to call you.
2) Can I come by for coffee at some point in the next couple of weeks?
Best to ML, etc.
Jon
Sent by Jon Leibowitz from his BlackBerry

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Secretary

January 23, 2012

The Honorable Herb Kohl
Chairman
Subcommittee on Antitrust, Competition Policy
and Consumer Rights
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Thank you for the December 19, 2011, letter from you and Senator Lee to the Federal Trade Commission concerning the Commission investigation of certain practices of Google, Inc. We appreciate receiving the information that you have provided, including the discussion of several concerns raised at the September 21, 2011 Antitrust Subcommittee hearing on Google's business practices. You have asked the Commission to carefully review all that information, and have urged us to conduct a thorough investigation to determine whether Google may have violated the federal antitrust laws.

Your correspondence has been forwarded to the Commissioners and to appropriate members of the Commission staff for review. Although a number of statutory prohibitions and the Rules of the Commission prevent me from disclosing the contours of any nonpublic investigation, I am able to confirm that the Commission is conducting an investigation of Google because Google has publicly disclosed that fact.[1] I can also assure you that the information and concerns which you have forwarded are receiving careful consideration, and that the Commission is committed to conducting a thorough investigation, and to considering all pertinent information and views gathered, as we do in all our investigations.

Thank you again for your interest in these important issues. Protecting consumers from anticompetitive acts and practices in the marketplace is vital to our nation's economic health, and your ongoing vigilance is greatly appreciated. Members of the Commission staff will promptly publicize any public action which the Commission or its staff may take with respect to the Commission investigation. If you or your staff have any questions or wish to provide

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[1] *See Federal Trade Commission Policy Concerning Disclosures of Nonmerger Competition and Consumer Protection Investigations: Notice of Revised Policy*, 63 Fed. Reg. 63477 (Nov. 13, 1998); *see also Federal Trade Commission Notice of Policy of Disclosing Investigations of Announced Mergers: Notice of Revised Policy,* 62 Fed. Reg. 18630 (Apr. 16, 1997).

additional information or comments, please feel free to call or have your staff call Ms. Jeanne Bumpus, the Director of our Office of Congressional Relations, at (202) 326-2195. More generally, please let us know whenever we may be of service with respect to any other matter.

Sincerely,

Donald S. Clark
Secretary of the Commission

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Secretary

January 23, 2012

The Honorable Mike Lee
Ranking Member
Subcommittee on Antitrust, Competition Policy
and Consumer Rights
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Lee:

Thank you for the December 19, 2011, letter from you and Chairman Kohl to the Federal Trade Commission concerning the Commission investigation of certain practices of Google, Inc. We appreciate receiving the information that you have provided, including the discussion of several concerns raised at the September 21, 2011 Antitrust Subcommittee hearing on Google's business practices. You have asked the Commission to carefully review all that information, and have urged us to conduct a thorough investigation to determine whether Google may have violated the federal antitrust laws.

Your correspondence has been forwarded to the Commissioners and to appropriate members of the Commission staff for review. Although a number of statutory prohibitions and the Rules of the Commission prevent me from disclosing the contours of any nonpublic investigation, I am able to confirm that the Commission is conducting an investigation of Google because Google has publicly disclosed that fact.[1] I can also assure you that the information and concerns which you have forwarded are receiving careful consideration, and that the Commission is committed to conducting a thorough investigation, and to considering all pertinent information and views gathered, as we do in all our investigations.

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the Commission investigation. If you or your staff have any questions or wish to provide additional information or comments, please feel free to call or have your staff call Ms. Jeanne Bumpus, the Director of our Office of Congressional Relations, at (202) 326-2195. More generally, please let us know whenever we may be of service with respect to any other matter.

Sincerely,

Donald S. Clark

Donald S. Clark
Secretary of the Commission

Office of the Secretary

Correspondence Referral

Remember to Designate FOIA Status

Today's Date: 12/30/11

Reference Number: 14005402

Type of Response (or) Action:
Complaint

Date Forwarded:
12/30/11

Action: Secretary's Signature

Subject of Correspondence:
Google's search engine

Author:
Senator Herb Kohl
Senator Mike Lee

Representing:

Copies of Response To:
Office of Public Affairs (Press Office)
Office of the Executive Director
Office of the General Counsel
Office of the Secretary

Copies of Correspondence To:
Office of the Chairman
Office of Commissioner Kovacic
Office of Commissioner Rosch
Office of Commissioner Brill
Office of Commissioner Ramirez
Office of Congressional Relations - (0309)

Deadline:
01/13/12

Organization Assigned:
Policy and Coordination - BC

LOG

Date Received	FTC Org Code	Assignment To:	Date Assigned	Action Required
	1039	Alan J. Friedman		

EXPEDITE

United States Senate

COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510–6275

BRUCE A. COHEN, *Chief Counsel and Staff Director*
KOLAN L. DAVIS, *Republican Chief Counsel and Staff Director*

December 19, 2011

The Honorable Jonathan D. Leibowitz
Chairman
Federal Trade Commission
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580

Dear Chairman Leibowitz:

We are writing to you regarding our examination of competition concerns arising from the business practices of the world's leading Internet search engine, Google Inc. ("Google"). On September 21, 2011, we held an Antitrust Subcommittee hearing to examine allegations that Google's search engine is biased in favor of its own secondary products and services, undermining free and fair competition among e-commerce websites. While we take no position on the ultimate legality of Google's practices under the antitrust laws and the FTC Act, we believe these concerns warrant a thorough investigation by the FTC. We detail below a number of concerns raised at the hearing, in the course of our Subcommittee inquiry, and by a number of industry participants that we believe deserve careful review.

The Internet is a driving force of the American economy. Today, approximately 240 million people throughout the United States regularly use the Internet, and last year their activity generated nearly $170 billion in commerce. Recent studies show that 92% of adults online use search engines to access information on over one trillion websites. [1] Experts estimate that the number of Internet websites will continue to grow, making the role of Internet search engines ever more important for those seeking information or engaging in commerce online. In July 2011 alone, there were 17.1 billion search queries in the United States, up 3 percent from the previous month. Google is dominant in general Internet searches, with a 65 to 70 percent market share in computer-based Internet search, and a market share of at least 95 percent for Internet searches done on mobile devices. [2] Indeed, in response to Senator Kohl's question at our Subcommittee hearing to Google's Executive Chairman Eric Schmidt as to whether Google is a monopolist in online search, he responded, "I would agree, Senator, that we're in that area."[3]

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[1] Kristin Purcell, Pew Internet and American Life Project, Pew Research Center, *Search and Email Still Top the List of Most Popular Online Activities*, (2011), http://www.pewinternet.org/~/media//Files/Reports/2011/PIP_Search-and-Email.pdf.

[2] StatCounter Global States, Top Search Engines in the U.S. from Oct. 3 to Nov. 1, 2011, http://gs.statcounter.com/#search_engine-US-daily-20111003-20111101 (last visited Nov. 2, 2011).

[3] *The Power of Google: Serving Consumers or Threatening Competition? Before the Subcomm.on Antitrust, Competition Policy and Consumer Rights of S. Comm. on the Judiciary, 112th Cong., 1st Sess.* (September 21, 2011)

(continued...)

Google faces competition from only one general search engine, Bing, a partnership of Microsoft and Yahoo!, which is a distant second in market share and is losing an estimated $2 billion annually.[4] Given the scope of Google's market share in general Internet search, a key question is whether Google is using its market power to steer users to its own web products or secondary services and discriminating against other websites with which it competes.

Google began as a general Internet search engine, whose mission was simply to identify the web pages most relevant to user queries. Google's stated goal was to transfer users from its search results page to the websites listed on that page as soon as possible. As Google co-founder and current CEO Larry Page said at the time of its Initial Public Offering in 2004, "We want you to come to Google and quickly find what you want. Then we're happy to send you to the other sites. In fact, that's the point."[5] At that time, Google had very little, if any, web content or products of its own.

Google's business model has changed dramatically in recent years. Google now seeks not only to link users to relevant websites, but also to answer user queries, provide a variety of related services, and direct customers to additional information on its own secondary web pages. To do so, Google has made numerous acquisitions in recent years, purchasing a large amount of web-based content and various e-commerce products and services,[6] as well as developing such offerings on its own. Google now owns a large and growing array of search-dependent products and services (what are commonly known as "vertical search sites"), including Google Places/Local, Google Finance, Google News, YouTube, Google Maps, Google Travel, Google Flight Search, and Google Product Search. Google has been very successful in many of these areas, often replacing previous market leaders in short periods of time. Many question whether it is possible for Google to be both an unbiased general or "horizontal" search engine and at the same time own this array of secondary web-based services from which the company derives substantial advertising revenues.

Google's critics argue that given its acquisitions and development of these varied web products and services, Google has a strong incentive to bias its search results in favor of its own offerings. Rather than act as an honest broker of unbiased search results, Google's search results

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(hereinafter "*September 2011 Senate Antitrust Subcommittee Google Hearing*") (testimony of Eric Schmidt, Executive Chairman, Google). The precise question Mr. Schmidt was asked was "do [you] recognize that . . . your market share constitutes monopoly . . . dominant firm, monopoly firm? Do you recognize you're in that area?" Schmidt replied that he "would agree." However, in response to written questions for the record following the hearing, Mr. Schmidt revised this answer, stating: "[i]nferring that Google is in any way 'dominant' in search would be incorrect." (*September 2011 Senate Antitrust Subcommittee Google Hearing*) (response to post hearing question for the record from Sen. Richard Blumenthal to Eric Schmidt, Executive Chairman, Google, p. 2).

[4] David Goldman, *Microsoft's plan to stop Bing's $1 billion bleeding*, CNNMoney, Sept. 20, 2011, http://money.cnn.com/2011/09/20/technology/microsoft_bing/index.htm.

[5] Google Inc. Amendment 7 to SEC Form S-1, Appendix B, p. B-5, filed August 13, 2004. In the same document, Mr. Page re-emphasized this, contrasting his vision for Google at the time with the way web portals operated, stating "Most portals show their own content above other content elsewhere on the web. We feel that's a conflict of interest, analogous to taking money for search results. Their search engine doesn't necessarily provide the best results, it provides the portal's results. Google conscientiously tries to stay away from this. We want to get you out of Google and to the right place as fast as possible. It's a very different model."*Id.*, p. B-6.

[6] Google has made over 100 acquisitions since 2001, including: Motorola Mobility (2011) (still under Justice Department review), Zagat's (2011), Like.com (2010), ITA Software (2010), AdMob (2009), DoubleClick (2007), YouTube (2006), and Android (2005).

appear to favor the company's own web products and services.[7] Given Google's dominant market share in Internet search, any such bias or preferencing would raise serious questions as to whether Google is seeking to leverage its search dominance into adjacent markets, in a manner potentially contrary to antitrust law.

As discussed at our Subcommittee hearing, Marissa Mayer, Google's Vice President of Local, Maps, and Location Services, admitted in a 2007 speech that Google did in fact preference its own websites. She acknowledged that, in the past, Google ranked links "based on popularity . . . but when we roll[ed] out Google Finance, we did put the Google link first. It seems only fair, right? We do all the work for the search page and all these other things, so we do put it first... That has actually been our policy, since then . . . So for Google Maps again, it's the first link, so on and so forth. And after that it's ranked usually by popularity."[8] In response to written follow-up questions asking whether her statement was an accurate statement of Google policy, Eric Schmidt stated that "it is my understanding that she was referring to the placement of links within a onebox . . . and her description was accurate."[9] While the basis for Mr. Schmidt's "understanding" is not clear, even if her statement was in fact limited to the "onebox" result, this is a clear admission of preferencing Google results. As consumer surveys show that 88 percent of consumers click on one of the first three links, these statements appear significant when analyzing Google's potentially anti-competitive practices.[10]

Also at our Subcommittee hearing, Yelp! CEO Jeremy Stoppelman and Nextag CEO Jeffrey Katz testified that Google's practice of favoring its own content harms them directly by depriving their sites of user traffic and advertising revenue. Mr. Stoppelman testified that 75 percent of Yelp!'s web traffic consists of consumers who find its website as a result of Google searches, and Mr. Katz testified that 65 percent of Nextag's traffic originates from Google searches.[11] They testified that losing this traffic would threaten the continued viability of their companies, which would have to spend much more on advertising to make up for lost traffic coming from Google queries. Indeed, both CEOs testified that they would not attempt to launch

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[7] Google critics also argue that the very layout of the Google search results first page is biased in favor of its own products and services. They point to the amount of the "real estate" in the search result page devoted to Google content, including paid advertising at the top and on the right of the page, and the Google "places" or "onebox" results, which are not designated as Google results separate from the algorithmic results. Consumers have no way of knowing that these one box results are not part of the algorithmic results. We believe, under the FTC's mandate to protect consumers from misleading and deceptive practices, the FTC should seriously consider requiring Google to label its "onebox" or "places" listing (or other similar listings), as Google products, just as it labels paid search results.

[8] Marissa Mayer, Google VP of Local, Maps, and Location Services Address at the Google Seattle Conference on Scalability (June 23, 2007), http://video.google.com/videoplay?docid=-6304964351441328559#docid=-7039469220993285507.

[9] *September 2011 Senate Antitrust Subcommittee Google Hearing* (response to post hearing question for the record from Sen. Herb Kohl to Eric Schmidt, Executive Chairman, Google, question 1(a), p. 2).

[10] *See* SEO Scientist, *Google Ranking and CTR – How Clicks Distribute Over Different Rankings on Google* (July 12, 2009), http://www.seo-scientist.com/google-ranking-ctr-click-distribution-over-serps.html.

[11] *September 2011 Senate Antitrust Subcommittee Google Hearing* (testimony of Jeremy Stoppelman, CEO of Yelp!, and Jeremy Katz, CEO of Nextag).

their companies today given Google's current practices, raising serious concerns about the impact of these practices on innovation.[12]

Mr. Katz and others also allege that Google sometimes subjects websites to "search penalties" that drastically lower where links to these websites are found on Google searches. Although there are valid reasons for instituting such penalties—such as for websites that promote illegal activities, or for sites that are fraudulent or pornographic—observers suggest that some sites are penalized only because they compete with Google. According to Mr. Katz, Google informed him that Nextag's sites in Europe were penalized mainly because they offered links to other sites and search functionality. Of course, websites that link to other sites and allow users to perform searches have an almost identical function as the Google search engine. If these allegations are true, they raise serious questions as to whether Google is penalizing these competing websites simply in order to maintain its dominant market share in Internet search.

The importance of Google search result rankings for competing web-based products and services is underscored when one considers the market share of Google's search engine on mobile devices. Google has a 97 percent market share of Internet searches done on mobile devices (such as smart phones, tablet computers and the like).[13] Given the exploding consumer demand for these devices, it is projected that over half of all Internet searches will be done on mobile devices by 2014.[14] Additionally, Google owns the popular Android operating system for smart phones and in September 2011 announced its acquisition of Motorola Mobility, a leading mobile phone manufacturer. The Android operating system has grown rapidly in a few short years and is now installed in 43 percent of these smart phones, with expectations of further increases in market share in the near future.[15] Industry observers have raised concerns that Google may, as a condition of access to the Android operating system, require phone manufacturers to install Google as the default search engine. In response to written questions after our hearing, Google denied that it presently makes this demand, suggesting that manufacturers are free to install any search engine they wish.[16] Yet Google has been unwilling to provide any assurance that it will not adopt such a policy in the future. We urge that your investigation consider all avenues necessary to ensure robust competition in the mobile Internet search market.

In sum, it appears the issues raised at our Subcommittee hearing merit serious scrutiny by the FTC. It is important to note that the concerns expressed in this letter are not an effort to protect any specific competitor. Rather, our interest is to ensure robust competition in this vital market. We recognize that the Internet is fast evolving and subject to rapid technological change. We are motivated by a strong desire to protect the Internet's openness, competitiveness, and capacity for innovation. Critics contend that Google's efforts to favor its own secondary

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[12] *Id.*

[13] Greg Sterling, *Google Controls 97% of the Mobile Paid Search: Report*, Search Engine Land (Mar. 7, 2011).

[14] Morgan Stanley, *The Mobile Internet Report*, http://www.morganstanley.com/institutional/techresearch/mobile_internet_report122009.html.

[15] Don Kellogg, *40 Percent of U.S. Mobile Users Own Smartphones; 40 Percent are Android*, NielsenWire (Sept. 1, 2011), http://blog.nielsen.com/nielsenwire/online_mobile/40-percent-of-u-s-mobile-users-own-smartphones-40-percent-are-android/.

[16] *September 2011 Senate Antitrust Subcommittee Google Hearing* (response to post hearing question for the record from Sen. Herb Kohl to Eric Schmidt, Executive Chairman, Google, p. 10).

offerings threaten to retard the development of new innovative products and services on the Internet. They argue that if new web products and services are downgraded on Internet search listings, they will not receive the traffic or advertising revenues necessary to survive, and venture capitalists will not invest in developing innovative alternatives. According to Tom Barnett, the Assistant Attorney General for Antitrust in the administration of President George W. Bush, the ultimate result of Google's practices will be an Internet with fewer choices for consumers and businesses, higher prices, and less innovation.

Google strongly denies the arguments of its critics. Google claims it has done nothing to harm competition and that it merely seeks to serve consumers with the best Internet search results. Competition, it contends, is just "one click away," and Google does nothing to impede consumers' access to this competition.

Nonetheless, for the reasons explained above and from the testimony at our Subcommittee hearing, we believe these allegations regarding Google's search engine practices raise important competition issues. We are committed to ensuring that consumers benefit from robust competition in online search and that the Internet remains the source of much free-market innovation. We therefore urge the FTC to investigate the issues raised at our Subcommittee hearing to determine whether Google's actions violate antitrust law or substantially harm consumers or competition in this vital industry.[17]

Thank you for your attention to this matter.

Sincerely,

14005402

Herb Kohl

HERB KOHL
Chairman, Subcommittee on
Antitrust, Competition Policy
and Consumer Rights

MIKE LEE
Ranking Member, Subcommittee on
Antitrust, Competition Policy
and Consumer Rights

[17] In this regard, we note that several state antitrust regulators have begun investigating allegations that Google is engaged in anti-competitive practices. In the fall of 2010, Texas was the first state to formally begin an investigation; and more recently, attorneys general in New York, California, Ohio, Mississippi, and Oklahoma have opened full-scale investigations. Overseas, the European Commission is in its second year of its investigation, saying it is looking into whether Google might be giving its web services "preferential placement" in search results.

Office of the Secretary

Correspondence Referral

Remember to Designate FOIA Status

Today's Date: 12/11/12

Reference Number: 14007580

Type of Response (or) Action:
Complaint

Date Forwarded:
12/11/12

Action: Chairman's Signature

Subject of Correspondence:
Google Investigations

Author:

Copies of Correspondence To:
Office of the Chairman
Office of Commissioner Ohlhausen
Office of Commissioner Rosch
Office of Commissioner Brill
Office of Commissioner Ramirez
Office of Public Affairs (Press Office)

Representing:

Copies of Response To:
Office of Congressional Relations - (0309)
Office of the Executive Director
Office of the General Counsel
Office of the Secretary

Deadline:
12/28/12

Organization Assigned:

ACTION LOG

Date Received	FTC Org Code	Assignment To:	Date Assigned	Action Required
		Rachel Miller Dawson		

EXPEDITE

DIANNE FEINSTEIN
CALIFORNIA

SELECT COMMITTEE ON INTELLIGENCE - CHAIRMAN
COMMITTEE ON APPROPRIATIONS
COMMITTEE ON THE JUDICIARY
COMMITTEE ON RULES AND ADMINISTRATION

United States Senate
WASHINGTON, DC 20510-0504
http://feinstein.senate.gov

December 11, 2012

The Honorable Jon Leibowitz
Chairman, Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Dear Chairman Leibowitz:

I write to express my deep concern that possible actions by Federal Trade Commission against Google, Inc. are consistently being leaked to the press. As I hope you know, the Commission's Operating manual provides in Chapter 3.1.2.3 that:

> Unless otherwise directed by the Commission, all investigations are nonpublic. Accordingly, the existence of the investigation, the identity of the parties or practices under investigation, [and] the facts developed in the investigation . . . can be disclosed only in accordance with the Commission's directives and procedures for the disclosure of information . . .

However, notwithstanding this prohibition, there appears to have been a lengthy series of leaks coming from the Commission about what should be, according to the policy above, a nonpublic investigation of Google, including:

- A June 29, 2012 Bloomberg article that discusses a Commission probe of Google subsidiary Motorola Mobility's handling of "standard essential patents", including allocation of responsibility between the Justice Department and the FTC for handling investigations of Samsung Electronics and Google, respectively. The "person familiar with the matter" that was the source did not know the status of the Justice investigation, but did know the FTC's status.

- An August 30, 2012 Bloomberg article relied on "four people familiar with the matter" of an FTC antitrust investigation of Google, who discussed the

timing of a presentation by FTC staff to the commissioners, and the staff's probable recommendation. Three of these people also spoke of the FTC's awareness of Google's proposal to European Commission antitrust authorities.

- An October 1, 2012 Mlex article states that Commissioner Rosch and yourself are pushing for a conclusion of the investigation of Google. The article describes a staff briefing the commissioners received in mid-September, and the commissioners' directions back to the Bureau of Competition.

- An October 12, 2012 Reuters article reported that four of the five FTC commissioners support bringing an antitrust case against Google, and that the fifth is "skeptical"; the story cites "three people familiar with the matter."

- An October 13, 2012 Bloomberg article discusses "an internal draft memo that recommends suing Google Inc." regarding search-related issues that FTC investigators are circulating. It describes the length and content of this memo. It further relays that "A majority of commissioners, including FTC Chairman Jon Leibowitz, have expressed concerns internally about Google's practices, and are deciding how to proceed, two of the [unnamed] people said." The article also discusses various possible bases for action against Google that the commission is considering, civil investigative demands that were issued to Google, and the FTC's purpose in issuing these demands.

- On October 18, 2012, the New York Post reported about charges that the FTC soon will bring against Google, citing "a source close to the situation." The source discusses the direction of the investigation, the basis for the charges, and the likely FTC action.

- A November 2, 2012 Bloomberg article reported on FTC staff recommendations to the commissioners about the Motorola Mobility patent issues, and that "A majority of the agency's five commissioners are inclined to sue," citing "four people familiar with the matter."

- Finally, a November 14, 2012 article in the Policy and Regulatory Report/Financial Times explicitly cites "two FTC lawyers" among other sources in reporting on the FTC's strategy in the "Big Google" case. These

FTC lawyers are explicitly (although anonymously) cited in discussions of various strategies for and bases for a case against Google.

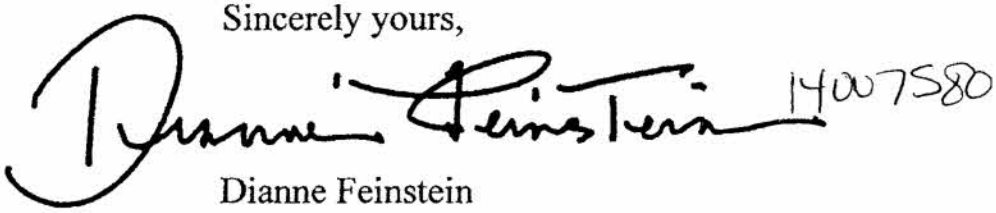
There is a belief that competitors of Google are in the process of manipulating legislative and regulatory actions against Google, to try to gain advantages against the company that they have been unable to obtain in the free marketplace. I have no way of knowing whether this is true or not, but it is a concern that I wanted to relay to you.

Google is a major California company, that employs thousands of Californians. They are subject to fierce competition in the marketplace, most or all of which is accessible with the click of a mouse. It is important that they be treated fairly in a government investigation, and not be subjected to a constant, one-sided assault of selective leaks to the press.

According to these media reports, this investigation has been going on for a year and a half. I hope that, out of fairness to the company, any investigation can be wrapped up and resolved one way or another in a reasonable time, and that the leaks will stop.

Thank you for your attention, and may I take this opportunity to wish you and your family a wonderful holiday season.

Sincerely yours,



Dianne Feinstein
United States Senator

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Secretary

December 5, 2011

The Honorable Herb Kohl
Chairman
Subcommittee on Antitrust, Competition Policy and Consumer Rights
Committee on the Judiciary
United States Senate
Washington, DC 20510-6275

Dear Chairman Kohl:

Thank you for your letter dated November 18, 2011, requesting a confidential staff briefing on the agency's investigation into Google, Inc.'s search engine practices. The Commission is responding to your request as an official request of a Congressional Subcommittee, *see* Commission Rule 4.11(b), 16 C.F.R. § 4.11(b), and has authorized its staff to provide the requested briefing.

Most of the information that the Commission attorneys will discuss during the briefing is nonpublic and statutorily protected from public disclosure by the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 41 *et seq.*, as well as exempt from mandatory disclosure under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. In particular, some of the information would be protected under Section 6(f) of the FTC Act, 15 U.S.C. § 46(f), as confidential commercial or financial information. The Commission is prohibited from disclosing such information publicly, and it would be exempt from disclosure under FOIA Exemption 3, 5 U.S.C. § 552(b)(3). Because disclosure of this information is likely to result in substantial competitive harm to the submitters, or is clearly not of a kind that submitters would customarily make available to the public, it would be exempt from disclosure under FOIA Exemption 4, 5 U.S.C. § 552(b)(4). *See Critical Mass Energy Project v. NRC*, 975 F.2d 871, 877-80 (D.C. Cir. 1992) (*en banc*), *cert. denied*, 507 U.S. 984 (1993) (exempt status accorded to information submitted voluntarily); *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) (exempt status accorded to information submitted under compulsion).

Most of the information that the Commission attorneys will discuss was obtained by compulsory process or provided voluntarily in lieu thereof in a law enforcement investigation. Such information is protected from public disclosure under Section 21(f) of the FTC Act, 15 U.S.C. § 57b-2(f). By virtue of that section, such information is also exempt from public disclosure under FOIA Exemption 3(B), 5 U.S.C. § 552(b)(3)(B). *McDermott v. FTC*, 1981-1 Trade Cas. (CCH) ¶ 63,964 at 75,982-3 (D.D.C. April 13, 1981); *Dairymen, Inc. v. FTC*, 1980-2

Trade Cas. (CCH) ¶ 63,479 (D.D.C. July 9, 1980). Moreover, third party submitters provided their materials and information with a specific request for confidential treatment under Section 21 (c)) of the FTC Act, 15 U.S.C. § 57b-2(c)). Under Commission Rule 4.10(d), 16 C.F.R. § 4.10(d), the Commission has waived its discretion to release to the public materials submitted pursuant to compulsory process or materials submitted voluntarily in lieu of process that have been marked confidential by the submitting parties.[1]

Additional information that may be discussed during the briefing was submitted in response to the Hart-Scott-Rodino premerger notification requirements of the Clayton Act, 15 U.S.C. § 18a. Section 7A(h) of the Act prohibits public disclosure of such documents or information. By virtue of this statutory prohibition, this information is also exempt from disclosure under Freedom of Information Act (FOIA) Exemption 3A, 5 U.S.C. § 552(b)(3)(A).[2]

Further, information discussed during the briefing would reveal the existence of, and information concerning, an ongoing, nonpublic law enforcement investigation. Disclosure of this information could reasonably be expected to interfere with law enforcement proceedings, and this information is therefore protected from mandatory public disclosure by FOIA Exemption 7(A), 5 U.S.C. § 552(b)(7)(A). *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 232 (1978); *Ehringhaus v. FTC*, 525 F. Supp. 21, 24 (D.D.C. 1980).

Finally, some of the information that will be discussed during the briefing will include internal staff analyses and recommendations, which are predecisional, deliberative materials exempt from mandatory public disclosure under FOIA Exemption 5, 5 U.S.C. § 552(b)(5). *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975); *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). Some of this information may also be protected from mandatory public disclosure under FOIA Exemption 5 as attorney work product prepared in anticipation of litigation. *FTC v. Grolier, Inc.*, 462 U.S. 19, 28 (1983); *Martin v. Office of Special Counsel, Merit Systems Protection Board*, 819 F.2d 1181, 1187 (D.C. Cir. 1987).

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[1] The Commission is required to notify persons who submitted information pursuant to compulsory process in a law enforcement investigation, or voluntarily in lieu thereof on a confidential basis, if the Commission receives a request from a Congressional Committee or Subcommittee for that information. *See* 15 U.S.C. §§ 57b-2(b)(3)(C), 57b-2(d)(1)(A); Commission Rule 4.11(b), 16 C.F.R. § 4.11(b). Staff is providing the requisite notice.

[2] The Commission has instructed its staff to provide reasonable notice, when possible, of the release to Congress of information submitted pursuant to HSR. *See Statement of Basis and Purpose of HSR Rules and Regulations*, 43 Fed. Reg. 33519 (July 31, 1978). Staff has provided notice to submitters pursuant to this policy.

Notwithstanding the protected status of most of the responsive information, the FTC Act, 15 U.S.C. § 57b-2(d)(1)(A), the Clayton Act, 15 U.S.C. § 18a(h), and the FOIA, 5 U.S.C. § 552(d), provide no authority to withhold such information from this Congressional Subcommittee, and the Commission has authorized staff to provide the requested briefing to Subcommittee staff. Because the confidential information would not be available to the public under the FOIA or otherwise, the Commission requests that the Subcommittee maintain its confidentiality.

By direction of the Commission.

Donald S. Clark
Secretary

Office of the Secretary

Correspondence Referral

Remember to Designate FOIA Status

Today's Date: 11/21/11

Reference Number: 14005166

Type of Response (or) Action:
Complaint

Date Forwarded:
11/21/11

Action: Secretary's Signature

Subject of Correspondence:
confidential briefing about FTC's antitrust investigation into Google's search engine practices

Author:
Senator Herb Kohl

Representing:

Copies of Response To:
Office of the Chairman
Office of the Executive Director
Office of the General Counsel
Office of the Secretary

Copies of Correspondence To:
Office of Commissioner Kovacic
Office of Commissioner Rosch
Office of Commissioner Brill
Office of Commissioner Ramirez
Office of Public Affairs (Press Office)
Office of Congressional Relations - (0309)

Deadline:
12/06/11

Organization Assigned:
Policy and Coordination - BC

ACTION LOG

Date Received	FTC Org Code	Assignment To:	Date Assigned	Action Required
	1039	Alan J. Friedman		

EXPEDITE

14005166

United States Senate

COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510–6275

November 18, 2011

The Honorable Jon Leibowitz
Chairman, Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Suite 444
Washington, DC 20580

Dear Chairman Leibowitz:

I am writing to request that knowledgeable members of the FTC staff provide our Subcommittee staff with a confidential briefing about the FTC's antitrust investigation into Google's search engine practices.

I understand the sensitivity of discussing pending investigations. Therefore, my staff and I will ensure that any non-public information that your staff provides during the briefing will not be shared with anyone outside the Subcommittee. If you require further confidentiality assurances, we will do our best to accommodate you.

Thank you very much for your assistance in this matter.

Respectfully yours,

Herb Kohl

HERB KOHL
Chairman
Subcommittee on Antitrust, Competition Policy and Consumer Rights

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Secretary

October 19, 2012

The Honorable Herb Kohl
Chairman
Subcommittee on Antitrust, Competition Policy
and Consumer Rights
Committee on the Judiciary
United States Senate
Washington, DC 20510-6275

Dear Chairman Kohl:

Thank you for your letter dated October 17, 2012, requesting a confidential staff briefing on the agency's investigations into allegations that Google, Inc. has been engaged in anticompetitive conduct. The Commission is responding to your request as an official request of a Congressional Subcommittee, *see* Commission Rule 4.11(b), 16 C.F.R. § 4.11(b), and has authorized its staff to provide the requested briefing.

Most of the information that the Commission attorneys will discuss during the briefing is nonpublic and statutorily protected from public disclosure by the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 41 *et seq.*, as well as exempt from mandatory disclosure under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. In particular, some of the information would be protected under Section 6(f) of the FTC Act, 15 U.S.C. § 46(f), as confidential commercial or financial information. The Commission is prohibited from disclosing such information publicly, and it would be exempt from disclosure under FOIA Exemption 3, 5 U.S.C. § 552(b)(3). Because disclosure of this information is likely to result in substantial competitive harm to the submitters, or is clearly not of a kind that submitters would customarily make available to the public, it would be exempt from disclosure under FOIA Exemption 4, 5 U.S.C. § 552(b)(4). *See Critical Mass Energy Project v. NRC*, 975 F.2d 871, 877-80 (D.C. Cir. 1992) (*en banc*), *cert. denied*, 507 U.S. 984 (1993) (exempt status accorded to information submitted voluntarily); *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) (exempt status accorded to information submitted under compulsion).

Most of the information that the Commission attorneys will discuss was obtained by compulsory process or provided voluntarily in lieu thereof in a law enforcement investigation. Such information is protected from public disclosure under Section 21(f) of the FTC Act, 15 U.S.C. § 57b-2(f). By virtue of that section, such information is also exempt from public

disclosure under FOIA Exemption 3(B), 5 U.S.C. § 552(b)(3)(B). *McDermott v. FTC*, 1981-1 Trade Cas. (CCH) ¶ 63,964 at 75,982-3 (D.D.C. April 13, 1981); *Dairymen, Inc. v. FTC*, 1980-2 Trade Cas. (CCH) ¶ 63,479 (D.D.C. July 9, 1980). Moreover, third party submitters provided their materials and information with a specific request for confidential treatment under Section 21 (c)) of the FTC Act, 15 U.S.C. § 57b-2(c)). Under Commission Rule 4.10(d), 16 C.F.R. § 4.10(d), the Commission has waived its discretion to release to the public materials submitted pursuant to compulsory process or materials submitted voluntarily in lieu of process that have been marked confidential by the submitting parties.[1]

Additional information that may be discussed during the briefing was submitted in response to the Hart-Scott-Rodino premerger notification requirements of the Clayton Act, 15 U.S.C. § 18a. Section 7A(h) of the Act prohibits public disclosure of such documents or information. By virtue of this statutory prohibition, this information is also exempt from disclosure under Freedom of Information Act (FOIA) Exemption 3A, 5 U.S.C. § 552(b)(3)(A).[2]

Further, information discussed during the briefing would reveal the existence of, and information concerning, ongoing, nonpublic law enforcement investigations. Disclosure of this information could reasonably be expected to interfere with law enforcement proceedings, and this information is therefore protected from mandatory public disclosure by FOIA Exemption 7(A), 5 U.S.C. § 552(b)(7)(A). *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 232 (1978); *Ehringhaus v. FTC*, 525 F. Supp. 21, 24 (D.D.C. 1980).

Finally, some of the information that will be discussed during the briefing will include internal staff analyses and recommendations, which are predecisional, deliberative materials exempt from mandatory public disclosure under FOIA Exemption 5, 5 U.S.C. § 552(b)(5). *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975); *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). Some of this information may also be protected from mandatory public disclosure under FOIA Exemption 5 as attorney work product prepared in anticipation of litigation. *FTC v. Grolier, Inc.*, 462 U.S. 19, 28 (1983); *Martin v. Office of Special Counsel, Merit Systems Protection Board*, 819 F.2d 1181, 1187 (D.C. Cir. 1987).

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[1] The Commission is required to notify persons who submitted information pursuant to compulsory process in a law enforcement investigation, or voluntarily in lieu thereof on a confidential basis, if the Commission receives a request from a Congressional Committee or Subcommittee for that information. *See* 15 U.S.C. §§ 57b-2(b)(3)(C), 57b-2(d)(1)(A); Commission Rule 4.11(b), 16 C.F.R. § 4.11(b). Staff is providing the requisite notice.

[2] The Commission has instructed its staff to provide reasonable notice, when possible, of the release to Congress of information submitted pursuant to HSR. *See Statement of Basis and Purpose of HSR Rules and Regulations*, 43 Fed. Reg. 33519 (July 31, 1978). Staff has provided notice to submitters pursuant to this policy.

Notwithstanding the protected status of most of the responsive information, the FTC Act, 15 U.S.C. § 57b-2(d)(1)(A), the Clayton Act, 15 U.S.C. § 18a(h), and the FOIA, 5 U.S.C. § 552(d), provide no authority to withhold such information from this Congressional Subcommittee, and the Commission has authorized staff to provide the requested briefing to Subcommittee staff. Because the confidential information would not be available to the public under the FOIA or otherwise, the Commission requests that the Subcommittee maintain its confidentiality.

By direction of the Commission.

Donald S. Clark
Secretary

Office of the Secretary

Correspondence Referral

Remember to Designate FOIA Status

Today's Date: 10/17/12

Reference Number: 14007131

Type of Response (or) Action:
Complaint

Date Forwarded:
09/21/12

Action: Secretary's Signature

Subject of Correspondence:
Request for Confidential Staff Briefing on Google's Anticompetitive Practices

Author:
Senator Herb Kohl

Representing:

Copies of Response To:
Office of Public Affairs (Press Office)
Office of Congressional Relations - (0309)
Office of the General Counsel
Office of the Secretary

Copies of Correspondence To:
Office of the Chairman
Office of Commissioner Ohlhausen
Office of Commissioner Rosch
Office of Commissioner Brill
Office of Commissioner Ramirez
Office of the Executive Director

Deadline:
10/05/12

Organization Assigned:
Policy and Coordination - BC

ACTION LOG

Date Received	FTC Org Code	Assignment To:	Date Assigned	Action Required
	1039	Alan J. Friedman		

EXPEDITE

7131

HERB KOHL
WISCONSIN

WASHINGTON OFFICE:
330 HART SENATE OFFICE BUILDING
WASHINGTON, DC 20510
(202) 224-5653
http://kohl.senate.gov/

United States Senate

WASHINGTON, DC 20510-4903

COMMITTEES:

APPROPRIATIONS

JUDICIARY

SPECIAL COMMITTEE
ON AGING

October 17, 2012

The Honorable Jon Leibowitz
Chairman, Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Suite 444
Washington, DC 20580

Dear Chairman Leibowitz:

I am writing to request that knowledgeable members of the FTC staff provide our Subcommittee staff with a confidential briefing about the FTC's antitrust investigations into allegations that Google has been engaged in anticompetitive conduct.

I understand the sensitivity of discussing pending investigations. Therefore, my staff and I will ensure that any non-public information that your staff provides during the briefing will not be shared with anyone outside the Subcommittee. If you require further confidentiality assurances, we will do our best to accommodate you.

Thank you very much for your assistance in this matter.

Respectfully yours,

Herb Kohl

HERB KOHL
Chairman
Subcommittee on Antitrust, Competition Policy and Consumer Rights

MILWAUKEE OFFICE:
310 WEST WISCONSIN AVENUE
SUITE 950
MILWAUKEE, WI 53203
(414) 297-4451
T.T.Y. (414) 297-4485

MADISON OFFICE:
14 WEST MIFFLIN STREET
SUITE 207
MADISON, WI 53703
(608) 264-5338

EAU CLAIRE OFFICE:
402 GRAHAM AVENUE
SUITE 206
EAU CLAIRE, WI 54701
(715) 832-8424

APPLETON OFFICE:
4321 WEST COLLEGE AVENUE
SUITE 370
APPLETON, WI 54914
(920) 738-1640

LA CROSSE OFFICE:
205 5TH AVENUE SOUTH
SUITE 216
LA CROSSE, WI 54601
(608) 796-0045

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Secretary

September 13, 2011

The Honorable Herb Kohl
Chairman
Subcommittee on Antitrust, Competition Policy and Consumer Rights
Committee on the Judiciary
United States Senate
Washington, DC 20510-6275

Dear Chairman Kohl:

Thank you for your letter dated September 7, 2011, requesting a confidential staff briefing on the agency's investigation into Google, Inc.'s search engine practices. The Commission is responding to your request as an official request of a Congressional Subcommittee, *see* Commission Rule 4.11(b), 16 C.F.R. § 4.11(b), and has authorized its staff to provide the requested briefing.

Most of the information that the Commission attorneys will discuss during the briefing is nonpublic and statutorily protected from public disclosure by the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 41 *et seq.*, as well as exempt from mandatory disclosure under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. In particular, some of the information would be protected under Section 6(f) of the FTC Act, 15 U.S.C. § 46(f), as confidential commercial or financial information. The Commission is prohibited from disclosing such information publicly, and it would be exempt from disclosure under FOIA Exemption 3, 5 U.S.C. § 552(b)(3). Because disclosure of this information is likely to result in substantial competitive harm to the submitters, or is clearly not of a kind that submitters would customarily make available to the public, it would be exempt from disclosure under FOIA Exemption 4, 5 U.S.C. § 552(b)(4). *See Critical Mass Energy Project v. NRC*, 975 F.2d 871, 877-80 (D.C. Cir. 1992) (*en banc*), *cert. denied*, 507 U.S. 984 (1993) (exempt status accorded to information submitted voluntarily); *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) (exempt status accorded to information submitted under compulsion).

Most of the information that the Commission attorneys will discuss was obtained by compulsory process or provided voluntarily in lieu thereof in a law enforcement investigation. Such information is protected from public disclosure under Section 21(f) of the FTC Act, 15 U.S.C. § 57b-2(f). By virtue of that section, such information is also exempt from public disclosure under FOIA Exemption 3(B), 5 U.S.C. § 552(b)(3)(B). *McDermott v. FTC*, 1981-1 Trade Cas. (CCH) ¶ 63,964 at 75,982-3 (D.D.C. April 13, 1981); *Dairymen, Inc. v. FTC*, 1980-2

Trade Cas. (CCH) ¶ 63,479 (D.D.C. July 9, 1980). Moreover, third party submitters provided their materials and information with a specific request for confidential treatment under Section 21(c) of the FTC Act, 15 U.S.C. § 57b-2(c). Under Commission Rule 4.10(d), 16 C.F.R. § 4.10(d), the Commission has waived its discretion to release to the public materials submitted pursuant to compulsory process or materials submitted voluntarily in lieu of process that have been marked confidential by the submitting parties.[1]

Additional information that may be discussed during the briefing was submitted in response to the Hart-Scott-Rodino premerger notification requirements of the Clayton Act, 15 U.S.C. § 18a. Section 7A(h) of the Act prohibits public disclosure of such documents or information. By virtue of this statutory prohibition, this information is also exempt from disclosure under Freedom of Information Act (FOIA) Exemption 3A, 5 U.S.C. § 552(b)(3)(A).[2]

Further, information discussed during the briefing would reveal the existence of, and information concerning, an ongoing, nonpublic law enforcement investigation. Disclosure of this information could reasonably be expected to interfere with law enforcement proceedings, and this information is therefore protected from mandatory public disclosure by FOIA Exemption 7(A), 5 U.S.C. § 552(b)(7)(A). *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 232 (1978); *Ehringhaus v. FTC*, 525 F. Supp. 21, 24 (D.D.C. 1980).

Finally, some of the information that will be discussed during the briefing will include internal staff analyses and recommendations, which are predecisional, deliberative materials exempt from mandatory public disclosure under FOIA Exemption 5, 5 U.S.C. § 552(b)(5). *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975); *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). Some of this information may also be protected from mandatory public disclosure under FOIA Exemption 5 as attorney work product prepared in anticipation of litigation. *FTC v. Grolier, Inc.*, 462 U.S. 19, 28 (1983); *Martin v. Office of Special Counsel, Merit Systems Protection Board*, 819 F.2d 1181, 1187 (D.C. Cir. 1987).

---

[1] The Commission is required to notify persons who submitted information pursuant to compulsory process in a law enforcement investigation, or voluntarily in lieu thereof on a confidential basis, if the Commission receives a request from a Congressional Committee or Subcommittee for that information. *See* 15 U.S.C. §§ 57b-2(b)(3)(C), 57b-2(d)(1)(A); Commission Rule 4.11(b), 16 C.F.R. § 4.11(b). Staff is providing the requisite notice.

[2] The Commission has instructed its staff to provide reasonable notice, when possible, of the release to Congress of information submitted pursuant to HSR. *See Statement of Basis and Purpose of HSR Rules and Regulations*, 43 Fed. Reg. 33519 (July 31, 1978). Staff has provided notice to submitters pursuant to this policy.

Notwithstanding the protected status of most of the responsive information, the FTC Act, 15 U.S.C. § 57b-2(d)(1)(A), the Clayton Act, 15 U.S.C. § 18a(h), and the FOIA, 5 U.S.C. § 552(d), provide no authority to withhold such information from this Congressional Subcommittee, and the Commission has authorized staff to provide the requested briefing to Subcommittee staff. Because the confidential information would not be available to the public under the FOIA or otherwise, the Commission requests that the Subcommittee maintain its confidentiality.

By direction of the Commission.

Donald S. Clark
Secretary

Office of the Secretary

Correspondence Referral

Remember to Designate FOIA Status

Today's Date: 09/09/11

Reference Number: 14004739

Type of Response (or) Action:
Complaint

Date Forwarded:
09/09/11

Action: Chairman's Signature

Subject of Correspondence:
Nonpublic Briefing Request Re Google Investigation

Author:
Senator Herb Kohl

Representing:

Copies of Response To:
Office of the Chairman
Office of the Executive Director
Office of the General Counsel
Office of the Secretary

Copies of Correspondence To:
Office of Commissioner Kovacic
Office of Commissioner Rosch
Office of Commissioner Brill
Office of Commissioner Ramirez
Office of Public Affairs (Press Office)
Office of Congressional Relations - (0309)

Deadline:
09/15/11

Organization Assigned:
Policy and Coordination - BC

ACTION LOG

Date Received	FTC Org Code	Assignment To:	Date Assigned	Action Required
	1039	Alan J. Friedman		

EXPEDITE

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510–6275

September 7, 2011

The Honorable Jon Leibowitz
Chairman, Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Suite 444
Washington, DC 20580

Dear Chairman Leibowitz:

I am writing to request that knowledgeable members of the FTC staff provide our Subcommittee staff with a confidential briefing about the FTC's antitrust investigation into Google's search engine practices.

I understand the sensitivity of discussing pending investigations. Therefore, my staff and I will ensure that any non-public information that your staff provides during the briefing will not be shared with anyone outside the Subcommittee. If you require further confidentiality assurances, we will do our best to accommodate you.

Thank you very much for your assistance in this matter.

Respectfully yours,

Herb Kohl

HERB KOHL
Chairman
Subcommittee on Antitrust, Competition Policy and Consumer Rights

HERB KOHL
WISCONSIN

WASHINGTON OFFICE:
330 HART SENATE OFFICE BUILDING
WASHINGTON, DC 20510
(202) 224-5653
http://kohl.senate.gov/

United States Senate

WASHINGTON, DC 20510-4903

COMMITTEES:

APPROPRIATIONS

JUDICIARY

SPECIAL COMMITTEE
ON AGING

September 21, 2012

The Honorable Jon Leibowitz
Chairman, Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Suite 444
Washington, DC 20580

Dear Chairman Leibowitz:

I am writing to request that knowledgeable members of the FTC staff provide our Subcommittee staff with a confidential briefing about the FTC's antitrust investigation into allegations that Google has been engaged in anticompetitive conduct with respect to Internet search, and related issues.

I understand the sensitivity of discussing pending investigations. Therefore, my staff and I will ensure that any non-public information that your staff provides during the briefing will not be shared with anyone outside the Subcommittee. If you require further confidentiality assurances, we will do our best to accommodate you.

Thank you very much for your assistance in this matter.

Respectfully yours,

Herb Kohl

1400131

HERB KOHL
Chairman
Subcommittee on Antitrust, Competition Policy and Consumer Rights

MILWAUKEE OFFICE:
310 WEST WISCONSIN AVENUE
SUITE 950
MILWAUKEE, WI 53203
(414) 297-4451
T.T.Y. (414) 297-4485

MADISON OFFICE:
14 WEST MIFFLIN STREET
SUITE 207
MADISON, WI 53703
(608) 264-5338

EAU CLAIRE OFFICE:
402 GRAHAM AVENUE
SUITE 206
EAU CLAIRE, WI 54701
(715) 832-8424

APPLETON OFFICE:
4321 WEST COLLEGE AVENUE
SUITE 370
APPLETON, WI 54914
(920) 738-1640

LA CROSSE OFFICE:
205 5TH AVENUE SOUTH
SUITE 216
LA CROSSE, WI 54601
(608) 796-0045

Blank, Barbara

From: Levitas, Pete
Sent: Friday, November 04, 2011 12:37 PM
To: Blank, Barbara
Subject: FW: 09-21-11 Google Hearing -Schmidt Responses
Attachments: Schmidt Responses to Blumenthal.pdf; Schmidt Responses to Cornyn.pdf; Schmidt Responses to Franken.pdf; Schmidt Responses to Grassley.pdf; Schmidt Responses to Kohl.pdf; Schmidt Responses to Lee.pdf

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From: Bloom, Seth (Judiciary-Dem) [mailto:Seth_Bloom@Judiciary-dem.senate.gov]
Sent: Friday, November 04, 2011 10:20 AM
To: JDL; Levitas, Pete
Subject: FW: 09-21-11 Google Hearing -Schmidt Responses

FYI, attached are Eric Schmidt's answers to the Subcommittee's written follow-up questions from our hearing.

Response of Eric Schmidt, Executive Chairman, Google Inc.
Before the Senate Committee on the Judiciary
Subcommittee on Antitrust, Competition Policy, and Consumer Rights

Hearing on "The Power of Google: Serving Consumers or Threatening Competition?"
September 21, 2011

Questions For the Record for Eric Schmidt from Sen. Blumenthal

Questions about Google's Market Power:

1. **For 100 years, federal antitrust law and competition law have existed to protect consumers from the potential negative effects of highly concentrated market power. The bigger a company gets, the more danger there is that the company will abuse its monopoly position to stifle innovation and raise prices.**

   Justice Scalia noted this fundamental principle in his opinion in *Eastman Kodak Co. v. Image Technical Services*, where he said:

   > **"Where a defendant maintains substantial market power, his activities are examined through a special lens: Behavior that might otherwise not be of concern to the antitrust laws – or that might even be viewed as precompetitive – can take on exclusionary connotations when practiced by a monopolist."**

   Google is clearly the dominant provider of web search services worldwide. In the United States, 65% or more of all general Internet searches take place on Google. In Europe, Google has 94% of this market. The explosion of smartphones has provided a new search market – and in that space, Google processes a whopping 97% of all searches.

   Ten years ago, there were many competing search engines – AltaVista, Lycos, Ask.com, AOL Search, just to name a few. Now, there are really only two – Google, and Microsoft, which provides the underlying software for both the Bing and Yahoo search engines. Microsoft does not appear to have a sustainable alternative – they hold 30% of the market, but are losing over $2 billion a year on search services, while Google is made $29 billion in 2010.

   Q: Mr. Schmidt, your company is overwhelmingly dominant – it really has only one rival, and that rival is losing incredible sums of money each year. Given the tremendous market power of your company, do you believe it's fair to characterize Google as a monopoly?

First, I would disagree that Google is dominant. By investing smartly, hiring extremely talented engineers, and working very, very hard (and with some good luck), Google has been blessed with a great deal of success. But given the rapid pace of change in the technology industry, we take nothing for granted.

As I acknowledged during the Committee hearing, Google is "in the area" of 65% of queries in the U.S., if you look only at Google's general search competitors, such as Microsoft's Bing and Yahoo!. In fact, we find

that the monthly general search query figures released by comScore and Hitwise don't reflect the reality of how many sites Google competes with in search. Google has many competitors that are not general search engines, including specialized search engines, social networks, and mobile apps. So inferring that Google is in any way "dominant" in search would be incorrect.

At the hearing, I noted that the question of whether such a market share, if accurate, would constitute a monopoly, is a legal determination; Ms. Creighton is more qualified to speak to those points. At a minimum, though, I am confident that Google competes vigorously with a broad range of companies that go well beyond just Microsoft's Bing and Yahoo!, and that Google has none of the characteristics that I associate with market power. The technology industry is one of the most competitive and dynamic spaces in the entire economy, with small companies as well as larger companies competing hard against each other in lots of areas. Google has many strong competitors. We compete against a broad array of companies, including, for example, general search engines (e.g., Microsoft's Bing, Yahoo!), specialized search engines (e.g., Kayak, Amazon, WebMD, eBay), social networks (e.g., Facebook, Twitter), mobile apps, and voice-activated search tools like Apple's Siri. The Internet is incredibly competitive, and new forms of accessing information are being utilized every day.

Unlike technologies of the past, on the Internet, competition is one click away. In addition, the history of the technology industry shows that technologies usually get supplanted by completely new models. Therefore, the question is not necessarily, "Who is going to beat Google in search?" but also, "What new model might take the place of search?"

2. **Google frequently argues that it is not a monopoly because it provides its service for free and competition is "one-click away." This argument sounds appealing. Consumers are not forced to use Google, and anyone can start a website. The problem is that Google, like all search engines, serves consumers and advertisers. Consumers are really just a means to an end – Google generates nearly all of its revenue from advertisers, through advertisements on its own website and through ads it places across the internet.**

   This is not a "new" model. It's similar to broadcast TV. TV shows cost millions to produce, but consumers get them for free – because they're funded by advertisers. Millions of people watch ABC, so ABC can charge advertisers high costs, are re-invested into new million-dollar TV shows. But the difficulty in building ad revenue is a significant barrier to entry into this market. You can only fund new shows if you have advertisers. You can only get advertisers if you have viewers. And you can only get viewers if you have new shows. It's great if you already have all of the viewers – but good luck starting from scratch. These markets tend to move toward concentration and monopoly – there are only a few national broadcast networks.

   Google has all the "viewers" on the internet. Since most consumers use Google's search engine, most advertisers need to advertise through the company. – Google controls 80% of the online search advertising market. Ad revenue means better products, which means more users. This "network effect" makes it hard to push Google from its dominant position.

   Jonathan Rosenberg, Google's own VP of Product Management and Marketing, actually gave the best explanation of this in 2008. He said:

   "Google is really based on this. Users go where the information is so people bring more information to us. Advertisers go where the users are, so we get more advertisers. We get more users because we have more advertisers because we can buy distribution on sites that understand that our search engine monetizes better. So more users more information,

more information more users, more advertisers more users, it's a beautiful thing, lather, rinse, repeat, that's what I do for a living. So that's … the engine that can't be stopped."

Q: Mr. Schmidt, please indicate on an company by company basis how much revenue was shared with each of your top 100 internet advertisers in the prior fiscal year, at whatever level of specificity is appropriate. If you were running most internet businesses, do you think it would be practical to refuse to advertise with Google?

Google does not share revenue with advertisers. They pay Google, through our AdSense program, to advertise on website publishers websites.

Google does share revenue with our publishing partners through Google AdSense. Publishers, such as the New York Times, that use AdSense receive a revenue share when a user clicks on a Google-hosted ad on their site.

Google's specific revenue share agreements with our publishing partners are confidential, proprietary information that is never shared publicly. I can, however, offer the information requested through more general numbers. Google's AdSense has two main types of publisher contracts: AdSense for Content and AdSense for Search. AdSense for Content publishers, who make up the vast majority of our AdSense publishers, typically earn a 68% revenue share. AdSense for Search partners typically earn 51% revenue share.[1] The precise revenue sharing arrangement can be subject to a negotiated agreement, however.

Advertisers use the combination of advertising channels that gives them the best return on their investment. While some advertisers may only use Google, our experience shows that almost all advertisers use multiple means of advertising to reach the greatest number of customers. Additionally, there are many businesses that choose not to advertise with Google at all and instead spend their ad dollars on TV, radio, newspapers, magazines, and online banner ads. That is why we need to offer the best services for our advertisers, because if we do not, competition is just a click or a phone call away.

3. **In your testimony before the committee, you suggested that Google's market share is not a significant barrier to entry because competition is "one-click away." This seems inconsistent you're your statement in 2003, when you told the New York Times that "[m]anaging search at our scale is a very serious barrier to entry."**

   Q: Mr. Schmidt, please explain why "[m]anaging search at our scale is a very serious barrier to entry" and how this can be reconciled with your claim that competition is "one-click away."

I made that statement to the New York Times over eight years ago, and I was probably talking about search in a more narrow way than I view competition today. That same New York Times article emphasizes that Google's advantage in 2003 was that we had amassed a large number of data centers to handle a sizable volume of queries.[2] But today, data centers have been reduced to a commodity that any company can buy or rent. Moreover, both Microsoft's Bing and Yahoo! today handle *millions more queries* than Google did in 2003. In two short years, Microsoft's Bing has already reached the size that Google was in 2007.

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[1] Neal Mohan, "The AdSense Revenue Share", Inside AdSense Blog, May 24, 2010, http://adsense.blogspot.com/2010/05/adsense-revenue-share.html.

[2] John Markoff and G. Pascal Zachary, "In Searching the Web, Google Finds Riches", New York Times, April 13, 2003, http://www.nytimes.com/2003/04/13/business/in-searching-the-web-google-finds-riches.html?pagewanted=all&src=pm.

Scale certainly plays a role in Google's success, but it is not the key to our success. Google is not successful because of the number of queries we process. Competition on the Internet is just one click away and that disciplines Google into concentrating on making our users happy. To this end, Google makes tremendous investments in research and development and in hiring the best engineers, who are extremely talented, have a huge depth of experience, and are focused like a laser on thinking of ways to deliver better services to our users. We believe we are better not because we are bigger but because our technology is better.

Google does not believe that scale is a barrier to entry. The Internet provides a level playing field for competition; Google's size has not changed that fact. Indeed, recent entry into the general search business by start-ups such as Blekko, venture capital investments in search startups like DuckDuckGo, and Microsoft's Bing's success after only two years demonstrate that entry is not only possible but real.

A lack of scale did not deter companies like Facebook, Twitter, and LinkedIn from starting, finding an audience, and achieving widespread prominence, recognition, and ultimately success. At the same time, the large size of many Internet companies like MySpace did not prevent them from losing their audience and ultimately faltering. Given the nature of the Internet, websites and services can and do get supplanted by completely new models. So the relevant question may not be, "Who will beat Google in search?" but rather, "What new model might take the place of search?"

4. **When Google argues that it is not anticompetitive, the company sometimes points to its efforts to allow consumers to easily move away from Google Products. Google actually runs an organization called the "Data Liberation Front" to help you "move your data in and out of Google Products." The group's mission statement is this:**

   > **"Users should be able to control the data they store in any of Google's products. Our team's goal is to make it easier to move data in and out."**

   Of course, it's the advertisers who are actually generating profits for Google. Google's products are free so that they can gain additional consumers, making their platform more attractive to advertisers. It's what economists call a classic example of a "two-sided market" – a business that provides value to two separate but related groups of customers. Consumers could choose not to use Google. But advertisers certainly can't.

   Economists have noted allowing advertisers to move easily and cheaply between platforms helps to deter the market concentration and monopoly effects that are a natural result of markets that generate increasing value from large networks.

   If a small company has to invest the resources to compete in an effective internet advertising auction, it's going to invest in Google's ads, not Microsoft's. If the company could easily export its data to Microsoft, it could advertise in both places with no additional cost. But if it has to choose one, it's going to choose the dominant player.

   In your testimony before the committee, you indicated that advertisers have the same freedom to move data in and out of Google's advertising platform as users. Some companies, however, have complained that it is not easy to move advertising data they have compiled for Google's ad auctions to competing advertising platforms, like Microsoft's Bing or Yahoo.

   Q: Mr. Schmidt, please explain precisely what advertising data can and cannot be exported from Google's ad services and imported into online advertising auctions on competing platforms.

A number of resources exist to make it as easy as possible for AdWords users to export their data out of AdWords and use it for any purpose, including uploading it to another platform. In fact, Google is a leading proponent of data portability, and our Data Liberation Front provides step-by-step instructions to guide advertisers.[3] Competitors such as Microsoft also provide advertisers with simple instructions to import their Google ad data into their advertising platforms.[4]

Google provides a free tool, AdWords Editor, that make it easy for advertisers (and agencies or resellers acting on their behalf) to move their ad campaign from Google to a competing platform. Using AdWords Editor, advertisers or their agents can download their full campaign structure to a CSV file.[5] Thereafter advertisers are free to use the data as they deem appropriate, including uploading it onto competing platforms and using third-party tools to manage it.

Google also makes an AdWords API available that enables advertisers to build their own tools, and allows third-party developers to build tools for advertisers and agencies to use. The AdWords API Terms and Conditions impose minimal restrictions on advertisers in the creation or use of their own tools, and they can build most any functionality they deem necessary with AdWords API. In fact, Google specifically exempts advertisers from the requirements of Section III.2.c (referenced in your question).[6] There are modest limitations on the programmatic bulk input and direct copying of data through the use of AdWords API-based third-party tools. In fact, bulk input restriction is not applicable to all fields, and a number of such fields can be uploaded simultaneously across platforms. This is reflected by the extremely high level of advertiser multi-homing on numerous advertising platforms.

Questions about Google's Use of Its Market Power:

5. **It's not a crime to be a big. Google's explosive growth over the last decade is a great American success story. Federal law is concerned with the responsibilities that a big company has not abuse that dominance. One classic legal concern is when a dominant company uses its market power to push into new markets and unfairly hurt competitors. This is the chief complaint that other online companies have about Google. In 2007, Google's VP Marissa Mayer said that Google favors its own content:**

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[3] Brian Fitzpatrick, "Yes You Can Export Data From AdWords, Too", Google Public Policy Blog, October 8, 2009, http://googlepublicpolicy.blogspot.com/2009/10/yes-you-can-export-data-from-adwords.html.

[4] adCenter Desktop, "Import Google AdWords Campaigns to Microsoft adCenter using adCenter Desktop (video)", http://www.youtube.com/watch?v=MyWBPOS8dVM&feature=mfu_in_order&list=UL; Microsoft Advertising, "Import a Google campaign by using Microsoft Advertising adCenter Desktop (Beta)", http://advertising.microsoft.com/small-business/product-help/adcenter/topic?query=MOONSHOT_PROC_ImportGoogleCampaignsUsingDesktopTool.htm (5-step process); *see also* Amber, "Upload Your Google AdWords Campaigns Into Yahoo and MSN adCenter in a Flash!", PPC Hero, March 17, 2009, http://www.ppchero.com/upload-your-google-adwords-campaigns-into-yahoo-and-msn-adcenter-in-a-flash/ (3-step process).

[5] AdWords Editor Help, "How Do I Export a Spreadsheet from AdWords Editor," accessed November 1, 2011, http://www.google.com/support/adwordseditor/bin/answer.py?answer=38657.

[6] Google, AdWords API Terms and Conditions, accessed November 1, 2011, http://code.google.com/apis/adwords/docs/terms.html (In Section III(2)(c), Google explicitly notes that this section "does not apply to End-Advertiser-Only AdWords API Clients.").

"[When] we roll[ed] out Google Finance, we did put the Google link first. It seems only fair, right? … That actually has been our policy, since then…. So for Google Maps, again, it's the first link, so on and so forth. And after that it's ranked usually by popularity."

Google calls this practice of directing users to its own products at the top of its search page "Universal Search" – and says it's an effort to provide a better consumer experience. But if Google's product always wins, there's little incentive to make it the best consumer option.

"Google Product Search" is an online shopping comparison product. Originally called "Froogle," it was seen as a failure for its first five years, with few users–until December 2007, when Google started putting Google Product Search first. Over the next two years, Product Search traffic grew by over 1,200 percent. In 2008, an online retail consultant noted:

"Previously, Google Product Search struggled to get more than 2% of Google users… [but now] Google Product Search has become the largest and most important specialty shopping search engine in existence…. Yet their shopping product itself is still inferior in its presentation and usability to some other leading shopping search engines."

Q: Mr. Schmidt, how can consumers be assured of a better experience if they are always directed to Google software first?

Before addressing your question let me first offer a little background. Google's search results seek to achieve one fundamental thing: to connect users to the information they seek. We do this in two key ways. First, we started with conventional search—the traditional ten blue links—which involved crawling and indexing the web and returning results based on general responsiveness. Second, starting in 2001, we began to incorporate search results designed to respond to signals that a user is looking for specific types of information—a map, an image, a local business, a product, a news update, etc. We sometimes call these "thematic" search results.

When presenting thematic results, Google displays them in a way that is designed to make them user friendly. Prior to the launch of universal search in 2007, Google's thematic results like news were displayed, when relevant, at the top of the search results page. With the introduction of "universal search," we began to allow these thematic results to "float" from the top position to positions in the middle and bottom of the page, based on our assessment of how relevant conventional and thematic results were to the user's query.

Other major search engines also incorporate thematic and conventional search results on their search results pages. In fact, the first efforts at blending thematic and conventional search results by other general search engines date back to the late 1990s. It reflects the effort to achieve what one industry expert described in 2001 as the "Holy Grail" of search: "The real Holy Grail of all this will be when search engines can detect the type of search we are doing and feed out more targeted results from appropriate databases."[7]

But what is crucial to understand is that thematic search results are *not* separate "products and services" from Google. Rather, the incorporation of thematic and conventional results in universal search reflects Google's effort to connect users to the information that is most responsive to their queries. Because of this, the question of whether we "favor" our "products and services" is based on an inaccurate premise. These

[7] Danny Sullivan, "Being Search Boxed to Death", Search Engine Watch, March 4, 2001, http://searchenginewatch.com/article/2065235/Being-Search-Boxed-To-Death.

universal search results *are* our search service—they are not some separate "Google content" that can be "favored."

That said, in keeping with our focus on quality and delivering the most relevant results for consumers, Google constantly experiments with new ways to provide the most relevant information is response to a user's query. For example, for certain queries, where Google is highly confident that the user wants a specific answer, Google will provide that answer prominently on the page. These direct answers are known as "oneboxes." Oneboxes are generally displayed to convey an answer that is clear and straightforward, for example, movie showtimes, weather forecasts, mathematical calculations, stock prices, sports scores, and so on. Microsoft's Bing and Yahoo! display similar "oneboxes" prominently in their results as well, demonstrating their belief that these results are useful for consumers.

The decision whether to display a onebox is determined based on Google's assessment of user intent. Contrary to what some of Google's critics suggest, Google does not make money when users click on oneboxes. In fact, the opposite is true: oneboxes that are responsive to what users are looking for may draw users away from the ads displayed on the page. Nonetheless, because oneboxes help Google deliver a satisfying experience to users, Google believes that by displaying them we are enhancing user satisfaction, which is in the long-term best interest of the company.

In some instances, Google has licensed data from third parties for use in our oneboxes. In other instances, we have developed this data ourselves. In either case, whether users are searching for a weather forecast, a mathematical calculation (e.g., [pounds to grams]), or a stock price, Google's user studies confirm that users seeking this type of information generally do not want to click through to multiple options, whether in the form of ads or more natural links. Rather, users want a quick, direct answer that they can trust is correct. Oneboxes provide fast, accurate answers in response to this user demand.

6. **Google's effort to build its own local business reviews product provides a good example of where Google's dominance may cause problems. Yelp.Com and TripAdvisor.Com grew into significant businesses based on user-generated reviews of hotels, restaurants, and stores. Google wanted to enter this market with a competing product – "Google Places." But "Google Places" had low traffic because it had no reviews.**

   Of course, Google had all of Yelp and TripAdvisor's reviews saved in its search servers. So the company took a shortcut – they "scraped" those reviews from its competitors, and pasted them on "Google Places" pages. TripAdvisor and Yelp cried foul. Those reviews are the heart of their businesses. But Google said if they didn't like it, they could just withdraw from the search engine entirely. That is totally impractical. When Microsoft tried to do the same thing to Yelp, Yelp threatened to withdraw from Bing, and Microsoft backed down. Google, however, generates most of the traffic to TripAdvisor and Yelp. Those companies would lose half their revenue if they left Google. As TripAdvisor's CEO has said, "I don't feel like it's fair to force me to provide information to a site that's trying to compete with me." Google announced just this past July that it would no longer scrape third party reviews and put them up on Google Places pages.

   Q: Mr. Schmidt, please indicate with as much specificity as is possible why Google decided to change its policy on scraping competitor content.

Google developed Place pages to help users to access information about a local business. When Google first launched Place pages, Google displayed snippets—a few lines of text—from various review sites for each local business listed, and required that users click through to read the full review. The ultimate goal of Place pages, along with Google's other thematic local results, was to help users locate local information on the web.

Google entered a two-year licensing agreement with Yelp in 2005 to display the full text of Yelp's reviews in our conventional search results and our thematic local search results. Two years later, Yelp chose not to renew its agreement with Google. With the expiration of the license, Google no longer displayed the full text of Yelp's reviews. Thus, we returned to simply showing snippets of third-party reviews within our conventional results as well as our thematic local search results, a practice permitted under the long-established fair use doctrine of copyright law. Snippets generally display about two or three lines of text. For users to access the full text, they must select a link that directs them to the review site. Showing snippets of websites is an important part of search; it enables users to determine whether the site in question is responsive to their queries. It also drives traffic to websites.

If, at any point, Yelp (or any other site owner) wishes to be excluded from Google's (or any other search engine's) index, it can—with relative ease—block search engine crawlers using a very simple and common protocol. Specifically, every site owner has the option to use the robots exclusion protocol, also referred to as robots.txt, to signal to Google or any other search engine that they do not want particular webpages, or even an entire site, to be crawled and indexed.[8] Site owners can easily exclude certain sites or portions of sites from being indexed, and can also specify different protocols for different search engines. The robots.txt protocol—which has been in place for over 17 years—can be utilized either by writing a new robots.txt file,[9] or by accessing one of many publicly available robots.txt files.[10]

As Google continued to develop our thematic local search results, Yelp began voicing concerns regarding how and where, exactly, within Google's search results its snippets appeared. It's worth noting that by 2009, search competitors Microsoft Bing, Yahoo!, and Ask.com all integrated third-party review snippets in essentially the same exact way within their respective local search results.

Yelp subsequently requested that Google remove snippets of Yelp reviews in Google's local search results but continue providing links to Yelp. After a series of business conversations with Yelp in an attempt to address Yelp's numerous concerns, Google agreed to comply with Yelp's request. After the requested changes were implemented, snippets from Yelp's website continued to appear in conventional search results, and no longer appeared in the thematic local search results.

In July 2011, Google redesigned Place pages. One of the major changes, implemented after careful thought about the future direction of Place pages and feedback from third-party review sites, was removing snippets of reviews from sites like Yelp, TripAdvisor, and CitySearch. Instead, Google chose to feature reviews from our own users, with links to third-party review sites. In addition, the "star rating" and "total review count" were modified to reflect only those ratings and reviews that have been submitted by Google users.

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[8] robots.txt is an industry standard that allows a site owner to control how search engines access their web site. Access can be controlled at multiple levels – the entire site, through individual directories, pages of a specific type, or even individual pages. Basically, robots.txt is a structured text file that can indicate to web-crawling robots that certain parts of a given server are off-limits. This allows search engines such as Google to determine which parts of a website a site owner wants to display in search results, and which parts to keep private and non-searchable. Dan Crow, "Controlling How Search Engines Access and Index Your Website", The Official Google Blog, January 26, 2007, http://googleblog.blogspot.com/2007/01/controlling-how-search-engines-access.html.

