Before the
Federal Trade Commission
Washington, DC 20580

In the Matter of	)
	)
Google, Inc.	)
and	)
DoubleClick, Inc.	)
	)

Complaint Requesting Recusal of the Federal Trade Commission Chairman From the Pending Review of the Proposed Google-Doubleclick Merger

1. Pursuant to 16 C.F.R. 4.17 ("Disqualification of Commissioners"), petitioners hereby move for the recusal of Federal Trade Commission Chairman Deborah Platt Majoras from the pending review of the proposed Google–Doubleclick merger.

2. Petitioners have previously filed complaints with the FTC regarding this matter and have met with each one of the Commission members to discuss this matter.[1] Petitioners have asserted that the proposed merger of the Internet's largest search company and the "leading provider of data and technology solutions for marketers, advertising agencies and web publishers" posed a unique and substantial threat to the privacy interests of Internet users around the globe.[2] In several filings with the Commission, Petitioners have stated that the two companies would be under virtually no legal obligation to protect the privacy and security of the information that they collect. For these reasons and others, Petitioners have urged the Commission to either block the deal or impose substantial conditions that would safeguard privacy as condition of the merger.

3. Petitioners learned on Monday, December 10, 2007 that Doubleclick, a party to the proceeding, has retained the Washington law firm of Jones Day to represent the company before the Federal Trade Commission in the pending merger review. (*See* Appendix 1 attached). As the announcement on the law firm web site states:

[1] EPIC, CDD, U.S. PIRG, *In the Matter of Google, Inc., and DoubleClick, Inc: Complaint and Request for Injunction, Request for Investigation and for Other Relief before the Federal Trade Commission* (Apr. 20, 2007), *available at* http://www.epic.org/privacy/ftc/google/epic_complaint.pdf; EPIC, CDD, U.S. PIRG, *In the matter of Google, Inc. and DoubleClick, Inc.: Supplemental Materials in Support of Pending Complaint and Request for Injunction, Request for Investigation and for Other Relief, before the Federal Trade Commission* (June 6, 2007), *available at* http://www.epic.org/privacy/ftc/google/supp_060607.pdf; EPIC, CDD, U.S. PIRG, *In the matter of Google, Inc. and DoubleClick, Inc.: Second Filing of Supplemental Materials in Support of Pending Complaint and Request for Injunction, Request for Investigation and for Other Relief, before the Federal Trade Commission* (Sept. 17, 2007), *available at* http://www.epic.org/privacy/ftc/google/supp2_091707.pdf.
[2] Press Release, Doubleclick, DoubleClick Raises Fourth Quarter and Full Year 2004 Outlook, Jan. 6, 2006, *available at* http://www.doubleclick.com/about/press.aspx?id=608&linkidentifier=id&itemid=608.

> Summary: Jones Day is advising DoubleClick Inc., the digital marketing technology provider, on the international and U.S. antitrust and competition law aspects of its planned $3.1 billion acquisition by Google Inc. The proposed acquisition will combine DoubleClick's expertise in ad management technology with Google's internet search and content platform. The transaction is currently under review by the U.S. Federal Trade Commission (FTC) and European Commission.[3]

4. The Chairman of the Federal Trade Commission Deborah Platt Majoras is a former equity partner of the law firm Jones Day. According to the biography posted on the FTC web site:

> Prior to her government service, Majoras was a partner in Jones Day's antitrust section. While at Jones Day, she represented clients on civil and criminal antitrust litigation matters, including mergers and acquisitions, monopolization, price-fixing, distribution issues, and governmental investigations.[4]

5. The spouse of the FTC Chairman, John M. Majoras, is currently an equity partner with the law firm Jones Day. His specialty is antitrust matters. According to the biography posted on the Jones Day site:

> John Majoras has more than 20 years of experience in general commercial litigation with a particular focus on antitrust matters. [. . .] Through leading and managing these series of investigations and litigation, John has honed extensive experience in coordinating responses to investigations and overseeing defenses of litigation that cross state as well as national boundaries. Additionally, he has helped developed and implement complex settlement strategies while vigorously opposing plaintiffs' enforcement and litigation efforts.[5]

The biography further states that:

> John is Partner-in-Charge of business development in the Washington, D.C. Office and is a member of the Firmwide Business Development Committee.[6]

6. The Chairman exercises a unique role in the functioning of the Commission, and has broad executive and administrative authority, with respect to (1) the appointment and supervision of personnel employed under the Commission, (2) the distribution of business among such personnel and among administrative units of the Commission, and (3) the use and expenditure of funds, 15 Fed. Reg. 3175, 64 Stat. 1264 (May 24,

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[3] Jones Day, Experience Details, http://www.jonesday.com/experience/experience_detail.aspx?exID=S11555.
[4] Fed. Trade Comm'n, Commissioners: Deborah Platt Majoras, Chairman, http://www.ftc.gov/commissioners/majoras/index.shtml.
[5] Jones Day, Professionals: John M. Majoras, http://www.jonesday.com/jmmajoras/.
[6] *Id*.

