Remarks of FTC Chairman Jon Leibowitz
As Prepared for Delivery
Fall Forum 2011
November 17, 2011

Thank you, Pamela, for that kind introduction. I am always delighted to speak to the antitrust and consumer protection bar. It is particularly satisfying to speak at a luncheon (or given the time, "bruncheon") event following Julie Brill and her excellent panel on the CFPB. This will be brief so that we have time for Q&A before the eggs benedict is served – I'll talk for a little about the benefits of consistency at the Commission and a few reforms at the Commission over the past few years.

Just this past Tuesday, Maureen Ohlhausen and I had our confirmation hearing before the Senate Commerce Committee. It went well, and Maureen did great. Having worked with Maureen when she was running OPP for Debbie Majoras and having gone through this DC ritual with her, Maureen is going to be a terrific addition to the Commission. And, who knows, as we've seen with Mario Monti, antitrust officials can even rise to lead nations, so her future is very bright.

For those of you who don't know about confirmation hearings, it is an opportunity for senators on our committee to ask us about anything we have done or will do on the Commission. Preparing for the hearing includes developing a statement for the committee and also getting ready for questions from the senators. Thinking about that statement, and getting ready for the questions – especially the potential knuckleballs and the handful of fastballs aimed at my chin – has put me in the mood to talk a bit about my time so far at the Commission, particularly as a way of talking about the Commission's future.

When I got to the Commission along with Debbie Majoras (we were paired through confirmation), the Commission included Pamela Jones Harbour, Orson Swindle, and Tom Leary. On the Competition side, the Commission was spending a lot of time on standard-setting cases like *Rambus* and *Unocal* and on pay-for-delay cases including the appeal in *Schering*. We had just gotten through one of the biggest merger waves in history. Gas prices were sky-rocketing (or we thought they were – we later got a better understanding of sky-rocketing price increases after hurricane Katrina – quote from CNN article from May 2004: "The average price for regular unleaded gasoline jumped to a record high *$2.017* a gallon nationwide" and the price in September was around $1.95). On the consumer protection side we were just beginning to think a lot about new technologies and how they would affect consumer privacy – for example, spyware and other malware hidden in consumers' computers – and we were in the last stages of ironing out the kinks on the operation of the do-not-

call rule, a rule that my staff wants you to know is the most popular government program since the Elvis stamp according to Dave Barry.

A lot of things impressed me about the Commission when I got here: the range of issues that we saw every day, the amazing quality and dedication of the staff; just to name a few examples.

I. Consistency and Consensus

What impressed me the most was the relationship between the Commissioners. At some Commissions here in DC there is little communication between the members of the Commission. Sometimes in those Commissions, important policies eke through on party line votes – votes that then are reversed when a new party takes power. Sometimes it is even worse – for evidence of that, see the article on Monday in the Washington Post regarding the CPSC. At the FTC, policy is developed through consensus. What became clear to me over the years – as the Commission transitioned from Tim Muris to Debbie Majoras to Bill Kovacic – was the real benefit of Commissioners of both parties getting together and forming a consensus on really important issues: Consensus creates consistency across administrations.

Let me step back a bit and talk about how this Commission moves forward and builds consensus on the most important issues we face.

At the FTC, our policies develop organically through the interaction of staff and the Commissioners. A Chairman cannot walk into the Commission on the first day, proclaim, as in Orwell's 1984, that "we have always been at war with Eastasia," and expect the rest of the Commission and staff to start marching.

In the case of our competition mission, this means that, although our priorities may change from time to time, there is a powerful continuity in what we do.

Let me give you a few examples.

Clarifying the state action doctrine, and limiting its anticompetitive potential, has been a Commission priority from 2001 through today. As most of you know, the state action doctrine ensures that federal antitrust laws apply even to conduct by state agencies, except where the state clearly articulates policies that supplant competition with some other regime, usually regulation.