[9] There are a number of resources available online that provide users with information on coding robots.txt files. *See e.g.* About/robots.txt, August 23, 2010, http://www.robotstxt.org/robotstxt.html.

[10] A non-comprehensive list of robots.txt files submitted by independent programmers is available here: http://www.robotstxt.org/db.html.

Commentators like Frank Reed of Marketing Pilgrim noted that these changes "essentially . . . gives Yelp and TripAdvisor their wish," while TechCrunch noted that "this should be a welcome change to third-party source of reviews like Yelp and TripAdvisor."[11]

Yelp has aired numerous concerns in the press over the past few years, and although Google has tried to act responsibly in addressing some of those concerns, ultimately Google builds our search results for the benefit of users, not websites. At all times, Google's primary motivation has been improving the search experience for our users by providing the most relevant and useful information in response to their queries. In the end, if users are unhappy with the answers Google provides, the openness of the web ensures that they can easily switch to Yelp or any other site with just one click.

Questions about Google's Market Power in Smartphone Operating Systems

7. **Google's dominant position in the smartphone market is under increasing scrutiny. Google's Android operating system now runs on over 50% of all smartphones. Nearly a half million new Android phones are activated daily. The growth of Android's smartphone market share raises questions around whether Google's market power is being unfairly leveraged to promote its other products – like its search engine, which runs on all Android phones, or its "Places" application, which seems to ship with every Android phone.**

   Q: Mr. Schmidt, does Google occupy a dominant position in the smartphone operating system market?

Google does not have a dominant position in the smartphone market. According to comScore, Android operates on only 34.1% while Apple's iOS runs on 43.1%.[12] Moreover, competition in the market for mobile software platforms is fierce. Innovation in the mobile space is frenetic; competitors are racing to introduce new devices which have the potential to radically change mobile market dynamics.

Furthermore, Android is a joint effort among many members of the mobile market including OEMs, carriers, application developers and chipset manufacturers. As a joint endeavor, Android's success depends on the success of these partners—not just Google's success.

One of the greatest benefits of Android is that it fosters competition at every level of the mobile market—including among application developers. Google respects the freedom of manufacturers to choose which applications should be pre-loaded on Android devices. Google does not condition manufacturers' access to or use of Android on pre-installation of any Google applications or on making Google the default search engine. Google also does not condition Android compatibility determinations on pre-installation of Google applications or making Google the default search engine.

8. **The most prominent claim of Google unfairly leveraging its market power is the case of Skyhook Wireless, who recently filed suit against Google arguing that the company pressured Motorola and other manufacturers into dropping Skyhook's mobile location**

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[11] Frank Reed, "Google Places Update Puts Focus on Google", Marketing Pilgrim, July 22, 2011, http://www.marketingpilgrim.com/2011/07/google-places-update-puts-focus-on-google.html. Erick Schonfeld, "Google Places Stops Stealing Reviews", TechCrunch, July 21, 2011, http://techcrunch.com/2011/07/21/google-places-stops-stealing-reviews/.

[12] "Smartphones and Tablets Drive Nearly 7 Percent of Total U.S. Digital Traffic," comScore press release, October 10, 2011, http://www.comscore.com/Press_Events/Press_Releases/2011/10/Smartphones_and_Tablets_Drive_Nearly_7_Percent_of_Total_U.S._Digital_Traffic.

service in favor of Google's. Emails from within Google made public as part of that lawsuit showed significant concern over Motorola's decision to go with Skyhook instead of Google's software. One email from Steve Lee, an Android product manager, speculates that Skyhook may have beaten out Google because it's "a hungry start-up" – or because Skyhook's location accuracy was superior to Google's.

Google ultimately forced Motorola and others to drop Skyhook's technology from their phones, arguing that it violated the company's Android "compatibility" requirements. But Dan Morrill, a manager in the Android group, noted at the time that it was obvious to manufacturers that in general, "we are using compatibility as a club to make them do things we want." Last month, Google announced that it intends to buy Motorola outright.

Q: Mr. Schmidt, does Google have an obligation to ensure that it does not abuse its smartphone market position to favor its own products, and if so, what policies are in place to ensure that such abuse does not occur?

Google's dispute with Skyhook is the subject of pending litigation, so I cannot comment extensively. However, as is reflected in publicly available filings, Google did not force either Motorola or Samsung to remove Skyhook software from their devices to receive certification as an Android compatible device. Google merely requested that these manufacturers use a version of the Skyhook software that was consistent with the Android Compatibility Definition Document ("CDD"). Skyhook possessed such a version of its software but refused to provide it to Motorola and Samsung. Thus, Google never was given a copy of the compliant software to review, which is why the Skyhook software was ultimately never deemed compatible by Google.

As to Mr. Morrill's remarks, reviewed in their full context express they reflect his belief that Google's efforts to maintain compatibility across different devices *could be misperceived* as a way for Google to improperly influence manufacturers. Google does not in fact use compatibility in this way. Mobile operating system competition is fierce—Apple, RIM (Blackberry), and Microsoft are very significant competitors—and carriers and handset manufacturers have many options other than Android. Google is committed to Android's success and to maintaining our strong partnerships with device manufacturers.

Google designed Android as an open source platform to foster customization by manufacturers of mobile software and hardware. In contrast to closed, proprietary operating systems, Android allows manufacturers to modify their own implementations of Android to create their own unique features and user interfaces. Android is also particularly adaptable to new hardware configurations and chipsets. By allowing broader differentiation in software and hardware, Android enhances competition and consumer choice. There are more than 500 models of Android devices on the market.

Google has undertaken extensive efforts to protect consumers and application developers to ensure their applications run seamlessly on all Android devices. Google, with the support of our Android partners, has identified certain specifications, such as minimum screen size and security features, that help ensure applications run flawlessly across device models. These specifications are reflected in the Android CDD, which is published on Android Open Source Project's website. Google and our partners believe that this baseline preserves the maximum amount of manufacturer freedom to customize Android, while simultaneously protecting Android developers, who need consistency and rely on minimum elements appearing on all Android devices, and Android customers, who may legitimately expect that Android applications will run on their Android devices.

Questions about Google's Market Dominance and Facilitation of IP Infringement

9. **As discussed during the September 21, 2011 hearing, on August 24, 2011, the Department of Justice announced that Google had been fined $500 million for allowing online Canadian**

pharmacies to place advertisements through its AdWords program, resulting in the unlawful importation of controlled and non-controlled prescription drugs into the United States. The Department's press release noted that "Google was aware as early as 2003, that generally, it was illegal" to ship pharmaceuticals into the U.S.

Based upon the questions, and your responses to those questions, Google is also well aware that online copyright infringement online occurs on a massive scale and that it is a "problem that [Google] takes very seriously."

In light of the Department of Justice's statement that it "will continue to hold accountable companies who in their bid for profits violate federal law," Google's approach to ensuring it does not profit from intellectual property theft should not only be of great interest to the Committee, but Google as well.

Q: Mr. Schmidt, to what extent does Google take steps to ensure that it does not profit from the violation of federal copyright or trademark laws?

Google believes strongly in protecting copyright and other intellectual property rights. We understand that despite the overwhelmingly positive and legitimate uses of Internet services and technologies, there will be some who misuse these for infringing purposes. Google has been an industry leader in developing innovative measures to protect copyright and help rightsholders control their content online. For example, Google has expended more than 50,000 engineering hours and more than $30 million to develop Content ID, our cutting-edge copyright protection tool that is helping rightsholders make money on YouTube. This powerful technology scans the more than 48 hours of video uploaded to YouTube every minute and, within seconds, compares it against more than six million references files provided by participating rightsholders. Content ID has proven to be an enormous success and is being used by a long list of content owners worldwide to make their own choices about how, where, when, or whether they want their content to appear on YouTube.

As is true for all Internet companies, the critical foundation for Google's anti-piracy efforts remains the Digital Millennium Copyright Act ("DMCA"), the seminal law Congress passed in 1998 to address copyright protection online and promote the worldwide expansion of e-commerce. Congress rightly understood that some material posted by the millions of people who use online services will infringe copyright, and that online service providers in the ordinary course of their operations engage in copying and other acts that expose them to potential copyright liability. Congress also recognized that requiring online providers to engage in pre-screening of every user-posted text, picture, and video would inhibit free expression and stifle the growth of the Internet.

At the request of copyright owners, Google in 2010 took action against approximately three million allegedly infringing items across all our products, which accounts for far less than 1% of all the materials hosted and indexed by Google. We received takedown notices by letter, fax, email, and web forms from all sorts of copyright owners (including movie studios, record labels, adult entertainment vendors, and needlepoint pattern publishers) from 70 countries and in a wide variety of languages. Hundreds of Google employees work on copyright and combating infringement online, including a growing team of employees dedicated to receiving, reviewing, and responding to DMCA notices. We check to make sure that the notices are complete and are not attempts by competitors or others to use invalid copyright claims to censor speech with which they disagree.

Last December, Google announced that we were designing new tools to enable us to act on reliable copyright takedown requests within 24 hours. We are happy to report that our average turnaround time for DMCA notices received from those using our new tools is now less than seven hours. Moreover, submissions using our new tools now account for more than 75% of all URLs identified to us for web search.

In addition, Google has (in compliance with the DMCA) implemented repeat infringer policies on all relevant products. In each of these products, repeat infringer terminations constitute far fewer than 1% of the total subscriber accounts.

We also employ a wide array of procedures and expend considerable financial resources to prevent our advertising products from being used to monetize material that infringes copyright. For example, our AdSense program enables website publishers to display ads alongside their content. Our policies prohibit the use of this program for infringing sites, and we use automated and manual review to weed out abuse. In 2010, we took action on our own initiative against nearly 12,000 sites for violating this policy. And in 2011, we have already taken action against more than 12,000 sites. We also respond swiftly when notified by rightsholders. We recently agreed to improve our AdSense anti-piracy review procedures and are working together with rightsholders on better ways to identify websites that violate our policies.

We also committed last year to prevent terms that are closely associated with piracy from appearing in autocomplete. We have begun working to prevent several piracy-related terms from appearing in autocomplete, and have asked content industry representatives to suggest other terms for consideration that won't overly restrict legitimate speech.

We are also helping to lead industry-wide solutions through our work with the Interactive Advertising Bureau ("IAB"), comprised of more than 460 leading media and technology companies. The IAB has established quality assurance guidelines through which participating advertising companies will take standardized steps to enhance buyer control over the placement and context of advertising and build brand safety. Google has certified our compliance with these guidelines.

Google also expends great effort to fight the challenge of counterfeit goods. Just as in the offline world, people misuse legitimate online services to try to market counterfeit goods. This abuse hurts our users and our business; combating it is central to Google's operations. The integrity and quality of the sponsored links displayed alongside Google search results are of paramount importance to our overall success. A Google user duped by a fake good is less likely to click on another Google ad in the future. For this reason, Google undertakes enormous efforts to root out ads for sites that sell counterfeit goods.

Google has clear policies against advertising counterfeit goods, and we expend considerable resources to enforce those policies. In the last year, we shut down approximately 95,000 accounts for attempting to use sponsored links to advertise counterfeit goods, and more than 95% of these accounts were discovered through our own detection efforts. Even more ads themselves were blocked on suspicion of policy violations. Our automated tools analyze thousands of signals to help prevent bad ads from being shown in sponsored links. Last year alone we invested $60 million in efforts to prevent violations of our ad policies.

Despite the best efforts of the online advertising industry, proactive measures will never be a complete solution. Some publishers deliberately take steps to evade detection systems, meaning bad sites will invariably slip through. Technologically sophisticated players use tactics like "cloaking" (showing one version of their site to the public and a different version to Google) to evade the protections that Google and other companies put in place. Because of these tactics, coupled with the sheer volume of ads served per day, finding a particular ad on the web that has circumvented our systems may always be possible. While the industry is aggressively going after this abuse, it is clearly a cat-and-mouse game to stay ahead of the bad actors, and Google is committed to being an industry leader in eradicating this behavior.

We also believe that making high-value content available in authorized forms is a crucial part of the battle against online infringement. With 800 million people per month coming to YouTube, we have expanded our movie rental services, made it easier for indie labels to become YouTube partners and share revenue when their music is played (even for user-generated content), and launched a feature to enable fans to buy artists' merchandise, music downloads, and concert tickets. And we've launched the Google eBookstore, featuring a wide array of books from authors and publishers. We also continue to improve YouTube's Content ID

system to help more copyright owners (including songwriters and music publishers) to monetize their works and we are working with WIPO on a rights registry that will help African musicians license their works.

In addition to launching our own authorized services, we also launched Music Rich Snippets, which allow other legitimate music sites to highlight content in the snippets that appear in Google's conventional web search results. Rhapsody and MySpace are among the first to implement this feature, which has been developed using open web markup standards, and we are looking forward to more sites and search engines marking up their pages. We hope that authorized music sites will take advantage of Music Rich Snippets to make their preview content stand out in search results.

10. **The DOJ announcement mentions that the $500 million forfeiture, one of the largest ever in the United States, represents, "the gross revenue received by Google as a result of Canadian pharmacies advertising" through Google services.**

    Q: Mr. Schmidt, what are the gross revenues received by Google as a result of advertising the company has placed on websites that have been identified by law enforcement, copyright owners, or Google itself as a venture that offers unauthorized copies of copyrighted materials?

As described above, Google believes strongly in protecting copyright and undertakes enormous efforts to root out publisher sites who violate our policies against using AdSense for sites that infringe copyright. Google has no interest in making or keeping any revenue from infringement and therefore our target revenues are zero.

We employ a wide array of procedures to prevent infringing sites from using our ads products, and we expend considerable financial resources to find and eject advertisers and publishers who violate our policies. For example, publishers who want to join the AdSense program are vetted upon joining for their compliance with program policies. In addition, automated systems monitor the pages on which AdSense ads appear, and bring potentially problematic material to the attention of human reviewers. Finally, Google responds swiftly when notified by a rightsholder that our AdSense program is being used to monetize infringing or counterfeit sites, and we have policies in place to terminate the accounts of repeat offenders. The volume of complaints in this regard is not high, and represents far less than 1% of all our AdSense partner sites.

Perhaps contrary to perceptions, in many ways we lose revenue opportunities from the actions of bad actors who traffic in counterfeit goods or infringing content. Often stolen credit cards are involved, and we don't collect on accounts that are terminated for counterfeit violations. Infringing or counterfeit ads also cost us space that we could have used for a legitimate ad. And a Google user duped by a fake good is less likely to click on another Google ad in the future.

Lastly, it is important to note that the DOJ announcement you referenced states that the figure "represents the gross revenue received by Google as a result of Canadian pharmacies advertising through Google's AdWords program, *plus gross revenue made by Canadian pharmacies from their sales to U.S. consumers*" (emphasis added).

11. **The August 24, 2011 release stated that, "this investigation is about the patently unsafe, unlawful, importation of prescription drugs by Canadian on-line pharmacies, with Google's knowledge and assistance, into the United States, directly to U.S. consumers… It is about taking a significant step forward in limiting the ability of rogue on-line pharmacies from reaching U.S. consumers, by compelling Google to change its behavior." As you know, I am a cosponsor of the PROTECT IP Act, which gives the government the ability – after an investigation by federal prosecutors and review by a federal judge – to cut-off a foreign-based website that profits by facilitating the online theft of works from the U.S. marketplace. This proposal was unanimously approved by the Senate Judiciary Committee earlier this year.**

Q: Mr. Schmidt, to what extent are you aware of Ads by Google, Adsense, DoubleClick or any other Google advertising service on offshore websites that are not authorized to make available the copyrighted music or movies that are the heart of those websites?

Google employs a wide array of procedures and expends considerable financial resources to prevent our advertising products from being used to monetize material that infringes copyright. Our policies prohibit the use of our advertising services on infringing sites, and we use automated and manual review to weed out abuse. For example, last year, we took action on our own initiative against nearly 12,000 sites for violating this policy. And in 2011, we have already taken action against more than 12,000 sites. We also respond swiftly when notified by rightsholders. For AdSense, our current average response time is 24 hours.

Google supports the PROTECT IP Act's goal of targeting foreign "rogue" websites that are dedicated to copyright infringement or counterfeiting. Google could support a "follow the money" legislative approach, which would choke off revenue to "rogue" sites who are dedicated to providing infringing access to copyrighted material and/or counterfeit goods. Consistent with our policies, this means payment services (e.g., Google Checkout) and advertising networks (e.g., Google AdSense) would not be allowed to provide services to rogue sites. We are also mindful that the Internet is key to American economic growth, and we have serious concerns about certain proposed legislative provisions that not only stifle innovation and threaten the Internet economy, but also jeopardize the millions of small businesses that rely on the web everyday.

As you know, one of the most discussed provisions of the PROTECT IP Act has been the definition of an "[i]nternet site dedicated to infringing activities," and earlier versions of this legislation raised serious concerns for legitimate U.S. businesses. Distinguishing whether, for example, a given video is "authorized" to be made available on a given site is not a simple task. It is the rightsholders who know what material they own the rights to, where in the world, and for what purpose. That is why the structure of the shared responsibility of the DMCA works effectively to take down the content that rightsholders have specified. For search engines, the DMCA process already enables rightsholders to remove infringing material that is located on foreign rogue sites.

12. **Q: Mr. Schmidt, to what extent have you been contacted by property owners regarding the presence of ads that enable such rogue websites to reap financial gain?**

Google employs a wide array of procedures to prevent infringing sites from using our ads products, and we expend considerable financial resources to find and eject advertisers and publishers who violate our policies. For example, publishers who want to join the AdSense program are vetted upon joining for their compliance with program policies. In addition, automated systems monitor the pages on which AdSense ads appear, and bring potentially problematic material to the attention of human reviewers. Finally, Google responds swiftly when notified by a rightsholder that our AdSense program is being used to monetize infringing or counterfeit sites, and we have policies in place to terminate the accounts of repeat offenders. The volume of complaints in this regard is not high, and represents far less than 1% of all our AdSense partner sites. We get lots of different types of complaints, and it can take time to investigate various claims, such as a claim that a given product is being distributed without authorization.

13. **Q: Mr. Schmidt, how does Google respond when contacted by a property rights owner or advertiser regarding Google advertising on a site offering or distributing its content or product without authorization? On average, how long does it take Google to respond to such a complaint?**

We employ a wide array of procedures and expend considerable financial resources to prevent our advertising products from being used to monetize material that infringes copyright. For copyright, as noted above, last year we took action on our own initiative against nearly 12,000 sites for violating our policies against using

AdSense for sites that infringe copyright, and we have certified our compliance with IAB's guidelines. As we also noted above, though, proactive measures will never be a complete solution, even with the best efforts of the online advertising industry. We respond swiftly when notified of violations of our AdSense policies by rightsholders and recently agreed to improve our AdSense anti-piracy review procedures. Our current average response time is 24 hours. We are working together with rightsholders on better ways to identify websites that violate our policies.

Google also has clear policies against advertising counterfeit goods, and we expend considerable resources to enforce those policies. We work with over one million advertisers in 190 countries. In the second half of 2010, we received legitimate complaints about less than 0.25% of advertisers. In the last year, we shut down approximately 95,000 accounts for attempting to use sponsored links to advertise counterfeit goods, and more than 95% of these accounts were discovered through our own detection efforts. Even more ads themselves were blocked on suspicion of policy violations. Our automated tools analyze thousands of signals to help prevent bad ads from being shown in sponsored links. Last year alone we invested $60 million in efforts to prevent violations of our ad policies.

But there is no silver bullet. It's a whack-a-mole problem, as we constantly work to improve our practices against sophisticated entities trying to game our protections. While Google's tools are quite effective, it is incredibly difficult for Google to identify a counterfeit product being advertised. This is a challenging task, even for brand owners. Online advertising companies, which do not take possession of physical goods, cannot know for sure whether any particular item out of millions advertised is indeed a counterfeit. As has always been the case with newspapers and offline advertising platforms, it is essentially impossible for Google to block all attempted abuse.

14. **Q: Mr. Schmidt, what technologies is Google developing to ensure that its companies do not place ads on sites engaged in piracy and counterfeiting?**

Google has committed significant resources to developing technology that enables detection of content that violates our copyright and counterfeit policies. We use sophisticated automated tools, which analyze thousands of signals along every step of the advertising process. We devote significant engineering and machine resources to prevent violations of our ad policies including our anti-counterfeiting policy. In fact, we invested over $60 million last year alone in these efforts. Google also regularly refers to and cooperates with law enforcement on fraud and abuse investigations, including those relating to counterfeit goods.

15. **The FDA stated that it will hold "all contributing parties accountable for conduct that results in vast profits at the expense of the public health." While the theft of music and movies does not endanger the public health, it does endanger consumers who patronize professional looking websites that are validated and made to feel legitimate with "Ads by Google." It endangers consumers because it exposes them to liability for the theft of copyrighted materials. It endangers consumers who provide credit card and other personal information to criminal organizations. It exposes their computers to malware, viruses and spam, and, is not only wrong, but also a drain on the US economy. Equally important, it allows criminal operations – and your company – to profit from crime.**

    Q: Mr. Schmidt, what can you and others in the online advertising sector do to devise a workable plan that holds all parties accountable for conduct that results in vast profits for those operating online criminal enterprises predicated on the theft of American-made intellectual property?

Google supports developing effective policy and technology tools to combat large-scale commercial infringement. Google has dedicated tens of millions of dollars in engineering and other resources to help weed out notorious bad actors.

Our policies prohibit the use of our AdSense and AdMob programs on web pages (AdSense) or apps (AdMob) that include infringing materials or seek to sell counterfeit goods. We employ a wide array of procedures to prevent infringing sites from using our ads products, and we expend considerable financial resources to find and eject advertisers and publishers who violate our policies. For example, publishers who want to join the AdSense program are vetted upon joining for their compliance with program policies. In addition, automated systems monitor the pages on which AdSense ads appear, and bring potentially problematic material to the attention of human reviewers. Finally, Google responds swiftly when notified by a rightsholder that our AdSense program is being used to monetize infringing or counterfeit sites, and we have policies in place to terminate the accounts of repeat offenders. The volume of complaints in this regard is not high, and represents far less than 1% of all our AdSense partner sites.

Moreover, Google has long enabled advertisers directly to control where their ads appear. Using available exclusion tools for our ad programs, Ads by Google advertisers can exclude domains of their choosing from displaying their ads (whether because of infringement or any other concern). Similarly, if an advertiser discovers its ads running on an objectionable site that it had not previously been aware of, that advertiser can use the tools to prevent any future appearances on that site.

While we are proud of the policies and procedures we have in place to prevent improper use of our ads products, we are always striving to improve. As mentioned above, we will continue to work with rightsholders to identify, and, when appropriate, expel violators from the AdSense program.

In addition, Google is helping to lead industry-wide solutions to prevent legitimate ads from appearing on illegitimate sites through our work with the IAB, comprised of more than 460 leading media and technology companies. The IAB has established quality assurance guidelines through which participating advertising companies will take standardized steps to enhance buyer control over the placement and context of advertising and build brand safety. Despite the best efforts of the online advertising industry, however, technologically sophisticated players use tactics like "cloaking" (showing one version of their site to users and a different version to Google) to evade the protections that Google and other companies put in place. While the industry is aggressively going after those who abuse online advertising programs, it is clearly a cat-and-mouse game and efforts to legislate in this area must be careful not to target ad platforms for abuses of their systems that could not reasonably be prevented.

Response of Eric Schmidt, Executive Chairman, Google Inc.
Before the Senate Committee on the Judiciary
Subcommittee on Antitrust, Competition Policy, and Consumer Rights

Hearing on "The Power of Google: Serving Consumers or Threatening Competition?"
September 21, 2011

Questions for the Record – Senator Cornyn to Mr. Schmidt

1. **At the hearing, you referenced Google's Non-Prosecution Agreement ("NPA") with the U.S. Department of Justice. As you may recall, I asked you about that agreement and provided you the opportunity to provide a complete and accurate picture of Google as a corporate citizen. There appeared to be some confusion as to whether you could discuss the NPA. You stated that you had been advised by your lawyers not to "speak about the details" or "comment" on the NPA.**

    a. **Did you know before your testimony that the agreement explicitly states that you are "prohibited from contradicting" the factual statements?**

Under the terms of the NPA, Google and its management have to be mindful of the NPA's limitations on making public statements about the facts or the investigation to avoid any breach of our obligations under it. For this reason, I was very measured in my remarks at the hearing, but as you state and as I understand better now, I can restate the facts stipulated in the NPA and could have restated those facts with you at the hearing. I apologize for my confusion.

    b. **Do you agree that Google is expressly permitted to defend any litigation or investigation or proceeding as long as you do not contradict the factual statements?**

Yes. Of course, the Department of Justice is the arbiter of what contradicts the factual statements in the NPA, and Google intends to be very careful not to breach our obligations. The NPA's provisions regarding public statements permissible by Google speak for themselves. That being said, it is also true that Google must at all times be incredibly mindful of the very limitation you reference, that Google not contradict, intentionally or unintentionally, any of the factual statements in the NPA.

2. **I would like to provide you an opportunity to clarify the record with regard to one of my questions. I asked, regarding Google's conduct set forth in the NPA:** *"Was it … the result of oversight or inadvertence or were there some employees in the company that were doing this without your knowledge…"* **I believe that you responded as follows:** *"Well, certainly not without my knowledge. Again, I have been advised, unfortunately, I'm not allowed to go into any of the details and I apologize, Senator, except to say that we're very regretful and it was clearly a mistake."*

    Your answer would seem to suggest that you did indeed have knowledge of the conduct set forth in paragraph 2 of the NPA. I understand that you may not have heard my question accurately and that sometimes answers can be misconstrued. I would like to give you an opportunity to clarify your answer to my question and answer some related questions.

a. Did you know that Canadian online pharmacies were advertising prescription drugs for sale in the U.S. using Google's AdWords or other Company advertising platforms between 2003 and 2009?

b. When did you learn of this conduct?

c. How did you learn of this conduct?

d. Did you alert others in the company about this conduct? Who did you alert? When did you do so? What did you say or write in alerting others in the company regarding this conduct?

As I'm sure you can appreciate, Google has a wide variety of policies governing ads in many different countries. I do not recall the specifics of when these particular policies first came to my attention. Sometime around 2004, it was brought to management's attention generally that there were some potential issues to consider regarding pharmacies advertising via AdWords, in violation of Google's policies, and I believe I first learned of this issue around that time through meetings and internal discussions. The company's policy did not block licensed Canadian pharmacies certified by SquareTrade and later PharmacyChecker to advertise in the United States. SquareTrade verified whether online pharmacies seeking to advertise through AdWords were licensed in at least one state in the United States or in Canada. SquareTrade required pharmacies seeking to advertise through AdWords to self-certify that they would act in accordance with applicable U.S. laws and regulations. As for PharmacyChecker, although it did not certify online pharmacies that shipped controlled prescription drugs, Canadian or otherwise, it did certify advertisers of non-controlled prescription drugs, including distributors of non-controlled prescription drugs located in Canada. Some advertisers did not qualify for certification by either SquareTrade or PharmacyChecker, but nonetheless were able to circumvent Google's certification requirements by, for example, setting up advertising campaigns intended for audiences outside the U.S., thus not requiring certification, and then later changing the geo-targeting of those campaigns to include the U.S. Some advertisers also circumvented Google's manual review of ads, for example, by not including pharmaceutical terms triggering manual review by Google's systems in the text of the ads. The NPA—specifically paragraphs 2(j) and 2(l) through 2(n)—sets forth the pertinent facts about the timing and duration of that advertising. Google is not in a position to comment further on the matter for the reasons explained above.

3. As I noted during the hearing, one of the reasons I asked you about this topic is because I believe that it speaks directly to the issue of trust. I understand from your testimony that the conduct that was covered in the NPA has nothing to do with the company's current advertising practices or policies. Because the issue of trust is so important, I would like to give you the opportunity to describe in more detail just how those practices have changed and when they did so.

a. The NPA, paragraph 2(q), states that Google became aware of the government's investigation in 2009. When in 2009?

Google became aware of the government's investigation at the end of May 2009.

b. What steps has Google taken to prevent this sort of thing from happening again?

We agree that complying with the law and maintaining the trust of our users is essential. Google changed our policy regarding Canadian pharmacies in March 2010. Since that time, the AdWords program allows only online pharmacies based in the United States to run ads appearing in the United States. Further, Google became the first online search provider to require these U.S. online pharmacies to be accredited by the National Association Boards of Pharmacy VIPPS program. The VIPPS certification is stringent and fewer

than 20 online pharmacies nationwide are currently certified by VIPPS. Google also continues to improve our existing automated screening programs and developed new tools to enhance our ability to enforce and monitor advertisers' compliance with these policies. As part of this enforcement effort, Google contracted with an independent company with knowledge of online pharmacies to conduct regular "sweeps" of ads running via AdWords to find any drug- or online-pharmacy-related advertisements from advertisers who manage to evade Google's screening programs. The NPA itself notes the changes Google has made to our policy and to our enforcement efforts. Google also took a lead role in a cross-industry effort to collaborate with government bodies to attempt to stop the problems of online pharmacy advertising at the source.

c. What, if any, disciplinary measures has Google taken against any of its executives or employees who allowed the Canadian pharmacies to illegally sell drugs in the U.S.?

d. Was anyone terminated? Who? When?

The failure to block U.S.-focused advertisements from licensed Canadian pharmacies that were certified by SquareTrade and then PharmacyChecker to advertise in the United States came as the result of a number of company decisions. Accordingly, Google has not taken any disciplinary action against any employees based on the existence of ads by Canadian pharmacies certified by SquareTrade and then PharmacyChecker. Of course, Google does discipline and even terminate employees for violations of Google policies, including our policies against various types of ads. In the course of our investigation into online pharmaceutical advertisements, we disciplined or terminated several employees who had violated our policies.

e. Are you confident that the steps the company has taken will prevent the sale of illegal drugs through ads placed via Google?

The steps Google has taken to prevent pharmacies from unlawfully advertising on Google, described above, are robust and significant, and our experience with these steps since implementing them over a year ago shows very good results. History has shown that some rogue pharmacies find ways to circumvent Google's safeguards, but we are constantly evolving our practices to meet these challenges. One way we are addressing these rogue actors is by contracting with an independent company with knowledge of online pharmacies to conduct regular "sweeps" of ads running via AdWords to find any drug- or online-pharmacy-related advertisements from advertisers who manage to evade Google's screening programs. Upon receipt of those reports, offending advertisements are removed, and the advertiser accounts for these rogue pharmacies are terminated. Of course, this is a continuing arms race, involving millions of ads every day covering a wide range of products and services, that faces us and other online platforms. We use a variety of sophisticated filters, scans, and tools for human review to identify ads that may be for illegal products or that otherwise violate our policies, and we regularly update our policies to address new categories of ads. Bad actors in many countries around the world are constantly working to circumvent these barriers, and Google is actively improving our detection and deterrence tools.

4. I remain concerned about the reasons behind the conduct that became the subject of the DOJ investigation into Google's advertising practices. I understand that you cannot make any statements contradicting the facts set forth in paragraph 2 of the NPA. Without contradicting any statements in paragraph 2 of the NPA, please provide answers to the following questions:

a. Who at Google would have been in a position to prevent the conduct that led to the government's investigation and the Statement of Facts in the NPA?

Not blocking licensed Canadian pharmacies certified by SquareTrade and PharmacyChecker from advertising in the United States was the result of a continuing discussion involving a variety of policy and implementation

questions over several years. In hindsight it is possible that any of a number of individuals might have been able to influence those policies and practices.

b. Whose responsibility was it to respond to the two letters sent to Google in 2003 and 2008 by the National Association of Boards of Pharmacy warning Google that it was illegal to import prescription drugs from Canada? Did you ever see those letters? Did Google respond to them? See NPA, Para 2(f)

Google receives numerous inquiries and correspondence from many different parties about our products and services every day. We do our best to review correspondence and take appropriate action, which may or may not include a response to the sender. I understand that the National Association of Boards of Pharmacy ("NABP") sent Google the 2003 letter after we requested from it information regarding online pharmacies and the VIPPS program. Google considered the information provided by the NABP as we reviewed and updated our online pharmacy policies in 2003 and 2004. I myself do not recall seeing either letter.

c. What ultimately caused the conduct that is described in paragraph 2 of the NPA to cease?

Google disallowed Canadian pharmacies from advertising in the United States, and took the other steps described in response to Question 3b above, as a result of the government's investigation and our ongoing efforts to improve our policies and enforcement tools.

d. Who were the members of the Company's policy group in 2003 through 2009?

Google's advertising policy team had numerous members throughout this time period, many of whom no longer work at Google or on the policy team. As I noted earlier, not blocking licensed Canadian pharmacies certified by SquareTrade and PharmacyChecker from advertising in the United States was the result of a continuing discussion involving a variety of policy and implementation questions over several years, and involved many employees in the company beyond those on the policy team.

Response of Eric Schmidt, Executive Chairman, Google Inc.
Before the Senate Committee on the Judiciary
Subcommittee on Antitrust, Competition Policy, and Consumer Rights

Hearing on "The Power of Google: Serving Consumers or Threatening Competition?"
September 21, 2011

Questions for the Record from Senator Al Franken for Eric Schmidt

1. **In your testimony you stated that you are not aware of "any unnecessary or strange boosts or biases" in Google's algorithms for Google's own products and services. Can you confirm that Google does not give its own services an unfair advantage in its organic search results?**

Google's search results seek to achieve one fundamental thing: to connect users to the information they seek. We do this in two key ways. First, we started with conventional search—the traditional ten blue links — which involved crawling and indexing the web and returning results based on general responsiveness. Second, starting in 2001, we began to incorporate search results designed to respond to signals that a user is looking for specific types of information—a map, an image, a local business, a product, a news update, etc. We sometimes call these "thematic" search results.

Other major search engines also incorporate thematic and conventional search results on their search results pages. In fact, the first efforts at blending thematic and conventional search results by other general search engines date back to the late 1990s. It reflects the effort to achieve what one industry expert described in 2001 as the "Holy Grail" of search: "The real Holy Grail of all this will be when search engines can detect the type of search we are doing and feed out more targeted results from appropriate databases."[1]

These universal search results are not separate "products and services" from Google. Rather, the incorporation of thematic and conventional results in universal search reflects Google's effort to connect users to the information that is most responsive to their queries. Because of this, the question of whether we give an "unfair advantage" to our "products and services" is based on an inaccurate premise. These universal search results *are* our search service—they are not some separate "Google content" that can be "favored."

That said, in keeping with our focus on quality and delivering the most relevant results for consumers, Google constantly experiments with new ways to provide the most relevant information is response to a user's query. For example, for certain queries, where Google is highly confident that the user wants a specific answer, Google will provide that answer prominently on the page. These direct answers are known as "oneboxes." Oneboxes are generally displayed to convey an answer that is clear and straightforward, for example, movie showtimes, weather forecasts, mathematical calculations, stock prices, sports scores, and so on. Microsoft's Bing and Yahoo! display similar "oneboxes" prominently in their results as well, demonstrating their belief that these results are useful for consumers.

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[1] Danny Sullivan, "Being Search Boxed to Death", Search Engine Watch, March 4, 2001, http://searchenginewatch.com/article/2065235/Being-Search-Boxed-To-Death.

The decision whether to display a onebox is determined based on Google's assessment of user intent. Contrary to what some of Google's critics suggest, Google does not make money when users click on oneboxes. In fact, the opposite is true: oneboxes that are responsive to what users are looking for may draw users away from the ads displayed on the page. Nonetheless, because oneboxes help Google deliver a satisfying experience to users, Google believes that by displaying them we are enhancing user satisfaction, which is in the long-term best interest of the company.

In some instances, Google has licensed data from third parties for use in our oneboxes. In other instances, we have developed this data ourselves. In either case, whether users are searching for a weather forecast, a mathematical calculation (e.g., [pounds to grams]), or a stock price, Google's user studies confirm that users seeking this type of information generally do not want to click through to multiple options, whether in the form of ads or more natural links. Rather, users want a quick, direct answer that they can trust is correct. Oneboxes provide fast, accurate answers in response to this user demand.

In sum, we view our thematic search results as part of our search results, not as a separate product or service. With respect to a page on a Google-owned site such as YouTube that is crawled and ranked within our search results, such a page is not placed higher than an identical page would be if it were owned by another company.

2. **Please explain why Google's products (such as Google Places and Shopping) are not clearly labeled as Google products in your organic search results. Would Google consider clearly labeling these items so consumers understand these products are owned by Google?**

As I explained in answer to Question 1, thematic search results (such as Places and Shopping) incorporated in universal search results are not separate "products" from Google. Rather, the incorporation of thematic and conventional results in universal search reflects Google's effort to connect users to the information that is most responsive to their queries. These universal search results *are* our search service—they are not separate "Google content."

In response to a query seeking local information, for example, Google may either group local results together, or may distribute local results throughout our search results. Either way, Google is simply trying to organize and display local business results so as to save users time by displaying local information in the most effective manner, in order to eliminate the need to conduct multiple searches. As with any of Google's search results, local business listings are ranked according to likely relevance. For example, typing in a query for [shoe repair 22203] will typically return local business listings organized by geographic proximity to that zip code. The ranking of local business results is not affected by payment.

3. **What factors does Google consider in making the decision when and where to rank "answers" above "links" (such as to a metasearch site like Nextag)? Has Google considered providing search "answers" that are not owned or controlled by Google, for example pointing to products listed on a different product comparison service other than Google Shopping?**

Thematic search results for particular types of content (video, images, news articles, products, and so on) are incorporated when our consumer testing and data analysis shows that those results algorithms are most likely to deliver the results sought by our users. As I noted in my response to Question 1, oneboxes are displayed when Google believes it is likely that a user is seeking a specific answer, and they often contain information or data that are licensed from third parties.

4. **During his testimony, Nextag CEO Jeffrey Katz stated that Google offers "unique ad placements, which competitors such as [Nextag] can't even purchase." Does Google prevent companies from purchasing certain ads? If so, what process does Google use to determine who is eligible to bid for certain ads?**

NexTag is a valued customer of Google's that advertises extensively through our traditional AdWords system. What Mr. Katz was referring to was a discrete ad format where users see a specific product's picture and price. Our user studies have found that users expect to be able to purchase a product when they click on advertisements containing a product's picture and price. Accordingly, we require advertisers that use this format to direct their advertisement to a page where the product can be sold. As of this past September, we were working with NexTag to set up Product Listing Ads for the products sold directly through the site.

5. **During Mr. Stoppleman's testimony, he indicated that Yelp had difficulty removing its content from Google Places's reviews, and he was told Google would only remove Yelp content from its site if Yelp "de-indexed" its website.**

    a. **Please describe, in detail, the official process for a company to challenge Google's use of its content in a manner which the company believes is inappropriate?**

Every site owner has the option to use the robots exclusion protocol, also referred to as robots.txt, to indicate to Google or any other search engine that they do not want particular webpages, or even an entire site, to be crawled and indexed.[2] Site owners can easily exclude certain sites or portions of sites from being indexed, and can also specify different protocols for different search engines. The robots.txt protocol, which has been in place for over 17 years, can be utilized either by writing a new robots.txt file,[3] or by accessing one of many publicly available robots.txt files.[4]

In addition, Google regularly engages in business conversations with people in the search industry, from industry pundits to local businesses to SEO firms to site owners of websites both large and small. When Yelp raised issues with the way Google indexed Yelp content in Google's local search results, Google willingly engaged in a series of business conversations with Yelp in an attempt to address Yelp's numerous concerns.

    b. **Does Google "scrape" content from other websites? If so, please list the websites where Google is appropriating content and indicate whether any of these companies have complained to Google about this practice.**

Google believes strongly in protecting copyright and other intellectual property rights. Google relies, as does every other major search engine, on the established doctrine of fair use in order to display snippets of text in our search results, giving users a preview of the type of content they can find for a given link. Indeed, snippets are an important feature of search generally, and they drive traffic to websites. Google previously displayed review snippets from sites such as Yelp and TripAdvisor in our thematic local search results.

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[2] robots.txt is an industry standard that allows a site owner to control how search engines access their web site. Access can be controlled at multiple levels – the entire site, through individual directories, pages of a specific type, or even individual pages. Basically, robots.txt is a structured text file that can indicate to web-crawling robots that certain parts of a given server are off-limits. This allows search engines such as Google to determine which parts of a website a site owner wants to display in search results, and which parts to keep private and non-searchable. Dan Crow, "Controlling How Search Engines Access and Index Your Website", The Official Google Blog, January 26, 2007, http://googleblog.blogspot.com/2007/01/controlling-how-search-engines-access.html.

[3] There are a number of resources available online that provide users with information on coding robots.txt files. *See e.g.* About/robots.txt, August 23, 2010, http://www.robotstxt.org/robotstxt.html.

[4] A non-comprehensive list of robots.txt files submitted by independent programmers is available here: http://www.robotstxt.org/db.html.

Google's practice of displaying review snippets did not disadvantage review sites—in fact, quite the opposite. In fact, Google sends millions of clicks a month to Yelp, TripAdvisor, and other review sites. Google facilitates free traffic to both Yelp and TripAdvisor, and each of the sites has reaped the benefits of this free user exposure.

Yelp has aired numerous concerns in the press over the past few years, and although Google tries to act responsibly in response to website concerns, ultimately Google builds our search results and search-related products for the benefit of users, not websites. At all times, Google's primary motivation has been improving the search experience for our users by providing the most relevant and useful information in response to their queries. In the end, if users are unhappy with the answers Google provides, the openness of the web ensures that they can easily switch to Yelp or any other site with just one click.

6. **Many small businesses depend upon the Internet for customers to find them. I have heard from a number of Minnesota businesses that are concerned that the quality assessment measures Google rolled out in "Panda" will prevent them from competing with larger companies that can invest more in "search engine optimization." What is Google doing to address this concern and ensure that small businesses are not unfairly impacted by these changes?**

Google's ongoing aim is to ensure that we return search results that provide users with best answers. We developed the Panda algorithm in response to feedback from our users who wanted more relevant answers and a better user experience. While Google aims to provide users with websites that are likely to be the most useful for our users, over the past few years, websites with low-value content have learned how to game Google's algorithms so that they often outranked better websites. The Panda algorithm simply more adeptly ranks high-quality sites—sites with original content and information such as research, in-depth reports, thoughtful analysis, etc.—regardless of the size of the business in question.

Panda was a set of algorithm changes intended to improve the quality of search results and make it harder for poor quality sites to rank highly in Google's search algorithms. Panda does not prevent small businesses from competing with larger companies. We work hard to make sure that all companies' websites are ranked according to their usefulness to queries, and we continually keep small businesses in mind when we test out new algorithms and evaluate possible improvements to the algorithms.

7. **In your testimony, you estimated that just over two-thirds of Android phones were shipped with Google products pre-installed. Please confirm the exact percentage of Android phones that are shipped with Google products pre-installed, and please specify which apps are pre-loaded or bundled, including Google Maps; Google Places; Google +; Google Shopping; Gmail; Latitude, etc..**

As I mentioned in my testimony, my estimate of the number of phones that come with Google products pre-installed was "not too precise." It was, in fact, an educated guess. Android's code is open-sourced, meaning that manufacturers are free to obtain the Android source code and create Android phones without Google's knowledge or involvement.[5] Because Google does not know the total number of Android-powered phones, it is not possible to confirm the percentage of Android phones that ship with Google products pre-installed.

Google does not demand that smartphone manufacturers make Google the default search engine as a condition of using the Android operating system. Android is a free, open source platform for mobile devices. The complete Android source code is available for download for free from the Android Open Source Project

[5] *See* Android Open Source Project, "Downloading the Source Tree", http://source.android.com/source/downloading.html.

website.[6] Any developer or manufacturer can use, modify, and distribute the Android operating system without Google's permission or any payment to Google. For example, Amazon recently announced the Kindle Fire—its new tablet device—using the Android source code without Google's involvement. This is one of the exciting and innovative aspects of Android that will help foster innovation and competition in the smartphone market.

One of the greatest benefits of Android is that it fosters competition at every level of the mobile market—including among application developers. Google respects the freedom of manufacturers to choose which applications should be pre-loaded on Android devices. Google does not condition access to or use of Android on pre-installation of any Google applications or on making Google the default search engine.

Manufacturers can choose to pre-install Google applications on Android devices, but they can also choose to pre-install competing search applications like Yahoo! and Microsoft's Bing. Many Android devices have pre-installed the Microsoft Bing and Yahoo! search applications. No matter which applications come pre-installed, the user can easily download Yahoo!, Microsoft's Bing, and Google applications for free from the Android Market.[7] In addition, Android gives manufacturers the freedom to pre-install third-party app stores, like the Amazon Appstore for Android, where a user can download a variety of apps, including Microsoft's Bing.[8]

8. I have heard complaints that it is difficult to delete pre-loaded apps from Android phones. Please explain the process to delete pre-loaded apps, and how it compares to the process for deleting other apps that are not pre-installed on a phone.

During the manufacturing process, a manufacturer typically loads a mobile device with a complete system image consisting of the operating system and pre-loaded applications. The system image is loaded into read-only memory, which for technical reasons cannot be modified by the user. Because Android devices are manufactured in this manner, the user cannot alter the Android platform itself or any pre-loaded applications. As a result, any application that is pre-installed and part of the system image cannot be deleted. This is not an issue limited to Android; both Apple's iOS and Microsoft's Windows Phone are loaded as system images that prevent modifying the operating system or removing pre-loaded applications.

But Android is designed, more than any other mobile operating system, to allow users to fully personalize their mobile devices. Users are given ample freedom to modify the user interface and features of their Android devices. Users can easily move any applications they do not wish to use away from the home screen or into folders, can easily install one of over 300,000 applications available in the Android Market and other applications sources, and can use these applications to the exclusion of any pre-loaded software.

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[6] *See* Android Open Source Project, "Downloading the Source Tree", accessed on November 1, 2011, http://source.android.com/source/downloading.html.

[7] Users can access the Microsoft Bing Search application here: https://market.android.com/details?id=com.microsoft.bing&feature=search_result; the Yahoo! Search application here: https://market.android.com/details?id=com.yahoo.mobile.client.android.yahoo&feature=search_result; and the Google Search application here: https://market.android.com/details?id=com.google.android.googlequicksearchbox&feature=search_result.

[8] Amazon makes the Microsoft Bing Search application available here: http://www.amazon.com/Microsoft-Corporation-Bing/dp/B004T54Y2M/

Furthermore, the new version of the Android platform (Android 4.0: Ice Cream Sandwich) allows the user to disable pre-loaded applications. Although the application cannot truly be deleted for the reasons described above, a disabled application is hidden from view and cannot be launched unless the user re-enables it.

9. **How does Google define whether an application is "compatible" with the Android operating system? What steps has Google taken to help application developers to understand how applications are assessed for compatibility so they are not barred from the Android market?**

Google does not define whether applications are "compatible" with the Android operating system. Google has, however, undertaken extensive efforts to protect consumers and application developers to ensure their applications run seamlessly on all Android devices. Google, with the support of our Android partners, has identified certain specifications, such as minimum screen size and security features, that help ensure applications run flawlessly across device models. These specifications are reflected in the Android Compatibility Definition Document ("CDD"), which is published on Android Open Source Project's website. Google and our partners believe that this baseline preserves the maximum amount of manufacturer freedom to customize Android, while simultaneously protecting Android developers, who need consistency and rely on minimum elements appearing on all Android devices, and Android customers, who may legitimately expect that Android applications will run on their Android devices.

Application developers seeking to create an application that runs on the Android operating system can use the Android application programming interfaces ("APIs") that are made available through the Android operating system. Developers can also download the Android software development kit ("SDK"), and Android native development kit ("NDK"), which are all available for free on the Android developer website.[9] These tools allow anyone to create rich, innovative applications that can be distributed on Android devices.

10. **If a copyright or trademark owner alerts Google that a website or application is operating illegally, what process does Google take against those sites and applications? Is there a way to expedite this process?**

When we are notified by a rightsholder of infringing activity or material, we act promptly to address the issue. The nature of our response depends on the Google product that is involved—if we are hosting the content in question, we can remove it; if it involves advertising on an infringing site, we can remove the ads and terminate the site's account; if infringing material is appearing in search results, we can prevent those links from appearing in future search results.

For example, on YouTube, we don't even wait to be notified—we proactively employ our Content ID tools to match every video against our database of "claimed" audio and video before it appears on the site. This powerful technology scans the more than 48 hours of video uploaded to YouTube every minute and, within seconds, compares it against more than six million references files provided by participating rightsholders. This is possible because YouTube is a video hosting service, which means the videos reside on servers that we control. Content ID has proven to be an enormous success and is being used by a long list of content owners worldwide to make their own choices about how, where, when, or whether they want their content to appear on YouTube. In addition to our Content ID system, we also have developed a sophisticated Digital Millennium Copyright Act ("DMCA") takedown system, the Content Verification Program ("CVP"), for reliable, high-volume submitters. The response time for those using our CVP system is effectively immediate.

In contrast, where web search is concerned, Google has no ability to "take down" the sites that exist on the web, because we don't control the web. Instead, when copyright owners notify us of infringing material appearing in search results, we remove it from future results. While we have always processed takedown

[9] Android Developers, Download the Android SDK, accessed November 1, 2011, http://developer.android.com/sdk/index.html.

notices expeditiously, over the past several months, we have dramatically improved our turnaround time for DMCA notices for web search. We did this by building new tools for reliable, high-volume submitters. These tools are now being successfully used by more than a dozen content industry partners who together account for more than 75% of all URLs submitted in DMCA takedowns for web search. Our goal was to reduce average response time for these notices to less than 24 hours. In fact, we've exceeded that goal. Current average response time is now less than seven hours.

We also employ a wide array of procedures and expend considerable financial resources to prevent our advertising products from being used to monetize material that infringes copyright. For example, our AdSense program enables website publishers to display ads alongside their content. Our policies prohibit the use of this program for infringing sites, and we use automated and manual review to weed out abuse. Last year, we took action on our own initiative against nearly 12,000 sites for violating this policy. And in 2011, we have already taken action against more than 12,000 sites.

We also respond promptly when we are notified that our advertising products are being used by infringing sites. We recently agreed to improve our AdSense anti-piracy review procedures and are working together with rightsholders on better ways to identify websites that violate our policies.

Google also expends great effort to fight the challenge of counterfeit goods. Just as in the offline world, people misuse legitimate online services to try to market counterfeit goods. This abuse hurts our users and our business; combating it is central to Google's operations. In the last year, we shut down approximately 95,000 accounts for attempting to use sponsored links to advertise counterfeit goods, and more than 95% of these accounts were discovered through our own detection efforts. Even more ads themselves were blocked on suspicion of policy violations. Our automated tools analyze thousands of signals to help prevent bad ads from being shown in sponsored links. Last year alone we invested $60 million in efforts to prevent violations of our ad policies.

We also have a fast and easy complaint form for brand owners to notify us of ads for potentially counterfeit goods. Earlier this year, Google announced that for brand owners who use this form responsibly, we will commit to an average response time of 24 hours or less. Brand owner feedback is an important way in which we improve our systems—as we get more data about bad ads, we get better at counteracting the new ways that bad actors try to game the system.

a. If a property holder alerts Google that a new incarnation of the website or application has become available, how quickly does Google take action against this new site or application?

As mentioned above, the response time for DMCA notices varies depending on the Google product that is involved. For DMCA takedown notices submitted through our new tools, which together account for more than 75% of all URLs submitted in DMCA takedowns for web search, we are happy to announce that we've exceeded our goal of reducing average response time to less than 24 hours. Current average response times are now less than seven hours.

b. Does Google have a system in place to screen out applications that appear to advertise intellectual property infringement in the title or description of the application (i.e. – a "Freemusicdownload" app) before these applications are listed in the Android marketplace?

Android Market provides a platform for independent developers to distribute software applications ("apps"). Our policies on Android Market are clear: applications that infringe copyrights, or otherwise violate the law, are prohibited. All Android Market developers must agree to the Developer Distribution Agreement ("DDA") before submitting any apps. Section 7.2 of the DDA provides, "if Google is notified by you or otherwise becomes aware and determines in its sole discretion that a Product . . . violates the intellectual

property rights or any other rights of any third party . . . Google may remove the Product from the Market."[10] Further, the Android Market Developer Program Policies (the "Content Policy"), incorporated by reference into the DDA, provide:

> **Intellectual Property:** Don't infringe on the intellectual property rights of others, including patent, trademark, trade secret, copyright, and other proprietary rights. We will respond to clear notices of alleged copyright infringement. For more information or to file a DMCA request, please visit our copyright procedures.
>
> **Illegal Activities:** Keep it legal. Don't engage in unlawful activities on this product.[11]

The Content Policy also states: "Serious or repeated violations of the Developer Distribution Agreement or this Content Policy will result in account termination. Repeated infringement of intellectual property rights, including copyright, will also result in account termination."[12] Correspondingly, we take steps to terminate the accounts of developers who are repeat infringers. Furthermore, we attempt to detect and terminate other accounts created by developers who have been previously terminated for repeat infringement and other policy violations. We also require all developers to register with Google Checkout and pay $25. This basic authentication step acts as a filter to keep out spammers and other bad actors. Typically, after three policy violations of any kind, we terminate the developer account. In addition, we also ban related accounts whether or not those accounts have directly incurred any policy violations.

Our practice is to remove an application pursuant to the Content Policy if we become aware, through formal DMCA complaints or otherwise, that such application violates those policies.

We offer a web form designed to enable rightsholders to submit DMCA notices electronically for Android Market. During 2010, Google removed 1,026 applications through our DMCA copyright process for Android Market. Through September 2011, Google has removed 1,960 applications through our DMCA copyright process for Android Market.

Our response time for DMCA copyright notices for Android Market has varied depending on the incoming volume of notices and the app in question. Currently, our average response time is less than 48 hours for notices submitted electronically through our web form.

11. What measures does Google take to make sure that its ads are not placed on websites engaged in copyright or trademark infringement? Please explain if these policies are consistent across all Google advertising products, including AdSense, DoubleClick, and AdMob.

Our policies prohibit the use of our AdSense and AdMob programs on web pages (AdSense) or apps (AdMob) that include infringing materials or seek to sell counterfeit goods. DoubleClick is an ad management and ad serving platform. As with our other advertising tools, we are prepared to take appropriate action, including account termination, where DoubleClick publishers are shown to be using our product to serve ads on infringing content.

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[10] Android, "Android Market Developer Distribution Agreement", accessed November 1, 2011, http://www.android.com/us/developer-distribution-agreement.html.

[11] Android, "Android Market Developer Program Policies", accessed November 1, 2011, http://www.android.com/us/developer-content-policy.html.

[12] *Id.*

It is generally through the AdSense program that Google places ads on other websites. We employ a wide array of procedures to prevent infringing sites from using our ads products, and we expend considerable financial resources to find and eject advertisers and publishers who violate our policies. For example, publishers who want to join the AdSense program are vetted upon joining for their compliance with program policies. In addition, automated systems monitor the pages on which AdSense ads appear and bring potentially problematic material to the attention of human reviewers. Finally, Google responds swiftly when notified by a rightsholder that our AdSense program is being used to monetize infringing or counterfeit sites and we have policies in place to terminate the accounts of repeat offenders. The volume of complaints in this regard is not high and represents far less than 1% of all our AdSense partner sites.

Moreover, Google has long enabled advertisers directly to control where their ads appear. Using available exclusion tools for our ad programs, advertisers can exclude domains of their choosing from displaying their ads (whether because of infringement or any other concern). Similarly, if an advertiser discovers its ads running on an objectionable site that it had not previously been aware of, that advertiser can use the tools to prevent any future appearances on that site.

While we are proud of the policies and procedures we have in place to prevent improper use of our ads products, we are always striving to improve. We continue to work with rightsholders to identify, and, when appropriate, expel violators from the AdSense program.

In addition, Google is helping to lead industry-wide solutions to prevent legitimate ads from appearing on illegitimate sites through our work with the Interactive Advertising Bureau ("IAB"), comprised of more than 460 leading media and technology companies. The IAB has established quality assurance guidelines through which participating advertising companies will take standardized steps to enhance buyer control over the placement and context of advertising and build brand safety. Despite the best efforts of the online advertising industry, however, technologically sophisticated players use tactics like "cloaking" (showing one version of their site to users and a different version to Google) to evade the protections that Google and other companies put in place. While the industry is aggressively going after those who abuse online advertising programs, it is clearly a cat-and-mouse game, and efforts to legislate in this area must be careful not to target ad platforms for abuses of their systems that could not reasonably be prevented.

12. How many copyright and trademark violators have been expelled from AdSense and other Google advertising services in 2010 and 2011? What measures has Google adopted to prevent violators from re-joining these services using a new account? Does Google have a system in place to pre-screen websites prior to them signing up with one of Google's advertising services?

For copyright, last year we took action on our own initiative against nearly 12,000 sites for violating our policy against using AdSense for sites infringing copyright. In 2011, we have already taken action against more than 12,000 sites, and we have certified our compliance with IAB's guidelines. As described above, we employ a wide array of procedures to prevent infringing sites from using our ads products, and we expend considerable financial resources to find and eject advertisers and publishers who violate our policies. For example, publishers who want to join the AdSense program are vetted upon joining for their compliance with program policies. In addition, automated systems monitor the pages on which AdSense ads appear, and bring potentially problematic material to the attention of human reviewers. Finally, Google responds swiftly when notified by a rightsholder that our AdSense program is being used to monetize infringing or counterfeit sites and we have policies in place to terminate the accounts of repeat offenders.

Google also has clear policies against advertising counterfeit goods, and we expend considerable resources to enforce those policies. In the last year, we shut down approximately 95,000 accounts for attempting to use sponsored links to advertise counterfeit goods, and more than 95% of these accounts were discovered through our own detection efforts. Even more ads themselves were blocked on suspicion of policy

violations. Our automated tools analyze thousands of signals to help prevent bad ads from being shown in sponsored links. Last year alone we invested $60 million in efforts to prevent violations of our ad policies.

Response of Eric Schmidt, Executive Chairman, Google Inc.
Before the Senate Committee on the Judiciary
Subcommittee on Antitrust, Competition Policy, and Consumer Rights

Hearing on "The Power of Google: Serving Consumers or Threatening Competition?"
September 21, 2011

Senator Grassley's Written Questions for Eric Schmidt

1. **Some Iowans question whether "Google promotes fairness, competition and transparency in the online search business." What can you tell them about this? Do Google's business practices promote fairness, competition and transparency? How?**

Google is proud of its business practices. The open web of high-quality publishers is important to Google's success. Through Google Webmaster Central, the company has made substantial investments in tools and transparency for websites. In addition to building industry-leading tools to help websites diagnose problems and improve performance, Google provides more information about how our rankings work than any other major search engine.

In order to continue to provide good results, however, some aspects of search algorithms need to be kept secret. Otherwise spammers would game their way to the top of search result rankings with tricks and gimmicks. Because spammers consistently try to game Google's search algorithms, Google has published detailed quality guidelines for webmasters. In addition to providing constructive advice for improving website performance on Google, these guidelines clearly articulate spam tactics that are against the rules and could lead to a site being demoted or removed from our index.

Competition is just one click away. Google does not—and cannot—make it more difficult for users to switch to Microsoft's Bing, Yahoo!, Blekko, or any specialized search engine such as Amazon (for products), Yelp (for local reviews), or OpenTable (for restaurant reviews). As Microsoft researcher Ryen White observed this year in summarizing his research findings, "The barrier to switching Web Search engines is low and multiple engine usage is common."[1] In fact, according to multiple studies, including one from Microsoft,[2] it is clear that a majority of searchers use more than one search engine in any given month (what the industry refers to as "multi-homing").[3] Multi-homing is evidence that there is no lock-in: if there were, the studies should demonstrate no multi-homing because users are locked-in to a single search engine.

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[1] Qi Guo, Ryen W. White, Yunqiao Zhang, Blake Anderson, and Susan T. Dumais, "Why Searchers Switch: Understanding and Predicting Engine Switching Rationales", SIGIR 2011, July 24-28, 2011, http://research.microsoft.com/en-us/um/people/ryenw/papers/GuoSIGIR2011.pdf.

[2] *Id.*

[3] *See* Jake Loechner, "Websearchers Are Tenacious", Center for Media Research, October 4, 2010, http://www.mediapost.com/publications/article/136907/ (reporting on 2010 Performics Study that found 79% of Internet searchers will try a different site if they do not initally find what they seek); *see also* Jacqui Cheng, "Nielsen: Fickle Search Engine Users Could Benefit Bing", Ars Technica, June 2, 2009, http://arstechnica.com/web/news/2009/06/nielsen-fickle-search-engine-users-could-benefit-bing.ars

2. **In the 1990's when Microsoft added enhanced desktop search to Windows, Google took the position that it was an illegal tying of the dominant Windows platform. Today, many competitors are concerned that Google is illegally tying services to Google's dominant Search and Search advertising businesses in a similar way. For example, Google Maps and Google Places have been given priority placing in Google search results at the expense of competitors like MapQuest, Yelp or Trip Advisor. How is tying like this acceptable, but Microsoft's was not?**

The manner in which Google and other search engines (including Microsoft's Bing) display their search results does not "tie" one kind of result to another. There is one product—search—and numerous means of displaying information that may be useful and responsive to queries. Users are not coerced in any way; they can click on what they want or navigate to an entirely different information source.

3. **Some Iowans have expressed concerns that because of Google's dominance in the online search market, it "can easily pick winners and losers based on some arbitrary and undisclosed system." Another Iowan wrote, "Over the past few years, Google has ratcheted up competition with established websites by developing its own products and often promoting them above regular search results. . . . How will a startup compete with a giant like Google that has essentially monopolized the Internet?" Are these valid concerns?**

Google's efforts to deliver responsive results to our users in no way harm competition or deter innovators from entering the market. To the contrary, Google actually provides free promotion to millions of innovative websites through our search results. Indeed, innovation on the Internet is happening at an unprecedented rate. As the CEO of Blekko (a relatively new firm that offers a general search engine and recently attracted $30 million in additional financing) noted last month: "We don't need federal intervention to level the playing field with Google. Innovation and competition are far more powerful instruments."[4]

The Internet is incredibly dynamic and new companies with tremendous ideas are being created every day. Facebook, Twitter, and LinkedIn all achieved extraordinary success long after Google began integrating thematic algorithms into our search results—and all are changing the way in which users think about finding information online. Already, many users utilize these sites, and others like them, to find the information they need. The New York Times, for example, receives only 16% of its web traffic from Google.[5] Similarly, ComedyCentral.com receives more traffic from Facebook than it does from Google.[6] Amazon, Travelocity, and Expedia, among others, provide thematic search results and do not need Google to find an audience—they are quite successful in finding an audience on the Internet.

Moreover, history shows that popular technology is often supplanted by entirely new models. Even in the few weeks since the hearing, Apple has launched an entirely new approach to search technology with Siri, its voice-activated search and task-completion service built into the iPhone 4S. As one respected technology site

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(finding that 72 percent of all heavy Internet searchers use more than three different search engines in a month).

[4] Rich Skrenta (co-founder and CEO of Blekko), "Blekko's not afraid of Google, why is Washington?", Skrentablog, September 20, 2011, http://www.skrenta.com/2011/09/blekkos_not_afraid_of_google_w.html.

[5] Compete.com, September 2011 Site Analytics Data for The New York Times, accessed October 27, 2011, http://siteanalytics.compete.com/nytimes.com/.

[6] Compete.com, September 2011 Site Analytics Data for Comedy Central, accessed October 27, 2011, http://siteanalytics.compete.com/comedycentral.com/.

reported: "[E]veryone keeps insisting that Apple will eventually get into the search engine business. Well they have. But not in the way that everyone was thinking. Siri is their entry point."[7] Another commentator has described Siri more simply as intended to be a "Google killer."[8]

Finally, we do not have to speculate as to whether there are new entrants in vertical search services such as comparison shopping and local search and review sites. There are new entrants in these market segments all the time. A new comparison shopping site, FindTheBest, launched by the co-founder of DoubleClick last year, just raised $6 million in venture funding over the summer. Cheapism is an comparison shopping site that launched in 2009, dedicated to bargain hunters on the Internet and was recognized in the New York Times and on CBS New York. More recently, a new entrant called Centzy launched a website that combines both local search and comparison shopping functionality. Centzy's CEO used to work at SnapFish and is currently seeking funding following its successful launch for New York and San Francisco. Unlike Yelp, Centzy integrates pricing information for goods and services on its site so that users can comparison shop for local services. Barefootfloors.com is a comparison shopping site that launched in January that is focused on home goods and "is now helping online shoppers to educate themselves on everything related to the home and to save money on a wide variety of products for the home."[9] In February of this year, the travel comparison shopping site, Hipmunk, received $4.6 million in venture funding, even as Google continues to expand its own flight search and hotel search functionality.

These are just a few of the many recent entrants in local and comparison shopping that are entering the market even as Google continues to innovate. While they may not all succeed, venture capitalists and entrepreneurs alike continue to believe they can compete with Google, Yelp, Nextag, and other established competitors.

4. How would you characterize Google's view of intellectual property and its role in the economy?

Google believes in a strong and balanced approach to protecting copyright and other intellectual property rights, in line with the Constitution's goal of promoting "the progress of science and useful arts." We understand that despite the overwhelmingly positive and legitimate uses of Internet services and technologies, there will be some who misuse these for infringing purposes. Google invests millions of dollars in engineering and other resources to help rightsholders fight this misuse.

Google adheres to the takedown process Congress established under the Digital Millennium Copyright Act ("DMCA"), which provides copyright owners with expeditious recourse when they discover infringement online while also giving online service providers like Google the certainty necessary to invest in the services that millions of Americans rely on each day. Across our search engine and hosted products, we remove or disable access to millions of infringing items each year at the request of copyright owners. We voluntarily take several steps well beyond our legal obligations, and we regularly cooperate with a wide array of law enforcement authorities.

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[7] MG Siegler, "Why So Siri-ous?", TechCrunch, October 16, 2011, http://techcrunch.com/2011/10/16/iphone-siri/.

[8] Eric Jackson, "Why Siri Is a Google Killer", Forbes, October 28, 2011, http://www.forbes.com/sites/ericjackson/2011/10/28/why-siri-is-a-google-killer/2/.

[9] Tanya Tymoshuk, "BarefootFloor.com: New Price Comparison Engine Helps Consumers Shop Smartly for Home Goods", Yahoo! News, January 11, 2011, http://news.yahoo.com/barefootfloor-com-price-comparison-engine-helps-consumers-shop-20110111-070000-289.html.

With the explosive growth of the Internet and skyrocketing demand for Internet-enabled devices, it is innovation-friendly copyright limitations and exceptions, principally fair use and the DMCA safe harbors, that have directly led to the creation of entirely new marketplaces for promoting and monetizing content. Online platforms like YouTube, Facebook, and Twitter in turn have unleashed new sources of creativity, economic development, and jobs. It is no exaggeration to note that the DMCA set the legal foundation for e-commerce. The Computer and Communications Industry Association has found that industries that rely on fair use and other limitations generate $4.7 trillion in revenue, represent one sixth of total U.S. GDP, and support 17 million jobs. While online piracy remains a serious enforcement problem, we should not lose sight of the overall balance of our nation's copyright laws, which continue to spur a broad array of American-bred creativity and innovation.

Google also works closely with rightsholders to make authorized content more accessible on the Internet. We realize that providing users with access to legitimate content is critical to addressing the problem of copyright infringement online. From its startup phase in 2005, YouTube is now monetizing for content owners over three billion video views per week. We create revenue for more than 20,000 partners. Record labels are now making millions of dollars a month on YouTube. Hundreds of YouTube users make six figures a year. Today over 2,000 media companies—including every major U.S. network broadcaster, movie studio, and record label—use the copyright protection tools that YouTube offers, and a majority of them choose to monetize rather than block their content online.

5. **I've heard complaints from a number of rights holders regarding Google's approach to intellectual property rights. In the opinion of many of Google's critics, Google has taken a cavalier attitude toward the intellectual property of others. The issues that are being raised are not insignificant, considering the ease in which a site engaged in counterfeiting or piracy can be found with a search, the profits earned from advertising on such sites, and the large number of mobile applications on the Android platform that facilitate piracy. After reading about the recent Google $500 million settlement with the Department of Justice regarding the placement of ads on rogue pharmaceutical sites, I'm interested in hearing about Google's approach to ensuring the protection of intellectual property rights. As you know, a few months ago the Senate Judiciary Committee favorably reported the PROTECT-IP Act that is intended to address the rampant problem of online infringement. I believe that Google as a company should do more voluntarily to protect intellectual property rights. How does Google plan to do better?**

Google understands that despite the overwhelmingly positive and legitimate uses of Internet services and technologies, there will be some who misuse these for infringing purposes. Google has been an industry leader in developing innovative measures to protect copyright and help rightsholders control their content online. For example, Google has expended more than 50,000 engineering hours and more than $30 million to develop Content ID, our cutting-edge copyright protection tool that is helping rightsholders make money on YouTube. This powerful technology scans the more than 48 hours of video uploaded to YouTube every minute and, within seconds, compares it against more than six million references files provided by participating rightsholders. Content ID has proven to be an enormous success and is being used by a long list of content owners worldwide to make their own choices about how, where, when, or whether they want their content to appear on YouTube.

As is true for all Internet companies, the critical foundation for Google's anti-piracy efforts remains the DMCA, the seminal law Congress passed in 1998 to address copyright protection online and promote the worldwide expansion of e-commerce. Congress rightly understood that some material posted by the millions of people who use online services will infringe copyright, and that online service providers in the ordinary course of their operations engage in copying and other acts that expose them to potential copyright liability. Congress also recognized that requiring online providers to engage in pre-screening of every user-posted text, picture, and video would inhibit free expression and stifle the growth of the Internet.

At the request of copyright owners, Google in 2010 took action against approximately three million allegedly infringing items across all our products, which accounts for far less than 1% of all the materials hosted and indexed by Google. We received takedown notices by letter, fax, email, and web forms from all sorts of copyright owners (including movie studios, record labels, adult entertainment vendors, and needlepoint pattern publishers) from 70 countries and in a wide variety of languages. Hundreds of Google employees work on copyright and combating infringement online, including a growing team of employees dedicated to receiving, reviewing, and responding to DMCA notices. We check to make sure that the notices are complete and are not attempts by competitors or others to use invalid copyright claims to censor speech with which they disagree.

Last December, Google announced that we were designing new tools to enable us to act on reliable copyright takedown requests within 24 hours. We are happy to report that our average turnaround time for DMCA notices received from those using our new tools is now less than seven hours. Moreover, submissions using our new tools now account for more than 75% of all URLs identified to us for web search.

