

## I. Introduction

Chairman Dorgan, Ranking Member DeMint, and Members of the Subcommittee, I am Deborah Platt Majoras, Chairman of the Federal Trade Commission (“Commission” or “FTC”). I am pleased to come before you today at this reauthorization hearing.<sup>1</sup>

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 anticompetitive, deceptive, or unfair, and 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.

The agency’s consumer protection work has focused on data security and identity theft, technology risks to consumers such as spam and spyware, fraud in the marketing of health care products, deceptive financial practices in the subprime mortgage and credit repair industries, telemarketing fraud, and Do Not Call enforcement. During the past three fiscal years, the FTC has obtained more than 250 court orders requiring defendants to pay more than \$1.2 billion in consumer redress, obtained 47 court judgments for civil penalties in an amount over \$38 million,

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<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.

and filed approximately 180 new complaints in federal district court to stop unfair and deceptive practices. It also completed 54 statutorily-mandated rulemakings and reports, hosted 48 conferences and workshops, issued 40 reports on topics significant to consumers, and developed 250 consumer and business education campaigns.

The Commission's competition mission has worked 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 and pharmaceuticals, energy, technology, and real estate. So far in fiscal year 2007, there have been 20 merger cases that have resulted in enforcement action or withdrawal – including three litigated preliminary injunction actions – and 11 nonmerger enforcement actions.<sup>3</sup>

Our testimony today summarizes some of the major activities of the recent past and describes some of our planned future initiatives. It also identifies certain legislative recommendations that the Commission believes will allow us to better protect U.S. consumers.

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<sup>3</sup> The Commission wants to ensure that the quality of our work is maintained despite the quantity of demands placed upon us, the breadth of our mission, and the increasing challenges of a dynamic domestic and global marketplace. Today, the FTC has 1,074 full-time equivalent employees ("FTEs"). In the last few years, 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, the Children's Online Privacy Protection Act, the Gramm-Leach-Bliley Act, and the U.S. SAFEWEB Act. We would like to work with the Committee to help ensure that our reauthorization includes appropriate increases in resources to meet these growing challenges.

These are:

- (1) to stop brand name drug companies from paying generic companies not to compete at the expense of consumers;
- (2) to repeal the telecommunications common carrier exemption; and
- (3) to ensure that the Commission has authority to impose civil penalties in cases in which the Commission's traditional equitable remedies are inadequate, such as spyware and data security cases.<sup>4</sup>

## **II. Consumer Protection**

As the nation's consumer protection agency, the FTC has a broad mandate. This year, it devoted significant resources to the issues of data security and identity theft, technology risks to consumers, fraud in the marketing of the health care products, financial practices, telemarketing fraud, and Do Not Call enforcement.<sup>5</sup> The Commission plans to continue our important work in these areas in 2008. This testimony highlights key issues and initiatives for the agency's consumer protection mission, as well as the methods the FTC will use to address them.

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<sup>4</sup> The Commission's ability to seek civil penalties is limited, and we look forward to working with you to ensure that the FTC has the authority it needs to deter wrongful conduct and protect American consumers. For example, where civil penalties are authorized (such as for violations of specific statutes like CAN-SPAM, or regulations including the Telemarketing Sales Rule), the Commission cannot, unlike other agencies such as the Securities and Exchange Commission or the Commodity Futures Trading Commission, go directly to court, but must first refer the case to the Department of Justice, which has 45 days in which to decide whether to bring the action. Only if the DOJ declines may the FTC bring the civil penalties claim. The Commission has a good, long-standing working relationship with DOJ, which has greatly assisted us in our consumer protection efforts. But, for example, there are cases in which we must forgo seeking civil penalties in the interest of seeking expeditious injunctive relief. We look forward to working with the Committee to examine this issue.