Earlier this year, in the *North Carolina Board of Dental Examiners* case,[1] the Commission unanimously rejected the Board's motion to dismiss the case on state action grounds. To us, the fact that the Board is composed of members of the very

[1] N.C. Bd. of Dental Examiners, 151 F.T.C. 607 (2011), *available at* http://ftc.gov/os/adjpro/d9343/110208commopinion.pdf.

profession they are regulating changed the character of the Board from a purely state government agency, which needs no supervision to protect consumers, to an association of competitors, which does. While the Commission recognizes that we are taking a strong stand on the state action doctrine, this is an area that has been part of the Commission's agenda for the last decade. The opinion received unanimous support from Commissioners.

We also recently unanimously challenged Phoebe Putney's proposed acquisition of its rival hospital in Albany, Georgia,[2] alleging that the parties in that case structured the deal – seemingly a merger to monopoly – to try to use a local hospital authority as a straw man to shield the acquisition from federal antitrust scrutiny under the state action doctrine. The Eleventh Circuit has some odd ideas about clear articulation so we may have a hard time prevailing. But we think it is important to bring cases like this.

The real issue with that merger is that it could raise prices for medical care in one of the poorest areas in the country. Just as with the *South Carolina State Board of Dentistry* case that we brought during the Muris administration,[3] where a restriction made it more expensive for impoverished children in South Carolina to obtain dental hygiene services, most of our state action cases are really about increasing choices and keeping costs down for real people with real problems.

This case may very well reach the Supreme Court.

Another example is our policy engagement with innovation, standard-setting, and patents. Over the past decade and a half, the Commission has made a number of contributions in this area. We began during the Pitofsky administration with the *Dell* consent.[4] And our commitment to this mission continued through the Muris, Majoras, and Kovacic administrations with cases like *Unocal*,[5] *Rambus*,[6] and *N-Data*,[7]

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[2] Phoebe Putney Health Sys., 2011 F.T.C. LEXIS 64 (2011), *available at* http://www.ftc.gov/os/adjpro/d9348/110420phoebecmpt.pdf.

[3] S.C. State Bd. of Dentistry, 138 F.T.C. 229 (2004), *available at* http://www.ftc.gov/os/adjpro/d9311/040728commissionopinion.pdf.

[4] Dell Computer Corp., 128 F.T.C. 151 (1999), *available at* http://www.ftc.gov/os/1999/08/9823563c3888dell.htm.

[5] Union Oil Co. of Cal., 140 F.T.C. 123 (2005), *available at* http://www.ftc.gov/os/adjpro/d9305/index.shtm.

[6] Rambus Inc., 2007 F.T.C. LEXIS 13 (2007), *available at* http://www.ftc.gov/os/adjpro/d9302/070205finalorder.pdf.

[7] Negotiated Data Solutions, LLC, 2008 F.T.C. LEXIS 120 (2008), *available at* http://www.ftc.gov/os/caselist/0510094/080923ndsdo.pdf.; Dissenting Statement of Commissioner Kovacic, Negotiated Data Solutions, LLC 2008 F.T.C. LEXIS 9 (2008), *available at* http://www.ftc.gov/os/caselist/0510094/080122kovacic.pdf; Dissenting Statement of Chairman Majoras, Negotiated Data Solutions, LLC 2008 F.T.C. LEXIS 10 (2008), *available at* http://www.ftc.gov/os/caselist/0510094/080122majoras.pdf.

and with major reports on competition and patent law that we issued in 2003 and 2007.[8]

This year we issued another significant patent study,[9] this time focusing on damages and notice, held a workshop on patents and standard-setting – and we continue to investigate cases relating to standard-setting. We held the 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 hold-up. Our focus was on requirements for disclosure of relevant patents, early announcement or discussion of licensing terms, and commitments to license on reasonable and non-discriminatory terms.

Many of you have asked whether the recent workshop will lead to a report, and if so what the report will cover. Standard-setting and patents is a complicated area, and not everything we do gets the unanimous support of the courts or even in the Commission. We will have to see whether we can make a useful contribution to policy-makers or courts before we decide whether to issue a report. But regardless, our commitment here has been long-standing and bi-partisan, and will continue because it has had the beneficial effect over the years of ensuring that firms with patents behave better at standard setting organizations.