In addition, Google has (in compliance with the DMCA) implemented repeat infringer policies on all relevant products. In each of these products, repeat infringer terminations constitute far fewer than 1% of the total subscriber accounts.

We also employ a wide array of procedures and expend considerable financial resources to prevent our advertising products from being used to monetize material that infringes copyright. For example, our AdSense program enables website publishers to display ads alongside their content. Our policies prohibit the use of this program for infringing sites, and we use automated and manual review to weed out abuse. In 2010, we took action on our own initiative against nearly 12,000 sites for violating this policy. And in 2011, we have already taken action against more than 12,000 sites. We also respond swiftly when notified by rightsholders. We recently agreed to improve our AdSense anti-piracy review procedures and are working together with rightsholders on better ways to identify websites that violate our policies.

We also committed last year to prevent terms that are closely associated with piracy from appearing in autocomplete. We have begun working to prevent several piracy-related terms from appearing in autocomplete and have asked content industry representatives to suggest other terms for consideration that won't overly restrict legitimate speech.

We are also helping to lead industry-wide solutions through our work with the Interactive Advertising Bureau ("IAB"), comprised of more than 460 leading media and technology companies. The IAB has established quality-assurance guidelines through which participating advertising companies will take standardized steps to enhance buyer control over the placement and context of advertising and build brand safety. Google has certified our compliance with these guidelines.

Google also expends great effort to fight the challenge of counterfeit goods. Just as in the offline world, people misuse legitimate online services to try to market counterfeit goods. This abuse hurts our users and our business; combating it is central to Google's operations. The integrity and quality of the sponsored links displayed alongside Google search results are of paramount importance to our overall success. A Google user duped by a fake good is less likely to click on another Google ad in the future. For this reason, Google undertakes enormous efforts to root out ads for sites that sell counterfeit goods.

Google has clear policies against advertising counterfeit goods, and we expend considerable resources to enforce those policies. In the last year, we shut down approximately 95,000 accounts for attempting to use sponsored links to advertise counterfeit goods, and more than 95% of these accounts were discovered through our own detection efforts. Even more ads themselves were blocked on suspicion of policy violations. Our automated tools analyze thousands of signals to help prevent bad ads from being shown in sponsored links. Last year alone we invested $60 million in efforts to prevent violations of our ad policies.

Despite the best efforts of the online advertising industry, proactive measures will never be a complete solution. Some publishers deliberately take steps to evade detection systems, meaning bad sites will invariably slip through. Technologically sophisticated players use tactics like "cloaking" (showing one version of their site to the public and a different version to Google) to evade the protections that Google and other companies put in place. Because of these tactics, coupled with the sheer volume of ads served per day, finding a particular ad on the web that has circumvented our systems may always be possible. While the industry is aggressively going after this abuse, it is clearly a cat-and-mouse game to stay ahead of the bad actors, and Google is committed to being an industry leader in eradicating this behavior.

We also believe that making high-value content available in authorized forms is a crucial part of the battle against online infringement. With 800 million people per month coming to YouTube, we have expanded our movie rental services, made it easier for indie labels to become YouTube partners and share revenue when their music is played (even for user-generated content), and launched a feature to enable fans to buy artists' merchandise, music downloads, and concert tickets. And we've launched the Google eBookstore, featuring a wide array of books from authors and publishers. We also continue to improve YouTube's Content ID system to help more copyright owners (including songwriters and music publishers) to monetize their works, and we are working with WIPO on a rights registry that will help African musicians license their works.

In addition to launching our own authorized services, we also launched Music Rich Snippets, which allow other legitimate music sites to highlight content in the snippets that appear in Google's conventional web search results. Rhapsody and MySpace are among the first to implement this feature, which has been developed using open web markup standards, and we are looking forward to more sites and search engines marking up their pages. We hope that authorized music sites will take advantage of Music Rich Snippets to make their preview content stand out in search results.

6. **With so many people now using smart phones, one of my constituents wonders what sort of data Google is collecting from smart phone users. Do you track more than Google searches? Are you able to track text messages and the use of applications? She is concerned about the amount of personal information that Google may have access to, and if there are any privacy issues that are implicated by Google's practices.**

Google respects our users' privacy. The ordinary phone and text messaging features of mobile devices are not handled by Google, but rather by the mobile network operator. Therefore, Google does not track these user phone calls or text message.

The Google search service, as well as other Google applications and Google web services (such as Gmail and YouTube) are available to users on mobile devices, whether they use Android or another operating system. The Google Mobile Privacy Policy (http://www.google.com/mobile/privacy.html) and Google Privacy Policy (http://www.google.com/intl/en/privacy/privacy-policy.html) describe the types of information collected by Google from mobile devices.

Response of Eric Schmidt, Executive Chairman, Google Inc.
Before the Senate Committee on the Judiciary
Subcommittee on Antitrust, Competition Policy, and Consumer Rights

Hearing on "The Power of Google: Serving Consumers or Threatening Competition?"
September 21, 2011

Sen. Kohl's Follow-Up Questions for the Record for Eric Schmidt

1. **At the hearing, we discussed the 2007 statement of Google senior executive (currently Vice President for Location and Local Services) Marissa Mayer that Google used to rank links "based on popularity, but when we roll[ed] out Google Finance, we did put the Google link first. It seems only fair, right? We do all the work for the search page and all these other things, so we do put it first… That has actually been our policy, since then . . . So for Google Maps again, it's the first link, so on and so forth. And after that it's ranked usually by popularity."**

    a. **At the hearing, I asked you whether Ms. Mayer's statement was an accurate statement of Google policy. You replied, "I wasn't there [when Ms. Mayer made the statement], so maybe I should use my own voice on this question," and later added, "I'll let Marissa speak for herself on her quote." You never stated whether Ms. Mayer correctly described Google's policy in 2007. However, in answering Senator Blumenthal's question, "As I understand it, certain Google properties – Maps, for example – are at the top of the search results regardless of the algorithm or formula or methodology," you responded "Right. Sure." So does Ms. Mayer's quote accurately describe Google's policy regarding Google content (not only Google Finance) at the time she said it 2007? Did this policy change at any time? If so, when, and what was the change(s)? In general, does Google put the Google Finance and other Google content, such as Google Maps, Local Search, Shopping, etc., results at or near the top of non-sponsored search results on the search results page (or above the search results), regardless of its popularity?**

Before I address Ms. Mayer's statements, let me first address some questions of terminology. To begin with, Google's search results seek to achieve one fundamental thing: to connect users to the information they seek. We do this in two key ways. First, we started with conventional search—the traditional ten blue links—which involved crawling and indexing the web and returning results based on general responsiveness. Second, starting in 2001, we began to incorporate search results designed to respond to signals that a user is looking for specific types of information—a map, an image, a local business, a product, a news update, etc. We sometimes call these "thematic" search results.

When presenting thematic results, Google displays them in a way that is designed to make them user friendly. Prior to the launch of universal search in 2007, Google's thematic results like news were displayed, when relevant, at the top of the search results page. With the introduction of "universal search," we began to allow these thematic results to "float" from the top position to positions in the middle and bottom of the page, based on our assessment of how relevant conventional and thematic results were to the user's query.

Other major search engines also incorporate thematic and conventional search results on their search results pages. In fact, the first efforts at blending thematic and conventional search results by other general search engines date back to the late 1990s. It reflects the effort to achieve what one industry expert described in 2001 as the "Holy Grail" of search: "The real Holy Grail of all this will be when search engines can detect the type of search we are doing and feed out more targeted results from appropriate databases."[1]

But what is crucial to understand is that universal search results are *not* separate "products and services" from Google. Rather, the incorporation of thematic and conventional results in universal search reflects Google's effort to connect users to the information that is most responsive to their queries. Because of this, the question of whether we "favor" our "products and services" is based on an inaccurate premise. These universal search results *are* our search service—they are not some separate "Google content" that can be "favored."

That said, in keeping with our focus on quality and delivering the most relevant results for consumers, Google constantly experiments with new ways to provide the most relevant information is response to a user's query. For example, for certain queries, where Google is highly confident that the user wants a specific answer, Google will provide that answer prominently on the page. These direct answers are known as "oneboxes." Oneboxes are generally displayed to convey an answer that is clear and straightforward, for example, movie showtimes, weather forecasts, mathematical calculations, stock prices, sports scores, and so on. Microsoft's Bing and Yahoo! display similar "oneboxes" prominently in their results as well, demonstrating their belief that these results are useful for consumers.

The decision whether to display a onebox is determined based on Google's assessment of user intent. Contrary to what some of Google's critics suggest, Google does not make money when users click on oneboxes. In fact, the opposite is true: oneboxes that are responsive to what users are looking for may draw users away from the ads displayed on the page. Nonetheless, because oneboxes help Google deliver a satisfying experience to users, Google believes that by displaying them we are enhancing user satisfaction, which is in the long-term best interest of the company.

In some instances, Google has licensed data from third parties for use in our oneboxes. In other instances, we have developed this data ourselves. In either case, whether users are searching for a weather forecast, a mathematical calculation (e.g., "pounds to grams"), or a stock price, Google's user studies confirm that users seeking this type of information generally do not want to click through to multiple options, whether in the form of ads or more natural links. Rather, users want a quick, direct answer that they can trust is correct. Oneboxes provide fast, accurate answers in response to this user demand.

With regard to Ms. Mayer's quote, it is my understanding that she was referring to the placement of links within a onebox (but not the ranking of other thematic results within search results), and her description was accurate.

b. If your answer is that Ms. Mayer did accurately describe Google's policy, doesn't ranking Google's sites automatically first in this manner give Google an unfair competitive advantage over non-Google web sites? And doesn't this policy deter new innovative services from entering the market?

For certain types of queries, such as stock quotes and weather forecasts, our studies show that users like direct answers. As stated above, it is my understanding that Ms. Mayer was referring to the placement of links within a onebox (but not the ranking of other thematic results within search results), and her description was accurate.

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[1] Danny Sullivan, "Being Search Boxed to Death", Search Engine Watch, March 4, 2001, http://searchenginewatch.com/article/2065235/Being-Search-Boxed-To-Death.

Google's primary goal is to give users the information they seek, and if for any reason we do not succeed in providing the best answers for our users, they can and will quickly switch to another source of information.

With respect to the second question, Google's efforts to deliver responsive results to our users in no way harm competition or deter innovators from entering the market. To the contrary, Google actually provides free promotion to millions of innovative websites through our search results. Indeed, innovation on the Internet is happening at an unprecedented rate. As the CEO of Blekko (a relatively new firm that offers a general search engine and recently attracted $30 million in additional financing) noted last month: "We don't need federal intervention to level the playing field with Google. Innovation and competition are far more powerful instruments."[2]

The Internet is incredibly dynamic and new companies with tremendous ideas are being created every day. Facebook, Twitter, and LinkedIn all achieved extraordinary success long after Google began integrating thematic algorithms into our search results—and all are changing the way in which users think about finding information online. Already, many users utilize these sites, and others like them, to find the information they need. The New York Times, for example, receives only 16% of its web traffic from Google.[3] Similarly, ComedyCentral.com receives more traffic from Facebook than it does from Google.[4] Amazon, Travelocity, and Expedia, among others, provide thematic search results and do not need Google to find an audience—they are quite successful in finding an audience on the Internet.

Moreover, history shows that popular technology is often supplanted by entirely new models. Even in the few weeks since the hearing, Apple has launched an entirely new approach to search technology with Siri, its voice-activated search and task-completion service built into the iPhone 4S. As one respected technology site reported: "[E]veryone keeps insisting that Apple will eventually get into the search engine business. Well they have. But not in the way that everyone was thinking. Siri is their entry point."[5] Another commentator has described Siri more simply as intended to be a "Google killer."[6]

Finally, we do not have to speculate as to whether there are new entrants in vertical search services such as comparison shopping and local search and review sites. There are new entrants in these market segments all the time. A new comparison shopping site, FindTheBest, launched by the co-founder of DoubleClick last year, just raised $6 million in venture funding over the summer. Cheapism is a comparison shopping site that launched in 2009, dedicated to bargain hunters on the Internet and was recognized in the New York Times and on CBS New York. More recently, a new entrant called Centzy launched a website that combines both local search and comparison shopping functionality. Centzy's CEO used to work at SnapFish and is currently seeking funding following its successful launch for New York and San Francisco. Unlike Yelp, Centzy integrates pricing information for goods and services on its site so that users can comparison shop for local

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[2] Rich Skrenta (co-founder and CEO of Blekko), "Blekko's not afraid of Google, why is Washington?", Skrentablog, September 20, 2011, http://www.skrenta.com/2011/09/blekkos_not_afraid_of_google_w.html.

[3] Compete.com, September 2011 Site Analytics Data for The New York Times, accessed October 27, 2011, http://siteanalytics.compete.com/nytimes.com/.

[4] Compete.com, September 2011 Site Analytics Data for Comedy Central, accessed October 27, 2011, http://siteanalytics.compete.com/comedycentral.com/.

[5] MG Siegler, "Why So Siri-ous?", TechCrunch, October 16, 2011, http://techcrunch.com/2011/10/16/iphone-siri/.

[6] Eric Jackson, "Why Siri Is a Google Killer", Forbes, October 28, 2011, http://www.forbes.com/sites/ericjackson/2011/10/28/why-siri-is-a-google-killer/2/.

services. Barefootfloors.com is a comparison shopping site that launched in January that is focused on home goods and "is now helping online shoppers to educate themselves on everything related to the home and to save money on a wide variety of products for the home."[7] In February of this year, the travel comparison shopping site, Hipmunk, received $4.6 million in venture funding, even as Google continues to expand its own flight search and hotel search functionality.

These are just a few of the many recent entrants in local and comparison shopping that are entering the market even as Google continues to innovate. While they may not all succeed, venture capitalists and entrepreneurs alike continue to believe they can compete with Google, Yelp, Nextag, and other established competitors.

c. If your answer is that Ms. Mayer did not accurate describe Google's policy, why did Ms. Mayer say it was in 2007? And what is Google's policy?

As described above in response to Questions 1a and 1b, I do not believe that Ms. Mayer's quote was inaccurate.

d. Google's recently announced its plans to purchase the restaurant review service Zagat. Does Google intend to place Zagat's results ahead of Yelp, OpenTable, or other sites that currently compete with Zagat's?

Google wants to provide users with high-quality information about local businesses. Zagat provides survey-based aggregate ratings of businesses and curated user reviews. Acquiring Zagat is part of our efforts to ensure that we can provide high-quality information about and ratings of local businesses.

After acquiring Zagat, we are likely to include Zagat ratings in Google's local results in some way, but we have not yet determined exactly how. Nonetheless, we will continue to rely on our user feedback and testing to provide guidance about how Zagat can enhance the answers we provide our users.

e. How do you respond to Mr. Stoppelman's charge that he would not start Yelp today given Google's practice of putting its local search at or near the top of search results and as a result taking so much "real estate" on the search results page? How can a new start up expect to compete with Google's own content in search results?

Yelp has many means of promoting its service, including advertising, promotion, and mobile apps. I would note that Mr. Stoppelman, when previously asked about Yelp's competitors, said "I worry about neither [Google nor Groupon]."[8]

Despite Mr. Stoppelman's statement, Yelp's continuing growth demonstrates that new web services have many means of attracting users. This chart, from Yelp's own web site, illustrates how Yelp has continued to thrive during the period covering Yelp's complaints:[9]

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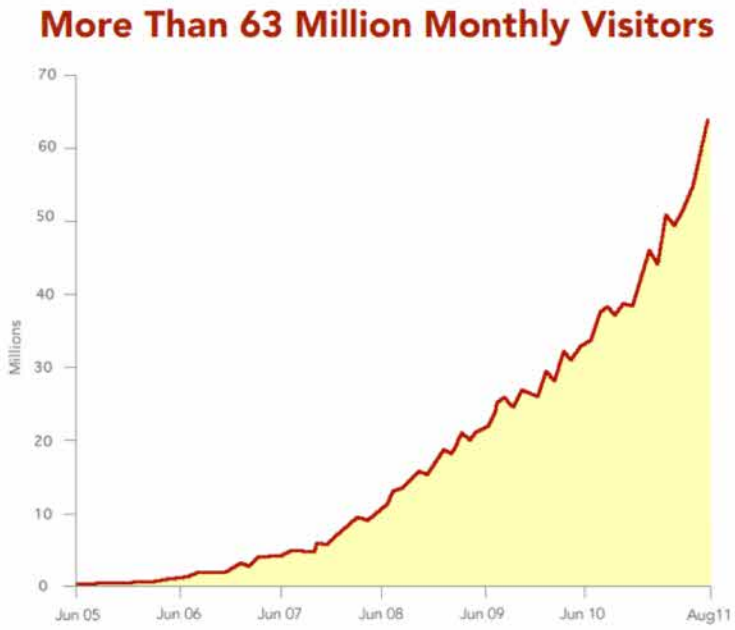
[7] Tanya Tymoshuk, "BarefootFloor.com: New Price Comparison Engine Helps Consumers Shop Smartly for Home Goods", Yahoo! News, January 11, 2011, http://news.yahoo.com/barefootfloor-com-price-comparison-engine-helps-consumers-shop-20110111-070000-289.html.

[8] Jeremy Stoppelman, "Interview at TechCrunch Disrupt SF 2011", September 13, 2011, http://www.ustream.tv/recorded/17252745 ("I worry about neither [Google nor Groupon]... We're doing something that is very unique... Google doesn't have the content. They just have people starting web searches... We actually have people that are coming to our site everyday that are saying, 'I trust you to steer me to the right business.' I think that's a very special place to be.").



What I can comment on is that the Internet remains a very vibrant and innovative space. As I noted earlier, we do not have to speculate as to whether there are new entrants in vertical search services such as local search and comparison shopping sites. There are new entrants in these market segments all the time. A new comparison shopping site, FindTheBest, launched by the co-founder of DoubleClick last year, just raised $6 million in venture funding over the summer. Cheapism is a comparison shopping site that launched in 2009, dedicated to bargain hunters on the Internet and was recognized in the New York Times and on CBS New York. More recently, a new entrant called Centzy launched a website that combines both local search and comparison shopping functionality. Centzy's CEO used to work at SnapFish and is currently seeking funding following its successful launch for New York and San Francisco. Unlike Yelp, Centzy integrates pricing information for goods and services on its site so that users can comparison shop for local services. Barefootfloors.com is a comparison shopping site that launched in January that is focused on home goods and "is now helping online shoppers to educate themselves on everything related to the home and to save money on a wide variety of products for the home."[10] In February of this year, the travel comparison shopping site, Hipmunk, received $4.6 million in venture funding, even as Google continues to expand its own flight search and hotel search functionality.

These are just a few of the many recent entrants in local and comparison shopping that are entering the market even as Google continues to innovate. While they may not all succeed, venture capitalists and entrepreneurs alike continue to believe they can compete with Google, Yelp, Nextag, and other established competitors.

2. **Have you put in place any safeguards at Google to insure search results do not favor Google products and services merely because they are owned by Google? If so, what are they, and if not, why not?**

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[9] Yelp, "An Introduction to Yelp: Metrics as of August 2011", accessed on November 1, 2011, http://www.yelp.com/html/pdf/Snapshot_August_2011_en_US.pdf.

[10] Tanya Tymoshuk, "BarefootFloor.com: New Price Comparison Engine Helps Consumers Shop Smartly for Home Goods", Yahoo! News, January 11, 2011, http://news.yahoo.com/barefootfloor-com-price-comparison-engine-helps-consumers-shop-20110111-070000-289.html.

As mentioned in Question 1a, universal search results are not separate "products and services" from Google. Rather, the incorporation of thematic and conventional results in universal search reflects Google's effort to connect users to the information that is most responsive to their queries. Because of this, the question of whether we "favor" our "products and services" is based on an inaccurate premise. These universal search results *are* our search service—they are not some separate "Google product or service" that can be "favored."

The fundamental openness of the Internet places powerful competitive pressure on Google to ensure that our search results are those that are most responsive to what users are looking for. As Microsoft researcher Ryen White observed this year in summarizing his research findings, "The barrier to switching Web Search engines is low and multiple engine usage is common."[11] There are even sites that allow Internet users to simultaneously compare Google's results against those of our competitors. If Google stops delivering the most relevant results to users, they can and will switch away. That is what we mean by competition being "one click away," and it is that reality that drives Google's constant effort to improve the results we deliver to users.

3. **At the hearing, you argued that Google now seeks to provide consumers with the best answers, not just links to websites with the answers. While we understand your desire to provide answers and not just links, why are the answers always provided by Google products and services rather than any other website? And, if you contend that your products and services are "better," please provide with any objective criteria or consumer studies you believe demonstrate this contention?**

As I noted in my response to Question 1a, oneboxes are displayed when Google believes it is likely that a user is seeking a specific answer, and they often contain information or data that are licensed from third parties. And as also noted previously, universal search results are not separate "Google products and services" distinct from Google's search results. Rather, as I said in response to Question 1a, these *are* Google's search results. Thematic search results for particular types of content (video, images, news articles, products, and so on) are incorporated when our consumer testing and data analysis shows that those results algorithms are most likely to deliver the results sought by our users. This analysis is reinforced by research conducted by Microsoft, which indicates that 58% of heavy users want to complete tasks inside the search engine.[12]

4. **At the hearing, you stated that as opposed to merely providing links to websites, "there's a category of queries which are not well served by the 10 links answer." Please list all such categories of searches for which Google believes the search is either not "well served by the 10 links answer" or in which Google modifies search results to provide a "one box" or presumed superior answer to the search.**

Google currently provides specialized search results or onebox answers for the following types of queries: videos, images, products, news, maps, books, local businesses, flights, finance, sports scores, weather, math results, among others.

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[11] Qi Guo, Ryen W. White, Yunqiao Zhang, Blake Anderson, and Susan T. Dumais, "Why Searchers Switch: Understanding and Predicting Engine Switching Rationales," SIGIR 2011, July 24-28, 2011, http://research.microsoft.com/en-us/um/people/ryenw/papers/GuoSIGIR2011.pdf.

[12] Robert Andrews, "Interview: Microsoft's 'Not Walking Away From Search'", paidContent.org, August 2, 2011, http://m.paidcontent.org/article/419-interview-microsofts-not-walking-away-from-search/ (interviewing Stefan Weitz, Microsoft Bing's Director).

5. **In 1998 at the same time they were founding Google, its co-founders Larry Page and Sergey Brin wrote a thesis at Stanford University which addressed search engine bias. They wrote that**

   [Search] bias is much more insidious than advertising, because it is not clear who 'deserves' to be there, and who is willing to pay money to be listed…For example, a search engine could add a small factor to search results from 'friendly' companies, and subtract a factor from results from competitors. This type of bias is very difficult to detect but could still have a significant effect on the market.

   They added that they expected that advertising-funded search engines "will be inherently biased towards advertisers and away from the needs of consumers."

   Do you disagree with their view then that search engine bias is "insidious" and "difficult to detect"? Or that advertising funded search engines are "inherently biased"?

Larry and Sergey's thesis, which was written 13 years ago, addressed industry practices prevailing at that time. During the time they were students at Stanford, most search engines operated under a "paid inclusion" model. Specifically, search engines like Yahoo! integrated paid advertising among the conventional search results without labeling them as ads. This practice continued to be sufficiently prevalent that it was the subject of a complaint filed with the Federal Trade Commission in 2001 that named eight search engine companies as engaging in this practice, including Lycos, MSN.com, Altavista, and HotBot. Google was not among the companies accused of engaging in this practice.

Many websites today continue to use this kind of "pay to play" placement model, including sites that have complained about Google (for example, Nextag and Foundem). Obviously, those sites may pursue such a business model, but one of Google's founding principles has been that advertiser payment should not affect advertiser's search result rankings.

Google recognizes the importance of advertising to the search business, but we believe that ads should always be clearly labeled. Indeed, paid inclusion in search results—without labeling—was the subject of Larry and Sergey's thesis. In our opinion, advertisements and natural results both serve to create a positive user experience. This is similar to a well-run newspaper, where the advertisements are clear and the articles are not influenced by the advertisers' payments.

6. **At the hearing, in answering my question as to whether Google had an incentive to favor its own products and services in search results because in doing so it would be behaving as we would expect as a rational business would to maximize its profits, you replied that "I'm not sure Google is a rational business trying to maximize its own profits." Is it really your position that Google does not conduct itself as rational business trying to maximize its profits? If so, can you point to any SEC disclosure which supports this view?**

As we stated in our 2004 IPO letter, "Google is not a conventional company."[13] From the very beginning, we have sought to protect Google's ability to innovate because we were confident that, in the long run, this would benefit Google and our shareholders. Indeed, we told our potential shareholders in 2004 that in pursuing our goal of "developing services that significantly improve the lives of as many people as possible, . . . we may do things . . . even if the near term financial returns are not obvious."

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[13] Larry Page and Sergey Brin, 2004 Founders' Letter, August 18, 2004, http://investor.google.com/corporate/2004/ipo-founders-letter.html.

We often work on projects that do not have an immediate revenue model, e.g., Google Translate, because we anticipate that they will ultimately contribute to a positive user experience, which will maximize the company's returns in the long run. As we stated in the 2004 IPO letter, "if opportunities arise that might cause us to sacrifice short term results but are in the best long-term interest of our shareholders, we will take those opportunities." Thus, Google sometimes foregoes short-term profits in order to provide users with the best experience in the belief that such a strategy will benefit our shareholders in the long run.

7. **Google has argued that one cannot merely examine Google's market share as a search engine in determining whether it is a dominant firm, because it allegedly competes with Facebook and, further, that consumers can go directly to websites.**

    a. **As to Facebook, it is primarily a social-networking site and its Internet Search is powered by Bing. In other words, to search the Internet on Facebook, one must use Bing. So Facebook is not an additional competitor for Internet search beyond Bing, isn't that correct?**

That is not correct. Social networks have become a significant, potentially game-changing competitor. When consumers search for information online, they are looking for answers to their questions. Google seeks to provide answers to users' queries, and social networking sites like Facebook and Twitter also allow users to leverage their social networks to find answers to their questions. Google is therefore competing with all methods available to access information on the Internet, not just other general search engines. The source of Facebook's competition with Google is not only through using Bing to search the Internet but, also, by offering users a fundamentally different way to discover and connect with information on the Internet.

Consumers have a lot of options for accessing information, and recent statistics show that they are using them. Users can use general search engines and, at the same time or in lieu of online search, they can use social search to access information. The Internet is a robust and dynamic environment where new modes of thinking and technological innovation are constantly changing the way we view the competitive marketplace.

Outside experts agree with this assessment. One tech analyst explained that "the nascent search behaviors we see developing on Facebook right now suggest it not only has the potential to become a viable search engine, but in fact has a chance to help redefine the way we currently think of search."[14] Another noted that Facebook's "treasure trove of distinctive data . . . could put Google out of business."[15] Facebook agrees as well; an executive recently said that search in its current form "just didn't work," and it would have to "go social."[16]

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[14] Eli Goodman, "What History Tells Us About Facebook's Potential as a Search Engine," comScore Voices Blog, June 3, 2010, http://blog.comscore.com/2010/06/facebook_search_engine.html.

[15] Ben Elowitz, "How Facebook Can Put Google Out of Business," TechCrunch, June 3, 2011, http://techcrunch.com/2011/06/03/facebook-google-out-of-business/.

[16] Emma Barnett, "Google and other search engines are "failing" says top Facebook executive," The Telegraph, October 25, 2011, http://www.telegraph.co.uk/technology/facebook/8846314/Google-and-other-search-engines-are-failing-says-top-Facebook-executive.html (quoting Ethan Beard, Director of the Facebook Platform).

Some sites already get a significant portion of their traffic from social networks. Comedy Central gets almost one-third of its visits from Facebook and only 15% from Google.[17] Twenty-four percent of Twitter's traffic comes from Facebook, and only 10% comes from Google.[18]

b. In September 2010, you were quoted as saying, referring to Facebook and Apple, "We consider neither to be a competitive threat . . . our competitor is Bing." Do you stand by that quote, or do you contend that Google does compete with Facebook? If the latter, why were your views different in September 2010?

As I noted this past June, my statement last September was clearly wrong.[19] The Internet is dynamic and has changed significantly. The importance of social networking to consumers' online experience has changed remarkably—even over the past year. Consumers are looking for answers when they conduct searches online, and social search has become a serious competitor in helping people find those answers online. Similarly, Apple's Siri is a significant development—a voice-activated means of accessing answers through iPhones that demonstrates the innovations in search. The tech industry is one of the most competitive and dynamic spaces in the entire economy, with small companies as well as larger companies competing hard against each other in lots of areas. Google has many strong competitors and we sometimes fail to anticipate the competitive threat posed by new methods of accessing information. We compete against a broader array of companies than most people realize, including general search engines (Microsoft's Bing, Yahoo!), specialized search engines (Kayak, Amazon, WebMD, eBay), social networks (Facebook, Twitter), commercial software companies (Apple, Microsoft), mobile apps, and even direct navigation. The Internet is incredibly competitive, and new forms of accessing information are being utilized every day.

c. Doesn't the fact that survey data shows that 92% of adults use search engines to find information on the Internet belie the contention that Google competes with other websites that are not search engines?

Having not seen this study, I cannot speak directly to the statistic mentioned. This survey data, however, does not seem to indicate that consumers that use search engines do not also use other means of finding information on the Internet. For example, a consumer looking for a restaurant could start a Google search. But increasingly consumers might, instead or in addition, ask their friends on Facebook or Twitter for restaurant recommendations, or search their Yelp mobile application for restaurants. Users have a plethora of options to access information on the Internet, including general and specialized search engines, mobile apps, and social networks. They can use all of these methods, including search, to find answers to their questions.

Indeed, surveys have shown that users resort to various methods to access information online. Consumers have driven the demand for these multiple access points and Google competes vigorously with all of the other methods for accessing information over the Internet. As David Balto, the former policy director of the Federal Trade Commission, recently observed:

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[17] Compete.com, September 2011 Site Analytics Data for Comedy Central, accessed October 27, 2011, http://siteanalytics.compete.com/comedycentral.com/.

[18] Compete.com, September 2011 Site Analytics Data for Twitter, accessed October 27, 2011http://siteanalytics.compete.com/twitter.com/.

[19] As I mentioned during the D9: All Things Digital Conference this past June, people want to know what their friends are interested in. This is just as true in the online world as it is in the physical one. *See* Geoffrey Fowler and Ian Sherr, "Google Missed the 'Friend Thing'", The Wall Street Journal, June 1, 2011, http://online.wsj.com/article/SB10001424052702303745304576358343688967086.html.

Google has consistently led the industry in innovations, and has played an important role in the evolution of search. But complacency would lead to certain obscurity. Websites such as Facebook, Amazon, eBay, Expedia, and Wikipedia all aggregate and organize information, steering users away from traditional search providers such as Google, Bing and Yahoo. Facebook is a particularly dangerous threat to the traditional search providers because it not only takes traffic away from Google, Bing, and Yahoo, but it also a growing source of redirected traffic for original content providers.[20]

8. **Millions of consumers now search the Internet using mobile devices like smartphones rather than on their computers. According to a leading industry expert, by 2014 the number of users accessing the Internet through mobile devices will exceed those doing so through desktop computers. Google's Android phones are now the most popular smartphones, with a 40% market share and growing. And just a few weeks ago Google announced it was purchasing Motorola, a major smartphone manufacturer.**

   Your critics fear that Google could demand from phone manufacturers that Google be made the default search engine for all Android smartphones, and in that way lock in your dominance on mobile devices. This is very similar to the tactic that Microsoft used in the 1990s when it demanded that computer manufacturers install Internet Explorer as the default web browser as a condition of using the Windows computer operating system.

   a. **Has Google demanded that smartphone manufacturers make Google the default search engine as a condition of using the Android operating system? Will you pledge that Google will not do this in the future?**

Google does not demand that smartphone manufacturers make Google the default search engine as a condition of using the Android operating system. Android is a free, open source platform for mobile devices. The complete Android source code is available for download for free from the Android Open Source Project website.[21] Any developer or manufacturer can use, modify, and distribute the Android operating system without Google's permission or any payment to Google. For example, Amazon recently announced the Kindle Fire—its new tablet device—using the Android source code without Google's involvement. This is one of the exciting and innovative aspects of Android that will help foster innovation and competition in the smartphone market.

One of the greatest benefits of Android is that it fosters competition at every level of the mobile market—including among application developers. Google respects the freedom of manufacturers to choose which applications should be pre-loaded on Android devices. Google does not condition access to or use of Android on pre-installation of any Google applications or on making Google the default search engine.

Manufacturers can choose to pre-install Google applications on Android devices, but they can also choose to pre-install competing search applications like Yahoo! and Microsoft's Bing. Many Android devices have pre-installed the Microsoft Bing and Yahoo! search applications. No matter which applications come pre-installed, the user can easily download Yahoo!, Microsoft's Bing, and Google applications for free from the

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[20] David Balto, "Internet Search Competition: Where is the Beef?", June 23, 2011, http://www.dcantitrustlaw.com/assets/content/documents/googlesearchfinal-Balto.pdf.

[21] *See* Android Open Source Project, "Downloading the Source Tree", accessed on November 1, 2011, http://source.android.com/source/downloading.html.

Android Market.[22] In addition, Android gives manufacturers the freedom to pre-install third-party app stores, like the Amazon Appstore for Android, where a user can download a variety of apps, including Microsoft's Bing.[23]

b. New York magazine reports that an email from one of your executives, Dan Morrill, was disclosed in a lawsuit. In this email, Mr. Morrill suggested that Google was using compatibility with Android "as a club to make [phone manufacturers] do things we want." Could you explain what he meant? Further, if the Department of Justice decides not to block Google's proposed acquisition of Motorola Mobility, will Google commit not to use the patents it acquires through that acquisition "as a club" against other companies in the mobile space? Specifically, will Google commit to license these patents to competitors and others on reasonable and non-discriminatory terms?

As to the New York Magazine article, Mr. Morrill's remarks reviewed in their full context express his belief that Google's efforts to maintain compatibility across different devices *could be misperceived* as a way for Google to improperly influence manufacturers. Google does not in fact use compatibility in this way. Mobile operating system competition is fierce—Apple, RIM (Blackberry), and Microsoft are very significant competitors—and carriers and handset manufacturers have many options other than Android. Google is committed to Android's success and to maintaining our strong partnerships with device manufacturers.

Google designed Android as an open source platform to foster customization by manufacturers of mobile software and hardware. In contrast to closed, proprietary operating systems, Android allows manufacturers to modify their own implementations of Android to create their own unique features and user interfaces. Android is also particularly adaptable to new hardware configurations and chipsets. By allowing broader differentiation in software and hardware, Android enhances competition and consumer choice. There are more than 500 models of Android devices on the market.

Google has undertaken extensive efforts to protect consumers and application developers to ensure their applications run seamlessly on all Android devices. Google, with the support of our Android partners, has identified certain specifications, such as minimum screen size and security features, that help ensure applications run flawlessly across device models. These specifications are reflected in the Android Compatibility Definition Document ("CDD"), which is published on Android Open Source Project's website. Google and our partners believe that this baseline preserves the maximum amount of manufacturer freedom to customize Android, while simultaneously protecting Android developers, who need consistency and rely on minimum elements appearing on all Android devices, and Android customers, who may legitimately expect that Android applications will run on their Android devices.

One of the most significant benefits of Android is that it is free. This has significantly reduced Android device costs and has helped drive down handset prices across the wireless industry.[24] But Android and our

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[22] Users can access the Microsoft Bing Search application here: https://market.android.com/details?id=com.microsoft.bing&feature=search_result; the Yahoo! Search application here: https://market.android.com/details?id=com.yahoo.mobile.client.android.yahoo&feature=search_result; and the Google Search application here: https://market.android.com/details?id=com.google.android.googlequicksearchbox&feature=search_result.

[23] Amazon makes the Microsoft Bing Search application available here: http://www.amazon.com/Microsoft-Corporation-Bing/dp/B004T54Y2M/

partners have recently come under significant fire by firms attempting to use patent infringement suits to drive up the cost of Android phones and jeopardize the Android platform. Google's intent in acquiring Motorola Mobility is to provide a defense against these suits. Google hopes that Motorola Mobility's patent portfolio will deter other companies from suing to limit the distribution of Android or from attempting to burden it with unreasonable licensing fees.

9. **Prior to its acquisition of ITA, Google gave several assurances that Online Travel Agencies (OTAs) would be included in its flight search products. Google's statements included the following:**

   The "acquisition will benefit passengers, airlines and online travel agencies by making it easier for users to comparison shop for flights and airfares and by driving more potential customers to airlines' and online travel agencies' websites."

   "Our goal is to build tools that drive more traffic to airline and online travel agency sites where customers can purchase tickets."

   "Google does not plan to sell airline tickets directly; our goal is to build a tool that drives more traffic to airline and online travel agency sites where customers can purchase tickets."

   It is my understanding that Google's new Flight Search tool shows a list of flights and links only to airlines where flights can be booked; there are no links to online travel agencies. How is this consistent with Google's promises that the ITA acquisition would drive more traffic to online travel agencies? Why is there no link to OTAs on Google's new Flight Search tool? Is this because Google now competes with OTAs for advertising revenues?

We're excited about the initial positive reaction to our new flight search tools. But like any other partner, Google needs to honor the airline's distribution decisions. With the flight search feature, that means we continue to explore opportunities to showcase online travel agents ("OTAs") and metasearch firms further. In fact, Expedia CEO Dara Khosrowshahi recently observed, "We are happy to see OTA links at the bottom of the Google Flight result. . . ."[25]

The ITA transaction was approved by the Department of Justice with conditions that are incorporated into a consent decree. Google has carefully adhered to the decree.

10. **Various companies that offer consumer reviews such as our witness Yelp have accused Google "scraping" its user reviews of restaurants, hotels and other services, and using these reviews on the Google own "places" page, which also contains reviews. Yelp testify at the hearing that Google was doing this without Yelp's permission, and instead offered them a Hobson's choice of Yelp allowing this practice, or Yelp's website would not be listed on Google search results. This past summer, Google changed this practice and ceased**

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[24] Dan Nystedt, "They're Here: Cheap Android Smartphones", PC World, February 26, 2010, http://www.pcworld.com/article/190271/theyre_here_cheap_android_smartphones.html ("A new group of companies, electronics contract manufacturers, are starting to make high-end mobile phones, including smartphones, for mobile network operators around the world, and these are companies adept at slashing prices.").

[25] Dennis Schaal, "Expedia Sees Hotel Improvements, But Still Admires Booking.com From Afar", Tnooz, October 28, 2011, http://www.tnooz.com/2011/10/28/news/expedia-sees-hotel-improvements-but-still-admires-booking-com-from-afar/.

including Yelp content in Google places pages. Why did Google change its policy this summer? Prior to the policy being changed, did Google use Yelp and other similar review sites content without their permission?

Google developed Place pages to help users to access information about a local business. When Google first launched Place pages, Google displayed snippets—a few lines of text—from various review sites for each local business listed, and required that users click through to read the full review. The ultimate goal of Place pages, along with Google's other thematic local results, was to help users locate local information on the web.

Google entered a two-year licensing agreement with Yelp in 2005 to display the full text of Yelp's reviews in our conventional search results and our thematic local search results. Two years later, Yelp chose not to renew its agreement with Google. With the expiration of the license, Google no longer displayed the full text of Yelp's reviews. Thus, we returned to simply showing snippets of third-party reviews within our conventional results as well as our thematic local search results, a practice permitted under the long-established fair use doctrine of copyright law. Snippets generally display about two or three lines of text. For users to access the full text, they must select a link that directs them to the review site. Showing snippets of websites is an important part of search; it enables users to determine whether the site in question is responsive to their queries. It also drives traffic to websites.

If, at any point, Yelp (or any other site owner) wishes to be excluded from Google's (or any other search engine's) index, it can—with relative ease—block search engine crawlers using a very simple and common protocol. Specifically, every site owner has the option to use the robots exclusion protocol, also referred to as robots.txt, to signal to Google or any other search engine that they do not want particular webpages, or even an entire site, to be crawled and indexed.[26] Site owners can easily exclude certain sites or portions of sites from being indexed, and can also specify different protocols for different search engines. The robots.txt protocol—which has been in place for over 17 years—can be utilized either by writing a new robots.txt file,[27] or by accessing one of many publicly available robots.txt files.[28]

As Google continued to develop our thematic local search results, Yelp began voicing concerns regarding how and where, exactly, within Google's search results its snippets appeared. It's worth noting that by 2009, search competitors Microsoft Bing, Yahoo!, and Ask.com all integrated third-party review snippets in essentially the same exact way within their respective local search results.

Yelp subsequently requested that Google remove snippets of Yelp reviews in Google's local search results but continue providing links to Yelp. After a series of business conversations with Yelp in an attempt to address Yelp's numerous concerns, Google agreed to comply with Yelp's request. After the requested changes were

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[26] robots.txt is an industry standard that allows a site owner to control how search engines access their web site. Access can be controlled at multiple levels – the entire site, through individual directories, pages of a specific type, or even individual pages. Basically, robots.txt is a structured text file that can indicate to web-crawling robots that certain parts of a given server are off-limits. This allows search engines such as Google to determine which parts of a website a site owner wants to display in search results, and which parts to keep private and non-searchable. Dan Crow, "Controlling How Search Engines Access and Index Your Website", The Official Google Blog, January 26, 2007, http://googleblog.blogspot.com/2007/01/controlling-how-search-engines-access.html.

[27] There are a number of resources available online that provide users with information on coding robots.txt files. *See e.g.* About/robots.txt, August 23, 2010, http://www.robotstxt.org/robotstxt.html.

[28] A non-comprehensive list of robots.txt files submitted by independent programmers is available here: http://www.robotstxt.org/db.html.

implemented, snippets from Yelp's website continued to appear in conventional search results, and no longer appeared in the thematic local search results.

In July 2011, Google redesigned Place pages. One of the major changes, implemented after careful thought about the future direction of Place pages and feedback from third-party review sites, was removing snippets of reviews from sites like Yelp, TripAdvisor, and CitySearch. Instead, Google chose to feature reviews from our own users, with links to third-party review sites. In addition, the "star rating" and "total review count" were modified to reflect only those ratings and reviews that have been submitted by Google users.

Commentators like Frank Reed of Marketing Pilgrim noted that these changes "essentially . . . gives Yelp and TripAdvisor their wish," while TechCrunch noted that "this should be a welcome change to third party source of reviews like Yelp and TripAdvisor."[29]

Yelp has aired numerous concerns in the press over the past few years, and although Google has tried to act responsibly in addressing some of those concerns, ultimately Google builds our search results for the benefit of users, not websites. At all times, Google's primary motivation has been improving the search experience for our users by providing the most relevant and useful information in response to their queries. In the end, if users are unhappy with the answers Google provides, the openness of the web ensures that they can easily switch to Yelp.com or any other site with just one click.

11. Vertical search companies, companies that help consumers search for a specific product or service – such as Nextag and the British product comparison site Foundem -- have complained they have been the subject of "search penalties" on the Google search engine. They allege that they are dropped down in the search rankings by these penalties by among other things, the fact that they have their own search functionality on their sites, and that they contain links to other sites. Allegedly, these search penalties occur whether or not these websites are popular with consumers.

a. A web site that has search functionality and offer links to other sites resembles Google itself. What do you say to your critics who would argue that Google deliberately penalizes websites that resemble Google in order to defeat your competition and maintain your dominant share in search?

We never take actions to hurt specific websites for competitive reasons. Our search quality and ad quality systems assess the quality of webpages and ads without regard to whether a site competes with Google, only on the basis of what is most likely to be useful for consumers.

We rank search results to deliver the best answers to users. We built Google for consumers, not websites. To achieve this result, we consistently rank high-quality sites with original content in the highest position regardless of whether they compete with Google. While we understand that there is no objective right answer to most search queries and that the answer is a "scientific opinion," we also recognize that if we do not give users the best possible search results, they are likely to click away to one of our competitors. This necessarily means that not every website can come out on top, or even appear on the first page of our results, so there will almost always be website owners who are unhappy about their rankings. The most important thing is that we satisfy our users.

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[29] Frank Reed, "Google Places Update Puts Focus on Google", Marketing Pilgrim, July 22, 2011, http://www.marketingpilgrim.com/2011/07/google-places-update-puts-focus-on-google.html. Erick Schonfeld, "Google Places Stops Stealing Reviews", TechCrunch, July 21, 2011, http://techcrunch.com/2011/07/21/google-places-stops-stealing-reviews/.

b. Do you deny that Google has the ability to manually alter the ranking of websites in its search results?

Ideally, we would never have to manually intervene with the search results returned by our algorithms. Search, however, is still in its infancy, and our algorithms are still learning how to rank certain types of results. There are a few, limited instances in which we may utilize manual controls—spam, security, legal requirements (copyright, child pornography), and exception lists for results that are improperly excluded by the algorithms. However, we do not manually elevate specific sites in the search results.

When we manually intervene in our conventional search rankings, we do so to enhance the general user experience. As many Internet users are aware, the worldwide web contains many poor quality sites that range from annoying (webspam) to destructive (malware). Without manual intervention, unwitting users might accidentally access such a site through a Google search result. Rather than finding the answers they seek, these users will instead have their search derailed or, much worse, their computer infected. Similarly, displaying content from certain websites can violate the law. Finally, Google's algorithms are not infallible. To account for this, we use exception lists to reintegrate results that should not have been removed by the algorithms from the search results.

I should also note that this is standard industry procedure. Microsoft's Bing, Yahoo!, and other search engines have acknowledged that they also utilize manual controls.[30]

12. Google has stated that consumers prefer to go to sites offering products directly for sale rather than product comparison sites like Nextag that compare prices, offer product reviews, and themselves contain links to retailers. Does Google sell products on its Shopping results page or does it provide links to websites that sell the product? And, please provide the factual basis for this assertion, including the results of any consumer studies that support this assertion.

Google does not sell merchandise through Google product search. Rather, we provide links to merchants who sell merchandise. These links can include inventory and price information provided by those merchants via a dynamic feed. More than 200,000 merchants participate in this program, providing us with information for more than one billion products.

Google product search results can float within the search results page, based on our assessment of the nature of the user's search. Search is about answers, and we have found that when a user submits a query about a specific product, there is a high probability that he expects to see shopping results. This expectation has been validated by our testing process, which is driven by user feedback. For example, a few years ago, we started thinking that when our users search for products, like [sony digital camera prices], they would likely find shopping results useful. So we conducted a test with our user raters, and asked them whether they preferred a results page with shopping results, or without. Users overwhelmingly preferred the page with shopping results. This is consistent with research conducted by Microsoft indicating that 58% of heavy users want to

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[30] *See e.g.*, "How Bing Delivers Search Results", Microsoft Bing Help, accessed October 28, 2011, http://onlinehelp.microsoft.com/en-us/bing/ff808447.aspx. ("In limited cases, to comply with applicable laws and/or to address public policy concerns such as privacy, intellectual property protection, and the protection of children, we might remove particular resources from the index of available information. In each case where we are required to do so by law, we try to limit our removal of search results to a narrow set of circumstances so as to comply with applicable law but not to overly restrict access of Bing users to relevant information.").

complete tasks inside the search engine.[31] Further, our own research conducted through user studies, independent rater evaluations, and click data consistently show that consumers like a mixture of retailer, review, and manufacturer sites like Amazon.com, CNET, or Sony.

In addition, in the course of our testing process, Google has found that users prefer results that are distinct and diversified. Users do not want sites that provide duplicative and unoriginal content. Google's search results provide consumers with product prices from different merchants so that our users can make the most informed decision about the products they want to purchase. Our rankings are driven by consumer signals about what sites they find useful. Consumers can easily switch from Google to a competing site if they disagree with our rankings or believe we are not providing the best possible results.

13. Please explain why Google Shopping results appear near the top of Google search results when users enter a query for consumer products, and why, as alleged by Nextag, other product comparison sites are not generally placed in the same favorable position.

Search is about answers, and we have found that when a user submits a query about a specific product, there is a high probability that he wants to go directly to a page featuring detailed information about the product, including where it can be purchased and at what price. This expectation has been validated by our testing process, which is driven by user feedback. For example, a few years ago, we started thinking that when our users search for products, like [sony digital camera prices], they would likely find shopping results of this kind useful. So we conducted a test with our user raters, and asked them whether they preferred a results page with shopping results, or without. Users overwhelmingly preferred the page with shopping results. This is consistent with research conducted by Microsoft indicating that 58% of heavy users want to complete tasks inside the search engine.[32]

That said, it would not be accurate to suggest that Google product search results are always displayed at the top of the search results page. Thematic search results may be displayed at the top, middle, or bottom of the search results page—or may not be displayed at all—based on our assessment of the likelihood that the user wants shopping results of this kind. Notably, Google is significantly more conservative in deciding whether to trigger thematic search results than some of our competitors. Bing, for example, triggers thematic results within its search results approximately 50% more frequently than Google does.

14. Please explain why the Google "Places" listing for local searches such restaurants, hotels, and other local products and services are typically placed in the first Google results page, near the top of the results, but without any designation that the "Places" results is a Google product and not an organic search result? How can a consumer be expected to know this is a Google product, not an organic search result? Would Google agree to label its "Places" listing as a Google product, and set it off with a different color background?

As explained previously, thematic search results (such as Places) incorporated in universal search results are *not* separate "products and services" from Google. Rather, the incorporation of thematic and conventional results in universal search reflects Google's effort to connect users to the information that is most responsive to their queries. These universal search results *are* our search service—they are not some separate "Google product" that can be "favored."

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[31] Robert Andrews, "Interview: Microsoft's 'Not Walking Away From Search"', paidContent.org, August 2, 2011, http://m.paidcontent.org/article/419-interview-microsofts-not-walking-away-from-search/ (interviewing Stefan Weitz, Microsoft Bing's Director).

[32] Robert Andrews, "Interview: Microsoft's 'Not Walking Away From Search"', paidContent.org, August 2, 2011, http://m.paidcontent.org/article/419-interview-microsofts-not-walking-away-from-search/ (interviewing Stefan Weitz, Microsoft Bing's Director).

Depending on the search query, Google may either group local results together, or may distribute local results throughout our search results. Either way, Google is simply trying to organize and display local business results so as to save users time by displaying local information in the most effective manner, in order to eliminate the need to conduct multiple searches. As with any of Google's search results, local business listings are ranked according to likely relevance. For example, typing in a query for [shoe repair 22203] will typically return local business listings organized by geographic proximity to that zip code. The ranking of local business results is not affected by payment.

We are always assessing how we can provide a better service to our users and are always open to suggestions about how to improve the user experience.

15. **How is it determined which establishments are listed in the Google Places listing, and in which order? Is a different method used than used for ordering in Google organic search results, and if so how is it different? Does advertising or a commercial relationship with Google play any role in which businesses are listed in Google Places, and in which order?**

Please see answer above. Advertising or commercial relationships are irrelevant with respect to what order business listings are displayed in search results.

16. **At the hearing, you stated several times that because Google is in the business of ranking, when one website's ranking goes up, another's necessarily has to go down. But competition concerns arise when Google consistently ranks its *own* websites (such as shopping, local search, maps, etc.) in the top few search results, pushing competing websites down. Such a strategy seems to financially benefits Google in two ways: (1) Google captures advertising revenue by keeping users on its own websites rather than its competitors'; and (2) in order to be found by consumers, companies who are pushed further down the screen or onto subsequent search results pages need to invest more in advertising in order to show up in a prominent place on Google's search results page. Do you agree that Google benefits financially benefits when competitors' websites are found further down the search results page?**

Google benefits financially in the long term when we help users find the information they are looking for. Consumers can easily compare the results they get from Google with information provided by other websites. If we do not do a good job of connecting users to the information they seek, they can and will look elsewhere. It is not in our interest to frustrate our users by making it more difficult to find information they want.

17. **At the hearing in answer to a question from Senator Klobuchar, you were asked about Google's participation in advertising auctions. You said that Google participates in auctions, but that you limit your participation for "obvious reasons." Can you explain those reasons? And, if the concerns about your participation are obvious, why do you participate in them even in a limited way?**

Online marketing is a great tool by which we can connect with users; therefore, we sometimes use AdWords to promote our own products and new product features ("house ads"). On rare occasions, Google also uses AdWords to provide information to our users on specific issues of public interest, e.g., ongoing crises or disasters such as earthquakes. Google's house ads may appear on Google sites and on AdSense for Search and AdSense for Content partner sites.

Google's participation in AdWords auctions is commercially appropriate, but we have limited our participation as follows. Google has established an internal review committee that monitors our compliance with house ad policies and processes. First, Google's house ads are not guaranteed to display in any given

position. Second, our house ads must comply with the same advertising policies that apply to any other AdWords advertiser. Third, only quality ads that are directly relevant to a user's query will appear (based on the same criteria applicable to all other AdWords advertisers). Thus, when Google's house ads are triggered, it is because Google is acting as any other rational advertiser would.

It is also important to note that Google's participation in an auction has no impact on the price paid by external advertisers. The AdWords system has been set up so that advertisers who compete with house ads in auctions pay as if the house ad were not participating in the auction.

Response of Eric Schmidt, Executive Chairman, Google Inc.
Before the Senate Committee on the Judiciary
Subcommittee on Antitrust, Competition Policy, and Consumer Rights

Hearing on "The Power of Google: Serving Consumers or Threatening Competition?"
September 21, 2011

Senator Mike Lee Questions for the Record for Eric Schmidt

1. **Are Google products and services subject to the same search-ranking algorithmic process as all other organic search results?**

Before addressing your question let me first offer a little background. Google's search results seek to achieve one fundamental thing: to connect users to the information they seek. We do this in two key ways. First, we started with conventional search—the traditional ten blue links—which involved crawling and indexing the web and returning results based on general responsiveness. Second, starting in 2001, we began to incorporate search results designed to respond to signals that a user is looking for specific types of information—a map, an image, a local business, a product, a news update, etc. We sometimes call these "thematic" search results.

When presenting thematic results, Google displays them in a way that is designed to make them user friendly. Prior to the launch of universal search in 2007, Google's thematic results like news were displayed, when relevant, at the top of the search results page. With the introduction of "universal search," we began to allow these thematic results to "float" from the top position to positions in the middle and bottom of the page, based on our assessment of how relevant conventional and thematic results were to the user's query.

Other major search engines also incorporate thematic and conventional search results on their search results pages. In fact, the first efforts at blending thematic and conventional search results by other general search engines date back to the late 1990s. It reflects the effort to achieve what one industry expert described in 2001 as the "Holy Grail" of search: "The real Holy Grail of all this will be when search engines can detect the type of search we are doing and feed out more targeted results from appropriate databases."[1]

But what is crucial to understand is that thematic search results are *not* separate "products and services" from Google. Rather, the incorporation of thematic and conventional results in universal search reflects Google's effort to connect users to the information that is most responsive to their queries. Because of this, the question of whether we "favor" our "products and services" is based on an inaccurate premise. These universal search results *are* our search service—they are not some separate "Google content" that can be "favored."

That said, in keeping with our focus on quality and delivering the most relevant results for consumers, Google constantly experiments with new ways to provide the most relevant information is response to a user's query. For example, for certain queries, where Google is highly confident that the user wants a specific answer, Google will provide that answer prominently on the page. These direct answers are known as "oneboxes." Oneboxes are generally displayed to convey an answer that is clear and straightforward, for

[1] Danny Sullivan, "Being Search Boxed to Death", Search Engine Watch, March 4, 2001, http://searchenginewatch.com/article/2065235/Being-Search-Boxed-To-Death.

example, movie showtimes, weather forecasts, mathematical calculations, stock prices, sports scores, and so on. Microsoft's Bing and Yahoo! display similar "oneboxes" prominently in their results as well, demonstrating their belief that these results are useful for consumers.

The decision whether to display a onebox is determined based on Google's assessment of user intent. Contrary to what some of Google's critics suggest, Google does not make money when users click on oneboxes. In fact, the opposite is true: oneboxes that are responsive to what users are looking for may draw users away from the ads displayed on the page. Nonetheless, because oneboxes help Google deliver a satisfying experience to users, Google believes that by displaying them we are enhancing user satisfaction, which is in the long-term best interest of the company.

In some instances, Google has licensed data from third parties for use in our oneboxes. In other instances, we have developed this data ourselves. In either case, whether users are searching for a weather forecast, a mathematical calculation (e.g., [pounds to grams]), or a stock price, Google's user studies confirm that users seeking this type of information generally do not want to click through to multiple options, whether in the form of ads or more natural links. Rather, users want a quick, direct answer that they can trust is correct. Oneboxes provide fast, accurate answers in response to this user demand.

2. **Does the algorithm used to produce organic search results place a Google product or service higher than it would an identical page owned by another business?**

As mentioned in response to Question 1, we view our thematic search results as part of our search results, not as a separate product or service. With respect to a page on a Google-owned site such as YouTube that is crawled and ranked within our search results, such a page is not placed higher because it is on a site owned by Google than an identical page would be if it were owned by another business.

3. **Does Google favor sites that display Google AdSense advertisements in its natural or organic search results?**

Google does not give preference to sites that advertise with Google, via our AdWords program, or to sites that accept Google ads via our AdSense program. Ranking in natural search results is not affected by payment or financial benefit to Google.

4. **You will recall that during the hearing I displayed and described to you results of a study that compared Google's search rankings of three popular price comparison sites with the search ranking for Google Shopping results (displayed as a "OneBox" result using "Universal Search").**

   In response to evidence that Google consistently ranks and displays Google Shopping results higher than competing price comparison sites, you responded that it was "an apples to oranges comparison" because the Google Shopping results are "answers" that take users directly to the websites of companies that sell the product in question.

   a. **On September 28, 2011, a search query on Google for "UK product search" returned Google Product Search as the first result, described as "Google's UK price comparison service." Is Google Product Search a price comparison service?**

Google product search is a type of thematic search that allows consumers to compare prices and see which websites are selling a particular product.

   b. **Does Google Product Search compete with other price comparison services?**

As mentioned in response to Question 1, we view our thematic search results as part of our search results, not as a separate Google product or service. Google's search service competes with stand-alone price comparison services to provide consumers with relevant product-related information, and also competes with other websites, such as Amazon and eBay, as well as competing search engines, such as Microsoft's Bing and Yahoo!, that include comparative product information.

c. The Google 2009 Annual Report reads, in part, as follows:

We face competition from [v]ertical search engines and e-commerce sites, such as WebMD (for health queries), Kayak (travel queries), Monster.com (job queries), and Amazon.com and eBay (commerce). We compete with these sites because they, like us, are trying to attract users to their web sites to search for product or service information, and some users will navigate directly to those sites rather than go through Google.

Does Google compete with vertical search engines?

Yes. Google competes with all of the methods for accessing information on the Internet. Users seek answers to their questions, and Google, along with specialized search engines, social networks, mobile apps, and other websites, is competing to provide users with the most relevant information available. Unlike technologies of the past, on the Internet competition is one click away. The history of the technology industry shows that technologies often get supplanted by completely new models, thus creating a robust and competitive market within which consumer demand drives innovation. For many commentators, specialized search services operate according to this new model with which Google will now have to compete. As Jeffrey Rayport from Businessweek observed,

> Google's . . . real threat is not from such Goliaths as Microsoft, but from a myriad of Davids—specialized search engines tailored to conduct "vertical" search tasks. Examples of these include restaurant reservations by OpenTable . . . job hunting at Simply Hired, and online travel with sites like Orbitz . . . and Priceline . . . . These sites are not promoted explicitly as "search engines," but that's what they are; they also happen to execute transactions.[2]

You do not have to take Google's word for it, either. Every one of the companies that Google lists as a competitor in its 10-K, including Amazon, WebMD, Monster, and eBay also list Google or search engines generally as their competitors.[3] Unfortunately, the conventional general search query share figures released by comScore and Hitwise do not reflect the reality that Google competes against all of these specialized sites, plus social networks, mobile apps, and now voice-activated search like Apple's Siri when it comes to accessing information.

d. Is the information displayed when a user clicks on a Google Shopping result often similar to the information provided by competing price comparison sites?

Google believes that our shopping results are more comprehensive and current than most comparison shopping sites. In addition to crawled content, we have direct feeds that allow more than 200,000 online

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[2] Jeffrey F. Rayport, "Google's Search Gold Mine Could Tap Out", Bloomberg Businessweek, February 13, 2011, http://www.businessweek.com/technology/content/feb2011/tc20110211_680322.htm.

[3] *See e.g.*, Amazon 2010 10-K, WebMD Health Corp. 2010 10-K, Monster Worldwide, Inc. 2010 10-K, and eBay 2010 10-K at http://www.sec.gov/edgar/searchedgar/companysearch.html. Kayak is not publicly owned and therefore does not file 10-K forms with the Securities and Exchange Commission.

merchants to publicize their inventory and prices—in real time—to interested shoppers searching Google. Currently, more than one billion products are available for sale through these partners' websites.

e. Does Google display Google Shopping results within its natural search results without any label identifying them as Google results or as otherwise distinct from true "search results"?

As stated in my response to Question 1, universal search results are *not* separate "products and services;" they *are* our "true" results.

f. Does clicking on various links within a Google Shopping result take the user to another Google page and not always, as you suggested in your testimony, directly to the site of a company that sells the product in question?

Depending on the specificity of the user's query, clicking on a shopping result will either take a user to a page where they can compare the prices of many different merchants, or directly to a merchant's site. For example, a search for a specific camera model might show shopping results that link directly to merchant sites, but a broader query like [sony digital camera] might yield broader shopping results that the user can then refine in order to find the product he wants.

g. Is it possible that consumers consider competing price comparison sites as potential substitutes for Google Shopping results?

As stated above, Google product search is a type of thematic search that allows consumers to compare prices and see which websites are selling a particular product. In that sense, Google product search competes with stand-alone price comparison services and also competes with other websites, such as Amazon and eBay, as well as competing search engines, such as Microsoft's Bing and Yahoo!, that include comparative product information.

h. Is it possible that Google's practice of preferencing its own Google Shopping results may deprive competing price comparison sites of user traffic and thus decrease competition from such sites?

As stated in my response to Question 1, universal search results that integrate conventional and thematic search results are not different "results." The suggestion that Google "preferences" Google shopping results is thus based on an inaccurate premise.

Google was built to benefit users, not any website or group of websites. As I said above, our primary goal is to give users answers, and if, for any reason, we do not provide the best answers for our users, they can and will switch to another source of information. For example, users can go to websites by directly navigating to the website (i.e., entering the address in their browsers), through advertisements on other websites, through mobile apps, or through their social networks. Google does not prevent users from reaching other shopping comparison sites.

Consumer research has confirmed that users prefer the incorporation of thematic and conventional search results, which is why all of the largest general search engines today provide such blended results. In fact, an October 2010 analysis by comScore showed that Microsoft's Bing displays thematic results as part of its search results 54% of the time, while Google displays them 33% of the time.[4] Indeed, as I mentioned in my

[4] Eli Goodman, "Universal Search: Not All Blends Are Created Equal," comScore Voices blog, October 26, 2010, http://blog.comscore.com/2010/10/universal_search.html.

answer to Question 1, general search engines have been providing such blended results since at least the late 1990s.

i. Do customers normally believe that the first few results are the most relevant?

While we have not surveyed customers' beliefs on this issue, we hope that the better job we do of providing useful and interesting information, the more they will find that information relevant and helpful.

We hope that we continue to improve our ability to discern user intent. We believe that we are able to provide superior search results because our ranking algorithms allow us to identify the most useful material and present it to the user first. We make over 500 changes to the algorithms every year to improve search and fight malicious websites. Search has become more than just providing links to relevant information; users want search engines to give them answers. Sometimes the best answer is a list of links, but sometimes it is a map, a stock quote, a sports score, or shopping results, which both Google and our competitors sometimes incorporate into search results to better serve consumers. As Microsoft's president of its online services division, Qi Lu, observed: "Search is a means to an end. We want our product to go substantially beyond just finding information, go all the way to help the user make decisions and complete tasks."[5]

5. You testified that you were "not sure Google is a rational business trying to maximize its own profits" in every respect. But more specifically, does Google have a financial incentive to preference its own secondary pages, many of which include advertisements that may generate revenue, above those of its competitors?

As we stated in our 2004 IPO letter, "Google is not a conventional company."[6] From the very beginning, we have sought to protect Google's ability to innovate because we were confident that, in the long run, this would benefit Google and our shareholders. Indeed, we told our potential shareholders in 2004 that in pursuing our goal of "developing services that significantly improve the lives of as many people as possible, . . . we may do things . . . even if the near term financial returns are not obvious."

Google's financial incentive is to do a good job in connecting users to the information they seek, and thematic search results are intended to connect users to information they seek. Users can easily compare our search results with information available from other websites; and they can and will switch to other sources if we do a poor job. Google's thematic search results frequently contain extensive specific information of the kind understood to be sought by a user, such as natural links to merchants selling a particular product, or links to the site of a restaurant listed in a Places page; Google receives no revenue when a user clicks on one of these links.

6. When asked at the hearing whether Google's own services "are . . . subject to the same test, the same standard as all the other results" in Google's non-sponsored search results, you said, "I believe so. . . . I'm not aware of any unnecessary or strange boosts or biases." Please provide the Subcommittee with a direct, definitive, and precise answer to this question.

As mentioned in response to Question 1, we view our thematic search results as part of our search results, not as a separate product or service. With respect to a page on a Google-owned site such as YouTube that is

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[5] Qi Lu, Comments at Microsoft Financial Analyst Meeting, Anaheim, California, September 14, 2011, http://www.microsoft.com/investor/downloads/events/09142011_FAM_Qi.docx (downloads Word document).

[6] Larry Page and Sergey Brin, 2004 Founders' Letter, August 18, 2004, http://investor.google.com/corporate/2004/ipo-founders-letter.html.

ranked within our search results, such a page does not appear higher on our search results page because it is on a site owned by Google than an identical page would be if it were owned by another company.

7. **At the May 2007 Seattle Conference on Sustainability, Marissa Mayer stated the following:**

   [When] we roll[ed] out Google Finance, we did put the Google link first. It seems only fair, right? We do all the work for the search page and all these other things, so we do put it first . . . That has actually been our policy since then, because of Finance. So for Google Maps again, it's the first link.

   Is this statement accurate?

It is my understanding that Ms. Mayer was referring to the placement of links within a onebox (but not the ranking of other thematic results within search results), and her description was accurate.

8. **What has Google done to let its users know that its natural search algorithm gives preference to Google's own products and services?**

As described in my response to Question 1 above, I believe that the premise of this question is incorrect.

9. **Do you find anything problematic with respect to the way in which Google prioritizes the search rankings and enhances the display of its own products and services?**

As I said in response to Question 1, thematic search results are *not* separate "products and services" from Google. Rather, the incorporation of thematic and conventional results in universal search reflects Google's effort to connect users to the information that is most responsive to their queries. Because of this, the question of whether we "prioritize" our "products and services" is based on an inaccurate premise. These universal search results *are* our search service—they are not some separate "Google product" that can be "prioritized."

10. **In April of this year, Google's Chief Financial Officer, Patrick Pichette, when asked on an investment community call to discuss Google's investment in its Chrome Browser, stated that "everybody that uses Chrome is a guaranteed locked-in user for us…" (See http://www.zdnet.com/blog/btl/why-is-chrome-so-important-to-google-its-a-locked-in-user/47295.)**

    a. **Do you agree with Mr. Pichette's statement?**

Mr. Pichette's comment is not correct. Chrome users are not in any way "locked-in" for Google. Chrome users can easily change the browser's default search engine to any competing search engine.[7] It is as easy as selecting the "Preference" menu in Chrome and selecting your desired search engine from the drop-down menu. In addition, a user who downloads Chrome actually has to select the search engine he or she wants; Google is not set as the default.

On the other hand, Microsoft's Internet Explorer—the web browser with the largest share of users (with a 40-50% market share)—includes Microsoft's Bing as the default search engine, and we believe that it is cumbersome to switch to another search engine as the default.

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[7] *See* Chrome Help, Setting Your Default Search Engine, accessed November 1, 2011, http://www.google.com/support/chrome/bin/answer.py?answer=95426.

b. Given your testimony at the hearing that Google lives by the principle of "loyalty, not lock in," will Google commit to ensuring that its Chrome Browser, Toolbar, and other software applications make it easy for users to switch from the default Google search engine to other offerings?

As described above, in response to Question 10a, Google already makes it easy for users to switch from Chrome and other software applications.

11. At IBM's Business Partner Leadership Conference in 2008, you said: "If it's not searchable by Google, it's not open, and open is best for the consumer." You have a long personal history as a leading advocate for open-source software and a reputation for creating and participating in open movements such as OpenSocial and the Open Handset Alliance.

In your written testimony, you stated that "[a]t Google we believe that open is better than closed" and that "open sourcing software has real benefits in the marketplace." You also said:

> **"Open" also means supporting features that have been approved by formal standards bodies, and, if none exist, working to create standards that improve the entire ecosystem. And "open" means releasing the source code to numerous projects that were developed by Google so that third parties can utilize these technologies to build their own products without having to reinvent the wheel, thereby speeding up the innovation cycle and providing consumers with even more choices.**

It appears to some that Google's "open" initiatives have centered on areas where Google lags behind competitors in a market. Conversely, many claim that Google seems to avoid open initiatives in areas where it is a market leader, as with Google Books, YouTube, and its own search index.

Some commentators, such as Danny Sullivan, editor-in-chief of Search Engine Land, advocate for Google's participation in an open index project. This is an example of an area in which Google is a clear industry leader and could foster innovation and marketplace growth by allowing others access to its index, without requiring Google to reveal trade secrets such as its search algorithm. Will Google commit to lead a search-index open initiative?

I am not familiar with Mr. Sullivan's proposed initiative. I do know that Google has made a number of our key innovations available as open source software, including Android (mobile operating system), WebM (video codec), Chromium (desktop/mobile OS), and Tesseract (optical character recognition software). We do not limit our open source projects to areas where we lag behind competitors. Google's open source projects have spurred innovation and competition in several markets. Some of Google's open source initiatives have been hailed as the most significant open source initiatives in the software industry.

12. There have been reports that Google has acted to obstruct access to some of its substantive content, preventing competing search engines from offering results that include a full index of that content. In the case of YouTube, rival search engines claim to have been granted access only to some of YouTube's video content. Reports also suggest that Google attempted to settle litigation surrounding Google Books by signing an agreement that would give Google exclusive control over who may index its digitized copyrighted books. It would come as a surprise to many users that a company so vocal in its dedication to openness might be attempting to block some of its content from competitors. Will Google commit to

ensure that other search engines may fully crawl and index all non-secure Google content, now and in the future?

Google has not restricted legitimate third-party search engines from accessing YouTube to index the site. However, to prevent the wholesale copying of videos from YouTube in violation of existing partner agreements, Google has placed automated restrictions on bots' ability to access YouTube. Any legitimate search engines, including Microsoft's Bing, Yahoo!, and China's Baidu, that wish to crawl and index YouTube, are given an exception to the bot restrictions.

