CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

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September 6, 2011

Honorable Jon Leibowitz
Chairman
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20590

Re: Regulatory Review Schedule

Dear Chairman Leibowitz:

The U.S. Chamber of Commerce, the world's largest business federation representing the interests of more than three million businesses and organizations of every size, sector, and region, writes to thank you and the Federal Trade Commission (FTC) for its continued and recently publicly restated commitment to regulatory review and the reduction of unnecessary burdens on business. This clear commitment is a model for other independent agencies to follow.

In this regard, the Chamber writes to reemphasize its long-standing concerns surrounding the lack of guidance as to the bounds of the Commission's Section 5 authority. While the current federal register notice seeks comments with regard to regulatory review and guidance, uncertainty is often a more significant burden on the business community than known regulation or guidance. It can act as a significant deterrent to creativity and experimentation in all its manifestations, including investments in research and development, and therefore represents a threat to innovation, the most basic and essential driver of long-run productivity growth and economic progress. Given the need to eliminate uncertainty in this challenging economic climate arguably nothing within the FTC's purview is in greater need of review and guidance than what is the standard by which the FTC plans to pursue "unfair methods of competition" that exist beyond traditional theories of consumer harm supported by established antitrust law precedents.

In October 2008, the Commission held a workshop exploring the appropriate bounds of Section 5. Despite an initial pledge by the FTC and the Chamber's supportive urgings to do so, the Commission has not issued a final report on the conclusions of that workshop. As a result great uncertainty remains and the actions undertaken by this Commission in the Intel case and from a series of public comments made within the last year have only added to the level of uncertainty.

Last year, during the Senate Judiciary Committee's Subcommittee on Antitrust, Competition Policy and Consumer Rights general oversight hearing you endorsed the need for a standard and business certainty in response to Senator Hatch's concerns and question about the bounds of Section 5. You went on to elaborate that with the exception of invitations to collude the use of Section 5 beyond traditional antitrust laws "can be a little dicey." The Chamber agrees.

In September 2009, the Chamber authored in Competition Policy International an article entitled *Unfair Methods of Competition Under Section 5 of the FTC Act: Does the U.S. Need Rules "Above and Beyond Antitrust?"* The article recognized the ill-defined authority given by Congress to the FTC. While we agree that policing invitations to collude is clearly appropriate, we also made clear that "Section 5 should be informed by the same principles of 'protecting competition not competitors' and 'maximizing consumer welfare' that inform the antitrust laws." Further, we argued that the FTC has a responsibility to "provide significant notice and guidance to the business community (including hearings) before embarking on cases that are uniquely covered by Section 5."

In a Bloomberg interview from January of this year, you were quoted as saying "We would like to see it (Section 5 authority) tested by appellate courts because we think the legislation, the plain language of the legislation, makes it crystal clear that our jurisdiction goes beyond the antitrust laws." But, as the FTC is well aware, to date the courts have uniformly turned away efforts to assert Section 5 authority beyond the bounds of established antitrust laws. Factors relied upon in these judicial decisions include (1) the absence of clear criteria for distinguishing between proper and improper conduct; (2) the inability of businesses to conform their conduct to the

standards asserted by the FTC; and (3) the need to provide some limits—however marginal—to the discretion of the FTC to condemn competitive practices as illegal. Commissioner Kovacic's has argued that his "interpretation of unsuccessful FTC section 5 cases is that judges believed the FTC had not shown them enough in the form of theory, evidence or limiting principles."[1]

Despite the courts' concerns, earlier this year in a speech to the New York Bar Association, Commissioner Rosch espoused the virtues of Section 5 above and beyond Section 2 of the Sherman Act. In that speech he argued that "Section 5 more generally provides a better vehicle to resolve unsettled questions of law." This statement is unsettling given Senator Hatch's expressed concerns at last year's hearing when he questioned whether "parties charged under Section 5 will have to go through a trial and appeal just to find out what the law is." Commissioner Rosch further boldly asserted in his speech that "the Commission is uniquely suited to act as a neutral arbiter and make the hard decision about when a monopolist (or near monopolist) has engaged in an anticompetitive course of conduct in violation of Section 5" and argued that this places the FTC's ability to judge the merits of these cases ahead of the federal courts.

Most recently, at the recent June 21st workshop on "Patents and Standard-Setting: Tools to Prevent 'Hold-up'", Commissioner Ramirez noted "as the Commission concluded in *N-Data,* conduct that permits patent hold-up can violate Section 5 of the FTC Act even if it does not necessarily violate Section 2 of the Sherman Act." Later, in closing remarks, the Director of the Commission's Bureau of Economics, Joseph Farrell, speaking of his concern that consumers aren't represented at the standards setting table, foreshadowed that "the Federal Trade Commission or some other

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[1] As reported by Commissioner Kovacic, "The FTC's experience with Section 5 has been a story of almost unremitting failure. Since 1968, no federal Court of Appeals has endorsed an FTC competition decision that relied on section 5 as a source of infringement. That's more than 40 years ago – a long time ago in a galaxy far, far away. The Supreme Court has never endorsed an FTC finding of infringement that involves abuse of dominance under any theory of liability." He also noted "painful episodes in which the Congress and the White House have lashed out at the FTC for application of Section 5 in competition cases." According to Kovacic, "To some extent, the Commission's political vulnerability in applying Section 5 stems from a lack of clarity in the standards that the agency will apply in using its broad mandate." Dominance and Unilateral Conduct, Global Competition Review (9 February 2010).

consumer oriented organization could try and stand in the shoes of consumers and that is what I hope we are going to be trying to do."

The Chamber unequivocally supports enforcement of U.S. antitrust laws as we prefer well-functioning markets over regulation. To that end, we also believe antitrust laws and their enforcement must be transparent, fair, predictable, and reasonably stable over time. Companies should not be held responsible post hoc for violating an ill-defined "unfair methods of competition" standard.

The Chamber is also acutely conscious of the global dimension and increasing complexity of international antitrust. Further, the Chamber is deeply concerned that antitrust laws and enforcement approaches in certain jurisdictions are being used to promote industrial policy instead of liberalizing markets. In these jurisdictions rule of law is suspect. Beyond our domestic expectations of transparent, fair, and predictable antitrust laws and enforcement, we are concerned that the FTC's use of Section 5 beyond the bounds of established antitrust law without clear advanced guidance may appear to legitimize and thereby fuel what would clearly be viewed as protectionist antitrust enforcement in foreign jurisdictions.

The Chamber respectfully calls on the Commission to bring greater clarity and certainty to the business community as to how it plans to proceed under Section 5 to inform both domestic and international audiences.

The existence of two antitrust enforcement authorities in the United States with different procedures and substantive standards for enforcing relatively well-understood antitrust law with regard to mergers already creates enough existing uncertainty for the business community. However, the current path the FTC seems to be on in trying to establish its new, expansive authority under Section 5 through enforcement actions with little to no advance guidance only serves to drive the divergence and uncertainty between the two agencies to greater unsustainable heights.

At last year's Senate oversight hearing you stated "we're going to be writing a report on this issue and we're going to use it carefully because we know that Congress can take away any authority it gives us." The Chamber asks in light of this public

commitment and the expressed intent behind the current federal register notice inquiry into FTC plans for regulatory review and guidance that it agree to establish guidance as to the standards of conduct that business should be held to under Section 5.

Sincerely,