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ABSTRACT

ANTITRUST / COMPETITION

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- *Our economy depends upon open markets, open systems, open networks, and full, fair and open competition to promote innovation and benefit consumers.*
- *Competition is a vital component of our modern economy. As we emerge from the economic downturn, we are pleased that U.S. regulators have reaffirmed their commitment to promote competition and revive consumer-oriented antitrust enforcement, especially in regard to monopolistic behavior. However, regulators must be careful not to deter companies from innovating in fast-moving markets.*
- *Sound antitrust enforcement is of particular importance to high-tech industries. Characteristics underlying technology markets—complicated patent portfolios, network effects, economies of scale, standardization, and interoperability—make anticompetitive actions difficult to detect, harder to remedy, and more detrimental to innovation and venture capital allocation. However, not all high-tech markets are created equal. For example, barriers to entry are much higher in markets for computer chips than they are for websites or social platforms. Regulators must be highly cognizant of both current and potential competition when evaluating behavior and suggesting remedies.*

***Background*:** For over 30 years, CCIA has supported antitrust laws that ensure a level playing field for all participants in computer and communications markets. It is clear that competition policy will play an increasingly larger role in the shape and operation of our industry.

***CCIA's Position*:** CCIA advocates for open markets, open systems, open networks, and full, fair and open competition. Antitrust and competition policy should be designed to advance these goals. Competition and vibrant markets fuel economic growth and reinforce our industry's leadership in innovation and technological development.

Competition Policy and the High-tech Industry: The competitive dynamic is especially important in high-tech industries where rapid innovation is a defining characteristic. To a greater extent than most markets, high-tech and internet-centric industries are characterized by a heavy reliance on complicated patent portfolios, network effects, economies of scale, standardization, and interoperability. These inherent features often make anticompetitive actions difficult to detect, harder to remedy, and more detrimental to innovation and venture capital allocation. However, high-tech markets, particularly Internet websites and services, are highly susceptible to disruptive innovation. If antitrust regulators become too fixated on static views of the current markets, they might disregard potential competitive threats or prevent current firms from evolving their products in ways that are beneficial to consumers. As a result, antitrust enforcers

must be ever vigilant, but also disciplined in their use of the powerful legal tools at their disposal.

Current Status:

The most significant antitrust event in the high-tech world in 2011 was the eventual abandonment of the AT&T, T-Mobile merger after it ran into significant opposition at both the DOJ and the FCC. CCIA strongly opposed this highly concentrating merger and is glad that the government took decisive action. Regulators are also reviewing a proposed transaction by Verizon to acquire significant amounts of high quality spectrum from several cable companies. CCIA has identified a number of potential concerns with this transaction. Competition in the wireless space is crucial to the future health of this fast growing market. Although the primary task of the government should be aimed at freeing up more spectrum for mobile broadband, they must also be proactive about avoiding too much consolidation. Without preserving competition, incentives to make the significant capital investments that are necessary for cutting-edge wireless services will likely erode over time. As barriers to entry are significant in the wireless carrier space, it is unlikely that major competitors will emerge to challenge the status quo unless policy is formulated with this goal in mind. Furthermore, regulators most not foreclose nascent technologies and business models, such as super Wi-Fi and cognitive radios, by underemphasizing the importance of high-quality unlicensed spectrum.

As far as the Obama administration's stance on single firm conduct, CCIA welcomed former Assistant Attorney General Christine Varney's announcement that her department would take a harder line against anticompetitive monopolistic conduct than her unprecedentedly lax predecessor. She immediately had her department update its Section 2 report, which signaled that the agency would revert to the prior practice and aggressively pursue conduct that was detrimental to competition and innovation. Furthermore, this announcement placed the DOJ back in line with its sister competition enforcer, the FTC, who had refused to shift its policy direction in the waning years of the prior administration.