Another example, close to my heart, is the Commission's pay-for-delay agenda, which began under Chairman Pitofsky during the Clinton Administration, received the continuous support of all three Republican chairmen throughout the second Bush Administration, and is a focus of the Commission's work today. For the one guy in the back of the room who may not have heard me talk about this issue, the problem arises when a brand pharmaceutical company pays a generic competitor to drop a patent challenge and stay out of the market – behavior that costs consumers $3.5 billion each year in higher drug prices, and would be per se illegal if there weren't a patent dispute.

We continue to bring cases in district court and we hope to get a case to the Supreme Court, and – starting when Debbie Majoras was Chairman – we also began to work in Congress.

Although we face opposition from both the brand and the generic industry – they usually fight about everything, but they are in agreement supporting these

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[8] FTC, Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition: A Report Issued By the U.S. Department of Justice and the Federal Trade Commission (2007), *available at* http://www.ftc.gov/reports/innovation/P040101PromotingInnovationandCompetitionrpt0704.pdf; FTC, 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.

[9] FTC, The Evolving IP Marketplace: Aligning Patent Notice and Remedies with Competition (2011), *available at* http://www.ftc.gov/os/2011/03/110307patentreport.pdf.

sweetheart deals – we continue to build support. The President included a provision to curb pay-for-delay settlements in his recommendations to the Joint Committee on Deficit Reduction. The bi-partisan Kohl-Grassley bill was scored at a $4.8 billion savings to the government over a decade, so the budget process may work in our favor here. As one member of the Super Committee told me, "that is almost real money."

Developing consistency throughout administrations has powerful benefits for the Commission and for consumers. As we spend more time refining our policies from administration to administration, we get better at deciding what is important, where we need to do more, and where competition is already working well and there's no need for involvement by us. But consistency has value for the firms we deal with as well. Because we have been relatively consistent over administrations, companies know the rules of the road regardless of the administration in power – they know where we are going because they know where we've been.

II. Reforming the way we do business

As important as consistency is in our enforcement missions, it is also important that we work hard to improve the way we do our jobs. To do this, we've adopted a variety of tools, from improving our ability to understand complicated high technology industries early in our investigations, to reforming our rules to ensure that we get our work done faster -- Tom Rosch was the innovator here -- so that we can resolve issues, and so that everyone can move on.

a. Improving out technical expertise

Because we are an independent agency, created to be an expert in the industries we oversee, we – and this is particularly important in staff – have a continuing duty to know almost as much about the industries as they know about themselves. Sometimes, as with our merger retrospectives, we continue to follow the facts even after a case is over to make sure that we are learning the right lessons from the marketplace and from our actions. And we don't just learn from bringing cases; we also hold workshops, write reports, and, when appropriate, bring in experts. And that's true on the consumer protection side as well.

As the American economy and the FTC portfolio becomes more and more focused on technology and e-commerce, our need for expertise is still greater. Over the last year we've been actively building our expertise and understanding of high technology "platforms." We've recognized that technological platforms have come to play a central role in the American economy today, creating great value but also complex consumer protection and competition issues. So, to supplement staff, we've brought in experts like our first Chief Technologist Ed Felten, who we have borrowed from Princeton for the last year, and Tim Wu, who is a Senior Advisor at the FTC

and runs our own Platform Policy Working Group. These experts enhance the way we do our jobs: by augmenting information we receive early on from dueling industry experts with analysis from our in-house experts, we can avoid being either unnecessarily skeptical or unnecessarily credulous of any party. Getting on the right footing in investigations like these is critical to bringing them to a conclusion in a reasonable time, and experts like Ed and Tim are essential to that.

