

**OVERSIGHT OF THE  
FEDERAL TRADE COMMISSION**

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**HEARING**

BEFORE THE

**COMMITTEE ON COMMERCE,  
SCIENCE, AND TRANSPORTATION**

**UNITED STATES SENATE**

**ONE HUNDRED TENTH CONGRESS**

**FIRST SESSION**

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**APRIL 10, 2007**  
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ONE HUNDRED TENTH CONGRESS

FIRST SESSION

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# **OVERSIGHT OF THE FEDERAL TRADE COMMISSION**

**TUESDAY, APRIL 10, 2007**

U.S. SENATE,  
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,  
*Washington, DC.*

The Committee met, pursuant to notice, at 11:03 a.m. in room SR-253, Russell Senate Office Building, Hon. Mark Pryor, presiding.

## **OPENING STATEMENT OF HON. MARK PRYOR, U.S. SENATOR FROM ARKANSAS**

Senator PRYOR. Let's go ahead and get started here. Senator Inouye has asked me to pinch hit for him today, and I'm honored to do so. We're going to have a number of Senators coming and going throughout the hearing.

And I want to thank the Federal Trade Commissioners for being before the Committee today. It's a rare opportunity to have all five here. I believe the last time all five commissioners were here was in June of 2005, for a hearing on identity theft, and I'd like to welcome the Chairman and all the commissioners, and thank them both for their time in delivering their statements and for the performance of the mission there at the FTC. We appreciate it here in the Senate because we know how important the mission of the FTC is.

I'd also like to take a moment to express the Committee's sorrow to the families of Martha Stringer Schoenborn and Sally Dean McGhee. Their service and loyalty to the Commission were unparalleled, and their presence is sorely missed.

Established in 1914 under the Federal Trade Commission Act, the Commission's mandate has two distinct components: first, to protect consumers from unfair or deceptive acts or practices in or affecting commerce; and, second, to protect consumers from unfair methods of competition. As part of this authority, the agency enforces some 46 statutes. While the overall mission has not changed over the past 93 years, the technology and services that Americans now experience challenge the Commission to keep pace. While the competition mission looks similar to what Americans faced during the Wilson Administration, the consumer protection mission does not. The concept of telemarketing in 1914 was probably fuzzy, at best; but now we have a Do Not Call list that gives consumers the choice not to be bothered in their homes or on their cell phones. No one in 1914 could conceive of the notion that a fraudster could

step into their identity with the press of a few keystrokes and potentially ruin their life.

But, with all these differences, some problems are very similar and continue to persist. In 1914, the price of gasoline was about 15 cents per gallon, with concerns that the oil and retail gasoline industry had so much power, it could escalate prices over what they should be in a competitive environment. Today, the nationwide price of regular gasoline is about \$2.70 per gallon, with concerns that the oil and retail gasoline industry has so much power that it could escalate prices over what it should in a competitive environment. As you all know, I'm particularly interested in these topics.

I think most Americans would call the Do Not Call Registry a rousing success, but there are issues in regards to the fee structure and the continued viability of the Registry that need to be addressed. Americans continue to be victimized by large-scale breaches, such as the T.J. Maxx breach, and Americans are anxious for robust protections from identity theft, including the ability to freeze their credit if they so choose.

After Hurricane Katrina, Americans got a refresher course in the power of oil and retail gasoline producers, after seeing \$6 gas prices in some areas immediately following the storm. The Commission has had success in protecting the American consumer in several areas, but there is more work to do. I hope that the Committee and the Senate can enact legislation to protect consumers' identity, ensure the continued viability of the Do Not Call Registry, and ensure competition and transparency in the oil and gas industry.

I look forward to today's testimony, and I look forward to working with the Commission as this Committee works toward legislation to improve the Commission's ability to protect consumers from deceptive practices and abusive methods of competition.

Senator Stevens?

**STATEMENT OF HON. TED STEVENS,  
U.S. SENATOR FROM ALASKA**

Senator STEVENS. Thank you, Mr. Chairman.

I join you in thanking the witnesses for being here today, and join you also in expressing our condolences to the FTC and its family for their loss. And I know it has been a difficult time for all the members of the Commission and its staff.

Your Commission has two important missions: protecting consumers from unfair and deceptive practices and protecting consumers from unfair methods of competition. We should assist the Commission to fulfill these missions by reporting out a clean bill to authorize the Commission for the first time since 1998. I think it should be one of our goals.

In addition, the Committee must ensure that the FTC has the regulatory authority it needs to go after and prosecute bad actors on the current scene, particularly when crimes involve new and emerging technologies. The illicit use of spam and spyware to perpetuate identity theft is one of the instances where increased regulatory authority could assist the Commission in doing its job.

But I do thank you all, and we look forward to hearing your statements today.

And I thank you very much for having this oversight hearing.

Senator PRYOR. Thank you, Senator Stevens.

What we'll do today is, we will allow each of the Commissioners to do a 5-minute opening statement. We'll take Chairwoman Majoras first, and then we'll go down through a list. So, I'll just recognize you as we go.

Madam Chair, would you like to start?

**STATEMENT OF HON. DEBORAH PLATT MAJORAS, CHAIRMAN,  
FEDERAL TRADE COMMISSION**

Ms. MAJORAS. Thank you very much, Chairman Pryor, Vice Chairman Stevens, members of the Committee. My fellow commissioners and I are pleased to appear before you today. I will provide an overview of the FTC's work to protect consumers and competition, while my colleagues each will provide some detail on a particular area of focus.

The FTC is pursuing a vigorous and effective law enforcement program in a dynamic marketplace that is increasingly global and characterized by changing technologies. We challenge business practices that are anticompetitive, deceptive, and unfair, and we promote informed consumer choice and understanding of the competitive process. To meet the challenges of a growing workload in Fiscal Year 2008, the FTC requests \$240,239,000 and 1,084 FTEs.

During the past 3 fiscal years, our consumer protection work has produced more than 235 court orders, requiring defendants to pay more than \$1.3 billion in consumer redress; more than 52 court judgments for civil penalties, totaling over \$40 million; and 187 new Federal court complaints aimed at stopping unfair and deceptive conduct. At the same time, we have developed roughly 200 new consumer and business education campaigns, completed 58 statutorily-mandated rulemakings and reports, hosted 48 public conferences and workshops, and issued 33 reports on issues of significance to our consumers. We must continue with our active and aggressive agenda if we are to fulfill our responsibility to consumers.

Protecting the privacy of American consumers has become, and remains, a top priority in the information age. Deterring identity theft begins with data security, and the FTC has brought 14 enforcement actions against companies for their failure to provide reasonable security. Recently, we launched a nationwide identity theft consumer education campaign, "Deter, Detect, Defend," and we released a new business education guide on data security. We also protect privacy through implementation of the highly successful Do Not Call Registry, which now contains 142 million telephone numbers. And enforcement actions against telephone pretexters and those who violate the Children's Online Privacy Protection Act. And we are aggressively pursuing purveyors of spyware and spam.

To protect consumers in the financial services marketplace, this year we're focusing enforcement efforts on the marketing of alternative mortgage products, illegal methods used in debt collection, and deception in the credit area. Other areas of attack in our fraud program include business opportunity and work-at-home scams, telemarketing fraud, and bogus health and weight-loss claims. And,

among these, phony healthcare products rank high on our agenda, as they can seriously harm consumers who forego otherwise legitimate and effective treatment options. And we've brought forward more than a dozen of these cases in just the past year.

We've also been a driving force in the recent renewal of self-regulation in the area of childhood obesity, and we continue our work in monitoring self-regulation among marketers of alcohol and also of videogame, music, and movies with violent content. Thanks to Congress, which worked with us to pass the U.S. SAFE WEB Act of 2006, we now have better tools to battle cross-border fraud.

We focused our competition efforts on areas that have the most significant impact on consumers, healthcare, energy, high-tech, and real estate. In Fiscal Year 2006, we identified 16 mergers that raised concerns for competition, requiring relief in nine, whilst the other seven were abandoned or withdrawn or restructured. And so far in this fiscal year we've issued 18 second requests in mergers, 11 merger cases already have resulted in enforcement action or withdrawal, and we've brought seven nonmerger cases.

In healthcare, during the past year we achieved substantial relief before allowing mergers in areas such as generic drugs, over-the-counter meds, injectable analgesics and other medical devices and diagnostic services. The Commission has been aggressive in challenging price-fixing agreements among competing physicians and agreements between drug companies that delay generic entry. And we continue to stand up against exclusion payment settlements by working with Congress on bipartisan efforts to advance a workable legislative remedy.

So far in 2007, the Commission has challenged two mergers in the energy industry. Equitable Resources, Inc. proposed acquisition of The People's Natural Gas Company, and the proposed \$22-billion deal whereby energy firm Kinder Morgan would be taken private by its management and by a group of investment firms.

During the past year, the agency has brought eight enforcement actions against associations of Realtors® for brokers who adopted rules, but allegedly withheld the benefits of the multiple listing services they control from consumers simply because those consumers chose to enter into nontraditional listing contracts with brokers.

And in the technology arena, the Commission issued a final opinion and order in the nonmerger proceeding against technology developer Rambus, determining that Rambus unlawfully monopolized the markets for four computer memory technologies.

Mr. Chairman, members of the Committee, you have my commitment that we will continue to work tirelessly on the behalf of the consumers of the United States. We appreciate your support. We appreciate your condolences this morning. And we look forward to continuing our work together to further the interests of American consumers.

Thank you.

[The prepared statement of Ms. Majoras follows:]

PREPARED STATEMENT OF HON. DEBORAH PLATT MAJORAS, CHAIRMAN,  
FEDERAL TRADE COMMISSION

## I. Introduction

Chairman Inouye, Vice Chairman Stevens, and members of the Committee, I am Deborah Platt Majoras, Chairman of the Federal Trade Commission (“Commission” or “FTC”). My fellow Commissioners and I are pleased to come before you today to testify about the FTC’s Fiscal Year 2008 budget and to discuss our work to protect consumers and promote competition.<sup>1</sup> We look forward to continuing to work together to further the interests of American consumers.

The FTC is the only Federal agency with both consumer protection and competition jurisdiction in broad sectors of the economy.<sup>2</sup> The agency enforces laws that prohibit business practices that are harmful to consumers because they are anti-competitive, deceptive, or unfair, and it promotes informed consumer choice and understanding of the competitive process.

The FTC has pursued a vigorous and effective law enforcement program in a dynamic marketplace that is increasingly global and characterized by changing technologies. Through the efforts of a dedicated, professional staff, the FTC continues to handle a growing workload. Our testimony today summarizes some of the major activities of the past year and describes some of the planned initiatives for FY 2008.

To meet the challenges in our Consumer Protection and Maintaining Competition efforts in FY 2008, the FTC requests \$240,239,000 and 1,084 FTEs.

During FY 2008, the FTC will address significant law enforcement and policy issues throughout the U.S. economy and abroad, devoting major portions of its resources to those areas in which the agency can provide the greatest benefits to consumers. This testimony highlights program priorities in the FTC’s two missions. The focus of the Consumer Protection mission will be on broad efforts to fight unfair and deceptive conduct involving data security, identity theft, Do Not Call enforcement, financial services, advertising, media violence ratings, childhood obesity, and new technology-driven threats such as spam and spyware. The focus of the Competition mission will be on merger and nonmerger enforcement, particularly in the health care, energy, and high technology industries. The testimony concludes with a summary of the agency’s FY 2008 appropriation request.

## II. Consumer Protection

During FY2006, the FTC’s Bureau of Consumer Protection achieved many successes. It obtained 93 court orders requiring defendants to pay more than \$309 million in consumer redress; obtained 24 court judgments for civil penalties in an amount over \$27 million; filed 60 new complaints in Federal district court to stop unfair and deceptive practices; completed 13 statutorily-mandated rulemakings and other statutorily-mandated requirements such as reports; led three law enforcement sweeps; hosted 11 conferences and workshops; filed 24 consumer advocacy comments; issued 11 reports on topics significant to consumers; and developed 79 consumer and business education campaigns.

The FTC continues to build on this successful record. This testimony highlights key issues and initiatives for the agency’s consumer protection mission in FY 2008, as well as the methods the FTC will use to address them.

### A. Consumer Privacy

Protecting the privacy of American consumers has long been a top priority at the Federal Trade Commission, and it remains a crucial consumer protection issue. The following highlights some examples of the Commission’s recent work on privacy issues.

#### 1. Data Security and Identity Theft

In 1998, Congress passed the Identity Theft Assumption and Deterrence Act (“the Identity Theft Act”), which assigned the FTC a unique role in combating identity

<sup>1</sup>The written statement represents the views of the Federal Trade Commission. My oral presentation and responses to questions are my own and do not necessarily reflect the views of the Commission or any other Commissioner.

<sup>2</sup>The FTC has broad law enforcement responsibilities under the Federal Trade Commission Act, 15 U.S.C. § 41 *et seq.* With certain exceptions, the statute provides the agency with jurisdiction over nearly every economic sector. Certain entities, such as depository institutions and common carriers, as well as the business of insurance, are wholly or partly exempt from FTC jurisdiction. In addition to the FTC Act, the agency has enforcement responsibilities under more than 50 other statutes and more than 30 rules governing specific industries and practices.

theft and coordinating government efforts.<sup>3</sup> This role includes taking consumer complaints; implementing the Identity Theft Data Clearinghouse, a centralized database of victim complaints used by 1,300 law enforcement agencies; assisting victims and consumers by providing information and education; and educating businesses on sound security practices. The FTC continues to focus on combating identity theft primarily through law enforcement, participation in the Presidential Identity Theft Task Force, workshops, and education to assist the millions of Americans harmed by identity theft.

#### *a. Law Enforcement*

While the FTC, a civil enforcement agency, cannot enforce criminal identity theft laws, it can take law enforcement action against businesses that fail to implement reasonable safeguards to protect sensitive consumer information from identity thieves. Over the past few years, the FTC has brought 14 enforcement actions against businesses, including BJ's Wholesale Club, ChoicePoint, CardSystems Solutions, and DSW, for their failure to provide reasonable data security. These actions include cases against companies that allegedly threw files containing consumer home loan applications into an unsecured dumpster; stored sensitive information in multiple files when there was no longer a business need to keep the information; failed to implement simple, low-cost, and readily available defenses to well-known web-based hacker attacks; stored sensitive consumer information in unencrypted files that could be easily accessed using commonly known user IDs and passwords; and failed to use readily available security measures to prevent unauthorized wireless connections to their networks. The Commission continues to monitor the marketplace to encourage companies to implement and maintain reasonable safeguards to protect sensitive consumer information. In appropriate cases, the Commission will bring enforcement action.

#### *b. Identity Theft Task Force*

Last year, President Bush established the Identity Theft Task Force, which Attorney General Gonzales chairs and I co-chair.<sup>4</sup> In his Executive Order, the President directed the Task Force to submit to him a strategic plan for fighting identity theft. The 18 Federal agencies that comprise the Task Force have been hard at work developing the plan.

On September 19, 2006, the Task Force issued a series of interim recommendations. These recommendations include: development of government-wide guidance addressing whether and how to provide notice to individuals in the event of a government agency data breach; the development of a universal police report that identity theft victims can use to present their case to creditors and credit reporting agencies; and an accelerated review of government's use of Social Security numbers.<sup>5</sup> Following issuance of the interim recommendations, the Task Force solicited public comments to supplement its research and analysis, and to identify areas where additional recommendations may be warranted.<sup>6</sup> The Task Force is in the process of reviewing the comments and will release a final strategic plan and recommendations this week.

#### *c. Education*

Education of consumers and businesses is integral to the Commission's consumer protection mission. The FTC continues to educate consumers on how to avoid becoming victims of identity theft, and last year launched a nationwide identity theft education program.<sup>7</sup> The program has been very popular—the FTC has distributed more than 1.5 million brochures and 40,000 education kits to address identity theft, which can be used by employers, community groups, Members of Congress, and others to inform their constituencies.

The FTC also sponsors an innovative multimedia website, *OnGuardOnline*, designed to educate consumers about basic computer security.<sup>8</sup> The website provides information on specific topics such as phishing, spyware, and spam. Since its launch in late 2005, *OnGuardOnline* has attracted more than 3.5 million visits.

<sup>3</sup>Pub. L. 105–318, 112 Stat. 3007 (1998) (codified at 18 U.S.C. § 1028).

<sup>4</sup>See FTC News Release, *FTC Launches Nationwide ID Theft Education Campaign* (May 10, 2006), available at <http://www.ftc.gov/opa/2006/05/ddd.htm>.

<sup>5</sup>President's Identity Theft Task Force, *Summary of Interim Recommendations* (Sept. 2006), available at <http://www.ftc.gov/os/2006/09/060916interimrecomm.pdf>.

<sup>6</sup>President's Identity Theft Task Force Seeks Public Comment (Dec. 26, 2006), available at <http://www.ftc.gov/speeches/majoras/061221PublicNoticeFinal.pdf>.

<sup>7</sup>See FTC News Release, *FTC Launches Nationwide ID Theft Education Campaign* (May 10, 2006), available at <http://www.ftc.gov/opa/2006/05/ddd.htm>.

<sup>8</sup>Available at <http://onguardonline.gov/index.html>.

The Commission directs its outreach to businesses as well. Just this month, the FTC released a new business education guide on data security.<sup>9</sup> The Commission anticipates that the brochure will prove to be a useful tool in alerting businesses to the importance of data security issues and give them a solid foundation on how to address them.

#### d. Workshops

The Commission continually tries to stay abreast of developments in privacy, data security, and identity theft. Over the past several years, the Commission has hosted numerous workshops and public forums to this end.<sup>10</sup>

This month, the Commission will host a workshop to explore consumer authentication as another avenue for combating identity theft. Implementing better procedures for verifying that consumers are who they say they are when they open new accounts or access existing ones can make it more difficult for criminals to use stolen information. We hope that the Commission's workshop will help spur the development of more effective techniques, like multifactor authentication and biometrics.

## 2. Pretexting

Another important issue on the Commission's privacy agenda is the practice of telephone records pretexting. Phone pretexting is the short-hand term used to describe the use of false pretenses to obtain sensitive phone records, including lists of calls made and the dates and duration of such calls, and then to sell them to third parties without the knowledge or consent of the actual account holder.

In May 2006, before the Hewlett-Packard pretexting story became national news, the Commission filed five cases against web-based operations that obtained and sold consumers' confidential telephone records to third parties.<sup>11</sup> The FTC's complaints allege that the unauthorized sale of phone records is an unfair practice in violation of the FTC Act and seek a permanent halt to the sale of the phone records. To date, the Commission has resolved two of these and is litigating the rest. The settlement orders impose strong remedies against the defendants, including a ban on obtaining or selling phone records and a prohibition against pretexting to obtain other personal information of consumers. Additionally, the defendants must give up the profits made from their sales.

Most recently, in February 2007, the FTC announced a case against Action Research Group, an alleged pretexter who deceptively obtained and sold consumers' confidential phone records without their knowledge or consent.<sup>12</sup> The agency has asked the court to stop the conduct and to order the defendants to give up their ill-gotten gains.

### B. Technology

Although technology can play a key role in combating identity theft and improving consumers' lives, it also can create new consumer protection challenges. The Commission has worked aggressively to protect consumers from technological

<sup>9</sup> Available at <http://www.ftc.gov/bcp/edu/microsites/idtheft/business/data-breach.html>.

<sup>10</sup> See materials for the conferences *Protecting Consumers in the Next Tech-Ade* (Nov. 6–8, 2006), available at <http://www.ftc.gov/techade>; *Information Flows, The Costs and Benefits to Consumers and Businesses of the Collection and Use of Consumer Information* (June 18, 2003), available at <http://www.ftc.gov/bcp/workshops/infoflows/030618agenda.html>; *The eInformation Marketplace: Merging and Exchanging Consumer Data* (Mar. 13, 2001), available at <http://www.ftc.gov/bcp/workshops/informktplace/index.html>; *Technologies for Protecting Personal Information Workshop I: The Consumer Experience* (May 13, 2003), available at <http://www.ftc.gov/bcp/workshops/technology/agenda.htm>; *FTC Spyware Workshop* (Apr. 19, 2004), available at <http://www.ftc.gov/bcp/workshops/spyware>; *Radio Frequency Identification: Applications and Implications for Consumers* (June 21, 2004), available at <http://ftc.gov/bcp/workshops/rfid/index.htm>.

<sup>11</sup> *FTC v. Info. Search, Inc.*, No. 1:06–CV–01099–AMD (D. Md. filed May 1, 2006), available at <http://www.ftc.gov/os/caselist/pretextingsweep/060501informationsearch-cmplt.pdf>; *FTC v. AccuSearch, Inc. d/b/a Abika.com*, No. 06–CV–0105 (D. Wyo. filed May 1, 2006), available at <http://www.ftc.gov/os/caselist/pretextingsweep/060501accusearchcomplaint.pdf>; *FTC v. CEO Group, Inc. d/b/a Check Em Out*, No. 06–60602 (S.D. Fla. filed May 1, 2006), available at <http://www.ftc.gov/os/caselist/pretextingsweep/060501ceogroup-cmplt.pdf>; *FTC v. 77 Investigations, Inc.*, No. EDCV06–0439 VAP (C.D. Cal. filed May 1, 2006), available at <http://www.ftc.gov/os/caselist/pretextingsweep/060501-77investigcmplt.pdf>; *FTC v. Integrity Sec. & Investigation Servs., Inc.*, No. 2:06–CV–241–RGD–JEB (E.D. Va. filed May 1, 2006), available at <http://www.ftc.gov/os/caselist/pretextingsweep/060503integritysecrcmplt.pdf>. The Commission's efforts against phone pretexting are ongoing. In addition to our civil cases, in light of recent Congressional passage of the Telephone Records and Privacy Protection Act, which criminalizes certain telephone pretexting, the Commission is likely to develop investigations that can be referred to criminal law enforcement authorities.

<sup>12</sup> *FTC v. Action Research Group*, No. 6:07–CV–0227–ORL–22JGG (M.D. Fla. filed Feb. 15, 2007), available at <http://www.ftc.gov/os/caselist/0723021/070214actionresearchgrpcmplt.pdf>.

threats such as spyware and spam. In addition, the agency has focused on identifying new issues related to technology in order to better protect consumers in the next decade.

### 1. Spyware

The Commission has brought eleven spyware enforcement actions in the past 2 years. These actions have reaffirmed three key principles: First, a consumer's computer belongs to him or her, not the software distributor. Second, buried disclosures do not work, just as they have never worked in more traditional areas of commerce. And third, if a distributor puts a program on a consumer's computer that the consumer does not want, the consumer must be able to uninstall or disable it.

The Commission's most recent settlement with DirectRevenue, a distributor of adware, illustrates these principles.<sup>13</sup> According to the FTC's complaint, DirectRevenue, directly and through its affiliates, offered consumers free content and software, such as screen savers, games, and utilities, without disclosing adequately that downloading these items would result in the installation of adware. The installed adware monitored the online behavior of consumers and then used the results of this monitoring to display a substantial number of pop-up ads on their computers. Moreover, it was almost impossible for consumers to identify, locate, and remove this unwanted adware. Among other things, the FTC's complaint alleged that DirectRevenue used deception to induce the installation of the adware and that it was unfair for the company to make it unreasonably difficult to uninstall the adware. To resolve these complaint allegations, DirectRevenue has agreed to provide clear and prominent disclosures of what it is installing, obtain express consent prior to installation, clearly label its ads, provide a reasonable means of uninstalling software, and monitor its affiliates to assure that they (and their own affiliates) comply with the FTC's order. In addition, DirectRevenue has agreed to disgorge \$1.5 million to the U.S. Treasury. The Commission will continue to bring law enforcement actions in this area.

### 2. Spam

Since 1997, when the FTC brought its first case involving spam, the Commission has aggressively pursued deceptive and unfair practices involving spam through 89 law enforcement actions, 26 of which were filed after Congress enacted the CAN-SPAM Act. In FY 2006, the FTC brought eight new law enforcement actions targeting deceptive and fraudulent spam e-mail.<sup>14</sup>

The FTC continues to devote resources to fighting spam. The Commission is aware of e-mail filtering companies' recent reports that the amount of spam they process is rising and is studying whether this increase has resulted in a change in the amount of spam actually reaching consumers. The Commission's recent experience suggests that spam is being used increasingly as a vehicle for more pernicious conduct, such as phishing, viruses and spyware. This spam goes beyond mere annoyance to consumers—it can result in significant harm by shutting down consumers' computers, enabling keystroke loggers to steal identities, and undermining the stability of the Internet. This summer, as a follow-up to its initial Spam Forum of 2003, the Commission will host a workshop to examine how spam has evolved and what stakeholders can do to address it.