Google is aware that Microsoft has complained that, for a time, it was unable to crawl YouTube. Google believes that Microsoft was unable to do so because Microsoft changed the name of its web crawler from "MSNBot," which was allowed to crawl and index YouTube, to "Bingbot" without informing Google of that name change. Thus, when Microsoft's newly-named Bingbot attempted to crawl YouTube, it was denied access because Google's automated systems believed that the newly-named crawler was not a legitimate search engine. The first time Microsoft made us aware of the problem was through their antitrust complaint in the EU. We promptly granted an exemption for Bingbot so that it could crawl and index YouTube. Google has been committed, and remains committed, to allowing third-party search engines to index YouTube content.

Google does not allow third parties to crawl our book content. First, because of copyright laws, Google does not allow third parties unfettered access to scan and reproduce Google Books content that is under copyright, including that which Google has licensed from third parties for our own use. Second, Google has invested many millions of dollars in our scanning project because we believe that users benefit from getting access to out-of-print and public domain books. Google's competitors, including Microsoft, could have done the same, but chose not to because they believed that the cost of doing so was not worth the benefit. Indeed, as an example, Microsoft began scanning the same corpus of books but abandoned its efforts, deciding to concentrate on other areas that it believed were more profitable, like travel search.[8] Nothing in the proposed Google Books settlement agreement would have prevented third parties from scanning and indexing books.

13. **In both your written and oral testimony, you stated that Google believes in "loyalty, not lock-in." You also testified that Google has a team of engineers whose sole goal is "to help our users move their data in and out of Google's products." On the day of the hearing, Google spokespeople were quoted in the press saying that Google "place[s] no restrictions on advertisers transferring their own ad campaign data to other platforms." Google's own AdWords API Terms and Conditions, however, purport to impose restrictions on advertisers' use of this data, including by restricting the tools that advertisers may use to manage their ad campaigns (see, e.g., section III.2.c). Some claim that the tools Google prohibits would allow businesses, particularly small businesses, to run ad campaigns on multiple ad platforms more easily and efficiently.**

    a. **Does the current version of the AdWords API Terms and Conditions (http://code.google.com/apis/adwords/docs/terms.html) permit advertisers to use their data on other platforms "without restriction," including use of third-party tools for this purpose?**

A number of resources exist to make it as easy as possible for AdWords users to export their data out of AdWords and use it for any purpose, including uploading it to another platform. In fact, Google is a leading proponent of data portability, and our Data Liberation Front provides step by step instructions to guide

[8] *See* Betsy Schiffman, "Microsoft Gives Up on Book Search", Wired Magazine, May 23, 2008, http://www.wired.com/epicenter/2008/05/microsoft-cans/.

advertisers.[9] Competitors such as Microsoft also provide advertisers with simple instructions to import their Google ad data into their advertising platforms.[10]

Google provides a free tool, AdWords Editor, that make it easy for advertisers (and agencies or resellers acting on their behalf) to move their ad campaign from Google to a competing platform. Using AdWords Editor, advertisers or their agents can download their full campaign structure to a CSV file.[11] Thereafter advertisers are free to use the data as they deem appropriate, including uploading it onto competing platforms and using third-party tools to manage it.

Google also makes an AdWords API available that enables advertisers to build their own tools, and allows third-party developers to build tools for advertisers and agencies to use. The AdWords API Terms and Conditions impose minimal restrictions on advertisers in the creation or use of their own tools, and they can build most any functionality they deem necessary with AdWords API. In fact, Google specifically exempts advertisers from the requirements of Section III.2.c (referenced in your question).[12] There are modest limitations on the programmatic bulk input and direct copying of data through the use of AdWords API-based third-party tools. In fact, bulk input restriction is not applicable to all fields, and a number of such fields can be uploaded simultaneously across platforms. This is reflected by the extremely high level of advertiser multi-homing on numerous advertising platforms.

b. If not, will Google commit to remove this and all other restrictions in the API Terms and Conditions on advertisers' use of ad campaign data?

As stated above, every advertiser—big or small—can export their ad campaign data and easily move it in and out themselves with no restrictions.

14. Among the concerns raised about Google's relationship with specialized search engines is scraping. "Scraping" refers to the unauthorized use of content that is collected, or "scraped," when a site is crawled and indexed by a search engine. Both Trip Advisor and Yelp, whose reviews appeared without permission on Google Places and whose CEO also testified at the hearing, have made such complaints. It is my understanding that Google has recently discontinued the practice of scraping reviews for use on its Places page.

a. Will Google commit to preventing any future occurrence of unauthorized scraping?

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[9] Brian Fitzpatrick, "Yes You Can Export Data From AdWords, Too", Google Public Policy Blog, October 8, 2009, http://googlepublicpolicy.blogspot.com/2009/10/yes-you-can-export-data-from-adwords.html.

[10] adCenter Desktop, "Import Google AdWords Campaigns to Microsoft adCenter using adCenter Desktop (video)", http://www.youtube.com/watch?v=MyWBPOS8dVM&feature=mfu_in_order&list=UL; Microsoft Advertising, "Import a Google campaign by using Microsoft Advertising adCenter Desktop (Beta)", http://advertising.microsoft.com/small-business/product-help/adcenter/topic?query=MOONSHOT_PROC_ImportGoogleCampaignsUsingDesktopTool.htm (5-step process); *see also* Amber, "Upload Your Google AdWords Campaigns Into Yahoo and MSN adCenter in a Flash!", PPC Hero, March 17, 2009, http://www.ppchero.com/upload-your-google-adwords-campaigns-into-yahoo-and-msn-adcenter-in-a-flash/ (3-step process).

[11] AdWords Editor Help, "How Do I Export a Spreadsheet from AdWords Editor," accessed November 1, 2011, http://www.google.com/support/adwordseditor/bin/answer.py?answer=38657.

[12] Google, AdWords API Terms and Conditions, accessed November 1, 2011, http://code.google.com/apis/adwords/docs/terms.html (In Section III(2)(c), Google explicitly notes that this section "does not apply to End-Advertiser-Only AdWords API Clients.").

b. There is, of course, a great benefit that Google has already received as a result of scraping reviews from sites like Yelp and Trip Advisor. Users tend to visit sites that have amassed numerous reviews. As a result, companies invest substantial time and resources in developing robust databases of user reviews. Google Places was able to attract traffic and generate its own reviews on the basis of content—one might even say intellectual property—it took from competing sites. What does Google plan to do to address the problems caused by your prior scraping policy and the manner in which it has disadvantaged competing user review sites?

Google believes strongly in protecting copyright and other intellectual property rights. Google relies, as does every other major search engine, on the established doctrine of fair use in order to display snippets of text in our search results, giving users a preview of the type of content they can find for a given link. Indeed, snippets are an important feature of search generally, and they drive traffic to websites. Google previously displayed review snippets from sites such as Yelp and TripAdvisor in our thematic local search results. Google's practice of displaying review snippets did not disadvantage review sites—in fact, quite the opposite. Google sends millions of clicks a month to Yelp, TripAdvisor, and other review sites. Google facilitates free traffic to both Yelp and TripAdvisor, and each of the sites has reaped the benefits of this free user exposure.

Yelp has aired numerous concerns in the press over the past few years, and although Google tries to act responsibly in response to website concerns, ultimately Google builds our search results and search-related products for the benefit of users, not websites. At all times, Google's primary motivation has been improving the search experience for our users by providing the most relevant and useful information in response to their queries. In the end, if users are unhappy with the answers Google provides, the openness of the web ensures that they can easily switch to Yelp or any other site with just one click.

15. According to a Nielsen report from this month, 40 percent of U.S. mobile consumers now use smartphones, and Google's Android is the fastest growing and most popular mobile operating system. Some have expressed concern that Google may be using Android "compatibility issues" as a means of excluding competitors. For example, Skyhook, a company that produces geolocation software for mobile devices, claims that Google, a direct competitor, informed both Samsung and Motorola that handsets loaded with Skyhook software could not be shipped due to incompatibility issues between Skyhook software and the Android platform.

a. Does Google ask or require handset manufacturers that contract with you to ship mobile phones with only software that you approve?

No. Google does not require handset manufacturers to ship mobile phones with only software that we approve. In contrast to closed, proprietary operating systems, Android allows manufacturers to modify their own implementations of Android to create their own unique features and user interfaces. Android is also particularly adaptable to new hardware configurations and chipsets. By allowing broader differentiation in software and hardware, Android enhances competition and consumer choice. There are more than 500 models of Android devices on the market.

Google has undertaken extensive efforts to protect consumers and application developers to ensure their applications run seamlessly on all Android devices. Google, with the support of our Android partners, has identified certain specifications, such as minimum screen size and security features, that help ensure applications run flawlessly across device models. These specifications are reflected in the Android Compatibility Definition Document ("CDD"), which is published on Android Open Source Project's website. Google and our partners believe that this baseline preserves the maximum amount of manufacturer freedom to customize Android, while simultaneously protecting Android developers, who need consistency

and rely on minimum elements appearing on all Android devices, and Android customers, who may legitimately expect that Android applications will run on their Android devices.

b. Does Google ask or require manufacturers to preload phones with Google applications?

No. Google does not require that smartphone manufacturers preload phones with Google applications.

Android is a free, open source platform for mobile devices. The complete Android source code is available for download for free from the Android Open Source Project website.[13] Any developer or manufacturer can use, modify, and distribute the Android operating system without Google's permission or any payment to Google. For example, Amazon recently announced the Kindle Fire—its new tablet device—using the Android source code without Google's involvement. This is one of the exciting and innovative aspects of Android that will help foster innovation and competition in the smartphone market.

One of the greatest benefits of Android is that it fosters competition at every level of the mobile market—including among application developers. Google respects the freedom of manufacturers to choose which applications should be pre-loaded on Android devices. Google does not condition manufacturers' access to or use of Android on pre-installation of any Google applications or on making Google the default search engine.

Manufacturers can choose to pre-install Google applications on Android devices, but they can also choose to pre-install competing search applications like Yahoo! and Microsoft's Bing. Many Android devices have pre-installed the Microsoft Bing and Yahoo! search applications. No matter which applications come pre-installed, the user can easily download Yahoo!, Microsoft's Bing, and Google applications for free from the Android Market.[14] In addition, Android gives manufacturers the freedom to pre-install third-party app stores, like the Amazon Appstore for Android, where a user can download a variety of apps, including Microsoft's Bing.[15]

c. Will Google commit to removing its own view of "compatibility" with Android as a prerequisite to the shipment or sale of handsets?

As noted in our answers to Questions 15a and b, Google has undertaken extensive efforts to protect consumers and application developers to ensure their applications run seamlessly on all Android devices. Google, with the support of our Android partners, has identified certain specifications, such as minimum screen size and security features, that help ensure applications run flawlessly across device models. These specifications are reflected in the Android Compatibility Definition Document ("CDD"), which is published on Android Open Source Project's website. Google and our partners believe that this baseline preserves the maximum amount of manufacturer freedom to customize Android, while simultaneously protecting Android

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[13] *See* Android Open Source Project, "Downloading the Source Tree", accessed on November 1, 2011, http://source.android.com/source/downloading.html.

[14] Users can access the Microsoft Bing Search application here: https://market.android.com/details?id=com.microsoft.bing&feature=search_result; the Yahoo! Search application here: https://market.android.com/details?id=com.yahoo.mobile.client.android.yahoo&feature=search_result; and the Google Search application here: https://market.android.com/details?id=com.google.android.googlequicksearchbox&feature=search_result.

[15] Amazon makes the Microsoft Bing Search application available here: http://www.amazon.com/Microsoft-Corporation-Bing/dp/B004T54Y2M/

developers, who need consistency and rely on minimum elements appearing on all Android devices, and Android customers, who may legitimately expect that Android applications will run on their Android devices.

16. In 2003, you were quoted in the New York Times as stating that "[m]anaging search at our scale is a very serious barrier to entry."

a. Why is scale a "very serious barrier to entry" in search?

I made that statement to the New York Times over eight years ago, and I was probably talking about search in a more narrow way than I view competition today. That same New York Times article emphasizes that Google's advantage in 2003 was that we had amassed a large number of data centers to handle a sizable volume of queries.[16] But today, data centers have been reduced to a commodity that any company can buy or rent. Moreover, both Microsoft's Bing and Yahoo! today handle *millions more queries* than Google did in 2003. In two short years, Microsoft's Bing has already reached the size that Google was in 2007.

Scale is not the key to our success. Google is not successful because of the number of queries we process. Competition on the Internet is just one click away and that disciplines Google into concentrating on making our users happy. To this end, Google makes tremendous investments in research and development and in hiring the best engineers, who are extremely talented, have a huge depth of experience, and are focused like a laser on thinking of ways to deliver better services to our users. We believe we are better not because we are bigger but because our technology is better.

Google does not believe that scale is a barrier to entry. The Internet provides a level playing field for competition; Google's size has not changed that fact. Indeed, recent entry into the general search business by start-ups such as Blekko, venture capital investments in search startups like DuckDuckGo, and Microsoft's Bing's success after only two years demonstrate that entry is not only possible but real.

A lack of scale did not deter companies like Facebook, Twitter, and LinkedIn from starting, finding an audience, and achieving widespread prominence, recognition, and ultimately success. At the same time, the large size of many Internet companies like MySpace did not prevent them from losing their audience and ultimately faltering. Given the nature of the Internet, websites, and services can and do get supplanted by completely new models. So the relevant question may not be, "Who will beat Google in search?" but rather, "What new model might take the place of search?"

b. Given that scale constitutes such a serious barrier to entry, do you agree that search engines lacking Google's scale are unable to offer as comprehensive and relevant results as those provided by Google, regardless of whether such search engines are "one click away" for users?

As explained above, Google does not believe that scale constitutes a barrier to entry. Google's size has not prevented competitors from reaching audiences and achieving success. Indeed, in just two short years, Microsoft's Bing has grown to the same volume of queries that Google had in 2007. Google believes that Microsoft's Bing and Yahoo! achieved the scale necessary to compete with Google long ago.

Google offers better results than Microsoft's Bing or Yahoo! not because we are bigger but because our engineers are better, our technology is better, and our indexing and crawling solutions are more sophisticated. A comprehensive crawl is the first ingredient to precise query matching, and Google devotes significant resources and manpower to constructing, updating, and maintaining a highly sophisticated crawling and

[16] John Markoff and G. Pascal Zachary, "In Searching the Web, Google Finds Riches", New York Times, April 13, 2003, http://www.nytimes.com/2003/04/13/business/in-searching-the-web-google-finds-riches.html?pagewanted=all&src=pm.

indexing system. Independent analysts have confirmed the superiority of Google's index; as reported in June 2011, "the experts at SMX [a conference for search marketing experts] seemed to believe that Google's crawler is currently much better at discovering content than Microsoft Bing's search bot (undoubtedly part of why Google is still the No. 1 search engine in the market, by comScore's latest measure)."[17]

17. During the hearing, some Senators suggested a panel to oversee changes in your company's algorithm. I want to state clearly and for the record that I oppose subjecting a company's core intellectual property to such regulation. Please describe the problems that could result from opening Google's algorithm to regulatory oversight.

In the open world of the Internet where competition is a click away, innovation happens at a feverish pace. In this rapidly changing industry, Google has evolved to operate at lightning speed; our engineers test more than ten thousand changes per year and ultimately make more than 500 changes a year to our search algorithms, or one to two changes *per day*. Each change focuses on improving the user experience, with the understanding that if Google does not deliver the best search results, someone else will.

Google's engineers also work tirelessly to modify the algorithms to protect users from spam, malware, viruses, and scams. Purveyors of these fraudulent devices are always looking for ways to get around Google's algorithms to entrap consumers. Having a government panel oversee each change to the algorithms would tie Google's hands, and make it impossible for our engineers to react quickly and effectively to improve user experience and keep users safe. This would severely harm consumers.

Having a government panel oversee algorithm changes raises other serious concerns. There is no "correct" search result. Results are generated in response to user queries. For example, a search for [President Obama address] could be asking for the location of the President's residence or a speech that the President made. Google's formulation of search results is a type of "scientific opinion"—a prediction of what the user might be looking for. Those results have been deemed by several courts to be a protected form of free speech under the First Amendment.[18] Just as a government panel could not dictate to the New York Times, the Drudge Report, or the Huffington Post what stories they could publish on their websites without infringing their freedom of speech, so too would government-mandated results likely violate Google's freedom of speech.

A government oversight panel for search would also enable firms that compete with Google to file spurious complaints in an effort to slow down Google's innovations. This would hurt consumers.

The purpose of the antitrust laws is to protect competition (not competitors) for the benefit of consumers. To this end, the openness of the Internet and the ability of users to switch easily between rival websites ensure robust competition and consumer welfare. Where users can effectively inform Google which changes they like by clicking away from Google, there is no need for a government panel to ensure changes are made for the benefit of consumers.

18. While under review by the Justice Department for the acquisition of ITA Software, Google said on its website that "our goal will be to refer people quickly to a site where they can actually purchase flights, and that we have no plans to sell flights ourselves," specifying that "Google does not plan to sell airline tickets directly."

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[17] "SEO Case Study: Sites See More Pages Indexed by Google Than Bing -- Even Post Panda," Brafton News, June 9, 2011, http://www.brafton.com/news/seo-case-study-sites-see-more-pages-indexed-by-google-than-bing-even-post-panda-800527170.

[18] *See Kinderstart.com, LLC v. Google, Inc.*, Case No. C 06-2057 JF (RS) (N.D. Ca., March 16, 2007); *Search King, Inc. v. Google Technology, Inc.*, Case No. Civ-02-1457-M (W.D. Okla., Jan. 13, 2003).

a. Does this remain Google's position in regard to travel transactions?

We do not currently plan to sell airline tickets directly, and the first version of Google flight search contains links to airline websites where you can buy a ticket.

b. Please update the Subcommittee on Google's current and future plans to be involved in facilitating the sale of travel services, including booking flights and hotels.

We've been excited about the opportunity to work with ITA to build extraordinary tools for flight search. We continue to look for areas where we can offer users compelling travel services. At present, we have no plans to offer flight or hotel bookings.

Kelly, Andrea

From: Blank, Barbara
Sent: Wednesday, October 10, 2012 4:18 PM
To: Lippincott, Victoria
Cc: Green, Geoffrey; Sabo, Melanie; Harrison, Lisa M.; Vaytsman, Olga; Vandecar, Kim
Subject: Emailing: 2012-9-21 Briefing Request.pdf, 2012-10-10 Memo re Request for Briefing.wpd, 2012-10-10 Response Letter for Briefing Request.wpd
Attachments: 2012-9-21 Briefing Request.pdf; 2012-10-10 Memo re Request for Briefing.wpd; 2012-10-10 Response Letter for Briefing Request.wpd

Hi Victoria,

Revised memo attached (with the rest of the package). The description of the case has been revised as follows:

(b)(5)

Hope this addresses the issue we discussed. Let me know if you need anything else.

Best Regards,

Barbara

Kelly, Andrea

From: Blank, Barbara
Sent: Tuesday, October 23, 2012 12:17 PM
To: Sabo, Melanie; Bayer Femenella, Peggy
Subject: FW: Google Hill briefing on Thursday
Attachments: 2012-10-23 Google notice.pdf; 2012-10-23 (b)(7)(D) notice.pdf

Do you mean you have separate notices for both matters?

This is the notice I was planning on sending today to (b)(7)(D) and Google. Should we send both in one email?

From: Sabo, Melanie
Sent: Tuesday, October 23, 2012 12:17 PM
To: Blank, Barbara; Harrison, Lisa M.; Vaytsman, Olga
Cc: Green, Geoffrey; Vandecar, Kim
Subject: RE: Google Hill briefing on Thursday

We have letters for both matters, and Peggy and/or Nick plan to attend. I think Pete is consider attending too.

From: Blank, Barbara
Sent: Tuesday, October 23, 2012 12:14 PM
To: Harrison, Lisa M.; Vaytsman, Olga
Cc: Green, Geoffrey; Sabo, Melanie; Vandecar, Kim
Subject: RE: Google Hill briefing on Thursday

It was our understanding that this briefing is only addressing the Google Search investigation. I don't think anyone on the SEP side has been informed, unless I'm mistaken. And our memo to the Commission seeking permission for this briefing didn't address SEPs.

From: Harrison, Lisa M.
Sent: Tuesday, October 23, 2012 12:08 PM
To: Blank, Barbara; Vaytsman, Olga
Subject: RE: Google Hill briefing on Thursday

Thanks. I assume we are sending one letter covering both search engine and SEP investigations? Perhaps the letter needs to be addressed to both lead counsel for Google on search and lead counsel for Google on the SEP investigation.

The sentence referencing search engine practices needs to be changed because we got the revised incoming letter with an expanded request. Olga, can you send language based on what we said in the Commission letter authorizing the briefing?

From: Blank, Barbara
Sent: Tuesday, October 23, 2012 11:57 AM
To: Vaytsman, Olga; Harrison, Lisa M.
Subject: Google Hill briefing on Thursday

Olga and Lisa,

Should I go ahead and send the standard notices today to Google and (b)(7)(D) about the upcoming briefing Thursday? Sample attached here.

Best Regards,

Barbara

Kelly, Andrea

From: Blank, Barbara
Sent: Monday, September 26, 2011 4:10 PM
To: (b)(7)(C) Felten, Edward; (b)(7)(C)
(b)(7)(C)
(b)(7)(C) Wu, Timothy; (b)(7)(C)
Subject: FW: Google Senate
Attachments: Summary of Senate Antitrust Hearing on Google.pdf

Categories: Red Category

FYI

From: (b)(7)(C)
Sent: Monday, September 26, 2011 4:08 PM
To: Blank, Barbara
Subject: Google Senate

From a friend on the Hill.

A Summary of
The Senate Antitrust Subcommittee's Hearing on
Google, Competition, and Antitrust

On September 21, the Senate Subcommittee on Antitrust, Competition Policy and Consumer Rights held a hearing on "The Power of Google: Serving Consumers or Threatening Competition?" Witnesses included representatives of Google and of companies that claim to have been harmed by Google's anticompetitive practices. This paper briefly summarizes the hearing, highlights key exchanges, and identifies key questions raised.

Opening Statements

Chairman Kohl's opening statement noted that, with "65 to 70% of all US Internet searches on computers and 95% on mobile devices," Google, "as the dominant firm in Internet search, . . . has special obligations under antitrust law to not deploy its market power to squelch competition." Although Google's original mission was "to get the user off Google's home page and onto [other] web sites" as quickly as possible, he noted that, as Google "has grown ever more dominant and powerful, . . . it appears its mission has changed." Chairman Kohl added that Google's recent "acquisition binge" has "transformed Google from a mere search engine to a major Internet conglomerate. And these acquisitions raise a very fundamental question -- is it possible for Google to be both an unbiased search engine and at the same time own a vast portfolio of web-based products and services? Does Google's transformation create an inherent conflict of interest which threatens to stifle competition?"

Ranking Member Lee, echoing the market share figures cited by Chairman Kohl, quoted the head of Google's search ranking team who described Google as "the biggest king-maker on earth." He added that, given Google's "ability to steer e-commerce and the flow of online information, Google is in a position to help determine who will succeed and who will fail on the Internet." Senator Lee listed a litany of "growing concerns" that had been raised about Google's practices, including that it uses its search algorithms to advantage itself and disadvantage other businesses; that it "impedes competing search engines from crawling, indexing, and returning [search] results [from its] YouTube content and book scans"; that it "imposes exclusivity restrictions" on partners; and that it has imposed "limits on advertisers' ability to transfer data associated with Google's advertising platform to any other platform using third-party tools that would make the process simple and automatic." He concluded that, "[i]n this instance, I believe that preserving competitive markets through antitrust principles can forestall the imposition of burdensome government regulation."

Panel 1

The sole witness on the first panel was **Eric Schmidt**, who served as Google's CEO from 2001 to April 2011 and since then as its Chairman. Mr. Schmidt, testifying under oath, said Google has "absorbed the lessons" of earlier antitrust cases and that "We get it. . . . We also get [that] it's natural for you to have questions about our business . . . . What we ask is that you help us to ensure that the Federal Trade Commission's inquiry [into possible antitrust violations by Google] is a fair and focused process, which I'm sure you'll do." Mr. Schmidt then listed various principles that, in his view, guide Google's actions and described recent Google investments in employment and mobile, among other issues.

At the conclusion of this testimony, Senators asked questions on a number of issues, including:

- ***Does Google have market power?***

Several Senators asked Mr. Schmidt for his views on whether Google has market power. **Senator Blumenthal,** for instance, noted that, with a "65 or 70 percent" share of search and "an even higher share" of search advertising revenue, "there's no question about the fact that Google is really the behemoth in the search market these days." **Senator Kohl** added, "Does Google recognize that as a monopoly or dominant power, special rules apply that there is conduct that must be taken and conduct that must be refrained from?"

Mr. Schmidt first disputed claims that Google has market power, stating that "We argue we're in a highly competitive market." When **Senator Kohl** pressed Mr. Schmidt on whether Google was "in [the] area" of monopoly power, Mr. Schmidt responded, "I would agree, Senator, that we're in that area." With respect to what special responsibilities come with such power, however, Mr. Schmidt explained that, in his view, "we have a special responsibility to debate all the issues that you're describing to us." He added that Google is "satisfied the things we're doing are in the legal and philosophical balance of what we're trying to do."

- ***Does Google favor its own services in search results?***

Several Senators invited Mr. Schmidt to comment on whether Google favors itself in its organic search results. **Senator Lee** asked whether Google's own services "are . . . subject to the same test, the same standard as all the other results" in organic search. Mr. Schmidt responded, "I believe so. . . . I'm not aware of any unnecessary or strange boosts or biases." **Senator Lee** then pointed to a study reflecting that, in a test of hundreds of searches for products on Google, Google's own result (for Google Shopping) "ranked third [place] in virtually every single instance." He added, "when I see you magically coming up third every time, that seems to me, I don't know whether you call this a separate algorithm or reversed engineered, but either way you cooked it so you're always third." Mr. Schmidt disagreed, insisting that "we have not cooked anything."

Senator Franken expressed concern that Mr. Schmidt's response on this issue was "fuzzy" and asked, "If you don't know [whether Google favors itself in search results], who does? That really bothers me, because that's the crux of this, isn't it? . . . [W]e're trying to have a hearing here about whether you favor your own stuff and you're asked that question and you admittedly don't know the answer." In a later exchange, Mr. Schmidt conceded that "[w]e have a product called universal search and universal search chooses how to organize the page . . . . So the answer is, we give preference, but we give preference in the context of our best judgment of the sum of what the person wants to do."

Senator Blumenthal summarized Members' concerns on this issue by way of an analogy: "You run the race track, you own the race track. For a long time, you had no horses. Now you have horses and you have control over where those hoses are placed and your horses seem to be winning. And, you know, I think what a lot of these questions raise is the potential conflict of interest . . ."

- ***Did Google Executive Marissa Meyer accurately describe the company's practice of placing Google's own services at the top of search results?***

Senator Kohl quoted Google Executive Marissa Meyer's 2007 statement that, although Google ranks non-Google services in its search results based on their popularity,

> "When we rolled out Google Finance, we did put the Google link first. Seems only fair, right? We do all the work for the results page and all those other things so we do it, put it first. This has actually been our policy since then."

He asked Mr. Schmidt how he could square that statement with Mr. Schmidt's own testimony, which suggested that Google's results are not discriminatory. Mr. Schmidt replied, "I wasn't there [when Ms. Meyer made the statement], so maybe I should use my own voice on this question," and later added, "I'll let Marissa speak for herself on her quote."

- ***Does Google's control over both information and user access to information create conflicts of interest?***

Several Senators raised concerns that Google was extending beyond its traditional role of being a neutral arbiter of providing access to information and increasingly was moving into being a source of that information. **Senator Franken,** for instance, noted that he was "skeptical of big companies that simultaneously control both information and the distribution channels to that information, and for me, that is at the heart of the problem here." **Senator Kohl** added, "As a rational business trying to make the most profit, wouldn't we expect Google to favor its products and services in providing these answers?"

Mr. Schmidt responded, "I'm not sure Google is a rational business trying to maximize its own profits." He later sought to clarify his position by assuring Members that "Google does nothing to block access to any of the competitors and other sources of information"--to which **Senator Blumenthal** responded that no one was claiming that Google excluded competing services from its search results, only that it directed users to its own services over those of competitors.

- ***Was Mr. Schmidt aware of Google's illegal practices that recently led to a $500 million criminal settlement with the Department of Justice?***

Senator Cornyn referenced Google's recent $500 million payment to settle criminal charges that for several years it actively helped rogue online pharmacies sell potentially counterfeit and tainted drugs to U.S. consumers through Google ads. He invited Mr. Schmidt to comment, and specifically asked, "were there some employees in the company that were doing this without your knowledge?" Mr. Schmidt responded, "Certainly not without my knowledge," which suggests that Mr. Schmidt <u>was</u> aware of this activity. It is possible, however, that Mr. Schmidt misspoke and meant to say that the activity happened without his knowledge.

Attempts to clarify what Mr. Schmidt knew or did not know were frustrated when Mr. Schmidt refused to answer further questions. Mr. Schmidt claimed, "I have been advised very clearly by our lawyers that we have an agreement with the Department of Justice that we are not to speak about any of the details of" the settlement. When Senator Cornyn explained that the DoJ agreement in fact <u>permits</u> Google to comment on the agreement, just not to contradict it, Mr. Schmidt conferred briefly off the record with his counsel, after which, while not disagreeing with Senator Cornyn's characterization of the agreement, he refused to answer more questions, saying "Again, I'm not allowed to go into the details or characterize it beyond the -- beyond what has been stated in the agreement."

- ***Will Google take voluntary steps to address the competition concerns that have been raised?***

Senator Blumenthal asked whether Google, "drawing on the lessons that presumably you have learned" from earlier antitrust cases, could "suggest measure to be taken voluntarily at this point to promote competition" in light of the various concerns that had been raised. Mr. Schmidt responded, "I

would argue that the levers . . . that are necessary to guarantee the outcome you're looking for are largely already in place." When Senator Blumenthal asked whether "eliminating that preference" [of Google services in search results pages] might be "a step in the right direction," Mr. Schmidt disagreed, in part on the ground that Google's competitors would still be able to do so.

Panel 2

The first witness on Panel 2 was **Thomas Barnett**, a partner at Covington & Burling LLP who served as Assistant Attorney General for Antitrust at the DoJ from 2005 to 2008. Testifying on behalf of Expedia, Mr. Barnett observed that both the DoJ and FTC had determined that Google has market power, and that even Mr. Schmidt himself, in a 2003 statement, acknowledged that Google's large scale advantage in search "is a very serious barrier to entry." Mr. Barnett noted that Google is expanding its market power into new areas, in part by giving its own services preferential placement in natural search results without disclosing this to users. Google "has a direct financial interest in placing [its own services] above the natural search results, and by failing to disclose what they are doing to users, they can mislead them into going to a [Google] site."

The second witness was **Jeff Katz**, CEO at comparison shopping company **Nextag**. Although Nextag began working with Google in 2002, believing that Google would "live up" to its promise to "treat others fairly," Google has since "abandoned those core principles when they started interfering with profit growth." In Mr. Katz's words, "Today, Google doesn't play fair. Google rigs its results, biasing in favor of Google Shopping and against competitors like us." Mr. Katz observed that "Google is not a search engine anymore"--instead of presenting "the information that users want," Google "presents the information Google wants you to see based on its commercial interest."

Next to testify was **Jeremy Stoppelman**, chairman, CEO, and co-founder of review website **Yelp**. Mr. Stoppelman noted that "Google is no longer in the business of sending people to the best sources of information on the web" and instead "now hopes to be a destination site itself"--but has used its dominance in search to tilt the playing field in its favor. Google gave Yelp "an ultimatum that only a monopoly can give: in order to appear in web search, you must allow us to use your content to compete against you." Because not being on Google "is equivalent to not existing on the Internet," Yelp had "no choice" but to accept. Mr. Stoppelman also noted that Google calls "special attention" to its own properties in its search results "through larger text, great graphics, isolated placement" and by "pushing objectively ranked websites down the page," with the result that "websites in Google search results now take a back seat to Google's own competing products."

The final speaker was **Susan Creighton**, a partner at Wilson Sonsini Goodrich & Rosati, PC, a former director of the FTC's Bureau of Competition who now serves as competition counsel to Google. She argued that the government should "exercise extreme caution before acting" and that "extraordinary care must be taken to assure that government intervention in the market is truly essential." Ms. Creighton warned that government action to remedy search manipulation by Google would "turn Google's search service into a regulated utility."

At the conclusion of these statements, Senators asked the witness about several of the same issues raised in Panel 1, as well as a few new ones, including:

- ***Would entrepreneurs today be able to launch services such as Nextag and Yelp, given Google's dominance and current practices?***

In response to a question from **Senator Franken**, Mr. Stoppelman stated that he "absolutely" would not consider starting fresh in the local review space now that Google is "taking up more of the real estate." Mr. Katz expressed a similar opinion, that it "would be impossible" to launch Nextag with "the Google that exists today where roughly the top half of the page is dominated by Google-related product interests" and the right half of the page is filled with "unique ad placements which competitors such as [Nextag] can't even purchase."

- ***Did Google coerce smaller companies into allowing it to use their content in competition with them--or face being excluded from Google search results?***

In Panel 1, Mr. Schmidt testified that, when Google learned that Yelp objected to Google's scraping of Yelp's content and using it in Google's competing "Places" service, Google removed that content. In response to a question from **Senator Franken,** Mr. Stoppelman stated that, in fact, Google had continued to scrape and use Yelp's content against it and did not stop "until there was some interest from the government side." In response to a question from **Senator Kohl,** Mr. Barnett explained that his client, **Trip Advisor,** suffered a similar experience. He added, "I completely agree with Mr. Stoppelman, the only reason that changed at all . . . was this year, after the FT opened up an investigation, there were presentations made to the national state attorneys general, and within weeks, if not days, Google started to back down." When **Senator Blumenthal** asked Ms. Creighton whether Google had ever scraped or co-opted content, as Mr. Stoppelman had testified, she replied:

> "Senator, to the best of my knowledge, what Google has done and what Mr. Stoppelman is describing, he wanted to have -- Google's experience has been that people like a line or two being written about them because that's what drives traffic to the site. What Mr. Stoppelman is describing is micro-management . . . [he] was asking Google to engage in extra engineering to be able to make that possible."

- ***Could Google's actions harm consumers?***

In response to a question from **Senator Lee** on whether Google's actions could harm consumers, Mr. Barnett identified two specific harms. First, he noted that Google made roughly $30 billion last year in advertising and, "given that they are dominant in advertising, a good portion of that is already monopoly rents. . . . [T]hat's money that advertisers have to spend that ultimately consumers pay for because it's going to flow through in the cost of goods and services." The more "fundamental" problem, he added, was that if only Google is innovating, consumers "lose the benefit of competition in innovation, and that's what's really going to drive and promote consumer welfare in the long run."

- ***What voluntary actions could Google take to address competition concerns?***

Several Senators asked what actions Google could take voluntarily to address the competition concerns that had been raised. Mr. Stoppelman responded that "the key would be separating out [Google's] distribution from its own properties" so that it no longer preferenced its own services in search results. Mr. Katz noted that "the guiding principle is really having a level playing field," including by making all spots on the search results page accessible to all. Mr. Barnett responded that the first thing Google should do is to "acknowledge they are a dominant company and have a special responsibility." Google should also ensure that its display of search results "is not misleading or deceptive to consumers" and should "refrain from using content from other sites without their permission." They should also ensure

that "their algorithm really is based on objective criteria and not penalizing sites because they are competitors."

Senator Blumenthal then posed the same question to Ms. Creighton, who responded, "I would want to go to the provisions that are preventing consumer choice." Ms. Creighton declined to answer Senator Blumenthal's question about what remedies would be appropriate if a court found that Google engages in anticompetitive conduct, stating that his question had "so many hypotheticals in it, [she] wouldn't be able to answer it." When **Senator Franken** asked whether Google might be willing to voluntarily accept a Technical Committee to assist the company in addressing these issues, Ms. Creighton responded, "I would be extremely concerned that's just another word for regulation." When Senator Franken reiterated that this would be voluntary, Ms. Creighton maintained her opposition, arguing that "I think a Technical Committee would be too slow to keep up with the changes in the market."

Kelly, Andrea

From: Blank, Barbara
Sent: Monday, December 05, 2011 4:34 PM
To: Sabo, Melanie
Subject: FW: Official Request for Staff Briefing on Google investigation, File No. 111-0163
Attachments: 2011-9-14 Letter to Sher.pdf

From: Blank, Barbara
Sent: Wednesday, September 14, 2011 9:12 AM
To: Sher, Scott
Cc: Harrison, Lisa M.; Watts, Marianne R.
Subject: Official Request for Staff Briefing on Google investigation, File No. 111-0163

Scott,

Per my VM, I'm attaching a letter here that lays out the request from Senator Kohl's office. I'm tied up in meetings this morning, but should be around this afternoon if you want to chat about this.

Best Regards,

Barbara

Barbara R. Blank, Esq.
Federal Trade Commission, Bureau of Competition
Anticompetitive Practices Division
601 New Jersey Avenue, N.W.
Washington, D.C. 20580
Tel. (202) 326-2523
Fax (202) 326-3496
bblank@ftc.gov

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

September 14, 2011

VIA EMAIL

Scott A. Sher, Esq.
Wilson Sonsini Goodrich & Rosati PC
1700 K Street, N.W.
Fifth Floor
Washington, D.C. 20006
ssher@wsgr.com

Dear Scott:

This notifies you of an official request for information that the Federal Trade Commission has received from Chairman Herb Kohl of the Senate Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights. The Subcommittee has requested a staff briefing on the agency's investigation into Google, Inc.'s search engine practices. Certain information that Google Inc. has submitted may be responsive to this request.

The Commission routinely receives official requests for confidential information from congressional committees and subcommittees. Neither the Freedom of Information Act, 5 U.S.C. § 552(d), nor the Federal Trade Commission Act, 15 U.S.C. § 57b-2(d)(1)(A), authorizes the Commission to withhold such information from congressional committees or subcommittees. The Commission, of course, requests that the responsive information and materials be kept confidential by the congressional committees and subcommittees.

If you have any questions about the congressional inquiry or handling of the requested information, please direct them to subcommittee staff at (202) 224-3406. Questions about the Commission's response may be directed to me at (202) 326-2523.

Sincerely,

Barbara R. Blank

cc: Office of General Counsel

Kelly, Andrea

From: Blank, Barbara
Sent: Monday, December 05, 2011 4:34 PM
To: Sabo, Melanie
Subject: FW: Official Request for Staff Briefing on Google investigation, File No. 111-0163
Attachments: 2011-9-14 Letter To (b)(7)(D) pdf

Melanie, here's what I sent to both (b)(7)(D) and Scott. I cc'd OGC on it at their request.

From: Blank, Barbara
Sent: Wednesday, September 14, 2011 9:07 AM
To: (b)(7)(D)
Cc: Harrison, Lisa M.; Watts, Marianne R.
Subject: Official Request for Staff Briefing on Google investigation, File No. 111-0163

(b)(7)(D)

Per my VM, I'm attaching a letter here that lays out the request from Senator Kohl's office. I'm tied up in meetings this morning, but should be around this afternoon if you want to chat about this.

Best Regards,

Barbara

Barbara R. Blank, Esq.
Federal Trade Commission, Bureau of Competition
Anticompetitive Practices Division
601 New Jersey Avenue, N.W.
Washington, D.C. 20580
Tel. (202) 326-2523
Fax (202) 326-3496
bblank@ftc.gov

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

September 14, 2011

VIA EMAIL

(b)(7)(D)

(b)(7)(D)

This notifies you of an official request for information that the Federal Trade Commission has received from Chairman Herb Kohl of the Senate Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights. The Subcommittee has requested a staff briefing on the agency's investigation into Google, Inc.'s search engine practices. Certain information that (b)(7)(D) has submitted may be responsive to this request.

The Commission routinely receives official requests for confidential information from congressional committees and subcommittees. Neither the Freedom of Information Act, 5 U.S.C. § 552(d), nor the Federal Trade Commission Act, 15 U.S.C. § 57b-2(d)(1)(A), authorizes the Commission to withhold such information from congressional committees or subcommittees. The Commission, of course, requests that the responsive information and materials be kept confidential by the congressional committees and subcommittees.

If you have any questions about the congressional inquiry or handling of the requested information, please direct them to subcommittee staff at (202) 224-3406. Questions about the Commission's response may be directed to me at (202) 326-2523.

Sincerely,

Barbara R. Blank

cc: Office of General Counsel

Kelly, Andrea

From: Clark, Donald S.
Sent: Tuesday, December 06, 2011 12:43 PM
To: Sabo, Melanie; Vandecar, Kim
Cc: Thompson, Patricia V.; Bumpus, Jeanne; Runco, Philip; Caditz-Peck, Russell
Subject: Original and Signed Copy of Commission Letter Authorizing Nonpublic Briefing Re Operation of Google Search Engine, File No. 1110163
Attachments: The Honorable Herb Kohl Ltr re Google Inc .pdf

Everyone, Pat has now delivered the signed original of this letter to OCR (thanks, Pat!), and I've attached a signed copy; good luck with the briefing!

Don

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Secretary

December 5, 2011

The Honorable Herb Kohl
Chairman
Subcommittee on Antitrust, Competition Policy and Consumer Rights
Committee on the Judiciary
United States Senate
Washington, DC 20510-6275

Dear Chairman Kohl:

Thank you for your letter dated November 18, 2011, requesting a confidential staff briefing on the agency's investigation into Google, Inc.'s search engine practices. The Commission is responding to your request as an official request of a Congressional Subcommittee, *see* Commission Rule 4.11(b), 16 C.F.R. § 4.11(b), and has authorized its staff to provide the requested briefing.

Most of the information that the Commission attorneys will discuss during the briefing is nonpublic and statutorily protected from public disclosure by the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 41 *et seq.*, as well as exempt from mandatory disclosure under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. In particular, some of the information would be protected under Section 6(f) of the FTC Act, 15 U.S.C. § 46(f), as confidential commercial or financial information. The Commission is prohibited from disclosing such information publicly, and it would be exempt from disclosure under FOIA Exemption 3, 5 U.S.C. § 552(b)(3). Because disclosure of this information is likely to result in substantial competitive harm to the submitters, or is clearly not of a kind that submitters would customarily make available to the public, it would be exempt from disclosure under FOIA Exemption 4, 5 U.S.C. § 552(b)(4). *See Critical Mass Energy Project v. NRC*, 975 F.2d 871, 877-80 (D.C. Cir. 1992) (*en banc*), *cert. denied*, 507 U.S. 984 (1993) (exempt status accorded to information submitted voluntarily); *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) (exempt status accorded to information submitted under compulsion).

Most of the information that the Commission attorneys will discuss was obtained by compulsory process or provided voluntarily in lieu thereof in a law enforcement investigation. Such information is protected from public disclosure under Section 21(f) of the FTC Act, 15 U.S.C. § 57b-2(f). By virtue of that section, such information is also exempt from public disclosure under FOIA Exemption 3(B), 5 U.S.C. § 552(b)(3)(B). *McDermott v. FTC*, 1981-1 Trade Cas. (CCH) ¶ 63,964 at 75,982-3 (D.D.C. April 13, 1981); *Dairymen, Inc. v. FTC*, 1980-2

Trade Cas. (CCH) ¶ 63,479 (D.D.C. July 9, 1980). Moreover, third party submitters provided their materials and information with a specific request for confidential treatment under Section 21 (c)) of the FTC Act, 15 U.S.C. § 57b-2(c)). Under Commission Rule 4.10(d), 16 C.F.R. § 4.10(d), the Commission has waived its discretion to release to the public materials submitted pursuant to compulsory process or materials submitted voluntarily in lieu of process that have been marked confidential by the submitting parties.[1]

Additional information that may be discussed during the briefing was submitted in response to the Hart-Scott-Rodino premerger notification requirements of the Clayton Act, 15 U.S.C. § 18a. Section 7A(h) of the Act prohibits public disclosure of such documents or information. By virtue of this statutory prohibition, this information is also exempt from disclosure under Freedom of Information Act (FOIA) Exemption 3A, 5 U.S.C. § 552(b)(3)(A).[2]

Further, information discussed during the briefing would reveal the existence of, and information concerning, an ongoing, nonpublic law enforcement investigation. Disclosure of this information could reasonably be expected to interfere with law enforcement proceedings, and this information is therefore protected from mandatory public disclosure by FOIA Exemption 7(A), 5 U.S.C. § 552(b)(7)(A). *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 232 (1978); *Ehringhaus v. FTC*, 525 F. Supp. 21, 24 (D.D.C. 1980).

Finally, some of the information that will be discussed during the briefing will include internal staff analyses and recommendations, which are predecisional, deliberative materials exempt from mandatory public disclosure under FOIA Exemption 5, 5 U.S.C. § 552(b)(5). *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975); *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). Some of this information may also be protected from mandatory public disclosure under FOIA Exemption 5 as attorney work product prepared in anticipation of litigation. *FTC v. Grolier, Inc.*, 462 U.S. 19, 28 (1983); *Martin v. Office of Special Counsel, Merit Systems Protection Board*, 819 F.2d 1181, 1187 (D.C. Cir. 1987).

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[1] The Commission is required to notify persons who submitted information pursuant to compulsory process in a law enforcement investigation, or voluntarily in lieu thereof on a confidential basis, if the Commission receives a request from a Congressional Committee or Subcommittee for that information. *See* 15 U.S.C. §§ 57b-2(b)(3)(C), 57b-2(d)(1)(A); Commission Rule 4.11(b), 16 C.F.R. § 4.11(b). Staff is providing the requisite notice.

[2] The Commission has instructed its staff to provide reasonable notice, when possible, of the release to Congress of information submitted pursuant to HSR. *See Statement of Basis and Purpose of HSR Rules and Regulations*, 43 Fed. Reg. 33519 (July 31, 1978). Staff has provided notice to submitters pursuant to this policy.

Notwithstanding the protected status of most of the responsive information, the FTC Act, 15 U.S.C. § 57b-2(d)(1)(A), the Clayton Act, 15 U.S.C. § 18a(h), and the FOIA, 5 U.S.C. § 552(d), provide no authority to withhold such information from this Congressional Subcommittee, and the Commission has authorized staff to provide the requested briefing to Subcommittee staff. Because the confidential information would not be available to the public under the FOIA or otherwise, the Commission requests that the Subcommittee maintain its confidentiality.

By direction of the Commission.

Donald S. Clark
Secretary

Kelly, Andrea

From: Blank, Barbara
Sent: Wednesday, October 10, 2012 1:03 PM
To: (b)(7)(C)
Cc:
Subject: RE: Google Update

(b)(5)

From: Blank, Barbara
Sent: Wednesday, October 10, 2012 11:54 AM
To: (b)(7)(C)
(b)(7)(C)
Subject: Google Update

Hi everyone,

(b)(5)

(b)(5)

I think that's everything for now. Thanks very much (and apologies for the ridiculous length of this email).

Best,

BB

Kelly, Andrea

From: Signs, Kelly
Sent: Wednesday, May 01, 2013 2:53 PM
To: Frost, James
Subject: 3 questions on Google
Attachments: QFRs for Ramirez.docx; Antitrust Oversight 4.16.13.pdf; Antitrust Hearing Issue Summaries 3.29.13.pdf; Antitrust Hearing Q&As 3.29.13.pdf

Tracking:

Recipient	Delivery	Read
Frost, James	Delivered: 5/1/2013 2:53 PM	Read: 5/1/2013 2:55 PM

Actually, it's only three. They are highlighted in yellow on the QFR document. Also attached is the transcript, and a final version of the briefing materials, which unfortunately don't contain much on Google. That's because her staff said she was fine with answering those on her own.

(b)(5)

Thanks!

Questions and Answers

Antitrust Oversight Hearing
April 16, 2013

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Prepared: March 22, 2013
*** Denotes content added on March 29, 2013**

Kelly, Andrea

From: Gray, Joshua Barton
Sent: Friday, May 03, 2013 11:39 AM
To: Kraus, Elizabeth
Cc: Signs, Kelly
Subject: RE: Couple of points on QFRs

(b)(5)

From: Kraus, Elizabeth
Sent: Friday, May 03, 2013 10:45 AM
To: Gray, Joshua Barton
Cc: Signs, Kelly
Subject: Fw: Couple of points on QFRs

Possible to coordinate with Kelly, with the proviso, short is very sweet.

(b)(5)

From: Signs, Kelly
Sent: Friday, May 03, 2013 10:36 AM
To: Kraus, Elizabeth
Subject: Couple of points on QFRs

Hi Liz,

I'm looking for your input on the front-end of drafting. (b)(5)

(b)(5)

Kelly, Andrea

From: Blank, Barbara
Sent: Friday, May 03, 2013 10:17 AM
To: Signs, Kelly
Subject: RE: Google - 2-sided markets

Looks fine to me. (b)(5)
(b)(5)

From: Signs, Kelly
Sent: Friday, May 03, 2013 10:11 AM
To: Blank, Barbara
Subject: RE: Google - 2-sided markets

See what you think (FWIW, I like it.)

(b)(5)

From: Blank, Barbara
Sent: Friday, May 03, 2013 9:50 AM
To: Signs, Kelly
Subject: Google - 2-sided markets

Hi Kelly,

Here's the excerpt, and I'm also attaching the entire document (I tried to respond to all the major criticisms in this document):

(b)(5)

Kelly, Andrea

From: Signs, Kelly
Sent: Friday, May 03, 2013 3:40 PM
To: Green, Geoffrey
Cc: Ducore, Daniel P.
Subject: RE: voluntarycommitments_draft.docx

Tracking:

Recipient	Delivery	Read
Green, Geoffrey	Delivered: 5/3/2013 3:40 PM	Read: 5/3/2013 3:45 PM
Ducore, Daniel P.	Delivered: 5/3/2013 3:40 PM	Read: 5/3/2013 4:04 PM

Works for me. I'll put that in and then the draft is off to Pete.

Thanks to both of you for your help.

From: Green, Geoffrey
Sent: Friday, May 03, 2013 3:35 PM
To: Signs, Kelly
Cc: Ducore, Daniel P.
Subject: RE: voluntarycommitments_draft.docx

Alternative:

(b)(5)

From: Signs, Kelly
Sent: Friday, May 03, 2013 2:18 PM
To: Green, Geoffrey
Cc: Ducore, Daniel P.
Subject: RE: voluntarycommitments_draft.docx

Good, thanks. And I have a couple of follow ups.

(b)(5)

(b)(5)

From: Green, Geoffrey
Sent: Friday, May 03, 2013 2:08 PM
To: Signs, Kelly
Cc: Ducore, Daniel P.
Subject: voluntarycommitments_draft.docx

Kelly, Andrea

From: Signs, Kelly
Sent: Friday, May 03, 2013 11:09 AM
To: Mongoven, James F.
Subject: Draft answers
Attachments: QFRs for Ramirez_OPCresponses.docx

Tracking:

Recipient	Delivery	Read
Mongoven, James F.	Delivered: 5/3/2013 11:09 AM	Read: 5/3/2013 11:14 AM

Kelly Signs
Office of Policy and Coordination • Bureau of Competition • Federal Trade Commission
601 New Jersey Avenue, N.W., Washington D.C. 20580
☎ (202) 326-3191 .. (202) 326-3394 .. ksigns@ftc.gov . www.ftc.gov

---

Kelly, Andrea

From: Signs, Kelly
Sent: Friday, May 03, 2013 4:16 PM
To: Feinstein, Richard; Levitas, Pete
Cc: Mongoven, James F.; Bumpus, Jeanne
Subject: Draft responses to (some) QFRs
Attachments: QFRs for Ramirez_OPCresponses.docx

Rich and Pete,

So here they are, the answers assigned to BC for drafting. As you can see, I've deleted questions that others will be responding to. Hopefully, you'll get a look at those answers on Monday.

This has been a joint effort by several folks from Health Care, ACP and Compliance as well as OPC. The good news is that we've got pretty good answers for the majority of questions. The bad news is that we have two questions that still need draft answers—and they are really hard. (b)(5)

(b)(5)

(b)(5) With direction, I'm happy to try to draft something, but maybe you prefer to try to write down what you think the Chairwoman should say in response.

Lots to read, and there will be more. When you're done, others would like to review these answers, so you can send edits back to me and I'll keep them moving.

Have a good weekend. ~Kelly

Kelly, Andrea

From: Signs, Kelly
Sent: Monday, May 06, 2013 2:27 PM
To: Levitas, Pete
Cc: Mongoven, James F.
Subject: FW: Emailing: QFRs for Ramirez_OPCresponses.docx
Attachments: antitrust oversight QFRs prelim inj draft answers.docx; QFRs for Ramirez_OPCresponses.docx

Tracking:

Recipient	Delivery	Read
Levitas, Pete	Delivered: 5/6/2013 2:27 PM	Read: 5/6/2013 2:27 PM
Mongoven, James F.	Delivered: 5/6/2013 2:27 PM	Read: 5/6/2013 2:30 PM

Pete, Rachel Dawson took a look at the draft I sent you and has some suggestions (in parens in this draft). I suspect you will address many of these in your edits. Also, OGC took a first crack at the questions on preliminary injunction standards (see attached).

Also, per Mary's email, I think you will be getting draft answers from OPP and OIA, probably sometime today.

Let me know what I can do to help you. ~Kelly

-----Original Message-----
From: Dawson, Rachel Miller
Sent: Monday, May 06, 2013 1:43 PM
To: Signs, Kelly
Subject: Emailing: QFRs for Ramirez_OPCresponses.docx

Did this work?

Kelly, Andrea

From: Signs, Kelly
Sent: Tuesday, May 07, 2013 9:46 AM
To: Levitas, Pete
Subject: FW: QFR's: Use this version when you start again!
Attachments: QFRs for Ramirez may6pm.docx

Tracking:

Recipient	Delivery	Read
Levitas, Pete	Delivered: 5/7/2013 9:46 AM	Read: 5/7/2013 9:47 AM

Sorry—the caption of Jeanne's email was the same so I didn't want you to be confused. Jeanne made a few (good) edits so start with this.

From: Bumpus, Jeanne
Sent: Monday, May 06, 2013 5:54 PM
To: Signs, Kelly; Levitas, Pete
Cc: Mongoven, James F.
Subject: RE: QFR's: Use this version when you start again!

I have suggested some changes to the answers Pete's already edited, as well as to Rachel's responses. Not Responsive

Not Responsive

From: Signs, Kelly
Sent: Monday, May 06, 2013 4:29 PM
To: Levitas, Pete
Cc: Mongoven, James F.; Bumpus, Jeanne
Subject: QFR's: Use this version when you start again!

Not Responsive

From: Levitas, Pete
Sent: Monday, May 06, 2013 2:46 PM
To: Bumpus, Jeanne; Signs, Kelly
Cc: Vandecar, Kim; Runco, Philip
Subject: RE: Jon and Mary don't need QFRs until Thursday morning

My suggestions – I'll pick up where I left off tomorrow and send around a revised document starting w the qs I haven't gotten to yet. thanks

---

From: Bumpus, Jeanne
Sent: Monday, May 06, 2013 2:27 PM
To: Levitas, Pete; Signs, Kelly

Cc: Vandecar, Kim; Runco, Philip
Subject: Jon and Mary don't need QFRs until Thursday morning

Edith has said she doesn't need them until Friday morning, and Mary just told me she and Jon only need them Thursday morning. A little more time for all.

Kelly, Andrea

From: Feinstein, Richard
Sent: Wednesday, May 01, 2013 3:50 PM
To: Signs, Kelly; Levitas, Pete
Cc: Mongoven, James F.
Subject: RE: 4-16-13 Antitrust Hearing - Questions for the Record (Ramirez)

Yes (as to OPP contributions), if time permits.

I will be traveling to New York on Monday morning, but will be able to review at NERO in the afternoon and/or on train coming back Tuesday.

From: Signs, Kelly
Sent: Wednesday, May 01, 2013 3:47 PM
To: Feinstein, Richard; Levitas, Pete
Cc: Mongoven, James F.
Subject: RE: 4-16-13 Antitrust Hearing - Questions for the Record (Ramirez)

Okay, we're going to try this piecemeal. What I want to avoid is collecting a batch on Friday afternoon and dumping it on you over the weekend. We'll no doubt have some for you to review on Friday, and the rest will come Monday.

BTW, OPP is drafting on a number of questions about FRAND, SEPs, PAEs and GPOs. (I know, it's just alphabet soup.) Would you like a chance to review their responses if there's time?

From: Feinstein, Richard
Sent: Wednesday, May 01, 2013 3:38 PM
To: Levitas, Pete; Signs, Kelly
Cc: Mongoven, James F.
Subject: RE: 4-16-13 Antitrust Hearing - Questions for the Record (Ramirez)

That works for me. Thanks.

From: Levitas, Pete
Sent: Wednesday, May 01, 2013 3:37 PM
To: Signs, Kelly
Cc: Mongoven, James F.; Feinstein, Richard
Subject: RE: 4-16-13 Antitrust Hearing - Questions for the Record (Ramirez)

I'd like to review them and I'm guessing Rich will too, but given the timing it may be difficult –I'm in and out of the office a bit next week. Maybe the best way to do this is for you guys to send over drafts on a rolling basis so we can turn them around a few at a time? adding Rich for his thoughts

---

From: Signs, Kelly
Sent: Wednesday, May 01, 2013 2:23 PM
To: Levitas, Pete
Cc: Mongoven, James F.
Subject: FW: 4-16-13 Antitrust Hearing - Questions for the Record (Ramirez)

Pete,

Just FYI for now, but we've received the QFRs from last month's antitrust oversight hearing. OPC is coordinating the drafting, and shipping questions out to different offices. There are many questions, but we have briefing materials for most topics.

The bigger problem is timing. The Chairwoman would like to see draft responses by next Wednesday, May 8. We are hoping to have drafts to you by Monday sometime, but I wanted to check with you about your preference on reviewing the BC-generated responses.

Give me a call to discuss.

~Kelly (x3191)

From: Bumpus, Jeanne
Sent: Tuesday, April 30, 2013 6:00 PM
To: Clark, Donald S.
Cc: Signs, Kelly; Vandecar, Kim; Runco, Philip; Nathan, Jon J.; Kimmel, Lisa; Hippsley, Heather; Dawson, Rachel Miller; Shonka, David C.; Kraus, Elizabeth; Koslov, Tara Isa
Subject: FW: 4-16-13 Antitrust Hearing - Questions for the Record (Ramirez)

Attached please find the post hearing questions. Replies are due May 14. The questions are quite extensive, particularly from Senator Lee. I have copied all of the Bureaus/Offices I anticipate will need to be involved in preparing draft responses for the Chairwoman. The questions cover the following topics:

Sen. Grassley
PFD

Sen. Leahy
GPOs
PAEs
Various aspects of Google and agency technical expertise

Sen. Lee
Section 2 guidance
Section 5
Differences in standards/procedures between FTC and DoJ
Voluntary commitments
Standard used in Google
Coordination with states on Google
Clearance
SEPs and Bosch
PFD
PAEs and 6(b) study
Mandatory IP licensing by foreign authorities
Eyeglass prescriptions
International transparency
Use of advocacy resources

Sen. Klobuchar
Role of antirust
Clearance
SEPs

Kelly, Andrea

From: Harrison, Lisa M.
Sent: Wednesday, October 17, 2012 4:28 PM
To: Vandecar, Kim; Vaytsman, Olga; Renner, Christopher
Subject: RE: Google Letter

I think just the more recent one, since I believe it is intended as a substitute.

From: Vandecar, Kim
Sent: Wednesday, October 17, 2012 4:28 PM
To: Vaytsman, Olga; Harrison, Lisa M.; Renner, Christopher
Subject: RE: Google Letter

Good catch. Probably just the more recent one?

From: Vaytsman, Olga
Sent: Wednesday, October 17, 2012 4:27 PM
To: Harrison, Lisa M.; Renner, Christopher
Cc: Vandecar, Kim
Subject: RE: Google Letter

Will do. But it occurs to me that we should change to date, too. Should we reference the old and new letters, or just the more recent one?

From: Harrison, Lisa M.
Sent: Wednesday, October 17, 2012 4:26 PM
To: Vaytsman, Olga; Renner, Christopher
Cc: Vandecar, Kim
Subject: RE: Google Letter

(b)(5)

Olga, can you send a new version to Chris?

From: Vaytsman, Olga
Sent: Wednesday, October 17, 2012 4:09 PM
To: Renner, Christopher
Cc: Harrison, Lisa M.
Subject: RE: Google Letter

Of course. I've revised it in the first paragraph and later in the letter.
Thanks,
Olga

From: Renner, Christopher
Sent: Wednesday, October 17, 2012 4:04 PM
To: Vaytsman, Olga
Cc: Harrison, Lisa M.
Subject: RE: Google Letter

Thanks, Olga – sorry to be a pain, but can "investigations" be in the plural? Thanks.

From: Vaytsman, Olga
Sent: Wednesday, October 17, 2012 4:00 PM
To: Renner, Christopher
Cc: Harrison, Lisa M.
Subject: Google Letter

Chris,

Please find attached the revised letter to Sen. Kohl (redlined and clean versions).

Olga Vaytsman
Attorney, Office of the General Counsel
Federal Trade Commission
600 Pennsylvania Avenue N.W.
Washington D.C. 20580
Tel: 202-326-3626
Email: ovaytsman@ftc.gov

Kelly, Andrea

From: Sabo, Melanie
Sent: Tuesday, October 23, 2012 1:04 PM
To: Renner, Christopher; Harrison, Lisa M.; Vandecar, Kim; Vaytsman, Olga
Subject: RE: Google Hill briefing on Thursday

Good, thanks. We'll finalize the letters to the parties and get those out.

From: Renner, Christopher
Sent: Tuesday, October 23, 2012 12:45 PM
To: Harrison, Lisa M.; Vandecar, Kim; Sabo, Melanie; Vaytsman, Olga
Subject: Re: Google Hill briefing on Thursday

Lisa is correct on all counts.

From: Harrison, Lisa M.
Sent: Tuesday, October 23, 2012 12:31 PM
To: Vandecar, Kim; Sabo, Melanie; Vaytsman, Olga
Cc: Renner, Christopher
Subject: RE: Google Hill briefing on Thursday

It has been circulated to the Commission for a vote, and I believe Commission has already approved it. The email train below relates to the separate notices staff send to Google informing them of the briefing.

From: Vandecar, Kim
Sent: Tuesday, October 23, 2012 12:30 PM
To: Harrison, Lisa M.; Sabo, Melanie; Vaytsman, Olga
Cc: Renner, Christopher
Subject: Re: Google Hill briefing on Thursday

Has this not been circulated to the Commission for a vote? Briefing is Thurs at 11.

From: Harrison, Lisa M.
Sent: Tuesday, October 23, 2012 12:20 PM
To: Blank, Barbara; Sabo, Melanie; Vaytsman, Olga
Cc: Green, Geoffrey; Vandecar, Kim
Subject: RE: Google Hill briefing on Thursday

No problem. Can you coordinate with ACP to either send two notices to google, or just one combined one? Olga sent Barbara what could be used for a combined letter.

From: Blank, Barbara
Sent: Tuesday, October 23, 2012 12:19 PM
To: Harrison, Lisa M.; Sabo, Melanie; Vaytsman, Olga
Cc: Green, Geoffrey; Vandecar, Kim
Subject: RE: Google Hill briefing on Thursday

My apologies for the confusion, I wasn't aware. We will straighten this out on our end and send the correct notice to (b)(7)(D) and Google.

From: Harrison, Lisa M.
Sent: Tuesday, October 23, 2012 12:18 PM
To: Sabo, Melanie; Blank, Barbara; Vaytsman, Olga
Cc: Green, Geoffrey; Vandecar, Kim
Subject: RE: Google Hill briefing on Thursday

OGC worked with Chairman's office to revise the Commission letter and advise the Commission via motion that briefing would also cover SEPs.

From: Sabo, Melanie
Sent: Tuesday, October 23, 2012 12:17 PM
To: Blank, Barbara; Harrison, Lisa M.; Vaytsman, Olga
Cc: Green, Geoffrey; Vandecar, Kim
Subject: RE: Google Hill briefing on Thursday

We have letters for both matters, and Peggy and/or Nick plan to attend. I think Pete is consider attending too.

From: Blank, Barbara
Sent: Tuesday, October 23, 2012 12:14 PM
To: Harrison, Lisa M.; Vaytsman, Olga
Cc: Green, Geoffrey; Sabo, Melanie; Vandecar, Kim
Subject: RE: Google Hill briefing on Thursday

It was our understanding that this briefing is only addressing the Google Search investigation. I don't think anyone on the SEP side has been informed, unless I'm mistaken. (b)(5)

(b)(5)

From: Harrison, Lisa M.
Sent: Tuesday, October 23, 2012 12:08 PM
To: Blank, Barbara; Vaytsman, Olga
Subject: RE: Google Hill briefing on Thursday

Thanks. I assume we are sending one letter covering both search engine and SEP investigations? Perhaps the letter needs to be addressed to both lead counsel for Google on search and lead counsel for Google on the SEP investigation.

The sentence referencing search engine practices needs to be changed because we got the revised incoming letter with an expanded request. Olga, can you send language based on what we said in the Commission letter authorizing the briefing?

From: Blank, Barbara
Sent: Tuesday, October 23, 2012 11:57 AM
To: Vaytsman, Olga; Harrison, Lisa M.
Subject: Google Hill briefing on Thursday

Olga and Lisa,

Should I go ahead and send the standard notices today to Google and (b)(7)(D) about the upcoming briefing Thursday? Sample attached here.

Best Regards,

Barbara

Kelly, Andrea

From: Tucker, Darren
Sent: Friday, October 19, 2012 1:20 PM
To: Renner, Christopher
Subject: RE: Google briefing for Senate Judiciary

Yes. Thanks.

From: Renner, Christopher
Sent: Friday, October 19, 2012 1:20 PM
To: Tucker, Darren
Subject: FW: Google briefing for Senate Judiciary

Hi Darren – please let me know if this works. Thanks.

From: Levitas, Pete
Sent: Friday, October 19, 2012 1:15 PM
To: Renner, Christopher
Subject: RE: Google briefing for Senate Judiciary

Yes, that will certainly be the case. thanks

From: Renner, Christopher
Sent: Friday, October 19, 2012 1:14 PM
To: Levitas, Pete
Subject: FW: Google briefing for Senate Judiciary

(b)(5)

From: Tucker, Darren
Sent: Friday, October 19, 2012 11:13 AM
To: Renner, Christopher
Subject: RE: Google briefing for Senate Judiciary

Chris,

(b)(5)

Darren

From: Renner, Christopher
Sent: Wednesday, October 17, 2012 3:47 PM
To: Tucker, Darren; Slater, Abigail A.; Kimmel, Lisa; Luib, Gregory; Okuliar, Alexander
Cc: Clark, Donald S.; Harrison, Lisa M.; Levitas, Pete; Sabo, Melanie
Subject: Google briefing for Senate Judiciary

Hi –

On October 10 BC circulated a recommendation to authorize a non-public briefing for the Senate Judiciary Subcommittee on Antitrust of the Commission's Google search investigation. Now, the Subcommittee has requested a broader briefing, including Google SEP. If there are no objections, we will circulate a motion to authorize the broader (Google search and Google SEP) non-public briefing by COB on Friday, October 19. Please let me know if that timing does not work.

Thanks,

Chris

From: Clark, Donald S.
Sent: Wednesday, October 17, 2012 2:23 PM
To: Taylor, Susan; Cornish, Alexis CTR
Cc: Clark, Donald S.; Vaytsman, Olga; Sabo, Melanie; Levitas, Pete; Renner, Christopher; Patton, Andrew; Runco, Philip; Vandecar, Kim
Subject: Request To Replace DocSmart File For CMS # 14007131

Sue and Alexis, please replace the version of this letter currently in the DocSmart file with the attached version from Kim. Thanks!

Don

Kelly, Andrea

From: Vandecar, Kim
Sent: Thursday, October 25, 2012 2:26 PM
To: Levitas, Pete; Feinstein, Richard; Renner, Christopher
Cc: Sabo, Melanie
Subject: non public briefing

The non public briefing on Google, with Senate Judiciary Committee this morning went very well. Our staff did an excellent job (and I probably can't say enough how impressive Barbara Banks is, although everyone was great), and the hill staff was very engaged. Staff for Kohl, Lee, Franken and Schumer attended. They were interested in the SEP case, but seemed slightly disappointed (particularly Seth) that the Google search case did not appear to be likely to happen.

Happy to chat further if you like.

Kelly, Andrea

From: Vandecar, Kim
Sent: Wednesday, October 17, 2012 2:19 PM
To: Clark, Donald S.; Vaytsman, Olga; Sabo, Melanie; Levitas, Pete; Renner, Christopher
Cc: Patton, Andrew; Runco, Philip
Subject: FW: Request for Google briefing
Attachments: Request for FTC briefing on Google 10.17.12.pdf

Please replace the September 21 letter from Chairman Kohl with the attached.

HERB KOHL
WISCONSIN

WASHINGTON OFFICE:
330 HART SENATE OFFICE BUILDING
WASHINGTON, DC 20510
(202) 224-5653
http://kohl.senate.gov/

United States Senate

WASHINGTON, DC 20510-4903

COMMITTEES:

APPROPRIATIONS

JUDICIARY

SPECIAL COMMITTEE
ON AGING

October 17, 2012

The Honorable Jon Leibowitz
Chairman, Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Suite 444
Washington, DC 20580

Dear Chairman Leibowitz:

I am writing to request that knowledgeable members of the FTC staff provide our Subcommittee staff with a confidential briefing about the FTC's antitrust investigations into allegations that Google has been engaged in anticompetitive conduct.

I understand the sensitivity of discussing pending investigations. Therefore, my staff and I will ensure that any non-public information that your staff provides during the briefing will not be shared with anyone outside the Subcommittee. If you require further confidentiality assurances, we will do our best to accommodate you.

Thank you very much for your assistance in this matter.

Respectfully yours,

Herb Kohl

HERB KOHL
Chairman
Subcommittee on Antitrust, Competition Policy and Consumer Rights

MILWAUKEE OFFICE:
310 WEST WISCONSIN AVENUE
SUITE 950
MILWAUKEE, WI 53203
(414) 297-4451
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MADISON OFFICE:
14 WEST MIFFLIN STREET
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MADISON, WI 53703
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APPLETON, WI 54914
(920) 738-1640

LA CROSSE OFFICE:
205 5TH AVENUE SOUTH
SUITE 216
LA CROSSE, WI 54601
(608) 796-0045

Kelly, Andrea

From: Vaytsman, Olga
Sent: Wednesday, October 17, 2012 4:32 PM
To: Harrison, Lisa M.; Renner, Christopher
Subject: RE: Google Letter
Attachments: 2012-10-17 Response Letter for Briefing Request - CLEAN.wpd; 2012-10-17 Response Letter for Briefing Request -REDLINE.wpd

Further revised drafts attached.

