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*Hearing on "The Foreign Investment Climate in China:
U.S. Administration Perspectives on the Foreign Investment Climate in China"*

**Testimony of Maureen K. Ohlhausen¹
Commissioner, Federal Trade Commission**

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Good morning. Thank you to the Commission for inviting me to testify today. I want to focus my remarks this morning on China's AML enforcement and some of the recent developments spurred in part by continued engagement of U.S. officials with their Chinese counterparts as well as with prominent Chinese academics and practitioners. Over the last few years we have seen a significant ramp-up in Chinese antitrust enforcement, including against Western companies, which has highlighted many of the differences between the Chinese regime and others in the world. A number of critics, including American businesses, claim that China is using its antitrust law to promote industrial policy and domestic competitors. Because China is a leading global economic power, however, it is in our mutual interest to find a way to move forward harmoniously and fruitfully.

It is for these reasons I have made engagement with China a top priority. Since becoming Commissioner, I have traveled to China five times, participated in bilateral talks with the Chinese here in the United States, and several months ago hosted top Chinese enforcers for an informal breakfast in conjunction with the ABA Antitrust Spring Meeting. In these discussions, I have repeatedly extolled the values of predictability, fairness, and transparency in enforcement and outlined five actionable goals for competition agencies: *First*, competition-based factors should guide policy and enforcement decisions. *Second*, industrial organization economics should form the foundation for agency actions. *Third*, competition regimes should abide by commonly-accepted best practices, including those developed by voluntary organizations like the International Competition Network or "ICN." *Fourth*, competition agencies should afford parties fundamental due process, including the right to a defense, the right to local and international counsel of their choosing, notification of the legal and factual basis of an investigation, and meaningful engagement with agency staff and decision makers. *Fifth* transparency into agency analyses and actions is critical for promoting self-regulation and honoring due process rights of

¹ The views expressed in these remarks are my own and do not necessarily reflect the views of the Federal Trade Commission or any other Commissioner.

parties. *Sixth*, and finally, competition agencies should cooperate with their counterparts internationally.

During my many discussions in and about China, people have told me that while the Chinese look to more mature competition agencies for guidance, they are focused on creating an enforcement program with “Chinese characteristics.” Over time, I have come to realize that “Chinese characteristics” may include, as a practical matter, relying on non-competition factors to examine mergers, acquisitions, and conduct with an eye to promoting domestic industry. In fact, China’s Anti-Monopoly Law or “AML,” itself said to have Chinese characteristics, explicitly provides for the consideration of non-competition factors such as protecting “social public interest” and “promoting the healthy development of the socialist market economy.”² With respect to merger review in particular, the AML provides that when reviewing a transaction, China’s Ministry of Commerce, or “MOFCOM,” should consider factors such as “the influence of the concentration of business operators on the national economic development.”³ In addition, Chinese characteristics could mean encouraging immediate economic gains by extracting additional value from intellectual property by reducing the protection of intellectual property rights, particularly the right of exclusion. We are hearing a lot of criticism of Chinese actions in these areas.

Importantly, and on a more positive note, we appear to be seeing a serious response to U.S. government engagement by Chinese enforcers that could signal improvement in their approach to these issues. It is also appropriate to recognize that the concerns with AML enforcement in China are not unique. Many new antitrust regimes face limits on staff and their experience, as is the case in China, although with China the importance of our economic relationship makes getting past these limitations all the more important. Let me elaborate for a few minutes on each of these points.

I. Application of Non-Competition Factors

As I mentioned a minute ago, China’s AML expressly provides for consideration of non-competition factors. Subsequent to passage of the AML, the Legislative Affairs Commission of the NPC Standing Committee issued a doctrine known as the “Three Musts,” to guide enforcement of Article 4 of the AML.⁴ This doctrine includes a directive for the state to implement competition rules consistent with the socialist economy. These “musts” include bearing “in mind the requirements to enlarge and strengthen, concentrate and improve the market competitiveness of our enterprises, [and] macro-coordinate the relations between anti-monopoly and the implementation of national industrial policies....”⁵

² Art. 1, China Anti-Monopoly Law (effective Aug. 1, 2008), available at http://www.china.org.cn/government/laws/2009-02/10/content_17254169.htm.

³ *Id.* at Art. 27.

⁴ *Translation of Legislative Affairs Commission, Interpretation of the Anti-Monopoly Law of the People’s Republic of China*, Law Press China (2008) at 4, as found in U.S. Chamber of Commerce, *Competing Interests in China’s Competition Law Enforcement: China’s Anti-Monopoly Law Application and the Role of Industrial Policy* at 24 (Sept. 9, 2014) (quoting same), available at https://www.uschamber.com/sites/default/files/aml_final_090814_final_locked.pdf [hereinafter Chamber Report].