<sup>13</sup>In *the Matter of DirectRevenue, LLC*, FTC File No. 052 3131 (Feb. 16, 2007), available at <http://www.ftc.gov/os/caselist/0523131/0523131directrevenueagreement.pdf>.

<sup>14</sup>In FY 2006, the FTC brought eight new law enforcement actions targeting deceptive and fraudulent spam e-mail. *FTC v. Pacific Herbal Sciences, Inc., et al.*, No. CV-05-7242 (C.D. Cal. filed Oct. 6, 2005) (alleging false header information, deceptive subject lines, inconspicuous opt-out mechanism, non-functioning opt-out mechanism, inconspicuous solicitation, and omitted postal address); *FTC v. Zachary Kinion*, No. 05C-6737 (N.D. Ill. filed Nov. 29, 2005) (alleging false header information, deceptive subject lines, inconspicuous opt-out mechanism, non-functioning opt-out mechanism, and omitted postal address); *FTC v. Matthew Olson*, No. C05-1979 (W.D. Wash. filed Nov. 29, 2005) (alleging false header information, deceptive subject lines, inconspicuous opt-out mechanism, non-functioning opt-out mechanism, and omitted postal address); *FTC v. Brian McMullen*, No. 05C-6911 (N.D. Ill. filed Dec. 8, 2005) (alleging false header information, deceptive subject lines, inconspicuous opt-out mechanism, non-functioning opt-out mechanism, and omitted postal address); *FTC v. William Dugger, et al.*, No. CV-06-0078 (D. Ariz. filed Jan. 9, 2006) (alleging false header information, relay of messages through computers without authorization, and failure to include adult-content label); *United States v. Jumpstart Technologies, LLC, et al.*, No. C-06-2079 (N.D. Cal. filed Mar. 21, 2006) (alleging false header information, deceptive subject lines, inconspicuous opt-out mechanism, failure to honor opt-out requests, and inconspicuous solicitation); *United States v. Kodak Imaging Network, Inc.*, No. 06-3117 (N.D. Cal. filed May 10, 2006) (alleging inconspicuous opt-out mechanism, non-functioning opt-out mechanism, and omitted postal address); and *United States v. Ice.com*, No. 8:06-CV-580 (N.D.N.Y. filed May 11, 2006) (alleging failure to honor opt-out requests).

### 3. The Tech-Ade Workshop

The FTC is committed to understanding the implications of the development of technology on privacy and consumer protection—as, or even before, these developments happen. Last November, the FTC convened public hearings on the subject of *Protecting Consumers in the Next Tech-Ade*.<sup>15</sup> The FTC heard from more than 100 of the best and brightest people in the tech world about new technologies on the horizon and their potential effect on consumers.

One interesting trend that was highlighted at Tech-Ade is the widening gap between older and younger consumers in their use of technology. Younger consumers are much more likely to be interconnected with other users of technology in a wide variety of ways—they are online, on cell phones, text messaging, uploading videos, playing multiplayer online games, and creating websites and blogs.

Accordingly, advertisers and marketers are making creative use of these technologies to convey their messages to consumers at an early age. At the Tech-Ade workshop, participants discussed several new interactive methods to make advertising more relevant to younger consumers. These included: (1) advergaming and in-game advertising, such as interactive games on an advertiser’s website that incorporate the advertiser’s products or video games that feature a product advertisement; (2) behavioral targeting, which relies on sophisticated technology to analyze consumers’ online activities and provide advertising identified as relevant to their interests; and (3) viral, “buzz,” and word-of-mouth marketing, which rely on pre-existing social networks to increase awareness about a particular product or brand. The Commission also heard about the convergence of marketing and user-generated content and the challenges that can be presented when the line between consumer and producer is blurred.

Given these trends, the FTC is proposing the development of a “media literacy” initiative to educate and empower children and their parents to be more discerning consumers of information. The goals of this initiative are to raise awareness of advertising and marketing messages; increase knowledge of how to skillfully read, analyze, and appreciate an advertisement; show the benefits of being an informed consumer; and help build partnerships to leverage agency resources and education messages.

This initiative is just one example of how the Commission is using what it learned at the Tech-Ade conference to develop its future consumer protection agenda. The Commission will issue a draft report on the Tech-Ade conference highlighting additional new developments this spring.

### 4. Civil Penalties

We believe the Commission’s ability to protect consumers from unfair or deceptive acts or practices would be substantially improved by legislation, all of which is currently under consideration by Congress, to provide the Commission with civil penalty authority in the areas of data security, telephone pretexting and spyware. Civil penalties are important in these areas where our traditional equitable remedies, including consumer restitution and disgorgement, may be impracticable or not optimally effective in deterring unlawful acts. Restitution is often impracticable in these cases because consumers suffer injury that is either non-economic in nature or difficult to quantify. Likewise, disgorgement may be unavailable because the defendant has not profited from its unlawful acts, for example, in cases we bring against companies for failing to maintain reasonable safeguards to protect sensitive consumer data. As such, we renew our support for civil penalty authority in these areas and look forward to continuing to work with this Committee in particular to buttress the Commission’s ability to protect consumers.

#### C. Health

Of course not all fraud is technology-related. Health fraud, for example, can still be found in the offline world as in the online world. Too often, consumers fall prey to fraudulent health marketing because they are desperate for help. Fifty million Americans suffer from a chronic pain condition<sup>16</sup> and have found no effective cure

<sup>15</sup> See FTC News Release, *Hearings Will Explore Emerging Technologies and Consumer Issues in the Next Decade* (July 26, 2006), available at <http://www.ftc.gov/opa/2006/07/techade.htm>.

<sup>16</sup> Partners for Understanding Pain, *Pain Advocacy Tool Kit* (Sept. 2006) (including members from American Cancer Society, American Pharmacists Association, and Arthritis Foundation, among others), available at [http://www.nmmra.org/resources/Home\\_Health/Nurses\\_Tool\\_Kit\\_2006.pdf](http://www.nmmra.org/resources/Home_Health/Nurses_Tool_Kit_2006.pdf).

or treatment. Seventy million Americans are trying to lose weight.<sup>17</sup> The FTC continues to take action against companies that take advantage of these consumers.

From April 2006 through February 2007, the FTC initiated or resolved 13 law enforcement actions involving 25 products making allegedly deceptive health claims.<sup>18</sup> For example, in September 2006, a Federal district court found that defendants' claims for their purported pain relief ionized bracelets were false and unsubstantiated, and required the individual and corporate defendants to pay up to \$87 million in refunds to consumers.

In January 2007, the Commission announced separate cases against the marketers of four extensively advertised products—Xenadrine EFX, CortiSlim, TrimSpa, and One-A-Day WeightSmart. Marketers for these products settled charges that they had made false or unsubstantiated weight-loss or weight-control claims. In settling, the marketers surrendered cash and other assets collectively worth at least \$25 million and agreed to limit their future advertising claims.<sup>19</sup>

Another important issue on the Commission's health agenda is childhood obesity. In the Summer of 2005, the Commission and the Department of Health & Human Services held a joint workshop on the issue of childhood obesity.<sup>20</sup> The goal was to encourage industry to respond to the public concerns surrounding food advertising and marketing by taking strong action to modify their products, their marketing techniques, and their messages. The Commission's April 2006 report on the workshop pointed out that all segments of society—parents, schools, government, health care professionals, food companies, and the media—need to work to improve our children's health. The report urged industry to consider a wide range of options as to how self-regulation could assist in combating childhood obesity.<sup>21</sup>

A number of companies took the FTC's recommendations seriously. On October 16, 2006, for example, the Walt Disney Company announced new food guidelines aimed at giving parents and children healthier eating options.<sup>22</sup> And just a few months ago, the Children's Advertising Review Unit, CARU, which is administered by the Council of Better Business Bureaus, announced a new self-regulatory advertising initiative designed to use advertising to help promote healthy dietary choices and healthy lifestyles among American children.<sup>23</sup> Eleven leading food manufacturers—including McDonalds, The Hershey Company, Kraft Foods, and Cadbury Schweppes—committed to devoting at least 50 percent of their advertising directed to children under twelve to products that represent healthy dietary choices or that prominently include healthy lifestyle messages that encourage physical activity or good nutrition. They also committed to reducing their use of third-party licensed characters and to incorporating healthy lifestyle messages into their interactive games.

#### D. Financial Practices

As with health issues, financial issues impact all consumers—whether they are purchasing a home, trying to establish credit or improve their credit rating, or managing rising debt. Thus, protecting consumers in the financial services marketplace is a critical part of the FTC's consumer protection mission. This year, the Commis-

<sup>17</sup>M.K. Serdula, et al., *Prevalence of Attempting Weight Loss and Strategies for Controlling Weight*, 282 JAMA 1353–1358 (1999).

<sup>18</sup>E.g., *FTC v. Window Rock Enters., Inc.*, No. CV04–8190 (JTLx) (C.D. Calif. filed Jan. 4, 2007) (stipulated final orders) (CortiSlim), available at <http://www.ftc.gov/os/caselist/windowrock/windowrock.htm>; *In the Matter of Goen Techs. Corp.*, FTC File No. 042 3127 (Jan. 4, 2007) (consent order) (TrimSpa), available at <http://www.ftc.gov/os/caselist/goen/0423127agreement.pdf>; *United States v. Bayer Corp.*, No. 07–01 (HAA) (D.N.J. filed Jan. 3, 2007) (consent decree) (One-A-Day), available at <http://www.ftc.gov/os/caselist/bayercorp/070104consentdecree.pdf>; *FTC v. Chinery*, No. 05–3460 (GEB) (D.N.J. filed Dec. 26, 2006) (stipulated final order) (Xenadrine), available at <http://www.ftc.gov/os/caselist/chinery/070104stipulatedfinalorder.pdf>; *FTC v. QT, Inc.*, No. 03 C 3578 (N.D. Ill. Sept. 8, 2006) (final judgment order), available at <http://www.ftc.gov/os/caselist/0323011/061113grayfinaljdgmntorder.pdf>.

<sup>19</sup>See FTC News Release, *Federal Trade Commission Reaches "New Year's" Resolutions with Four Major Weight-Control Pill Marketers* (Jan. 4, 2007), available at <http://www.ftc.gov/opa/2007/01/weightloss.htm>.

<sup>20</sup>See FTC News Release, *Workshop Explores Marketing, Self-Regulation, and Childhood Obesity* (July 15, 2005), available at <http://www.ftc.gov/opa/2005/07/obesityworkshopma.htm>.

<sup>21</sup>*Perspectives on Marketing, Self-Regulation, & Childhood Obesity: A Report on a Joint Workshop of the Federal Trade Commission and the Department of Health and Human Services* (Apr. 2006), available at <http://www.ftc.gov/os/2006/05/PerspectivesOnMarketingSelf-Regulation&ChildhoodObesityFTCandHHSReportonJointWorkshop.pdf>.

<sup>22</sup>See Bruce Horowitz and Laura Petrecca, *Disney to Make Food Healthier for Kids*, USA TODAY (Oct. 17, 2006), available at [http://www.usatoday.com/money/media/2006-10-16-disney\\_x.htm](http://www.usatoday.com/money/media/2006-10-16-disney_x.htm).

<sup>23</sup>See Annys Shin, *Ads Aimed at Children Get Tighter Scrutiny; Firms to Promote More Healthful Diet Choices*, WASH. POST, Nov. 15, 2006, at D1.

sion will focus on the “ABCs” of financial practices: Alternative mortgages, Bad debt collection, and Credit-related deception.

### 1. Alternative Mortgages

Commission law enforcement actions have targeted deceptive and other illegal practices in the mortgage market, with a focus on the subprime market. FTC actions have targeted deceptive or unfair practices by mortgage brokers, lenders, and loan servicers in all stages of mortgage lending—from advertising and marketing through loan servicing. In recent years, the Commission has brought 21 actions against companies in the mortgage lending industry, yielding more than \$320 million in redress for consumers.

The FTC will continue this enforcement work, with an eye toward recent developments in mortgage products. In recent years, more and more consumers entered into “nontraditional” or “alternative” mortgage products. Last year the Commission held a workshop to examine the consumer protection issues arising from them.<sup>24</sup> These products generally offer consumers the option of making lower required payments in the early years of a loan—which make it easier, initially, to purchase a home, or to purchase a more expensive home. But they also pose substantial risks for consumers who do not understand, or are not prepared for, the possible “payment shock” down the road, when monthly minimum payments jump higher—sometimes even double—at the end of the introductory period. Following up on what the Commission learned at its workshop, it is looking closely at instances of deceptive mortgage advertising, particularly advertising of “nontraditional” mortgages.

### 2. Bad Debt Collection

As consumer debt levels have risen, so have complaints to the Commission about debt collectors. The Commission receives more complaints about debt collectors than any other single industry, with 66,000 complaints about third-party debt collectors in 2005 and more than 69,000 in 2006.

The FTC is tackling the problem of unlawful debt collection practices in two ways. First, the Commission engages in aggressive law enforcement. In January, for example, the Commission filed an action to stop a debt collector’s allegedly repeated, egregious violations of the Fair Debt Collection Practices Act.<sup>25</sup> Second, this Fall, the FTC will hold a workshop to take stock of the debt collection industry. The Fair Debt Collection Practices Act was enacted 30 years ago. Given the rise in consumer debt levels, as well as consumer complaints, it is time to take another look at the industry. The Commission will examine changes in the industry and the related consumer protection issues, including whether the law has kept pace with developments.

### 3. Credit Deception

Some consumers with financial problems fall prey to deceptive debt negotiation or similar credit repair schemes. Legitimate credit counseling organizations offer valuable services to help consumers solve their financial problems. However, the Commission has taken enforcement actions against those offering debt reduction services that charge hidden fees, make false promises to lower consumers’ debts, or misrepresent that they will eliminate accurate negative information from consumers’ credit reports.

Earlier this year, the Commission filed a complaint against Select Management Solutions.<sup>26</sup> In its complaint, the Commission alleged that telemarketers for Select Management Solutions falsely promised that they could lower consumer credit card interest rates to the single digits, resulting in savings of at least \$2,500. Consumers were charged \$695 for this service. The Commission alleged that consumers experienced no savings and that the money-back guarantee was false. The FTC succeeded in obtaining a preliminary injunction in this case. The Commission continues to monitor this industry and will continue to bring appropriate enforcement actions as warranted.

### *E. Do Not Call*

The National Do Not Call (DNC) Registry has been an unqualified success. It has registered more than 142 million telephone numbers since its inception in 2003. Because consumers’ registrations expire after 5 years, the Commission plans a significant effort to educate consumers on the need to reregister their phone numbers.

<sup>24</sup> Available at <http://www.ftc.gov/bcp/workshops/mortgage/index.html>.

<sup>25</sup> *FTC v. Rawlins & Rivera, Inc.*, No. 6:07–CIV–146–ORL (M.D. Fla. filed Jan. 31, 2007) (complaint), available at <http://www.ftc.gov/os/caselist/0623139/070202cmp0623139.pdf>.

<sup>26</sup> Available at <http://www.ftc.gov/os/caselist/0623215/0623215.htm>.

Most entities covered by the DNC Rule comply, but for those who do not, tough enforcement is a high priority for the FTC. Since the FTC began enforcing compliance with the Registry in October 2003, the agency has pursued 25 enforcement actions against 52 individual and 73 corporate defendants, alleging that they had called consumers protected by the Registry. In these cases, the FTC has obtained settlements with orders requiring payment in the aggregate of approximately \$9 million in civil penalties and more than \$8.2 million in consumer redress and disgorgement.

#### *F. Retail Practices*

The FTC has been examining retail practices in several areas. In January 2007, the FTC hosted a workshop analyzing the marketing of goods and services through offers with negative option features—*i.e.*, offers where sellers interpret a consumer's failure to take an affirmative action to reject goods or services, or to cancel a sales agreement, as acceptance of the offers.<sup>27</sup> On April 27, 2007, the FTC will host a public workshop in San Francisco, California, to discuss the issues surrounding the use of mail-in rebates by manufacturers and retailers.<sup>28</sup> One goal of the workshop will be to explore “best practices” in the offering and fulfillment of rebates.

Another retail practice that the Commission has been examining is hidden expiration dates and dormancy fees on gift cards. In recent weeks, the Commission has announced two settlements in this area, one with Kmart Corporation and another with the national restaurant company, Darden Restaurants.<sup>29</sup> According to the FTC's complaints, both Kmart and Darden promoted their gift card as equivalent to cash but failed to disclose that fees are assessed after 2 years (initially 15 months, in Darden's case) of non-use. In addition, the FTC alleged that Kmart affirmatively misrepresented that its card would never expire. Kmart and Darden have agreed to disclose any fees or expiration date prominently in future advertising and on the front of the gift card. Both companies have also agreed to provide refunds of dormancy fees assessed on their cards. Kmart will reimburse the dormancy fees for consumers who provide an affected gift card's number, a mailing address, and a telephone number. Darden will automatically restore to each card any dormancy fees that were assessed. In 2006, both companies voluntarily stopped charging dormancy fees on their gift cards.

#### *G. Media Violence*

The Commission has continued its efforts to monitor the marketing of violent entertainment to children and to encourage industry self-regulation. Since 1999, the Commission has issued five reports on the marketing of violent entertainment products. In April 2007, the Commission will issue its sixth report on the entertainment industries' self-regulatory programs. In addition to updating the current state of industry practices, the report will include the results of a nationwide telephone survey of parents and children regarding their familiarity, use, and perceptions of the video game rating system. The report will also include the results of another nationwide undercover mystery shop of movie, game, and music retailers.

#### *H. Aiding Criminal Enforcement*

The frauds that the FTC pursues civilly are also often crimes. Over the past 2 years, the FTC's Criminal Liaison Unit, or CLU, has stepped up cooperation with criminal authorities—a dramatic illustration of the FTC's efforts to bring the collective powers of different government agencies to bear upon serious misconduct in many consumer protection areas.

During 2006, CLU reported some outstanding developments. Grand juries charged 71 FTC defendants and their close associates with crimes including mail and wire fraud, bank fraud, conspiracy, money laundering, and tax fraud. During the same period, Federal prosecutors obtained convictions of 57 FTC defendants and their close associates. And consumer protection-related crimes continue to draw stiff sentences. Thirty-three FTC defendants and their close associates received prison sentences totaling more than 259 years, ranging from 1 year to more than 17 years in prison. The FTC's criminal referral program continues to be a high priority.

<sup>27</sup> See FTC News Release, *FTC to Hold Public Workshop on Negative Option Marketing* (Dec. 21, 2006), available at <http://www.ftc.gov/opa/2006/12/negativeoption.htm>.

<sup>28</sup> See FTC News Release, *FTC to Hold “Rebate Debate” Public Workshop in San Francisco* (Jan. 31, 2007), available at <http://www.ftc.gov/opa/2007/01/rebate.htm>.

<sup>29</sup> See FTC News Release, *National Restaurant Company Settles FTC Charges for Deceptive Gift Card Sales* (Apr. 3, 2007), available at <http://www.ftc.gov/opa/2007/04/darden.htm>.

### I. Consumer Advocacy

Advocacy is another method used by the Commission to advance consumers' interests. The FTC frequently provides comments to legislatures and government agencies on the effect of proposed laws and regulations. The Commission also testified before the 109th Congress 31 times. Although consumers need to be protected from fraud and deception, unduly broad restrictions on the dissemination of truthful and non-misleading information are likely to limit competition and consumer choice.<sup>30</sup>

### III. Maintaining Competition

In addition to addressing unfair and deceptive conduct, the Commission is charged with protecting consumers by maintaining competition. The goal of the FTC's competition mission is to strengthen free and open markets by removing the obstacles that impede competition and prevent its benefits from flowing to consumers. To accomplish this, the FTC has focused its enforcement efforts on sectors of the economy that have a significant impact on consumers, such as health care, energy, technology, and real estate. In this testimony, the Commission will highlight several important merger and nonmerger enforcement actions of the past year.

#### A. Health Care

The health care industry plays a crucial role in the U.S. economy in terms of consumer spending and welfare, and thus, the FTC has dedicated substantial resources to protecting consumers by vigorously reviewing proposed merger transactions, investigating potentially anticompetitive conduct that threatens consumer interests, and taking action to prevent anticompetitive effects.

##### 1. Agreements That Delay Generic Entry

The FTC continues to be vigilant in the detection and investigation of agreements between drug companies that delay generic entry, including investigating some patent settlement agreements between pharmaceutical companies that are required to be filed with the Commission under the Medicare Prescription Drug, Improvement, and Modernization Act of 2003. In these "exclusion payment settlements" (or, to some, "reverse payment settlements"), the brand-name drug firm pays its potential generic competitor to abandon the patent challenge and delay entering the market. Such settlements restrict competition at the expense of consumers, whose access to lower-priced generic drugs is delayed, sometimes for many years.

In addition, in November 2005, in the case of *FTC v. Warner Chilcott Holdings Company III, Ltd.*, the Commission filed a complaint in Federal district court seeking to terminate an agreement between drug manufacturers Warner Chilcott and Barr Laboratories that denied consumers the choice of a lower-priced generic version of Warner Chilcott's Ovcon 35, a branded oral contraceptive.<sup>31</sup> Under threat of a preliminary injunction sought by the FTC, in September 2006, Warner Chilcott waived the exclusionary provision in its agreement with Barr that prevented Barr

<sup>30</sup>Through enforcement and advocacy with the Food and Drug Administration (FDA), the FTC has developed substantial expertise in policy issues related to food and drug advertising and labeling. Recently, the FTC staff provided comments to the FDA in response to a request for public comment regarding its draft guidelines for labeling statements about the whole grain content of food products. The staff suggested that the FDA expand on its guidance by reconsidering whether to allow certain claims (such as "good source" of whole grains) to be made by companies, providing additional guidance on the appropriate use of certain claims (such as "100 percent whole grain"), and conducting further research to determine how best to define whole grain-related terms and reduce consumer confusion. See FTC Staff Comment Before the Food and Drug Administration: *In the Matter of Draft Guidance for Industry and FDA Staff: Whole Grain Label Statements*, FTC file No. V060114 (Apr. 18, 2006) available at <http://www.ftc.gov/os/2006/04/v060114ftcstaffcommentofthefdaredocketno2006-0066.pdf>. The FTC also recently has used advocacy to protect children from online child predators. FTC staff filed a comment regarding proposed legislation in Hawaii designed to protect minors from unwanted commercial e-mails (spam) that advertise products or services they are prohibited from buying or that contain adult advertising or links to adult content. The bill would establish a Child Protection Registry and make it illegal to send such messages to registrants. The FTC staff explained that, much as it did in commenting on similar legislation in Illinois in 2005, the registry easily could be abused by online child predators, publishing a list of verified e-mail addresses could unintentionally increase the amount of spam received by registrants, and the bill's substantial compliance costs could hamper Internet competition and prevent consumers from receiving legitimate and wanted information. The Hawaii legislature ultimately did not adopt this bill. See FTC Staff Comment to The Honorable Carol Fukunaga Concerning Hawaii Senate Bill 2200, *A Bill To Create A Child Protection Registry and Prohibit Certain Unwanted Commercial Email Messages*, FTC File No. V060012 (Mar. 2006) available at <http://www.ftc.gov/os/2006/04/V060012FTCStaffCommentReHawaiiSenateBill2200Image.pdf>.

<sup>31</sup>*FTC v. Warner Chilcott Holdings Co. III*, No. 1:05-cv-02179-CKK (D.D.C. filed Nov. 7, 2005) (complaint filed), available at <http://www.ftc.gov/os/caselist/0410034/051107comp0410034%20.pdf>.

from entering with its generic version of Ovcon. The next day, Barr announced its intention to start selling a generic version of the product, and it now has done so.<sup>32</sup>

## 2. Pharmaceuticals, Medical Devices, and Diagnostic Systems

The Commission is active in enforcing the antitrust laws in the pharmaceutical, medical devices, and diagnostic systems industries. For example, the FTC approved a consent order regarding Barr Pharmaceuticals' proposed acquisition of Pliva.<sup>33</sup> In settling the Commission's charges that the transaction would have increased concentration and led to higher prices, Barr is required to sell its generic antidepressant, trazodone; its generic blood pressure medication, triamterene/HCTZ; either Pliva's or Barr's generic drug for use in treating ruptured blood vessels in the brain; and Pliva's branded organ preservation solution. Last year, the FTC imposed conditions on several other pharmaceutical mergers, including: Watson Pharmaceuticals/Andrx Corporation;<sup>34</sup> Teva Pharmaceutical Industries/IVAX Corporation;<sup>35</sup> Johnson & Johnson's acquisition of Pfizer's consumer health division;<sup>36</sup> and Hospira, Inc./Mayne Pharma Limited.<sup>37</sup> Recent medical devices and diagnostic systems cases include: the FTC's consent order regarding the proposed \$27 billion acquisition of Guidant Corporation by Boston Scientific Corporation, which required the divestiture of Guidant's vascular business to an FTC-approved buyer;<sup>38</sup> and consent orders in mergers affecting markets for biopsy systems and for centrifugal vacuum evaporators used in the health care industry.<sup>39</sup>

FTC staff also has initiated a study on authorized generic drugs.<sup>40</sup> The study is intended to help the agency understand the circumstances under which innovator companies launch authorized generics; to provide data and analysis of how competition between generics and authorized generics during the Hatch-Waxman Act's 180-day exclusivity period has affected short-run price competition and long-run prospects for generic entry; and to build on the economic literature about the effect of generic drug entry on prescription drug prices.