From: Harrison, Lisa M.
Sent: Wednesday, October 17, 2012 4:26 PM
To: Vaytsman, Olga; Renner, Christopher
Cc: Vandecar, Kim
Subject: RE: Google Letter

(b)(5)

Olga, can you send a new version to Chris?

From: Vaytsman, Olga
Sent: Wednesday, October 17, 2012 4:09 PM
To: Renner, Christopher
Cc: Harrison, Lisa M.
Subject: RE: Google Letter

Of course. I've revised it in the first paragraph and later in the letter.
Thanks,
Olga

From: Renner, Christopher
Sent: Wednesday, October 17, 2012 4:04 PM
To: Vaytsman, Olga
Cc: Harrison, Lisa M.
Subject: RE: Google Letter

Thanks, Olga – sorry to be a pain, but can "investigations" be in the plural? Thanks.

From: Vaytsman, Olga
Sent: Wednesday, October 17, 2012 4:00 PM
To: Renner, Christopher
Cc: Harrison, Lisa M.
Subject: Google Letter

Chris,

Please find attached the revised letter to Sen. Kohl (redlined and clean versions).

Olga Vaytsman
Attorney, Office of the General Counsel
Federal Trade Commission
600 Pennsylvania Avenue N.W.
Washington D.C. 20580
Tel: 202-326-3626
Email: ovaytsman@ftc.gov

Kelly, Andrea

From: JDL
Sent: Monday, December 17, 2012 10:32 PM
To: Renner, Christopher; Feinstein, Richard; Shelanski, Howard; Lupovitz, Joni; Levitas, Pete; DeLorme, Christine Lee
Cc: Prewett, Cecelia; Bumpus, Jeanne
Subject: RE: Google and COppa

Also: Senator Kohl said he would put out a supportive statement (no matter where we ended up with our Google investigation!), which was very nice.
Best,
Jon

Not Responsive

Kelly, Andrea

From: Vaytsman, Olga
Sent: Wednesday, October 17, 2012 4:12 PM
To: Renner, Christopher
Subject: RE: Google Letter
Attachments: 2012-10-17 Response Letter for Briefing Request -REDLINE.wpd

Here you go.

From: Renner, Christopher
Sent: Wednesday, October 17, 2012 4:09 PM
To: Vaytsman, Olga
Subject: RE: Google Letter

Thanks – could you send a redline?

From: Vaytsman, Olga
Sent: Wednesday, October 17, 2012 4:09 PM
To: Renner, Christopher
Cc: Harrison, Lisa M.
Subject: RE: Google Letter

Of course. I've revised it in the first paragraph and later in the letter.
Thanks,
Olga

From: Renner, Christopher
Sent: Wednesday, October 17, 2012 4:04 PM
To: Vaytsman, Olga
Cc: Harrison, Lisa M.
Subject: RE: Google Letter

Thanks, Olga – sorry to be a pain, but can "investigations" be in the plural? Thanks.

From: Vaytsman, Olga
Sent: Wednesday, October 17, 2012 4:00 PM
To: Renner, Christopher
Cc: Harrison, Lisa M.
Subject: Google Letter

Chris,

Please find attached the revised letter to Sen. Kohl (redlined and clean versions).

Olga Vaytsman
Attorney, Office of the General Counsel
Federal Trade Commission
600 Pennsylvania Avenue N.W.
Washington D.C. 20580
Tel: 202-326-3626

Email: ovaytsman@ftc.gov

Kelly, Andrea

From: Kaplan, Peter P.
Sent: Thursday, December 20, 2012 10:05 PM
To: Levitas, Pete; Shelanski, Howard; JDL; Renner, Christopher; Feinstein, Richard; Gavil, Andrew I.
Cc: Katz, Mitchell J.; Prewett, Cecelia
Subject: RE: Google validators

OK, glad to hear about Kovacic. There is no way of telling what reporters will ask them once they get on the phone. Ideally, they would be prepared to talk about either one. But of course they're free to take a pass on questions they don't feel like they can answer. What we really want them to say in general terms is that the Commission is acting reasonably and impartially in a way that is good for competition and consumers, although of course we can't prescribe what they say.

From: Levitas, Pete
Sent: Thursday, December 20, 2012 6:05 PM
To: Kaplan, Peter P.; Shelanski, Howard; JDL; Renner, Christopher; Feinstein, Richard; Gavil, Andrew I.
Cc: Katz, Mitchell J.; Prewett, Cecelia
Subject: RE: Google validators

Peter – Jon wanted us to add Bill Kovacik as a validator – they spoke and he is willing to be part of this. (b)(5)

(b)(5)

From: Kaplan, Peter P.
Sent: Thursday, December 20, 2012 3:01 PM
To: Levitas, Pete; Shelanski, Howard; JDL; Renner, Christopher; Feinstein, Richard; Gavil, Andrew I.
Cc: Katz, Mitchell J.; Prewett, Cecelia
Subject: Google validators

Hi all. Here's the list I've got reflecting our previous discussions on validators. (b)(5)

(b)(5)

Kelly, Andrea

From: Renner, Christopher
Sent: Monday, November 26, 2012 5:50 PM
To: Levitas, Pete; Feinstein, Richard
Subject: Re: As you think about Google . . .

This is great; makes me feel prescient. Ten bucks says the dude in the last paragraph is Balto.

From: Levitas, Pete
Sent: Monday, November 26, 2012 05:40 PM
To: Renner, Christopher; Feinstein, Richard
Subject: Fw: As you think about Google . . .

From: Bloom, Seth (Judiciary-Dem) [mailto:Seth_Bloom@Judiciary-dem.senate.gov]
Sent: Monday, November 26, 2012 05:35 PM
To: JDL; Levitas, Pete
Subject: As you think about Google . . .

Consider that they can't even let poor little DuckDuckGo alone. Google bought the company that owns the domain duck.com, and now when someone enters duck.com they get directed to Google!

Sometimes the little things say a lot.

See the Reuters story -

19:17 21Nov12 -Google competitor DuckDuckGo says it's getting shut out

By Diane Bartz

WASHINGTON, Nov 21 (Reuters) - Upstart Internet search engine DuckDuckGo, which promotes itself as a Google Inc <GOOG.O> rival which does not track users' personal information, says it is being hurt by the search giant which is being investigated by U.S. regulators.

The Federal Trade Commission has been examining allegations by Google critics that the company breaks antitrust laws by using its power in the market to smother competitors.

Many of the complaints are similar to assertions made by Gabriel Weinberg, a Massachusetts Institute of Technology graduate who started DuckDuckGo.com five years ago.

In an interview on Wednesday, Weinberg said it is difficult to make his DuckDuckGo the default search site in Google's Chrome web browser, and that Google disadvantages his company in the Android mobile operating system as well.

Google denies any wrongdoing and says it allows its users to choose alternative search engines across platforms.

Companies, including travel site operators and consumer reviews website Yelp <YELP.N>, have accused Google of manipulating search results to steer traffic to Google products.

There have also been complaints about Google blocking access by rivals to its Android wireless phone operating system and about inappropriately asking for injunctions for infringing on standard essential patents, which ensure interoperability.

FTC commissioners are wrestling with whether they have enough evidence to file a complaint against Google on manipulating search results. But the agency is more confident that it could litigate the other issues, according to two people familiar with the FTC's deliberations.

Weinberg, who met with the FTC recently but declined to describe the talks, said that the Android wireless phone comes with Google as the phone's standard search mechanism.

DuckDuckGo can be added as an app to a mobile device, which is less convenient than being the default search engine, said Weinberg.

He also said his company had tried to buy the duck.com domain from its previous owner, On2 Technologies, but was rejected. Google eventually acquired the domain when it bought the entire company, and redirects duck.com traffic to Google.com.

"It only started redirecting after we inquired about (buying the domain name)," said Weinberg. "It causes confusion."

A Google spokeswoman said the company acquired On2 in 2010 and then pointed duck.com to Google's homepage, "just as we have for many domains we've gotten through acquisitions."

Weinberg told Reuters that Google's Chrome browser also made it difficult to change the instant search feature at the top of the browser to DuckDuckGo.

"It's one-click to get onto Firefox and it's five steps on Chrome and people generally fail," he said.

The Google spokeswoman said popular search alternatives were offered on its Chrome browser in a dropdown menu, such as Yahoo <YHOO.O> and Microsoft's <MSFT.O> Bing, but any search engine could be easily added.

A former antitrust enforcer, who asked not to be named, said the actions that Weinberg complained about were unexciting taken individually but, as a cluster, could be worrisome.

"It's relevant. It's what antitrust enforcers call monopoly soup," said the enforcer.

Kelly, Andrea

From: Renner, Christopher
Sent: Friday, October 19, 2012 8:48 AM
To: Wagman, Jillian
Subject: Fw: Request To Replace DocSmart File For CMS # 14007131
Attachments: Request for FTC briefing on Google 10.17.12.pdf

The new Kohl letter for the Google package.

From: Clark, Donald S.
Sent: Wednesday, October 17, 2012 02:22 PM
To: Taylor, Susan; Cornish, Alexis CTR
Cc: Clark, Donald S.; Vaytsman, Olga; Sabo, Melanie; Levitas, Pete; Renner, Christopher; Patton, Andrew; Runco, Philip; Vandecar, Kim
Subject: Request To Replace DocSmart File For CMS # 14007131

Sue and Alexis, please replace the version of this letter currently in the DocSmart file with the attached version from Kim. Thanks!

Don

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WISCONSIN

WASHINGTON OFFICE:
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ON AGING

October 17, 2012

The Honorable Jon Leibowitz
Chairman, Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Suite 444
Washington, DC 20580

Dear Chairman Leibowitz:

I am writing to request that knowledgeable members of the FTC staff provide our Subcommittee staff with a confidential briefing about the FTC's antitrust investigations into allegations that Google has been engaged in anticompetitive conduct.

I understand the sensitivity of discussing pending investigations. Therefore, my staff and I will ensure that any non-public information that your staff provides during the briefing will not be shared with anyone outside the Subcommittee. If you require further confidentiality assurances, we will do our best to accommodate you.

Thank you very much for your assistance in this matter.

Respectfully yours,

Herb Kohl

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Chairman
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MILWAUKEE OFFICE:
310 WEST WISCONSIN AVENUE
SUITE 950
MILWAUKEE, WI 53203
(414) 297-4451
T.T.Y. (414) 297-4485

MADISON OFFICE:
14 WEST MIFFLIN STREET
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(920) 738-1640

LA CROSSE OFFICE:
205 5TH AVENUE SOUTH
SUITE 216
LA CROSSE, WI 54601
(608) 796-0045

Kelly, Andrea

From: Renner, Christopher
Sent: Wednesday, October 17, 2012 3:51 PM
To: Wagman, Jillian
Subject: FW: Request To Replace DocSmart File For CMS # 14007131
Attachments: Request for FTC briefing on Google 10.17.12.pdf

Let's talk

From: Clark, Donald S.
Sent: Wednesday, October 17, 2012 2:23 PM
To: Taylor, Susan; Cornish, Alexis CTR
Cc: Clark, Donald S.; Vaytsman, Olga; Sabo, Melanie; Levitas, Pete; Renner, Christopher; Patton, Andrew; Runco, Philip; Vandecar, Kim
Subject: Request To Replace DocSmart File For CMS # 14007131

Sue and Alexis, please replace the version of this letter currently in the DocSmart file with the attached version from Kim. Thanks!

Don

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ON AGING

October 17, 2012

The Honorable Jon Leibowitz
Chairman, Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Suite 444
Washington, DC 20580

Dear Chairman Leibowitz:

I am writing to request that knowledgeable members of the FTC staff provide our Subcommittee staff with a confidential briefing about the FTC's antitrust investigations into allegations that Google has been engaged in anticompetitive conduct.

I understand the sensitivity of discussing pending investigations. Therefore, my staff and I will ensure that any non-public information that your staff provides during the briefing will not be shared with anyone outside the Subcommittee. If you require further confidentiality assurances, we will do our best to accommodate you.

Thank you very much for your assistance in this matter.

Respectfully yours,

Herb Kohl

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Chairman
Subcommittee on Antitrust, Competition Policy and Consumer Rights

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310 WEST WISCONSIN AVENUE
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(920) 738-1640

LA CROSSE OFFICE:
205 5TH AVENUE SOUTH
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LA CROSSE, WI 54601
(608) 796-0045

Kelly, Andrea

From: Freedman, Bruce
Sent: Monday, May 06, 2013 4:55 PM
To: Dawson, Rachel Miller; Shonka, David C.; White, Christian S.
Cc: Harrison, Lisa M.
Subject: RE: Draft responses to (some) QFRs

(b)(5)

-----Original Message-----
From: Dawson, Rachel Miller
Sent: Monday, May 06, 2013 4:26 PM
To: Freedman, Bruce; Shonka, David C.; White, Christian S.
Cc: Harrison, Lisa M.
Subject: RE: Draft responses to (some) QFRs

(b)(5)

-----Original Message-----
From: Freedman, Bruce
Sent: Monday, May 06, 2013 4:21 PM
To: Dawson, Rachel Miller; Shonka, David C.; White, Christian S.
Cc: Harrison, Lisa M.
Subject: RE: Draft responses to (some) QFRs

(b)(5)

(b)(5)

-----Original Message-----
From: Freedman, Bruce
Sent: Monday, May 06, 2013 2:34 PM
To: Dawson, Rachel Miller; Shonka, David C.; White, Christian S.
Cc: Harrison, Lisa M.
Subject: RE: Draft responses to (some) QFRs

I looping in Lisa, who was also involved in these issues. Here are some ideas:

(b)(5)

-----Original Message-----
From: Dawson, Rachel Miller
Sent: Monday, May 06, 2013 1:20 PM
To: Shonka, David C.; White, Christian S.; Freedman, Bruce
Subject: Fw: Draft responses to (some) QFRs

(b)(5)

(b)(5)

Timing : Bc is trying to get all the responses to the ch's office by cob tomorrow, and would appreciate comments today if possible to allow this.

Many thanks.

From: Signs, Kelly
Sent: Friday, May 03, 2013 04:17 PM
To: Dawson, Rachel Miller
Subject: FW: Draft responses to (some) QFRs

Rachel,

Here is a batch from BC. You can send edits back to me. I think I'm holding the pen for now.

Have a great weekend. Kelly

From: Signs, Kelly
Sent: Friday, May 03, 2013 4:16 PM
To: Feinstein, Richard; Levitas, Pete
Cc: Mongoven, James F.; Bumpus, Jeanne
Subject: Draft responses to (some) QFRs

Rich and Pete,

So here they are, the answers assigned to BC for drafting. As you can see, I've deleted questions that others will be responding to. Hopefully, you'll get a look at those answers on Monday.

This has been a joint effort by several folks from Health Care, ACP and Compliance as well as OPC. The good news is that we've got pretty good answers for the majority of questions. The bad news is that we have two questions that still need draft answers (b)(5)

(b)(5)

(b)(5)

Lots to read, and there will be more. When you're done, others would like to review these answers, so you can send edits back to me and I'll keep them moving.

Have a good weekend. ~Kelly

Kelly, Andrea

From: Dawson, Rachel Miller
Sent: Monday, May 06, 2013 2:41 PM
To: Shonka, David C.; Freedman, Bruce; White, Christian S.
Cc: Harrison, Lisa M.
Subject: RE: Draft responses to (some) QFRs

Fyi I have just heard that the final draft answers don't have to go to the ch's office till Thursday am, which gives bc (and us) some more time to figure out answers.

-----Original Message-----
From: Shonka, David C.
Sent: Monday, May 06, 2013 2:36 PM
To: Freedman, Bruce; Dawson, Rachel Miller; White, Christian S.
Cc: Harrison, Lisa M.
Subject: RE: Draft responses to (some) QFRs

Lisa and Bruce, we are going to get together to discuss this at 5:00. Want to join chris, Rachel and me?

-----Original Message-----
From: Freedman, Bruce
Sent: Monday, May 06, 2013 2:34 PM
To: Dawson, Rachel Miller; Shonka, David C.; White, Christian S.
Cc: Harrison, Lisa M.
Subject: RE: Draft responses to (some) QFRs

I looping in Lisa, who was also involved in these issues. Here are some ideas:

(b)(5)

-----Original Message-----
From: Dawson, Rachel Miller
Sent: Monday, May 06, 2013 1:20 PM

To: Shonka, David C.; White, Christian S.; Freedman, Bruce
Subject: Fw: Draft responses to (some) QFRs

(b)(5)

Timing : Bc is trying to get all the responses to the ch's office by cob tomorrow, and would appreciate comments today if possible to allow this.

Many thanks.

From: Signs, Kelly
Sent: Friday, May 03, 2013 04:17 PM
To: Dawson, Rachel Miller
Subject: FW: Draft responses to (some) QFRs

Rachel,

Here is a batch from BC. You can send edits back to me. I think I'm holding the pen for now.

Have a great weekend. Kelly

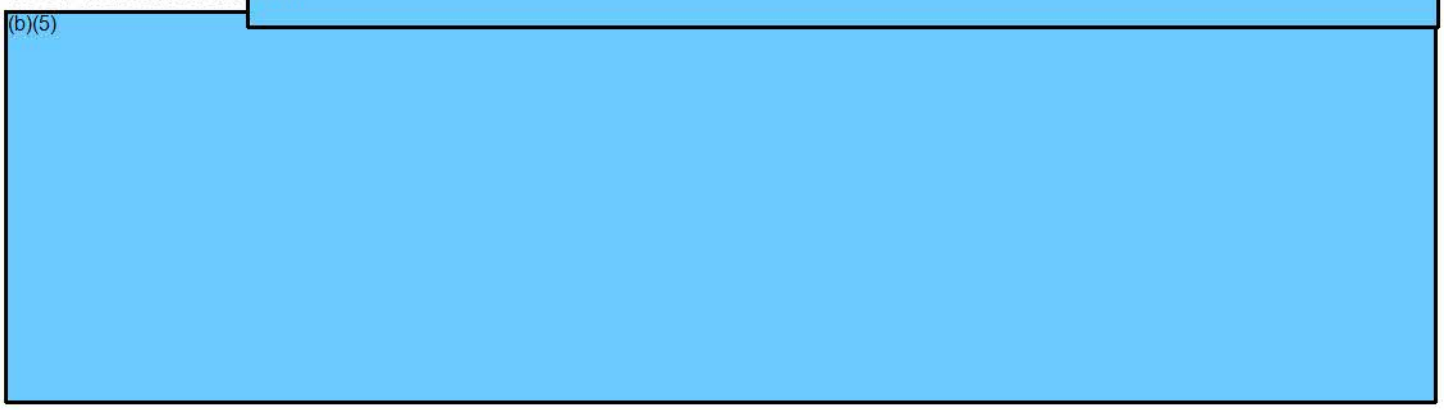
From: Signs, Kelly
Sent: Friday, May 03, 2013 4:16 PM
To: Feinstein, Richard; Levitas, Pete
Cc: Mongoven, James F.; Bumpus, Jeanne
Subject: Draft responses to (some) QFRs

Rich and Pete,

So here they are, the answers assigned to BC for drafting. As you can see, I've deleted questions that others will be responding to. Hopefully, you'll get a look at those answers on Monday.

This has been a joint effort by several folks from Health Care, ACP and Compliance as well as OPC. The good news is that we've got pretty good answers for the majority of questions. The bad news is that we have two questions that still need draft answers (b)(5)

(b)(5)



Lots to read, and there will be more. When you're done, others would like to review these answers, so you can send edits back to me and I'll keep them moving.

Have a good weekend. ~Kelly

Kelly, Andrea

From: Dawson, Rachel Miller
Sent: Monday, May 06, 2013 2:03 PM
To: White, Christian S.; Shonka, David C.; Freedman, Bruce
Subject: RE: Draft responses to (some) QFRs

Ok here

From: White, Christian S.
Sent: Monday, May 06, 2013 1:57 PM
To: Shonka, David C.; Dawson, Rachel Miller; Freedman, Bruce
Subject: RE: Draft responses to (some) QFRs

OK.

From: Shonka, David C.
Sent: Monday, May 06, 2013 1:56 PM
To: Dawson, Rachel Miller; White, Christian S.; Freedman, Bruce
Subject: RE: Draft responses to (some) QFRs

Can we meet at 5:00 to discuss? Thanks

From: Dawson, Rachel Miller
Sent: Monday, May 06, 2013 1:20 PM
To: Shonka, David C.; White, Christian S.; Freedman, Bruce
Subject: Fw: Draft responses to (some) QFRs

(b)(5)

Timing : Bc is trying to get all the responses to the ch's office by cob tomorrow, and would appreciate comments today if possible to allow this.

Many thanks.

From: Signs, Kelly
Sent: Friday, May 03, 2013 04:17 PM
To: Dawson, Rachel Miller
Subject: FW: Draft responses to (some) QFRs

Rachel,

Here is a batch from BC. You can send edits back to me. I think I'm holding the pen for now.

Have a great weekend. Kelly

From: Signs, Kelly
Sent: Friday, May 03, 2013 4:16 PM
To: Feinstein, Richard; Levitas, Pete
Cc: Mongoven, James F.; Bumpus, Jeanne
Subject: Draft responses to (some) QFRs

Rich and Pete,

So here they are, the answers assigned to BC for drafting. As you can see, I've deleted questions that others will be responding to. Hopefully, you'll get a look at those answers on Monday.

This has been a joint effort by several folks from Health Care, ACP and Compliance as well as OPC. The good news is that we've got pretty good answers for the majority of questions. The bad news is that we have two questions that still need draft answers (b)(5)

(b)(5)

Lots to read, and there will be more. When you're done, others would like to review these answers, so you can send edits back to me and I'll keep them moving.

Have a good weekend. ~Kelly

Kelly, Andrea

From: Harrison, Lisa M.
Sent: Tuesday, May 07, 2013 6:31 PM
To: Signs, Kelly
Cc: Shonka, David C.; Dawson, Rachel Miller
Subject: QFRs

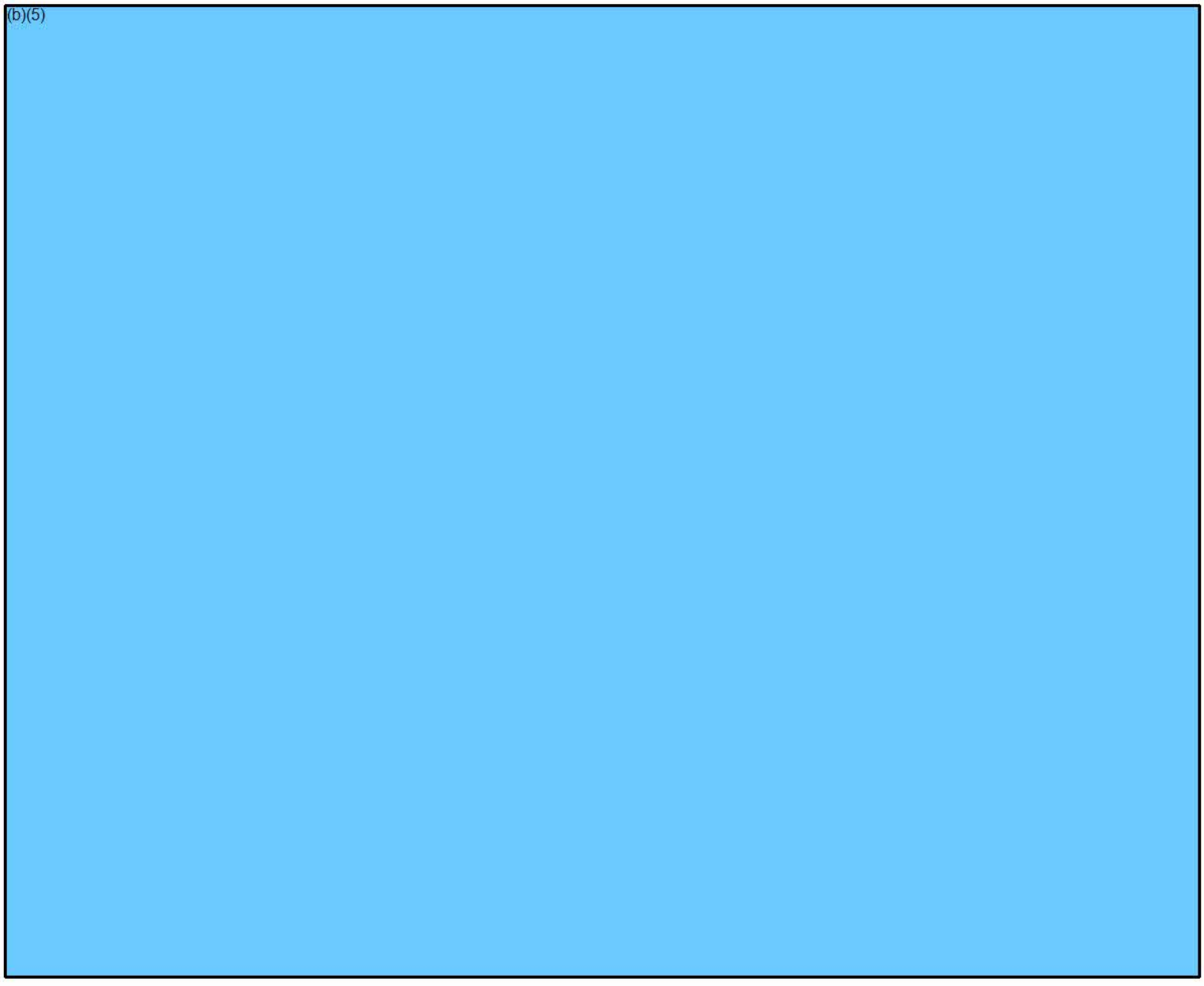
Tracking:

Recipient	Delivery	Read
Signs, Kelly	Delivered: 5/7/2013 6:31 PM	Read: 5/7/2013 9:06 PM
Shonka, David C.	Delivered: 5/7/2013 6:31 PM	
Dawson, Rachel Miller	Delivered: 5/7/2013 6:31 PM	Read: 5/7/2013 6:31 PM

Kelly,

I thought you were sending a new draft but I just went ahead and wrote out the changes, based on an earlier OGC version. Let us know if you need any guidance in how these would fit into the current draft.

(b)(5)



Kelly, Andrea

From: Harrison, Lisa M.
Sent: Thursday, October 04, 2012 5:31 PM
To: Blank, Barbara; Vandecar, Kim
Cc: Vaytsman, Olga
Subject: Dec 2011 Google package

Follow Up Flag: Follow up
Flag Status: Flagged

Here is what was sent to the Commission. Let me see if I have the word versions.

[redacted]

ASSIGNMENT

The attached document is assigned to

Chairman Leibowitz

for review and presentation to the Commission.

Assignment Date: 11/30/2011

Document Number: 557500

Matter Name: Google, Inc.

Matter Number: 1110163 Issue Number: 6

Staff Contact: SABO, MELANIE

Document Title: RECOMMENDATION TO GRANT THE REQUEST OF THE SENATE COMMITTEE ON THE JUDICIARY, SUBCOMMITTEE ON ANTITRUST, COMPETITION POLICY AND CONSUMER RIGHTS, FOR A CONFIDENTIAL STAFF BRIEFING ON THE COMMISSION'S INVESTIGATION OF THE SEARCH ENGINE PRACTICES OF GOOGLE, INC.

In the transfer of information from this sheet to a Commission circulation form, please note that the document number shown above should be entered on the Commission circulation form as the RELATED DOCUMENT NUMBER. In addition, please note that the document title shown above should NOT be identical to the document title on the circulation form. Instead, the document title on the circulation form should begin with one of the following three phrases:

"Motion to"
"For Information Circulation of" OR

Donald S. Clark

Target Motion Date: 01/17/2012

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

MEMORANDUM

TO: Commission

FROM: Melanie Sabo

DATE: November 30, 2011

SUBJECT: Request from Chairman Kohl for a Confidential Staff Briefing on the Commission's Antitrust Investigation into Google, Inc.'s Search Engine Practices Matter No. 111-0163[1]

RECOMMENDATION: To Authorize Staff to Provide the Requested Non-Public Briefing

By letter dated November 18, 2011, Chairman Herb Kohl of the Senate Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights has requested a confidential staff briefing on the Agency's antitrust investigation into Google, Inc.'s search engine practices.[2] Subject to Commission approval, the briefing is tentatively scheduled for Wednesday, December 7, 2011. We recommend that the Commission authorize staff to provide the requested non-public briefing in response to this official Subcommittee request. *See* Commission Rule 4.11(b), 16 C.F.R. § 4.11(b).

This briefing request is a follow-up request to one that Chairman Kohl directed to the Commission back in September. He and his staff primarily are interested in a status update and a discussion of any changes that might have occurred in the investigation. (b)(5)

(b)(5)

(b)(5)

A draft response letter for the Secretary's signature is attached. The draft response includes a discussion of the confidential status accorded the responsive information, and further requests that the Subcommittee maintain the information's confidential status. Notwithstanding the confidential status of most of the responsive information, the FTC Act, 15 U.S.C. § 57b-2(d)(1)(A), the Clayton Act, 15 U.S.C. § 18a(h), and the Freedom of Information Act, 5 U.S.C. § 552(d), provide no authority to withhold such information from a Congressional Subcommittee. Accordingly, we recommend that the Commission authorize staff to provide the requested non-public briefing in response to this official Subcommittee request. *See* Commission Rule 4.11 (b), 16 C.F.R. § 4.11 (b).

APPROVED:

Richard A. Feinstein
Director

CONCUR:

Willard K. Tom
General Counsel

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Secretary

The Honorable Herb Kohl
Chairman
Subcommittee on Antitrust, Competition Policy and Consumer Rights
Committee on the Judiciary
United States Senate
Washington, DC 20510-6275

Dear Chairman Kohl:

Thank you for your letter dated November 18, 2011, requesting a confidential staff briefing on the agency's investigation into Google, Inc.'s search engine practices. The Commission is responding to your request as an official request of a Congressional Subcommittee, *see* Commission Rule 4.11(b), 16 C.F.R. § 4.11(b), and has authorized its staff to provide the requested briefing.

Most of the information that the Commission attorneys will discuss during the briefing is nonpublic and statutorily protected from public disclosure by the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 41 *et seq.*, as well as exempt from mandatory disclosure under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. In particular, some of the information would be protected under Section 6(f) of the FTC Act, 15 U.S.C. § 46(f), as confidential commercial or financial information. The Commission is prohibited from disclosing such information publicly, and it would be exempt from disclosure under FOIA Exemption 3, 5 U.S.C. § 552(b)(3). Because disclosure of this information is likely to result in substantial competitive harm to the submitters, or is clearly not of a kind that submitters would customarily make available to the public, it would be exempt from disclosure under FOIA Exemption 4, 5 U.S.C. § 552(b)(4). *See Critical Mass Energy Project v. NRC*, 975 F.2d 871, 877-80 (D.C. Cir. 1992) (*en banc*), *cert. denied*, 507 U.S. 984 (1993) (exempt status accorded to information submitted voluntarily); *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) (exempt status accorded to information submitted under compulsion).

Most of the information that the Commission attorneys will discuss was obtained by compulsory process or provided voluntarily in lieu thereof in a law enforcement investigation. Such information is protected from public disclosure under Section 21(f) of the FTC Act, 15 U.S.C. § 57b-2(f). By virtue of that section, such information is also exempt from public disclosure under FOIA Exemption 3(B), 5 U.S.C. § 552(b)(3)(B). *McDermott v. FTC*, 1981-1 Trade Cas. (CCH) ¶ 63,964 at 75,982-3 (D.D.C. April 13, 1981); *Dairymen, Inc. v. FTC*, 1980-2 Trade Cas. (CCH) ¶ 63,479 (D.D.C. July 9, 1980). Moreover, third party submitters provided their materials and information with a specific request for confidential treatment under Section

21 (c)) of the FTC Act, 15 U.S.C. § 57b-2(c)). Under Commission Rule 4.10(d), 16 C.F.R. § 4.10(d), the Commission has waived its discretion to release to the public materials submitted pursuant to compulsory process or materials submitted voluntarily in lieu of process that have been marked confidential by the submitting parties.[1]

Additional information that may be discussed during the briefing was submitted in response to the Hart-Scott-Rodino premerger notification requirements of the Clayton Act, 15 U.S.C. § 18a. Section 7A(h) of the Act prohibits public disclosure of such documents or information. By virtue of this statutory prohibition, this information is also exempt from disclosure under Freedom of Information Act (FOIA) Exemption 3A, 5 U.S.C. § 552(b)(3)(A).[2]

Further, information discussed during the briefing would reveal the existence of, and information concerning, an ongoing, nonpublic law enforcement investigation. Disclosure of this information could reasonably be expected to interfere with law enforcement proceedings, and this information is therefore protected from mandatory public disclosure by FOIA Exemption 7(A), 5 U.S.C. § 552(b)(7)(A). *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 232 (1978); *Ehringhaus v. FTC*, 525 F. Supp. 21, 24 (D.D.C. 1980).

Finally, some of the information that will be discussed during the briefing will include internal staff analyses and recommendations, which are predecisional, deliberative materials exempt from mandatory public disclosure under FOIA Exemption 5, 5 U.S.C. § 552(b)(5). *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975); *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). Some of this information may also be protected from mandatory public disclosure under FOIA Exemption 5 as attorney work product prepared in anticipation of litigation. *FTC v. Grolier, Inc.*, 462 U.S. 19, 28 (1983); *Martin v. Office of Special Counsel, Merit Systems Protection Board*, 819 F.2d 1181, 1187 (D.C. Cir. 1987).

Notwithstanding the protected status of most of the responsive information, the FTC Act, 15 U.S.C. § 57b-2(d)(1)(A), the Clayton Act, 15 U.S.C. § 18a(h), and the FOIA, 5 U.S.C. § 552(d), provide no authority to withhold such information from this Congressional Subcommittee, and the Commission has authorized staff to provide the requested briefing to Subcommittee staff. Because the confidential information would not be available to the public under the FOIA or otherwise, the Commission requests that the Subcommittee maintain its confidentiality.

---

[1] The Commission is required to notify persons who submitted information pursuant to compulsory process in a law enforcement investigation, or voluntarily in lieu thereof on a confidential basis, if the Commission receives a request from a Congressional Committee or Subcommittee for that information. *See* 15 U.S.C. §§ 57b-2(b)(3)(C), 57b-2(d)(1)(A); Commission Rule 4.11(b), 16 C.F.R. § 4.11(b). Staff is providing the requisite notice.

[2] The Commission has instructed its staff to provide reasonable notice, when possible, of the release to Congress of information submitted pursuant to HSR. *See Statement of Basis and Purpose of HSR Rules and Regulations*, 43 Fed. Reg. 33519 (July 31, 1978). Staff has provided notice to submitters pursuant to this policy.

United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510–6275

BRUCE A. COHEN, *Chief Counsel and Staff Director*
KOLAN L. DAVIS, *Republican Chief Counsel and Staff Director*

November 18, 2011

The Honorable Jon Leibowitz
Chairman, Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Suite 444
Washington, DC 20580

Dear Chairman Leibowitz:

I am writing to request that knowledgeable members of the FTC staff provide our Subcommittee staff with a confidential briefing about the FTC's antitrust investigation into Google's search engine practices.

I understand the sensitivity of discussing pending investigations. Therefore, my staff and I will ensure that any non-public information that your staff provides during the briefing will not be shared with anyone outside the Subcommittee. If you require further confidentiality assurances, we will do our best to accommodate you.

Thank you very much for your assistance in this matter.

Respectfully yours,

Herb Kohl

HERB KOHL
Chairman
Subcommittee on Antitrust, Competition Policy and Consumer Rights

Kelly, Andrea

From: Bayer Femenella, Peggy
Sent: Tuesday, October 23, 2012 1:47 PM
To: John D. Harkrider (JDH@avhlaw.com)
Cc: Holler, John A.; Widnell, Nicholas; Harrison, Lisa M.; Vaytsman, Olga
Subject: Google SEP Investigation
Attachments: Letter to Google 10.23.12.PDF

John,

Attached, please find a letter relating to a request from Senator Kohl's office for a briefing on the Commission's investigation into Google. Please let me know if you have any questions.

Thanks very much.

Best Regards,
Peggy

Peggy Bayer Femenella
Bureau of Competition
Federal Trade Commission
601 New Jersey Avenue, N.W.
Washington, D.C. 20001
Tel. 202.326.3086
Fax. 202.326.3496
pbayer@ftc.gov

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

October 23, 2012

VIA EMAIL

Mr. John Harkrider
Axinn, Veltrop & Harkrider LLP
114 West 47th Street
New York, NY 10036
jdh@avhlaw.com

Dear John:

This notifies you of an official request for information that the Federal Trade Commission has received from Chairman Herb Kohl of the Senate Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights. The Subcommittee has requested a staff briefing on the agency's investigations into allegations that Google, Inc. has engaged in anticompetitive conduct. Certain information that Google Inc. has submitted may be responsive to this request.

The Commission routinely receives official requests for confidential information from congressional committees and subcommittees. Neither the Freedom of Information Act, 5 U.S.C. § 552(d), nor the Federal Trade Commission Act, 15 U.S.C. § 57b-2(d)(1)(A), authorizes the Commission to withhold such information from congressional committees or subcommittees. The Commission, of course, requests that the responsive information and materials be kept confidential by the congressional committees and subcommittees.

If you have any questions about the congressional inquiry or handling of the requested information, please direct them to subcommittee staff at (202) 224-3406. Questions about the Commission's response may be directed to me at (202) 326-3086.

Sincerely,

Peggy Femenella

Peggy Bayer Femenella

cc: Office of General Counsel

Kelly, Andrea

From: Blank, Barbara
Sent: Tuesday, October 23, 2012 1:49 PM
To: Sher, Scott
Cc: Harrison, Lisa M.; Vaytsman, Olga
Subject: Official Request for Staff Briefing on Google investigations
Attachments: 2012-10-23 Letter to Sher.pdf

Scott,

Attached, please find a letter relating to the most recent request from Senator Kohl's office for a briefing on the Commission's investigations into Google. Please let me know if you have any questions.

Thanks very much.

Best Regards,

Barbara

Barbara R. Blank, Esq.
Bureau of Competition
Federal Trade Commission
601 New Jersey Avenue, N.W.
Washington, D.C. 20001
Tel. 202.326.2523
Fax. 202.326.3496
bblank@ftc.gov

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

October 23, 2012

VIA EMAIL

Scott A. Sher, Esq.
Wilson Sonsini Goodrich & Rosati PC
1700 K Street, N.W.
Fifth Floor
Washington, D.C. 20006
ssher@wsgr.com

Dear Scott:

This notifies you of an official request for information that the Federal Trade Commission has received from Chairman Herb Kohl of the Senate Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights. The Subcommittee has requested a staff briefing on the agency's investigations into allegations that Google, Inc. has engaged in anticompetitive conduct. Certain information that Google Inc. has submitted may be responsive to this request.

The Commission routinely receives official requests for confidential information from congressional committees and subcommittees. Neither the Freedom of Information Act, 5 U.S.C. § 552(d), nor the Federal Trade Commission Act, 15 U.S.C. § 57b-2(d)(1)(A), authorizes the Commission to withhold such information from congressional committees or subcommittees. The Commission, of course, requests that the responsive information and materials be kept confidential by the congressional committees and subcommittees.

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Sincerely,

Barbara R. Blank

cc: Office of General Counsel

Kelly, Andrea

From: Blank, Barbara
Sent: Tuesday, October 23, 2012 1:49 PM
To: (b)(7)(D)
Cc: Bayer Femenella, Peggy; Harrison, Lisa M.; Vaytsman, Olga
Subject: Official Request for Staff Briefing on Google investigations
Attachments: 2012-10-23 Letter to (b)(7)(D) pdf

(b)(7)(D)

Attached, please find a letter relating to the most recent request from Senator Kohl's office for a briefing on the Commission's investigations into Google. Please let me or Peggy know if you have any questions.

Thanks very much.

Best Regards,

Barbara

Barbara R. Blank, Esq.
Bureau of Competition
Federal Trade Commission
601 New Jersey Avenue, N.W.
Washington, D.C. 20001
Tel. 202.326.2523
Fax. 202.326.3496
bblank@ftc.gov

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

October 23, 2012

VIA EMAIL

(b)(7)(D)

(b)(7)(D)

This notifies you of an official request for information that the Federal Trade Commission has received from Chairman Herb Kohl of the Senate Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights. The Subcommittee has requested a staff briefing on the agency's investigations into allegations that Google, Inc. has engaged in anticompetitive conduct. Certain information that (b)(7)(D) has submitted may be responsive to this request.

The Commission routinely receives official requests for confidential information from congressional committees and subcommittees. Neither the Freedom of Information Act, 5 U.S.C. § 552(d), nor the Federal Trade Commission Act, 15 U.S.C. § 57b-2(d)(1)(A), authorizes the Commission to withhold such information from congressional committees or subcommittees. The Commission, of course, requests that the responsive information and materials be kept confidential by the congressional committees and subcommittees.

If you have any questions about the congressional inquiry or handling of the requested information, please direct them to subcommittee staff at (202) 224-3406. Questions about the Commission's response may be directed to me at (202) 326-2523 or to Peggy Bayer Femenella at (202) 326-3086.

Sincerely,

Barbara R. Blank

cc: Office of General Counsel

Kelly, Andrea

From: Harrison, Lisa M.
Sent: Friday, October 19, 2012 4:55 PM
To: Vaytsman, Olga
Subject: FW: 111 0163 & 121 0120 - Google, Inc. & Google/Motorola

Follow Up Flag: Follow up
Flag Status: Flagged

Briefing authorized.

From: Swenson, Robert
Sent: Friday, October 19, 2012 3:16 PM
To: Blank, Barbara
Cc: OSBC
Subject: 111 0163 & 121 0120 - Google, Inc. & Google/Motorola

On October 19, 2012, a motion to grant the request of the Senate Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights for a confidential staff briefing concerning the agency's investigation into Google, Inc.'s search engine practices and Standard Essential Patents was approved by a vote of 5-0.

Please contact the Minutes Section, at x2521, or Donald Clark, at x2514, if you need additional information.

Robert F. Swenson
Paralegal Specialist
Office of the Secretary
(202) 326-2676
rswenson@ftc.gov

Kelly, Andrea

From: Harrison, Lisa M.
Sent: Wednesday, October 17, 2012 4:27 PM
To: Vandecar, Kim; Vaytsman, Olga
Subject: FW: Google briefing for Senate Judiciary
Attachments: Request for FTC briefing on Google 10.17.12.pdf

FYI.

From: Renner, Christopher
Sent: Wednesday, October 17, 2012 3:47 PM
To: Tucker, Darren; Slater, Abigail A.; Kimmel, Lisa; Luib, Gregory; Okuliar, Alexander
Cc: Clark, Donald S.; Harrison, Lisa M.; Levitas, Pete; Sabo, Melanie
Subject: Google briefing for Senate Judiciary

Hi –

On October 10 BC circulated a recommendation to authorize a non-public briefing for the Senate Judiciary Subcommittee on Antitrust of the Commission's Google search investigation. Now, the Subcommittee has requested a broader briefing, including Google SEP. If there are no objections, we will circulate a motion to authorize the broader (Google search and Google SEP) non-public briefing by COB on Friday, October 19. Please let me know if that timing does not work.

Thanks,

Chris

From: Clark, Donald S.
Sent: Wednesday, October 17, 2012 2:23 PM
To: Taylor, Susan; Cornish, Alexis CTR
Cc: Clark, Donald S.; Vaytsman, Olga; Sabo, Melanie; Levitas, Pete; Renner, Christopher; Patton, Andrew; Runco, Philip; Vandecar, Kim
Subject: Request To Replace DocSmart File For CMS # 14007131

Sue and Alexis, please replace the version of this letter currently in the DocSmart file with the attached version from Kim. Thanks!

Don

HERB KOHL
WISCONSIN

WASHINGTON OFFICE:
330 HART SENATE OFFICE BUILDING
WASHINGTON, DC 20510
(202) 224-5653
http://kohl.senate.gov/

United States Senate

WASHINGTON, DC 20510-4903

COMMITTEES:

APPROPRIATIONS

JUDICIARY

SPECIAL COMMITTEE
ON AGING

October 17, 2012

The Honorable Jon Leibowitz
Chairman, Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Suite 444
Washington, DC 20580

Dear Chairman Leibowitz:

I am writing to request that knowledgeable members of the FTC staff provide our Subcommittee staff with a confidential briefing about the FTC's antitrust investigations into allegations that Google has been engaged in anticompetitive conduct.

I understand the sensitivity of discussing pending investigations. Therefore, my staff and I will ensure that any non-public information that your staff provides during the briefing will not be shared with anyone outside the Subcommittee. If you require further confidentiality assurances, we will do our best to accommodate you.

Thank you very much for your assistance in this matter.

Respectfully yours,

Herb Kohl

HERB KOHL
Chairman
Subcommittee on Antitrust, Competition Policy and Consumer Rights

MILWAUKEE OFFICE:
310 WEST WISCONSIN AVENUE
SUITE 950
MILWAUKEE, WI 53203
(414) 297-4451
T.T.Y. (414) 297-4485

MADISON OFFICE:
14 WEST MIFFLIN STREET
SUITE 207
MADISON, WI 53703
(608) 264-5338

EAU CLAIRE OFFICE:
402 GRAHAM AVENUE
SUITE 206
EAU CLAIRE, WI 54701
(715) 832-8424

APPLETON OFFICE:
4321 WEST COLLEGE AVENUE
SUITE 370
APPLETON, WI 54914
(920) 738-1640

LA CROSSE OFFICE:
205 5TH AVENUE SOUTH
SUITE 216
LA CROSSE, WI 54601
(608) 796-0045

Kelly, Andrea

From: Vandecar, Kim
Sent: Wednesday, October 17, 2012 2:19 PM
To: Clark, Donald S.; Vaytsman, Olga; Sabo, Melanie; Levitas, Pete; Renner, Christopher
Cc: Patton, Andrew; Runco, Philip
Subject: FW: Request for Google briefing
Attachments: Request for FTC briefing on Google 10.17.12.pdf

Follow Up Flag: Follow up
Flag Status: Flagged

Please replace the September 21 letter from Chairman Kohl with the attached.

HERB KOHL
WISCONSIN

WASHINGTON OFFICE:
330 HART SENATE OFFICE BUILDING
WASHINGTON, DC 20510
(202) 224-5653
http://kohl.senate.gov/

United States Senate

WASHINGTON, DC 20510-4903

COMMITTEES:

APPROPRIATIONS

JUDICIARY

SPECIAL COMMITTEE
ON AGING

October 17, 2012

The Honorable Jon Leibowitz
Chairman, Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Suite 444
Washington, DC 20580

Dear Chairman Leibowitz:

I am writing to request that knowledgeable members of the FTC staff provide our Subcommittee staff with a confidential briefing about the FTC's antitrust investigations into allegations that Google has been engaged in anticompetitive conduct.

I understand the sensitivity of discussing pending investigations. Therefore, my staff and I will ensure that any non-public information that your staff provides during the briefing will not be shared with anyone outside the Subcommittee. If you require further confidentiality assurances, we will do our best to accommodate you.

Thank you very much for your assistance in this matter.

Respectfully yours,

Herb Kohl

HERB KOHL
Chairman
Subcommittee on Antitrust, Competition Policy and Consumer Rights

MILWAUKEE OFFICE:
310 WEST WISCONSIN AVENUE
SUITE 950
MILWAUKEE, WI 53203
(414) 297-4451
T.T.Y. (414) 297-4485

MADISON OFFICE:
14 WEST MIFFLIN STREET
SUITE 207
MADISON, WI 53703
(608) 264-5338

EAU CLAIRE OFFICE:
402 GRAHAM AVENUE
SUITE 206
EAU CLAIRE, WI 54701
(715) 832-8424

APPLETON OFFICE:
4321 WEST COLLEGE AVENUE
SUITE 370
APPLETON, WI 54914
(920) 738-1640

LA CROSSE OFFICE:
205 5TH AVENUE SOUTH
SUITE 216
LA CROSSE, WI 54601
(608) 796-0045

Kelly, Andrea

From: Harrison, Lisa M.
Sent: Wednesday, October 17, 2012 3:28 PM
To: Vaytsman, Olga
Subject: Google nonpublic

And FYI, here is the actual Commission circulation.

[redacted]

C O P Y ASSIGNMENT C O P Y

The attached document is assigned to

Chairman Leibowitz

for review and presentation to the Commission.

Assignment Date: 10/11/2012

Document Number: 562382

Matter Name: Google, Inc.

Matter Number: 1110163 Issue Number: 18

Staff Contact: BLANK, BARBARA

Document Title: RECOMMENDATION TO GRANT THE REQUEST OF THE SENATE JUDICIARY SUBCOMMITTEE ON ANTITRUST, COMPETITION POLICY AND CONSUMER RIGHTS FOR A CONFIDENTIAL STAFF BRIEFING CONCERNING THE AGENCY'S INVESTIGATION INTO GOOGLE INC.'S SEARCH ENGINE PRACTICES

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"Motion to"
"For Information Circulation of" OR

Donald S. Clark

Target Motion Date: N/A

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

OCT 11 2012

MEMORANDUM

TO: Commission

FROM: Barbara R. Blank, Attorney

DATE: October 10, 2012

SUBJECT: Request from Chairman Kohl for a Confidential Staff Briefing on the Commission's Antitrust Investigation into Google, Inc.'s Search Engine Practices Matter No. 111-0163[1]

RECOMMENDATION: To Authorize Staff to Provide the Requested Non-Public Briefing

By letter dated September 21, 2012, Chairman Herb Kohl of the Senate Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights has requested a confidential staff briefing on the Agency's antitrust investigation into Google, Inc.'s search engine practices.[2] Subject to Commission approval, the briefing is tentatively scheduled for Wednesday, October 24, 2012. We recommend that the Commission authorize staff to provide the requested non-public briefing in response to this official Subcommittee request. *See* Commission Rule 4.11(b), 16 C.F.R. § 4.11(b).

This briefing request is a follow-up request to requests that Chairman Kohl directed to the Commission in September and November of 2011. He and his staff primarily are interested in a status update and a discussion of any changes that might have occurred in the investigation.

(b)(5)

(b)(5)

A draft response letter for the Secretary's signature is attached. The draft response includes a discussion of the confidential status accorded the responsive information, and further requests that the Subcommittee maintain the information's confidential status. Notwithstanding the confidential status of most of the responsive information, the FTC Act, 15 U.S.C. § 57b-2(d)(1)(A), the Clayton Act, 15 U.S.C. § 18a(h), and the Freedom of Information Act, 5 U.S.C. § 552(d), provide no authority to withhold such information from a Congressional Subcommittee. Accordingly, we recommend that the Commission authorize staff to provide the requested non-public briefing in response to this official Subcommittee request. *See* Commission Rule 4.11 (b), 16 C.F.R. § 4.11 (b).

APPROVED:

Richard A. Feinstein
Director

CONCUR:

Willard K. Tom
General Counsel

HERB KOHL
WISCONSIN

WASHINGTON OFFICE:
330 HART SENATE OFFICE BUILDING
WASHINGTON, DC 20510
(202) 224-5653
http://kohl.senate.gov/

United States Senate

WASHINGTON, DC 20510–4903

COMMITTEES:

APPROPRIATIONS

JUDICIARY

SPECIAL COMMITTEE
ON AGING

September 21, 2012

The Honorable Jon Leibowitz
Chairman, Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Suite 444
Washington, DC 20580

Dear Chairman Leibowitz:

I am writing to request that knowledgeable members of the FTC staff provide our Subcommittee staff with a confidential briefing about the FTC's antitrust investigation into allegations that Google has been engaged in anticompetitive conduct with respect to Internet search, and related issues.

I understand the sensitivity of discussing pending investigations. Therefore, my staff and I will ensure that any non-public information that your staff provides during the briefing will not be shared with anyone outside the Subcommittee. If you require further confidentiality assurances, we will do our best to accommodate you.

Thank you very much for your assistance in this matter.

Respectfully yours,

Herb Kohl

1400731

HERB KOHL
Chairman
Subcommittee on Antitrust, Competition Policy and Consumer Rights

MILWAUKEE OFFICE:
310 WEST WISCONSIN AVENUE
SUITE 950
MILWAUKEE, WI 53203
(414) 297-4451
T.T.Y. (414) 297-4485

MADISON OFFICE:
14 WEST MIFFLIN STREET
SUITE 207
MADISON, WI 53703
(608) 264-5338

EAU CLAIRE OFFICE:
402 GRAHAM AVENUE
SUITE 206
EAU CLAIRE, WI 54701
(715) 832-8424

APPLETON OFFICE:
4321 WEST COLLEGE AVENUE
SUITE 370
APPLETON, WI 54914
(920) 738-1640

LA CROSSE OFFICE:
205 5TH AVENUE SOUTH
SUITE 218
LA CROSSE, WI 54601
(608) 796-0045

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Secretary

The Honorable Herb Kohl
Chairman
Subcommittee on Antitrust, Competition Policy and Consumer Rights
Committee on the Judiciary
United States Senate
Washington, DC 20510-6275

Dear Chairman Kohl:

Thank you for your letter dated September 21, 2012, requesting a confidential staff briefing on the agency's investigation into Google, Inc.'s search engine practices. The Commission is responding to your request as an official request of a Congressional Subcommittee, *see* Commission Rule 4.11(b), 16 C.F.R. § 4.11(b), and has authorized its staff to provide the requested briefing.

Most of the information that the Commission attorneys will discuss during the briefing is nonpublic and statutorily protected from public disclosure by the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 41 *et seq.*, as well as exempt from mandatory disclosure under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. In particular, some of the information would be protected under Section 6(f) of the FTC Act, 15 U.S.C. § 46(f), as confidential commercial or financial information. The Commission is prohibited from disclosing such information publicly, and it would be exempt from disclosure under FOIA Exemption 3, 5 U.S.C. § 552(b)(3). Because disclosure of this information is likely to result in substantial competitive harm to the submitters, or is clearly not of a kind that submitters would customarily make available to the public, it would be exempt from disclosure under FOIA Exemption 4, 5 U.S.C. § 552(b)(4). *See Critical Mass Energy Project v. NRC*, 975 F.2d 871, 877-80 (D.C. Cir. 1992) (*en banc*), *cert. denied*, 507 U.S. 984 (1993) (exempt status accorded to information submitted voluntarily); *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) (exempt status accorded to information submitted under compulsion).

Most of the information that the Commission attorneys will discuss was obtained by compulsory process or provided voluntarily in lieu thereof in a law enforcement investigation. Such information is protected from public disclosure under Section 21(f) of the FTC Act, 15 U.S.C. § 57b-2(f). By virtue of that section, such information is also exempt from public disclosure under FOIA Exemption 3(B), 5 U.S.C. § 552(b)(3)(B). *McDermott v. FTC*, 1981-1 Trade Cas. (CCH) ¶ 63,964 at 75,982-3 (D.D.C. April 13, 1981); *Dairymen, Inc. v. FTC*, 1980-2 Trade Cas. (CCH) ¶ 63,479 (D.D.C. July 9, 1980). Moreover, third party submitters provided their materials and information with a specific request for confidential treatment under Section

21 (c)) of the FTC Act, 15 U.S.C. § 57b-2(c)). Under Commission Rule 4.10(d), 16 C.F.R. § 4.10(d), the Commission has waived its discretion to release to the public materials submitted pursuant to compulsory process or materials submitted voluntarily in lieu of process that have been marked confidential by the submitting parties.[1]

Additional information that may be discussed during the briefing was submitted in response to the Hart-Scott-Rodino premerger notification requirements of the Clayton Act, 15 U.S.C. § 18a. Section 7A(h) of the Act prohibits public disclosure of such documents or information. By virtue of this statutory prohibition, this information is also exempt from disclosure under Freedom of Information Act (FOIA) Exemption 3A, 5 U.S.C. § 552(b)(3)(A).[2]

Further, information discussed during the briefing would reveal the existence of, and information concerning, an ongoing, nonpublic law enforcement investigation. Disclosure of this information could reasonably be expected to interfere with law enforcement proceedings, and this information is therefore protected from mandatory public disclosure by FOIA Exemption 7(A), 5 U.S.C. § 552(b)(7)(A). *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 232 (1978); *Ehringhaus v. FTC*, 525 F. Supp. 21, 24 (D.D.C. 1980).

Finally, some of the information that will be discussed during the briefing will include internal staff analyses and recommendations, which are predecisional, deliberative materials exempt from mandatory public disclosure under FOIA Exemption 5, 5 U.S.C. § 552(b)(5). *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975); *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). Some of this information may also be protected from mandatory public disclosure under FOIA Exemption 5 as attorney work product prepared in anticipation of litigation. *FTC v. Grolier, Inc.*, 462 U.S. 19, 28 (1983); *Martin v. Office of Special Counsel, Merit Systems Protection Board*, 819 F.2d 1181, 1187 (D.C. Cir. 1987).

Notwithstanding the protected status of most of the responsive information, the FTC Act, 15 U.S.C. § 57b-2(d)(1)(A), the Clayton Act, 15 U.S.C. § 18a(h), and the FOIA, 5 U.S.C. § 552(d), provide no authority to withhold such information from this Congressional Subcommittee, and the Commission has authorized staff to provide the requested briefing to Subcommittee staff. Because the confidential information would not be available to the public under the FOIA or otherwise, the Commission requests that the Subcommittee maintain its confidentiality.

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[1] The Commission is required to notify persons who submitted information pursuant to compulsory process in a law enforcement investigation, or voluntarily in lieu thereof on a confidential basis, if the Commission receives a request from a Congressional Committee or Subcommittee for that information. *See* 15 U.S.C. §§ 57b-2(b)(3)(C), 57b-2(d)(1)(A); Commission Rule 4.11(b), 16 C.F.R. § 4.11(b). Staff is providing the requisite notice.

[2] The Commission has instructed its staff to provide reasonable notice, when possible, of the release to Congress of information submitted pursuant to HSR. *See Statement of Basis and Purpose of HSR Rules and Regulations*, 43 Fed. Reg. 33519 (July 31, 1978). Staff has provided notice to submitters pursuant to this policy.

By direction of the Commission.

Donald S. Clark
Secretary

Kelly, Andrea

From: Harrison, Lisa M.
Sent: Wednesday, October 17, 2012 3:40 PM
To: Vandecar, Kim
Cc: Vaytsman, Olga
Subject: Google nonpublic

I talked to Chris. He is going to revise the Commission letter as we discussed. The motion package Don circulates will (1) include the revised Kohl letter (2) include the revised Commission letter and (3) indicate in the motion that the scope of the nonpublic has broadened.

Kelly, Andrea

From: Blank, Barbara
Sent: Wednesday, October 10, 2012 12:12 PM
To: Harrison, Lisa M.; Vandecar, Kim; Vaytsman, Olga
Subject: FW: Senate Subcomittee briefing package - Google
Attachments: 2012-10-10 Response Letter for Briefing Request.wpd; 2012-9-21 Briefing Request.pdf; 2012-10-10 Memo re Request for Briefing.wpd

Follow Up Flag: Follow up
Flag Status: Flagged

FYI

-----Original Message-----
From: Blank, Barbara
Sent: Wednesday, October 10, 2012 11:20 AM
To: Seidman, Mark; Lippincott, Victoria
Cc: Sabo, Melanie; Green, Geoffrey
Subject: Senate Subcomittee briefing package - Google

Hi Mark and Victoria,

Here is the package for the upcoming Senate Subcommittee briefing - it includes a short memo to the Commission, a draft response to Senator Kohl, and the original briefing request. These drafts are essentially unchanged from the last briefing (December 2011) but for being updated to reflect the dates and acknowledgement of the prior briefings. Please let me know if you need anything else.

Thanks very much.

Best Regards,

Barbara

Kelly, Andrea

From: Harrison, Lisa M.
Sent: Friday, October 05, 2012 8:48 AM
To: Blank, Barbara
Cc: Vaytsman, Olga
Subject: google nonpublic
Attachments: Kohl Second Briefing Request on Google Search Investigation - Memo to the Commn2.wpd; Kohl Second Briefing Request on Google Investigation - Response Letter.wpd

Follow Up Flag: Follow up
Flag Status: Flagged

Barbara,

I think these are the final wp versions for the December briefing. (you can match them against the pdf I sent you yesterday)

Kelly, Andrea

From: Kraus, Elizabeth
Sent: Monday, May 20, 2013 3:56 PM
To: Tritell, Randolph W.; Heimert, Andrew J.; Gray, Joshua Barton; O'Brien, Paul
Subject: Questions for the Record Of for Chairwoman Edith Ramirez compare.docx
Attachments: Questions for the Record Of for Chairwoman Edith Ramirez compare.docx

This should be a compare to our the earlier OIA/BC version Not Responsive

Kelly, Andrea

From: Gray, Joshua Barton
Sent: Monday, May 20, 2013 4:04 PM
To: Kraus, Elizabeth; O'Brien, Paul; Heimert, Andrew J.; Tritell, Randolph W.
Subject: RE: QFRs - the latest (close to final) draft

Not Responsive

Not Responsive (b)(5)

(b)(5)

JG

From: Kraus, Elizabeth
Sent: Monday, May 20, 2013 1:24 PM
To: O'Brien, Paul; Heimert, Andrew J.; Gray, Joshua Barton; Tritell, Randolph W.
Subject: FW: QFRs - the latest (close to final) draft

Any edits?

From: Lehner, Mary
Sent: Monday, May 20, 2013 1:23 PM
To: Koslov, Tara Isa; Seidman, Mark; Tabas, Matthew; Gavil, Andrew I.; Levitas, Pete; Dawson, Rachel Miller; Kraus, Elizabeth; Bumpus, Jeanne; Vandecar, Kim
Cc: Kimmel, Lisa; Nathan, Jon J.
Subject: QFRs - the latest (close to final) draft

All,

I have attached the latest draft, which incorporates Edith's edits and feedback. There may still be a few tweaks from our office (particularly with respect to Section 5 – Edith is still reviewing the revised draft responses to Lee 2 and 4), but (fingers crossed) I think we are getting there. Could everyone do a last look on substance to make sure you are comfortable? **Feedback by cob today would be ideal.** And, Jeanne, could your office put the responses in the appropriate form to send in? Thanks so much –

Mary

Kelly, Andrea

From: Tritell, Randolph W.
Sent: Tuesday, March 26, 2013 4:58 PM
To: Kraus, Elizabeth
Subject: RE: Testimony draft points
Attachments: International Topics - redline.docx

Thanks, Liz. See attached suggested edits. As Jeanne asked for "no more than 1 ½ to 2 pages of Qs and As (in the form of very short talking points instead of the format we previously used below)," please reformat into short bulleted points, reduce to two pages absolute maximum, and make sure Jeanne gets by the end of her day tomorrow. Let me know if you'd like to discuss anything.

Randy

From: Kraus, Elizabeth
Sent: Monday, March 25, 2013 7:10 PM
To: Tritell, Randolph W.
Subject: Testimony draft points

Kelly, Andrea

From: Kraus, Elizabeth
Sent: Monday, March 25, 2013 7:10 PM
To: Tritell, Randolph W.
Subject: Testimony draft points
Attachments: International Topics (2).docx

Kelly, Andrea

From: Kraus, Elizabeth
Sent: Wednesday, March 27, 2013 8:24 PM
To: Bumpus, Jeanne
Cc: Tritell, Randolph W.
Subject: International Topics - For 2013 Testimony
Attachments: International Topics - 2013.docx

Jeanne,

The international antitrust points are attached Not Responsive

Liz

Kelly, Andrea

From: Kraus, Elizabeth
Sent: Thursday, May 09, 2013 2:32 PM
To: Tritell, Randolph W.
Subject: FW: Draft QFRs from Antitrust Oversight Hearing
Attachments: QFRs for Ramirez_may8.docx

Here you go.

From: Signs, Kelly
Sent: Thursday, May 09, 2013 2:31 PM
To: Kraus, Elizabeth
Subject: FW: Draft QFRs from Antitrust Oversight Hearing

Sorry, I never know which people are relieved to never see it again.

From: Signs, Kelly
Sent: Wednesday, May 08, 2013 5:59 PM
To: Nathan, Jon J.; Kimmel, Lisa; Lehner, Mary
Cc: Bumpus, Jeanne; Levitas, Pete; Gavil, Andrew I.; Vandecar, Kim
Subject: Draft QFRs from Antitrust Oversight Hearing

Jon, Lisa and Mary,

Attached is a set of proposed answers for the questions received from four senators as a follow-up to last month's hearing. Not Responsive

Not Responsive

Not Responsive

Also note that I've kept some of the comments from various editors in the draft for your consideration. Hopefully, you can distinguish comments from Pete, Andy or Suzanne.

Please let me know if there is anything else you need.

Kelly Signs
Office of Policy and Coordination • Bureau of Competition • Federal Trade Commission
601 New Jersey Avenue, N.W., Washington D.C. 20580
(202) 326-3191 (202) 326-3394 ksigns@ftc.gov www.ftc.gov

Not Responsive

From: Kraus, Elizabeth
Sent: Wednesday, May 01, 2013 5:09 pm
To: O'Brien, Paul; Heimert, Andrew J.; Gray, Joshua Barton
Cc: Tritell, Randolph W.
Subject: FW: 4-16-13 Antitrust Hearing - Questions for the Record (Ramirez)

The FTC received follow-up questions from Edith's testimony, attached. I've reviewed the various questions and three address international:

Not Responsive

Leahy 4(d) – on European approach to Google.

Jeanne's note below provides that replies are due on May 14th. Apparently, we are asked to have responses to Jeanne by May 6. I'm confirming this. Our work is pretty easy Not Responsive

Not Responsive

Not Responsive Josh, BC will be handling the response to Leahy question 4, but I've asked for us to have a review of it (notably for the response to 4(d) before it goes up).

If the May 6th deadline is correct, would it be possible to get anything that we're responsible for drafting to Randy and me by COB Friday or at least before start of business on Monday?

Liz

Attached please find the post hearing questions. Replies are due May 14. The questions are quite extensive, particularly from Senator Lee. I have copied all of the Bureaus/Offices I anticipate will need to be involved in preparing draft responses for the Chairwoman. The questions cover the following topics:

Sen. Grassley
PFD

Sen. Leahy
GPOs
PAEs
Various aspects of Google and agency technical expertise

Sen. Lee

Section 2 guidance
Section 5
Differences in standards/procedures between FTC and DoJ
Voluntary commitments
Standard used in Google
Coordination with states on Google
Clearance
SEPs and Bosch
PFD
PAEs and 6(b) study
Mandatory IP licensing by foreign authorities
Eyeglass prescriptions
International transparency
Use of advocacy resources

Sen. Klobuchar
Role of antirust
Clearance
SEPs

From: Kartzmer, Melanie (Judiciary) [mailto:Melanie_Kartzmer@judiciary-dem.senate.gov]
Sent: Tuesday, April 30, 2013 2:35 PM
To: Bumpus, Jeanne
Cc: Holland, Caroline (Judiciary-Dem); Ross, Halley (Judiciary)
Subject: 4-16-13 Antitrust Hearing - Questions for the Record (Ramirez)

Dear Ms. Jeanne Bumpus:

Attached please find a letter from Chairman Leahy as well as questions submitted for the record to Chairwoman Ramirez from Senator Leahy, Senator Klobuchar, Senator Grassley and Senator Lee.

Please do not hesitate to contact me should you have any questions or need any additional information.

Best,

Melanie

Melanie Kartzmer
Hearing Clerk
Committee on the Judiciary
http://judiciary.senate.gov/

Kelly, Andrea

From: Kraus, Elizabeth
Sent: Tuesday, May 14, 2013 7:04 PM
To: Lehner, Mary
Subject: QFRs look good to us

Thanks for asking.

Kelly, Andrea

From: Gray, Joshua Barton
Sent: Friday, May 31, 2013 4:05 PM
To: Kelly, Andrea
Subject: FW: Draft on Sec 5 -- Thoughts, edits, etc.?

Hi,

This is all I still have from our drafting of the answers to the Judiciary Questions. Josh

---

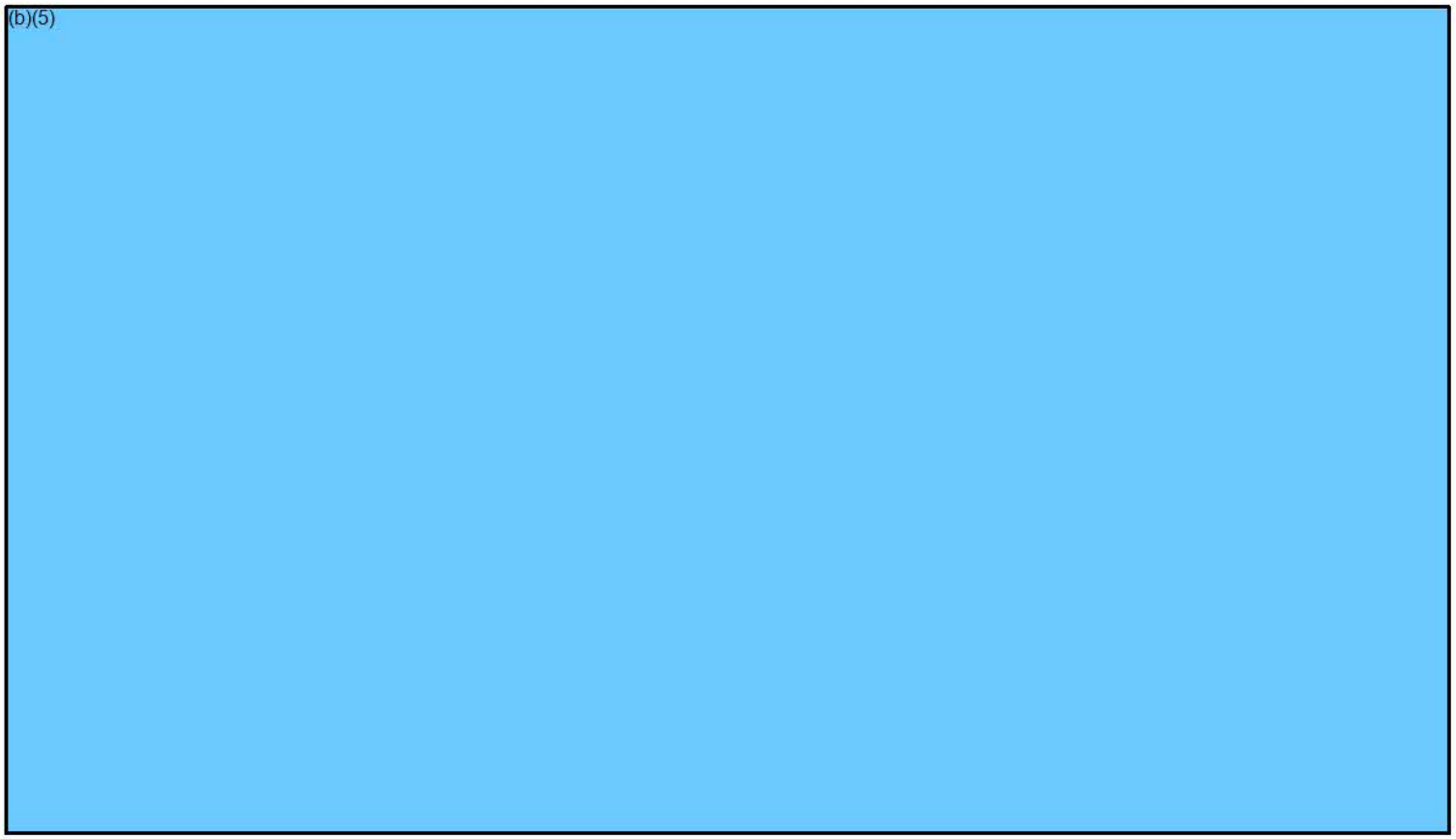
From: Signs, Kelly
Sent: Friday, May 03, 2013 2:55 PM
To: Gray, Joshua Barton
Subject: RE: Draft on Sec 5 -- Thoughts, edits, etc.?