All of this expertise is especially critical when we look at fast moving high-tech industries. In those cases, the facts on the ground can change rapidly – often during the investigation. And mistakes in these markets can change the direction of these young industries for years. An example of how the Commission follows the facts where they lead is our decision to allow Google to close its deal to buy AdMob. In that case, Google, the proprietor of the major mobile platform, Android, and of one of the largest ad networks for mobile applications, was buying AdMob, another one of the largest ad networks for mobile applications. Because of the combined presence of the two companies in the market for what are called "performance ad networks" on mobile devices, the Commission came close to issuing a complaint challenging that merger, on a vote that would probably have been unanimous.

Instead, we voted unanimously to close.

As we noted in a statement concerning the merger,[10] during the investigation Apple acquired a large mobile ad network and emerged as a potentially strong mobile advertising network competitor. We also thought, given the developments in mobile platforms, that competition between platforms was likely to become the dominant mechanism for competition generally in the mobile space.

Much has changed in the markets in that case, from the growth of Android to the possible entrance of Google as a manufacturer of Android devices with its proposed acquisition of Motorola Mobility. And of course the rapid advance of related platforms, principally the iPad, is important as well.

So we will continue to look hard at this market to ensure that consumers are well served and companies continue to remain free to develop new products and services. And we will continue to try to get access to technical expertise early in these cases so that we can resolve them quickly and correctly.

b. Resolving Difficult Legal and Factual Issues In Time to Help Consumers

In antitrust, when anticompetitive conduct has already occurred and is on-going, all the history, bipartisanship, study, and technical expertise in the world can

[10] FTC, Statement of the Commission Concerning Google/AdMob, FTC File No. 101-0031 (2010), *available at* http://www.ftc.gov/os/closings/100521google-admobstmt.pdf.

become irrelevant if we cannot resolve cases before the anticompetitive practice becomes too entrenched to dislodge. That is why the Commission has been working, for a number of years now, on ways to speed things up. We've become better at getting to the bottom of investigations and resolving them faster to ensure that businesses get certainty and consumers get protection quickly. That was at the heart of the changes to our Part 3 rules – you get an antitrust trial quickly, within *eight months* in a conduct case – and it is implicit in every effort we make to learn more about industries and develop our internal expertise.

All of this means that we have moved away from the old-school antitrust process that allowed uncertainty to exist for many years during investigation and trials. By the time a conclusion was reached in some of these older cases, if there was a conclusion, often the only remedy left was sweeping and structural or non-existent: break up the company or drop the entire case and move on. Often long before that decision, the competitors had given up. The result? Too often, no one was helped – neither business that played by the rules nor the businesses that didn't, and certainly not American consumers.

That brings us to today and our current investigation of Google, which that company has acknowledged publicly. There has been a lot of commentary about this investigation and the commentary has been all over the map, from demands that Google has to be stopped to, well, frankly, demands that the FTC has to be stopped. But one interesting category of comments is about our process and our ability to get to the bottom of the issues presented in the investigation quickly. There is an underlying assumption in these comments that needs challenging: the assumption that antitrust is too slow to have any role in protecting consumers in fast-moving high technology industries.

At the Commission, we've made it a priority to ensure that antitrust remains relevant in these industries. And we recognize that getting answers quickly is an essential element of that. We need to balance our mission to protect consumers with a need, on the part of both firms and consumers, to do it quickly. Consumers are entitled to competitive markets, but they also deserve timely resolution of matters before the Commission. So do businesses.

Until the Commission became committed to what I like to call our antitrust "rocket docket," with even the most complex cases resolved and appealable to the circuit court of choice (yours, not ours) in months rather than years, we often took too long on complex investigations, especially in the high tech area – e.g., on *Intel*. As a result of what we have learned from Intel and other cases, the Commission is no longer bogged down in outmoded procedures. We get through our investigations quickly and then the Commission acts if action is warranted.

III. Conclusion

We still have a number of challenges as I speak to you today. Some of the challenges are new to me but not necessarily new to the Commission. For example, this is a very difficult budget environment as you all know.

We also have a Congressman who really, really, really wants to give our building to the National Gallery. Of course we agree with FDR who said at the dedication of our building in 1937, "May this permanent home of the Federal Trade Commission stand for all time."

Thank you very much. I'm happy to answer questions.