## 3. Hospitals and Physicians

The Commission has worked vigorously to preserve competition in local hospital markets. In October 2005, an FTC Administrative Law Judge found that Evanston Northwestern Healthcare Corporation's consummated acquisition of an important

<sup>32</sup> FTC News Release, *Consumers Win as FTC Action Results in Generic Ovcon Launch* (Oct. 23, 2006), available at <http://www.ftc.gov/opa/2006/10/chilcott.htm>. In October 2006, the district court entered a final order that settled the FTC's charges against Warner Chilcott. As a result of the settlement, Warner Chilcott: (1) must refrain from entering into agreements with generic pharmaceutical companies in which the generic agrees not to compete with Warner Chilcott and there is either a supply agreement between the parties or Warner Chilcott provides the generic with anything of value and the agreement adversely affects competition; (2) must notify the FTC whenever it enters into supply or other agreements with generic pharmaceutical companies; and (3) for 3 months, had to take interim steps to preserve the market for the tablet form of Ovcon in order to provide Barr the opportunity to compete with its generic version. *FTC v. Warner Chilcott Holdings Co. III*, No. 1:05-cv-02179-CKK (D.D.C. filed Oct. 23, 2006) (stipulated permanent injunction and final order), available at <http://www.ftc.gov/os/caselist/0410034/finalorder.pdf>. The FTC's case against Barr is ongoing.

<sup>33</sup> *In the Matter of Barr Pharms., Inc.*, FTC Docket No. C-4171 (Dec. 8, 2006) (decision and order), available at [http://www.ftc.gov/os/caselist/0610217/0610217barrdo\\_final.pdf](http://www.ftc.gov/os/caselist/0610217/0610217barrdo_final.pdf).

<sup>34</sup> *In the Matter of Watson Pharms., Inc., and Andrx Corp.*, FTC Docket No. C-4172 (Dec. 12, 2006) (decision and order), available at [http://www.ftc.gov/os/caselist/0610139/0610139do\\_public\\_ver0610139.pdf](http://www.ftc.gov/os/caselist/0610139/0610139do_public_ver0610139.pdf).

<sup>35</sup> *In the Matter of Teva Pharm. Indus. Ltd. and IVAX Corp.*, FTC Docket No. C-4155 (Mar. 2, 2006) (decision and order), available at <http://www.ftc.gov/os/caselist/0510214/0510214.htm>.

<sup>36</sup> *In the Matter of Johnson & Johnson and Pfizer Inc.*, FTC Docket No. C-4180 (Jan. 19, 2007) (decision and order), available at [http://www.ftc.gov/os/caselist/0610220/0610220c4180decisionorder\\_publicversion.pdf](http://www.ftc.gov/os/caselist/0610220/0610220c4180decisionorder_publicversion.pdf); see also *In the Matter of Allergan, Inc. and Inamed Corp.*, FTC Docket No. C-4156 (Apr. 17, 2006) (decision and order), available at <http://www.ftc.gov/os/caselist/0610031/0610031.htm>.

<sup>37</sup> FTC News Release, *FTC Challenges Hospira/Mayne Pharma Deal* (Jan. 18, 2007), available at <http://www.ftc.gov/opa/2007/01/hospiramayne.htm>; *In the Matter of Hospira, Inc. and Mayne Pharma Ltd.*, FTC Docket No. C-4182 (Jan. 18, 2007) (decision and order), available at <http://www.ftc.gov/os/caselist/0710002/070118do0710002.pdf>.

<sup>38</sup> *In the Matter of Boston Scientific Corp. and Guidant Corp.*, FTC Docket No. C-4164 (July 25, 2006) (decision and order), available at <http://www.ftc.gov/os/caselist/0610046/060725do0610046.pdf>.

<sup>39</sup> *In the Matter of Hologic, Inc.*, FTC Docket No. C-4165 (Aug. 9, 2006) (decision and order), available at <http://www.ftc.gov/os/caselist/0510263/0510263decisionandorderpubreccver.pdf>; *In the Matter of Thermo Electron Corp.*, FTC Docket No. C-4170 (Dec. 5, 2006) (decision and order), available at <http://www.ftc.gov/os/caselist/0610187/061205do0610187.pdf>.

<sup>40</sup> FTC News Release, *FTC Proposes Study of Competitive Impacts of Authorized Generic Drugs* (Mar. 29, 2006), available at <http://www.ftc.gov/opa/2006/03/authgenerics.htm>.

competitor, Highland Park Hospital, resulted in higher prices and a substantial lessening of competition for acute care inpatient hospital services in parts of Chicago's northern suburbs.<sup>41</sup> In May 2006, the Commission heard oral arguments on the appeal of this matter and a Commission opinion is forthcoming.<sup>42</sup> Several other hospital mergers have been announced within the past several months, and we have active investigations pending.<sup>43</sup>

The FTC continues to investigate and challenge unlawful price fixing by physicians and other health care providers that may lead to higher costs for consumers. In the past year, the FTC approved four consent orders settling charges that competing providers jointly set their prices and collectively agreed to refuse to deal with health care payers that did not meet their fee demands.<sup>44</sup>

### B. Energy

Few issues are more important to American consumers and businesses than current and future energy production and use. The FTC plays a key role in maintaining competition and protecting consumers in energy markets by challenging antitrust violations, conducting studies and analyses, and providing comments to other government agencies.

So far in 2007, the Commission has challenged two mergers in the energy industry. Last month, the Commission filed an administrative complaint challenging Equitable Resource's proposed acquisition of The People's Natural Gas Company, a subsidiary of Dominion Resources. Equitable and Dominion People's are each other's sole competitors in the distribution of natural gas to nonresidential customers in certain areas of Allegheny County, Pennsylvania, which includes Pittsburgh. The complaint alleges that the proposed transaction would result in a monopoly for many customers who now benefit from competition between the two firms. In January 2007, the Commission challenged the terms of a proposed \$22 billion deal whereby energy firm Kinder Morgan would be taken private by its management and a group of investment firms, including The Carlyle Group and Riverstone Holdings. The Commission's complaint alleged that Carlyle and Riverstone held significant positions in Magellan Midstream, a major competitor of Kinder Morgan in the terminaling of gasoline and other light petroleum products in the southeastern United States, and that the proposed transaction would threaten competition in those markets. In settling the Commission's complaint, Carlyle and Riverstone agreed to turn their investment in Magellan passive and to restrict the flow of sensitive information between Kinder Morgan and Magellan.<sup>45</sup>

<sup>41</sup>*In the Matter of Evanston Northwestern Healthcare Corp.*, FTC Docket No. 9315 (Oct. 20, 2005) (initial decision), available at <http://www.ftc.gov/os/adjpro/d9315/051021dtextversion.pdf>.

<sup>42</sup>*In the Matter of Evanston Northwestern Healthcare Corp.*, FTC Docket No. 9315 (Apr. 20, 2006) (notice scheduling oral argument), available at <http://www.ftc.gov/os/adjpro/d9315/060420notschedoralargu.pdf>.

<sup>43</sup>The Commission also challenged the merger of two of the top three operators of outpatient kidney dialysis clinics and required divestitures in 66 markets throughout the United States. *In the Matter of Fresenius AG*, FTC Docket No. C-4159 (June 30, 2006) (decision and order), available at <http://www.ftc.gov/os/caselist/0510154/0510154.htm>.

<sup>44</sup>*In the Matter of Puerto Rico Ass'n of Endodontists, Corp.*, FTC Docket No. C-4166 (Aug. 24, 2006) (decision and order), available at <http://www.ftc.gov/os/caselist/0510170/0510170e4166praedecisionorder.pdf>; *In the Matter of New Century Health Quality Alliance, Inc.*, FTC Docket No. C-4169 (Sept. 29, 2006) (decision and order), available at <http://www.ftc.gov/os/caselist/0510137/0510137nchqaprimecdecisionorder.pdf>; *In the Matter of Advocate Health Partners, et al.*, FTC Docket No. C-4184 (Feb. 7, 2007) (decision and order), available at <http://www.ftc.gov/os/caselist/0310021/0310021.htm>; and *In the Matter of Health Care Alliance of Laredo, L.C.*, FTC Docket No. C-4158 (Mar. 23, 2006) (decision and order), available at <http://www.ftc.gov/os/caselist/0410097/0410097.htm>.

<sup>45</sup>Other recent energy matters include: *Chevron/USA Petroleum*, an abandoned transaction in which Chevron would have acquired most of the retail gasoline stations owned by USA Petroleum, the largest remaining chain of service stations in California not controlled by a refiner (USA Petroleum's president stated that the parties abandoned the transaction because of resistance from the FTC), see Elizabeth Douglass, *Chevron Ends Bid to Buy Stations*, LA TIMES, Nov. 18, 2006, Part C at 2; *EPCO/TEPPCO*, in which EPCO's \$1.1 billion acquisition of TEPPCO's natural gas liquid storage business was only allowed to proceed if TEPPCO first agreed to divest its interests in the world's largest natural gas storage facility in Bellview, Texas, to an FTC-approved buyer, see *In the Matter of EPCO, Inc., and TEPPCO Partners, L.P.*, FTC Docket No. C-4173 (Oct. 31, 2006) (decision and order), available at <http://www.ftc.gov/os/caselist/0510108/0510108e4173do061103.pdf>; *Chevron/Unocal*, which resolved the Commission's administrative monopolization complaint against Unocal and antitrust concerns arising from Chevron's proposed \$18 billion acquisition of Unocal, see *In the Matter of Chevron Corp.*, FTC Docket No. C-4144 (July 27, 2005) (consent order), available at <http://www.ftc.gov/os/caselist/0510125/050802do0510125.pdf> and *Union Oil Co. of Calif.*, FTC Docket No. 9305 (July

In May 2006, the FTC released a report titled *Investigation of Gasoline Price Manipulation and Post-Katrina Gasoline Price Increases*.<sup>46</sup> This report contained the findings of a Congressionally-mandated Commission investigation into whether gasoline prices nationwide were “artificially manipulated by reducing refinery capacity or by any other form of market manipulation or price gouging practices.” The report also discusses gasoline pricing by refiners, large wholesalers, and retailers in the aftermath of Hurricane Katrina. In its investigation, the FTC examined evidence relating to a broad range of possible forms of manipulation. It found no instances of illegal market manipulation that led to higher prices during the relevant time periods, but found fifteen examples of pricing at the refining, wholesale, or retail level that fit the legislation’s definition of evidence of “price gouging.”<sup>47</sup> Other factors such as regional or local market trends, however, appeared to explain these firms’ prices in nearly all cases.<sup>48</sup>

### C. Real Estate

Purchasing or selling a home is one of the most significant financial transactions most consumers will ever make, and anticompetitive industry practices can raise the prices of real estate services. In the past year, the agency has brought eight enforcement actions against associations of competing realtors or brokers. The associations, which control multiple listing services, adopted rules that allegedly withheld valuable benefits from consumers who chose to enter into non-traditional, and often less expensive, listing contracts with real estate brokers. In seven of these matters, the Commission agreed to settlements prohibiting multiple listing services from discriminating against non-traditional listing arrangements. The eighth matter is currently in administrative litigation.<sup>49</sup> The result of these actions will allow consumers more choice and ensure that if consumers choose to use discount real estate brokers they will not be handicapped by rules preventing other consumers from seeing their listings on the Internet.

### D. Technology

Technology is another area in which the Commission has acted to protect consumers by safeguarding competition. In February 2007, the Commission issued an opinion and final order in the legal proceeding against computer technology developer Rambus, Inc.,<sup>50</sup> and the matter continues in litigation. Previously, in July 2006, the Commission had determined that Rambus unlawfully monopolized the markets for four computer memory technologies that have been incorporated into industry standards for dynamic random access memory (DRAM) chips. DRAM chips

27, 2005) (consent order), available at <http://www.ftc.gov/os/adjpro/d9305/050802do.pdf>; and *Aloha Petroleum/Trustreet Properties*, in which the Commission alleged that Aloha’s proposed acquisition of Trustreet Properties’ half interest in import-capable terminal and retail gasoline assets in Hawaii would have reduced from five to four the overall number of island gasoline marketers that had guaranteed access to supply, and from three to two the number of suppliers selling to unintegrated retailers, see *FTC v. Aloha Petroleum Ltd.*, No. CV05 00471 HG/KSC (Dist. Hi. complaint filed July 27, 2005), available at <http://www.ftc.gov/os/caselist/1510131/050728comp1510131.pdf>. Ultimately, *Aloha Petroleum* was dismissed at the agency’s request after Aloha announced a long-term agreement with a third party, Mid Pac Petroleum, that would give Mid Pac substantial rights to use the terminal to import gasoline into Hawaii.

<sup>46</sup> FTC News Release, *FTC Releases Report on its “Investigation of Gasoline Price Manipulation and Post-Katrina Gasoline Price Increases”* (May 22, 2006), available at <http://www.ftc.gov/opa/2006/05/katrinagasprices.htm>.

<sup>47</sup> Science, State, Justice, Commerce, and Related Agencies Appropriations Act, 2007, Pub. L. No. 109–108 § 632, 119 Stat. 2290 (2005) (Section 632).

<sup>48</sup> Federal Trade Commission, *Investigation of Gasoline Price Manipulation and Post-Katrina Gasoline Price Increases* (Spring 2006), available at <http://www.ftc.gov/reports/060518PublicGasolinePricesInvestigationReportFinal.pdf>; but see concurring statement of Commissioner Jon Leibowitz (concluding that the behavior of many market participants leaves much to be desired and that price gouging statutes, which almost invariably require a declared state of emergency or other triggering event, may serve a salutary purpose of discouraging profiteering in the aftermath of a disaster), available at <http://www.ftc.gov/speeches/leibowitz/060518LeibowitzStatementReGasolineInvestigation.pdf>.

<sup>49</sup> See, e.g., FTC News Release, *FTC Charges Austin Board of Realtors With Illegally Restraining Competition* (July 13, 2006), available at <http://www.ftc.gov/opa/2006/07/austinboard.htm>; see also FTC News Release, *FTC Charges Real Estate Groups with Anticompetitive Conduct in Limiting Consumers’ Choice in Real Estate Services* (Oct. 12, 2006), available at <http://www.ftc.gov/opa/2006/10/realestatesweep.htm>; FTC News Release, *Commission Receives Application for Proposed Divestiture from Linde AG and The BOC Group plc; FTC Approves Final Consent Orders in Real Estate Competition Matters* (Dec. 1, 2006), available at <http://www.ftc.gov/opa/2006/12/fyi0677.htm>.

<sup>50</sup> FTC News Release, *FTC Issues Final Opinion and Order in Rambus Matter* (Feb. 5, 2007), available at <http://www.ftc.gov/opa/2007/02/070502rambus.htm>.

are widely used in personal computers, servers, printers, and cameras.<sup>51</sup> In addition to barring Rambus from making misrepresentations or omissions to standard-setting organizations again in the future, the February 2007 order, among other things, requires Rambus to license its SDRAM and DDR SDRAM technology; with respect to uses of patented technologies after the effective date of the order, bars Rambus from collecting more than the specified maximum allowable royalty rates; and requires Rambus to employ a Commission-approved compliance officer to ensure that Rambus's patents and patent applications are disclosed to industry standard-setting bodies in which it participates.<sup>52</sup> Our hope is that this case will result in more accurate and useful disclosure of intellectual property in standard-setting bodies, which will improve product quality and lower costs to consumers.

#### *E. Retail and Other Industries*

The FTC also guards against anticompetitive conduct in the retail sector and brings enforcement cases where necessary. In March 2007, the Commission announced a proposed order settling charges that the Missouri State Board of Embalmers and Funeral Directors illegally restrained competition by defining the practice of funeral directing to include selling funeral merchandise to consumers on an at-need basis.<sup>53</sup> The Board's regulation permitted only licensed funeral directors to sell caskets to consumers on an at-need basis, thereby discouraging other retailers from selling caskets. The Board ended the restriction last year and agreed that it will not prohibit or discourage the sale of caskets, services, or other funeral merchandise by unlicensed persons.

The Commission also has sought to protect customers by imposing conditions on mergers involving launch services;<sup>54</sup> the manufacture of ammunition for mortars and artillery;<sup>55</sup> the Nation's two largest funeral home and cemetery chains;<sup>56</sup> and liquid oxygen and helium.<sup>57</sup>

#### *F. Guidance, Transparency, and Merger Review Process Improvements*

The FTC also works to facilitate cooperation and voluntary compliance with the law by promoting transparency in enforcement standards, policies, and decision-making processes. During the last year, the FTC implemented two important process reforms that streamlined the merger review process. In February 2006, the Commission announced the implementation of significant merger process reforms aimed at reducing the costs borne by both the FTC and merging parties.<sup>58</sup> In June 2006, the FTC and the Department of Justice Antitrust Division implemented an electronic filing system that allows merging parties to submit, via the Internet, premerger notification filings required by the Hart-Scott-Rodino (HSR) Act.<sup>59</sup>

<sup>51</sup>*In the Matter of Rambus, Inc.*, Docket No. 9302 (July 31, 2006) (opinion of the Commission), available at <http://www.ftc.gov/os/adjpro/d9302/060802commissionopinion.pdf>.

<sup>52</sup>*In the Matter of Rambus, Inc.*, Docket No. 9302 (Feb. 5, 2007) (opinion of the Commission on remedy), available at <http://www.ftc.gov/os/adjpro/d9302/070205opinion.pdf>; *In the Matter of Rambus Inc.*, Docket No. 9302 (Feb. 2, 2007) (final order), available at <http://www.ftc.gov/os/adjpro/d9302/070205finalorder.pdf>.

<sup>53</sup>*In the Matter of Missouri Board of Embalmers and Funeral Directors*, FTC File No. 061 0026 (Mar. 9, 2007) (proposed decision and order), available at <http://www.ftc.gov/os/caselist/0610026/0610026decisionorder.pdf>.

<sup>54</sup>*In the Matter of Lockheed Martin Corp. and The Boeing Co.*, FTC File No. 051 0165 (Oct. 3, 2006) (decision and order), available at <http://www.ftc.gov/os/caselist/0510165/0510165decisionorderpublicv.pdf>; *In the Matter of Lockheed Martin Corp. and The Boeing Co.*, FTC File No. 051 0165 (Oct. 3, 2006) (agreement containing consent order), available at <http://www.ftc.gov/os/caselist/0510165/0510165agreement.pdf>.

<sup>55</sup>*In the Matter of Gen. Dynamics Corp.*, FTC Docket No. C-4181 (Dec. 28, 2006) (decision and order), available at <http://www.ftc.gov/os/caselist/0610150/0610150decisionorder.pdf>; *In the Matter of Gen. Dynamics Corp.*, FTC Docket No. C-4181 (Dec. 28, 2006) (agreement containing consent orders), available at <http://www.ftc.gov/os/caselist/0610150/0610150agreement.pdf>.

<sup>56</sup>*In the Matter of Serv. Corp. Int'l and Alderwoods Group Inc.*, FTC Docket No. C-4174 (Dec. 29, 2006) (decision and order), available at <http://www.ftc.gov/os/caselist/0610156/070105do0610156.pdf>.

<sup>57</sup>*In the Matter of Linde AG and The BOC Group PLC*, FTC Docket No. C-4163 (Sept. 5, 2006) (decision and order), available at <http://www.ftc.gov/os/caselist/0610114/0610114c4163LindeBOCDOPubRecV.pdf>.

<sup>58</sup>FTC News Release, *FTC Chairman Announces Merger Process Reforms* (Feb. 16, 2006), available at [http://www.ftc.gov/opa/2006/02/merger\\_process.htm](http://www.ftc.gov/opa/2006/02/merger_process.htm).

<sup>59</sup>FTC News Release, *Federal Trade Commission and Department of Justice Allow Electronic Submission of Premerger Notification Filings* (June 20, 2006), available at <http://www.ftc.gov/opa/2006/06/premerger.htm>.

### G. Competition Advocacy

The Commission frequently provides comments to Federal and state legislatures and government agencies, sharing its expertise on the competitive impact of proposed laws and regulations when they explicitly or implicitly impact the antitrust laws, and when they alter the competitive environment through restrictions on price, innovation, or entry conditions. Recent FTC advocacy efforts have contributed to several positive consumer outcomes. In the past year, the FTC has sought to persuade regulators to adopt policies that do not unnecessarily restrict competition in the areas of wine distribution,<sup>60</sup> patent rules of practice,<sup>61</sup> online auction trading assistants,<sup>62</sup> attorney matching services,<sup>63</sup> real estate legal services,<sup>64</sup> and pharmacy benefit managers.<sup>65</sup>

### H. Hearings, Reports, Conferences, and Workshops

Hearings, conferences, and workshops organized by the FTC represent a unique opportunity for the agency to develop policy and research tools and help foster a deeper understanding of the complex issues involved in the economic and legal analysis of antitrust law.

Beginning in June 2006, the FTC and the Department of Justice Antitrust Division have held hearings to discuss the boundaries of permissible and impermissible conduct under Section 2 of the Sherman Act.<sup>66</sup> The primary goal of the hearings is to examine whether and when specific types of single-firm conduct are procompetitive or benign and when they may harm competition. The Commission expects to complete the hearings in the second quarter of 2007.

The Commission and the Department of Justice are nearing completion of a second report addressing issues that arise at the intersection of antitrust and intellectual property law and policy. This second report follows an initial report issued in 2003 following extensive hearings on this important topic.

In August 2006, the FTC convened the Internet Access Task Force to examine issues raised by converging technologies and regulatory developments, and to inform the enforcement, advocacy, and education initiatives of the Commission. Under the leadership of the Internet Access Task Force, the FTC recently addressed two issues of interest to policymakers.

First, in October 2006, the FTC released a staff report, *Municipal Provision of Wireless Internet*. The report identifies the potential benefits and risks to competition and consumers associated with municipal provision of wireless Internet service.<sup>67</sup> Second, in February 2007, the FTC hosted a two-day workshop to explore the many competition and consumer protection issues relating to broadband Internet access, including so-called “network neutrality.”<sup>68</sup> Among the topics discussed at the workshop were the current and future state of competition in the market for broadband Internet access; the capabilities and incentives of broadband Internet service providers to discriminate against, degrade, block, or charge fees for prioritized delivery of unaffiliated content and applications; and the potential effects of network neutrality regulation on innovation and competition in the market for

<sup>60</sup> FTC Staff Comments to The Honorable Paula Dockery (Apr. 10, 2006), available at <http://www.ftc.gov/os/2006/04/V060013FTCStaffCommentReFloridaSenateBill282.pdf>.

<sup>61</sup> Comments of the United States Federal Trade Commission Before the United States Patent and Trademark Office, *In the Matter of Changes to Practice for Continuing Applications, Requests for Continued Examination Practice, and Applications Containing Patentably Indistinct Claims*, Docket No. 2-5-P-066 (May 3, 2006), available at <http://www.ftc.gov/os/2006/05/P052103CommissionCommentsRePTODocketNo2-95-P-066BeforethePatentandTrademarkOfficeText.pdf>.

<sup>62</sup> FTC Staff Comments to The Honorable Noble E. Ellington, Louisiana State Senate (May 26, 2006), available at <http://www.ftc.gov/os/2006/06/V060015CommentsToLouisianaStateSenateImage.pdf>.

<sup>63</sup> FTC Staff Comments to Mr. W. John Glancy, Chairman, Professional Ethics Committee for the State Bar of Texas (May 26, 2006), available at <http://www.ftc.gov/os/2006/05/V060017CommentsOnARequestForAnEthicsOpinionImage.pdf>.