Terrific, thanks. I'm going to graft this onto the other paragraph that deals with this multi-part question.

I appreciate the quick help.

From: Gray, Joshua Barton
Sent: Friday, May 03, 2013 2:47 PM
To: Signs, Kelly
Subject: Draft on Sec 5 -- Thoughts, edits, etc.?

(b)(5)



From: Signs, Kelly
Sent: Friday, May 03, 2013 12:05 PM
To: Gray, Joshua Barton
Subject: RE: Couple of points on QFRs

Sure. I'm around if you want to give me a call and loop in anyone else from OIA.

From: Gray, Joshua Barton
Sent: Friday, May 03, 2013 12:04 PM
To: Signs, Kelly
Subject: FW: Couple of points on QFRs

Should we discuss today? Not Responsive

From: Kraus, Elizabeth
Sent: Friday, May 03, 2013 10:45 AM
To: Gray, Joshua Barton
Cc: Signs, Kelly
Subject: Fw: Couple of points on QFRs

Possible to coordinate with Kelly, with the proviso, short is very sweet.

Not Responsive

From: Signs, Kelly
Sent: Friday, May 03, 2013 10:36 AM
To: Kraus, Elizabeth
Subject: Couple of points on QFRs

Hi Liz,

I'm looking for your input on the front-end of drafting. (b)(5)

(b)(5)

Kelly, Andrea

From: Feinstein, Richard
Sent: Monday, May 06, 2013 12:00 PM
To: Signs, Kelly; Levitas, Pete
Cc: Mongoven, James F.; Bumpus, Jeanne
Subject: Re: Draft responses to (some) QFRs

Thanks, Kelly. I think these are in good shape. I have not coordinated with Pete on this, so I assume that he is conveying his reaction separately (or perhaps has already done so). There is a typo at the bottom of page 10 ("care" should be "case").

From: Signs, Kelly
Sent: Friday, May 03, 2013 04:16 PM
To: Feinstein, Richard; Levitas, Pete
Cc: Mongoven, James F.; Bumpus, Jeanne
Subject: Draft responses to (some) QFRs

Rich and Pete,

So here they are, the answers assigned to BC for drafting. As you can see, I've deleted questions that others will be responding to. Hopefully, you'll get a look at those answers on Monday.

This has been a joint effort by several folks from Health Care, ACP and Compliance as well as OPC. The good news is that we've got pretty good answers for the majority of questions. The bad news is that we have two questions that still need draft answers (b)(5)

(b)(5)

Lots to read, and there will be more. When you're done, others would like to review these answers, so you can send edits back to me and I'll keep them moving.

Have a good weekend. ~Kelly

Kelly, Andrea

From: Widnell, Nicholas
Sent: Monday, January 14, 2013 4:55 PM
To: Levitas, Pete
Subject: RE: public briefing on Google w/Senate Judiciary staff Leahy

Pete,

Any thoughts about what we should do to prepare?

-----Original Appointment-----
From: Vandecar, Kim
Sent: Monday, January 14, 2013 4:02 PM
To: Levitas, Pete; Blank, Barbara; Widnell, Nicholas
Subject: public briefing on Google w/Senate Judiciary staff Leahy
When: Tuesday, January 15, 2013 11:00 AM-12:00 PM (GMT-05:00) Eastern Time (US & Canada).
Where: tbd

Car will leave HQ at 10:40 and pick up staff at 601 at 10:45. See you tomorrow.

Kelly, Andrea

Subject:	public briefing on Google w/Senate Judiciary staff Leahy
Location:	tbd
Start:	Tue 1/15/2013 11:00 AM
End:	Tue 1/15/2013 12:00 PM
Show Time As:	Tentative
Recurrence:	(none)
Meeting Status:	Not yet responded
Organizer:	Vandecar, Kim
Required Attendees:	Levitas, Pete; Blank, Barbara; Widnell, Nicholas

Kelly, Andrea

Subject:	public briefing on Google w/Senate Judiciary staff Leahy
Location:	tbd
Start:	Tue 1/15/2013 11:00 AM
End:	Tue 1/15/2013 12:00 PM
Show Time As:	Tentative
Recurrence:	(none)
Meeting Status:	Not yet responded
Organizer:	Vandecar, Kim
Required Attendees:	Levitas, Pete; Blank, Barbara; Widnell, Nicholas

Car will leave HQ at 10:40 and pick up staff at 601 at 10:45. See you tomorrow.

Kelly, Andrea

From: Dawson, Rachel Miller
Sent: Sunday, May 05, 2013 10:25 PM
To: Levitas, Pete; Bumpus, Jeanne; Signs, Kelly
Subject: RE: Antitrust Oversight Hearing Transcript 4.16.13
Attachments: antitrust oversight QFRs prelim inj draft answers.docx

Not Responsive

From: Levitas, Pete
Sent: Thursday, May 02, 2013 6:52 PM
To: Dawson, Rachel Miller
Cc: Signs, Kelly
Subject: Re: Antitrust Oversight Hearing Transcript 4.16.13

Thanks.

From: Dawson, Rachel Miller
Sent: Thursday, May 02, 2013 06:39 PM
To: Levitas, Pete
Cc: Signs, Kelly
Subject: RE: Antitrust Oversight Hearing Transcript 4.16.13

Not Responsive

I would appreciate seeing the other answers as soon as I can, no need to wait till they're standardized. Thanks.

From: Levitas, Pete
Sent: Thursday, May 02, 2013 12:16 PM
To: Lehner, Mary; Bumpus, Jeanne; Hippsley, Heather; Feinstein, Richard; Armstrong, Norman; Signs, Kelly; Shonka, David C.; Koslov, Tara Isa; Kraus, Elizabeth; Dawson, Rachel Miller
Cc: Nathan, Jon J.; Kimmel, Lisa
Subject: RE: Antitrust Oversight Hearing Transcript 4.16.13

Thanks Mary – to the extent everyone can send these over on a rolling basis that would be helpful. Also, we're trying to get these finished and in to Mary and Jon and Lisa by cob Tuesday, so if you can send things either over the weekend if they are ready or as early on Monday as possible that will make things easier. Thanks

From: Lehner, Mary
Sent: Wednesday, May 01, 2013 6:29 PM
To: Bumpus, Jeanne; Hippsley, Heather; Feinstein, Richard; Armstrong, Norman; Signs, Kelly; Shonka, David C.; Koslov, Tara Isa; Kraus, Elizabeth; Dawson, Rachel Miller
Cc: Levitas, Pete; Nathan, Jon J.; Kimmel, Lisa
Subject: RE: Antitrust Oversight Hearing Transcript 4.16.13

All,

For ease of administration, Pete has graciously agreed to review and standardize the responses before they come to Jon and me on Tuesday evening. Please coordinate timing with Pete, so that he knows when to expect drafts of the responses you are working on. Thanks so much, everyone –

Mary

From: Kimmel, Lisa
Sent: Wednesday, May 01, 2013 9:06 AM
To: Bumpus, Jeanne; Nathan, Jon J.; Hippsley, Heather; Feinstein, Richard; Armstrong, Norman; Levitas, Pete; Signs, Kelly; Shonka, David C.; Koslov, Tara Isa; Kraus, Elizabeth; Dawson, Rachel Miller; Lehner, Mary
Subject: Re: Antitrust Oversight Hearing Transcript 4.16.13

Thanks Jeanne. Adding Mary Lehner. Please include her on circulation list re testimony. Thanks.

From: Bumpus, Jeanne
Sent: Wednesday, May 01, 2013 09:04 AM
To: Nathan, Jon J.; Kimmel, Lisa; Hippsley, Heather; Feinstein, Richard; Armstrong, Norman; Levitas, Pete; Signs, Kelly; Shonka, David C.; Koslov, Tara Isa; Kraus, Elizabeth; Dawson, Rachel Miller
Subject: FW: Antitrust Oversight Hearing Transcript 4.16.13

Attached please find the transcript of the 4/16 hearing. Some of the Chairwoman's statements are quoted or referred to in to the QFRs.

Kelly, Andrea

Not Responsive

From: Levitas, Pete
Sent: Monday, May 06, 2013 2:46 PM
To: Bumpus, Jeanne; Signs, Kelly
Cc: Vandecar, Kim; Runco, Philip
Subject: RE: Jon and Mary don't need QFRs until Thursday morning

My suggestions – I'll pick up where I left off tomorrow and send around a revised document starting w the qs I haven't gotten to yet. thanks

---

From: Bumpus, Jeanne
Sent: Monday, May 06, 2013 2:27 PM
To: Levitas, Pete; Signs, Kelly
Cc: Vandecar, Kim; Runco, Philip
Subject: Jon and Mary don't need QFRs until Thursday morning

Edith has said she doesn't need them until Friday morning, and Mary just told me she and Jon only need them Thursday morning. A little more time for all.

Kelly, Andrea

From: Dawson, Rachel Miller
Sent: Tuesday, May 07, 2013 7:17 PM
To: Signs, Kelly
Subject: Fw: QFRs

(b)(5)

From: Harrison, Lisa M.
Sent: Tuesday, May 07, 2013 06:30 PM
To: Signs, Kelly
Cc: Shonka, David C.; Dawson, Rachel Miller
Subject: QFRs

Kelly,

I thought you were sending a new draft but I just went ahead and wrote out the changes, based on an earlier OGC version. Let us know if you need any guidance in how these would fit into the current draft.

(b)(5)

Kelly, Andrea

From: Dawson, Rachel Miller
Sent: Tuesday, May 07, 2013 1:53 PM
To: Shonka, David C.
Cc: Harrison, Lisa M.
Subject: FW: revised Google

Importance: High

Bruce liked it and chris made a few minor changes which I included. any more comments or can I go ahead and send it to bc? Thx.

From: White, Christian S.
Sent: Tuesday, May 07, 2013 1:16 PM
To: Dawson, Rachel Miller
Subject: RE: revised Google

(b)(5)

(b)(5)

[redacted]

From: Freedman, Bruce
Sent: Tuesday, May 07, 2013 12:50 PM
To: Dawson, Rachel Miller; Shonka, David C.; White, Christian S.; Harrison, Lisa M.
Subject: Re: revised google

Revisions look good.

(b)(5)

[redacted]

Kelly, Andrea

From: Dawson, Rachel Miller
Sent: Monday, May 06, 2013 2:47 PM
To: Shonka, David C.; Harrison, Lisa M.
Subject: heads up on another issue in antitrust questions for the record

(b)(5)

Kelly, Andrea

From: Dawson, Rachel Miller
Sent: Tuesday, May 07, 2013 3:35 PM
To: Signs, Kelly
Subject: antitrust oversight QFRs prelim inj draft answers.full set.new rmd
Attachments: antitrust oversight QFRs prelim inj draft answers.full set.new rmd.docx

Aside from the current issue of leahy staff's study question, and the possibility that shonka may want to tweak the google questions further, this seems to be all our comments and edits.

Kelly, Andrea

From: Signs, Kelly
Sent: Tuesday, May 07, 2013 12:34 PM
To: Dawson, Rachel Miller
Subject: RE: current qfrs

Yeah, I suspect the formatting will need a redo once we're all done. I'll make sure it all gets put back together.

Not Responsive

From: Signs, Kelly
Sent: Tuesday, May 07, 2013 11:12 AM
To: Levitas, Pete; Gavil, Andrew I.; Koslov, Tara Isa; Dawson, Rachel Miller; Harrison, Lisa M.; Watts, Marianne R.; Bumpus, Jeanne
Subject: RE: current qfrs

Please send edits back to me and I will incorporate them into one document for final review.

From: Levitas, Pete
Sent: Tuesday, May 07, 2013 10:54 AM
To: Signs, Kelly; Gavil, Andrew I.; Koslov, Tara Isa; Dawson, Rachel Miller; Harrison, Lisa M.; Watts, Marianne R.; Bumpus, Jeanne
Subject: current qfrs

When this is final I think that I'd like bc staff to see this again just for google and pfd certainty. I'll start to work on opp stuff soon. Thanks

Kelly, Andrea

From: Kraus, Elizabeth
Sent: Tuesday, May 07, 2013 2:30 PM
To: Levitas, Pete; Signs, Kelly; Gavil, Andrew I.; Koslov, Tara Isa; Dawson, Rachel Miller; Harrison, Lisa M.; Watts, Marianne R.; Bumpus, Jeanne
Subject: RE: current qfrs

These changes are fine with OIA. Thanks Pete.

Liz

Not Responsive

From: Signs, Kelly
Sent: Tuesday, May 07, 2013 11:12 AM
To: Levitas, Pete; Gavil, Andrew I.; Koslov, Tara Isa; Dawson, Rachel Miller; Harrison, Lisa M.; Watts, Marianne R.; Bumpus, Jeanne
Subject: RE: current qfrs

Please send edits back to me and I will incorporate them into one document for final review.

From: Levitas, Pete
Sent: Tuesday, May 07, 2013 10:54 AM
To: Signs, Kelly; Gavil, Andrew I.; Koslov, Tara Isa; Dawson, Rachel Miller; Harrison, Lisa M.; Watts, Marianne R.; Bumpus, Jeanne
Subject: current qfrs

When this is final I think that I'd like bc staff to see this again just for google and pfd certainty. I'll start to work on opp stuff soon. Thanks

Kelly, Andrea

From: Levitas, Pete
Sent: Tuesday, May 07, 2013 12:58 PM
To: Signs, Kelly; Gavil, Andrew I.; Koslov, Tara Isa; Dawson, Rachel Miller; Harrison, Lisa M.; Watts, Marianne R.; Bumpus, Jeanne
Subject: RE: current qfrs
Attachments: QFRs OPP pjl.docx

A few from opp thx

From: Signs, Kelly
Sent: Tuesday, May 07, 2013 11:12 AM
To: Levitas, Pete; Gavil, Andrew I.; Koslov, Tara Isa; Dawson, Rachel Miller; Harrison, Lisa M.; Watts, Marianne R.; Bumpus, Jeanne
Subject: RE: current qfrs

Please send edits back to me and I will incorporate them into one document for final review.

From: Levitas, Pete
Sent: Tuesday, May 07, 2013 10:54 AM
To: Signs, Kelly; Gavil, Andrew I.; Koslov, Tara Isa; Dawson, Rachel Miller; Harrison, Lisa M.; Watts, Marianne R.; Bumpus, Jeanne
Subject: current qfrs

When this is final I think that I'd like bc staff to see this again just for google and pfd certainty. I'll start to work on opp stuff soon. Thanks

Kelly, Andrea

Not Responsive

From: Dawson, Rachel Miller
Sent: Tuesday, May 07, 2013 2:02 PM
To: Harrison, Lisa M.
Subject: FW: current qfrs

This one shows pete's edits (not mine)

From: Levitas, Pete
Sent: Tuesday, May 07, 2013 10:54 AM
To: Signs, Kelly; Gavil, Andrew I.; Koslov, Tara Isa; Dawson, Rachel Miller; Harrison, Lisa M.; Watts, Marianne R.; Bumpus, Jeanne
Subject: current qfrs

When this is final I think that I'd like bc staff to see this again just for google and pfd certainty. I'll start to work on opp stuff soon. Thanks

Kelly, Andrea

From: Dawson, Rachel Miller
Sent: Friday, May 03, 2013 4:20 PM
To: Signs, Kelly
Subject: RE: Draft responses to (some) QFRs

Many thanks.

From: Signs, Kelly
Sent: Friday, May 03, 2013 4:17 PM
To: Dawson, Rachel Miller
Subject: FW: Draft responses to (some) QFRs

Rachel,

Here is a batch from BC. You can send edits back to me. I think I'm holding the pen for now.

Have a great weekend. Kelly

From: Signs, Kelly
Sent: Friday, May 03, 2013 4:16 PM
To: Feinstein, Richard; Levitas, Pete
Cc: Mongoven, James F.; Bumpus, Jeanne
Subject: Draft responses to (some) QFRs

Rich and Pete,

So here they are, the answers assigned to BC for drafting. As you can see, I've deleted questions that others will be responding to. Hopefully, you'll get a look at those answers on Monday.

This has been a joint effort by several folks from Health Care, ACP and Compliance as well as OPC. The good news is that we've got pretty good answers for the majority of questions. The bad news is that we have two questions that still need draft answers (b)(5)

(b)(5)

Lots to read, and there will be more. When you're done, others would like to review these answers, so you can send edits back to me and I'll keep them moving.

Have a good weekend. ~Kelly

Kelly, Andrea

From: Freedman, Bruce
Sent: Monday, May 06, 2013 2:54 PM
To: Shonka, David C.; Dawson, Rachel Miller; White, Christian S.
Cc: Harrison, Lisa M.
Subject: RE: Draft responses to (some) QFRs

Yes definitely.

-----Original Message-----
From: Shonka, David C.
Sent: Monday, May 06, 2013 2:36 PM
To: Freedman, Bruce; Dawson, Rachel Miller; White, Christian S.
Cc: Harrison, Lisa M.
Subject: RE: Draft responses to (some) QFRs

Lisa and Bruce, we are going to get together to discuss this at 5:00. Want to join chris, Rachel and me?

-----Original Message-----
From: Freedman, Bruce
Sent: Monday, May 06, 2013 2:34 PM
To: Dawson, Rachel Miller; Shonka, David C.; White, Christian S.
Cc: Harrison, Lisa M.
Subject: RE: Draft responses to (some) QFRs

I looping in Lisa, who was also involved in these issues. Here are some ideas:

(b)(5)

-----Original Message-----
From: Dawson, Rachel Miller

Sent: Monday, May 06, 2013 1:20 PM
To: Shonka, David C.; White, Christian S.; Freedman, Bruce
Subject: Fw: Draft responses to (some) QFRs

(b)(5)

Timing : Bc is trying to get all the responses to the ch's office by cob tomorrow, and would appreciate comments today if possible to allow this.

Many thanks.

From: Signs, Kelly
Sent: Friday, May 03, 2013 04:17 PM
To: Dawson, Rachel Miller
Subject: FW: Draft responses to (some) QFRs

Rachel,

Here is a batch from BC. You can send edits back to me. I think I'm holding the pen for now.

Have a great weekend. Kelly

From: Signs, Kelly
Sent: Friday, May 03, 2013 4:16 PM
To: Feinstein, Richard; Levitas, Pete
Cc: Mongoven, James F.; Bumpus, Jeanne
Subject: Draft responses to (some) QFRs

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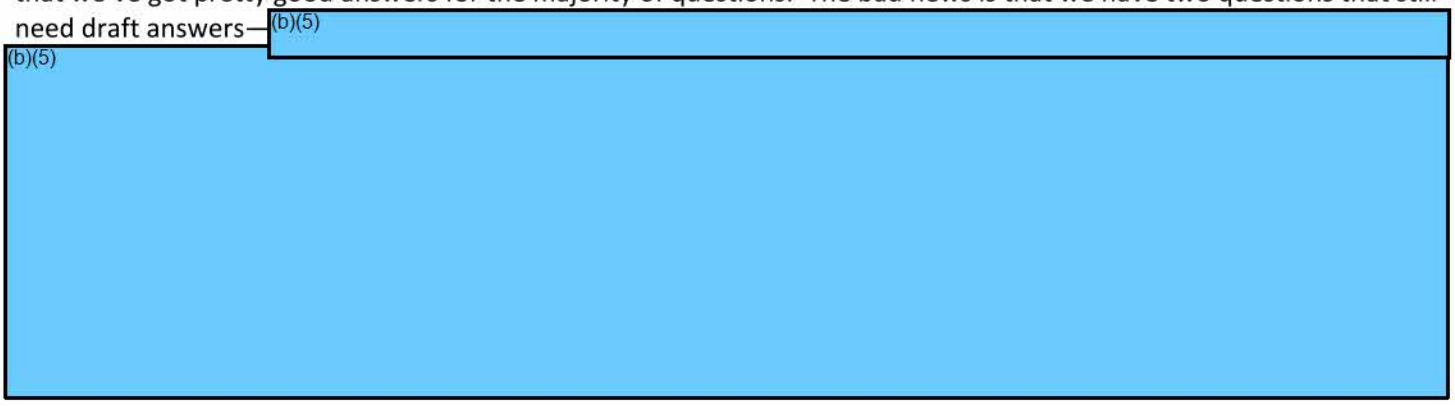

Lots to read, and there will be more. When you're done, others would like to review these answers, so you can send edits back to me and I'll keep them moving.

Have a good weekend. ~Kelly

Kelly, Andrea

From: Signs, Kelly
Sent: Monday, May 06, 2013 2:20 PM
To: Dawson, Rachel Miller
Subject: RE: Draft responses to (some) QFRs

Good, okay.

Not Responsive

From: Dawson, Rachel Miller
Sent: Monday, May 06, 2013 12:55 PM
To: Signs, Kelly
Subject: Fw: Draft responses to (some) QFRs

Kelly - I hope I've managed to attach the docs-to-go version w my comments. They are all in parentheses. Lisa supplied the (few) comments on pfd.

(b)(5)

From: Signs, Kelly
Sent: Friday, May 03, 2013 04:17 PM
To: Dawson, Rachel Miller
Subject: FW: Draft responses to (some) QFRs

Rachel,

Here is a batch from BC. You can send edits back to me. I think I'm holding the pen for now.

Have a great weekend. Kelly

From: Signs, Kelly
Sent: Friday, May 03, 2013 4:16 PM
To: Feinstein, Richard; Levitas, Pete
Cc: Mongoven, James F.; Bumpus, Jeanne
Subject: Draft responses to (some) QFRs

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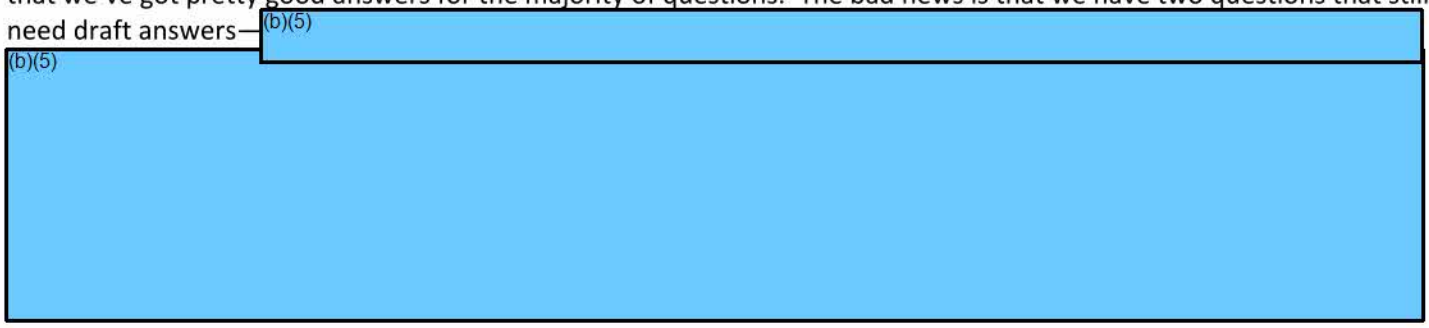

Lots to read, and there will be more. When you're done, others would like to review these answers, so you can send edits back to me and I'll keep them moving.

Have a good weekend. ~Kelly

Kelly, Andrea

From: Signs, Kelly
Sent: Monday, May 06, 2013 1:06 PM
To: Dawson, Rachel Miller
Subject: RE: Draft responses to (some) QFRs

Rachel, I think this is what I sent you. I don't see any comments on this version.

From: Dawson, Rachel Miller
Sent: Monday, May 06, 2013 12:55 PM
To: Signs, Kelly
Subject: Fw: Draft responses to (some) QFRs

Kelly - I hope I've managed to attach the docs-to-go version w my comments. They are all in parentheses. Lisa supplied the (few) comments on pfd.

(b)(5)

From: Signs, Kelly
Sent: Friday, May 03, 2013 04:17 PM
To: Dawson, Rachel Miller
Subject: FW: Draft responses to (some) QFRs

Rachel,

Here is a batch from BC. You can send edits back to me. I think I'm holding the pen for now.

Have a great weekend. Kelly

From: Signs, Kelly
Sent: Friday, May 03, 2013 4:16 PM
To: Feinstein, Richard; Levitas, Pete
Cc: Mongoven, James F.; Bumpus, Jeanne
Subject: Draft responses to (some) QFRs

Rich and Pete,

So here they are, the answers assigned to BC for drafting. As you can see, I've deleted questions that others will be responding to. Hopefully, you'll get a look at those answers on Monday.

This has been a joint effort by several folks from Health Care, ACP and Compliance as well as OPC. The good news is that we've got pretty good answers for the majority of questions. The bad news is that we have two questions that still need draft answers. (b)(5)

(b)(5)

Kelly, Andrea

From: Harrison, Lisa M.
Sent: Monday, May 06, 2013 11:10 AM
To: Dawson, Rachel Miller
Subject: RE: Draft responses to (some) QFRs

I don't think you sent this to me earlier.

Not Responsive

From: Dawson, Rachel Miller
Sent: Monday, May 06, 2013 10:51 AM
To: Harrison, Lisa M.
Subject: Fw: Draft responses to (some) QFRs

Did I send this to you? Some are yours. Thx

From: Signs, Kelly
Sent: Friday, May 03, 2013 04:17 PM
To: Dawson, Rachel Miller
Subject: FW: Draft responses to (some) QFRs

Rachel,

Here is a batch from BC. You can send edits back to me. I think I'm holding the pen for now.

Have a great weekend. Kelly

From: Signs, Kelly
Sent: Friday, May 03, 2013 4:16 PM
To: Feinstein, Richard; Levitas, Pete
Cc: Mongoven, James F.; Bumpus, Jeanne
Subject: Draft responses to (some) QFRs

Rich and Pete,

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(b)(5)

Kelly, Andrea

From: Signs, Kelly
Sent: Friday, May 03, 2013 5:12 PM
To: Dawson, Rachel Miller
Subject: Re: Draft responses to (some) QFRs

Yep

From: Dawson, Rachel Miller
Sent: Friday, May 03, 2013 05:01 PM
To: Signs, Kelly
Subject: RE: Draft responses to (some) QFRs

Is mon am ok?

> **From:** Signs, Kelly
> **Sent:** Friday, May 03, 2013 4:17 PM
> **To:** Dawson, Rachel Miller
> **Subject:** FW: Draft responses to (some) QFRs
>
> Rachel,
>
> Here is a batch from BC. You can send edits back to me. I think I'm holding the pen for now.
>
> Have a great weekend. Kelly

> **From:** Signs, Kelly
> **Sent:** Friday, May 03, 2013 4:16 PM
> **To:** Feinstein, Richard; Levitas, Pete
> **Cc:** Mongoven, James F.; Bumpus, Jeanne
> **Subject:** Draft responses to (some) QFRs
>
> Rich and Pete,
>
> So here they are, the answers assigned to BC for drafting. As you can see, I've deleted questions that others will be responding to. Hopefully, you'll get a look at those answers on Monday.
>
> This has been a joint effort by several folks from Health Care, ACP and Compliance as well as OPC. The good news is that we've got pretty good answers for the majority of questions. The bad news is that we have two questions that still need draft answers (b)(5)

(b)(5)

Kelly, Andrea

From: Vaytsman, Olga
Sent: Monday, May 06, 2013 6:46 PM
To: Dawson, Rachel Miller
Subject: Re: Draft responses to (some) QFRs

(b)(5)

From: Dawson, Rachel Miller
Sent: Monday, May 06, 2013 02:22 PM
To: Vaytsman, Olga
Subject: FW: Draft responses to (some) QFRs

(b)(5)

From: Dawson, Rachel Miller
Sent: Monday, May 06, 2013 1:20 PM
To: Shonka, David C.; White, Christian S.; Freedman, Bruce
Subject: Fw: Draft responses to (some) QFRs

(b)(5)

Timing : Bc is trying to get all the responses to the ch's office by cob tomorrow, and would appreciate comments today if possible to allow this.

Many thanks.

From: Signs, Kelly
Sent: Friday, May 03, 2013 04:17 PM
To: Dawson, Rachel Miller
Subject: FW: Draft responses to (some) QFRs

Rachel,

Here is a batch from BC. You can send edits back to me. I think I'm holding the pen for now.

Have a great weekend. Kelly

From: Signs, Kelly
Sent: Friday, May 03, 2013 4:16 PM
To: Feinstein, Richard; Levitas, Pete

Cc: Mongoven, James F.; Bumpus, Jeanne
Subject: Draft responses to (some) QFRs

Rich and Pete,

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(b)(5)

Lots to read, and there will be more. When you're done, others would like to review these answers, so you can send edits back to me and I'll keep them moving.

Have a good weekend. ~Kelly

Kelly, Andrea

From: Signs, Kelly
Sent: Monday, May 06, 2013 1:59 PM
To: Dawson, Rachel Miller
Subject: RE: Emailing: QFRs for Ramirez_OPCresponses.docx

Yes, I see them now. I will try to pass them on to Pete, who is working with the language right now.

-----Original Message-----
From: Dawson, Rachel Miller
Sent: Monday, May 06, 2013 1:43 PM
To: Signs, Kelly
Subject: Emailing: QFRs for Ramirez_OPCresponses.docx

Did this work?

Kelly, Andrea

From: White, Christian S.
Sent: Tuesday, May 07, 2013 1:24 PM
To: Dawson, Rachel Miller
Subject: RE: revised Google

(b)(5)

From: Dawson, Rachel Miller
Sent: Tuesday, May 07, 2013 1:20 PM
To: White, Christian S.
Subject: RE: revised Google

(b)(5)

From: White, Christian S.
Sent: Tuesday, May 07, 2013 1:16 PM
To: Dawson, Rachel Miller
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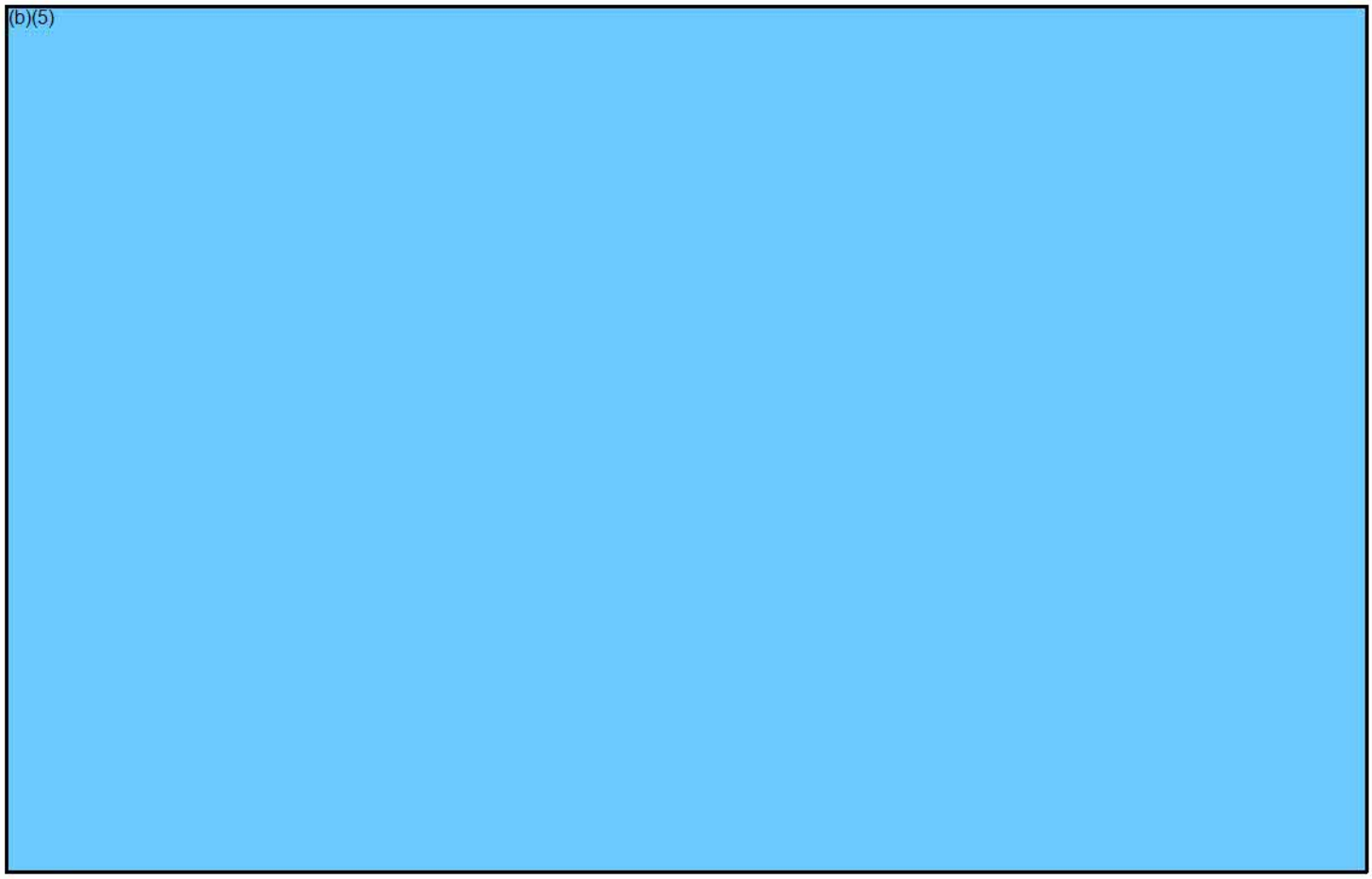
(b)(5)

(b)(5)

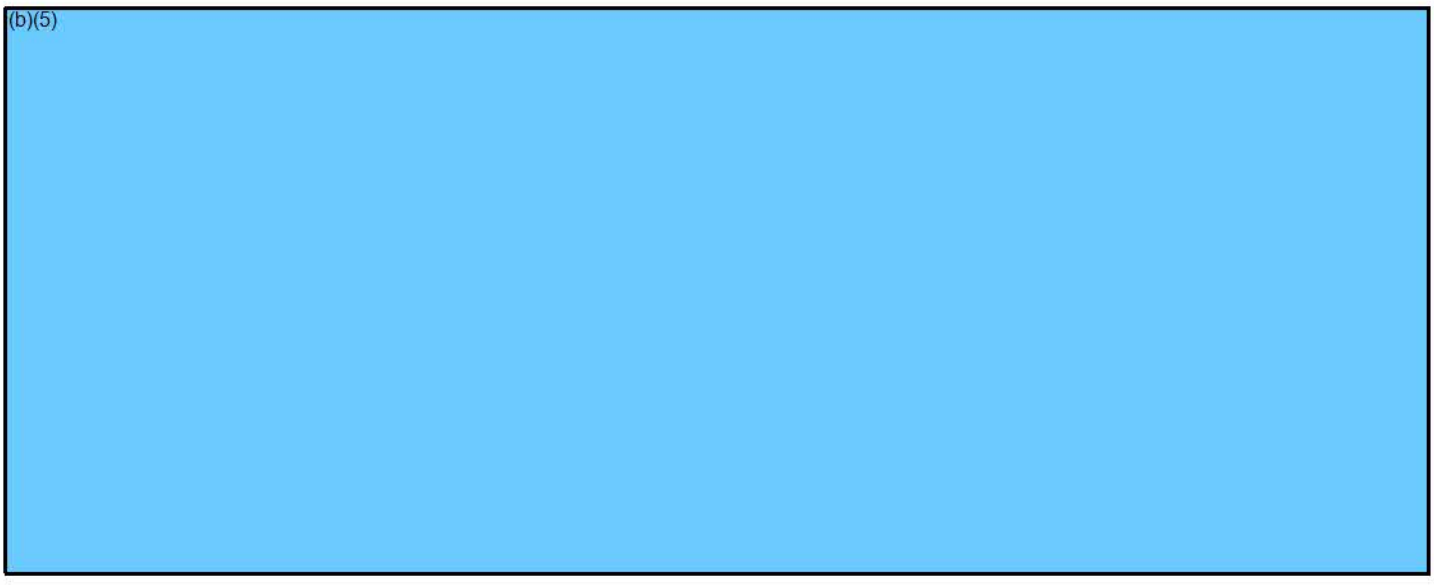


From: Freedman, Bruce
Sent: Tuesday, May 07, 2013 12:50 PM
To: Dawson, Rachel Miller; Shonka, David C.; White, Christian S.; Harrison, Lisa M.
Subject: Re: revised google

Revisions look good.

From: Dawson, Rachel Miller
Sent: Tuesday, May 07, 2013 12:12 PM
To: Shonka, David C.; White, Christian S.; Harrison, Lisa M.; Freedman, Bruce
Subject: revised google

(b)(5)



Kelly, Andrea

From: Harrison, Lisa M.
Sent: Tuesday, May 07, 2013 1:59 PM
To: Dawson, Rachel Miller
Subject: RE: revised Google

Let me know if you'd like me to take a look. I could do so in about 15 minutes.

From: Dawson, Rachel Miller
Sent: Tuesday, May 07, 2013 1:53 PM
To: Shonka, David C.
Cc: Harrison, Lisa M.
Subject: FW: revised Google
Importance: High

Bruce liked it and chris made a few minor changes which I included. any more comments or can I go ahead and send it to bc? Thx.

From: White, Christian S.
Sent: Tuesday, May 07, 2013 1:16 PM
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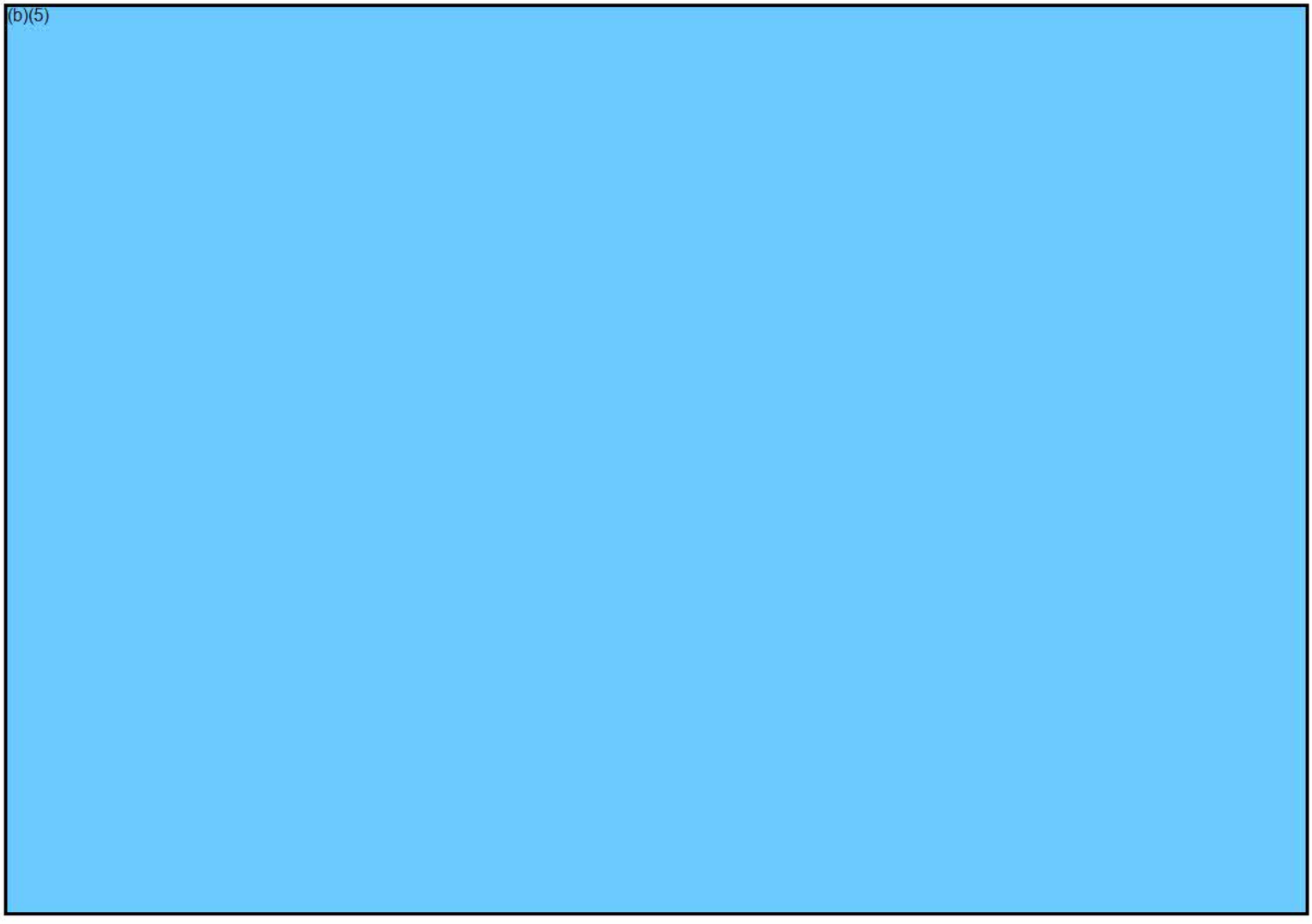
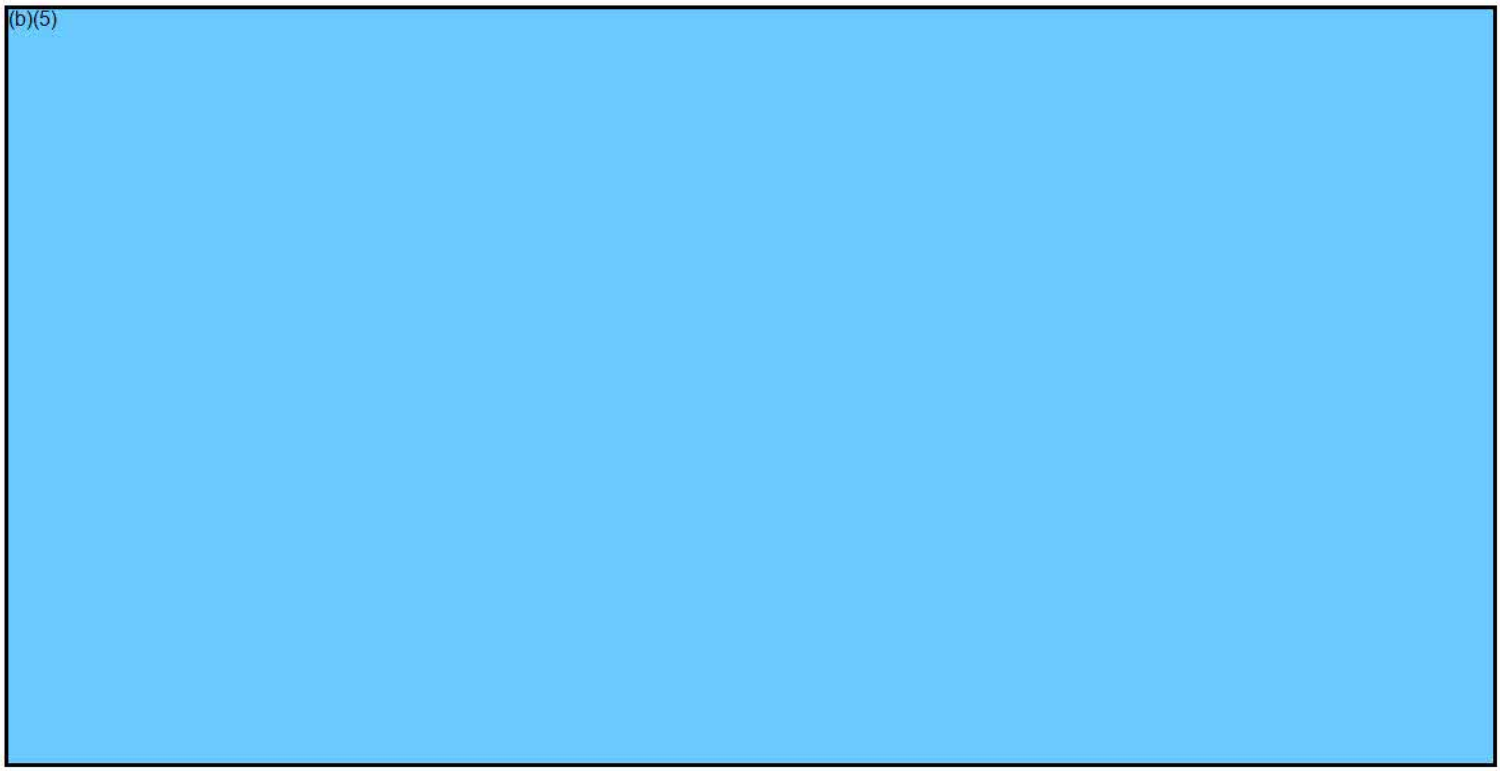
(b)(5)



(b)(5)



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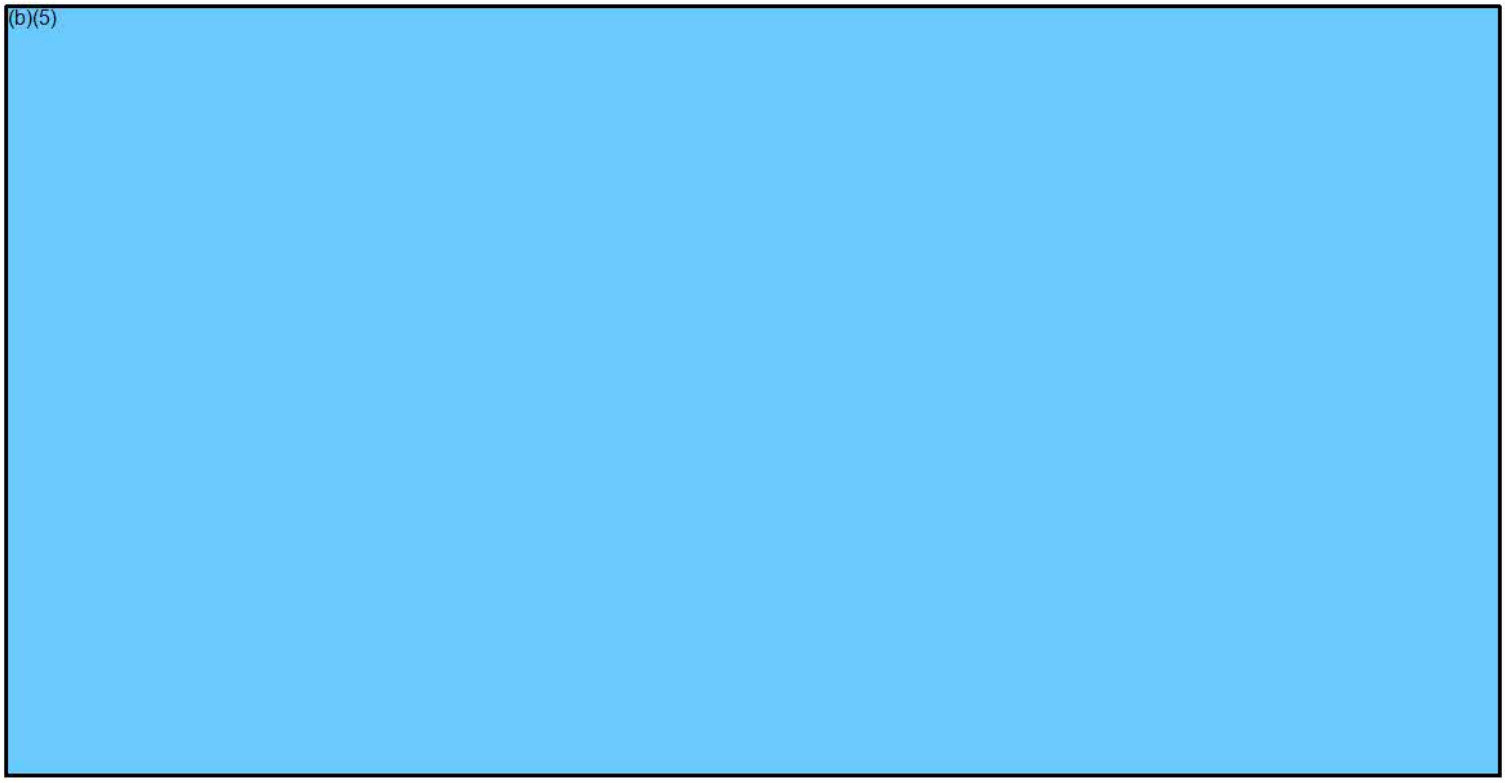

Kelly, Andrea

From: Harrison, Lisa M.
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(b)(5)

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To: Harrison, Lisa M.
Subject: RE: revised Google

(b)(5)

From: Harrison, Lisa M.
Sent: Tuesday, May 07, 2013 2:43 PM
To: Dawson, Rachel Miller; Shonka, David C.
Subject: RE: revised Google

I've put my comments and suggestions in blue underline below.

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Sent: Tuesday, May 07, 2013 1:53 PM
To: Shonka, David C.
Cc: Harrison, Lisa M.
Subject: FW: revised Google
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Bruce liked it and chris made a few minor changes which I included. any more comments or can I go ahead and send it to bc? Thx.

From: White, Christian S.
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(b)(5)

(b)(5)

[redacted]

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To: Dawson, Rachel Miller; Shonka, David C.; White, Christian S.; Harrison, Lisa M.
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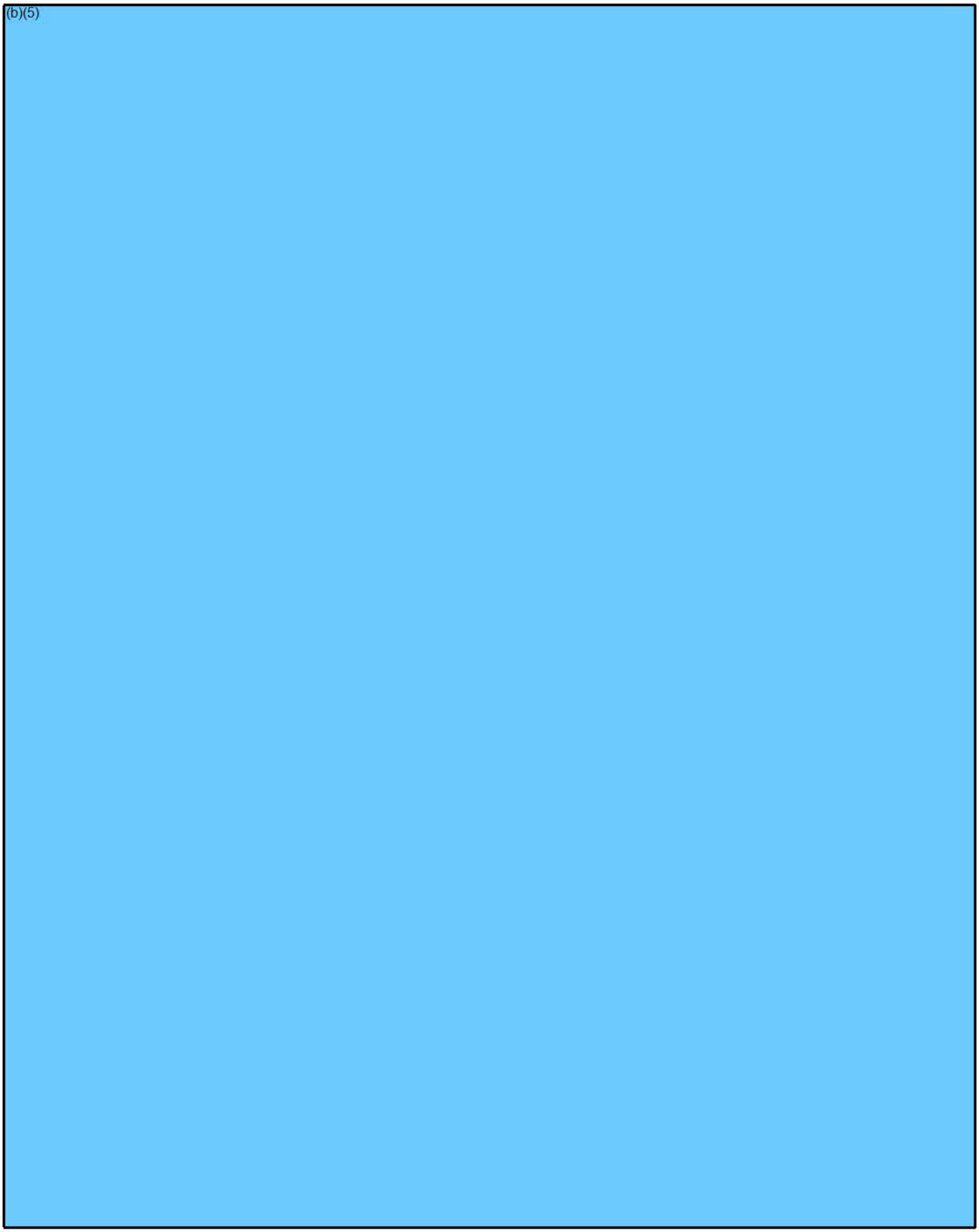

Kelly, Andrea

From: Harrison, Lisa M.
Sent: Tuesday, May 07, 2013 5:29 PM
To: Shonka, David C.; Dawson, Rachel Miller
Subject: RE: revised Google

I'm going to enter these in below since Rachel is working at home. I'm not sure a pdf would be legible.

From: Shonka, David C.
Sent: Tuesday, May 07, 2013 5:24 PM
To: Harrison, Lisa M.; Dawson, Rachel Miller
Subject: RE: revised Google

Lisa, I put a few handwritten suggestions on your chair.

From: Harrison, Lisa M.
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To: Dawson, Rachel Miller; Shonka, David C.
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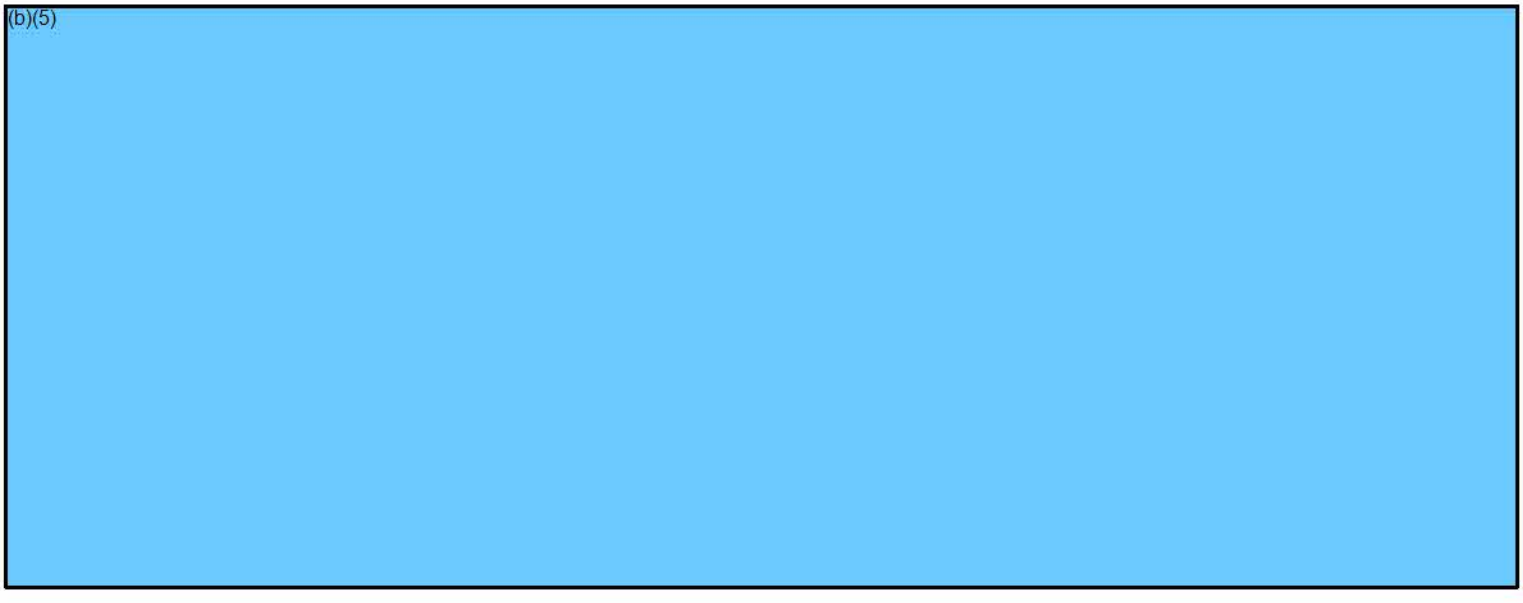

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To: Shonka, David C.; White, Christian S.; Harrison, Lisa M.; Freedman, Bruce
Subject: revised google

(b)(5)

Kelly, Andrea

From: Harrison, Lisa M.
Sent: Tuesday, May 07, 2013 5:35 PM
To: Shonka, David C.; Dawson, Rachel Miller
Subject: RE: revised Google

I called Kelly Signs in BC about this, who currently holds the pen. She will send me soon a new clean version, and then I'll input Dave's edits and send back to her and Rachel.

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To: Harrison, Lisa M.; Dawson, Rachel Miller
Subject: RE: revised Google

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From: Harrison, Lisa M.
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To: Dawson, Rachel Miller; Shonka, David C.
Subject: RE: revised Google

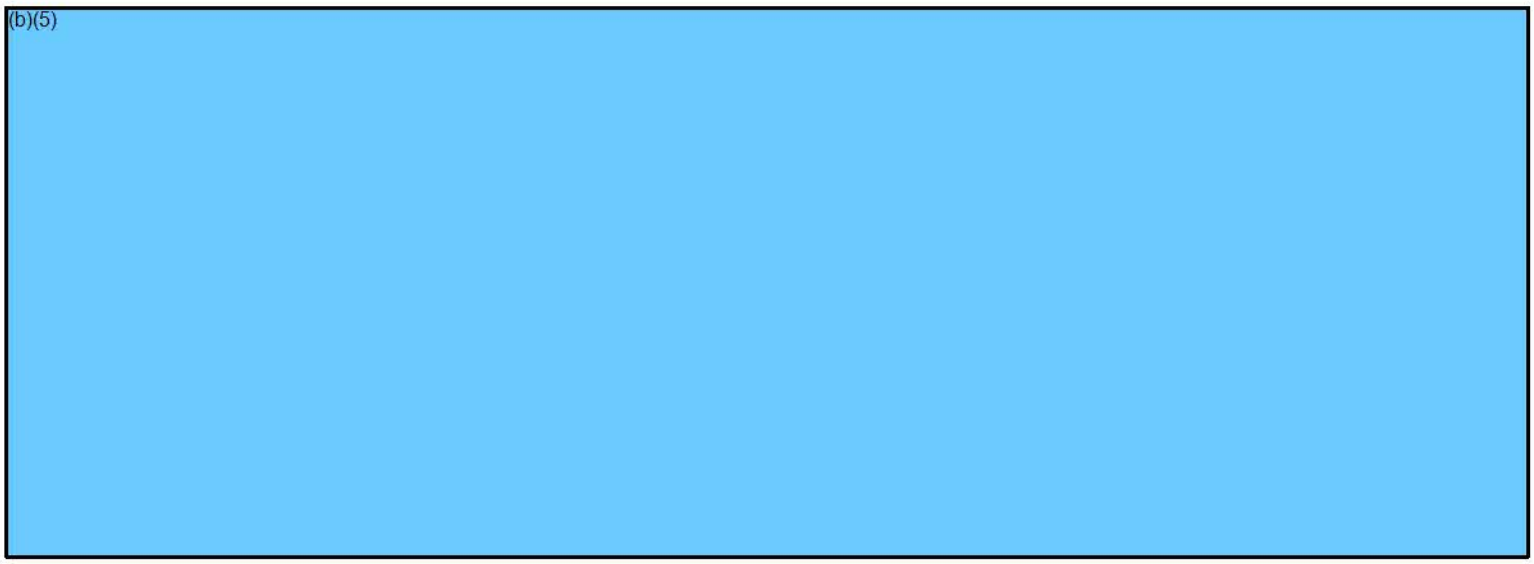
I've put my comments and suggestions in blue underline below.

From: Dawson, Rachel Miller
Sent: Tuesday, May 07, 2013 1:53 PM
To: Shonka, David C.
Cc: Harrison, Lisa M.
Subject: FW: revised Google
Importance: High

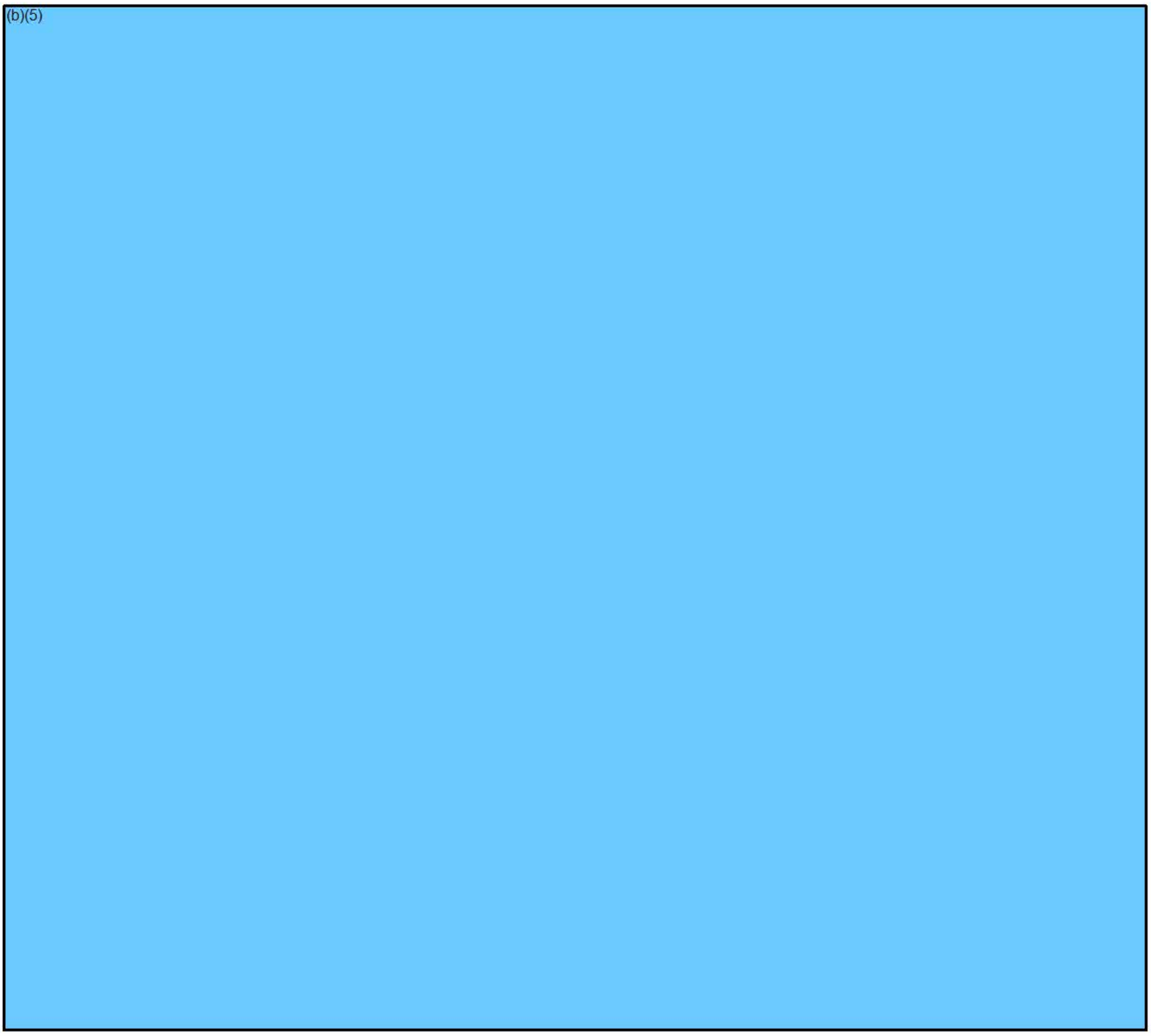
Bruce liked it and chris made a few minor changes which I included. any more comments or can I go ahead and send it to bc? Thx.

From: White, Christian S.
Sent: Tuesday, May 07, 2013 1:16 PM
To: Dawson, Rachel Miller
Subject: RE: revised Google

(b)(5)



(b)(5)



From: Freedman, Bruce
Sent: Tuesday, May 07, 2013 12:50 PM
To: Dawson, Rachel Miller; Shonka, David C.; White, Christian S.; Harrison, Lisa M.
Subject: Re: revised google

Revisions look good.

From: Dawson, Rachel Miller
Sent: Tuesday, May 07, 2013 12:12 PM
To: Shonka, David C.; White, Christian S.; Harrison, Lisa M.; Freedman, Bruce
Subject: revised google

Kelly, Andrea

From: Dawson, Rachel Miller
Sent: Wednesday, May 01, 2013 2:48 PM
To: Signs, Kelly
Cc: Harrison, Lisa M.; Watts, Marianne R.
Subject: Re: 4-16-13 Antitrust Hearing - Questions for the Record (Ramirez)

Not Responsive

From: Signs, Kelly
Sent: Wednesday, May 01, 2013 02:04 PM
To: Dawson, Rachel Miller; Harrison, Lisa M.; Watts, Marianne R.
Subject: FW: 4-16-13 Antitrust Hearing - Questions for the Record (Ramirez)

Not Responsive

In the meantime, we've got BC, OPP and OIA drafting responses to all the other questions. You should see drafts from various people sometime on Monday. The hope is to get something back to Jeanne on Tuesday early.

Call if you have any questions or need other background material. We have quite a bit on this topic, most of which I believe you have as well.

Good luck! Kelly

From: Bumpus, Jeanne
Sent: Tuesday, April 30, 2013 6:00 PM
To: Clark, Donald S.
Cc: Signs, Kelly; Vandecar, Kim; Runco, Philip; Nathan, Jon J.; Kimmel, Lisa; Hippsley, Heather; Dawson, Rachel Miller; Shonka, David C.; Kraus, Elizabeth; Koslov, Tara Isa
Subject: FW: 4-16-13 Antitrust Hearing - Questions for the Record (Ramirez)

Attached please find the post hearing questions. Replies are due May 14. The questions are quite extensive, particularly from Senator Lee. I have copied all of the Bureaus/Offices I anticipate will need to be involved in preparing draft responses for the Chairwoman. The questions cover the following topics:

Sen. Grassley
PFD

Sen. Leahy
GPOs
PAEs
Various aspects of Google and agency technical expertise

Sen. Lee
Section 2 guidance
Section 5
Differences in standards/procedures between FTC and DoJ
Voluntary commitments

Standard used in Google
Coordination with states on Google
Clearance
SEPs and Bosch
PFD
PAEs and 6(b) study
Mandatory IP licensing by foreign authorities
Eyeglass prescriptions
International transparency
Use of advocacy resources

Sen. Klobuchar
Role of antirust
Clearance
SEPs

From: Kartzmer, Melanie (Judiciary) [mailto:Melanie_Kartzmer@judiciary-dem.senate.gov]
Sent: Tuesday, April 30, 2013 2:35 PM
To: Bumpus, Jeanne
Cc: Holland, Caroline (Judiciary-Dem); Ross, Halley (Judiciary)
Subject: 4-16-13 Antitrust Hearing - Questions for the Record (Ramirez)

Dear Ms. Jeanne Bumpus:

Attached please find a letter from Chairman Leahy as well as questions submitted for the record to Chairwoman Ramirez from Senator Leahy, Senator Klobuchar, Senator Grassley and Senator Lee.

Please do not hesitate to contact me should you have any questions or need any additional information.

Best,

Melanie

Melanie Kartzmer
Hearing Clerk
Committee on the Judiciary
http://judiciary.senate.gov/

Kelly, Andrea

From: Dawson, Rachel Miller
Sent: Thursday, May 02, 2013 1:45 PM
To: Watts, Marianne R.; Harrison, Lisa M.
Subject: FW: Antitrust Oversight Hearing Transcript 4.16.13

fyi

From: Koslov, Tara Isa
Sent: Thursday, May 02, 2013 1:45 PM
To: Levitas, Pete; Lehner, Mary; Bumpus, Jeanne; Hippsley, Heather; Feinstein, Richard; Armstrong, Norman; Signs, Kelly; Shonka, David C.; Kraus, Elizabeth; Dawson, Rachel Miller; Gavil, Andrew I.; Munck, Suzanne
Cc: Nathan, Jon J.; Kimmel, Lisa
Subject: RE: Antitrust Oversight Hearing Transcript 4.16.13

I'm adding Andy and Suzanne to the distribution list, since we're all working on various pieces of this project. Thanks!

