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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

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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

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

(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

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

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,



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.