<sup>64</sup> Federal Trade Commission and United States Department of Justice Comments to Assemblywoman Helene E. Weinstein, Chair, Committee on Judiciary, New York State Assembly (June 21, 2006), available at <http://www.ftc.gov/os/2006/06/V060016NYUplFinal.pdf>.

<sup>65</sup> FTC Staff Comments to Terry G. Kilgore, Member, Commonwealth of Virginia House of Delegates (Oct. 2, 2006), available at <http://www.ftc.gov/be/V060018.pdf>.

<sup>66</sup> FTC News Release, *FTC and DOJ to Host Joint Public Hearings on Single-Firm Conduct as Related to Competition* (Nov. 28, 2005), available at <http://www.ftc.gov/opa/2005/11/unilateral.htm>.

<sup>67</sup> FTC Staff Report, *Municipal Provision of Wireless Internet* (Sept. 2005) available at <http://www.ftc.gov/os/2006/10/V060021municipalprovwirelessinternet.pdf>.

<sup>68</sup> FTC Workshop, *Broadband Competition Connectivity Policy* (Feb 13-14, 2007), available at <http://www.ftc.gov/opp/workshops/broadband/index.html>.

broadband Internet access. The FTC intends to release a report of this workshop later this year.

In April 2007, the Commission will hold a three-day conference on *Energy Markets in the 21st Century: Competition Policy in Perspective*.<sup>69</sup> The conference will bring together leading experts from government, the energy industry, consumer groups, and the academic community to participate on panels to examine such topics as: (1) the relationship between market forces and government policy in energy markets; (2) the dependence of the U.S. transportation sector on petroleum; (3) the effects of the electric power industry restructuring on competition and consumers; (4) what energy producers and consumers may expect in the way of technological developments in the industry; (5) the security of U.S. energy supplies; and (6) the government's role in maintaining competition and protecting energy consumers.

#### *I. Competition Education Initiatives*

The FTC is committed to enhancing consumer confidence in the marketplace through enforcement and education. This year, Commission staff launched a multi-dimensional outreach campaign, targeting new and bigger audiences, with the message that antitrust enforcement helps consumers reap the benefits of competitive markets by keeping prices low and services and innovation high, as well as by encouraging more choices in the marketplace.<sup>70</sup> As a part of this effort, the Commission's website, [www.ftc.gov](http://www.ftc.gov), continues to grow in size and scope with resources on competition policy in a variety of vital industries. This year, the FTC launched new industry-specific websites for Oil and Gas,<sup>71</sup> Health Care,<sup>72</sup> Real Estate,<sup>73</sup> and Technology.<sup>74</sup> These minisites serve as a one-stop shop for consumers and businesses who want to know what the FTC is doing to promote competition in these important business sectors. In the past year, the FTC also issued practical tips for consumers on buying and selling real estate, funeral services, and generic drugs, as well as "plain language" columns on oil and gas availability and pricing.

### **IV. International**

The FTC's Office of International Affairs (OIA), created in January 2007, brings together the international functions formerly handled in the Bureaus of Competition and Consumer Protection and the Office of General Counsel. OIA will bring increased prominence to the FTC's international work, and will enhance the FTC's ability to coordinate its enforcement efforts effectively to promote convergence toward best practices with our counterpart agencies around the world.

The FTC has built a strong network of cooperative relationships with its counterparts abroad, and plays a leading role in key multilateral fora. The growth of communication media and electronic commerce presents new challenges to law enforcement—fraud and deception now are without borders. We work with other nations to protect American consumers who can be harmed by anticompetitive conduct and frauds perpetrated outside the United States. The FTC also actively assists new democracies moving toward market-based economies with developing competition and consumer protection laws and policies.

#### *A. Consumer Protection*

Globalization and rapid changes in technology have accelerated the pace of new consumer protection challenges, such as spam, spyware, telemarketing fraud, data security, and privacy, that cross national borders and raise both enforcement and policy issues. The Internet and modern communications devices, such as Voice-over-Internet Protocol, have provided tremendous benefits to consumers but also have aided telemarketing fraud and raised fresh privacy concerns. The FTC has a comprehensive international consumer protection program of enforcement, networking, and policy initiatives to address these new challenges.

In the coming year, the FTC will implement the U.S. SAFE WEB Act of 2006, which was signed into law last December. Thanks to the action of the Commerce Committee and of Congress, the U.S. SAFE WEB Act provides the FTC with updated tools for the 21st century. It allows the FTC to cooperate more fully with foreign law enforcement authorities in the area of cross-border fraud and other practices, such as fraudulent spam, spyware, misleading health and safety advertising, privacy and security breaches, and telemarketing fraud, that are global and that

<sup>69</sup> FTC Conference, *Energy Markets in the 21st Century: Competition Policy in Perspective* (Apr. 10–12, 2007), available at <http://www.ftc.gov/bcp/workshops/energymarkets/index.html>.

<sup>70</sup> Available at <http://www.ftc.gov/ftc/antitrust.htm>.

<sup>71</sup> Available at <http://www.ftc.gov/ftc/oilgas/index.html>.

<sup>72</sup> Available at <http://www.ftc.gov/bc/healthcare/index.htm>.

<sup>73</sup> Available at <http://www.ftc.gov/bc/realestate/index.htm>.

<sup>74</sup> Available at <http://www.ftc.gov/bc/tech/index.htm>.

harm consumers. As the FTC begins to take advantage of these new tools, cooperation with foreign law enforcement agencies regarding information-sharing and investigative assistance will be greatly improved, diminishing fundamental roadblocks to effective cooperation.

The FTC works directly with consumer protection and other law enforcement officials in foreign countries to achieve its goals. In particular, in response to the amount of fraud across the U.S.-Canadian border, the FTC continues to build its relationship with its Canadian counterparts. We have worked hard to expand partnerships with Canadian regional entities to fight telemarketing fraud by Canadians targeting U.S. and Canadian consumers.

Increased globalization also requires the FTC to participate actively in international policy efforts to develop flexible, market-oriented standards, backed by aggressive enforcement, to address emerging consumer protection issues. In 2006, for example, the FTC, working with its foreign partners through the Organization for Economic Cooperation and Development (OECD) and through the London Action Plan, the international spam enforcement network, called for increased cross-border law enforcement cooperation and increased public/private sector cooperation to combat spam. The FTC will also continue to focus the international community on the importance of enforcement as a key component of privacy protection in the OECD, the Asia Pacific Economic Cooperation (APEC), and other multilateral organizations. The FTC also continues to participate actively in APEC's Electronic Commerce Steering Group and several OECD committees, including the Committee on Consumer Policy, and in the International Consumer Protection Enforcement Network (ICPEN). The FTC supported the ICPEN's operations this year by hosting its Secretariat.

#### *B. Competition*

The FTC's cooperation with competition agencies around the world is a vital component of our enforcement and policy programs, facilitating our ability to collaborate on cross-border cases, and promoting convergence toward sound, consumer welfare-based competition policies.

FTC staff routinely coordinate with colleagues in foreign agencies on mergers and anticompetitive conduct cases of mutual concern. The FTC promotes policy convergence through formal and informal working arrangements with other agencies, many of which seek the FTC's views in connection with developing new policy initiatives. For example, during the past year, the FTC consulted with the European Commission regarding its review of policies on abuse of dominance and remedies; with the Canadian Competition Bureau on merger remedies and health care issues; with the Japan Fair Trade Commission on abuse of dominance and revisions to its merger guidelines; and with the Chinese authorities on the drafting of a new antitrust law. We will also be consulting with the European Commission on its new draft guidelines for the review of non-horizontal mergers. The FTC participated in consultations in Washington and in foreign capitals with top officials of, among others, the European Commission, the Japan and Korea Fair Trade Commissions, and the Mexican Federal Competition Commission. Chairman Majoras became the first FTC Chairman to visit China, establishing important relationships with officials involved in developing the first comprehensive competition law in China, and underscoring the importance of the FTC's and Antitrust Division's work to provide input into the drafting process. Several other Commissioners have also been to China to work on consumer protection and competition issues.

The FTC is an active participant in key multilateral fora that provide important opportunities for competition agencies to enhance mutual understanding in order to promote cooperation and convergence, including the International Competition Network (ICN), the OECD, the United Nations Conference on Trade and Development (UNCTAD), and APEC. For example, over the past year, the FTC has served on the ICN's Steering Group, co-chaired its Unilateral Conduct working group and related objectives subgroup, chaired its Merger Notification and Procedures subgroup, and played a lead role in its working group on Competition Policy Implementation. In addition, the FTC also participates in U.S. delegations that negotiate competition chapters of proposed free trade agreements, including in connection with negotiations with Korea, Thailand, and Malaysia during the last year. All of this work ultimately benefits American consumers.

#### *C. International Technical Assistance*

The FTC assists developing nations as they move toward market-based economies with developing and implementing competition and consumer protection laws and policies. These activities, funded mainly by the United States Agency for International Development and conducted in cooperation with the Department of Jus-

tice's Antitrust Division, are an important part of the FTC's efforts to promote sound competition and consumer protection policies around the world. In 2006, the FTC sent 34 different staff experts on 30 technical assistance missions to 17 countries, including the ten-nation ASEAN community, India, Russia, Azerbaijan, South Africa, Central America, and Egypt. We also conducted missions in Jordan and Ethiopia, and concluded a highly successful program in Mexico.

#### **V. Needed Resources for Fiscal Year 2008**

To accomplish the agency's mission in FY 2008, the FTC requests \$240,239,000 and 1,084 FTE. This level of resources is needed to allow the FTC to continue to build on its past record of accomplishments in enhancing consumer protection and protecting competition in the United States and, increasingly, abroad. The FY 2008 request represents an increase of \$17,239,000 over the FTC's FY2007 budget request before Congress. The increase includes:

- \$8,839,000 in mandatory salary and contract expenses;
- \$1,400,000 for 10 new FTE for the Consumer Protection Mission's Privacy and Identity Protection Program;
- \$4,500,000 for the Consumer Protection Mission's outreach and enforcement efforts including:
  - \$2,000,000 for the "Media literacy" initiative;
  - \$1,300,000 for Do Not Call registration renewals and outreach;
  - \$100,000 to increase enforcement efforts to combat spyware; and
  - \$100,000 to support our Congressionally-endorsed efforts to promote industry self-regulation in the marketing of entertainment and food to children;
- \$1,600,000 for electronic litigation support and E-Gov and information technology initiatives; and
- \$900,000 for facility reconditioning, equipment replacement, records management, and human capital and support needs.

The FTC's FY 2008 budget request is comprised of three funding sources. The majority of the funding will be derived from offsetting collections: HSR filing fees and Do Not Call fees will provide the agency with an estimated \$163,600,000 in FY 2008. The FTC anticipates that the remaining funding needed for the agency's operations will be funded through a direct appropriation of \$76,639,000 from the General Fund in the U.S. Treasury.

#### **VI. Conclusion**

Mr. Chairman, Mr. Vice Chairman, and members of the Committee, we want to ensure that the quality of our work is maintained despite the breadth of our mission and the challenges that we have described involving technological change and an evolving global economy. In the last several years, however, Congress has passed a variety of significant new laws that the FTC is charged, at least in part, with implementing and enforcing, such as the CAN-SPAM Act, the Fair and Accurate Credit Transactions Act (FACTA), the Children's Online Privacy Protection Act (COPPA), the Gramm-Leach-Bliley Act, and the U.S. SAFE WEB Act. In light of these new laws and challenges, we will continue to assess our personnel and resource needs to ensure that the agency vigorously protects American consumers and promotes a vibrant marketplace.

The FTC appreciates the strong support it has received from Congress to serve its critical mission of protecting consumers and maintaining competition. I would be happy to answer any questions that you and other Members may have about the FTC's programs and budget request.

Senator PRYOR. Thank you.  
The Honorable Pamela Jones Harbour?

#### **STATEMENT OF HON. PAMELA JONES HARBOUR, COMMISSIONER, FTC**

Ms. HARBOUR. Thank you, Chairman Pryor, Vice Chairman Stevens.

I am pleased to appear before you today to discuss the Commission's work in two rapidly developing areas: cross-border data protection and international law enforcement cooperation. In par-

ticular, I will focus on our work with the Asia Pacific Economic Cooperation, or APEC, to develop rules to govern the transfer of personal data across borders. I will also focus on the Commission's newly expanded authority granted by Congress in the U.S. SAFE WEB Act.

As you know, APEC consists of 31 economies, or countries, on the Pacific Rim, including the United States, all with different domestic legal frameworks. U.S. consumers are doing more business with foreign companies. And U.S. companies also are doing more business on an international scale. As a result, employees, data, products, and customers are scattered across multiple countries and, therefore, are subject to multiple privacy regulations.

APEC's data privacy subgroup has undertaken a project to create a flexible framework that enables cross-border data flows while accommodating the different approaches of all of its member economies around the globe. Because of the Commission's expertise in protecting consumer privacy domestically, we have been involved from the beginning in formulating the APEC privacy framework, which was endorsed by the member economies and by the United States in 2004. Since that time, the Commission has worked with the Department of Commerce to develop an implementation plan for cross-border privacy rules that is flexible enough to incorporate U.S. and other approaches to privacy, and to provide assurances that consumer data will be protected across borders.

There are many reasons why the Commission supports the development of cross-border privacy rules:

First, protecting consumer privacy is vital. Cross-border privacy rules will provide more consistent and reliable protections for consumers, and will assure other APEC economies that data transferred into the United States will benefit from appropriate privacy protections.

Second, cross-border data flows, through outsourcing, for example, convey benefits to consumers such as cost-savings and around-the-clock customer service.

And, third, cross-border or global privacy rules offer a way to harmonize different privacy regimes in an international setting. If implemented effectively, cross-border privacy rules can provide more consistent and reliable protections for consumers, as well as clear standards for businesses across the APEC region.

In short, cross-border privacy rules have tremendous potential. The challenge ahead is to develop workable rules that accommodate different domestic approaches around the globe. We are confident that the more support the U.S. gives this process, the more U.S. businesses and consumers will benefit in the long term.

It is against this backdrop that I will turn briefly to the U.S. SAFE WEB Act. We are tremendously gratified that Congress expanded the Commission's ability to cooperate with our foreign counterparts. SAFE WEB, which as you know, was signed into law December of 2006, deposits updated information-sharing tools into the Commission's law enforcement arsenal, and these tools will help us fight a wider range of practices that can harm consumers.

Now, although Section 5 of the FTC Act grants the Commission broad authority over unfair or deceptive acts or practices, the Act's cooperation provisions, drafted back in 1938, have become some-

what outdated in the face of 21st century global trade and technological developments. When we began tackling cross-border electronic fraud, such as spam, spyware, and phishing, these limits on our ability to cooperate internationally became an impediment to our law enforcement. And, unfortunately, because we could not share information with our foreign counterparts, high-tech con artists could strike quickly, victimize thousands of consumers, and then seemingly disappear without a trace. SAFE WEB updates our cross-border authority in many ways. We now can share compelled or confidential information with our foreign counterparts, and gather new information for them, as well.

We feel a great sense of accomplishment and appreciation that Congress has passed this law, but we realize that our work is just beginning. We now must take advantage of our new enforcement powers. And, to that end, we have convened a steering group to implement SAFE WEB, and we have begun to use these new tools in our investigations.

In conclusion, I appreciate the opportunity to present remarks on these increasingly important global issues, and I look forward to answering your questions.

Thank you.

Senator PRYOR. Thank you.

The Honorable Jonathan Leibowitz?

**STATEMENT OF HON. JONATHAN D. LEIBOWITZ,  
COMMISSIONER, FTC**

Mr. LEIBOWITZ. Thank you, Chairman Pryor, Vice Chairman Stevens. I am also pleased to appear before you today to talk about some of the technology issues that the Commission is currently examining.

Let me briefly highlight just three: spyware, spam, and telephone pretexting. All are Internet-related in one way or another.

First, spyware. The Commission has brought 11 spyware and adware cases in the past 2 years. Our initial cases involved hardcore spyware that hijacked Internet browsers, made CD-rom trays open and close and open and close, captured consumers' personal information, and caused computers to slow down or even crash. Recently we've begun to attack nuisance adware, disruptive software placed on people's computers without their notice or consent. These actions reaffirm several core principles: that consumers' computers belong to them, not to the software distributors; that buried disclosures do not suffice; and that the consumer must be able to uninstall unwanted adware.

Our recent settlements with Zango and DirectRevenue illustrate these principles vividly. The two companies offered consumers free content in software without, we allege, adequately disclosing that downloading these items would result in the installation of adware. That adware generated an eye-popping number of pop-up ads—6.9 billion pop-up ads by Zango alone. In both these cases, we obtained strong injunctive relief. The companies agreed to give clear notice and obtain express consent from consumers prior to installation. They agreed to provide a reasonable means to uninstall the software and to monitor their affiliates. The two companies will also forfeit a total of \$4.5 million in ill-gotten gains. The Commission

will continue to make spyware a priority. And we're happy to work with you—and, Senator Stevens, we appreciate you mentioning this spyware legislation—and this Committee on any measure you move forward with.

Second, spam. The Commission has brought almost 90 cases targeting spam in the last 10 years, many of those filed after the CAN-SPAM Act gave us the ability to sue those who assist or facilitate spam distribution and the authority to seek civil penalties—both tremendously helpful as we fight the spam epidemic.

As you know, spam goes beyond mere annoyance; it's being used as a vehicle for pernicious conduct, such as phishing scams, viruses, and spyware. This summer, the Commission will host a workshop to examine how spam has evolved and what stakeholders can do to address it. Filtering technology is a big part of the solution—so is the work of ISPs. But rest assured we will continue to bring forward spam cases.

More than half of all spam and spyware, by the way, is transmitted into the United States from other countries. And so, as the Chairman and Commissioner Harbour mentioned, your Committee's leadership and your staff's hard work in passing the U.S. SAFE WEB Act—I believe it passed at 4:22 in the morning, the final measure moved before the last Senate adjourned *sine die*—gives us important new authority to share confidential information with our law enforcement counterparts so that we can work more effectively to help Americans who are harmed from abroad.

The third issue, telephone pretexting. In May 2006, well before the Hewlett-Packard story became a national scandal, the Commission filed five complaints against web-based operations that obtained and sold consumers' confidential telephone records to third parties in violation of the FTC Act. To date, the Commission has resolved two cases with consent orders that impose strong remedies, including bans on obtaining phone records, prohibitions against pretexting to obtain other personal information, and disgorgement of profits. Last year, a law making pretexting a criminal offense was enacted but, as you know Senator Pryor, there is still a need for legislation that would close the gap and give the Commission authority to seek civil penalties against pretexters.

Finally, the sad truth is that Internet malefactors understand and exploit technology. To keep pace with them, we need to continually educate ourselves. Last November, the FTC convened hearings on "Protecting Consumers in the Next Tech-Ade." We heard from more than 100 technology leaders about trends that may not be here today, but will affect all of our lives tomorrow. Among other topics, panelists addressed viral marketing, social networking, and user-generated content—which holds tremendous promise for consumers but raises serious perils for parents of young children. These hearings will help us anticipate ways in which new technologies can be misused and develop new ways to use technology to benefit consumers.

To do any of this, of course, we need to work with our oversight Committee. And so I thank you again for the opportunity to testify. I'm happy to answer questions after my colleagues have finished.

Senator PRYOR. Thank you.

Next, the Honorable William Kovacic.

**STATEMENT OF HON. WILLIAM E. KOVACIC,  
COMMISSIONER, FTC**

Mr. KOVACIC. Chairman Pryor, Vice Chairman Stevens, thank you for the opportunity to review the Commission's recent competition policy initiatives concerning the energy sector.

I will focus on activities of the past 12 months, and will discuss four elements of our competition program for energy: law enforcement, research, cooperation with other government agencies, and public consultation.

Merger control is the core of recent FTC law enforcement concerning the energy sector. Four matters stand out:

In March, the Commission issued an administrative complaint challenging the proposed purchase by Equitable Resources, Inc. of a subsidiary of Dominion Resources. The FTC alleged that the proposed transaction would create a monopoly of natural gas distribution services in Pittsburgh and in surrounding parts of Allegheny County, Pennsylvania.

Two months ago, the Commission opposed the terms of a \$22 billion deal by which Kinder Morgan would have been taken private by its management and a group of investment firms. The Commission obtained adjustments to protect competition in the transportation and temporary storage of gasoline and other petroleum products in the southeastern United States.

Last November, Chevron and USA Petroleum abandoned a transaction by which Chevron would have bought most of USA Petroleum's retail gasoline stations in California. The FTC had been conducting an investigation of the proposed deal, and USA Petroleum's president said that resistance from the FTC ultimately induced the parties to abandon the transaction.

Last October, the FTC issued a consent order that compelled the divestiture of salt-dome storage capacity on the Texas Gulf Coast to resolve competitive issues arising from EPCO's acquisition of the natural-gas liquid storage business of TEPPCO partners.

These and other FTC law enforcement initiatives draw heavily upon the Commission's investment of resources to conduct research and perform studies involving the energy sector. These investments are the equivalent of research and development in public administration. They guide the FTC's pursuit of cases, and they inform our use of non-litigation tools that Congress has entrusted to the Commission.

In May 2006, the Commission presented to Congress its report on the investigation of gasoline price manipulation and post-Katrina gasoline price increases. The report examined whether energy firms had manipulated gasoline prices, and it described how energy markets responded to the destruction caused by Hurricanes Katrina and Rita.

In December 2006, the Commission also issued a report on the current state of ethanol production in the United States.

As you know, the FTC is not the only public body with competition policy responsibilities that affect the performance of the energy sector. Improved cooperation with other public authorities can help each institution spend its competition resources more effectively. I believe the creation of more effective public agency networks is a

key ingredient of future policy success in energy and other parts of the economy.

To this end, last September the FTC and representatives of various state attorneys general held a 1-day workshop to discuss competition and consumer protection issues that involved gasoline pricing. At the end of that day, the workshop participants, I think, unanimously regarded the event as a valuable step toward improving Federal and state cooperation to address developments of common concerns, such as mergers.

The fourth and final ingredient of the FTC's energy program is public consultation in the form of public hearings, seminars, or workshops. These consultations enable the FTC not only to give those outside our walls the benefit of our current thinking, but also permit the FTC to gain deeper insight into developments affecting the industry and consumers, to identify major emerging issues, and to help build a consensus about appropriate policy responses.

Earlier this morning, a short distance from this building, the FTC convened the first of 3 days of hearings on "Energy Markets in the 21st Century: Competition, Policy, and Perspective." These hearings are examining the role of old and new fuel cycles, demand-side issues, such as the operation of the transportation sector, lessons from past regulatory strategies, and the vulnerability of the United States to supply and demand shocks. The proceedings feature an extraordinary group of participants, drawn from consumer groups, government agencies, energy companies, think tanks, and universities. I believe the hearings have great promise to improve our understanding of how the FTC can best apply its competition policy instruments and, more ambitiously, to suggest the paths that our Nation's energy policy should take in the future.

I am pleased to address your comments and questions.

Senator PRYOR. Thank you.

And the Honorable J. Thomas Rosch.

**STATEMENT OF HON. J. THOMAS ROSCH, COMMISSIONER, FTC**

Mr. ROSCH. Thank you, Chairman Pryor, Vice Chairman Stevens—

Senator PRYOR. Microphone, please.

Mr. ROSCH. Now going? OK, great, thank you—and Senator Klobuchar, thank you very much for the opportunity to appear before you this morning. I really appreciate it. And I particularly appreciate, Chairman Pryor, your getting my name right. I can't believe it. It's the first time it has ever happened.

Today, I'd like to talk briefly about the Commission's activity in the healthcare area. One of the most important priorities of the Commission is, of course, the pursuit of those who make deceptive healthcare claims.

Over the past few years, the agency has brought several successful enforcement actions against marketers that deceptively advertise health-related products that they claimed could, among other things, cause weight loss, decrease pain, cure cancer, and increase height in adults and children. For example, marketers for weight-loss products recently settled charges that they'd made false or unsubstantiated claims; and in settling, they surrendered cash and

other assets collectively worth at least \$25 million, and agreed to limit their future advertising claims.

In addition to law enforcement action, the Commission works hard to educate the media and consumers about fraudulent claims. For example, since 2003 we've promoted a Red Flags initiative, which asks for the media's help in preventing the dissemination of facially deceptive advertising claims for weight-loss products. As a complement to this initiative, the agency has also created extensive consumer education campaigns to alert consumers about deceptive claims, including teaser websites and online games.