From: Levitas, Pete
Sent: Thursday, May 02, 2013 12:16 PM
To: Lehner, Mary; Bumpus, Jeanne; Hippsley, Heather; Feinstein, Richard; Armstrong, Norman; Signs, Kelly; Shonka, David C.; Koslov, Tara Isa; Kraus, Elizabeth; Dawson, Rachel Miller
Cc: Nathan, Jon J.; Kimmel, Lisa
Subject: RE: Antitrust Oversight Hearing Transcript 4.16.13

Thanks Mary – to the extent everyone can send these over on a rolling basis that would be helpful. Also, we're trying to get these finished and in to Mary and Jon and Lisa by cob Tuesday, so if you can send things either over the weekend if they are ready or as early on Monday as possible that will make things easier. Thanks

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From: Lehner, Mary
Sent: Wednesday, May 01, 2013 6:29 PM
To: Bumpus, Jeanne; Hippsley, Heather; Feinstein, Richard; Armstrong, Norman; Signs, Kelly; Shonka, David C.; Koslov, Tara Isa; Kraus, Elizabeth; Dawson, Rachel Miller
Cc: Levitas, Pete; Nathan, Jon J.; Kimmel, Lisa
Subject: RE: Antitrust Oversight Hearing Transcript 4.16.13

All,

For ease of administration, Pete has graciously agreed to review and standardize the responses before they come to Jon and me on Tuesday evening. Please coordinate timing with Pete, so that he knows when to expect drafts of the responses you are working on. Thanks so much, everyone –

Mary

From: Kimmel, Lisa
Sent: Wednesday, May 01, 2013 9:06 AM
To: Bumpus, Jeanne; Nathan, Jon J.; Hippsley, Heather; Feinstein, Richard; Armstrong, Norman; Levitas, Pete; Signs, Kelly; Shonka, David C.; Koslov, Tara Isa; Kraus, Elizabeth; Dawson, Rachel Miller; Lehner, Mary
Subject: Re: Antitrust Oversight Hearing Transcript 4.16.13

Thanks Jeanne. Adding Mary Lehner. Please include her on circulation list re testimony. Thanks.

From: Bumpus, Jeanne
Sent: Wednesday, May 01, 2013 09:04 AM
To: Nathan, Jon J.; Kimmel, Lisa; Hippsley, Heather; Feinstein, Richard; Armstrong, Norman; Levitas, Pete; Signs, Kelly; Shonka, David C.; Koslov, Tara Isa; Kraus, Elizabeth; Dawson, Rachel Miller
Subject: FW: Antitrust Oversight Hearing Transcript 4.16.13

Attached please find the transcript of the 4/16 hearing. Some of the Chairwoman's statements are quoted or referred to in to the QFRs.

Questions for the Record Of Senator Patrick Leahy (D-Vt.),
Chairman, Senate Judiciary Committee
Hearing before the Senate Committee on the Judiciary
Subcommittee on Antitrust, Competition Policy and Consumer Rights
on "Oversight of the Enforcement of the Antitrust Laws"
April 16, 2013

Questions for Chairwoman Ramirez

1) In 2012, the Government Accountability Office (GAO) issued a report concerning Federal oversight and self-regulation of Group Purchasing Organizations (GPOs). This area has long been of interest to the Judiciary Committee. After I raised concerns about the potential impact on patient costs of GPO contracting practices with the Justice Department in 2000, and the Department of Health and Human Services in 2001, the Antitrust Subcommittee held a series of hearings on GPO practices that culminated in a joint report by the Department of Justice and Federal Trade Commission in 2004. During the hearings, many expressed concern that fees paid by vendors to GPOs distort demand, resulting in higher prices for hospitals and consumers.

Although the Department of Justice and FTC have investigated complaints against various GPOs, since 2004 the Department has filed only one lawsuit against a GPO under the antitrust laws, and the FTC has filed none. The GAO's 2012 report observed: "While the oversight of GPOs is conducted through the exercise of investigatory authorities of HHS, DOJ, and FTC… this oversight does not address other key questions that have previously been raised about GPOs' activities. For example, inasmuch as the collection of contract administrative fees is permitted under the safe harbor provision to the Anti-Kickback statute and safe harbor regulation, this oversight cannot address whether or to what extent these fees create a financial incentive that is inconsistent with GPOs obtaining the lowest prices for their customers."

Do you believe that the current legislative framework is sufficient to address the risk of undesirable conduct by GPOs that increases prices for consumers? Do you agree that the legal framework could be strengthened through other measures, such as revisiting the safe harbor for GPOs provided in the Anti-Kickback Statute?

2) Last year, I asked then-Commissioner Ramirez and the Acting Assistant Attorney General for Antitrust, Joseph Wayland, whether "patent trolling" behavior by certain patent-assertion entities could constitute an antitrust violation. Mr. Wayland responded: "Any effort by a patent owner to harm competition by improperly extending the exclusionary scope of its patent . . . may violate the antitrust laws, and allegations of such actions merit investigation." I was pleased that your agencies recently held a joint workshop to further investigate this question. How do your agencies intend to follow up on the workshop?

3) In your testimony, you stated that the FTC has heard reports of patent assertion entities making unsubstantiated claims relative to small businesses. Unfortunately, I continue to hear frequently about this problem from small businesses in Vermont and across the country. What steps can the FTC take to address this conduct through its consumer protection authority? Will

you agree to monitor such activity and take appropriate action to address abusive behavior by patent trolls?

4) Earlier this year, the FTC concluded its investigation of Google's search engine practices. A majority of Commissioners found that certain practices used by Google threatened competition and innovation, yet the FTC relied on voluntary commitments from Google to end those practices, instead of a consent order.

a. In your testimony, you expressed concern about the use of voluntary commitments to address anticompetitive violations. Can you please elaborate on that? What actions does the FTC intend to take to enforce Google's commitments?

b. In discussing potential remedies, some commentators noted the challenges involved in overseeing a technologically complex business practice that is constantly being updated, such as a search engine algorithm. How is the Commission responding to the challenges of enforcement in an online world?

c. In your testimony, you said that the FTC concluded that certain changes made by Google to its search engine algorithm were "pro-competitive" because they were "designed to improve the overall search experience for the user," even though they had the effect of negatively impacting rivals. Would your analysis have come out differently if the FTC had focused on the harm experienced by Google's other "users"; namely, the advertisers who pay to post ads on its site? How did the FTC determine its framework of analysis in assessing the procompetitive justifications of Google's conduct?

d. In light of the recent reports of action by your European counterpart authorities, is the FTC taking any further action in these matters?

Senator Klobuchar's Questions for the Record
Subcommittee on Antitrust, Competition Policy and Consumer Rights
"Oversight of the Enforcement of the Antitrust Laws"

For Chairwoman Ramirez:

1. In these tough budget times, we're asking every agency to do more with less. Can you explain to us the value that you think antitrust enforcement brings to consumers and the economy as a whole?

2. The Antitrust Division and the Federal Trade Commission share responsibility for government enforcement of the federal antitrust laws. Sometimes this leads to conflicts regarding which agency will review a merger, what is known as the "clearance process." In some cases, the agencies take a long time, sometimes nearly the entire length of the thirty day pre-merger waiting period, to decide which one will investigate a merger. This unnecessarily delays resolution of the merger investigation, and imposes unnecessary burdens on the merging parties.

    - What is your agency doing to resolve clearance disputes in a more effective way? Are you working with the Antitrust Division/FTC, as the Antitrust Modernization Commission suggested in 2007, to develop a new merger clearance agreement?

3. Recently, standard essential patents have been the subject of several cases filed at the International Trade Commission (ITC). We can all agree that standardization of technology and standard essential patents have been critical to the development of a competitive market for smartphones and tablets. But recently, concerns have been raised about the practice of bringing standard essential patents cases to the ITC seeking an exclusion order to prevent products with the patents from being imported into the U.S. Some worry that the ITC exclusion orders related to standard essential patents could gravely harm competition.

    - What sorts of negative effects might the use of exclusion orders regarding standard essential patents have on competition and consumer welfare in general?

    - Is there any justification for the use of exclusion orders in the context of standard essential patents?

Written Questions of Senator Chuck Grassley for Judiciary Antitrust Subcommittee Hearing "Oversight of the Enforcement of the Antitrust Laws", April 16, 2013

Questions for Federal Trade Commission Chairwoman Ramirez

1. As you know, I've been concerned about settlement agreements between brand name and generic drug manufacturers that result in a payment to the generic manufacturer and a delay in market entry of the generic drug. These "pay for delay" or "reverse payment" agreements result in consumers having to pay higher costs for their drugs. Senator Kolbuchar and I have introduced a bill, the Preserve Access to Affordable Generics Act, that would help put a stop to these anti-competitive agreements and ensure that lower priced generic drugs enter the market as soon as possible. Former Chairman Jon Leibowitz was very supportive of our efforts to address this anti-competitive practice.

    a. Do you agree that these "pay for delay" agreements harm consumers?

    b. Do you agree that these kinds of agreements still a problem?

    c. What is the FTC doing to prevent these kinds of agreements?

    d. Do you believe that the Klobuchar/Grassley legislation would help preserve generic drug competition and ensure that more affordable drugs get to consumers as expeditiously as possible?

"Oversight of the Enforcement of the Antitrust Laws"
Senate Antitrust Subcommittee Hearing
April 16, 2013

Written Questions
Senator Michael S. Lee

Questions for Chairwoman Ramirez

1. In 2008, the Department of Justice released a report on Section 2 of the Sherman Act. The report was later withdrawn. That report provided the business community with guidance on applicable principles in Section 2 enforcement actions.

    a. Do you agree with the 2008 report's findings and conclusions?

    b. If not, with which specific findings and conclusions do you disagree?

    c. Do you agree that it would be helpful for the business community to have formal guidance on the enforcement agencies' approach to Section 2 enforcement?

    d. Will you commit to work with Mr. Baer to develop and publish formal guidance on Section 2 enforcement?

2. The Federal Trade Commission, particularly under the previous Chairman, has been in the practice of reaching settlements in cases brought under Section 5 of the FTC Act. These settlements are not subsequently reviewed by a court to establish a clear record of Section 5 enforcement boundaries. At the same time, the Commission has yet to provide definitive guidance as to how Section 5 can be used to enforce unfair methods of competition beyond the traditional scope of antitrust laws.

    a. Do you plan to continue the practice of enforcing Section 5 by means of settlements outside of court review?

    b. How do you think a practice of open-ended enforcement might be perceived in foreign jurisdictions where basic rule of law principles are often lacking?

    c. What formal guidance will you provide the business community regarding Section 5 enforcement?

3. At our Subcommittee's hearing last week, in response to a question regarding Section 5 of the FTC Act, you stated that you believe the Commission "has been using its Section 5 authority very rigorously and very judiciously," and that the agency is providing some measure of guidance through the pattern of its decisions.

    a. If the Commission is applying Section 5 "cautiously" and wishes to provide useful enforcement guidance, why are you resistant to provide such guidance in a more comprehensive, published form upon which the business community and others can meaningfully rely?

4. Some have expressed concern that the Commission's approach to Section 5 enforcement has left many in the business community confused and uncertain as the contours of that provision and the breadth of possible enforcement actions.

    a. Do you believe that the Commission may use Section 5 to create convergence with U.S. antitrust doctrine and that of international jurisdictions?

    b. Do you believe the Commission may use Section 5 to place additional emphasis within U.S. competition policy on consumer choice as a touchstone of antitrust law?

    c. Do you believe the Commission may use Section 5 to bring actions that increasingly incorporate analysis and assumptions based on behavioral economics?

5. At our Subcommittee's hearing last week, you stated that you believe the standards used by the FTC and the DOJ for obtaining a preliminary injunction are "quite similar" and that "as a practical matter what each agency needs to do is go before a judge and show and provide evidence that backs up the charges that are being made." You further stated that you "believe it would be difficult to point to a specific situation where…a case would have led to a different outcome had it been handled by a different agency."

    a. In its 2007 Report and Recommendations, the Antitrust Modernization Commission wrote that the "FTC's ability to continue a merger case in administrative litigation also may lead companies whose transactions are investigated by the FTC to feel greater pressure to settle a matter than if they had been investigated by the DOJ."

        i. Should companies face greater pressure to settle if their mergers are reviewed by the FTC rather than the DOJ?

        ii. Do you agree that even the perception of a more lenient standard for FTC cases than those brought by the DOJ could result in a practical difference for litigants who must weigh litigation risk?

    b. The 2007 Report further states that differences in the preliminary injunction standards faced by the FTC and the DOJ, whether real or perceived, "can undermine the public's confidence that the antitrust agencies are reviewing mergers efficiently and fairly and that it does not matter which agency reviews a given merger."

        i. Do you agree that public confidence is important and can be affected by public perception of differing standards applied to identical issues?

        ii. Do you agree that it would be problematic if the identity of the reviewing agency led to different outcomes due to the parties' perception that the FTC and the DOJ face different standards for obtaining a preliminary injunction?

        iii. What measures do you believe appropriate to remedy any perceived or real inconsistency in the preliminary injunction standards faced by the agencies?

    c. In *FTC v. CCC Holdings*, the district court granted the FTC's request for a

preliminary injunction. The judge noted that although the defendants' arguments might "ultimately win the day," under Section 13(b) the trial court needed only to determine that "the FTC had raised questions that are so 'serious, substantial, difficult and doubtful' that they are 'fair ground for thorough investigation, study, deliberation and determination by the FTC'" to conclude that a preliminary injunction should issue. Commentators have written that "[t]he importance of the CCC Holdings decision therefore is not merely academic, and the resulting agency divergence is not merely procedural. It may be outcome determinative in some cases."[1]

i. Do you believe the standard applied by the district court in *FTC v. CCC Holdings* was the same as the preliminary injunction standard applicable to the DOJ in a merger case?

ii. Do you agree that application of that lower standard may have had an impact on the outcome of the case, in the sense that the outcome may have been different if the DOJ standard had been applied?

d. In the *Whole Foods* litigation, the FTC argued on appeal before the D.C. Circuit: "This Court has recognized, in keeping with the intent of Congress in creating the Commission and in enacting Section 13(b), that the Commission is not required to 'prove' any aspect of its case in order to secure a preliminary injunction in aid of its own adjudicative and remedial powers; rather, it need only show 'serious, substantial' questions requiring plenary administrative consideration. The district court's contrary approach ignores the statutory scheme, and effectively usurps the adjudicative role of the Commission."[2]

i. Do you contend the standard the Commission advanced in the *Whole Foods* appeal was the same standard DOJ has to meet in order to obtain a preliminary injunction in a merger case?

e. *FTC v. Libbey, Inc.*, 211 F. Supp.2d 34 (D.D.C. 2002), is another case in which a court applied a lower preliminary injunction standard to an FTC merger challenge than would have been applied if DOJ had brought the case.

i. Do you agree that the standard applied in that instance may have had an impact on the outcome of the case?

f. In February 2013, the Section of Antitrust Law of the American Bar Association issued a report entitled *Presidential Transition Report: The State of Antitrust Enforcement 2012*. The report commented that some circuits have relaxed the standard imposed on the FTC from the standard applicable to the DOJ. The Section noted that the standards applied in cases brought by the FTC differ from those in DOJ cases in other ways as well. The Section urged the FTC to adopt procedures "that will ensure that in merger cases it will seek injunctions only under the same equitable

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[1] Peter Love and Ryan C. Thomas, *FTC v. CCC Holdings: Message Received*, GCP (April 2009) at 10.
[2] http://www.ftc.gov/os/caselist/0710114/080114ftcwholefoodsproofbrief.pdf at 27.

standard for a preliminary injunction as that applied to Division injunction cases." Absent such procedures, the report urged the Administration "to seek legislative changes to Section 13(b) of the Federal Trade Commission Act that will make it consistent with traditional equitable standards for injunctive relief."

i. Will you commit to adopt procedures to ensure that the Commission only seeks preliminary injunctions under the same equitable standards that apply to DOJ actions?

ii. Would you support legislation to clarify that the FTC and the DOJ must satisfy identical standards to obtain a preliminary injunction?

iii. If you remain convinced that the differing standards applied to FTC and DOJ actions are "quite similar" and as a practical matter lead to little if any difference in outcome, what would be the harm in clarifying that the applicable standard is in fact the same or in establishing a unified standard?

6. At our Subcommittee's hearing last week, you expressed concern that an acceptance by the Commission of voluntary commitments, as opposed to a consent order, would create confusion over its settlement practices. You suggested that the Commission's acceptance of voluntary commitments by Google should not be considered precedent. Yet, other companies under investigation may believe they need not enter into binding consent decrees, instead asking to be treated by the Commission in the same manner as Google. In addition to an appearance of favoritism the Google agreement may create, I am concerned about informal and illegitimate regulatory creep when the Commission seeks to secure voluntary commitments from private companies. If a majority of commissioners finds a violation there should be a formal consent order. If a majority does not find a violation, the Commission has no authority to interfere in the market and should not pursue any enforcement action, whether voluntary or not.

   a. Now that the Commission has in fact negotiated and accepted a voluntary commitment in lieu of consent order, what specifically do you plan to do to correct perceptions and assumptions about future enforcement actions?

   b. If the Commission does not plan to follow the standard of settlement practices used in this case ever again, how will you respond to assertions that Google received special treatment from the Commission?

7. At our Subcommittee's hearing last week, you seemed to agree with me that voluntary commitments are an illegitimate approach for the Commission to use in seeking to resolve antitrust violations.

   a. Under your leadership, will the Commission move to correct this misstep and seek to embody Google's voluntary commitments in a formal consent order?

8. At our Subcommittee's hearing last week, you stated that if Google does not uphold and complete its voluntary commitments from the settlement, the Commission will take "appropriate action."

a. Given that there is no Commission precedent for dealing with this type of voluntary commitment, what specifically would that appropriate action entail?

b. Would such action require the Commission to undergo another complex and lengthy investigative proceeding, which could allow harmful business practices to continue undeterred until there is a formal settlement?

9. The Commission's closing statement in the Google matter concluded: "Challenging Google's product design decisions in this case would require the Commission – or court – to second-guess a firm's product design decisions where plausible procompetitive justifications have been offered, and where those justifications are supported by ample evidence." Similarly, Chairman Leibowitz's opening remarks stated: "Google's primary reason for changing the look and feel of its search results to highlight its own products was to improve the user experience."

   a. This approach appears to differ from the standard set forth in the Microsoft case and the standard that you said the Commission used to evaluate Google's conduct. Under the Microsoft decision, the Commission, or a court, must examine whether "the anticompetitive effect of the challenged action outweighs [any proffered justification for the product design change]." United States v. Microsoft Corp, 253 F.3d 34, 67 (D.C. Cir. 2001). It would have required the Commission to apply a balancing test rather than concluding its analysis simply upon a finding that Google put forth a plausible business justification, as suggested by the Commission's closing statement and Chairman Leibowitz's remarks. Please explain this apparent inconsistency.

   b. What standard will the Commission apply in the future to similar circumstances?

10. Several states have ongoing investigations of Google's conduct.

    a. Did the Commission coordinate its legal and factual analysis with these states?

    b. Did the Commission attempt to work with these states to obtain a coordinated settlement?

11. Google's practice of negotiating exclusionary syndication and distribution agreements was not addressed in the Commission's decision.

    a. Did the Commission review this conduct?

    b. If so, why was it not included in the Commission's final decision?

12. The Commission and the Department of Justice share enforcement of the antitrust laws, both in mergers and conduct investigations. It is not always clear to the parties involved who will review a transaction or business practice. In June 2011, then-Chairman Leibowitz told the Senate Commerce Committee: "It is true that there are occasional clearance disputes over which agency is in the better position to investigate a matter . . . . The FTC and DOJ have a process in place to resolve clearance disputes, which helps resolve the issue quickly." Please provide the Subcommittee:

a. The precise process(es) for resolving these disputes;

b. Examples of the types of agreements that the Commission and the Department have reached in merger and non-merger clearance disputes, including how the parties determine which agency will review a subsequent transaction involving the same company or industry and the duration of such agreements; and

c. The number of such disputes since January 2009 and the average length of time such disputes lasted.

13. The Commission has issued two recent orders that address the meaning of commitments to license on fair, reasonable, and non-discriminatory (FRAND) terms. In *Bosch*, the Commission embraced an order and remedy that many believe represented progress on this issue. A month later, the Commission adopted a more complicated order and remedy in the Google matter, criticized by some as being weak and riddled with loopholes.

    a. Why did the Commission seek such a complicated (and potentially weakened) remedy in the Google matter?

    b. Please explain your view of the *Bosch* decision.

        i. Are you concerned about using a merger review process to require relief on unrelated conduct as a condition for clearing the deal?

14. In the debate over standard essential patents and FRAND commitments, much discussion has focused on the willingness of potential licensees to engage in negotiations.

    a. In your view, what does it mean to be a willing licensee?

    b. Is a licensee unwilling simply because it refuses to accept a stated demand as FRAND or demands that the party demonstrate that its portfolio is composed of valid and infringed patents that have some value apart from its inclusion in the standard?

    c. There has been comparatively little focus on the willingness of SEP holders to engage in good faith negotiations—that is, whether the SEP holder is a willing licensor. Would you agree that there is a burden on the SEP holder to demonstrate the value of its SEP portfolio, a burden that is generally not discharged by merely quoting a rate, particularly when the rate clearly exceeds traditional industry benchmarks?

15. The Commission statement accompanying its decision relating to Google's abuse of certain standard essential patents indicated that "Google's settlement with the Commission requires Google to withdraw its claims for injunctive relief on FRAND encumbered patents around the world."

    a. How many of those claims for injunctive relief have been withdrawn and how many are still open?

    b. What is the Commission doing to ensure compliance with its Order?

16. In testimony before our Committee last July, you expressed concerns about anticompetitive abuse of standard essential patents and stated that the Commission "believes that the ITC has the authority under its public interest obligations . . . to deny an exclusion order if the holder of the FRAND-encumbered SEP has not complied with its FRAND obligation." You also suggested that if the ITC did not act appropriately, Congress should consider giving the ITC more flexibility to deny exclusion orders in such cases.

    a. In your view, has the ITC responded to the concerns you raised?

    b. Do you worry about ITC decisions in cases involving FRAND-encumbered SEPs, given that the only available ITC remedy is an exclusion order?

    c. Do you believe that enforcement action based on anticompetitive abuse of FRAND-encumbered SEPs could and should be pursued under Section 2 of the Sherman Act?

17. At our Subcommittee's hearing last week, there was much discussion of legislation that would impose a presumption that all patent settlements between innovator pharmaceutical companies and generic companies are anticompetitive. By statute, the Commission is already entitled to receive notice of such settlements, so it has ample opportunity to review such settlements for any anticompetitive problems. Both federal statute and Supreme Court case law state that patents are presumed to be valid. 35 U.S.C. § 282; *Microsoft Corp. v. i4i Limited Partnership*, 131 S.Ct. 2238 (2011). Indeed, patent invalidity must be proved by the elevated standard of clear and convincing evidence. *Microsoft*, 131 S.Ct. at 2252. In addition, it is well-settled law that settlements of litigation are highly favored. Yet, your position on patent settlements legislation seems to contradict quite squarely these two well-settled, time-tested principles.

    a. How can you reconcile your position with these principles, particularly when the settlement occurs within the term of the patent?

    b. Do you really believe that all such settlements are necessarily anticompetitive?

    c. Under what conditions might such a settlement be procompetitive in its effect?

18. The Commission's estimated cost savings associated with legislation providing the FTC with additional authorities to prevent parties from settling Hatch-Waxman patent litigation appears to differ from both Office of Management and Budget (OMB) numbers in the President's FY 2014 proposal and previous Congressional Budget Office (CBO) cost savings figures. In fact, there appear to be three entirely different estimates of what, if any, savings there may be.

    a. In light of these discrepancies, what effort has the Commission taken to coordinate information sharing of studies, proposals, or assumptions with OMB and CBO to determine the accuracy and validity of estimated cost savings?

    b. What information related to patent settlements has the Commission received from either CBO or OMB?

c. Has the Commission received any data or information from other public or private organization on patent settlements upon which it has relied in making assumptions about savings from patent settlements? If so, which entities?

19. Many in the IP community are concerned by the growing number of instances in which established operating companies transfer their patents to patent assertion entities (PAEs), so that these entities can target the established company's competitors. Some reports suggest that the operating companies often retain a revenue interest in the assertion of the transferred patents, which have included patents that are subject to commitments to license on FRAND terms. Last week, the Commission's directors of both economics and competition said that they support the issuance of a Section 6(b) order to investigate the PAE industry.

    a. Would you support such an order? If not, why not?

20. Both China and India have draft guidelines or policies that would make it an abuse of intellectual property rights for a dominant company unconditionally and unilaterally to refuse to license its critical intellectual property rights to a competitor who needs access to those rights to compete and innovate. These initiatives are clearly inconsistent with the DOJ's and FTC's Antitrust Guidelines for the Licensing of Intellectual Property, as well as U.S. case law, and could significantly harm innovative American companies operating overseas by undermining their intellectual property.

    a. What is the Commission doing about these broad intellectual property abuse policies that are emerging in key foreign jurisdictions?

    b. Because unconditional refusals to license strike at the heart of intellectual property rights, are you also working with USTR and the PTO to develop a holistic approach for influencing activities overseas?

    c. Are you concerned that open-ended tests for abuse may allow foreign governments to use antitrust policy as a backdoor means for usurping the intellectual property rights of U.S. companies?

21. Some have expressed concern about consumer harm in the prescription eyeglass and contact lens industry. Requiring consumers to obtain a prescription prior to purchasing a product impedes free market forces. Circumstances in which the prescriber is also the retailer of the prescribed product presents a conflict of interest that may lead to anticompetitive behavior. This is especially true when the product is prescribed by brand, locking a consumer into purchasing the brand selected by the prescriber. The Commission has historically taken steps to promote consumer choice in such markets, such as by promulgating the Eye Glass Rule in the late 1970s and the Contact Lens Rule, which implemented the Fairness to Contact Lens Consumers Act, nearly a decade ago. Both of these rules guarantee that upon completion of an eye exam, a consumer has the automatic right to receive copies of his prescriptions without having to make a request, pay a fee, or sign a waiver. These rules provide consumers with the opportunity to exercise that choice when buying contact lenses or eyeglasses.

a. Despite the requirement that patients receive eyeglass prescriptions including all "written specifications. . . necessary to obtain lenses for eyeglasses,"[3] pupillary distance (P/D) measurement is instead typically taken at the store where the eyeglasses are purchased. Now that eyeglasses are available online, it is important that P/D is included in prescriptions given consumers—as required by law—allowing them freedom to purchase eyeglasses where they want, whether at a brick-and-mortar store or online. To help ensure that consumers have this choice, will the Commission issue guidance reminding prescribers of their legal obligation to include on prescriptions all parameters necessary to produce lenses, including the P/D?

22. Under your predecessor, the Commission showed leadership in supporting the development of transparency and procedural fairness norms internationally. That work has been done in the OECD and is now being conducted in the ICN. It has also been incorporated into the Trans-Pacific Partnership and there will be an opportunity to do so in the US-EU Transatlantic Trade and Investment Partnership.

    a. What do you think about the need for increased transparency and due process in antitrust proceedings globally?

    b. Do you plan to continue to work in a similar vein as your predecessors in bringing these issues to forefront of the international antitrust policy debate?

23. Competition policy advocacy has traditionally been an important part of the Commission's role. As part of this function, the Commission recently sent comments to the Colorado PUC to discourage potential taxi regulations that would have had a negative impact on apps like Uber. You recently said that you hope to make the Commission's "research function" a priority during your term as Chair.

    a. Will you commit to devote the Commission's research and advocacy functions to support the development of new entrants to markets that bring competition to consumers and generally lower prices?

[3] 16 CFR 456.1(g).

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510–6275

April 30, 2013

The Honorable Edith Ramirez
Chairwoman
Federal Trade Commission
Washington, DC

Dear Ms. Edith Ramirez:

Thank you for your testimony at the Senate Committee on the Judiciary, Subcommittee on Antitrust, Competition Policy and Consumer Rights, hearing entitled "Oversight of the Enforcement of the Antitrust Laws" on April 16, 2013. Attached are written questions from Committee members. We look forward to including your answers to these questions, along with your hearing testimony, in the formal Committee record.

Please help us complete a timely and accurate hearing record by sending an electronic version of your responses to Melanie Kartzmer, Hearing Clerk, Senate Judiciary Committee, at Melanie_Kartzmer@judiciary-dem.senate.gov, no later than **May 14, 2013**.

Where circumstances make it impossible to comply with the two-week period provided for submission of answers, witnesses may explain in writing and request an extension of time to reply.

Again, thank you for your participation. If you have any questions, please contact Melanie at (202) 224-7703.

Sincerely,

Patrick Leahy

PATRICK LEAHY
Chairman

Questions for the Record for Chairwoman Edith Ramirez
Senator Patrick Leahy
Chairman, Senate Judiciary Committee

Hearing before the Senate Committee on the Judiciary
Subcommittee on Antitrust, Competition Policy and Consumer Rights
"Oversight of the Enforcement of the Antitrust Laws"
April 16, 2013

1. **In 2012, the Government Accountability Office (GAO) issued a report concerning Federal oversight and self-regulation of Group Purchasing Organizations (GPOs). This area has long been of interest to the Judiciary Committee. After I raised concerns about the potential impact on patient costs of GPO contracting practices with the Justice Department in 2000, and the Department of Health and Human Services in 2001, the Antitrust Subcommittee held a series of hearings on GPO practices that culminated in a joint report by the Department of Justice and Federal Trade Commission in 2004. During the hearings, many expressed concern that fees paid by vendors to GPOs distort demand, resulting in higher prices for hospitals and consumers.**

   Although the Department of Justice and FTC have investigated complaints against various GPOs, since 2004 the Department has filed only one lawsuit against a GPO under the antitrust laws, and the FTC has filed none. The GAO's 2012 report observed: "While the oversight of GPOs is conducted through the exercise of investigatory authorities of HHS, DOJ, and FTC... this oversight does not address other key questions that have previously been raised about GPOs' activities. For example, inasmuch as the collection of contract administrative fees is permitted under the safe harbor provision to the Anti-Kickback statute and safe harbor regulation, this oversight cannot address whether or to what extent these fees create a financial incentive that is inconsistent with GPOs obtaining the lowest prices for their customers."

   Do you believe that the current legislative framework is sufficient to address the risk of undesirable conduct by GPOs that increases prices for consumers? Do you agree that the legal framework could be strengthened through other measures, such as revisiting the safe harbor for GPOs provided in the Anti-Kickback Statute?

   The FTC has authority to take action against GPOs if they were to engage in anticompetitive conduct in violation of the antitrust laws. For example, Commission staff have investigated allegations by medical device manufacturers that GPO contracting practices unreasonably foreclosed competition among rival manufacturers, which may discourage innovation and create a disincentive for GPOs to negotiate the lowest prices. The FTC will continue to review GPO conduct on a case-by-case basis as part of our mission to promote competition in health care markets and take action when the factual circumstances warrant it.

As your question acknowledges, some concerns raised by various parties regarding GPOs fall outside of the scope of the antitrust laws, including the role of the safe harbor in the Anti-Kickback statute. As you know, these concerns often center on the potential for "agency problems" and corporate governance issues, whereby GPO management may be enticed to enter into contracts that are not in the best interests of their members, as distinct from the antitrust issues that are the Commission's focus.

2. **Last year, I asked then-Commissioner Ramirez and the Acting Assistant Attorney General for Antitrust, Joseph Wayland, whether "patent trolling" behavior by certain patent-assertion entities could constitute an antitrust violation. Mr. Wayland responded: "Any effort by a patent owner to harm competition by improperly extending the exclusionary scope of its patent . . . may violate the antitrust laws, and allegations of such actions merit investigation." I was pleased that your agencies recently held a joint workshop to further investigate this question. How do your agencies intend to follow up on the workshop?**

The FTC and Department of Justice received almost 70 public comments in connection with our Patent Assertion Entities (PAE) workshop. We have been actively considering those comments and applying our learning from the workshop to evaluate potential next steps. If the FTC finds potentially anticompetitive conduct, we will investigate it using our authority under Section 5 of the FTC Act. In addition, PAE activity may be a suitable focus for Commission policy studies and competition advocacy. For example, patent system issues related to notice and remedies may promote PAE harms. The FTC will continue to recommend improvements to the system of patent notice and remedies, as well as other appropriate reform to the patent system, to address these issues going forward.

3. **In your testimony, you stated that the FTC has heard reports of patent assertion entities making unsubstantiated claims relative to small businesses. Unfortunately, I continue to hear frequently about this problem from small businesses in Vermont and across the country. What steps can the FTC take to address this conduct through its consumer protection authority? Will you agree to monitor such activity and take appropriate action to address abusive behavior by patent trolls?**

Yes, the FTC will continue to monitor PAE activity and, when appropriate, we will use our competition and consumer protection enforcement authority to prevent harmful practices by PAEs.

4. **Earlier this year, the FTC concluded its investigation of Google's search engine practices. A majority of Commissioners found that certain practices used by Google**

threatened competition and innovation, yet the FTC relied on voluntary commitments from Google to end those practices, instead of a consent order.

a. **In your testimony, you expressed concern about the use of voluntary commitments to address anticompetitive violations. Can you please elaborate on that? What actions does the FTC intend to take to enforce Google's commitments?**

The voluntary commitments made by Google should not be considered a precedent, but were a good outcome for consumers under the specific circumstances of that case.

Our policy long has been – and under my leadership, will continue to be – that when a majority of Commissioners finds reason to believe that a law we enforce has been violated and enforcement would be in the public interest, any remedy should be embodied in a formal consent order or adjudicated order.

In the Google matter, three of the Commissioners – myself included – were concerned that some of Google's conduct had the potential to restrict competition. A Commission majority did not, however, support an enforcement action on any of the allegations under investigation. Therefore, the Commission was not in a position to accept a formal consent agreement.

In a public letter to then-Chairman Leibowitz, Google responded to the concerns of some Commissioners with voluntary commitments. We expect Google to honor its commitments. Google has stated publicly that material violations of its commitments would be actionable under the FTC Act, and Google will submit periodic compliance reports to the Commission. We will use this and other information to monitor Google's activities.

b. **In discussing potential remedies, some commentators noted the challenges involved in overseeing a technologically complex business practice that is constantly being updated, such as a search engine algorithm. How is the Commission responding to the challenges of enforcement in an online world?**

As the Commission has demonstrated throughout its almost 100-year history, antitrust analysis is sufficiently flexible to accommodate the complexities of technological change in dynamic markets. To support our highly fact-based approach to antitrust enforcement, the Commission and its staff constantly strive to enhance our understanding of rapidly evolving technology markets. Staff's expertise deepens case-by-case, just as in other important markets. In addition, in 2010 the agency created a Chief Technologist position, which thus far has been filled by two notable academics with significant real-world experience. We also hire technical experts to work on staff or as consultants when needed.

c. **In your testimony, you said that the FTC concluded that certain changes made by Google to its search engine algorithm were "pro-competitive" because they were "designed to improve the overall search experience for the user," even though they had the effect of negatively impacting rivals. Would your analysis have come out differently if the FTC had focused on the harm experienced by Google's other "users"; namely, the advertisers who pay to post ads on its site? How did the FTC determine its framework of analysis in assessing the procompetitive justifications of Google's conduct?**

Our analysis focused on the impact of Google's conduct on both consumers and advertisers because they are so closely intertwined. While Google focuses its search product on the search needs and buying preferences of consumers, it does so in order to attract advertisers. As discussed in the Commission's statement, we carefully considered the potential long-term effects of Google's conduct on so-called "vertical" websites, which might be viewed as current or potential rivals in markets for search and search advertising.

d. **In light of the recent reports of action by your European counterpart authorities, is the FTC taking any further action in these matters?**

We have worked closely with the EC's Directorate General for Competition ("DG Comp") for many years, and our staffs cooperated extensively throughout the Google investigation as well. We do not anticipate any further FTC action on the Google search matter.

Questions for the Record for Chairwoman Edith Ramirez
Senator Chuck Grassley
Senate Judiciary Committee

Hearing before the Senate Committee on the Judiciary
Subcommittee on Antitrust, Competition Policy and Consumer Rights
"Oversight of the Enforcement of the Antitrust Laws"
April 16, 2013

1. **As you know, I've been concerned about settlement agreements between brand name and generic drug manufacturers that result in a payment to the generic manufacturer and a delay in market entry of the generic drug. These "pay for delay" or "reverse payment" agreements result in consumers having to pay higher costs for their drugs. Senator Klobuchar and I have introduced a bill, the Preserve Access to Affordable Generics Act, that would help put a stop to these anti-competitive agreements and ensure that lower priced generic drugs enter the market as soon as possible. Former Chairman Jon Leibowitz was very supportive of our efforts to address this anti-competitive practice.**

   a. **Do you agree that these "pay for delay" agreements harm consumers?**

   Yes, pay-for-delay agreements pose a substantial threat to consumers. Agreements in which generic drug companies are paid to delay market entry of their products deprive consumers of the ability to choose lower cost medications – often for many years – and impose considerable costs on consumers and the government. FTC economists analyzed data from settlements reported to the FTC during 2004-2009 and calculated, using conservative assumptions, that pay-for-delay patent litigation settlements cost drug purchasers roughly $3.5 billion a year.[1]

   b. **Do you agree that these kinds of agreements are still a problem?**

   I do, and it seems the agreements are a growing problem. FTC staff analyzed settlements filed pursuant to the provisions of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA). The results show a steady increase in the number of agreements containing both a restriction on market entry by the generic drug manufacturer and compensation from the branded drug firm to the generic drug company, from zero in FY 2004 to forty in FY 2012.[2]

[1] Federal Trade Commission Staff, *Pay for Delay: How Drug Company Pay-Offs Cost Consumers Billions* (January 2010), at 8-10.
[2] Federal Trade Commission Staff, *Agreements Filed with the Federal Trade Commission under the Medicare Prescription Drug, Improvement, and Modernization Act* (FY 2012), http://www.ftc.gov/os/2013/01/130117mmareport.pdf.

c. What is the FTC doing to prevent these kinds of agreements?

The FTC currently has two law enforcement actions challenging pay-for-delay agreements. *FTC v. Actavis* is currently pending before the U.S. Supreme Court, with a decision expected to issue by the end of June. In the *Cephalon* case, the U.S. District Court for the Eastern District of Pennsylvania is awaiting the Supreme Court decision in *Actavis* before moving forward. Additionally, FTC staff continue to review every agreement reported to the agency pursuant to the MMA and have opened additional non-public investigations.

d. Do you believe that the Klobuchar/Grassley legislation would help preserve generic drug competition and ensure that more affordable drugs get to consumers as expeditiously as possible?

I do, and I strongly support this legislation. By declaring that pay-for-delay arrangements are presumptively illegal and requiring clear and convincing evidence to overcome that presumption, the Klobuchar/Grassley bill should help to protect consumers by deterring drug companies from entering into anticompetitive patent settlements.

Questions for the Record for Chairwoman Edith Ramirez
Senator Amy Klobuchar
Senate Judiciary Committee

Hearing before the Senate Committee on the Judiciary
Subcommittee on Antitrust, Competition Policy and Consumer Rights
"Oversight of the Enforcement of the Antitrust Laws"
April 16, 2013

1. **In these tough budget times, we're asking every agency to do more with less. Can you explain to us the value that you think antitrust enforcement brings to consumers and the economy as a whole?**

   Vigorous competition is a fundamental organizing principle of the U.S. economy. During financially troubled times, conscientious antitrust enforcement remains a good investment for the American people because it helps to support and strengthen our economy. Competitive markets yield lower prices, improved quality, and other benefits for consumers, including both individuals and businesses. Competition also promotes innovation, providing incentives and opportunities for the development of new goods and services.

   The Commission, with its highly professional and dedicated staff, strives to be a good steward of the resources entrusted to us. As one example of the value we deliver to consumers, in FY 2012 the FTC's efforts to prevent anticompetitive mergers saved consumers approximately thirteen times the amount of resources devoted to the agency's merger enforcement program.[3]

2. **The Antitrust Division and the Federal Trade Commission share responsibility for government enforcement of the federal antitrust laws. Sometimes this leads to conflicts regarding which agency will review a merger, what is known as the "clearance process." In some cases, the agencies take a long time, sometimes nearly the entire length of the thirty day pre-merger waiting period, to decide which one will investigate a merger. This unnecessarily delays resolution of the merger investigation, and imposes unnecessary burdens on the merging parties.**

   a. **What is your agency doing to resolve clearance disputes in a more effective way? Are you working with the Antitrust Division/FTC, as the Antitrust Modernization Commission suggested in 2007, to develop a new merger clearance agreement?**

      Clearance disputes are rare, and there is a process in place to resolve, in a timely and professional way, the few that arise. Staff at both agencies are alert to the

[3] Federal Trade Commission, Performance and Accountability Report, FY 2012, at 14, *available at* http://www.ftc.gov/opp/gpra/2012parreport.pdf.

time-sensitivity of clearance and HSR review. We are all working to minimize clearance disputes and associated delays, and the recent ABA Antitrust Section Transition Report released in February finds that "delays due to clearance battles have been reduced."[4] Nonetheless, we can always do better, and Assistant Attorney General Bill Baer and I have agreed that we will both make this issue a priority.

3. **Recently, standard essential patents have been the subject of several cases filed at the International Trade Commission (ITC). We can all agree that standardization of technology and standard essential patents have been critical to the development of a competitive market for smartphones and tablets. But recently, concerns have been raised about the practice of bringing standard essential patents cases to the ITC seeking an exclusion order to prevent products with the patents from being imported into the U.S. Some worry that the ITC exclusion orders related to standard essential patents could gravely harm competition.**

   a. **What sorts of negative effects might the use of exclusion orders regarding standard essential patents have on competition and consumer welfare in general?**

   I am concerned that a patentee might voluntarily commit to license its intellectual property on fair, reasonable, and non-discriminatory (FRAND) terms as part of the standard-setting process, and then escape that licensing obligation by seeking an exclusion order for infringement of the FRAND-encumbered standard essential patent (SEP). The threat of the exclusion order undercuts the procompetitive goals of the FRAND commitment and the standard-setting process. A potential licensee is likely to accept an unreasonable royalty demand if the alternative is an order that blocks its products from the market. Even a relatively small risk of that disruptive outcome can force an implementer to accept licensing terms that far exceed what it would have paid to license the patent before the standard was adopted.

   More broadly, unexpectedly high costs undermine the competitive value of the standard-setting process. And the uncertainty associated with the threat of an injunction can have the long-term impact of discouraging firms from investing to implement the standard, or to invest in standard-compliant products more generally.

[4] American Bar Association, Section of Antitrust Law, *Presidential Transition Report: The State of Antitrust Enforcement 2012* (Feb. 2013), at 12, *available at* http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/at_comments_presidential_201302.authcheckdam.pdf.

b. Is there any justification for the use of exclusion orders in the context of standard essential patents?

While injunctive relief in most cases should be unavailable for infringement of a SEP covered by a FRAND commitment, this should not be a blanket rule in all cases. One likely exception would cover foreign manufacturers with an insufficient presence in the United States to support federal court jurisdiction. In that instance, a patent holder could not obtain damages for infringement of a valid patent in a U.S. district court, and an ITC exclusion order might be warranted.

Questions for the Record for Chairwoman Edith Ramirez
Senator Michael S. Lee
Senate Judiciary Committee

Hearing before the Senate Committee on the Judiciary
Subcommittee on Antitrust, Competition Policy and Consumer Rights
"Oversight of the Enforcement of the Antitrust Laws"
April 16, 2013

1. **In 2008, the Department of Justice released a report on Section 2 of the Sherman Act. The report was later withdrawn. That report provided the business community with guidance on applicable principles in Section 2 enforcement actions.**

   a. **Do you agree with the 2008 report's findings and conclusions?**

   b. **If not, with which specific findings and conclusions do you disagree?**

   c. **Do you agree that it would be helpful for the business community to have formal guidance on the enforcement agencies' approach to Section 2 enforcement?**

   d. **Will you commit to work with Mr. Baer to develop and publish formal guidance on Section 2 enforcement?**

   The Commission did not join or endorse the Section 2 Report when it was released by the Department of Justice, and various Commissioners issued statements explaining their concerns. I was not a Commissioner at the time, but I share the concerns of the Commissioners who declined to endorse the Report.

   The two agencies' extensive joint hearings that provided the foundation for the Report, along with the statements of the then-Commissioners, made an important contribution to the development of antitrust law. The hearings brought together experts with a wide range of views to discuss important doctrinal and policy questions related to single firm conduct. The record of these hearings (available on the FTC website) and several posted FTC staff working papers continue to provide guidance for businesses and their counsel on various types of conduct.

   In addition, as Assistant Attorney General Bill Baer testified at the hearing, a series of U.S. Supreme Court and D.C. Circuit court opinions provide valuable guidance about how to apply Section 2. As courts continue to apply these analytical approaches to different sets of facts, the law will continue to evolve.

   The antitrust laws should not be applied in ways that might impose liability on firms for achieving marketplace success as a result of their superior products, services, or business models. Likewise, we should not tolerate market power

achieved or maintained via conduct that does not reflect competition on the merits and impairs competition or the competitive process.

Striking the appropriate balance, based on specific factual circumstances and sound economic theory, will help to ensure that markets operate efficiently, that innovation is promoted, and that all firms are encouraged to compete on the merits. We can most effectively satisfy these goals by continuing on our present course: first, to develop sound and predictable principles through case-by-case enforcement; and second, to engage in advocacy (such as amicus briefs) to support competition on the merits and oppose conduct that poses a significant threat of harm to competition or the competitive process.

2. **The Federal Trade Commission, particularly under the previous Chairman, has been in the practice of reaching settlements in cases brought under Section 5 of the FTC Act. These settlements are not subsequently reviewed by a court to establish a clear record of Section 5 enforcement boundaries. At the same time, the Commission has yet to provide definitive guidance as to how Section 5 can be used to enforce unfair methods of competition beyond the traditional scope of antitrust laws.**

   a. **Do you plan to continue the practice of enforcing Section 5 by means of settlements outside of court review?**

   b. **How do you think a practice of open-ended enforcement might be perceived in foreign jurisdictions where basic rule of law principles are often lacking?**

   c. **What formal guidance will you provide the business community regarding Section 5 enforcement?**

   As with the Sherman Act and the Clayton Act, Section 5 of the FTC Act has been developed over time, case-by-case, in the manner of common law. These precedents provide the Commission and the business community with important guidance regarding the appropriate scope and use of the FTC's Section 5 authority.

   For various reasons, including resource constraints, the Commission may – and often does – decide that it is in the public interest to settle a case, in exchange for a binding agreement to stop the allegedly harmful conduct. Parties before the agency, too, often prefer to settle cases for a variety of business reasons. Importantly, the possibility of settlement does not affect the rigor that we apply in choosing appropriate Section 5 enforcement actions, and the documents typically made public at the time of settlement provide significant guidance regarding the Commission's theory of harm.

3. **At our Subcommittee's hearing last week, in response to a question regarding Section 5 of the FTC Act, you stated that you believe the Commission "has been using its Section 5 authority very rigorously and very judiciously," and that the agency is providing some measure of guidance through the pattern of its decisions.**

   a. **If the Commission is applying Section 5 "cautiously" and wishes to provide useful enforcement guidance, why are you resistant to provide such guidance in a more comprehensive, published form upon which the business community and others can meaningfully rely?**

   Case-specific guidance, grounded in detailed facts and sound economic theory, is likely the most useful form of guidance for the business community and lawyers advising the business community. Due to the fact-based nature of antitrust cases, as well as our need to retain flexibility to use Section 5 to protect competition and consumers as markets and economic learning evolve, any non-case-specific guidance document would necessarily be far more general, and thus less useful.

   However, we can always strive to be more transparent regarding our enforcement philosophy and case selection priorities. I will continue to engage in a dialogue with my fellow Commissioners and the business community in pursuit of that goal.

4. **Some have expressed concern that the Commission's approach to Section 5 enforcement has left many in the business community confused and uncertain as the contours of that provision and the breadth of possible enforcement actions.**

   a. **Do you believe that the Commission may use Section 5 to create convergence with U.S. antitrust doctrine and that of international jurisdictions?**

   b. **Do you believe the Commission may use Section 5 to place additional emphasis within U.S. competition policy on consumer choice as a touchstone of antitrust law?**

   c. **Do you believe the Commission may use Section 5 to bring actions that increasingly incorporate analysis and assumptions based on behavioral economics?**

   In my view, the Agency's work on international convergence should focus on the promotion of fair processes and transparency in all jurisdictions, along with efforts to develop and share rigorous analytical tools and common approaches to difficult antitrust issues. As we already have seen in recent years, continued international convergence generates substantial benefits for businesses and consumers. While convergence may tend to lead to similar outcomes, convergence neither contemplates nor requires identical rules of decision or identical outcomes. I do not intend to use Section 5 as a mechanism to create

international convergence with respect to substantive outcomes. The FTC will continue to enforce U.S. laws, applying U.S. legal standards.

In our application of Section 5, as in our application of the antitrust laws generally, we work to use, but not go beyond, state-of the-art economic techniques that are rigorous and well-accepted for identifying competitive effects and efficiencies. The range of recognized harms and benefits from mergers or other competitive conduct may of course include non-price effects, such as those related to product quality or innovation.

5. **At our Subcommittee's hearing last week, you stated that you believe the standards used by the FTC and the DOJ for obtaining a preliminary injunction are "quite similar" and that "as a practical matter what each agency needs to do is go before a judge and show and provide evidence that backs up the charges that are being made." You further stated that you "believe it would be difficult to point to a specific situation where...a case would have led to a different outcome had it been handled by a different agency."**

   a. **In its 2007 Report and Recommendations, the Antitrust Modernization Commission wrote that the "FTC's ability to continue a merger case in administrative litigation also may lead companies whose transactions are investigated by the FTC to feel greater pressure to settle a matter than if they had been investigated by the DOJ."**

      i. **Should companies face greater pressure to settle if their mergers are reviewed by the FTC rather than the DOJ?**

      ii. **Do you agree that even the perception of a more lenient standard for FTC cases than those brought by the DOJ could result in a practical difference for litigants who must weigh litigation risk?.**

   b. **The 2007 Report further states that differences in the preliminary injunction standards faced by the FTC and the DOJ, whether real or perceived, "can undermine the public's confidence that the antitrust agencies are reviewing mergers efficiently and fairly and that it does not matter which agency reviews a given merger."**

      i. **Do you agree that public confidence is important and can be affected by public perception of differing standards applied to identical issues?**

      ii. **Do you agree that it would be problematic if the identity of the reviewing agency led to different outcomes due to the parties' perception that the FTC and the DOJ face different standards for obtaining a preliminary injunction?**

iii. **What measures do you believe appropriate to remedy any perceived or real inconsistency in the preliminary injunction standards faced by the agencies?**

Although some in the antitrust community perceive that the FTC and Department of Justice Antitrust Division face different preliminary injunction standards to enjoin pending mergers, as Assistant Attorney General Baer and I both testified, this has not been our experience. While the wording may differ, there appears to be no evidence that the substantive standard varies, or that any perceived difference has influenced the outcome of any specific case.

Public confidence in the agency is important, and the FTC has sought to address the perception that any procedural differences between the two agencies could affect outcomes. Since the Antitrust Modernization Commission issued its 2007 report, the Commission has revised its administrative adjudicative process to, among other things, impose significantly shorter deadlines. As a result, while the litigation process may differ between the two agencies, the time frames from complaint to final resolution in merger matters are now, on average, about the same for a federal district court decision in an Antitrust Division matter and an FTC adjudicative decision. Furthermore, the same substantive Clayton Act Section 7 legal standards apply regardless of whether the adjudicator is the Commission or a federal district court.

c. **In *FTC v. CCC Holdings*, the district court granted the FTC's request for a preliminary injunction. The judge noted that although the defendants' arguments might "ultimately win the day," under Section 13(b) the trial court needed only to determine that "the FTC had raised questions that are so 'serious, substantial, difficult and doubtful' that they are 'fair ground for thorough investigation, study, deliberation and determination by the FTC'" to conclude that a preliminary injunction should issue. Commentators have written that "[t]he importance of the CCC Holdings decision therefore is not merely academic, and the resulting agency divergence is not merely procedural. It may be outcome determinative in some cases."[5]**

i. **Do you believe the standard applied by the district court in *FTC v. CCC Holdings* was the same as the preliminary injunction standard applicable to the DOJ in a merger case?**

ii. **Do you agree that application of that lower standard may have had an impact on the outcome of the case, in the sense that the outcome may have been different if the DOJ standard had been applied?**

[5] Peter Love & Ryan C. Thomas, *FTC v. CCC Holdings: Message Received*, GCP (April 2009), at 10.

d. In the *Whole Foods* litigation, the FTC argued on appeal before the D.C. Circuit: "This Court has recognized, in keeping with the intent of Congress in creating the Commission and in enacting Section 13(b), that the Commission is not required to 'prove' any aspect of its case in order to secure a preliminary injunction in aid of its own adjudicative and remedial powers; rather, it need only show 'serious, substantial' questions requiring plenary administrative consideration. The district court's contrary approach ignores the statutory scheme, and effectively usurps the adjudicative role of the Commission."[6]

i. Do you contend the standard the Commission advanced in the *Whole Foods* appeal was the same standard DOJ has to meet in order to obtain a preliminary injunction in a merger case?

e. *FTC v. Libbey, Inc.*, 211 F. Supp.2d 34 (D.D.C. 2002), is another case in which a court applied a lower preliminary injunction standard to an FTC merger challenge than would have been applied if DOJ had brought the case.

i. Do you agree that the standard applied in that instance may have had an impact on the outcome of the case?

Although various courts considering the appropriate standard have stated it in different ways, the core focus of the preliminary injunction standard for both agencies is the same: a strong evidentiary presentation by the agency, which a defendant fails to rebut. *See, e.g., FTC v. H.J. Heinz Co.*, 246 F.3d 708, 714 (D.C. Cir. 2001) (recognizing that government agencies bear a different preliminary injunction burden than private parties when enforcing federal laws). In addition, as the joint Horizontal Merger Guidelines indicate, the two agencies apply the same analytical framework to merger review. Any differences in merger challenge outcomes are a consequence of specific underlying facts and the strength of the evidence in individual cases. They do not result from a difference (real or perceived) in preliminary injunction standards, and they are not agency-dependent.

With regard to the specific cases you raise, I do not believe that the courts applied a more lenient preliminary injunction standard or that outcomes were affected as a result. For example, in *FTC v. CCC Holdings*, the court relied on *Heinz* for the relevant standard applicable to a FTC preliminary injunction, *i.e.*, that governmental plaintiffs like the FTC face a lower standard than private parties, and emphasized that "ultimate success" requires a showing that the effect of a merger "may be substantially to lessen competition, or tend to create a monopoly" – the same test that applies to the Antitrust Division. 605 F. Supp. 2d 26, 30 (D.D.C. 2009).

[6] http://www.ftc.gov/os/caselist/0710114/080114ftcwholefoodsproofbrief.pdf at 27.

It is also important to recognize that the language used in *CCC Holdings* regarding the sufficiency of showing a likelihood of success by raising serious, substantial questions is a formulation adopted by many courts beginning in the late 1970s. See, *e.g.*, *FTC v. Beatrice Foods Co.*, 587 F.2d 1225, 1229 (D.C. Cir. 1978) (statement of Judges MacKinnon and Robb); *FTC v. Nat'l Tea Co.*, 603 F.2d 694, 698 (8th Cir. 1979); *FTC v. Warner Commc'ns Inc.*, 742 F.2d 1156, 1162 (9th Cir. 1984); *FTC v. Univ. Health*, 938 F.2d 1206, 1218 (11th Cir. 1991); *Heinz*, 246 F.3d at 714-15. In all of these cases, the FTC was required to make a persuasive evidentiary showing of a prima facie case that withstood the defendant's rebuttal. Where the FTC has not made such a showing, the agency's motion for a preliminary injunction has been denied. See, *e.g.*, *FTC v. Laboratory Corp. of Am.*, No. SACV 10-1873 AG, 2011 WL 3100372 (C.D. Cal. Mar. 11, 2011); *FTC v. Foster*, No. CIV 07-352 JBACT, 2007 WL 1793441 (D.N.M. May 29, 2007); *FTC v. ArchCoal Corp.*, 329 F. Supp. 2d 109 (D.D.C. 2004). With regard to the language you quote from the FTC's brief in the *Whole Foods* appeal, the FTC was merely clarifying that the court should not impose, in evaluating a preliminary injunction request, a requirement that the FTC prove the ultimate success of its case, which is the proper standard for a *permanent*, not a *preliminary*, injunction.

f. In February 2013, the Section of Antitrust Law of the American Bar Association issued a report entitled *Presidential Transition Report: The State of Antitrust Enforcement 2012*. The report commented that some circuits have relaxed the standard imposed on the FTC from the standard applicable to the DOJ. The Section noted that the standards applied in cases brought by the FTC differ from those in DOJ cases in other ways as well. The Section urged the FTC to adopt procedures "that will ensure that in merger cases it will seek injunctions only under the same equitable standard for a preliminary injunction as that applied to Division injunction cases." Absent such procedures, the report urged the Administration "to seek legislative changes to Section 13(b) of the Federal Trade Commission Act that will make it consistent with traditional equitable standards for injunctive relief."

i. Will you commit to adopt procedures to ensure that the Commission only seeks preliminary injunctions under the same equitable standards that apply to DOJ actions?

ii. Would you support legislation to clarify that the FTC and the DOJ must satisfy identical standards to obtain a preliminary injunction?

iii. If you remain convinced that the differing standards applied to FTC and DOJ actions are "quite similar" and as a practical matter lead to little if any difference in outcome, what would be the harm in

clarifying that the applicable standard is in fact the same or in establishing a unified standard?

In light of the fact that courts already apply what amounts to the same legal standard to preliminary injunction requests by both FTC and Antitrust Division, I do not believe the FTC needs to change its procedures. For the same reason, I do not believe there is any need for legislation altering the FTC standard.

6. **At our Subcommittee's hearing last week, you expressed concern that an acceptance by the Commission of voluntary commitments, as opposed to a consent order, would create confusion over its settlement practices. You suggested that the Commission's acceptance of voluntary commitments by Google should not be considered precedent. Yet, other companies under investigation may believe they need not enter into binding consent decrees, instead asking to be treated by the Commission in the same manner as Google. In addition to an appearance of favoritism the Google agreement may create, I am concerned about informal and illegitimate regulatory creep when the Commission seeks to secure voluntary commitments from private companies. If a majority of commissioners finds a violation there should be a formal consent order. If a majority does not find a violation, the Commission has no authority to interfere in the market and should not pursue any enforcement action, whether voluntary or not.**

   a. **Now that the Commission has in fact negotiated and accepted a voluntary commitment in lieu of consent order, what specifically do you plan to do to correct perceptions and assumptions about future enforcement actions?**

   b. **If the Commission does not plan to follow the standard of settlement practices used in this case ever again, how will you respond to assertions that Google received special treatment from the Commission?**

      The voluntary commitments made by Google should not be considered a precedent, but were a good outcome for consumers under the specific circumstances of that case.

      Our policy long has been – and under my leadership, will continue to be – that when a majority of Commissioners finds reason to believe a law we enforce has been violated, and enforcement would be in the public interest, any remedy should be embodied in a formal consent order or adjudicated order.

      In the Google search matter, three of the Commissioners – myself included – were concerned that some of Google's conduct had the potential to restrict competition. A Commission majority did not, however, support an enforcement action on any of the allegations under investigation. Therefore, the Commission was not in a position to accept a formal consent agreement. Google received no special

treatment. Indeed, Google faced an extremely comprehensive inquiry as the Commission and its staff collected and analyzed a broad and complex set of facts under the reason to believe standard. Ultimately, in a letter to then-Chairman Leibowitz, Google responded to concerns about some of their business practices with voluntary commitments, a step that will likely benefit consumers.

7. **At our Subcommittee's hearing last week, you seemed to agree with me that voluntary commitments are an illegitimate approach for the Commission to use in seeking to resolve antitrust violations.**

   a. **Under your leadership, will the Commission move to correct this misstep and seek to embody Google's voluntary commitments in a formal consent order?**

   Whenever a Commission majority finds reason to believe that violation of the law has occurred, and an enforcement action is in the public interest, I will make every effort to pursue formal agency action. Formal action through an enforcement proceeding or a consent decree is the most effective way for the Commission to enforce the antitrust laws. As noted above, however, the Commission was not in a position to accept a formal consent in the Google matter.

   We nonetheless expect Google to honor its commitments. Google has stated publicly that material violations of its commitments would be actionable under the FTC Act, and Google will submit periodic compliance reports to the Commission. We will use this and other information to monitor Google's activities, and will take appropriate action if Google does not abide by its commitments.

8. **At our Subcommittee's hearing last week, you stated that if Google does not uphold and complete its voluntary commitments from the settlement, the Commission will take "appropriate action."**

   a. **Given that there is no Commission precedent for dealing with this type of voluntary commitment, what specifically would that appropriate action entail?**

   b. **Would such action require the Commission to undergo another complex and lengthy investigative proceeding, which could allow harmful business practices to continue undeterred until there is a formal settlement?**

   As part of its commitments, Google not only agreed to stop the troubling conduct, but also stated publicly that material violations of the commitments would be actionable under the FTC Act for a period of at least five years. The Commission will make every effort to hold Google to those commitments.

9. **The Commission's closing statement in the Google matter concluded: "Challenging Google's product design decisions in this case would require the Commission – or court – to second-guess a firm's product design decisions where plausible procompetitive justifications have been offered, and where those justifications are supported by ample evidence." Similarly, Chairman Leibowitz's opening remarks stated: "Google's primary reason for changing the look and feel of its search results to highlight its own products was to improve the user experience."**

   a. **This approach appears to differ from the standard set forth in the Microsoft case and the standard that you said the Commission used to evaluate Google's conduct. Under the Microsoft decision, the Commission, or a court, must examine whether "the anticompetitive effect of the challenged action outweighs [any proffered justification for the product design change]." United States v. Microsoft Corp, 253 F.3d 34, 67 (D.C. Cir. 2001). It would have required the Commission to apply a balancing test rather than concluding its analysis simply upon a finding that Google put forth a plausible business justification, as suggested by the Commission's closing statement and Chairman Leibowitz's remarks. Please explain this apparent inconsistency.**

   b. **What standard will the Commission apply in the future to similar circumstances?**

      The Commission's Google investigation was guided by the precedent established in the D.C. Circuit's *Microsoft* decision, along with the existing, well-developed body of federal case law governing monopolization and product design. We carefully investigated whether Google's conduct harmed the competitive process. A majority of the Commission concluded, based on ample evidence, that Google's design changes were procompetitive because they improved the overall search experience for the user – even though the conduct also had some negative impact on competing search engines.

      The Commission will continue to follow *Microsoft* and related case law when assessing allegations of harm from unilateral conduct. The Commission will carefully review and assess any actual or probable harm to competition and the competitive process, on the one hand, and the likely consumer benefits of the challenged conduct, on the other. In my view, a monopolist cannot escape antitrust liability simply by putting forward any plausible explanation for its exclusionary conduct.

10. **Several states have ongoing investigations of Google's conduct.**

a. Did the Commission coordinate its legal and factual analysis with these states?

b. Did the Commission attempt to work with these states to obtain a coordinated settlement?

The Commission frequently coordinates its investigations with state enforcers, sharing resources and information, and we did so during our investigation of Google's conduct. Among other things, state enforcement personnel attended investigational hearings with Google executives and participated in conference calls and meetings where complainants provided us with information. FTC staff also regularly briefed state personnel on the progress and direction of our investigation, and these discussions enhanced the Commission's review.

In many cases, our cooperation with state enforcers culminates in a coordinated settlement that resolves both Commission and states' concerns. In the end, however, each public enforcer must make its own enforcement and settlement decisions. As a matter of prosecutorial discretion, and in the interest of conserving scarce investigative resources, the Commission unanimously determined to close our investigation.

11. Google's practice of negotiating exclusionary syndication and distribution agreements was not addressed in the Commission's decision.

a. Did the Commission review this conduct?

b. If so, why was it not included in the Commission's final decision?

The Commission extensively investigated these issues, but in the end determined an enforcement action was not warranted. The Commission does not routinely comment publicly on decisions to close investigations. In this case, the Commission determined that a closing statement focused mainly on the search bias allegations would provide useful transparency and guidance to the public and the antitrust bar, due to the novel nature of the claims and the exceptionally high level of public interest.

12. The Commission and the Department of Justice share enforcement of the antitrust laws, both in mergers and conduct investigations. It is not always clear to the parties involved who will review a transaction or business practice. In June 2011, then-Chairman Leibowitz told the Senate Commerce Committee: "It is true that there are occasional clearance disputes over which agency is in the better position to investigate a matter . . . . The FTC and DOJ have a process in place to resolve clearance disputes, which helps resolve the issue quickly." Please provide the Subcommittee:

a. **The precise process(es) for resolving these disputes;**

b. **Examples of the types of agreements that the Commission and the Department have reached in merger and non-merger clearance disputes, including how the parties determine which agency will review a subsequent transaction involving the same company or industry and the duration of such agreements; and**

c. **The number of such disputes since January 2009 and the average length of time such disputes lasted.**

Due to the shared antitrust jurisdiction of the FTC and the Department of Justice Antitrust Division, all proposed merger and conduct investigations are formally submitted to the other agency as a "clearance request" through a shared database. Until the other agency approves or "clears" the request, no formal investigation may commence and no parties or third parties may be contacted. Most investigations are submitted and cleared within two business days. When both agencies make a request to investigate the same merger transaction or conduct, this is called a "contested matter."

I understand that since January 2009, there have been 90 instances in which both the Antitrust Division and the FTC were interested in reviewing the same Hart-Scott-Rodino notified transaction. In those instances, it took an average of five business days for the agencies to agree which agency should handle the investigation.

Most of the time, clearance contests are resolved through an informal exchange of information regarding each agency's expertise. This is done by the designated Clearance Officers at each agency, working with investigative staff, by e-mail or telephone. The Clearance Officers are career staff with knowledge of the agency's work. If the Clearance Officers cannot resolve a matter informally, each agency prepares a clearance "claim," a memorandum explaining why it has the better expertise, gained from past investigations, to investigate the particular matter.

If clearance cannot be resolved by the agencies' Clearance Officers, it is escalated to the Deputy Director of the Bureau of Competition at the FTC and the Director of Civil Enforcement at the Antitrust Division for resolution, and if still unresolved, to the heads of the agencies. This level of escalation is extremely rare.

We are all working to minimize clearance disputes and associated delays. The recent ABA Antitrust Section Transition Report released in February found that "delays due to clearance battles have been reduced." Nonetheless, we can always do better. Assistant Attorney General Bill Baer and I have spoken about this issue

recently, and we both agree that one of our priorities is to continue to minimize such disputes to ensure that the clearance process is both fair and efficient.

13. The Commission has issued two recent orders that address the meaning of commitments to license on fair, reasonable, and non-discriminatory (FRAND) terms. In *Bosch*, the Commission embraced an order and remedy that many believe represented progress on this issue. A month later, the Commission adopted a more complicated order and remedy in the Google matter, criticized by some as being weak and riddled with loopholes.

a. Why did the Commission seek such a complicated (and potentially weakened) remedy in the Google matter?

The FTC's *Bosch* and *Google* consent orders continue the Commission's longstanding commitment to safeguard the integrity of the standard-setting process. Standard setting can deliver substantial benefits to American consumers, promoting innovation, competition, and consumer choice. But standard setting by its nature also creates the risk of harm to the competitive process and to consumers. Because standard setting often displaces the normal competitive process with the collective decision-making of competitors, preserving the integrity of the standard-setting process is central to ensuring that standard setting works to the benefit of, rather than against, consumers.

Although the proposed Google order differs from the Bosch order, I respectfully disagree with those who believe that the relief is weak or unduly complicated. Consent orders remedy violations arising out of specific factual situations, reflecting the Commission's assessment of the market and the conduct involved, and each is by nature different. The Google order is not yet final, and is still under consideration by the Commission. However, in January, I voted to issue the proposed order because I believed it remedied Google's alleged anticompetitive conduct resulting from breaches by Google and its subsidiary Motorola of Motorola's commitments to license its standard essential patents (SEPs) on FRAND terms.

b. Please explain your view of the *Bosch* decision.

As alleged in the Complaint, before its acquisition by Robert Bosch GmbH ("Bosch"), SPX Services ("SPX") reneged on a licensing commitment made to two standard-setting bodies to license its SEPs on FRAND terms, by seeking injunctions against willing licensees of those SEPs. Together with a majority of the Commission, I had reason to believe that this conduct tended to impair competition in the market for automobile air conditioning servicing devices.

i. Are you concerned about using a merger review process to require relief on unrelated conduct as a condition for clearing the deal?

I would be concerned about using the FTC's merger review process to require relief that was not reasonably related to an underlying violation of law, but that was not the case in the Commission's agreement with *Bosch*. If a party decides to settle an adjudicative challenge, then the FTC will consider various settlement options, including the potential to settle merger and conduct challenges concurrently.

14. **In the debate over standard essential patents and FRAND commitments, much discussion has focused on the willingness of potential licensees to engage in negotiations.**

    a. **In your view, what does it mean to be a willing licensee?**

    In this context, a willing licensee is a potential licensee who is engaged in good-faith negotiation to obtain a FRAND license to a standard essential patent and is capable of complying with the terms of a license.

    b. **Is a licensee unwilling simply because it refuses to accept a stated demand as FRAND or demands that the party demonstrate that its portfolio is composed of valid and infringed patents that have some value apart from its inclusion in the standard?**

    A potential licensee is not unwilling simply because it refuses to accept a stated demand as FRAND. When negotiating FRAND royalties, both the potential licensor and the potential licensee have a duty to negotiate in good faith.

    c. **There has been comparatively little focus on the willingness of SEP holders to engage in good faith negotiations—that is, whether the SEP holder is a willing licensor. Would you agree that there is a burden on the SEP holder to demonstrate the value of its SEP portfolio, a burden that is generally not discharged by merely quoting a rate, particularly when the rate clearly exceeds traditional industry benchmarks?**

    In my view, the potential licensor of a FRAND-encumbered SEP does not discharge its duty to negotiate in good faith by merely quoting a rate.

15. **The Commission statement accompanying its decision relating to Google's abuse of certain standard essential patents indicated that "Google's settlement with the Commission requires Google to withdraw its claims for injunctive relief on FRAND encumbered patents around the world."**

    a. **How many of those claims for injunctive relief have been withdrawn and how many are still open?**

b. What is the Commission doing to ensure compliance with its Order?

Under the terms of the order, Google cannot seek any new injunctions on FRAND-encumbered standard essential patents unless and until it follows the processes set out in the order. In addition, the order prohibits Google from obtaining or enforcing any injunctions in current actions without first following the processes set out in the order. Since the proposed order was accepted for public comment, Google has not obtained or enforced any injunctions on standard essential patents and many of those actions have been resolved. To our knowledge, Google is currently complying with the terms of the order, even though at this point the order is not final. When the order becomes final, the Commission will monitor and enforce the order as it does any other order.

16. In testimony before our Committee last July, you expressed concerns about anticompetitive abuse of standard essential patents and stated that the Commission "believes that the ITC has the authority under its public interest obligations . . . to deny an exclusion order if the holder of the FRAND-encumbered SEP has not complied with its FRAND obligation." You also suggested that if the ITC did not act appropriately, Congress should consider giving the ITC more flexibility to deny exclusion orders in such cases.

a. In your view, has the ITC responded to the concerns you raised?