⁵ *Id.*

As I am sure you will hear later today, many observers and industry participants believe that the Chinese government has enforced the AML to promote and protect Chinese industry in certain cases. The U.S. Chamber of Commerce and the U.S.-China Business Council issued critical reports a few months ago on the state of competition enforcement in China. According to the USCBC report, “[C]oncerns raised by international observers during the AML drafting process – such as the role of industrial policy considerations in competition reviews, lack of due process, and insufficient transparency – remain relevant based on China’s initial enforcement efforts.”⁶

II. Antitrust and Intellectual Property

A second topic of concern is China’s approach to issues at the intersection of the antitrust and intellectual property laws, including licensing practices and standard essential patents. I believe in strong intellectual property protection to promote innovation and consumer gains in any country. As the U.S. Supreme Court has said, strong intellectual property protection creates “an incentive to inventors to risk the often enormous costs in terms of time, research, and development. The productive effort thereby fostered will have a positive effect on society through the introduction of new products and processes of manufacture into the economy....”⁷

China has been exploring how to apply the AML to intellectual property rights. It appears to be moving to a system that favors short term economic gain from reduced intellectual property protections, including the right to exclusion and to fair compensation based on free negotiation of licensing terms and marketplace competition. For instance, MOFCOM has reached merger settlements in recent years in which it has imposed “Fair, Reasonable, and Non-Discriminatory” or FRAND commitments on patents that are not essential to an industry standard. This is different from our practice in the United States.

In addition, at a policy level, the State Administration for Industry & Commerce (SAIC) has been working on IP guidelines similar to those the FTC and DOJ issued in the 1990s⁸ and seeking public comments. Some aspects of the proposals reflect international norms. For example, SAIC removed a suggestion in an early draft that patent pools, which typically are evaluated under the rule of reason here, are presumptively unlawful.⁹ Other features of the proposed rules could serve to devalue IP rights, however, which will be felt most acutely by IP-intensive Western businesses. For instance, SAIC intends to apply the essential facilities doctrine to intellectual property rights, a doctrine that has faced serious criticism by the Supreme Court in the United States and has yet to be applied to patents anywhere in the world. In addition, many people are concerned about SAIC’s proposals to impose liability on a patentee based on royalty terms it demands on essential patents, including patents not contributed voluntarily by the owner

⁶ The U.S.-China Business Council, *Competition Policy and Enforcement in China*, 5 (Sept. 2014), available at <http://uschina.org/reports/competition-policy-and-enforcement-china>.

⁷ *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 480 (1974).

⁸ U.S. Dep’t of Justice and Fed. Trade Comm’n, *Antitrust Guidelines for the Licensing of Intellectual Property* (1995), available at <http://www.justice.gov/atr/public/guidelines/0558.htm>.

⁹ American Bar Association Section of Antitrust Law, Section of Intellectual Property Law, and Section of International Law, *Joint Comments on the SAIC Draft Rules on the Prohibition of Abuses of Intellectual Property Rights for the Purposes of Eliminating or Restricting Competition* 6, July 9, 2014, available at http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/at_comments_201407saic.authcheckdam.pdf.

to a standard setting body. This would expand liability to patentees not subject to FRAND licensing obligations commonly imposed by standard-setting bodies on contributed technology that becomes part of a standard. Moreover, China has elsewhere taken a similar view of imposing FRAND requirements on SEP holders in other policies and rules. As FTC Chairwoman Ramirez pointed out in a speech last year, imposing liability on patent holders who have not made a FRAND commitment or premising antitrust liability solely on royalty terms, for example “excessive pricing” in the absence of any evidence of hold-up, is a break from practice at the FTC, the DOJ, and Europe.¹⁰

III. Effective Federal Responses

My experience dealing with Chinese officials provides me with three insights that may help the government and business to engage them effectively over the coming years. First, continued dialogue and cooperation at all levels of the federal government can have a positive impact. Thus, for example, this past year’s U.S.-China Joint Commission on Commerce and Trade (JCCT) resulted in Chinese commitments of increased ability of counsel to attend meetings with the AML enforcement agencies, more transparent penalty procedures, and competition based remedies. These results would not have come about without continuous and determined engagement by federal officials on these issues. This is a notable advance, and it is merely one example of the FTC’s cooperation with other U.S. government agencies.

These are issues that I and my colleagues and staff at the FTC, along with the Antitrust Division at DOJ, have regularly raised in our dialogue with Chinese officials. In fact, the staffs of our two agencies were directly and closely involved in the drafting and discussions with China regarding these outcomes during the JCCT. Indeed, these commitments to take steps to improve the fairness of China’s AML enforcement procedures, including greater transparency and improved opportunities for parties to defend themselves, is welcome and one of the most important improvements China (or any country) can make to enhance the legitimacy of its antitrust enforcement activities.