Competition also plays an important role in our healthcare agenda. Our written statement describes some of our efforts to ensure that healthy competition exists in the markets in which healthcare providers do business, including our challenges to price fixing by physician providers and to hospital and drug company mergers. But I'd like to take a minute to describe our efforts to combat what we consider to be illegal reverse payments made by branded drugmakers to generic drugmakers in patent litigation settlements between branded and generic firms instituted under the Hatch-Waxman Act. As you know, the Eleventh Circuit reversed our decision in the *Schering* case that a substantial reverse payment made seemingly as a *quid pro quo* for the generic to abandon its effort to enter the market before expiration of the branded's patent was illegal. We held, in that case, that the settlement agreement was tantamount to a market division agreement between a competitor—namely, the branded—and a potential competitor—namely, the generic—which the Supreme Court has held is *per se* illegal.

The Eleventh Circuit held we were wrong in *Schering*, and that a settlement within the scope of the patent—in other words, a settlement that wouldn't affect the generic's unpatented products or keep the generic from competing beyond the life of the patent—is legal under the patent laws. The Supreme Court declined to review that decision, at the suggestion of the Justice Department, which advised that the issue was not ripe for Supreme Court review.

In the *Tamoxifen* case, which involved facts similar to *Schering*, a divided Second Circuit essentially followed the Eleventh Circuit. We think *Tamoxifen* and *Schering* are bad law. More specifically, we continue to believe that most, if not all, reverse payments are illegal if they're made at the same time a generic agrees not to compete as soon as it could if it won its challenge to the branded's patent.

*Schering* could be reversed in one of two ways:

First, the Supreme Court has just asked for the Justice Department's recommendation whether the Court should review the decision in *Tamoxifen*. We're hopeful that the Court will review and reverse *Tamoxifen*, and will do so in a fashion that will discredit *Schering*.

Second, the Judiciary Committee has reported a bipartisan bill that would generally prohibit reverse payments in the instances I described. Commissioner Leibowitz testified on behalf of the Commission in connection with that bill.

Whether the Supreme Court or the Congress overturns *Schering*, we firmly believe that one or the other should do so, because agreements like those at issue in *Schering* can severely hobble competi-

tion between providers of drugs, and thereby impose a very significant tax on the Federal and state governments, as well as on consumers, all of which spend billions of dollars each year buying drugs and stand to benefit from competition.

I look forward to answering any questions you may have. Thank you.

Senator PRYOR. Thank you.

Now—thank all the Commissioners for your testimony and your comments today—now, we made you go in a certain order when you testified here a moment ago, but we're not going to go in any order up here.

[Laughter.]

Senator PRYOR. And all I can say to that is, welcome to the U.S. Senate.

[Laughter.]

Senator PRYOR. No, actually, Vice Chairman Stevens has to slip out, as well as Senator Klobuchar, so we'll acknowledge Vice Chairman Stevens first, and then Senator Klobuchar.

Senator STEVENS. Thank you very much, Mr. Chairman. I'm concerned about, Mr. Rosch—

Mr. ROSCH. That's fine. Yes, Senator.

Senator STEVENS.—and his comments concerning the litigation that followed that reversed payment concept. On a generic basis, how often are your decisions at FTC taken to court?

Mr. ROSCH. That is the only time that a Hatch-Waxman Act case has been brought by the Commission.

Senator STEVENS. I'm sorry to interrupt you, but as a Commission, how much time do you spend in litigation concerning the appeals to the court from your decisions? That's what I'm trying to get to.

Mr. ROSCH. Oh, in any decisions or just in the drug area?

Senator STEVENS. Yes, in any decisions. I address to the Chairman first, if I may.

Ms. MAJORAS. What I would say is, probably once or twice a year from our own decisions, and then we have a very active *amicus* program in which private antitrust lawsuits that are in the courts of appeals are cases in which we often are asked to weigh in. And, of course, we weigh in, in a lot of Supreme Court cases.

Senator STEVENS. So, litigation, then, is not a substantial delay in the enforcement of your decisions?

Ms. MAJORAS. Not typically in the enforcement of our administrative case decisions. We are, of course, in court as prosecutors, particularly on the consumer protection side, quite frequently. For example, we filed—

Senator STEVENS. But you initiate that action, right?

Ms. MAJORAS. We initiate that action in Federal court, correct.

Senator STEVENS. Well, that's surprising, really, because there's more and more litigation that's delaying administrative decisions on it, and that's a very interesting statistic.

Going back to you, Mr. Rosch, you seem to suggest that if the Supreme Court doesn't take this case, then you would suggest that Congress review, and the House does have a bill. Is that right?

Mr. ROSCH. They—actually, the Senate Judiciary Committee has voted out a bipartisan bill.

It's not before, I think, the Senate.

Mr. LEIBOWITZ. Senator Stevens, if I could add, there's a bill introduced by Senator Kohl, Senator Grassley, Senator Leahy, and Senator Schumer, that would take a bright-line test—it would take a bright-line approach to prohibiting these deals. It came out of the Judiciary Committee by unanimous consent. Congressman Waxman introduced the bill that's in the House Energy and Commerce Committee. And we just feel like these pay-for-delay settlements in which a brand pays a generic to stay out of the market are very, very problematic. We believe they violate the antitrust laws. And whether we resolve this by virtue of the Supreme Court or by creating a split in the Circuits if the Supreme Court doesn't take *cert* on *Tamoxifen*, or whether Congress passes a law to overturn these deals, we just want to solve the problem, because it means consumers will get lower-priced drugs sooner; they won't have to pay for the higher-priced brand, they'll be able to pay for the lower-priced generic; and it means that the Federal Government—which buys, I think, after Medicare Part D, probably 25 percent of all pharmaceutical purchases—will be able to save money and reduce its budget deficit.

Senator STEVENS. My last question would be to any of you who wish to comment on it. What's the relationship now between the FTC and the FCC? In past years, it looked like there was a collision course in some of these areas. Have you worked out some comity with the FCC as particular commission?

Ms. MAJORAS. We do have a very good relationship with the FCC, I'm happy to report. There are several areas of overlap where we work closely. So, for example, implementation of the Do Not Call Registry. Telephone pretexting is an area where I think recently we've divided the work quite effectively; the FCC focused on the actual communications carriers themselves and their release of information that should not be released, and our focusing on the actual pretexters and those who are selling the information on the Internet. So, that's another area. And we have a group of individuals at each agency who communicate with one another in particular as a conduit.

I think the source of, perhaps, tension that you are recognizing, Senator Stevens, is, there are some questions that have been raised about the common carrier exemption that has, in our history, prevented the FTC from enforcing in the area of common carriers. Now, with the way industries are changing, we find our—and converging—we find ourselves bumping up against that exemption more and more in areas in which our public—and Congress, I think—expects us to enforce our laws; and yet, we have some companies saying, “But I'm partially a common carrier.” So, as the economy's changing, that's an issue, I think, to be addressed.

Senator STEVENS. Thank you very much, Mr. Chairman. One of my interests, as I think many people know, is the question of, How do we protect minors, in terms of access to objectionable content? I've asked you for some comments, but I do hope that you will all monitor that problem. I think, increasingly, the predator concept on the Internet is a particularly sensitive issue, as far as minors are concerned.

Thank you very much, Mr. Chairman.

Senator PRYOR. Thank you.

And Senator Stevens alluded to—we're going to leave the record open for 2 weeks for Senators to submit questions, and we'd appreciate a timely response.

Senator PRYOR. Senator Klobuchar?

**STATEMENT OF HON. AMY KLOBUCHAR,  
U.S. SENATOR FROM MINNESOTA**

Senator KLOBUCHAR. Thank you, Mr. Chairman. And thank you for allowing me to go now.

I thank all of you for coming, and I hope, at some point, we'll talk in more detail about the work you're doing with identity theft. As a former prosecutor, I actually referred people to your website many times and gave out your materials. In Minnesota, I had the notoriety of getting the legislature to pass a law banning phishing in Minnesota. That would be computer phishing.

[Laughter.]

Senator KLOBUCHAR. And I really do think that we need to talk more about how we work with local prosecutor's offices on what are essentially international/national problems, and I think it would be very fruitful if we could work on this together.

But I wanted to focus more today, in my questions, on the gasoline price-gouging issues. And I know that, you know, gas went up this summer. There was a lot of concern in our state about gas price-gouging. I know the FTC looked at this, and issued a report. But my question is really a broader one because I heard from some experts in the field that the FTC's current authority is insufficient to protect consumers, and in the rest of the country—in my State and the rest of the country—from gasoline price-gouging, because many of these practices, I have heard, are beyond the scope of the FTC's authority. And I wondered if you could comment on that.

Ms. MAJORAS. Certainly, thank you, Senator.

It is true that we enforce the antitrust laws and we enforce laws against deceptive or unfair practices. Those terms, "deceptive" and "unfair," have been defined over the years by the Commission and the courts so that they're not, you know, completely overly broad. And we do not have direct authority to challenge price gouging unless it's done in the context, for example, of an anticompetitive, you know, conspiratorial scheme, for example.

Senator KLOBUCHAR. Yes—

Ms. HARBOUR. Yes—

Senator KLOBUCHAR.—Commissioner.

Ms. HARBOUR.—I'd like to add something on that issue. At the Federal level, the price-gouging debate and the newly introduced legislation, in my opinion, only scratches the surface of our energy policy in this country. I think the United States clearly has some energy problems. We're faced with major challenges in sustaining, in my view, viable, long-term balances between supply and demand. I think there are some engineering problems, there are some environmental problems, and there are some lifestyle issues. But I think most of these problems are not only antitrust problems, and, even assuming a vigorous enforcement of the antitrust laws, I don't think that antitrust can fix all of these problems. But I will say

that if price-gouging statutes or legislation were passed, I would enforce those laws.

Mr. LEIBOWITZ. Yes, I think Senator Stevens introduced a bill this Congress that we've been looking at. Senator Cantwell introduced a bill last Congress. I believe she's going to reintroduce it. And, of course, although there's a division among us as to how supportive or—or how supportive we are as to price-gouging statutes, we will, of course, enforce any law that you enact.

Senator KLOBUCHAR. That's good to know.

[Laughter.]

Senator KLOBUCHAR. The second thing I wanted to ask was about the GAO report that found that mergers increased market concentration in the oil and gas industries approved by the FTC led to increased prices for American consumers. Do you all see the effects of these mergers and these consolidations? And, you know, where is the GAO wrong if you don't agree with their opinion in this report?

Ms. MAJORAS. Thank you, Senator. We've looked very extensively at the GAO report, and we worked very closely with DOJ—with GAO to dissect it, both their methodology and their results. We do think there are some problems with the study. It's—I mean, I give GAO credit. I mean, it's very difficult to determine the effects of mergers, especially—there were several large mergers, of course, in the energy industry during the 1990s. The FTC permitted many of the mergers to go through. But only after seeking significant, and getting significant, divestitures of the areas of competitive overlap.

In terms of—and so, what the GAO found was roughly, perhaps, a 1-cent to 5-cent increase, which I don't downplay. One cent to five cents of an increase can be a significant one for consumers. But there were problems that our economists found with the methodologies that GAO used, and with, then, taking those results and saying, "Therefore, all of these mergers were anticompetitive and are causing prices to go up." For example, if you look at the upstream market for oil, those markets are really unconcentrated. I mean, still every—any individual participant only has a very small market share. Moving forward through the chain to refining, those markets, contrary to popular belief, if you actually look at the facts, are still unconcentrated or only moderately concentrated. So, it's—and for a variety of other reasons—I don't want to take up all your time—they're—we had some issues with that report, that we've discussed with GAO. But, rather than just say, "That's it," we've been working with economists to try to develop new methodologies so that we can better measure the impacts of mergers, going forward.

Senator KLOBUCHAR. I know two of your fellow commissioners wanted to answer as well. OK.

Mr. KOVACIC. Senator, if I could add one thing that I like a great deal about what the GAO attempted to do, and one thing about which I disagree. Developing a custom or a habit, both within our agency or by knowledgeable outsiders, of doing assessments of the effects of what we do, is a highly desirable element of what public agencies should do. My own belief, intensely, is that government agencies should devote more resources than they do now to going back and measuring the effects of interventions or decisions not to act. The GAO's contribution to that process is a highly desirable

one. It's the GAO's execution of the effort about which I have questions, because the results in the admittedly difficult arena of this type of analysis are extraordinarily sensitive to the technique that one uses. I see it as being the equivalent, in many ways, of the GAO having jumped about 95 percent of the way across the Grand Canyon, which is an enormously impressive accomplishment, but ultimately quite disappointing.

[Laughter.]

Senator KLOBUCHAR. But at least, Commissioner, they did try to make the jump. I mean, they—

Mr. KOVACIC. I—

Senator KLOBUCHAR.—they start—I mean, my concern is whether the FTC is continuing to study this, because—

Mr. KOVACIC.—Indeed, we are, Senator. As a way of addressing these differences, Chairman Majoras and my current colleagues convened a conference, in January 2005, in which we presented the results of our studies side by side with the GAO and engaged in a discussion, the results of which are now in the public domain, about analytical techniques. So, I think it is incumbent on us not simply to say, “You didn't jump far enough,” but to improve the jumping technique to get across.

Mr. LEIBOWITZ. And if I could try to climb us out of the abyss of the—

Senator KLOBUCHAR. Oh, that was a nice segue.

Mr. LEIBOWITZ.—Grand Canyon a little bit—

[Laughter.]

Mr. LEIBOWITZ.—the GAO looked at deals that took place, I think, mostly prior to 2003. We're sort of a commission of—

Mr. KOVACIC. All of the deals studied were before 2001.

Mr. LEIBOWITZ. All of them were before 2001. We are sort of a commission of newbies here. I think the—I think we arrived in 2003, 2004, and—into 2005. And so, since we've been at the Commission, we've sued to block a deal in Hawaii involving Aloha Petroleum—where the number of marketers was going from five to four. We were successful there. We've been credited, as Commissioner Kovacic mentioned, with having Chevron pull out from a purchase of USA Petroleum in California. So, I like to think—and I think my fellow commissioners believe—that we're working aggressively on behalf of consumers in this area.

Mr. ROSCH. Yes, if I could just add, on that point, Senator, I know this is kind of a hot-button issue, so I do feel obliged to speak to it. I think that Chairman Majoras is absolutely right that even at the refinery level it may be the case that, in most areas of the United States, the markets are relatively unconcentrated. However, there is no question at all that further mergers will further concentrate these markets. And so, I think I can safely say that any further mergers of companies that have refinery properties will undergo very careful scrutiny by this Commission.

Senator KLOBUCHAR. Thank you very much. I appreciate it.

Senator PRYOR. Thank you.

Let me dive in here on a different matter, sort of a more general matter, and that is, I know it's difficult sometimes for a Federal commission or Federal agency to come to Congress and say, “We don't have enough resources to do our job.” And what I would en-

courage you to do is to talk to us, whether it's publicly or privately, and, if we could get you some more resources, tell us what you would do with those resources. And if you need more statutory authority—I think, Mr. Leibowitz, a few moments ago, you mentioned more statutory authority in a couple of areas, and others did, too. Tell us what you need to do your job better. And, again, it doesn't have to be in a big public forum like this, but I would love to have that dialogue with the Commission so that if we find any additional money in the budget, which is going to be hard to do, but if we do, and we find more resources, and if we can pass some law to help, we want to try to do that.

Let me start with Mr. Leibowitz, if I can. You talk about spyware and adware; especially—well, both of those, but especially with spyware, why should spyware be legal at all? Why should it ever be legal? What's the good public-policy reason to allow spyware to even exist?

Mr. LEIBOWITZ. Well, we don't—I think we don't believe spyware should be legal. If you are putting things on consumers' computers without their notice and consent, that very well could be a deceptive or unfair act in violation of Section 5. And so we're going to aggressively go after spyware and nuisance adware, and I think we have, in the last—in the last couple of years.

Senator PRYOR. I'm—

Mr. LEIBOWITZ. And the SAFE WEB Act that you enacted at the end of last year will be very helpful to us in going after cross-border fraud and spyware.

Senator PRYOR.—I'm glad to hear that, and I'm glad you're doing that because it's a real source of frustration for, I know, my constituents, my family, my office and everybody else. But basically for anybody that has a computer, it's a real source of frustration. So, I'm glad to hear you say that.

Here's the other question on spyware and adware, are your remedies sufficient—you talked about a huge case—I don't recall the name of the case, but you talked about a huge case, and it seemed like a fairly hefty fine, but the fine in relation to how much they were doing seemed relatively small. Is the remedy that you have available, is it sufficient?

Mr. LEIBOWITZ. Well, I would say this disgorgement of profits can be a very good and strong remedy sometimes. I think, from my perspective—and I'll let other commissioners speak to this, as well—if we had civil penalty authority to go after—to go after spyware malefactors, that would be very, very useful. I know it's in some of the bills that percolated around this Committee last Congress. Because with something like spyware, it's hard to determine what the injury is to each consumer, and it's hard to determine, sometimes, how much of the profits that the company makes are from illegal conduct and how much are from permissible conduct. And so, I think it would be a very, very good strong deterrent to have civil penalty authority. That would be helpful. Yes, sir.

Mr. KOVACIC. Mr. Chairman, if I could just add, a critical area of our effort in the last few years has been to work more closely with government agencies that have criminal enforcement authority, because many of the most serious wrongdoers we observe in this area are, I believe, only going to be deterred if their freedom

is withdrawn. Ultimately, it's going to be successful criminal prosecution, which engages the resources of the Department of Justice, the U.S. Attorneys, state governments, and foreign authorities, whom we've been emphasizing today, to take their freedom away. Many of the bad actors whose work your constituents have identified, are technologically proficient, they're geographically adaptable. Many of them operate outside the United States. They can only be described as vicious organized criminals. Until we have success, as a law enforcement community, in placing them in prison, I don't think we'll ultimately have the deterrent influence we need. So, that cooperative effort on the criminal enforcement side, I think, is a key dimension of the sanctions picture.

Senator PRYOR. Good. Let me switch gears here for just a moment, and then I'm going to recognize Senator Dorgan.

Not to pick on one company, but recently there were some stories about T.J. Maxx having, I think, over 45 million accounts of credit card and debit card information stolen. And apparently this happened in December of last year, but they did not reveal the details of this until March—late March of this year, until just a couple of weeks ago, I guess. First question I would have, maybe, for the Chairwoman, is, What should the notice requirement be when something like this happens? What notice requirement should exist to protect consumers? And, second, there's an idea floating around here in the Senate, and probably the House, on a credit freeze, which would allow consumers to freeze their credit so people couldn't have access to their credit information without their permission—without the consumers' permission. And I'm curious about your thoughts about whether that would actually protect consumers. So, Madam Chair, you can start, and other people can chime in.

Ms. MAJORAS. Thank you, Senator Pryor.

As you know, the area of data security is one in which we've been highly active, and, as T.J. Maxx, in fact, has acknowledged, we're taking a look at that situation. As far as the—as having a legislated notice-of-breach provision, we think it should be tied to when there is a significant risk of harm to consumers. And the reason for this is that there are plenty of situations in which security may be breached, but it's unlikely that it would have an impact on consumers. And we get concerned that if consumers get over-noticed, they will just simply stop paying attention, or, at the other end of the scale, panic in a situation in which they need not, and take expensive measures that they need not take. So, that's where we've been on that.

As far as credit freezes, when the issue was first raised, a couple of years ago, my view was that we should wait a bit. And the reason is because states were enacting them; whereas, the Federal Government had enacted certain measures in the FACT Act. And we really wanted to see those take hold and see how they were working for consumers before we jumped into a new area. And the nice benefit sometimes is, we can use the states as the laboratories of democracy to see what the impact is. So, we're now currently looking at this issue of credit freezes, versus the protections in the FACT Act, to see what's working, what's not, and what would be

best if a Federal statute were passed. So, we're happy to work with you further in thinking that through as we go forward.

Senator PRYOR. Great. Any other—

Ms. HARBOUR. Yes, Chairman Pryor. We are a very collegial commission, but there are times that we disagree slightly at the margins. And, as far as the legislative notice of breach, my opinion has always been that a significant risk of harm was too high of a bar. And I say that, because there are times when companies are very reluctant to quantify the breach as being significant, because they are fearful that it will have an impact on their stock prices, and they will, therefore, not feel it's significant, although it is a risk of harm. So, though we do agree about the breach notification, I would have some reservations about the "significant" moniker on that.

Mr. LEIBOWITZ. And if I could just add, the other two components that we all agree on in terms of data security legislation would be a safeguards rule, so that companies safeguard important personal information, and then civil penalty authority, so that we'll have a strong deterrent that we can use.

Mr. KOVACIC. I think that this is an issue that is worthy of a continuing conversation between ourselves and the Committee, because, in many ways, through the individual law enforcement proceedings that we've undertaken in specific investigations, we learn a bit more each time about what an appropriate standard might be. So, I would simply add that, in light of our experience in individual matters, I think every month we become better informed about what an ultimate legislative adjustment might be and how it might be designed.

Senator PRYOR. Great.  
Senator Dorgan?

**STATEMENT OF HON. BYRON L. DORGAN,  
U.S. SENATOR FROM NORTH DAKOTA**

Senator DORGAN. Mr. Chairman, thank you very much.

Let me thank the Commissioners for being here today.

I'd like to ask a series of questions. I do want to ask some questions about gas prices, at some point. But first, let me ask all of the Commissioners briefly—as you know, the common carrier exemption exists with respect to the 1934 Act on communications that really provided authority to the Federal Communications Commission over those areas. That has now largely been deregulated. And I would ask—I happen to believe, and I would ask if you concur—that the common carrier exemption should be repealed so that the Federal Trade Commission would have some jurisdiction in this area to investigate and protect consumers.

Ms. MAJORAS. Thank you, Senator Dorgan.

We do, in fact, believe that the exemption is outdated. We are already seeing places in which companies raise it and stymie our enforcement efforts. An example—to take a hypothetical example—would be, we endeavor to look at some advertising, perhaps, of a broadband provider that we think may be misleading, and the broadband provider is bundling broadband services, which we could enforce against, with traditional telephone services, and tells us,

“Uh-uh, no, you can’t go anywhere near that, because it’s—because of the common carrier exemption.”

Senator DORGAN. Do the rest of the Commissioners believe we should repeal the exemption?

Mr. LEIBOWITZ. Yes, we—I think it’s an anachronism, and we appreciate your leadership. I know you tried to remove it last year, and we think we can do good consumer protection and antitrust work if that prohibition is repealed.

Ms. HARBOUR. And, that’s right, because if it is not repealed, I think consumers do not benefit from FTC oversight against deceptive and unfair market, advertising, and billing practices. And I think the bundling of telecommunications services is a growing phenomenon that—this exemption basically complicates our ability to protect consumers. Therefore, we would advocate for removal of the exemption.

Mr. KOVACIC. Senator, I think the intuition of your proposal is exactly right. We essentially have a legal infrastructure that was built over 70 years ago, when the industry was much different. We have highly dynamic industries that are blurring together, yet we have a legal infrastructure whose essential elements are now outdated. So, I’d endorse your approach entirely.

Senator DORGAN. All right.

Mr. ROSCH. And I would just add my voice along with the others, except that I think I’d probably emphasize that our track record with respect to other instances in which we review mergers which are also before the FCC, and we make a contribution to the FCC’s understanding of the competition issues, I think speaks for itself, and I think that’s another reason for repealing the exemption.

Senator DORGAN. Does the common carrier exemption apply on the issue of XM and Sirius, the proposed merger of XM and Sirius, or are you involved in that?

Mr. ROSCH. No, that’s Justice. But it—the answer is—as to us, I don’t know what the answer would be.

Senator DORGAN. Why would you have a role to play in making a judgment about the XM and Sirius proposed merger?

Ms. MAJORAS. We do not. As you know, we share antitrust authority with the Department of Justice. We have an MOU between the two agencies in which we divide the work, and they’ve had the experience in radio, really since the 1996 Telecom Act, so the radio mergers go to Justice.

Senator DORGAN. Yes. One wouldn’t want to value that experience with any significant value, would we? Given what has happened with the concentration and growth, it doesn’t suggest that whatever the role of Justice was in these areas was a role that was helpful to our country. But that’s another story, perhaps for another time.

I think the XM/Sirius proposed merger raises very significant questions. I didn’t know whether you were involved in that or not. This Committee might want to have some discussions with Justice and others. And I know there’s a hearing scheduled on that issue, but that’s a very significant and a serious issue. And, you know, I have, from time to time, threatened to put the pictures of attorneys, both at Justice and the Federal Trade Commission, on the side of milk cartons, feeling that we’re paying a lot of them, but

they've vanished on the issue of antitrust enforcement because we've not had very significant antitrust enforcement in this country. You want to merge? Merge. Nobody seems to care very much. That has been true under Democratic Administrations and Republican Administrations. And, boy, I—if you'd look at growth and concentration in a range of areas, I think it's very troubling, and it's all happened with pom-poms and cheerleaders, and we have people say, "Well, we'll put conditions here and there," but the fact is, there has been dramatic growth in concentration in virtually every area of commerce. But that's just my lament.