Yes. The ITC issued Notices of Review in several investigations involving FRAND-encumbered SEPs in which it sought briefing from the public and the parties on a wide range of FRAND topics. For example, in an investigation involving Apple products, it asked the parties whether: (1) "the mere existence of a [F]RAND obligation preclude[s] issuance of an exclusion order[;]" (2) a patent owner that has refused to offer or negotiate a license on [F]RAND terms should be able to obtain an exclusion order; and (3) a patent owner should be able to obtain an exclusion order if it has offered a [F]RAND license, and that license has been rejected by the alleged infringer.[7] The ITC's actions demonstrate that it is taking seriously competitive concerns about exclusion orders for FRAND-encumbered SEPs.

b. Do you worry about ITC decisions in cases involving FRAND-encumbered SEPs, given that the only available ITC remedy is an exclusion order?

Yes. I am concerned that a patentee might voluntarily commit to license its intellectual property on FRAND terms as part of the standard-setting process, and then escape that licensing obligation by seeking an exclusion order for

[7] *In re Certain Wireless Communication Devices*, Inv. No. 337-TA-745, Notice of Commission Decision to Review in Part a Final Initial Determination Finding a Violation of Section 337 at 4-5 (June 2012).

infringement of the FRAND-encumbered SEP. The threat of the exclusion order undercuts the pro-competitive goals of the FRAND commitment. A potential licensee is likely to accept an unreasonable royalty demand if the alternative is an order that blocks its products from the market. Even a relatively small risk of that disruptive outcome can force an implementer to accept licensing terms that far exceed what it would have paid to license the patent before the standard was adopted. More broadly, unexpectedly high costs undermine the competitive value of the standard-setting process. And the uncertainty associated with the threat of an injunction can discourage firms from investing to implement the standard.

c. Do you believe that enforcement action based on anticompetitive abuse of FRAND-encumbered SEPs could and should be pursued under Section 2 of the Sherman Act?

The FTC does not have direct authority to enforce the provisions of Section 2 of the Sherman Act. Section 5 of the FTC Act, however, is understood to incorporate conduct that violates Section 2, and it can reach more broadly. Enforcement actions based on anticompetitive abuses of FRAND-encumbered SEPs are highly fact-specific and the FTC will use all of its enforcement tools to address these abuses, where appropriate.

17. At our Subcommittee's hearing last week, there was much discussion of legislation that would impose a presumption that all patent settlements between innovator pharmaceutical companies and generic companies are anticompetitive. By statute, the Commission is already entitled to receive notice of such settlements, so it has ample opportunity to review such settlements for any anticompetitive problems. Both federal statute and Supreme Court case law state that patents are presumed to be valid. 35 U.S.C. § 282; *Microsoft Corp. v. i4i Limited Partnership*, 131 S.Ct. 2238 (2011). Indeed, patent invalidity must be proved by the elevated standard of clear and convincing evidence. *Microsoft*, 131 S.Ct. at 2252. In addition, it is well-settled law that settlements of litigation are highly favored. Yet, your position on patent settlements legislation seems to contradict quite squarely these two well-settled, time-tested principles.

a. How can you reconcile your position with these principles, particularly when the settlement occurs within the term of the patent?

b. Do you really believe that all such settlements are necessarily anticompetitive?

c. Under what conditions might such a settlement be procompetitive in its effect?

I do not understand the bill introduced by Senators Klobuchar and Grassley to impose the broad presumption you describe. Instead, the proposed legislation

addresses what are known as "pay-for-delay" agreements, in which the brand-name-drug firm pays its would-be generic rival and the generic drug firm agrees to abandon its Hatch-Waxman patent challenge and forgo entry for a period of time, often several years. The vast majority of brand-generic settlements do not involve compensation to the generic patent challenger.[8] Thus, most Hatch-Waxman patent settlements would not be affected by the bill.

I do not believe that all patent settlements between brand-name drug manufacturers and generic drug companies should be treated as presumptively anticompetitive or that all such settlements are necessarily anticompetitive. I do believe, however, that treating pay-for-delay agreements as presumptively anticompetitive is sound antitrust policy. As the Commission's brief to the Supreme Court in *FTC v. Actavis* explains, a settlement in which the brand-name drug firm pays the generic patent challenger and the generic agrees to refrain from competing inherently aligns the generic firm's interest with the brand's interest in extending its monopoly. This aligning of the parties' incentives means the generic will accept a later entry date than it otherwise would accept based on its expectations about the likely outcome of the patent suit. As a result, the parties share a pool of profits that is made larger by their agreement not to compete. Such treaties between competitors, actual or potential, are at the core of what the antitrust laws proscribe. In contrast, the other ways that drug companies settle patent suits, such as with royalty payments by the allegedly infringing generic or waivers of accrued damage claims, do not have this inherent tendency to harm competition and consumers.

A legal rule that recognizes the inherent risk of harm from pay-for-delay agreements does not conflict with the statutory presumption of validity. The Supreme Court has never suggested that the presumption of validity gives the patent holder the right to share monopoly profits to induce potential competitors to abandon their efforts to compete. Moreover, the rationale for treating pay-for-delay settlements as presumptively anticompetitive does not rest on any assumption that the patent at issue is necessarily invalid or not infringed. Rather, such agreements are problematic because it is the payment, not the strength of the patent, which thwarts the competitive process that would otherwise operate to protect consumers.

The public policy favoring settlements is important, but it does not trump the important public values embodied in the antitrust laws. Were the law otherwise, private parties could use settlements to shield a wide range of anticompetitive activity. No one, however, suggests that parties who chose to settle their litigation by means of a price fixing agreement could avoid liability on the ground that public policy favors settlement. Moreover, arguments that limiting the use of payments will make it impossible to settle Hatch-Waxman patent cases are not

[8] *2012 Annual Report* at 2 (noting that more than 70% of brand-generic settlements are resolved without compensation to the generic).

borne out by the evidence noted above, which shows the vast majority of such settlements do not involve payment to the generic.

Under a legal rule that treats pay-for-delay settlements as presumptively anticompetitive, defendants may seek to rebut the presumption. The Commission's brief to the Supreme Court describes some general ways that parties might do so: showing that the compensation to the generic firm was for something other than delay; showing that the payment merely reflected litigation costs avoided by the settlement; or identifying some unusual business circumstance such that the payment creates an offsetting competitive benefit. As the brief notes, however, lower courts have had little opportunity to date to consider possible countervailing procompetitive justifications and evidence supporting any such rebuttals is likely to be in the possession of the defendants. Consequently, the specific conditions under which a presumptively anticompetitive settlement might be deemed on balance procompetitive would be a subject for further development in the courts.

18. The Commission's estimated cost savings associated with legislation providing the FTC with additional authorities to prevent parties from settling Hatch-Waxman patent litigation appears to differ from both Office of Management and Budget (OMB) numbers in the President's FY 2014 proposal and previous Congressional Budget Office (CBO) cost savings figures. In fact, there appear to be three entirely different estimates of what, if any, savings there may be.

a. In light of these discrepancies, what effort has the Commission taken to coordinate information sharing of studies, proposals, or assumptions with OMB and CBO to determine the accuracy and validity of estimated cost savings?

FTC staff have had numerous discussions with OMB and CBO about various estimates of the financial impact of pay-for-delay settlements (as noted in response to Question 17, the proposed legislation would not prevent parties from settling Hatch-Waxman patent litigation without compensation). While we cannot be certain of the exact methodology underlying the CBO and OMB estimates, it appears that the discrepancies are largely due to differing objectives. The FTC staff focused on predicting the harm to consumers from existing and anticipated future anticompetitive settlements that delay the entry of lower cost generic drugs.

CBO has produced estimates of the likely budgetary impact of several pieces of legislation related to these settlements. These estimates were prospective, generally predicting the amount of future harm that a law prohibiting pay-for-delay settlements could prevent. The FTC's studies have been retrospective, assessing the current and ongoing costs of settlements that already have been reached. A second difference is that CBO's primary goal was to estimate the

impact of proposed legislation on government expenditures, whereas the FTC's estimate was of the cost to all drug purchasers, private and public.

Like CBO, OMB also estimated the impact on government spending from future pay-for-delay settlements that would be prevented by legislation. But unlike CBO, this estimate included spending both on small molecule (or chemical) and large molecule (or biologic) drugs. Due to data limitations, the FTC's analysis was limited to small molecule drugs.

Consistent with the FTC's analysis, however, both CBO and OMB concluded that these agreements delay competition and significantly harm consumers.

b. What information related to patent settlements has the Commission received from either CBO or OMB?

We have had informal discussions with both CBO and OMB about techniques to estimate the impact of these settlements, but have not received any specific information from them related to patent settlements.

c. Has the Commission received any data or information from other public or private organization on patent settlements upon which it has relied in making assumptions about savings from patent settlements? If so, which entities?

The FTC staff's analysis relied on information from a variety of sources. The most important data came from our review of the settlements themselves, which companies are required to file with the FTC and the Antitrust Division under a provision of the MMA. The settlement data was supplemented with information from the FDA about Paragraph IV challenges by potential generic competitors, and information on the patents covered by the settlements, which is publicly available. The FTC also licensed commercially available sales data from IMS Health on the timing and market consequences of generic entry, as well as the level of expenditures impacted by the settlements.[9]

19. Many in the IP community are concerned by the growing number of instances in which established operating companies transfer their patents to patent assertion entities (PAEs), so that these entities can target the established company's competitors. Some reports suggest that the operating companies often retain a revenue interest in the assertion of the transferred patents, which have included patents that are subject to commitments to license on FRAND terms. Last week, the Commission's directors of both economics and competition said that they support the issuance of a Section 6(b) order to investigate the PAE industry.

[9] *See, e.g.*, C. Scott Hemphill & Bhaven Sampat, *Drug Patents in the Supreme Court*, 339 SCIENCE 1386 (2013) (reporting results of study of the adverse consequences of pay-for-delay settlements).

a. Would you support such an order? If not, why not?

The Commission's Section 6(b) authority is an investigative tool that allows the FTC to conduct studies to support our enforcement and policy missions. The increased litigation activity of PAEs raises a number of difficult questions and a well-designed 6(b) study may be a useful mechanism to explore the harms and efficiencies of PAE activity.

This is an important issue and one that I will be considering and discussing with my fellow Commissioners.

20. Both China and India have draft guidelines or policies that would make it an abuse of intellectual property rights for a dominant company unconditionally and unilaterally to refuse to license its critical intellectual property rights to a competitor who needs access to those rights to compete and innovate. These initiatives are clearly inconsistent with the DOJ's and FTC's Antitrust Guidelines for the Licensing of Intellectual Property, as well as U.S. case law, and could significantly harm innovative American companies operating overseas by undermining their intellectual property.

a. What is the Commission doing about these broad intellectual property abuse policies that are emerging in key foreign jurisdictions?

b. Because unconditional refusals to license strike at the heart of intellectual property rights, are you also working with USTR and the PTO to develop a holistic approach for influencing activities overseas?

c. Are you concerned that open-ended tests for abuse may allow foreign governments to use antitrust policy as a backdoor means for usurping the intellectual property rights of U.S. companies?

The Commission regularly engages with our counterpart agencies in both India (the Competition Commission of India) and China (MOFCOM, NDRC, and SAIC) on antitrust policy and implementation matters, including with regard to intellectual property-related antitrust issues. In our dialogues with the Chinese and Indian agencies, we have regularly emphasized the importance of intellectual property rights to innovation, competition, and consumer welfare, and encouraged them to avoid applying antitrust law as a tool to constrain the legitimate exercise of intellectual property rights.

Intellectual property laws and antitrust laws can work together to promote innovation. We have been advancing this message through a number of mechanisms. The FTC, along with the Department of Justice Antitrust Division, entered into a Memorandum of Understanding with the three Chinese antitrust agencies in 2011 and with India's agency (as well as its parent Ministry) in 2012.

These MOUs confirm our joint commitment to an ongoing dialogue on antitrust matters as well as other cooperative activities related to antitrust enforcement and competition policy, such as the provision of technical assistance. We expect that the MOUs will provide for increased opportunities for engagement on issues involving intellectual property and antitrust.

We, along with the Antitrust Division, have conducted numerous technical assistance workshops in both China and India on antitrust matters, including workshops for China's agencies in 2010 and 2012 on how the United States antitrust agencies apply U.S. antitrust law to conduct involving intellectual property. In addition, we have commented on draft competition laws and regulations in both countries, including those relating to the application of antitrust law to intellectual property.

The FTC also participates regularly in U.S. government inter-agency dialogues involving the USTR and the PTO, as well as the Department of Commerce, the State Department, and others, providing our input and experience regarding competition and intellectual property issues and helping to build a coordinated U.S. government position on intellectual property and antitrust issues in other countries.

21. **Some have expressed concern about consumer harm in the prescription eyeglass and contact lens industry. Requiring consumers to obtain a prescription prior to purchasing a product impedes free market forces. Circumstances in which the prescriber is also the retailer of the prescribed product presents a conflict of interest that may lead to anticompetitive behavior. This is especially true when the product is prescribed by brand, locking a consumer into purchasing the brand selected by the prescriber. The Commission has historically taken steps to promote consumer choice in such markets, such as by promulgating the Eye Glass Rule in the late 1970s and the Contact Lens Rule, which implemented the Fairness to Contact Lens Consumers Act, nearly a decade ago. Both of these rules guarantee that upon completion of an eye exam, a consumer has the automatic right to receive copies of his prescriptions without having to make a request, pay a fee, or sign a waiver. These rules provide consumers with the opportunity to exercise that choice when buying contact lenses or eyeglasses.**

    a. **Despite the requirement that patients receive eyeglass prescriptions including all "written specifications. . . necessary to obtain lenses for eyeglasses,"[10] pupillary distance (P/D) measurement is instead typically taken at the store where the eyeglasses are purchased. Now that eyeglasses are available online, it is important that P/D is included in prescriptions given consumers—as required by law—allowing them freedom to purchase eyeglasses where they want, whether at a brick-and-mortar store or online. To help ensure that consumers have this choice, will the Commission issue**

[10] 16 CFR 456.1(g).

guidance reminding prescribers of their legal obligation to include on prescriptions all parameters necessary to produce lenses, including the P/D?

I agree that prescription portability gives consumers the ability to comparison shop for optical goods, thereby promoting competition and helping to make markets more responsive to consumer needs and preferences. We remain committed to protecting optical goods consumers by enforcing the Eyeglass Rule, the Fairness to Contact Lens Consumers Act (FCLCA), the Contact Lens Rule, and the FTC Act.

We continue to monitor compliance with these laws and regulations, and to educate businesses and consumers about prescriber obligations and consumer rights, including the requirement that prescriptions include all of the information and parameters necessary to obtain the right lenses. While a substantial amount of guidance already exists regarding the optical goods rules, we will consider the need for additional guidance, especially as the optical goods marketplace evolves and online sales continue to grow.

22. **Under your predecessor, the Commission showed leadership in supporting the development of transparency and procedural fairness norms internationally. That work has been done in the OECD and is now being conducted in the ICN. It has also been incorporated into the Trans-Pacific Partnership and there will be an opportunity to do so in the US-EU Transatlantic Trade and Investment Partnership.**

a. **What do you think about the need for increased transparency and due process in antitrust proceedings globally?**

b. **Do you plan to continue to work in a similar vein as your predecessors in bringing these issues to forefront of the international antitrust policy debate?**

Transparency and due process are essential elements of antitrust agencies' investigative processes. There is increasing recognition at the international level that fair, predictable, and transparent processes facilitate effective agency enforcement. Recognizing the concerns regarding the levels of transparency and due process internationally, promoting the discussion of these issues among antitrust agencies is a priority for the FTC. We will continue to play a key role in supporting and advancing opportunities for such dialogue in our bilateral and multilateral work.

In 2010 and 2011, the OECD's Competition Committee held three roundtable discussions on transparency and procedural fairness. The FTC, together with the Antitrust Division, made written submissions and contributed to the discussions. The OECD summary of the key points from the discussions highlighted examples

of steps that many countries have taken to improve transparency and procedural fairness.

In 2012, the International Competition Network initiated a multi-year project on competition agencies' investigative processes. The FTC, along with the Directorate General for Competition of the European Commission, co-chairs the project, which involves agencies from over 40 jurisdictions along with leading representatives of the business community. The investigative process project addresses: the investigative tools that agencies use to obtain evidence; transparency and predictability; the ability of parties to present evidence and views during an investigation; agencies' internal checks and balances; the role of third parties; and confidentiality and legal privileges. Through this project, ICN member agencies and non-governmental advisors share experiences regarding agency powers and investigational procedures, with an eye towards developing guidance or recommendations. In 2013, the project delivered reports on investigative tools and transparency practices, highlighting common principles and effective practices across many jurisdictions. The FTC led a panel discussion of agency transparency practices at the recent ICN annual conference.

The FTC believes that transparent, predictable, and fair processes are not only beneficial to parties but also lead to better enforcement, informed by substantive input from parties. We will continue to promote the values of fairness, open dialogue with parties, and sound decision-making with our international counterparts and to keep these issues at the forefront of the international antitrust policy agenda.

23. Competition policy advocacy has traditionally been an important part of the Commission's role. As part of this function, the Commission recently sent comments to the Colorado PUC to discourage potential taxi regulations that would have had a negative impact on apps like Uber. You recently said that you hope to make the Commission's "research function" a priority during your term as Chair.

a. Will you commit to devote the Commission's research and advocacy functions to support the development of new entrants to markets that bring competition to consumers and generally lower prices?

Pursuant to our authority under Sections 6(a) and (f) of the FTC Act, the Commission regularly gathers and compiles information concerning certain business activity in order to better promote competition. One of the Commission's primary activities in this area is competition advocacy. This advocacy takes the form of submitting filings in support of competition principles to state legislatures, regulatory boards, and officials; state and federal courts; other federal agencies; and professional organizations. The Commission also organizes public workshops and issues reports on current competition topics.

This kind of research and advocacy is a critical component of the Commission's competition mission, and one that I support.

Office of the Secretary

Correspondence Referral

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Subject of Correspondence:

QFRs from hearing entitled "Oversight of the Enforcement of Antitrust Laws"

Author:
Senator Patrick Leahy

Representing:

Copies of Response To:

Deadline:
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Office of Congressional Relations - (0309)
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14008235

United States Senate

COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

April 30, 2013

The Honorable Edith Ramirez
Chairwoman
Federal Trade Commission
Washington, DC

Dear Ms. Edith Ramirez:

Thank you for your testimony at the Senate Committee on the Judiciary, Subcommittee on Antitrust, Competition Policy and Consumer Rights, hearing entitled "Oversight of the Enforcement of the Antitrust Laws" on April 16, 2013. Attached are written questions from Committee members. We look forward to including your answers to these questions, along with your hearing testimony, in the formal Committee record.

Please help us complete a timely and accurate hearing record by sending an electronic version of your responses to Melanie Kartzmer, Hearing Clerk, Senate Judiciary Committee, at Melanie_Kartzmer@judiciary-dem.senate.gov, no later than **May 14, 2013.**

Where circumstances make it impossible to comply with the two-week period provided for submission of answers, witnesses may explain in writing and request an extension of time to reply.

Again, thank you for your participation. If you have any questions, please contact Melanie at (202) 224-7703.

Sincerely,

Patrick Leahy

PATRICK LEAHY
Chairman

Questions for the Record Of Senator Patrick Leahy (D-Vt.),
Chairman, Senate Judiciary Committee
Hearing before the Senate Committee on the Judiciary
Subcommittee on Antitrust, Competition Policy and Consumer Rights
on "Oversight of the Enforcement of the Antitrust Laws"
April 16, 2013

Questions for Chairwoman Ramirez

1) In 2012, the Government Accountability Office (GAO) issued a report concerning Federal oversight and self-regulation of Group Purchasing Organizations (GPOs). This area has long been of interest to the Judiciary Committee. After I raised concerns about the potential impact on patient costs of GPO contracting practices with the Justice Department in 2000, and the Department of Health and Human Services in 2001, the Antitrust Subcommittee held a series of hearings on GPO practices that culminated in a joint report by the Department of Justice and Federal Trade Commission in 2004. During the hearings, many expressed concern that fees paid by vendors to GPOs distort demand, resulting in higher prices for hospitals and consumers.

Although the Department of Justice and FTC have investigated complaints against various GPOs, since 2004 the Department has filed only one lawsuit against a GPO under the antitrust laws, and the FTC has filed none. The GAO's 2012 report observed: "While the oversight of GPOs is conducted through the exercise of investigatory authorities of HHS, DOJ, and FTC... this oversight does not address other key questions that have previously been raised about GPOs' activities. For example, inasmuch as the collection of contract administrative fees is permitted under the safe harbor provision to the Anti-Kickback statute and safe harbor regulation, this oversight cannot address whether or to what extent these fees create a financial incentive that is inconsistent with GPOs obtaining the lowest prices for their customers."

Do you believe that the current legislative framework is sufficient to address the risk of undesirable conduct by GPOs that increases prices for consumers? Do you agree that the legal framework could be strengthened through other measures, such as revisiting the safe harbor for GPOs provided in the Anti-Kickback Statute?

2) Last year, I asked then-Commissioner Ramirez and the Acting Assistant Attorney General for Antitrust, Joseph Wayland, whether "patent trolling" behavior by certain patent-assertion entities could constitute an antitrust violation. Mr. Wayland responded: "Any effort by a patent owner to harm competition by improperly extending the exclusionary scope of its patent . . . may violate the antitrust laws, and allegations of such actions merit investigation." I was pleased that your agencies recently held a joint workshop to further investigate this question. How do your agencies intend to follow up on the workshop?

3) In your testimony, you stated that the FTC has heard reports of patent assertion entities making unsubstantiated claims relative to small businesses. Unfortunately, I continue to hear frequently about this problem from small businesses in Vermont and across the country. What steps can the FTC take to address this conduct through its consumer protection authority? Will

you agree to monitor such activity and take appropriate action to address abusive behavior by patent trolls?

4) Earlier this year, the FTC concluded its investigation of Google's search engine practices. A majority of Commissioners found that certain practices used by Google threatened competition and innovation, yet the FTC relied on voluntary commitments from Google to end those practices, instead of a consent order.

a. In your testimony, you expressed concern about the use of voluntary commitments to address anticompetitive violations. Can you please elaborate on that? What actions does the FTC intend to take to enforce Google's commitments?

b. In discussing potential remedies, some commentators noted the challenges involved in overseeing a technologically complex business practice that is constantly being updated, such as a search engine algorithm. How is the Commission responding to the challenges of enforcement in an online world?

c. In your testimony, you said that the FTC concluded that certain changes made by Google to its search engine algorithm were "pro-competitive" because they were "designed to improve the overall search experience for the user," even though they had the effect of negatively impacting rivals. Would your analysis have come out differently if the FTC had focused on the harm experienced by Google's other "users"; namely, the advertisers who pay to post ads on its site? How did the FTC determine its framework of analysis in assessing the procompetitive justifications of Google's conduct?

d. In light of the recent reports of action by your European counterpart authorities, is the FTC taking any further action in these matters?

Senator Klobuchar's Questions for the Record —
Subcommittee on Antitrust, Competition Policy and Consumer Rights
"Oversight of the Enforcement of the Antitrust Laws"

For Chairwoman Ramirez:

1. In these tough budget times, we're asking every agency to do more with less. Can you explain to us the value that you think antitrust enforcement brings to consumers and the economy as a whole?

2. The Antitrust Division and the Federal Trade Commission share responsibility for government enforcement of the federal antitrust laws. Sometimes this leads to conflicts regarding which agency will review a merger, what is known as the "clearance process." In some cases, the agencies take a long time, sometimes nearly the entire length of the thirty day pre-merger waiting period, to decide which one will investigate a merger. This unnecessarily delays resolution of the merger investigation, and imposes unnecessary burdens on the merging parties.

    - What is your agency doing to resolve clearance disputes in a more effective way? Are you working with the Antitrust Division/FTC, as the Antitrust Modernization Commission suggested in 2007, to develop a new merger clearance agreement?

3. Recently, standard essential patents have been the subject of several cases filed at the International Trade Commission (ITC). We can all agree that standardization of technology and standard essential patents have been critical to the development of a competitive market for smartphones and tablets. But recently, concerns have been raised about the practice of bringing standard essential patents cases to the ITC seeking an exclusion order to prevent products with the patents from being imported into the U.S. Some worry that the ITC exclusion orders related to standard essential patents could gravely harm competition.

    - What sorts of negative effects might the use of exclusion orders regarding standard essential patents have on competition and consumer welfare in general?

    - Is there any justification for the use of exclusion orders in the context of standard essential patents?

Written Questions of Senator Chuck Grassley for Judiciary Antitrust Subcommittee Hearing "Oversight of the Enforcement of the Antitrust Laws", April 16, 2013

Questions for Federal Trade Commission Chairwoman Ramirez

1. As you know, I've been concerned about settlement agreements between brand name and generic drug manufacturers that result in a payment to the generic manufacturer and a delay in market entry of the generic drug. These "pay for delay" or "reverse payment" agreements result in consumers having to pay higher costs for their drugs. Senator Kolbuchar and I have introduced a bill, the Preserve Access to Affordable Generics Act, that would help put a stop to these anti-competitive agreements and ensure that lower priced generic drugs enter the market as soon as possible. Former Chairman Jon Leibowitz was very supportive of our efforts to address this anti-competitive practice.

    a. Do you agree that these "pay for delay" agreements harm consumers?

    b. Do you agree that these kinds of agreements still a problem?

    c. What is the FTC doing to prevent these kinds of agreements?

    d. Do you believe that the Klobuchar/Grassley legislation would help preserve generic drug competition and ensure that more affordable drugs get to consumers as expeditiously as possible?

"Oversight of the Enforcement of the Antitrust Laws"
Senate Antitrust Subcommittee Hearing
April 16, 2013

Written Questions
Senator Michael S. Lee

Questions for Chairwoman Ramirez

1. In 2008, the Department of Justice released a report on Section 2 of the Sherman Act. The report was later withdrawn. That report provided the business community with guidance on applicable principles in Section 2 enforcement actions.

    a. Do you agree with the 2008 report's findings and conclusions?

    b. If not, with which specific findings and conclusions do you disagree?

    c. Do you agree that it would be helpful for the business community to have formal guidance on the enforcement agencies' approach to Section 2 enforcement?

    d. Will you commit to work with Mr. Baer to develop and publish formal guidance on Section 2 enforcement?

2. The Federal Trade Commission, particularly under the previous Chairman, has been in the practice of reaching settlements in cases brought under Section 5 of the FTC Act. These settlements are not subsequently reviewed by a court to establish a clear record of Section 5 enforcement boundaries. At the same time, the Commission has yet to provide definitive guidance as to how Section 5 can be used to enforce unfair methods of competition beyond the traditional scope of antitrust laws.

    a. Do you plan to continue the practice of enforcing Section 5 by means of settlements outside of court review?

    b. How do you think a practice of open-ended enforcement might be perceived in foreign jurisdictions where basic rule of law principles are often lacking?

    c. What formal guidance will you provide the business community regarding Section 5 enforcement?

3. At our Subcommittee's hearing last week, in response to a question regarding Section 5 of the FTC Act, you stated that you believe the Commission "has been using its Section 5 authority very rigorously and very judiciously," and that the agency is providing some measure of guidance through the pattern of its decisions.

    a. If the Commission is applying Section 5 "cautiously" and wishes to provide useful enforcement guidance, why are you resistant to provide such guidance in a more comprehensive, published form upon which the business community and others can meaningfully rely?

4. Some have expressed concern that the Commission's approach to Section 5 enforcement has left many in the business community confused and uncertain as the contours of that provision and the breadth of possible enforcement actions.

    a. Do you believe that the Commission may use Section 5 to create convergence with U.S. antitrust doctrine and that of international jurisdictions?

    b. Do you believe the Commission may use Section 5 to place additional emphasis within U.S. competition policy on consumer choice as a touchstone of antitrust law?

    c. Do you believe the Commission may use Section 5 to bring actions that increasingly incorporate analysis and assumptions based on behavioral economics?

5. At our Subcommittee's hearing last week, you stated that you believe the standards used by the FTC and the DOJ for obtaining a preliminary injunction are "quite similar" and that "as a practical matter what each agency needs to do is go before a judge and show and provide evidence that backs up the charges that are being made." You further stated that you "believe it would be difficult to point to a specific situation where…a case would have led to a different outcome had it been handled by a different agency."

    a. In its 2007 Report and Recommendations, the Antitrust Modernization Commission wrote that the "FTC's ability to continue a merger case in administrative litigation also may lead companies whose transactions are investigated by the FTC to feel greater pressure to settle a matter than if they had been investigated by the DOJ."

        i. Should companies face greater pressure to settle if their mergers are reviewed by the FTC rather than the DOJ?

        ii. Do you agree that even the perception of a more lenient standard for FTC cases than those brought by the DOJ could result in a practical difference for litigants who must weigh litigation risk?

    b. The 2007 Report further states that differences in the preliminary injunction standards faced by the FTC and the DOJ, whether real or perceived, "can undermine the public's confidence that the antitrust agencies are reviewing mergers efficiently and fairly and that it does not matter which agency reviews a given merger."

        i. Do you agree that public confidence is important and can be affected by – public perception of differing standards applied to identical issues?

        ii. Do you agree that it would be problematic if the identity of the reviewing agency led to different outcomes due to the parties' perception that the FTC and the DOJ face different standards for obtaining a preliminary injunction?

        iii. What measures do you believe appropriate to remedy any perceived or real inconsistency in the preliminary injunction standards faced by the agencies?

    c. In *FTC v. CCC Holdings*, the district court granted the FTC's request for a

preliminary injunction. The judge noted that although the defendants' arguments might "ultimately win the day," under Section 13(b) the trial court needed only to determine that "the FTC had raised questions that are so 'serious, substantial, difficult and doubtful' that they are 'fair ground for thorough investigation, study, deliberation and determination by the FTC'" to conclude that a preliminary injunction should issue. Commentators have written that "[t]he importance of the CCC Holdings decision therefore is not merely academic, and the resulting agency divergence is not merely procedural. It may be outcome determinative in some cases."[1]

i. Do you believe the standard applied by the district court in *FTC v. CCC Holdings* was the same as the preliminary injunction standard applicable to the DOJ in a merger case?

ii. Do you agree that application of that lower standard may have had an impact on the outcome of the case, in the sense that the outcome may have been different if the DOJ standard had been applied?

d. In the *Whole Foods* litigation, the FTC argued on appeal before the D.C. Circuit: "This Court has recognized, in keeping with the intent of Congress in creating the Commission and in enacting Section 13(b), that the Commission is not required to 'prove' any aspect of its case in order to secure a preliminary injunction in aid of its own adjudicative and remedial powers; rather, it need only show 'serious, substantial' questions requiring plenary administrative consideration. The district court's contrary approach ignores the statutory scheme, and effectively usurps the adjudicative role of the Commission."[2]

i. Do you contend the standard the Commission advanced in the *Whole Foods* appeal was the same standard DOJ has to meet in order to obtain a preliminary injunction in a merger case?

e. *FTC v. Libbey, Inc.*, 211 F. Supp.2d 34 (D.D.C. 2002), is another case in which a court applied a lower preliminary injunction standard to an FTC merger challenge than would have been applied if DOJ had brought the case.

i. Do you agree that the standard applied in that instance may have had an impact on the outcome of the case?

f. In February 2013, the Section of Antitrust Law of the American Bar Association issued a report entitled *Presidential Transition Report: The State of Antitrust Enforcement 2012*. The report commented that some circuits have relaxed the standard imposed on the FTC from the standard applicable to the DOJ. The Section noted that the standards applied in cases brought by the FTC differ from those in DOJ cases in other ways as well. The Section urged the FTC to adopt procedures "that will ensure that in merger cases it will seek injunctions only under the same equitable

[1] Peter Love and Ryan C. Thomas, *FTC v. CCC Holdings: Message Received*, GCP (April 2009) at 10.
[2] http://www.ftc.gov/os/caselist/0710114/080114ftcwholefoodsproofbrief.pdf at 27.

standard for a preliminary injunction as that applied to Division injunction cases." Absent such procedures, the report urged the Administration "to seek legislative changes to Section 13(b) of the Federal Trade Commission Act that will make it consistent with traditional equitable standards for injunctive relief."

i. Will you commit to adopt procedures to ensure that the Commission only seeks preliminary injunctions under the same equitable standards that apply to DOJ actions?

ii. Would you support legislation to clarify that the FTC and the DOJ must satisfy identical standards to obtain a preliminary injunction?

iii. If you remain convinced that the differing standards applied to FTC and DOJ actions are "quite similar" and as a practical matter lead to little if any difference in outcome, what would be the harm in clarifying that the applicable standard is in fact the same or in establishing a unified standard?

6. At our Subcommittee's hearing last week, you expressed concern that an acceptance by the Commission of voluntary commitments, as opposed to a consent order, would create confusion over its settlement practices. You suggested that the Commission's acceptance of voluntary commitments by Google should not be considered precedent. Yet, other companies under investigation may believe they need not enter into binding consent decrees, instead asking to be treated by the Commission in the same manner as Google. In addition to an appearance of favoritism the Google agreement may create, I am concerned about informal and illegitimate regulatory creep when the Commission seeks to secure voluntary commitments from private companies. If a majority of commissioners finds a violation there should be a formal consent order. If a majority does not find a violation, the Commission has no authority to interfere in the market and should not pursue any enforcement action, whether voluntary or not.

   a. Now that the Commission has in fact negotiated and accepted a voluntary commitment in lieu of consent order, what specifically do you plan to do to correct perceptions and assumptions about future enforcement actions?

   b. If the Commission does not plan to follow the standard of settlement practices used in this case ever again, how will you respond to assertions that Google received special treatment from the Commission?

7. At our Subcommittee's hearing last week, you seemed to agree with me that voluntary commitments are an illegitimate approach for the Commission to use in seeking to resolve antitrust violations.

   a. Under your leadership, will the Commission move to correct this misstep and seek to embody Google's voluntary commitments in a formal consent order?

8. At our Subcommittee's hearing last week, you stated that if Google does not uphold and complete its voluntary commitments from the settlement, the Commission will take "appropriate action."

a. Given that there is no Commission precedent for dealing with this type of voluntary commitment, what specifically would that appropriate action entail?

b. Would such action require the Commission to undergo another complex and lengthy investigative proceeding, which could allow harmful business practices to continue undeterred until there is a formal settlement?

9. The Commission's closing statement in the Google matter concluded: "Challenging Google's product design decisions in this case would require the Commission – or court – to second-guess a firm's product design decisions where plausible procompetitive justifications have been offered, and where those justifications are supported by ample evidence." Similarly, Chairman Leibowitz's opening remarks stated: "Google's primary reason for changing the look and feel of its search results to highlight its own products was to improve the user experience."

   a. This approach appears to differ from the standard set forth in the Microsoft case and the standard that you said the Commission used to evaluate Google's conduct. Under the Microsoft decision, the Commission, or a court, must examine whether "the anticompetitive effect of the challenged action outweighs [any proffered justification for the product design change]." United States v. Microsoft Corp, 253 F.3d 34, 67 (D.C. Cir. 2001). It would have required the Commission to apply a balancing test rather than concluding its analysis simply upon a finding that Google put forth a plausible business justification, as suggested by the Commission's closing statement and Chairman Leibowitz's remarks. Please explain this apparent inconsistency.

   b. What standard will the Commission apply in the future to similar circumstances?

10. Several states have ongoing investigations of Google's conduct.

    a. Did the Commission coordinate its legal and factual analysis with these states?

    b. Did the Commission attempt to work with these states to obtain a coordinated settlement?

11. Google's practice of negotiating exclusionary syndication and distribution agreements was not addressed in the Commission's decision.

    a. Did the Commission review this conduct?

    b. If so, why was it not included in the Commission's final decision?

12. The Commission and the Department of Justice share enforcement of the antitrust laws, both in mergers and conduct investigations. It is not always clear to the parties involved who will review a transaction or business practice. In June 2011, then-Chairman Leibowitz told the Senate Commerce Committee: "It is true that there are occasional clearance disputes over which agency is in the better position to investigate a matter . . . . The FTC and DOJ have a process in place to resolve clearance disputes, which helps resolve the issue quickly." Please provide the Subcommittee:

a. The precise process(es) for resolving these disputes;

b. Examples of the types of agreements that the Commission and the Department have reached in merger and non-merger clearance disputes, including how the parties determine which agency will review a subsequent transaction involving the same company or industry and the duration of such agreements; and

c. The number of such disputes since January 2009 and the average length of time such disputes lasted.

13. The Commission has issued two recent orders that address the meaning of commitments to license on fair, reasonable, and non-discriminatory (FRAND) terms. In *Bosch*, the Commission embraced an order and remedy that many believe represented progress on this issue. A month later, the Commission adopted a more complicated order and remedy in the Google matter, criticized by some as being weak and riddled with loopholes.

    a. Why did the Commission seek such a complicated (and potentially weakened) remedy in the Google matter?

    b. Please explain your view of the *Bosch* decision.

        i. Are you concerned about using a merger review process to require relief on unrelated conduct as a condition for clearing the deal?

14. In the debate over standard essential patents and FRAND commitments, much discussion has focused on the willingness of potential licensees to engage in negotiations.

    a. In your view, what does it mean to be a willing licensee?

    b. Is a licensee unwilling simply because it refuses to accept a stated demand as FRAND or demands that the party demonstrate that its portfolio is composed of valid and infringed patents that have some value apart from its inclusion in the standard?

    c. There has been comparatively little focus on the willingness of SEP holders to engage in good faith negotiations—that is, whether the SEP holder is a willing licensor. Would you agree that there is a burden on the SEP holder to demonstrate the value of its SEP portfolio, a burden that is generally not discharged by merely quoting a rate, particularly when the rate clearly exceeds traditional industry benchmarks?

15. The Commission statement accompanying its decision relating to Google's abuse of certain standard essential patents indicated that "Google's settlement with the Commission requires Google to withdraw its claims for injunctive relief on FRAND encumbered patents around the world."

    a. How many of those claims for injunctive relief have been withdrawn and how many are still open?

    b. What is the Commission doing to ensure compliance with its Order?

16. In testimony before our Committee last July, you expressed concerns about anticompetitive abuse of standard essential patents and stated that the Commission "believes that the ITC has the authority under its public interest obligations . . . to deny an exclusion order if the holder of the FRAND-encumbered SEP has not complied with its FRAND obligation." You also suggested that if the ITC did not act appropriately, Congress should consider giving the ITC more flexibility to deny exclusion orders in such cases.

    a. In your view, has the ITC responded to the concerns you raised?

    b. Do you worry about ITC decisions in cases involving FRAND-encumbered SEPs, given that the only available ITC remedy is an exclusion order?

    c. Do you believe that enforcement action based on anticompetitive abuse of FRAND-encumbered SEPs could and should be pursued under Section 2 of the Sherman Act?

17. At our Subcommittee's hearing last week, there was much discussion of legislation that would impose a presumption that all patent settlements between innovator pharmaceutical companies and generic companies are anticompetitive. By statute, the Commission is already entitled to receive notice of such settlements, so it has ample opportunity to review such settlements for any anticompetitive problems. Both federal statute and Supreme Court case law state that patents are presumed to be valid. 35 U.S.C. § 282; *Microsoft Corp. v. i4i Limited Partnership*, 131 S.Ct. 2238 (2011). Indeed, patent invalidity must be proved by the elevated standard of clear and convincing evidence. *Microsoft*, 131 S.Ct. at 2252. In addition, it is well-settled law that settlements of litigation are highly favored. Yet, your position on patent settlements legislation seems to contradict quite squarely these two well-settled, time-tested principles.

    a. How can you reconcile your position with these principles, particularly when the settlement occurs within the term of the patent?

    b. Do you really believe that all such settlements are necessarily anticompetitive?

    c. Under what conditions might such a settlement be procompetitive in its effect?

18. The Commission's estimated cost savings associated with legislation providing the FTC with additional authorities to prevent parties from settling Hatch-Waxman patent litigation appears to differ from both Office of Management and Budget (OMB) numbers in the President's FY 2014 proposal and previous Congressional Budget Office (CBO) cost savings figures. In fact, there appear to be three entirely different estimates of what, if any, savings there may be.

    a. In light of these discrepancies, what effort has the Commission taken to coordinate information sharing of studies, proposals, or assumptions with OMB and CBO to determine the accuracy and validity of estimated cost savings?

    b. What information related to patent settlements has the Commission received from either CBO or OMB?

c. Has the Commission received any data or information from other public or private organization on patent settlements upon which it has relied in making assumptions about savings from patent settlements? If so, which entities?

19. Many in the IP community are concerned by the growing number of instances in which established operating companies transfer their patents to patent assertion entities (PAEs), so that these entities can target the established company's competitors. Some reports suggest that the operating companies often retain a revenue interest in the assertion of the transferred patents, which have included patents that are subject to commitments to license on FRAND terms. Last week, the Commission's directors of both economics and competition said that they support the issuance of a Section 6(b) order to investigate the PAE industry.

    a. Would you support such an order? If not, why not?

20. Both China and India have draft guidelines or policies that would make it an abuse of intellectual property rights for a dominant company unconditionally and unilaterally to refuse to license its critical intellectual property rights to a competitor who needs access to those rights to compete and innovate. These initiatives are clearly inconsistent with the DOJ's and FTC's Antitrust Guidelines for the Licensing of Intellectual Property, as well as U.S. case law, and could significantly harm innovative American companies operating overseas by undermining their intellectual property.

    a. What is the Commission doing about these broad intellectual property abuse policies that are emerging in key foreign jurisdictions?

    b. Because unconditional refusals to license strike at the heart of intellectual property rights, are you also working with USTR and the PTO to develop a holistic approach for influencing activities overseas?

    c. Are you concerned that open-ended tests for abuse may allow foreign governments to use antitrust policy as a backdoor means for usurping the intellectual property rights of U.S. companies?

21. Some have expressed concern about consumer harm in the prescription eyeglass and contact lens industry. Requiring consumers to obtain a prescription prior to purchasing a product impedes free market forces. Circumstances in which the prescriber is also the retailer of the prescribed product presents a conflict of interest that may lead to anticompetitive behavior. This is especially true when the product is prescribed by brand, locking a consumer into purchasing the brand selected by the prescriber. The Commission has historically taken steps to promote consumer choice in such markets, such as by promulgating the Eye Glass Rule in the late 1970s and the Contact Lens Rule, which implemented the Fairness to Contact Lens Consumers Act, nearly a decade ago. Both of these rules guarantee that upon completion of an eye exam, a consumer has the automatic right to receive copies of his prescriptions without having to make a request, pay a fee, or sign a waiver. These rules provide consumers with the opportunity to exercise that choice when buying contact lenses or eyeglasses.

a. Despite the requirement that patients receive eyeglass prescriptions including all "written specifications. . . necessary to obtain lenses for eyeglasses,"[3] pupillary distance (P/D) measurement is instead typically taken at the store where the eyeglasses are purchased. Now that eyeglasses are available online, it is important that P/D is included in prescriptions given consumers—as required by law—allowing them freedom to purchase eyeglasses where they want, whether at a brick-and-mortar store or online. To help ensure that consumers have this choice, will the Commission issue guidance reminding prescribers of their legal obligation to include on prescriptions all parameters necessary to produce lenses, including the P/D?

22. Under your predecessor, the Commission showed leadership in supporting the development of transparency and procedural fairness norms internationally. That work has been done in the OECD and is now being conducted in the ICN. It has also been incorporated into the Trans-Pacific Partnership and there will be an opportunity to do so in the US-EU Transatlantic Trade and Investment Partnership.

    a. What do you think about the need for increased transparency and due process in antitrust proceedings globally?

    b. Do you plan to continue to work in a similar vein as your predecessors in bringing these issues to forefront of the international antitrust policy debate?

23. Competition policy advocacy has traditionally been an important part of the Commission's role. As part of this function, the Commission recently sent comments to the Colorado PUC to discourage potential taxi regulations that would have had a negative impact on apps like Uber. You recently said that you hope to make the Commission's "research function" a priority during your term as Chair.

    a. Will you commit to devote the Commission's research and advocacy functions to support the development of new entrants to markets that bring competition to consumers and generally lower prices?

[3] 16 CFR 456.1(g).

Prepared Statement of
the Federal Trade Commission

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

"Oversight of the Enforcement of the Antitrust Laws"

Washington, D.C.
April 16, 2013

Chairman Klobuchar, Ranking Member Lee, 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 the variety of choices available, and promoting innovation.

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 FTC continues to examine potentially anticompetitive mergers and conduct that are likely to harm competition and consumers, and takes action where appropriate.

One of the agency's principal responsibilities is to prevent mergers that may substantially lessen competition. Pre-merger filings under the Hart-Scott-Rodino Act continue to recover from recessionary levels—indeed, FY 2012 saw twice as many filings as FY 2009.[2] Agency staff reviews the filings, and a small number of the proposed mergers require additional investigation

[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. Commissioner Wright has voted to issue this Statement but takes no position with respect to enforcement actions or other matters that occurred prior to his tenure as Commissioner.

[2] In FY 2012, there were 1,400 adjusted transactions reported to the Agencies (transactions in which a second request could have been issued). Comparatively, in FY 2009 there were 684 such transactions.

to determine whether they are likely to violate Clayton Act Section 7. During FY 2012, the Commission challenged 25 mergers after the evidence showed that they would likely be anticompetitive.[3] In the current fiscal year, the Commission has challenged 11 mergers,[4] including two actions where the Commission sought a preliminary injunction in federal court to prevent consummation of the mergers.[5]

The FTC has also made significant progress in its ongoing efforts[6] to review and update rules, regulations, and guidelines periodically so that they remain current, effective, and not unduly burdensome. 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 discovery, motions practice, trial, and adjudication.[7] The result is a faster-paced administrative process, one comparable to or even faster than federal court timelines for similar actions.[8]

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[3] Seven proposed mergers were abandoned or restructured after FTC staff raised competitive concerns; fifteen were resolved by entry of Commission consent orders; and in three, the FTC filed complaints to stop the mergers pending a full administrative trial. See case summaries in the FTC's Competition Enforcement Database, *available at* http://www.ftc.gov/bc/caselist/merger/total/2012.pdf.

[4] See cases listed at http://www.ftc.gov/bc/caselist/merger/total/2013.pdf; several are discussed in more detail *infra*.

[5] Press Release, FTC and Pennsylvania Attorney General Challenge Reading Health System's Proposed Acquisition of Surgical Institute of Reading (Nov. 16, 2012), *available at* http://ftc.gov/opa/2012/11/reading.shtm; Press Release, FTC Issues Complaint Seeking to Block Integrated Device Technology, Inc.'s Proposed $330 Million Acquisition of PLX Technology, Inc. (Dec. 18, 2012), *available at* http://www.ftc.gov/opa/2012/12/idtplx.shtm.

[6] *See, e.g.*, Prepared Statement on The FTC's Regulatory Reform Program: Twenty Years of Systematic Retrospective Rule Reviews & New Prospective Initiatives to Increase Public Participation and Reduce Burdens on Business Before the House Committee on Energy and Commerce Subcommittee on Oversight and Investigations, 112th Congress (July 7, 2011), *available at* http://www.ftc.gov/os/testimony/110707regreview.pdf.

[7] Press Release, FTC Issues Final Rules Amending Parts 3 and 4 of the Agency's Rules of Practice (Apr. 27, 2009), *available at* http://www.ftc.gov/opa/2009/04/part3.shtm. In August 2011, the Commission made additional changes relating to discovery, the labeling and admissibility of certain evidence, and deadlines for oral arguments. Press Release, FTC Modifies Part 3 of Agency's Rules of Practice (Aug. 12, 2011), *available at* http://www.ftc.gov/opa/2011/08/part3.shtm.

[8] For example, after the Commission voted unanimously on January 6, 2011, to challenge a hospital merger in Toledo, Ohio, FTC lawyers filed an administrative complaint and, with the Ohio Attorney General, a motion for a preliminary injunction in federal court in Ohio. After a two-day trial, the federal judge issued a preliminary injunction on March 29 preventing further integration. Meanwhile, both FTC complaint counsel and the respondents prepared for a full administrative trial that began on May 31, 2011. After 30 days of testimony and motions, including 81 witnesses and over 2,700 exhibits, the ALJ heard closing arguments on September 29. Overall, within

This testimony highlights these and other key Commission efforts to promote competition in crucial health care, technology, and energy markets.

A. Promoting Competition in Health Care Markets

The rising cost of health care is a serious concern for most Americans. Health care consolidation can threaten to undermine efforts to control these costs, and it is critical that the Commission act to preserve and promote competition in health care markets. Competition encourages market participants to deliver cost-effective, high-quality care and to pursue innovation to further these goals.[9]

1. Stopping Anticompetitive Health Care Mergers

A number of FTC merger enforcement actions in the past several years have involved companies in health care markets: hospitals, pharmacies, medical device and pharmaceutical manufacturers, and other market participants.

In particular, the Commission has redoubled its efforts to prevent hospital mergers that may leave insufficient local options for in-patient hospital services, leading to higher prices for health care. In the last two years, the Commission has successfully prevented anticompetitive

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nine months, FTC staff prosecuted both a preliminary injunction action and a trial on the merits, which is a timeframe comparable to a fast-track litigation in federal district court.

[9] For a complete list of FTC enforcement actions relating to health care, see Overview of FTC Antitrust Actions in Health Care Services and Products, *available at* http://www.ftc.gov/bc/healthcare/antitrust/hcupdate.pdf and Overview of FTC Antitrust Actions in Pharmaceutical Services and Products, *available at* http://www.ftc.gov/bc/healthcare/antitrust/rxupdate.pdf.

hospital mergers in Toledo, Ohio,[10] and Rockford, Illinois,[11] as well as allegedly anticompetitive mergers involving other types of health care facilities.[12]

Additionally, in February, the Supreme Court unanimously ruled in favor of the Commission, reviving the Commission's challenge to a hospital merger resulting in an alleged monopoly for inpatient services in the Albany, Georgia area. [13] In so ruling, the Court accepted the Commission's argument that the state action doctrine did not exempt the acquisition from antitrust scrutiny. It held that the Georgia legislature did not articulate a clear policy that hospital authorities could eliminate competition through a hospital merger by merely conferring general corporate powers on the local hospital authority. The administrative hearing will commence this summer.[14]

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 hospitals mergers, these transactions can lead to higher health care costs. In March 2013, the Commission, along with the Idaho Attorney General, filed suit to prevent Idaho's dominant hospital system from raising health care costs through its acquisition of the state's largest multi-

[10] Press Release, Citing Likely Anticompetitive Effects, FTC Requires ProMedica Health System to Divest St. Luke's Hospital in Toledo, Ohio, Area (Mar. 28, 2012), *available at* http://www.ftc.gov/opa/2012/03/promedica.shtm. An appeal of the Commission's order is pending before the Sixth Circuit. *ProMedica Health Sys., Inc. v. FTC,* No. 12-3583 (6th Cir. appeal docketed May 18, 2012).

[11] Press Release, OSF Healthcare System Abandons Plan to Buy Rockford in Light of FTC Lawsuit; FTC Dismisses its Complaint Seeking to Block the Transaction (Apr. 13, 2012), *available at* http://www.ftc.gov/opa/2012/04/rockford2.shtm.

[12] For instance, the Commission took action to remedy the alleged anticompetitive effects of a merger of a hospital and a surgery center in Reading, Pennsylvania, Press Release, FTC and Pennsylvania Attorney General Challenge Reading Health System's Proposed Acquisition of Surgical Institute of Reading (Nov. 16, 2012), *available at* http://www.ftc.gov/opa/2012/11/reading.shtm., and required a divestiture in a merger of facilities providing inpatient psychiatric services. Press Release, FTC Puts Conditions on UHS's Proposed Acquisition of Ascend Health Corporation (Oct. 5, 2012), *available at* http://www.ftc.gov/opa/2012/10/uhs.shtm. The Commission also prevented the merger of two long-term care pharmacies that provide medications to skilled nursing homes. *See* Press Release, Omnicare Abandons Plan to Buy Rival Pharmacy in Light of FTC Lawsuit; FTC Votes to Dismiss its Complaint Seeking to Block the Transaction (Feb. 23, 2012), *available at* http://www.ftc.gov/opa/2012/02/omnicare.shtm.

[13] *FTC v. Phoebe Putney Health Sys. Inc.,* 133 S. Ct. 1003 (2013).

[14] *Phoebe Putney Health Sys. Inc.,* Docket No. 9348 (April 3, 2013) (order denying Respondents' motion to reschedule hearing date), *available at* http://www.ftc.gov/os/adjpro/d9348/130403phoebeorder.pdf.

specialty physician group.[15] While the Commission has concerns about consolidation among health care providers, we will not stand in the way of legitimate provider collaboration that will reduce costs and improve the quality of care.

The Commission also continues to review mergers between pharmaceutical manufacturers to prevent transactions or combinations that may allow companies to exercise market power by raising prices on needed medications. For instance, in the last two years, the Commission required divestitures to remedy competitive concerns stemming from eight proposed mergers between drug makers, preserving competition in the sale of over 40 drugs.[16]

2. Combatting Efforts to Stifle Generic Competition

A top priority for the Commission over the past decade has been ending anticompetitive "pay-for-delay" agreements: settlements of patent litigation in which a branded pharmaceutical manufacturer pays the generic manufacturer to keep its competing product off the market for a certain time. We of course are aware of Chairman Klobuchar, Senator Grassley and others' bill to address pay-for-delay agreements and appreciate your efforts in this important area. These agreements enable branded manufacturers to buy more protection from competition than the assertion of their patent rights alone provide. The agreements profit both the branded

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[15] Press Release, FTC and Idaho Attorney General Challenge St. Luke's Health System's Acquisition of Saltzer Medical Group as Anticompetitive (Mar. 12, 2013), *available at* http://www.ftc.gov/opa/2013/03/stluke.shtm. Additionally, in December 2012, the FTC finalized a consent decree with the largest hospital system in Reno, Nevada, designed to restore competition to the market for cardiology services there following Renown's acquisition of two local cardiology groups allegedly threatened competition in that market. Press Release, FTC Order Will Restore Competition for Adult Cardiology Services in Reno, Nevada (Aug. 6, 2012), *available at* http://www.ftc.gov/opa/2012/08/renownhealth.shtm.

[16] *Watson Pharms.*, Docket No. C-4373 (Dec. 14, 2012) (consent order), *available* at http://www.ftc.gov/os/caselist/1210132/index.shtm; *Novartis AG*, Docket No. C-4364 (Sept. 5, 2012) (consent order), *available* at http://www.ftc.gov/os/caselist/1210144/index.shtm; *Valeant Pharm. Int'l, Inc.*, Docket No. C-4342 (Feb. 22, 2012) (consent order), *available* at http://www.ftc.gov/opa/2012/02/valeant.shtm; *Teva Pharm., Inc.*, Docket No. C-4335 (July 2, 2012) (consent order), *available at* http://www.ftc.gov/os/caselist/1110166/index.shtm; *Hikma Pharms.*, Docket No. C-4320 (June 7, 2011) (consent order), *available at* http://www.ftc.gov/os/caselist/1110051/index.shtm; *Grifols S.A.*, Docket No. C-4322 (July 22, 2011) (consent order), *available at* http://www.ftc.gov/os/caselist/1010153/index.shtm; *Perrigo Co.*, Docket No. C-4329 (June 26, 2012) (consent order), *available at* http://www.ftc.gov/os/caselist/1110083/index.shtm.

manufacturers, who continue to charge monopoly prices, and the generic manufacturers, who receive substantial compensation for agreeing not to compete.

These agreements, however, impose substantial costs on consumers, businesses, and taxpayers—as much as $3.5 billion each year according to FTC economists[17]—and their numbers are growing. According to our most recent data, in FY 2012, the number of potentially anticompetitive patent dispute settlements between branded and generic drug companies increased significantly compared with FY 2011, jumping from 28 to 40.[18] Overall, the FY 2012 agreements covered 31 different brand-name pharmaceutical products with combined annual U.S. sales of more than $8.3 billion.

On March 25, 2013, the Supreme Court heard arguments in *FTC v. Actavis, Inc.*,[19] a Commission appeal of the Eleventh Circuit's dismissal of a challenge to an alleged "pay-for-delay" agreement involving the testosterone-replacement drug AndroGel. The Eleventh Circuit's decision followed a string of decisions from the courts of appeals largely insulating these agreements from antitrust scrutiny, a trend broken last year by the Third Circuit's ruling in the *In re K-Dur* litigation, which found the agreements presumptively unlawful.[20] We are hopeful for a favorable decision from the Supreme Court that stops these anticompetitive settlements.[21]

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[17] 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.

[18] Press Release, FTC Study: In FY 2012, Branded Drug Firms Significantly Increased the Use of Potential Pay-for-Delay Settlements to Keep Generic Competitors off the Market (Jan. 17, 2013), *available at* http://www.ftc.gov/opa/2013/01/mmarpt.shtm.

[19] *FTC v. Actavis, Inc.*, 2013 U.S. LEXIS 9415, *cert. granted*, 133 S. Ct. 787 (U.S. Dec. 7, 2012) (No. 12-146). When the Supreme Court granted certiorari, the case name was *Federal Trade Commission v. Watson Pharmaceuticals, Inc.* On January 24, 2013, Watson notified the Supreme Court that the company had changed its name to "Actavis, Inc.," which resulted in the Supreme Court modifying the name of the case.

[20] 686 F.3d 197 (3d Cir. 2012).

[21] A large number of amici, including the American Medical Association, 118 law, economics, and business professors, and 36 states plus the District of Columbia and the Commonwealth of Puerto Rico, supported our position.

In addition to our pay-for-delay efforts, the Commission continues to monitor other strategies adopted by branded pharmaceutical companies that may be designed to delay or prevent generic entry. For example, we recently filed amicus briefs in private antitrust litigations involving two of these strategies. One involved the potentially anticompetitive abuses of safety protocols known as Risk Evaluation and Mitigation Strategies ("REMS") to prevent a generic from being able to access samples of brand products to begin the bioequivalence testing process required by the Hatch-Waxman Act.[22] The other involves product hopping, which occurs when brand companies, facing a threat of generic competition, make minor non-therapeutic changes to their products.[23] While these changes may offer little or no benefit to patients, they may enable the brand to preserve its monopoly by preventing generic substitution at the pharmacy level, which is a key to competition in the pharmaceutical industry.

B. Antitrust Oversight in Technology Markets

The Commission also 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. The Commission recently challenged a proposed merger between Integrated Device Technology, Inc. and PLX Technology, Inc. Both companies make Peripheral Component Interconnect Express ("PCIe") switches, complex integrated circuits used to transmit data between processor chips and various endpoints in computer systems, such as

[22] Fed. Trade Comm'n, Brief as Amicus Curiae, *Actelion Pharms. Ltd.,v. Apotex Inc.*, No. 12-05743 (D.N.J. Mar. 11, 2013).
[23] Fed. Trade Comm'n, Brief as Amicus Curiae, *Mylan Pharms., Inc. v. Warner Chilcott Pub. Ltd. Co.*, No. 12-3824 (E.D. Pa. Nov. 21, 2012).

memory or graphics cards. There was substantial evidence of intense head-to-head competition on both price and innovation and a post-merger market share of over 80 percent in that matter.[24]

At other times, the evidence supports a more cautious approach. For instance, the Commission voted unanimously to close its investigation into allegations that Google harmed competition by unfairly preferencing its own content on the Google search results page and selectively demoting its competitors' content, a practice some refer to as "search bias." The Commission concluded that challenging Google's product design decisions would require the Commission or a court to second-guess Google's product design in the face of plausible procompetitive justifications, where the evidence reasonably could be viewed as showing that Google's design decisions improved the overall quality of Google search results. Based on this evidence, the Commission did not have reason to believe that Google's business practices were, on balance, demonstrably anticompetitive. Google did agree to make changes to certain other business practices that some members of the Commission found objectionable.[25]

The Commission also took action to stop Google's alleged misuse of standard essential patents ("SEPs"). Specifically, the Commission alleged that Google violated commitments made to several standard setting organizations to license patents essential to implementing several technology standards on fair, reasonable and non-discriminatory terms ("FRAND") to any interested manufacturer. The SEPs at issue were originally held by Motorola Mobility ("MMI") and covered technologies essential to interoperability standards used in a range of popular

[24] Press Release, FTC Issues Complaint Seeking to Block Integrated Device Technology, Inc.'s Proposed $330 Million Acquisition of PLX Technology, Inc. (Dec. 18, 2012), *available at* http://www.ftc.gov/opa/2012/12/idtplx.shtm. The parties abandoned the deal soon after the Commission filed suit.

[25] Google agreed to remove restrictions on the use of its online search advertising platform, AdWords, that may have made it more difficult for advertisers to coordinate online advertising campaigns across multiple platforms. Google also agreed to give websites the ability to "opt out" of display on Google vertical properties. *See* Letter from David Drummond, Senior Vice President and Chief Legal Officer, Google, Inc., to Chairman Jon Leibowitz, Fed. Trade Comm'n (Dec. 27, 2012), *available at* http://www.ftc.gov/os/2013/01/130103googleletterchairmanleibowitz.pdf.

devices such as smartphones, tablets, and gaming consoles. MMI, and then Google (after it acquired the MMI patent portfolio), allegedly refused to license the SEPs to willing licensees on FRAND terms, after manufacturers had developed standard compliant products in reliance on those commitments. In its administrative complaint, the Commission charged that Google engaged in unfair methods of competition and unfair acts and practices in violation of Section 5 of the Federal Trade Commission Act by seeking injunctions on SEPs for which FRAND promises had been made, thus threatening to harm the standard-setting process, impair competition in the markets for products using those patents, and ultimately, raise prices to consumers. To settle those charges, Google has agreed not to seek an injunction for infringement of its SEPs unless and until it has followed the process outlined in the Commission's proposed order, a process that encourages negotiation with potential licensees over disputed terms or ruling by a neutral third party.[26]

The proposed order in the Google-MMI decision is the most recent action[27] in more than two decades of Commission work involving complex issues at the intersection of antitrust and intellectual property law, issues pertaining to innovation, standard-setting, and patents. For instance, in 2003 and 2007, the Commission issued reports on competition and patent law,[28] and

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[26] Commissioner Ohlhausen voted against the proposed consent agreement in Google/MMI and issued a dissenting statement, which is available at http://www.ftc.gov/os/caselist/1210120/130103googlemotorolaohlhausenstmt.pdf.

[27] In a proposed order in November 2012, the Commission required largely similar commitments regarding SEPs from Robert Bosch GmbH. In order to proceed with its acquisition of SPX Service Solutions, Bosch agreed to sell its automotive air conditioner repair equipment business and to abandon SPX's claims to injunctive relief after SPX reneged on FRAND commitments involving SEPs for its equipment. Press Release, FTC Order Restores Competition in U.S. Market for Equipment Used to Recharge Vehicle Air Conditioning Systems (Nov. 26, 2012), *available at* http://www.ftc.gov/opa/2012/11/bosch.shtm. Commissioner Ohlhausen voted against the proposed consent agreement in *Bosch* and issued a separate statement, which is available at http://www.ftc.gov/os/caselist/1210081/121126boschohlhausenstatement.pdf.

[28] Fed. Trade Comm'n and Dep't of Justice, Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition (2007), *available at* http://www.ftc.gov/reports/innovation/P040101PromotingInnovationandCompetitionrpt0704.pdf; Fed. Trade Comm'n, To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy (2003), *available at* http://www.ftc.gov/os/2003/10/innovationrpt.pdf.

in 2011, we issued another significant patent study, focusing on notice and remedies.[29] That same year we held a workshop to learn more about licensing in the standard-setting context and how standard-setting organizations and their members have dealt with the risk of patent hold-up.[30] Last December, the FTC and DOJ held a joint workshop to discuss the activities of patent assertion entities.[31] In addition to this policy work, the Commission has brought several cases involving anticompetitive conduct by technology companies for undermining the standard-setting process.[32]

The Commission will continue to foster an ongoing dialogue with stakeholders in this important area, and 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.

C. Preserving Competition in Energy Markets

Few issues are more important to consumers and businesses alike 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.

Mergers can significantly affect competition in energy markets, and the Commission's review of proposed mergers is essential to preserving competition in these markets. The FTC

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[29] Fed. Trade Comm'n, The Evolving IP Marketplace: Aligning Patent Notice and Remedies with Competition (2011), *available at* http://www.ftc.gov/os/2011/03/110307patentreport.pdf.
[30] Fed. Trade Comm'n Workshop, Tools to Prevent Patent "Hold-Up" (June 21, 2011); materials available at http://www.ftc.gov/opp/workshops/standards/index.shtml.
[31] The workshop materials are available at http://www.ftc.gov/opp/workshops/pae/.
[32] *Dell Computer Corp.*, 121 F.T.C. 616 (1996); *Union Oil Co. of Cal.*, 140 F.T.C. 123 (2005); *Rambus Inc.*, 2007 F.T.C. LEXIS 13 (2007); *Negotiated Data Solutions, LLC*, 2008 F.T.C. LEXIS 120 (2008).

devotes significant resources to reviewing proposed mergers and acquisitions involving petroleum and other energy products, and to taking action where appropriate. As a recent example, last year the FTC required Kinder Morgan, Inc., one of the largest U.S. transporters of natural gas and other energy products, to sell three natural gas pipelines and two gas processing plants and associated storage capacity in the Rocky Mountain region to settle the Commission's charges that the acquisition likely would have been anticompetitive.[33] In another 2012 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.[34]

The Commission also participates in the Oil and Gas Price Fraud Working Group created by the Attorney General to monitor oil and gas markets for potential violations of criminal or civil laws.

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 helps the agency identify appropriate targets for further investigation of potentially anticompetitive conduct.[35] We also use the data generated by the monitoring project

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[33] Press Release, FTC Requires Kinder Morgan to Sell Rocky Mountain Pipelines as a Condition of Acquiring El Paso Corporation (May 1, 2012), *available at* http://www.ftc.gov/opa/2012/05/elpaso.shtm.
[34] 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.
[35] *See* Gasoline and Diesel Price Monitoring, *available at* http://www.ftc.gov/ftc/oilgas/gas_price.htm.

in conducting periodic studies of the factors that influence the prices that consumers pay for gasoline.[36]

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. Recent joint efforts resulted in the publication of two significant policy statements—the revised Horizontal Merger Guidelines and the Antitrust Enforcement Policy Statement Regarding Accountable Care Organizations—that enhance the consistency, clarity, and transparency of U.S. antitrust policy and enforcement. Additionally, the agencies recently co-hosted two workshops: one exploring the antitrust implications of most-favored-nation clauses[37] and, as mentioned above, another exploring the impact of patent assertion entities. The Commission understands the special obligation of the law 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.[38]

It is also crucial for the U.S. antitrust agencies to cooperate with our counterparts worldwide to ensure that competition laws functions coherently and effectively now that antitrust enforcement has gone global, with well over 120 jurisdictions enforcing a variety of competition laws. The FTC has developed strong bilateral relationships with many of our sister agencies and works with its foreign counterparts in multilateral fora to promote cooperation and convergence

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[36] 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* Press Release, FTC Issues New Report on Gasoline Prices and the Petroleum Industry (Sept.1, 2011), *available at* http://www.ftc.gov/opa/2011/09/gasprices.shtm.

[37] Press Release, FTC and Department of Justice to Hold Workshop on "Most-Favored-Nation" Clauses (Aug. 17, 2012), *available at* http://www.ftc.gov/opa/2012/08/mfn.shtm.

[38] The FTC also routinely coordinates on law enforcement efforts with state attorneys general. For example, last month, the FTC and Idaho Attorney General jointly investigated and sued to block an Idaho hospital from acquiring the state's largest multi-specialty physician practice group. *See* Press Release, FTC and Idaho Attorney General Challenge St. Luke's Health System's Acquisition of Saltzer Medical Group as Anticompetitive (Mar. 12, 2013), *available at* http://www.ftc.gov/opa/2013/03/stluke.shtm.

toward sound competition policy. The past few years have seen some important milestones for international cooperation. For example, the FTC and DOJ entered into a Memorandum of Understanding ("MOU") with the three Chinese antitrust agencies aimed at promoting greater communication and cooperation,[39] and signed a similar MOU with antitrust enforcers in India last fall.[40] In addition, at the recent annual bilateral consultations with the European Commission's Directorate General for Competition ("DG COMP"),[41] the FTC, DOJ, and EC issued revised Best Practices on Cooperation in Merger Investigations.[42] In a world where commerce knows no borders, international cooperation has proven to be a critical component of effective antitrust enforcement.

Through these and other activities, the FTC is well-positioned to combat harmful conduct and mergers and encourage policies at home and abroad that support competitive markets.

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.

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[39] 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.

[40] Press Release, FTC and DOJ Sign Memorandum of Understanding With Indian Competition Authorities (Sept. 27, 2012), *available at* http://www.ftc.gov/opa/2012/09/indiamou.shtm.

[41] The European Commission, together with the national competition authorities, enforces EU competition rules. Within the Commission, DG-Comp is primarily responsible for investigation and enforcement of these rules. http://ec.europa.eu/dgs/competition/index_en.htm.

[42] Press Release, United States and European Union Antitrust Agencies Issue Revised Best Practices for Coordinating Merger Reviews (Oct. 14, 2011), *available at* http://www.ftc.gov/opa/2011/10/eumerger.shtm.

Office of the Secretary

Correspondence Referral

Remember to Designate FOIA Status

Today's Date: 04/04/13

Reference Number: 14008118

Type of Response (or) Action:
Complaint

Date Forwarded:
04/04/13

Action: Commission Approval

Subject of Correspondence:

Invitation to Testify at a Hearing Entitled: "Oversight of the Enforcement of the Antitrust Laws" on April 16, 2013

Author:
Senator Amy Klobuchar

Representing:

Copies of Response To:

Deadline:
04/12/13

Copies of Correspondence To:

Organization Assigned:
Policy and Coordination - BC

ACTION LOG

Date Received	FTC Org. Code	Assignment To:	Date Assigned	Action Required
	1039			

EXPEDITE

United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

April 3, 2013

The Honorable Edith Ramirez
Chairwoman
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, DC

Dear Ms. Ramirez:

I invite you to testify on April 16, 2013, at the Senate Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights, hearing entitled, "Oversight of the Enforcement of the Antitrust Laws." The hearing is scheduled to begin at 2:30 p.m. in room 226 of the Dirksen Senate Office Building.

Committee rules require that you provide electronic copies of your testimony and biography for distribution to members of the Committee at least 24 hours before the hearing is scheduled to begin. Please send them to the attention of Maria Laverdiere at Maria_Laverdiere@klobuchar.senate.gov.

Please contact Caroline Holland at 202-224-3244 or caroline_holland@judiciary-dem.senate.gov with any questions. We look forward to your testimony.

Sincerely,

Amy Klobuchar

1400818

Amy Klobuchar
Chairman, Subcommittee on
Antitrust, Competition Policy,
and Consumer Rights