DEPARTMENT OF JUSTICE

Workshop on Conditional Pricing Practices
Opening Remarks

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Public Workshop on Conditional Pricing Practices

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Good morning and thank you for joining us today at the joint Department of Justice and Federal Trade Commission workshop on conditional pricing practices. Thanks to the FTC for hosting this event in their wonderful new Conference Center.

This is the latest in a series of joint public workshops the agencies have held over the past few years on significant antitrust policy and enforcement issues. Our workshops serve to illuminate challenging antitrust problems and are integral to our enforcement efforts. Perhaps most importantly, they help fulfill the agencies' responsibility to advance the public dialogue on issues that directly affect American consumers.

Both the Division and the FTC work hard to analyze and understand difficult antitrust questions so each can make the right policy and enforcement decisions. When recurring problems with broad implications for the economy arise, we think it can be productive to bring the best minds in the antitrust world to bear. That is why the agencies held workshops on most-favored-nation clauses and patent assertion entity activities and that is what we are doing today.

Conditional pricing practices, such as loyalty and bundled pricing, are common throughout the economy. They appear in many forms and across industries. There is vigorous debate among economists and lawyers about the competitive effects of these practices and the appropriate legal analysis. Courts analyzing loyalty and bundled pricing have generated different and sometimes conflicting tests for finding liability.

In many instances, conditional pricing practices save consumers money. Most of us benefit from loyalty and bundled pricing in the retail setting. For example, some of you might carry a coffee card in your pocket, offering you a free latte for your loyalty when you buy nine coffees from your corner shop. Others probably have taken advantage of bundled pricing at fast food restaurants, where purchasing a meal including a hamburger, fries, and a soda is cheaper than buying the items separately. These are not the types of conditional pricing we worry about.

Concerns can arise when a monopolist uses loyalty or bundled pricing to restrict competition and maintain its market power within a supply chain. Those concerns were manifested in the Division's 2011 case against United Regional Health Care System of Wichita Falls, Texas. United Regional, which enjoyed significant market power, had entered into contracts with insurers that required them to pay significantly higher prices if they also contracted with a competing hospital. Because insurers needed United Regional's business to compete in Wichita Falls, and the penalty for contracting with its rivals was so severe, almost every insurer in the area entered into exclusionary contracts with United Regional, helping maintain its monopoly. Our enforcement action resulted in a consent decree preventing United Regional from engaging in conditional pricing practices that harm competition.

Unfortunately, it is not always easy to draw the line between pricing practices that injure competition and those that do not. We want to be especially careful when drawing that line, because we do not want to discourage legitimate discounts that benefit consumers. We also must make sure that our approach protects competition, not individual competitors.

These are hard issues and important ones for the economy. Businesses need clarity in this area so they can confidently offer discounts that save consumers money. The good news is that we have a great set of panelists and presenters here today to help us advance our understanding of these practices. We are honored to have with us the best and the brightest economists, legal academics, and lawyers who have been thinking deeply about these issues.

Today you will hear economic experts discuss their theoretical and empirical analyses of loyalty and bundled pricing. Later in the afternoon, legal experts will talk about the development of the case law and legal standards in this area. They will address key U.S. cases, including *PeaceHealth* and *LePage's* and the more recent *Meritor* and *Sanofi* decisions. Additionally, as this month's European Union General Court *Intel* decision shows, conditional pricing practices are an important issue outside the United States as well and we are fortunate to have international panelists with us today to share their perspective on these issues. The workshop will close with a panel reviewing the day's learning and looking ahead to where we might see the law go.

I am excited about this program and I hope you are too. I want to thank all our distinguished panelists for being with us today and helping to increase our knowledge of these challenging practices. I also want to thank the FTC and DOJ staff members that helped make this event possible. And I thank you for coming and watching.

With that, I will pass the baton to Commissioner Ohlhausen.