1950), as well as the assignment of Commission personnel, including Commissioners, to perform such functions as may have been delegated by the Commission to Commission personnel, 26 Fed. Reg. 6191, 75 Stat. 837 (July 9, 1961).

7. For the reasons set forth below, FTC Chairman Deborah Platt Majoras is required to recuse herself from the pending review of the proposed merger between Google and Doubleclick.

Chairman Majoras's Past Recusals

8. Chairman Majoras has previously recused herself in antitrust matters pending before the FTC where there was a similar conflict of interest with her law firm Jones Day.

9. Chairman Majoras recused herself in the FTC's review of the Proctor & Gamble acquisition of Gillette "because her former law firm, Jones Day, represented P&G before the Commission, and Majoras' husband remains an active partner with the firm."[7]

10. Chairman Majoras recused herself in the merger review of Valero Energy Corporation and Premcor after Valero retained Jones Day to represent them in the FTC review of the deal. File No. 051-0145 (2005).

11. Chairman Majoras recused herself in the investigation of the $17 billion acquisition by Federated Department Stores, Inc. of the May Department Stores Company. File No. 051 0111, Proposed Acquisition by Federated Department Stores, Inc. of The May Department Stores Company (2005).[8]

12. Chairman Majoras recused herself in the investigation of the Aventis matter. File No. 041-0099, FTC, Announced Actions (Apr. 19, 2005).

The FTC Procedure for Recusal

13. Pursuant to 15 U.S.C. 46(g), the Commission has authority "to make rules and regulations for the purpose of carrying out the provisions of this Act."

14. The Commission has established procedures for Disqualification of Commissioners. The standard for disqualification is that "applicable to the proceeding in which such motion is filed." 16 C.F.R. 4.17.

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[7] Press Release, Voluntary Trade Council, FTC acted without quorum in P&G case, Oct. 19, 2005, *available at* http://www.voluntarytrade.org/newsite/modules/news/article.php?storyid=81.
[8] Press Release, Fed. Trade Comm'n FTC Issues Statement on Closure of Federated/May Investigation, Aug. 30, 2005, *available at* http://www.ftc.gov/opa/2005/08/federatedmay.shtm.

The Legal Standard for Recusal

15. The Ethics in Government Act and associated statutes set out the legal obligations for employees of the federal government. 5 U.S.C. sect. 7301.

16. The Office of Government Ethics has issued a final rule that establishes uniform standards of ethical conduct for officers and employees of the executive branch of the Federal Government. The final rule establishes standards relating to the receipt of gifts, whether from prohibited sources, because of official position, or between employees. It establishes standards for dealing with the employee's own and other financial interests that conflict with an employee's official duties. 57 Fed. Reg. 35006 (Aug. 7, 1992)

17. The Standards of Ethical Conduct for Employees of the Executive Branch states:

> Where an employee knows that a particular matter involving specific parties is likely to have a direct and predictable effect on the financial interest of a member of his household, or knows that a person with whom he has a covered relationship is or represents a party to such matter, and where the employee determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter, the employee should not participate in the matter unless he has informed the agency designee of the appearance problem and received authorization from the agency designee in accordance with paragraph (d) of this section.

5 C.F.R. 2635.502 (Personal and business relationships – Consideration of appearances by the employee.)

18. All of the elements of this provision are satisfied for recusal.

19. The particular matter is a pending merger and the specific parties are Google and Doubleclick. § 2637.102(a)(7)

20. The direct and predictable financial interest is on the spouse of the Chairman whose firm does not simply represent a party before the Commission but who himself is directly responsible for the firm's business development in Washington, D.C. § 2635.402(b)(1).

21. Moreover, a reasonable person with knowledge of the relevant facts would question the Chairman's impartiality in this matter because of (a) her prior association with the law firm representing a client before the Commission, (b) her spouse's current association and financial interest with a law firm representing a client before the Commission, (c) her spouse's specific expertise in antitrust matters that are at issue in the client's matter before the Commission, and (d) her spouse's specific responsibility for "business development in the Washington, D.C. Office."