Chairman Majoras, there was a posting today in the—an Associated Press story that had you saying, "A Federal law against oil company price gouging would be difficult to enforce and could hurt consumers by causing fuel shortages." How would a Federal law against oil company price gouging cause fuel shortages? Did you say that or is it a misquote?

Ms. MAJORAS. I don't remember that exact quote, but I have said things like that, yes.

Senator DORGAN. Tell me how a law that would prohibit price gouging would cause fuel shortages, in—

Ms. MAJORAS. Well—

Senator DORGAN.—your judgment.

Ms. MAJORAS. Well, the difficulty with a statute that prohibits price gouging, fundamentally, is, How do you define it? In other words, if you raise prices for one reason, then maybe that's OK, but if you raise prices because you're just a bad person and you want to gouge people, maybe that—that's another. And the difficulty that we've seen in our past history in the United States is that anytime we've tried to place constraints on the ability of companies to raise prices, particularly in times of crisis, which is when this generally has been raised, two things happen. First of all, price increases signal, particularly in times of emergency, to other suppliers, "Hey, we need more supply here. Come to this area." That's exactly what happened after Katrina, when we saw European supplies and the like being diverted to the Gulf, and that means, then, we have more supply and the price goes down a bit faster. The second signal that prices send is, they send the signal to consumers that, in fact, supplies are tight, and we need to reduce our demand. That also happened after the hurricanes—tragic hurricanes in 2005. So, if we put in—as virtually every economist I've read on the issue has said, if you put a constraint on prices, as well intentioned as it is, because, admittedly, price gouging sounds like a horrible thing, is a moral issue, and I understand that—the difficulty in enforcement would be in identifying it. And when we looked at these issues after Katrina, we found very few instances that we could say were true price gouging. And even in instances where you heard, you know, of a person here and there raising the price up to 6 bucks a gallon or something, what happened, actually, was pretty admirable. The market said, "No," and consumers said, "No." And that—those guys were—had to bring their price down pretty darn fast or they were going to lose all of their business. So—

Senator DORGAN. But do you understand—were you involved—I guess the answer is, you were not involved in the issues of wholesale electric pricing in California, where we now get the transcripts

of people that were manipulating supplies, manipulating the market system. Years afterwards—

Ms. MAJORAS. Sure.

Senator DORGAN.—we discovered that this was wholesale cheating. Consumers got bilked out of billions of dollars. FERC sat there, dead from the neck up, didn't give a damn, didn't do a thing, came and testified before my Committee, saying, "You must not interfere. You must not interfere. The market system will work." The market system was rigged. It was rigged.

Now, the question I have is—I don't know whether there's price gouging, at the moment, or where it might be, but you said that it—I guess you seemed to say that if price gouging is bad—I assume that you believe price gouging is inherently bad, do you not?

Ms. MAJORAS. Well, it depends on how you define it.

Senator DORGAN. Well, the term "gouging," itself, would suggest how I define it, but would you—

Ms. MAJORAS. But—

Senator DORGAN.—if the market system, whatever that is, has its arteries clogged by concentration, and, therefore, it allows the participants, rather than be engaged in price competition, to set their own price, and, therefore, gouge consumers at an inappropriate time, do you think that's inappropriate? Is that destructive of the consumer's interest?

Ms. MAJORAS. Not—I mean, not exactly as you've said it. Look, if the individual—if individual companies are making their own decisions about prices, not agreeing with the industry about prices, and the market's working, and they raise the price, then, no, I would not—I would not call that—I would not call that "gouging." If you tried, today, to do that, and raised the price up to—I don't know what you would think is gouging—5 or 6 bucks a gallon, it wouldn't be sustained. There's no way. Because there's enough competition there that the price would come back down.

Senator DORGAN. But you know something? I heard exactly the same testimony from FERC during the California ripoff, to the tune of billions of dollars.

Ms. MAJORAS. I understand, Senator. But it isn't as though we have no authority today to go after market manipulation. We scrutinize these petroleum markets constantly—

Senator DORGAN. Give me an example of—

Ms. MAJORAS.—looking for—

Senator DORGAN.—actions you've taken—

Ms. MAJORAS. Well—

Senator DORGAN.—to scrutinize. Have you taken actions?

Ms. MAJORAS. We have taken actions. We've brought—

Senator DORGAN. And—

Ms. MAJORAS. We've brought cases—we haven't—we haven't found manipulation, in the sense that you're talking about in the electricity markets. And, of course, there are some significant differences between electricity markets and petroleum markets that actually, I think, have an impact on the ability to manipulate. Electricity, for example, can't be stored or saved, and petroleum can be, and that has a huge impact on the market.

Senator DORGAN. But the similarities are much more interesting: highly concentrated and an ability to manipulate the market.

Mr. Leibowitz, you wanted to respond?

Mr. LEIBOWITZ. Yes, if I could just respond momentarily to both this issue and to the prior issue you raised. You know, the Chairman and I talk all the time about price-gouging legislation and other legislative and non-legislative issues. In this case, we're in disagreement. I do believe that price-gouging legislation could prevent some of the profiteering, for example, that we saw in the wake of Hurricane Katrina, some of the other bad acting, so long as it's limited in duration, there's an emergency trigger. I know Senator Stevens has a bill, and Senator Cantwell had a bill last year.

I want to come back, though, to the notion of putting our names on milk cartons. There has certainly been—

Senator DORGAN. It was actually pictures I was talking about.

Mr. LEIBOWITZ. There are pictures for—right. Well, pictures, names.

Senator DORGAN. Your picture and your name.

Mr. LEIBOWITZ. My picture and my name.

[Laughter.]

Mr. LEIBOWITZ. I would like, actually, Bill Kovacic's name under my picture.

[Laughter.]

Mr. LEIBOWITZ. I share your concern that—about antitrust enforcement—the need for vigorous antitrust enforcement. Most of the time I've heard those criticisms, though, it has not been about the FTC. We have brought cases to block oil company mergers, at least in the last couple of years, one in Hawaii, one—we've been given credit with having—causing the acquirer to pull out of a California deal because they knew we were going to go to court to block it.

And then, on the issue of reverse payments between the brands and the generics, where the brand—and we've talked about this issue—where the brand pays the generics to stay out of the market. I think we have been absolutely vigorous on that. And I'll put into the record an editorial from the *New York Times* entitled "Return of the Drug Company Payoffs," where it said the FTC has been waging a "valiant fight."

[The information referred to follows:]

*The New York Times* Editorial/Letters—Wednesday, January 24, 2007

#### RETURN OF THE DRUG COMPANY PAYOFFS

Two excessively lenient court decisions have allowed the manufacturers of brand-name drugs to resume the underhanded practice of paying generic competitors to keep their drugs off the market. It is a costly legal loophole that needs to be plugged by Congressional legislation.

The problem arises when a generic manufacturer tries to take its drug to market before the patent on a brand-name drug has expired by arguing that its product does not infringe upon the patent or that the patent is invalid. Huge sums of money are at stake, especially with blockbuster drugs whose annual sales can exceed a billion dollars.

Rather than risk it all, a brand-name manufacturer may choose to pay its generic competitor substantial compensation to drop its challenge and delay marketing its drug. Both companies make out handsomely. The big losers are consumers and the public and private insurers that must continue to pay monopoly prices for the brand-name drugs.

The Federal Trade Commission, which has been waging a valiant fight, succeeded for several years in eliminating such settlements. But two appeals court decisions in 2005 held that they are a legitimate way to resolve patent disputes. And sure

enough, the FTC reported last week that—after a five-year hiatus—brand-name companies made 3 such do-not-compete settlements in Fiscal Year 2005 and 14 more last year.

The pharmaceutical industry contends that the settlements are a reasonable way to resolve disputes and that they often result in bringing generic drugs to market before a patent has expired, albeit not as soon as the generic company wanted. The industry argues that regulators and the courts should judge such settlements on a case-by-case basis.

Our own hunch is that the better approach for Congress to take as it moves toward corrective legislation would be a “bright line” prohibition against making any payments to delay introduction of a generic drug. That would set a clear standard and enhance the likelihood that consumers would get a chance to benefit from real competition in the pharmaceutical market.

Senator DORGAN. I agree with that. And we’ve been—you’ve had a setback as a result of a court decision there——

Mr. LEIBOWITZ. Thank you.

Senator DORGAN.—and we need to—Congress needs to respond to that.

Maybe I draw with too broad a brush here. We have roughly 1,000-plus attorneys whose job it is to work on antitrust, and a good many in Justice, some at the FTC and other places, and it’s— if you just look back a decade, it’s hard to see that we’ve made much progress because there’s dramatically increased concentration in most areas. And that was the point I was trying to make.

Mr. ROSCH. Senator?

Senator DORGAN. Yes, sir.

Mr. ROSCH. I guess I’m the low man on the totem pole, literally, here, but let me make three quick points, if I may, because I came from California, and I was there during the price gouging with respect to electricity. And, you’re right, that was rigging the market. There’s no question about that.

The first point I would make is that we do have a statute that is different from FERC’s. We have a statute that prohibits unfair methods of competition. And I do believe that we can go after single-firm conduct in that context.

The second point I would make is that the closest analogy to that—I will say that electricity is, again, an area which, by and large, goes to Justice rather than the FTC—in an area where we do have jurisdiction, is probably what I’ve read about BP’s hoarding of heating oil on the East Coast about 18 months ago. And we thought about bringing a case in that area, but the fact of the matter is that the Commodities Futures Commission is already exercising jurisdiction in that area, and Justice is bringing a criminal case. It would be nothing but piling on and a waste of taxpayers’ dollars if we brought another case in that area.

The third point I would want to make is that the Chairman, I think, is absolutely right that if you get it wrong with respect to price gouging, the consequences can be very severe. I happen to be 67 years old, so I remember when President Nixon imposed price caps on petroleum back in the early 1970s, and what happened as a result of that is that I ended up in gas lines running several blocks.

Senator DORGAN. Mr. Rosch—finish up with——

Mr. ROSCH. No, I—I’m sorry.

Senator DORGAN. I love the——

Mr. ROSCH. I go on too long. Please.

Senator DORGAN. I understand about the market. The market system is the best system we know for the goods and services to be moved in the directions that consumers want goods and services. The allocation of goods and services by the marketplace is the best I know. But the marketplace needs effective regulation to work. When the arteries of the marketplace are clogged, and you have too much concentration, too much pricing power in the hands of too few, the consumers get injured, and injured badly. So, we create a Federal Trade Commission, an FTC, and we ask the FTC to be aggressive. Aggressive. We don't want you to get it wrong, but neither do we want you to sit back and say, "You know what? Let's let the market sort this out." There are plenty of perversions in the marketplace that need effective regulations.

You all really are the referees, of sorts, with respect to manipulation of markets, the damage to consumers from that manipulation. And I just—I react a little bit when I hear people say, "Let's let the marketplace sort that." That's exactly what FERC said to us, and FERC—it was in exactly the same situation—they sat at the table and they said to us, "It'll be fine. You all that want to slap some price controls on these folks, shame on you. The market will sort this out." In the meantime, the consumers are being cheated and bilked.

And the point I want to make is this: it is a matter of philosophy and will, as one assumes these jobs, about whether or not you're going to go after these things because you can say that you have the authority to do it, but using the authority, and having the will to use the authority, on behalf of consumers at the right time is critical for something like the FTC.

Now, one final point—Mr. Kovacic, I'll get to you—out of my subcommittee, we're going to try to move a piece of legislation that will reauthorize the Federal Trade Commission. It has been since 1996. I mean, we've got to do better than that. I'm going to try very hard to reauthorize the FTC, get it through this Committee and get it to the Congress. You deserve that, and so do the American people.

My only point today is that I want a Federal Trade Commission to be worthy of its appointment and its work on behalf of American consumers, to be a regulatory body—yes, regulatory—regulation, nothing wrong with regulation; that's what helps keep this free-market system free and working effectively. So, I want the Federal Trade Commission to succeed, not fail. Don't misinterpret my remarks.

Mr. Kovacic?

Mr. KOVACIC. Senator, thank you for indulging me for another minute.

I'd like to go to the Enron example. As I understand it, a critical element of the misconduct there was the deliberate manipulation and deception of an existing public regulatory process; that is, Enron and other traders lied to government regulators who were responsible for allocating capacity, where bottlenecks determine the flow of electricity to different users. That's a case I would have brought under the Federal Trade Commission Act. And I want to give you an energy example where we've brought a case by policing instances carefully where firms seek to achieve or exploit their market position by manipulating the processes of government regu-

lation. Our *Unocal* case, which was resolved in 2005, and resulted in the nonenforcement of patents for CARB gasoline in California, resulted from our allegations that what Unocal had done had been to lie to the state regulators in California in the process of setting the standard in question. That has been worth, by our calculation, essentially \$500 million a year through the life of those patents. That is, where the behavior—and I think this was key to the strategy in Enron—where the behavior in question involves the deceit, the manipulation of a regulatory process whose very existence is essential to the functioning of the sector, that's behavior that we would police aggressively.

Senator DORGAN. Let me say, Senator Pryor, you've indulged me with a lengthier period of questioning, but I want to make one response to that. I sat in that Chairman's chair and chaired the hearings on Enron in this Committee. Ken Lay sat where you sat, took the Fifth Amendment. Jeffery Skilling sat and talked all day. Turns out he didn't tell us the truth. But the plain fact is this. The FERC, Federal Energy Regulatory Commission, used language that rings a bell with me when I hear it again, that the market system—the market system—you say you would have brought action. The only way you would know what was happening there was to investigate aggressively, and that was not the case, because, philosophically, the other agency felt, "The market system will sort this out. Prices go up. They'll come down." And that's my only concern.

I guess we shouldn't debate history at greater length than that, except to say when I—Ms. Majoras, when I saw your statement this morning that price gouging—will cause fuel shortages, I don't buy it, not a bit. You and I are going to have some other discussion at some point, I hope, and perhaps even before this Committee.

Ms. HARBOUR. Senator Dorgan, I would like to just make a couple of comments. I've sat here, and I've listened, and I know you talked about the market system being rigged, and compared, perhaps, us to FERC. But I do know that we are very vigilant in this area. I view myself as being somewhat hawkish. I know that the Commission tracks daily retail gas prices in 360 cities and wholesale prices in 20 major urban areas. And, under the antitrust laws, if there were collusion, we would bring an action, or we would be talking about it and dissenting, if we didn't. We are looking at this very vigilantly. I think this is a very complicated industry. I have said before, I do not think that the Nation's gas and oil policies can be solved by antitrust alone. We know that, you know, there are supply-and-demand issues, we know that, on the—as domestic consumption goes up each year, China and India are consuming more and more oil. We have the Federal, we have the local, we have the regional influences of gasoline prices. I, for one, do not feel that I am sitting here and watching our gasoline prices going up, and doing nothing. I think that we are looking very carefully. And, under the antitrust laws, if there is any sort of collusion, we would certainly bring an action in that regard.

Senator DORGAN. Senator Pryor, are you completely out of patience?

Senator PRYOR. No, not—

Senator DORGAN. Probably close.

Senator PRYOR. I'm enjoying this. I—

Senator DORGAN. There's—  
[Laughter.]

Senator DORGAN. Let me just—Ms. Harbour, there's no marketplace here with respect to oil. I mean, no—certainly no free market. You have OPEC countries, a cartel sitting around a table deciding how much they'll produce and what they want to get for it. You have the spot market, which is an orgy of speculation, the futures market, an orgy of speculation. You have a much more highly concentrated oil industry with the majors now all having two names because they married up with some other company, so instead of one name, it's always two names. And then, in addition, a substantial portion of the oil in the international marketplace is controlled by countries, not companies. So, there's no free market here at all. And I'm not suggesting you're not doing anything. I'm not suggesting your work isn't worthy. I want to work with you to reauthorize the functions of the FTC. I'm just saying that I want the FTC to be an aggressive advocate on behalf of consumers. They're going to the gas pumps right now, paying, in some cases, close to \$3; in some parts of the country, well over \$3. Exxon will announce its latest profits, and I assume they will exceed the \$36 billion of last year. And I think a whole lot of consumers have a lot of questions to ask about whether this so-called, "free market," works for them. They know better—they know it doesn't. They know it works for some, but it certainly doesn't work for them.

Ms. HARBOUR. And I agree, Senator. But the United States, as I said earlier, clearly has some energy problems, and we have to work within that framework.

Senator DORGAN. Yes, I agree with that, but I would prefer a Federal Trade Commission that says, "We welcome a price-gouging Federal law." I mean, 26 states now have price-gouging laws they've enacted. I would prefer a Federal Trade Commission that says, "You know something? A Federal price-gouging law is right down in our wheelhouse of what ought to be done." I—

Ms. MAJORAS. Well, I would, Senator, if I thought that it was really what was going to help consumers. I mean, I care deeply about helping consumers, but just about every economist in our Nation, just about every editorial page of every major newspaper has come out again and again and said, "This won't help, and it potentially will hurt." So, I'd love to come up and talk to you further about these issues. And I—and I also think that—you're absolutely right about OPEC. I mean, we start with OPEC at the upstream market. But after that, I'd like to show you, Senator, the work that we've done that shows that we actually do have a market economy beyond OPEC for these markets, and the way—and the way that—or the way those markets have worked. We've—we pay more attention to this industry than any other, except perhaps healthcare. We are watching, all the time, and we're aggressively pursuing investigations. And if we find manipulation that violates the law, I can assure you I will be the first one lining up to—

Senator DORGAN. Would you—

Ms. MAJORAS.—bring the case.

Senator DORGAN. Would you send me a list of those economists that believe that price-gouging legislation is a bad thing?

Ms. MAJORAS. Oh—I mean, yes, the—I mean, the—

Senator DORGAN. That would be helpful.

Ms. MAJORAS.—it has been written about extensively.

Senator DORGAN. I used to teach economics in college briefly, but I overcame that and—

[Laughter.]

Senator DORGAN.—I'd like to get the names of economists that think that laws that prevent price gouging somehow are inherently unworthy.

Ms. MAJORAS. Yes. There are a lot of them, so I will.

Ms. HARBOUR. And antitrust lawyers, too.

Mr. LEIBOWITZ. And at the risk, Senator of continuing this round and restating the obvious, if Congress passes a price-gouging statute, we will obviously enforce it. I mean, I've been supportive of a price-gouging statute, but the whole Commission will enforce any law that you enact.

Mr. KOVACIC. Absolutely. Absolutely, Senator, the will of this body will be fulfilled in our own work, and I would welcome the chance to continue the conversation that you invited before.

Senator DORGAN. I just came to say hello.

[Laughter.]

Senator DORGAN. Apparently, I got carried away.

Mr. KOVACIC. We won't let you say goodbye.

[Laughter.]

Senator DORGAN. My colleague—I owe my colleague about 15 minutes of his life.

[Laughter.]

Senator DORGAN. Senator Pryor, thank you very much.

Senator PRYOR. Thank you, Senator Dorgan. That was good.

And I will say this, just in closing, on gas prices and oil markets, it is complicated. It's very complicated. It's the only industry I know of where when the feedstock—when the cost of the oil itself was going up, the profits of the industry were mushrooming. That doesn't happen normally. Normally, when you see the underlying feedstock go up, you see the profits being squeezed and squeezed and squeezed, under normal market conditions.

And also, I think that a lot of times when people talk about price gouging, they instinctively look at the retail level. But there's a lot of competition at the retail level, and they're really just passing on the costs that they inherit. It's almost like the local drugstore; you can't get mad at them for the high cost of drugs, because, you know, they make a very small margin on their drugs.

So, there are some similarities in the oil industry and the gasoline industry with other industries, and then some real differences. So, we want to work with you all through this. I know that we get a lot of comments about it in our office. I think I filled up today, and I paid \$2.77 a gallon. And so, prices are definitely increasing again.

But, with that, what we're going to do is, we're going to leave the record open for a couple of weeks, for 2 weeks. I know one person had something they wanted to submit for the record. That's fine. If you all have some documents you want to submit, if you want

to get that list of economists and make it part of the record, that would be great, Madam Chair.\*

And I don't have any other questions, at this point. There are no other Senators that do.

So, with that, we'll adjourn and leave the record open for 2 weeks. Thank you for being here.

[Whereupon, at 12:28 p.m., the hearing was adjourned.]

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\*The information previously referred to is maintained in the Committee files.



## A P P E N D I X

*The New York Times*—Editorial/Letters, June 8, 2006

### WHEN DRUG FIRMS PAY OFF COMPETITORS

We hope that the Supreme Court agrees to take up a pivotal drug patent case brought by the Federal Trade Commission against Schering-Plough. Otherwise, the Commission may find itself powerless to block one of the more underhanded tactics used by brand-name drug manufacturers to keep generic competitors off the market.

The tactic is brutally simple. A company that holds a patent on a brand-name drug, often a blockbuster that rakes in huge profits, pays a generic manufacturer to delay the sale of a competing product that might grab a big slice of the business. The patent holder makes so much money by delaying competition that it can easily afford to buy off the generic company, with the result that both companies share the wealth. The only losers are the consumers who must continue to pay high drug prices.

The Schering-Plough case involved K-Dur 20, a potassium supplement used to mitigate the side effects of drugs that treat high blood pressure and congestive heart failure. The active ingredient is in common use and not patentable, but Schering holds a patent for a coating material that releases the active ingredient slowly. That patent does not expire until this year. But two generic manufacturers filed applications in 1995 to market competing drugs whose coatings, they said, would not infringe Schering's patent.

Schering disagreed, sued, and then ultimately settled the cases. It paid \$60 million to one generic manufacturer in a settlement that delayed market entry until 2001 and \$15 million to another generic manufacturer in a deal that delayed entry until 2004.

After looking at details of the deal, the FTC concluded, quite reasonably, that these settlements were essentially payoffs to delay competition. The \$60 million had actually been demanded by one generic company as compensation for revenues it would lose by delaying sales of its product. And at least \$10 million of the other settlement would be paid only if the generic company got government approval to market a competitive product and thus posed a threat to Schering-Plough.

Even so, a Federal appeals court ruled that the payments did not violate antitrust law and that the facts did not bear out the FTC's contention that the payments were intended to delay competition.

That was a disastrous blow to Congressional laws that seek to speed the entry of generic competitors by brushing away spurious patent infringement claims by brand-name manufacturers. Since the appeals court decision, there has been a sharp rise in the number of settlements in which brand-name companies pay off generic competitors to keep their cheaper drugs off the market.

The FTC has rightly petitioned the Supreme Court to consider the case. But it has been undercut by the Justice Department, which has urged the Court to keep its hands off, arguing that the case does not provide a good vehicle for resolving the complex issues involved. Whether the court acts or not, Congress should try to find a legislative route to block unscrupulous drug companies from buying off the competition.

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RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. DANIEL K. INOUE AND  
HON. MARK PRYOR TO ALL FTC COMMISSIONERS

*Question 1.* What are your top priorities for the FTC to address this year?

Answer. Listed below are our top consumer protection and competition priorities, which cover a broad range of areas. Given the breadth of our mission and the need to be proactive in addressing new and evolving challenges facing consumers and competition, we ask that Congress fully fund the agency's FY 2008 budget request of \$240 million.

### *Consumer Protection Priorities*

We have several priorities for the upcoming year in the consumer protection area. First, data security and identity theft continue to be high priorities. The Commission has brought 14 enforcement actions against businesses for their failure to provide reasonable data security, and we will continue this enforcement work. We will also continue to educate consumers on how to avoid becoming victims of identity theft, and to educate businesses on steps they can take to safeguard their customers' sensitive information. On the policy front, the Commission continually tries to stay abreast of developments in privacy, data security, and identity theft. Over the past several years, the Commission has hosted numerous workshops and public forums to this end. Last month, the Commission hosted a workshop to explore consumer authentication, with the goal of encouraging better procedures to verify that consumers are who they say they are, so that it is more difficult for criminals to use stolen information. Through these activities, we will also be implementing the recommendations of the President's Identity Theft Task Force, which Chairman Majoras and Attorney General Gonzales co-chaired.