More broadly, the U.S. antitrust agencies’ dialogue with China’s antimonopoly enforcers and others stretches back to before the AML was passed, when we consulted with officials at China’s State Council and National People’s Congress regarding the draft law and ways to make it more consistent with international norms. Since the AML’s passage we have conducted a robust program of technical assistance to share with China’s new enforcers our best substantive and procedural practices for antitrust enforcement and have frequently submitted comments on draft implementing rules. We also established a regular senior-level dialogue through a memorandum of understanding with China’s three AML enforcement agencies. The combination of these engagements we believe has contributed significantly to putting much of China’s AML enforcement on the right track, even if concerns continue regarding aspects of that enforcement. For example, our dialogue has helped to move China towards international best practices, including its decision last year to enact fast track rules for simple merger transactions, which in its first several months has greatly reduced the typically lengthy time for merger reviews for a

¹⁰ Edith Ramirez, Chairwoman, Fed. Trade Comm’n, *Standard-Essential Patents and Licensing: An Antitrust Enforcement Perspective* 8-9 (Sept. 10, 2014), available at http://www.ftc.gov/system/files/documents/public_statements/582451/140915georgetownlaw.pdf.

sizable percentage of transactions. Similarly, as I mentioned above, SAIC's draft IP and AML rules have moved in many respects towards approaches consistent with those used in the U.S., likely a result of comments we, along with our colleagues in other agencies of the U.S. government, have provided to SAIC.

Second, shining a light on discrepancies or biases in Chinese enforcement or competition policies also can be effective. In response to the Chamber report, the Chinese antitrust agency heads responded with a joint press conference. They argued that their processes are fair, transparent, and follow regulations.¹¹ And, of course, this press conference was followed by the commitments made in December at the JCCT that in many ways reflected the characterizations of Chinese enforcement practices made by the antitrust agency heads. These actions suggest to me that China's enforcers want to be accepted internationally as serious and disciplined. Indeed, their enthusiasm for engaging with the FTC and DOJ, both in China and in the United States, and attentiveness to our experiences in enforcing our antitrust laws suggests a serious commitment to gaining international acceptance. In addition, I know that there are enforcers and other influential voices within China that want to see domestic enforcement that is in line with international norms.

A third, and final, lesson that I can share today is that American enforcers need to be very clear about the reasoning underlying our decisions. We must remember that we have an audience in China that can easily misunderstand, misinterpret, or even misuse our actions when they are unclear. For example, the FTC concluded a couple of matters in late 2012 and early 2013, including with respect to *Google/Motorola Mobility* in which we placed restrictions on the ability of patentees holding SEPs to seek injunctions.¹² My concern with those actions, in part, was that we could send the wrong message to our foreign counterparts that we do not place a very high value on intellectual property rights and that we did not give enough explanation about why those cases are the exception rather than the rule.

During a conference I attended in China, I heard a presentation on the U.S. and Chinese antitrust laws and the FTC's decision in *Google/Motorola Mobility* came up. The lecturer argued that the U.S. has a strong essential facilities doctrine and then drew a line from this supposed precedent, including the FTC's *Google/Motorola Mobility* decision, and similar European decisions, to the Chinese Anti-Monopoly Law and other Chinese laws that prohibit unreasonable refusals to deal as to essential facilities. He argued that the FTC's action meant that an "unreasonable" refusal to grant a license for an essential patent to a competitor should constitute monopolization under the essential facilities doctrine. The remedy, he implied, should be compulsory licensing (presumably on favorable terms to the licensee) because that would be the best way to facilitate competition among the licensees. This presenter did not in my opinion state accurately the law in the United States, but may have read the law as he wanted to see it or through a lens I do not entirely understand. Either way, it drove home the point that enforcers and others within China

¹¹ Michael Martina & Xiaoyi Shao, *Update 2-China's Antitrust Regulators Defend Probes; Qualcomm Inquiry Nearly Over* REUTERS (Sept. 11, 2014) available at <http://www.reuters.com/article/2014/09/11/china-antitrust-idUSL3N0RC2MY20140911>.

¹² See *In re Robert Bosch GmbH*, FTC File No. 121-0081, *Decision and Order*, at 13-14 (Nov. 26, 2012) [hereinafter *Bosch D&O*], available at <http://www.ftc.gov/os/caselist/1210081/121126boschdo.pdf>; *In re Motorola Mobility LLC and Google Inc.*, FTC File No. 121-0120, *Decision and Order*, at 6-12 (Jan. 3, 2013), available at <http://ftc.gov/os/caselist/1210120/130103googlemotorolado.pdf>.

are likely to advocate a version of antitrust enforcement that suits their own national economic interest and is grounded in their own cultural and legal norms. I think our goal should be to carefully explain our decisions and avoid making decisions that could be perceived as protectionist to prevent the possibility of misunderstanding or misuse.

I look forward to your questions. Thanks.