22. The Chairman failed to notify the petitioners and the public of this arrangement.

<u>Recusal Is the Only Satisfactory Outcome</u>

23. There is a procedure that would permit the Commission to allow the Chairman to continue to participate in a matter where the question of a conflict of interest has arisen, but in this matter such an outcome is not possible. As set out in §2635.502(d):

> Where an employee's participation in a particular matter involving specific parties would not violate 18 U.S.C. 208(a), but would raise a question in the mind of a reasonable person about his impartiality, the agency designee may authorize the employee to participate in the matter based on a determination, made in light of all relevant circumstances, that the interest of the Government in the employee's participation outweighs the concern that a reasonable person may question the integrity of the agency's programs and operations. Factors which may be taken into consideration include:
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> (1) The nature of the relationship involved;
>
> (2) The effect that resolution of the matter would have upon the financial interests of the person involved in the relationship;
>
> (3) The nature and importance of the employee's role in the matter, including the extent to which the employee is called upon to exercise discretion in the matter;
>
> (4) The sensitivity of the matter;
>
> (5) The difficulty of reassigning the matter to another employee; and
>
> (6) Adjustments that may be made in the employee's duties that would reduce or eliminate the likelihood that a reasonable person would question the employee's impartiality.

24. The spouse of the Chairman is an equity partner in a Washington law firm, responsible for business development, who has acquired a client that has a pending matter before the Commission.

25. The firm of the spouse of the Chairman would benefit from a resolution of the pending matter that is favorable to the firm's client Doubleclick. The spouse would specifically benefit from a favorable resolution of this matter for his firm's client because of both his expertise in antitrust and his responsibility for Washington, D.C. business development.

26. The employee is the Chairman of the Federal Trade Commission. There is no person in the agency who exercises greater control over the outcome of this matter. *See* Appendix 2 attached.

27. The matter is the most significant review of consumer privacy interests to ever reach the Commission. It concerns the acquisition of the Internet largest targeted advertising company by the Internet's largest search company. It has triggered worldwide investigations.[9] The merger would produce the third largest media firm in the world.

28. It will indeed impose additional burdens on the Commission to undertake the thorough investigation that would have occurred but for the conflict of interest that was created by the Chairman's participation.

29. Given the prospect that a decision in this matter may be announced very soon, the withdrawal of Jones Day at this point would not cure the defect.

Conclusion

30. In this matter, Petitioners have sought to represent the public interest in a merger review of enormous consequence for the American public. Petitioners respect the right of the parties to the merger to vigorously present their case. However, Petitioners do not accept the premise that the spouse of the Chairman should represent a client in the pending matter and profit from an outcome that is favorable to the client. Such an outcome calls into question the ability of the Commission to render decisions that are fair and just. Ethical guidelines were established to prevent precisely such situations.

31. As the Chairman of the Commission has previously recused herself in similar matters for similar reasons where there was a lesser conflict of interest, it is clear that she must recuse herself here. The Commission will carry the additional burden to ensure an impartial outcome in this matter.

Respectfully submitted,

Marc Rotenberg, Esq.
EPIC Executive Director

Jeff Chester, Executive Director
Center for Digital Democracy

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[9] On November 13, 2007, after completing its preliminary investigation, the European Commission Directorate on Competition announced a four-month in-depth investigation into the proposed merger. According to the Directorate, "[t]he Commission will, in particular, investigate whether without this transaction, DoubleClick would have grown into an effective competitor of Google in the market for online ad intermediation. It will also investigate whether the merger, which combines the leading providers of respectively, on the one hand, online advertising space and intermediation services, and, on the other hand, ad serving technology, could lead to anti-competitive restrictions for competitors operating in these markets and thus harm consumers." Press Release, European Comm'n Directorate on Competition, Mergers: Commission opens in-depth investigation into Google's proposed take over of DoubleClick (Nov. 13, 2007), *available at* http://europa.eu/rapid/searchResultAction.do?search=OK&query=comp&username=PROF&advanced=0&guiLanguage=en.

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<u>Appendix 1</u>

Jones Day Representation of Doubleclick regarding Acquisition by Google

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Experience Details

Client(s): DoubleClick Inc.

Representation: Acquisition by DoubleClick

Principal Professional(s): Joe Sims, Thomas Jestaedt, Alexandre G. Verheyden, Michael S. McFalls, Chris Ahern

Lead Practice(s): Antitrust Mergers/Joint Ventures

Industry(s): Media

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RELATED SERVICES
- Antitrust & Competition Law

PROFESSIONAL REPRESENTATION
- Joe Sims
- Thomas Jestaedt
- Alexandre G. Verheyden
- Michael S. McFalls
- Chris Ahern

Appendix 2

Organization Chart of the Federal Trade Commission