A second priority is financial issues affecting consumers. For example, the FTC has an important role to play in policing the subprime mortgage market. In recent years, we have brought over 20 law enforcement actions against businesses in the mortgage lending industry, obtaining over \$320 million in redress for consumers. This work has focused particularly on companies operating in the subprime market. We will continue our work in this area, focusing in particular on deceptive mortgage advertising. Another financial practice we are targeting through aggressive enforcement is the problem of abusive debt collection practices. We will also hold a workshop this fall to examine and take stock of the debt collection industry.

Third, in the technology area, combating spyware and spam are two high priorities for the Commission. The Commission has brought 11 spyware enforcement actions in the past 2 years, and will continue its work in this area. The Commission has also aggressively pursued deceptive and unfair practices in spam through 89 law enforcement actions, 26 of which were filed after Congress enacted the CAN-SPAM Act. This July, the Commission will host a workshop on the current state of spam, as a follow-up to a workshop the Commission held in 2003. The two-day public summit will analyze malicious spam, shifts in spamming incentives and tactics, strategies for protecting consumers and businesses, and countermeasures for stopping malicious spammers and cybercriminals.

A fourth priority is consumer health issues. In the past year, the FTC has initiated or resolved 13 law enforcement actions involving 25 products making allegedly deceptive health claims. In addition to health fraud, the FTC is active in the area of childhood obesity. In the Summer of 2005, the Commission and the Department of Health and Human Services held a joint workshop on the issue of childhood obesity. The Commission's April 2006 report on the workshop urged industry to consider a wide range of options as to how self-regulation could assist in combating childhood obesity. A number of companies took the FTC's recommendations seriously and announced that they would use advertising to help promote healthy dietary choices and healthy lifestyles among American children. The FTC will host a workshop this summer to report on industry progress in implementing these self-regulatory initiatives. The Commission is also conducting a comprehensive study of industry activities and expenditures associated with marketing food to children and adolescents. We plan to issue a report to Congress next year. Finally, the Commission will soon release a report, which presents a comprehensive analysis of the exposure of children (ages 2-11) to television advertising in 2004. The report will compare the recent level of exposure to that measured by studies done by the FTC's 1978 Children's Advertising Rulemaking, prior to the rise in childhood obesity rates.

A fifth priority is Do Not Call enforcement. The National Do Not Call (DNC) Registry has registered more than 130 million telephone numbers since its inception in 2003. Most entities covered by the DNC Rule comply, but for those that do not, tough enforcement is a high priority for the FTC. Since the FTC began enforcing compliance with the Registry in October 2003, the agency has filed 25 enforcement actions against 125 defendants, alleging that they had called consumers protected by the Registry. In these cases, the FTC has obtained settlements with orders requiring payment in the aggregate of approximately \$9 million in civil penalties and more than \$8.2 million in consumer redress and disgorgement. In addition, because consumers' registrations expire after 5 years, the Commission plans a significant effort to educate consumers on the need to reregister their phone numbers next year.

### *Competition Priorities*

Healthcare, particularly the pharmaceutical industry, is a top priority for the FTC. Our main legislative priority is to support legislation to fix the exclusion pay-

ment problem, and we continue to investigate and consider legal challenges to these agreements. We also actively review agreements between pharmaceutical manufacturers, including exclusion payment agreements between branded and generic companies.<sup>1</sup> We have continued to review pharmaceutical mergers and will litigate or order divestitures to cure competitive problems. We also work to secure competition among healthcare providers, including physicians and hospitals, by reviewing proposed mergers and stopping agreements on price among competing healthcare providers who have not engaged in sufficient financial or clinical integration.

We are also very active in pursuing any anticompetitive conduct in areas involving hi-tech industries, because competition and innovation are so important in that area. In the non-merger area, we just concluded a series of hearings on single firm conduct. We hope to issue a report in the near future that will provide guidance to businesses in this area of the law.

Preserving and promoting competition in energy markets is another priority for the FTC. We scrutinize mergers in the energy industry very closely and pursue litigation where needed to protect competition. We are currently litigating against two proposed mergers in the energy industry: one involving natural gas distribution and the other involving the bulk supply of light petroleum products. We continue to examine the state of competition in the oil and gasoline industries, including specifically the causes of gasoline price increases. Additionally, last month, we hosted “Energy Markets in the 21st Century: Competition Policy in Perspective,” a public conference, exploring a range of energy issues of importance to American consumers, as well as to the United States and other global economies, and we will study the submissions from this conference to inform our enforcement and study agenda in the energy sector.

Merger matters, in general, are also of great importance. HSR filed transactions, the number of second requests issued, and enforcement actions are up in the first 6 months of FY 2007 as compared to FY 2006. Approximately  $\frac{2}{3}$  of the Bureau of Competition’s resources are devoted to merger investigations and we expect we will continue to bring more important enforcement actions to protect competition during the remainder of the year. We will also continue to focus on the second request process itself—working cooperatively and constructively with merging parties to streamline our investigations and make them more efficient, consistent with the Commission’s need for information to evaluate the likely competitive effects of the merger.

Finally, real estate is a priority area for the FTC. Over the past year, the FTC brought several enforcement actions stopping real estate associations from limiting competition from discount brokers. We also just this month with the Department of Justice issued a report on competition in the real estate brokerage industry. The report was based on a workshop we held in October of 2005 on competition in real estate. We will continue to protect competition in this area and to educate consumers on how competition in the industry benefits them.

*Question 2.* Last year, the Commerce Committee reported a comprehensive bill that would require companies to provide increased security to sensitive consumer data and require companies to notify consumers if they had been subject to possible identity theft. In the last couple of years, are there any new and emerging trends or methods by those performing identity theft that warrant consideration?

*Answer.* Identity thieves acquire and exploit sensitive consumer data in a variety of ways, and are constantly developing new techniques and uses. For example, phishing recently has taken on a new form, dubbed “vishing” in which thieves use Voice-over-Internet Protocol (VoIP) technology to spoof the telephone call systems of financial institutions and request callers to provide their account information. Because the identity theft issue is ever-evolving, our approach to data security—and the model it advocates for any new law that may be passed—focuses on reasonable procedures to safeguard information, rather than mandating specific security practices and technologies. For example, the Safeguards Rule, implemented under the Gramm-Leach-Bliley Act, requires covered entities to develop a data security program that is reasonable in light of the sensitivity of the information at issue, the nature of the company’s business operations, and the risks the company faces. In creating its program, each company must designate an official or officials to be responsible for the program, conduct a risk assessment to determine the data security risks the company faces, develop safeguards to address those risks, oversee service providers who have access to company data, and adjust the plan to reflect business changes and new risks to data. We believe that this approach to data security is

<sup>1</sup>The Medicare Prescription Drug Improvement, and Modernization Act of 2003 requires that pharmaceutical companies file agreements with the Commission and the Department of Justice within 10 days of execution.

an appropriate one because it allows—indeed, requires—companies to adapt their safeguards to new threats, new technologies, and other changes over time.

*Question 3.* Has the Commission noticed any state efforts that have provided greater security from identity theft for consumers?

Answer. A number of states have passed laws that require companies and other entities to provide notice to consumers whose sensitive identifying information has been breached. At least some of these laws have contributed significantly to consumer awareness of the risks of identity theft—both as to the specific breach and in general. The increased awareness, in turn, can prompt consumers to take steps to protect themselves. The notification laws vary as to when and how the notice should be provided, what the notice should contain, and the circumstances under which notification can be delayed. The Commission supports the establishment of a Federal breach notification standard that would require notice when the data breach creates a significant risk of identity theft. A risk-based standard would mandate notification in situations where the notice would be useful to consumers by alerting them to the need to take protective measures. On the other hand, requiring notification for remote risks may not be beneficial to consumers, because the notices may cause consumers to take costly, but unnecessary actions and may result in them ignoring more significant incidents.<sup>2</sup>

Many states also have enacted credit freeze laws. Although there is great variation among the states in how these provisions operate, in general, they allow consumers to block all access to their credit report, thereby, as a practical matter, preventing fraudsters from opening new accounts in the consumer's name. In addition, the laws typically allow consumers to release the freeze, either temporarily or permanently. In some states, credit freezes are available only to identity theft victims, while in others, any consumer can place a freeze. State laws also vary on how promptly consumer reporting agencies must set and release freezes and what charges, if any, they allow the consumer reporting agencies to impose for placing or lifting the freeze. Because the state credit freeze laws are quite recent, it is difficult to assess their impact at this time. The President's Identity Theft Task Force recommended in its April 2007 Strategic Plan that the Federal Government assess the impact and effectiveness of credit freeze laws and issue a report in the first quarter of 2008. FTC staff plans to implement this recommendation by studying state credit freeze laws and making any appropriate recommendations.

*Question 4.* Does the Commission believe there are areas where Congress should further focus to protect consumers from identity theft?

Answer. As the Commission has stated in testimony before Congress, the agency supports legislation that would require: (1) all companies that maintain sensitive consumer information to implement reasonable procedures to safeguard it, and (2) notice to consumers in the event of a data breach that creates a significant risk of identity theft. The significant risk standard balances the need to alert consumers to take protective steps in situations where it makes sense to do so, with concerns about "over-notification."<sup>3</sup> If consumers are flooded with notices, they may start to ignore them, including in those situations where the risk is high. Alternatively, some consumers may take unnecessary actions, such as closing accounts or placing fraud alerts, when there is little or no risk of identity theft.

In addition, any data security legislation should grant civil penalty authority to the Commission—authority that the Commission currently lacks in the data security area except in very narrow circumstances. Although many businesses have made progress in securing their data, some have not taken their responsibilities seriously enough. The prospect of civil penalties could significantly enhance deterrence in this area and prompt businesses to pay the appropriate level of attention to their data security practices.

*Question 5.* What safeguards should a company like T.J. Maxx have in place to protect customers' data?

Answer. The Commission's cases and educational materials provide detailed guidance about the practices the Commission regards as reasonable and appropriate for companies that handle sensitive consumer data. For example, the Commission's recent business guidance brochure, *Protecting Personal Information*, provides businesses of all types and sizes with practical advice on how to design and implement

<sup>2</sup>Commissioner Harbour believes that requiring breach notification only when the risk of identity theft is "significant" may establish an unduly high threshold to trigger consumers' rights for notification.

<sup>3</sup>Commissioner Harbour believes that requiring breach notification only when the risk of identity theft is "significant" may establish an unduly high threshold to trigger consumers' rights for notification.

an effective data security plan. See <http://www.ftc.gov/infosecurity>. It is not tied to any particular law or regulation, and breaks down the data security challenge to five basic steps: First, “take stock” of the sensitive personal information you maintain—know what you are collecting. Second, “scale down”—only maintain the personal information necessary to your business. Third, “lock up” the information that you do maintain—secure it through appropriate physical and electronic safeguards, employee training, and oversight of your service providers. Fourth, “pitch,” or properly dispose of, the information that you no longer need—for example, by shredding, burning, or otherwise destroying it. Finally, “plan ahead” for security incidents. Make sure your response is quick and effective by establishing procedures beforehand to secure any compromised data and notify the appropriate people of the incident.

In addition, the Commission’s 14 enforcement actions provide guidance regarding practices that the FTC has found to be inadequate to protect sensitive consumer information. For example, in the FTC’s case against BJ’s Wholesale Club (“BJ’s”), the Commission alleged that BJ’s engaged in a number of practices that, taken together, failed to provide reasonable security for sensitive credit card information, including: (1) failing to encrypt information while in transit or while stored on BJ’s computer networks; (2) storing the information in files that could be accessed using a commonly known default user ID and password; (3) failing to use readily available security measures to limit access through wireless access points on the networks; (4) failing to employ measures sufficient to detect unauthorized access or to conduct security investigations; and (5) storing information for up to 30 days when BJ’s no longer had a business need to keep the information.

*Question 6.* What can consumers do to protect themselves from identity theft?

Answer. While nothing can entirely eliminate the risk of ID theft, consumers can minimize their risk if they manage their personal information carefully by:

- not providing information by phone/Internet/mail unless they have initiated the contact
- shredding sensitive documents before discarding them
- guarding mail from theft
- only carrying essential documents in their wallet
- installing firewalls, anti-virus software and other protections on their computers
- placing passwords on critical electronic files, as well as financial accounts.

Because identity theft may occur even when individuals have taken all reasonable precautions, we encourage consumers to check their credit reports regularly and review their billing statements and other financial accounts for evidence of misuse. By taking these measures, consumers can quickly discover possible misuse of their identity, and in doing so limit the impact of the crime. The FTC has developed extensive education materials on how consumers can protect themselves from identity theft, which can be found at [www.ftc.gov/idtheft](http://www.ftc.gov/idtheft).

*Question 7.* What viable options does Congress have to ensure that consumers remain protected under the National Do Not Call Registry? What further resources does the Commission need to maintain this program? Please explain how the current telemarketing fee structures work. Is this adequate to maintain the program? Are there any improvements that can be made?

Answer. We appreciate the continued Congressional interest and support of the National Do Not Call Registry, including the ongoing appropriations and the introduction of renewed authorization legislation. We currently are considering potential improvements to the proposed authorization legislation, which we hope to discuss with the Committee in the near future.

Pursuant to the Do-Not-Call Implementation Act, the Commission is authorized to collect fees from telemarketers who access the national registry. Under the current fee structure, telemarketers receive the first five area codes of data at no cost. Starting with the sixth area code, telemarketers are charged \$62 per area code of data up to a maximum of \$17,050 for the entire registry. The registry also provides access to exempt organizations at no cost. These are entities that are not required by law to access the registry or refrain from calling listed numbers but do so voluntarily in order to avoid calling consumers who have expressed their preference not to receive telemarketing calls. As a result of the current fee structure and appropriations, the Commission has sufficient funds to implement and enforce the “do-not-call” provisions of the Amended Telemarketing Sales Rule.

*Question 8.* What is the FTC doing to educate consumers about the need to reregister with the Do Not Call Registry Program? Why doesn’t the FTC allow these con-

consumers do not have to repeatedly reregister for the Program?

Answer. As you know, the National Do Not Call Registry started accepting consumer registrations on June 27, 2003. Pursuant to the Final Rule for the Amended Telemarketing Sales Rule (Statement of Basis and Purpose), 68 Fed. Reg. 4580, 4640 (January 29, 2003), telephone numbers remain on the registry for 5 years from the date of the most recent registration. We are happy to discuss further with the Committee the issue of requiring consumers to re-register their telephone numbers.

Because registrations were initially accepted in June 2003, consumers will need to reregister their telephone numbers beginning in the Summer of 2008. In order to educate consumers about this requirement, the Commission is planning a consumer education campaign that will commence in the Spring of 2008. We will utilize various media outlets to remind consumers of the need to re-register their telephone numbers; how to register those numbers; how to verify that a number is registered; and when the registration will expire. The Commission has requested funds as part of its Fiscal Year 2008 appropriation to cover the expenses associated with this consumer education campaign, and staff has informed the Federal Communications Commission about our plans.

*Question 9.* Do you think there are instances where Federal legislation is needed to address price gouging? What are the conditions, areas, or instances in which you think regulation would be justified?

Answer. As the Commission has testified before a number of Senate and House committees<sup>4</sup> and discussed in its Spring 2006 report on post-Katrina gasoline price gouging,<sup>5</sup> a Federal price gouging law is undesirable for several reasons. The most important reason involves such a statute's predictable effects on markets and consumers in an area affected by a disaster such as the hurricanes of 2005. Because a price gouging law would impose a ceiling on prices, it could blunt the incentives for consumers to curb their demand for the product and also could discourage suppliers from sending more product into the affected market. Indeed, the experience following Hurricanes Katrina and Rita tends to illustrate the benefits of market forces. Because gasoline prices were allowed to fluctuate in accordance with changing supply and demand conditions in the Gulf states, consumers found ways to consume less gasoline, while suppliers—both domestic and foreign—brought large quantities of additional gasoline into the affected region.<sup>6</sup> The result was that prices fell sharply a short time after the hurricanes. Our investigation of post-Katrina gasoline pricing stated that many of these beneficial supply and demand responses may not have occurred if Federal price gouging or other forms of price control legislation had been enforced across the board during the recovery period. Therefore, a genuine concern for the welfare of consumers militates against enactment of price-gouging legislation.<sup>7</sup>

*Question 10.* Are there other areas of price gouging that you think the states are addressing in an appropriate manner?

Answer. The Commission has observed in Congressional testimony that, if there is going to be enforcement of any price gouging laws, it makes the most sense for officials of state and local government to carry out that enforcement, since the overwhelming majority of instances of alleged price gouging occurs at the retail level.<sup>8</sup> Several state legislatures have made a choice to pass legislation on this subject, and we respect their authority to do so. We would note, however, that local enforcement can create the same distortions of the market and the same injury to consumers as enforcement of a Federal price gouging law.<sup>9</sup>

<sup>4</sup> See, e.g., Prepared Statement of the Federal Trade Commission, *FTC Investigation of Gasoline Price Manipulation and Post-Katrina Gasoline Price Increases*, presented by Chairman Deborah Platt Majoras before the Committee on Commerce, Science, and Transportation, U.S. Senate (May 23, 2006).

<sup>5</sup> Federal Trade Commission, *Investigation of Gasoline Price Manipulation and Post-Katrina Gasoline Price Increases*, Part III (Spring 2006).

<sup>6</sup> *Id.* At 196 n. 64.

<sup>7</sup> But see concurring statement of Commissioner Jon Leibowitz (concluding that price gouging statutes, which almost invariably require a declared state of emergency or other triggering event, may serve a salutary purpose of discouraging profiteering in the aftermath of a disaster), available at <http://www.ftc.gov/speeches/leibowitz/060518LeibowitzStatementReGasolineInvestigation.pdf>.

<sup>8</sup> See, e.g., Prepared Statement of the Federal Trade Commission, *Market Forces, Competitive Dynamics, and Gasoline Prices: FTC Initiatives to Protect Competitive Markets*, presented by John H. Seesel, Associate General Counsel for Energy, before the Committee on Commerce, Science, and Transportation, U.S. Senate (Sept. 21, 2005).

<sup>9</sup> But see concurring statement of Commissioner Jon Leibowitz (stating that “[a]s noted in the Report, twenty-nine states and the District of Columbia have price gouging laws that provide

*Question 11.* Are the credit monitoring services providing a service to consumers that is valuable to them? I know several companies are purchasing credit monitoring services for people that have been exposed in identity breaches.

Answer. Credit monitoring services—if promoted and sold in a truthful manner—can help consumers maintain an accurate credit file and provide them with valuable information for combating identity theft. For example, credit monitoring services may provide notice to consumers of any material change to one or more of their credit reports, such as creation of a new account or a change of address. Consumers who are risk-averse may choose to subscribe to monitoring services to enable them to detect signs of incipient identity theft or other changes to their credit status. These services are not the only way for consumers to monitor their credit files, however. The FACT Act gives every consumer the right to a free credit report from each of the three major credit reporting agencies once every 12 months. Consumers can stagger their requests from the three major agencies during the 12 month period. This important right is another tool for consumers to protect themselves from identity theft.

*Question 12.* Does the FTC think that the application of the Credit Repair Organizations Act or “CROA” to credit monitoring services is proper? If not, does the Commission invite a legislative clarification to the original CROA language?

Answer. As a matter of policy, we do not see a basis for having credit monitoring services subject to all of CROA’s specific prohibitions and requirements, which were intended to rein in fraudulent credit repair. In contrast, as mentioned in response to *Question 11*, credit monitoring services do offer benefits to consumers if promoted and sold in a truthful manner.

Drafting a legislative clarification poses challenges for effective law enforcement. The breadth of the clarification must be considered carefully. In the past, private sector groups have proposed legislative language that would have exempted only credit reporting agencies from CROA requirements. Such a proposal would raise two significant issues. First, it could have a discriminatory effect on sellers of credit monitoring services not covered by the exemption, including legitimate companies that sell credit monitoring services but are not within the exempted class. These companies would remain governed by CROA and thus would be at a significant competitive disadvantage. For example, non-exempted companies would be prohibited from accepting advance payment for their services and would have to offer customers a three-day cooling-off period, while exempted entities would not be so restricted.

Second, depending on the breadth of the exemption, it could allow fraudulent credit repair firms to evade CROA. In enforcing CROA, we have encountered many apparently fraudulent credit repair operations that aggressively find and exploit existing exemptions in an attempt to escape the strictures of the statute.<sup>10</sup>

Commission staff would be pleased to work with Congressional staff to provide technical comments on a legislative clarification that balances the competitive and enforcement concerns with the original goal of CROA which was to prohibit deceptive credit repair practices.

*Question 13.* How was the definition of business opportunity crafted, and what exactly was it intended to capture?

*Question 14.* Can you give some examples of direct sales companies that the FTC believes should not be covered by the rule?

*Question 15.* How many comments did the FTC receive in response to the proposed rule, and what portion of those comments were negative?

*Question 16.* What is the current status of the rulemaking? Is there an attempt to revise the definition so it is more narrowly and appropriately targeted? What is the likely timetable toward any progress on this effort?

Answers to Questions 13–16. The Commission is currently engaged in an ongoing rulemaking proceeding concerning the Business Opportunity Rule. As stated in its

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for either civil or criminal penalties and, in some situations, both . . . . Though many complaints about retailer pricing were received and investigated at the state level in the wake of Hurricanes Katrina and Rita, charges were brought only against a select few. In other words, current state price gouging laws appear to have been used judiciously post disaster in a manner entirely unthreatening to the operation of the free market’), *supra* note 5, at concurring statement p. 2, n. 4.

<sup>10</sup>See, e.g., *FTC v. ICR Services, Inc.*, No. 03C 5532 (N.D. Ill. Aug. 8, 2003) (consent decree) (complaint alleged that defendant falsely organized as a 501(c)(3) tax-exempt organization to take advantage of CROA exemption for nonprofits); and *United States v. Jack Schrold*, No. 98–6212–CIV–ZLOCH (S.D. Fla. 1998) (stipulated judgment and order for permanent injunction) (complaint alleged that defendant attempted to circumvent CROA’s prohibition against “credit repair organizations” charging money for services before the services are performed fully).

Notice of Proposed Rulemaking, the Commission's aim is to craft a new Business Opportunity Rule that is narrowly tailored to address unfair or deceptive practices in the sale of business opportunities that result in substantial consumer injury. The proposed definition of "business opportunity" is intended to capture business opportunities that the Commission has identified over the course of its law enforcement experience as having a high proclivity for causing substantial consumer loss. These include vending machine and rack display business opportunities, which have been covered under the Franchise Rule and will continue to be covered by that Rule until a final Business Opportunity Rule is implemented.

The proposed definition would also expand the scope of coverage to reach work-at-home schemes, pyramid schemes, and other types of business opportunities not within the scope of the current regulation. (The Franchise Rule covers only business opportunities costing the purchaser at least \$500.)

The rulemaking records contains approximately 17,000 comments, and staff is currently analyzing them. The staff will carefully consider these comments as it determines next steps in the ongoing Business Opportunity rulemaking proceeding. Unfortunately, the Commission is not in a position to respond in more detail to these questions because of the pending rulemaking proceeding.

*Question 17.* Has the telecommunications common carriers exemption in the Federal Trade Commission Act created difficulties for the FTC in its mission to protect consumers? Does it make sense to maintain the exemption in light of the changing communications industry?

Answer. Yes, the exemption has created difficulties, and the Commission does not believe it should be retained. The exemption is a relic of an era when telecommunications services providers were monopolies subject to close economic regulation by the Federal Communications Commission (FCC). In the last forty years, Congress and the FCC have eliminated most of the regime of economic regulation that once applied to the telecommunications carriers. Today, numerous providers of telecommunications services compete for consumers' business. Telecommunications firms have also expanded their offerings beyond traditional common carriage. The rationale behind the exemption, therefore, is now obsolete.

The common carrier exemption is a serious impediment to our consumer protection enforcement efforts. Because of the exemption, consumers of many telecommunications services do not receive the benefit of FTC enforcement of the FTC Act's prohibitions against deceptive and unfair practices. We have found that the common carrier exemption frustrates effective consumer protection with respect to a wide array of activities in the telecommunications industry, including advertising and billing practices. Moreover, as illustrated by the broadband Internet access marketplace, technological advances have blurred the traditional boundaries between telecommunications, entertainment, and high technology. As the telecommunications and Internet industries continue to converge, the common carrier exemption is likely increasingly to frustrate the FTC's ability to stop deceptive and unfair acts and practices with respect to interconnected communications, information, entertainment, and payment services.

*Question 18.* Recently, some broadband providers have stopped advertising an "unlimited" wireless data service because it was in fact limited to 5 GB (gigabytes) per month. While the cap was described in the service's terms and conditions, the marketing of the service was misleading. Has the FTC examined these advertising campaigns or other similar promotions that promise consumers more than the broadband service delivers?