Since then there has been a moderate amount of action on the monopolization front. In August 2010 the FTC settled its long running dispute with Intel and agreed to monitor Intel's compliance with a Consent Order aimed at maintaining a competitive market for computer chips. Intel has also paid over $4 billion in settlements and fines over the past few years to come to terms with the cases brought by the European Union, AMD and Nvidia.

However, several questions remain up in the air. The FTC has seemingly revived its relatively dormant commitment to its Section 5 authority, which forbids unfair and deceptive practices. Although this gives the Commission the ability to police behavior that falls outside the relatively strict confines that the federal courts have put on single firm conduct sections of the Sherman and Clayton Acts, it also promulgates uncertainty as the Section 5 precedent is relatively scant. The agency should clearly articulate its views on the limits of Section 5 and focus on aligning the statute with preserving legitimate consumer interests, including choice. A clear, limited articulation of Section 5 authority would also diminish the significant risk that exists that the courts would overturn the FTC's first attempts to enforce this newly reconceptualized authority.

Another policy shift has been the DOJ's shift to relying more heavily on "behavioral remedies" in policing mergers. Although such policies were traditionally used sparingly—and primarily in vertical mergers that presented specific, narrow problems—the DOJ's 2011 update of its Merger

Guidelines confirmed that the Department was committed to relying on behavioral remedies more frequently, instead of the traditional "structural remedies," which include outright blocking of mergers and targeted asset divestitures. Although this position gives the DOJ more tools to deal with potentially anticompetitive mergers, it also puts the Department in the unenviable position of becoming a de facto regulator in relatively specialized markets. CCIA encourages the Department to use these new tools sparingly, as behavioral remedies are often hard to monitor and more easily gamed than structural remedies.

Another area of concern, particularly in high-tech markets that have witnessed an explosion of low quality, poorly defined patents, is intellectual property and its nexus with competition policy. CCIA appreciates the FTC's 2011 report *The Evolving IP Marketplace* and believe its recommendations aimed at improving patent quality and aligning damages more directly with actual value of the patents in question is a good start. However, other areas of intellectual property and competition policy must also be examined.

The proliferation of non-producing entities (NPEs) is of particular concern to the competitive landscape of the technology industry. These entities amass patent portfolios to extract money from companies producing actual products, either through licensing or litigation, and often both. They are especially adept at praying on software and technology markets because programs often encompass thousands of patentable functions, and since the patents themselves are vaguely constructed the borders of liability are not clear. Since traditional antitrust analysis focuses on IP and its direct ties to product markets, antitrust policy as currently conceived is poorly targeted at dealing with the competitive problems posed by patent aggregators. These can dramatically harm downstream competition as they purchase expansive portfolios of patents in specific markets. Given the massive uncertainty and costs associated with patent litigation, these firms can often dictate the terms of competition (i.e. who they choose to sue or who they allow to license their portfolio), particularly for smaller competitors and new entrants who do not have the legal resources to defend themselves in the high-stakes game of patent litigation and licensing.

This competitive problem posed by these companies has been exacerbated by the rise in patent privateering. This new take on an old business model, where established companies extend patent licensing to some market players and then sell the patents to NPEs who implicitly or explicitly are directed to sue other downstream competitors, is effectively beyond the reach of antitrust regulators on account of the litigating firm's separation from the product markets in question and because of the lack of transparency in the transfer and licensing of patents in general. Antitrust authorities should explore retooling antitrust policy and practice to deal with these evolving, and potentially anticompetitive, business models.

In sum, CCIA applauds the Obama administration's reinvigoration of competition authority, but we recommend caution in its application. In mercurial markets, such as websites and services, antitrust regulators should pay special attention to the limited barriers to entry and the rapidly innovating marketplace. Allowing companies, whether established or upstarts, to innovate and serve their customers should be the primary goal of competition policy. Furthermore, antitrust regulators must modernize policies and tools to deal with evolving anticompetitive behavior, particularly those policies that pertain to the competitive treatment of intellectual property.