Answer. Over the last decade, the FTC has entered into consent agreements with a half dozen Internet Service Providers ("ISPs") to resolve FTC allegations that their advertising, marketing, and billing practices were deceptive. FTC staff continues to monitor the practices of ISPs, including those offering broadband services, to ensure that consumers receive truthful and accurate information about the products and services offered. Staff uses a wide variety of tools to monitor ISPs' practices including reviewing consumer complaints, reviewing advertising and other marketing materials, and staying abreast of discussions within the industry, consumer groups, and academic circles about new and evolving business models for offering broadband services.

The FTC's Internet Access Task Force held a two-day workshop in February to explore competition and consumer protection issues involving broadband services. One of the panels at the workshop focused solely on consumer protection issues, and addressed the importance of broadband providers clearly and conspicuously disclosing material information about their terms of service to consumers, including information about speed and bandwidth limits. To date, the agency has not brought any actions challenging conduct involving broadband services. However, in general,

the same standards that prohibit deceptive and unfair trade practices by narrowband providers apply to practices by broadband providers. Of course, we cannot disclose whether or not any particular advertising campaign is currently under investigation.

*Question 19.* What is being done to ensure that consumers are getting the service speeds they are expecting when they sign up for broadband access?

Answer. The Commission's Internet Access Task Force workshop included discussions on the importance of truthful and accurate representations to consumers about all material terms of their Internet access agreements, including claims about connection speeds. Again, we cannot disclose whether or not we have focused law enforcement attention on any specific campaign, but we will monitor practices in this area and take enforcement action as appropriate.

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RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. FRANK R. LAUTENBERG TO ALL FTC COMMISSIONERS

*Question 1.* Many smokers are under the impression that "light" or "low tar" tobacco products are not as harmful to their health. Is the Cambridge Filter Method (now known as the FTC Method) effective for measuring tar and nicotine levels in cigarettes? If not, is it in the public's best interest for the Federal Trade Commission to let tobacco companies advertise their products as "light" or "low tar" using this method?

Answer. The Cambridge Filter Method, or FTC Method, determines yields of tar and nicotine using a smoking machine that smokes every brand of cigarettes the same way. However, the tar and nicotine ratings obtained using this method do not represent the amounts of tar and nicotine any particular smoker will receive from smoking a cigarette. It is impossible to tell from the tar and nicotine ratings how much tar and nicotine any individual smoker will get from smoking any particular cigarette. First, people do not smoke cigarettes the same way the smoking machine does. And second, no two people smoke cigarettes the same way. Moreover, any cigarettes that receive "lower tar" ratings when measured by this test method have filters with small vent holes in the sides to allow air to dilute the smoke in each puff. It is easy for smokers to cover the holes unknowingly, which results in their receiving higher amounts of tar and nicotine than the amount obtained using the machine. In addition, many smokers of cigarettes having lower nicotine ratings tend to compensate by taking deeper and more frequent puffs.

The Commission has been concerned for some time that the current test method may be misleading to individual consumers who rely on the ratings it produces as indicators of how much tar and nicotine they actually will get from their cigarettes. In light of these concerns, in 1998, the Commission asked the U.S. Department of Health and Human Services ("HHS") to review the test methodology and to offer recommendations as to whether and how the test method should be changed.<sup>1</sup>

Although the Commission brings a strong market-based expertise to its scrutiny of consumer protection matters, it does not have the specialized scientific expertise needed to design scientific test procedures. In light of this, in its 1999 Cigarette Report, the Commission recommended that Congress consider giving authority over cigarette testing to one of the Federal Government's science-based, public health agencies.

*Question 2.* R.J. Reynolds Tobacco has recently introduced a new line of cigarettes called Camel No. 9. The advertising campaigns refer to the product as "light and luscious" and come in flashy hot-pink and minty-green teal packages. What is the Federal Trade Commission doing to make sure this product is not being marketed to children?

Answer. The Commission is aware of the Camel No. 9 marketing campaign, and of the concerns that some public health groups have raised about the campaign. The Commission shares the concern that cigarettes should not be marketed to children and adolescents. The Commission could have authority to take action if there were evidence indicating that the campaign had a significant appeal to and effect on adolescents and/or children under the legal smoking age. Under such circumstances, there could be reason to believe the campaign was legally unfair under the FTC Act. It is unlikely that the Commission would have authority to take action if the facts showed that Camel No. 9 cigarettes were targeted to adult females, absent evidence that the cigarettes were marketed in a manner that was deceptive or that there was a significant appeal to and effect on the illegal underage market.

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<sup>1</sup> Commissioner Harbour's view is that Congress should prohibit the use of any claims based on the FTC test method and that Congress should require improved testing and disclosures.

*Question 3.* Given the fact that the industry continued to advertise Camel cigarettes using the Joe Camel image despite the FTC's efforts in the 1980's to stop the campaign, do you believe that the FTC now has the kind of regulatory authority necessary to stop current or future harmful tobacco advertising, especially advertising aimed at children?

Answer. Section 5 of the FTC Act gives the Commission authority to take action against advertising, including tobacco advertising, that is deceptive or unfair. The FTC's deception authority gives the Commission jurisdiction to take action against advertising claims that are false, misleading, unsubstantiated, or that fail to disclose material information needed to prevent the advertisement from misleading consumers. The Commission has used this authority, for example, to stop cigarette companies from making false and misleading claims about the serious adverse health effects of smoking.

The Commission's unfairness jurisdiction gives it authority to take action against practices that cause or are likely to cause substantial injury that is not offset by countervailing benefits. In the Joe Camel litigation, the Commission used this authority to bring action against advertising that caused or was likely to cause substantial injury to children and adolescents under the age of 18.

At the same time, the Commission does not have general authority to stop or limit advertising that is offensive or irresponsible, but not legally deceptive or unfair. Of course, the Commission does not condone sellers who market their products in an irresponsible fashion.

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RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. CLAIRE McCASKILL TO  
ALL FTC COMMISSIONERS

*Question 1.* I understand that letters from more than 500 individuals, many of whom are Missouri constituents, including dairy producers, industry professional and consumers across the country, have been delivered to the FTC requesting action to stop reported deceptive milk labeling and advertising. How do you plan to respond to these claims?

Answer. The FTC has heard from individuals, including dairy farmers, about their concerns regarding advertising that they allege makes misleading claims about the health and safety benefits of milk from cows that have not been treated with rBST (recombinant bovine somatotropin), a synthetic growth hormone manufactured by Monsanto. Many of these letters accompanied a complaint about this advertising filed by Monsanto Company on February 27, 2007. In the past week, the Commission has also received numerous post cards from dairy farmers requesting a status report on the agency's handling of the complaint. A copy of staff's letter responding to these post cards is attached. The Commission has also received a letter from a dairy farmer expressing concern about the Monsanto complaint and asserting that the public has the right to know whether rBST has been used in the milk production process. Although the Commission generally treats all such complaints as non-public, the Monsanto complaint has been placed on the public record at the company's request.

Commission staff carefully review such complaints. Also, as with any matter that involves food labeling and advertising, the Commission shares jurisdiction with the Food and Drug Administration and coordinates closely with FDA staff in reviewing claims. FDA's expertise with respect to such claims is particularly important to the FTC's review, given that FDA approved the use of rBST and has subsequently issued interim guidance on voluntary labeling claims for milk and milk products from cows not treated with rBST.

FEDERAL TRADE COMMISSION—DIVISION OF ADVERTISING PRACTICES  
*Washington, DC, August 21, 2007*

JODIE Z. BERNSTEIN, Esq.,  
DANA B. ROSENFELD, Esq.,  
BRYAN CAVE LLP,  
Washington, DC.

Re: Monsanto Company Complaint on rBST-Related Claims  
FTC Matter No. 072-3080

Dear Ms. Bernstein and Ms. Rosenfeld:

As you know, the submission that you filed with the Commission on February 27, 2007 on behalf of Monsanto Company, various dairy producers, and other interested parties was referred to the Division of Advertising Practices for review. I am writing to inform you of the staff's resolution of this matter.

Monsanto requested that the FTC investigate allegedly misleading advertising and labeling claims relating to recombinant bovine somatotropin (“rBST”), a synthetic growth hormone manufactured by Monsanto and approved by FDA for use in dairy cows to increase milk production. While Monsanto acknowledges that milk processors and retailers “have the right to inform customers about the use or non-use of rBST,” it expresses concern about advertising and labeling claims that it believes may mislead consumers about the health and safety implications of rBST-use. Monsanto submits that consumers are being charged a premium for milk and other dairy products from cows not treated with rBST based on misleading claims that such milk and dairy products are healthier or safer for consumers than dairy products from cows treated with rBST.

The staff has completed its review of your original submission and subsequent filings in this matter and has conducted an independent review of websites and other marketing materials by the milk processors and other parties that were referenced in those filings. The staff has also reviewed FDA’s 1994 “on the Voluntary Labeling of Milk and Milk Products From Cows That Have Not Been Treated With Recombinant Bovine Somatotropin”<sup>1</sup> and has consulted with FDA staff regarding the agency’s policy on rBST-related labeling claims.<sup>2</sup>

In approving rBST use to increase milk production, FDA determined that milk from rBST-treated cows is safe for human consumption and that there is “no significant difference between milk from treated and untreated cows.” Under its current policy, FDA does not object to food companies making labeling claims that they do not use rBST, provided the claims are truthful and that, in the context of the entire label, they do not mislead consumers to believe that milk from cows not treated with rBST is safer or of higher quality. To avoid misleading implications, FDA suggested in its 1994 interim guidance that claims about rBST be accompanied by information that puts the claim in its proper context. For example, a statement that milk is “from cows not treated with rBST” might be accompanied by the statement “No significant difference has been shown between milk derived from rBST-treated and non-rBST-treated cows.” The guidance, however, does not require this accompanying statement and recognizes that proper context could also be achieved by conveying a firm’s reasons (other than safety or quality) for choosing not to use milk from cows treated with rBST, so long as the label is truthful and not misleading.

The FTC staff agrees with FDA that food companies may inform consumers in advertising, as in labeling, that they do not use rBST, but should be careful not to suggest a human health or safety benefit. At this time, there does not appear to be an adequate scientific basis for claims that milk from cows treated with rBST presents health or safety risks for consumers. In the absence of such scientific evidence, claims that suggest either directly or by implication any link between rBST use and human health and safety would be unsubstantiated and thus deceptive.<sup>3</sup> The “no significant difference” disclaimer is one possible approach to ensure that statements that rBST has not been used do not convey misleading claims about health or safety.

The FTC staff has reviewed rBST-related claims for all of the companies referenced in the Monsanto submission and subsequent filings. Although many companies reference rBST in product labeling and on company websites, the staff did not find any examples of national or significant regional advertising campaigns that made express or implied claims linking rBST to human health and safety. In addition, the majority of websites for companies cited by Monsanto as making rBST-related claims appear to include some variation of the “no significant difference” disclaimer.<sup>4</sup> The staff did identify, however, a few instances of companies making unfounded health and safety claims about rBST, primarily on their websites. Some of these companies appear to be small, locally operated businesses. The staff has conveyed its concerns to the companies at issue, and those companies are in the process of revising their marketing materials.

Given the limited nature and scope of advertising making rBST-related health and safety claims and the willingness of the companies contacted by staff to make modifications to their advertising, we have determined that formal investigation and

<sup>1</sup> The 1994 Interim Guidance is available on FDA’s website at <http://www.cfsan.fdagov/~lrd/fr940210.html>.

<sup>2</sup> As you are aware, the FTC shares jurisdiction with FDA over food marketing. Under a liaison agreement between the two agencies, FDA has primary authority over the regulation of claims made in labeling and the FTC has primary authority over claims made in advertising.

<sup>3</sup> Because all milk naturally contains hormones, including natural BST, it could also be deceptive to suggest that the milk or dairy product itself, rather than the production process, is rBST-free or hormone-free.

<sup>4</sup> Some of these websites have already been modified since Monsanto’s original submission to remove safety discussions and to include the “no significant difference” disclaimer.

enforcement action is not warranted at this time. Please feel free to contact me if you have any questions regarding this matter.

Very truly yours,

MARY K. ENGLE,  
Associate Director.

*Question 2.* Do you have a plan to bring an end to these deceptive advertising and marketing practices?

Answer. As you are aware, the Commission is directed to act in the interest of all consumers to prevent unfair or deceptive advertising pursuant to the Federal Trade Commission Act, 15 U.S.C. §§ 41–58. Should staff determine as a result of its review that there is a reason to believe that a violation of the FTC Act has occurred, we will make a decision at that point about the most appropriate course of action. In determining whether to take action, the Commission considers a number of factors, including the types of violations alleged and the nature and amount of consumer injury. We focus our efforts on those areas that may affect the greatest number of consumers, may pose a risk to consumers' health or safety, or may cause significant economic harm to consumers.

*Question 3.* If so, what is your timeline for implementing your plan?

Answer. The staff is currently evaluating this complaint to determine what agency action, if any, is warranted in this matter. The timing of that evaluation and any subsequent action depends on many factors including the complexity of the issues and the availability of staff resources. The FTC Act and implementing regulations prohibit the public disclosure of more specific information regarding the existence or status of any particular staff investigation. In the event that the Commission determines that formal law enforcement action is warranted and votes to issue a complaint against one or more parties, or in the event that the staff takes other formal action to resolve the matter, we will notify the Committee promptly.

*Question 4.* Are you taking any steps to communicate broadly to the industry about the standards for truthful non-deceptive advertising practices with respect to milk and dairy products?

Answer. A central part of the Commission's mission is to communicate to industry about standards for truthful non-misleading advertising practices. The Commission has numerous business education pieces that provide guidance to advertisers, including guidance pieces relating to food advertising and to health-related claims. These pieces are available on the Commission's website and disseminated in a variety of other ways. In addition, as already noted, the FDA has provided specific interim guidance regarding the use of voluntary labeling claims about rBST. The FTC has not issued any specific additional guidance to industry on this issue.

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RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. MARIA CANTWELL TO  
HON. DEBORAH PLATT MAJORAS

*Question 1.* Chairwoman Majoras, given your stated opposition to any legislation relating to oil and gas price gouging, how do you propose protecting consumers from instances, such as those discovered following Katrina, in which refineries purposely short supply in order to increase prices?

Answer. Our extensive investigation of post-Katrina price increases did not find instances in which refineries withheld supply in order to increase prices. We simultaneously conducted an investigation, as required by Section 1809 of the Energy Policy Act of 2005, to "determine if the price of gasoline [was] being artificially manipulated by reducing refinery capacity or by any other form of market manipulation or price gouging practices."<sup>1</sup> We did not find any evidence of market manipulation by withholding supplies or by any other anticompetitive behavior. Our investigation concluded that "no single refiner has a large enough market share to manipulate prices unilaterally through either underinvestment in capacity or reduction of refinery output," and the investigation revealed no evidence that any unilateral manipulation was occurring. The investigation also revealed no evidence that coordination to manipulate prices had occurred.<sup>2</sup> In fact, the investigation found quite the opposite: "After both Katrina and Rita, refineries unaffected by the hurricanes increased gasoline production and capacity utilization, consistent with behavior in a competitive market. The increase in gasoline output was most noticeable in the Midwest

<sup>1</sup> Energy Policy Act of 2005, Pub. L. 109–58 § 1809, 119 Stat. 594 (2005).

<sup>2</sup> Federal Trade Commission, *Investigation of Gasoline Price Manipulation and Post-Katrina Gasoline Price Increases* 20 (Spring 2006).

and on the East Coast, two regions of the country that experienced sizable price increases after the hurricanes.<sup>3</sup>

I strongly believe that the antitrust laws, as presently constituted and enforced, provide the best possible protection for consumers not only from collusive activity but also from unilateral actions by firms with market power designed to raise prices above competitive levels. Recent proposals to enact price gouging legislation are likely to have unanticipated consequences that will harm consumers: although a price gouging law might place an artificial cap on prices in the very short run, it is likely to exacerbate supply shortages in the longer run. In a competitive economy, prices are determined by the market forces of supply and demand, and that means that prices will rise—even absent any anticompetitive conduct—when supply is curtailed or demand spikes suddenly. We know, however, that rising and falling prices are the market mechanism that tempers consumer demand, induces more supply into the market, and thus brings the benefits of competition to consumers.

Indeed, just as economic theory would predict, in the months after Hurricane Katrina made landfall, normal forces of supply and demand in petroleum product markets mitigated the dramatic post-hurricane price spike. Not only did the sudden rise in gasoline prices curb consumer demand—and thus immediately relieve the upward price pressure experienced in the aftermath of last year’s Gulf Coast hurricanes—but higher gasoline prices also signaled suppliers to bring more product to the most severely affected areas of the country, further blunting the price increases. For example, imports of large quantities of gasoline to United States ports from European and other locations damped the price increases. In addition, because of increased refinery utilization and a shift in output from other products to gasoline, the production of gasoline increased at U.S. refineries outside the hurricane zone. This increase in gasoline production—which became profitable for these refineries precisely because of the post-hurricane gasoline price increase—ultimately led gasoline prices back down following the initial shock of the hurricanes.

*Question 2.* Chairwoman Majoras, I appreciate that the Commission is continuing to study market irregularities that occurred in Eastern Washington during the Summer and early Fall months of 2006. On October 19, 2006, you responded to my initial inquiry and on October 27, 2006, I responded asking you to delve further into a number of the irregularities highlighted in your initial report. With gas prices in Washington State and across the country on the rise again, those prices and this inquiry into them have once again become top issues for my constituents. You have indicated that a full study of this incident will take some time. Given the heightened impact of increasingly high gas prices not only to those in Washington State but also to entire country, what is the shortest possible time period within which this study could be completed?

*Question 3.* According to the figures included in the Commission’s October 19, 2006 letter, the reported retail prices for diesel in Spokane and Salt Lake City (SLC) track very closely, but retail gasoline prices in Spokane are often 10 to 15 cents per gallon (CPG) higher than in SLC—at one point, reaching 20 cents higher per gallon. Has the Commission assessed the cause for these retail price differentials between fuels?

*Question 4.* The Commission’s preliminary analysis offered the possibility that shifts in refinery output mix at PADD IV refineries account for the recent prices, above the Commission’s predicted range for both Spokane and SLC. For the two-month period beginning August 15, 2006, were there any refinery product allocation shifts or attendant downtimes that could account for the observed price effects?

*Question 5.* The Commission speculated, based on third party sources including press accounts, that PADD IV experienced “greater difficulty in handling this year’s nationwide conversion to ultra-low sulfur diesel (ULSD) fuel.” That raises the question of why PADD IV refineries experienced this problem, while other refineries nationwide (such as in PADD V) presumably did not. Were those conversion difficulties encountered by all PADD IV refineries, or a subset of those supplying Eastern Washington? I understand that refiners had years to prepare for the transition to ULSD, and would presume any individual refinery would know of its own impending transition issues. As such, why didn’t parent companies with refineries across the country work to shift ULSD product from successful production areas to those with shortages?

*Question 6.* The Commission’s preliminary analysis concluded that exogenous supply factors account for all of the Spokane area’s high gas prices. Did the Commission test this theory by comparing prices in small rural markets surrounding Spokane,

<sup>3</sup>*Id.* at 76.

which often have lower prices than the metropolitan area? I understand from the Commission's letter that the FTC's Gasoline and Diesel Price Monitoring Project monitors fuel price data from a number of these locales.

*Question 7.* Did refineries in the PADD IV region derive profits higher than historic averages following supply shortages caused by difficulties transitioning to ULSD? In general, how have PADD IV refineries expanded output to meet growing demand in the Rocky Mountain region?

Answer to Questions 2–7. I am aware of and share your concerns about the impact of high gasoline prices on consumers in Washington State and around the country. Because the questions you raise are similar to questions originally included in your letter to me dated October 27, 2006, I appreciate your staff clarifying that you are expecting only one response to *Questions 2–7*. As discussed earlier this year with your staff, the general thrust of the questions, and the Commission's own observations, pointed to issues of broad interest with respect to bulk supply and demand conditions and practices in the Northwest. The FTC staff is examining these issues—a process that itself takes significant time and effort—but my plan is to have a response by the end of this year.

*Question 8.* Chairwoman Majoras, Section 215 of the Fair and Accurate Credit Transactions Act of 2003 required the FTC to complete a study, within 2 years of enactment, on the potential disparate impact the use of credit scoring for insurance purposes has on protected classes of consumers. The study is still pending. What has caused the delay in the FTC completing the study? My understanding is that the data set the Commission has chosen to use for its analysis comes from an insurance industry-sponsored study. How is the Commission going to ensure that the data set provided is accurate and not biased? Will it be possible for third parties to verify that the data set provided by the insurers is accurate and not biased?

Answer. Shortly after the enactment of the Fair and Accurate Transaction Act of 2003, the Commission commenced studying the impact of credit scoring for insurance purposes on consumers and competition. Because the study will prove valuable to policymakers considering a wide variety of issues related to credit scoring and insurance, the FTC has focused on developing a sound empirical basis, for the study. The Commission is committed to completing a valid study as soon as practicable. The main reason that the study has not been completed yet is that the agency staff has faced substantial logistical challenges in combining massive amounts of sensitive consumer information received from many different sources into its database. Late last Summer, FTC staff received the last critical information for this database. At this time, the agency staff is completing its analysis of the data and preparing the required report.

The study will be methodologically sound and based on reliable and accurate data. It is correct that the core of the FTC's staff database is information a consulting firm compiled for an insurance industry study of the relationship between credit-based insurance scores and claims risk. Nevertheless, the FTC staff has confidence in the reliability of its database and results that will be drawn from it. First, insurers submitted the information knowing that the Commission could compel its production if the agency had any concerns the data had been manipulated and that it is unlawful to make false statements to the government. Second, because the FTC staff used Social Security Administration data on race, ethnicity, and national origin, and insurers do not have access to this critical information, it would be hard for them to manipulate the information in the database. Third, FTC staff has compared its information and results with other publicly available studies and independent data on the claims histories of the consumers in its database, which increases its confidence in the information's reliability and accuracy. Consequently, although third parties will not have an opportunity to verify independently the accuracy of the database information, which is confidential, the FTC staff is confident that third parties who review the study carefully will conclude that its methodology is sound and that the underlying data used are reliable and accurate.

*Question 9.* Chairwoman Majoras, I applaud the Commission's ongoing efforts to reduce identity theft. The FTC is Co-Chair of the President's Identity Theft Task Force, which sent out its interim recommendations for public comment that were due on January 19, 2007. When will the interim recommendation be finalized?

Answer. Attorney General Gonzales and I released the Task Force report, *Combating Identity Theft: A Strategic Plan* on April 23, 2007, a copy of which is attached.\* The plan, as well as a supplemental volume that describes current and ongoing measures to address identity theft, can be accessed at [www.idtheft.gov](http://www.idtheft.gov). The Plan contains 31 recommendations aimed at making it more difficult for thieves to

\*The information previously referred to is maintained in the Committee files.

steal sensitive consumer data, preventing the misuse of such data if it is stolen, improving tools for investigation and prosecution of identity theft crimes, and facilitating recovery for victims. The task force agencies and other governmental offices are now working on implementing the recommendations as expeditiously as possible.

*Question 10.* Chairwoman Majoras, as we discussed, I am interested in understanding the links between meth crimes and identity theft crimes. Anecdotally, local law enforcement officials in Washington State have described to me the apparent linkages between these two crimes. I want to determine if there is data that can be used to identify relationships and patterns between these crimes that can assist law enforcement. That is the reason why I introduced a bill in the 109th Congress as well as an amendment to the Identity Theft Protection Act of 2005 that required a detailed analysis of the correlation between methamphetamine use and identity theft crimes. My amendment to the Identity Theft Protection Act of 2005 that will likely be included in the introduced version of the Identity Theft Protection Act of 2007 calls for the FTC, in conjunction with the Department of Justice and other Federal agencies, to undertake a study of the correlation between methamphetamine use and identity theft crimes. Do you envision any inter-agency coordination issues in having the FTC take the lead on this study?

*Answer.* The FTC has worked effectively and collaboratively with the Department of Justice and the Federal criminal investigative agencies on various issues regarding identity theft, and would not foresee any coordination issues with respect to a study of the relationship between methamphetamine use and identity theft. As you know, the FTC is a civil agency with no direct criminal enforcement authority. Because our criminal enforcement partners have hands-on experience with the issues regarding methamphetamine labs and identity theft through their investigative and prosecutorial functions, they would be well-positioned to lead such a study. The FTC, of course, would be prepared to provide whatever assistance and guidance it can for such a study.