<sup>5</sup> So far during FY2007, the FTC's Bureau of Consumer Protection has achieved many successes. It obtained 57 court orders requiring defendants to pay more than \$236 million in consumer redress, obtained 8 court judgments for civil penalties in an amount over \$4.9 million, and filed 35 new complaints in federal district court to stop unfair and deceptive practices. It also completed 14 statutorily-mandated requirements such as rulemakings and reports, led 2 law enforcement sweeps, hosted 11 conferences and workshops, issued 5 reports on topics significant to consumers, and developed 16 consumer and business education campaigns.

## **A. Data Security and Identity Theft**

In 1998, Congress passed the Identity Theft Assumption and Deterrence Act (“Identity Theft Act”), which assigned the FTC a unique role in combating identity theft and coordinating government efforts.<sup>6</sup> This role includes collecting consumer complaints; implementing the Identity Theft Data Clearinghouse, a centralized database of victim complaints used by 1,600 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, implementation of the recommendations of the President’s Identity Theft Task Force, and education both to help consumers avoid identity theft and to assist the millions of Americans who are victimized each year.

### **1. Law Enforcement**

Although 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 Shoe Warehouse, for their alleged failures to provide reasonable data security. In these and other cases, the FTC has alleged, for example, that companies discarded files containing consumer home loan applications in an unsecured dumpster; stored sensitive information in multiple files when there was no longer a business need to keep the information, or in unencrypted files that could be easily accessed using commonly-known used IDs and passwords; failed to implement simple, low-cost, and readily available

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<sup>6</sup> Pub. L. No. 105-318, 112 Stat. 3007 (1998) (codified at 18 U.S.C. § 1028).

defenses to well-known Web-based hacker attacks; failed to use readily available security measures to prevent unauthorized wireless connections to their networks; and sold sensitive consumer information to identity thieves posing as the company's clients. 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 actions.

## **2. Identity Theft Task Force**

On May 10, 2006, the President established an Identity Theft Task Force, which I co-chair, and which comprises 17 federal agencies with the mission of developing a comprehensive national strategy to combat identity theft.<sup>7</sup> In April 2007, the Task Force published its strategic plan for combating identity theft.<sup>8</sup>

In the Strategic Plan, the Task Force recommends dozens of initiatives directed at reducing the incidence and impact of identity theft. To prevent identity theft, the Plan recommends that governments, businesses, and consumers improve data security. It recommends that federal agencies and departments improve their internal data security processes; develop breach notification systems; and reduce unnecessary uses of Social Security numbers, which are often the key item of information that identity thieves need. For the private sector, the Task Force proposes that Congress establish national standards for data security and breach notification that would preempt the numerous state laws on these issues. The Plan also

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<sup>7</sup> Exec. Order No. 13,402, 71 FR 27945 (May 10, 2006).

<sup>8</sup> The President's Identity Theft Task Force, *Combating Identity Theft: A Strategic Plan* ("Strategic Plan"), available at <http://www.idtheft.gov>.

recommends the dissemination of additional guidance to the private sector for safeguarding sensitive consumer data; continued law enforcement against entities that fail to implement appropriate security; a multi-year consumer awareness campaign to encourage consumers to take steps to safeguard their personal information and minimize their risk of identity theft; a comprehensive assessment of the private sector's uses of Social Security numbers; and workshops on developing more reliable methods of authenticating the identities of individuals to prevent thieves who obtain consumer information from using it to open accounts in the consumer's name.

To assist victims in the recovery process, the Plan recommends development of easy-to-use reference materials for law enforcement, often the first responders to identity theft; implementation of a standard police report, often a key document for victim recovery; nationwide training for victim assistance counselors; and development of an Identity Theft Victim Statement of Rights. And finally, the Plan includes a host of recommendations for strengthening law enforcement's ability to detect and punish identity thieves.

Many of the Task Force recommendations have already been implemented or are in the process of being implemented. For example, the Office of Management and Budget has issued data security and breach management guidance for government agencies.<sup>9</sup> The FTC has developed and distributed detailed data security guidance for businesses,<sup>10</sup> is planning regional

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<sup>9</sup> OMB Memorandum 07-16, "Safeguarding Against and Responding to the Breach of Personally Identifiable Information" (May 22, 2007), available at <http://www.whitehouse.gov/omb/memoranda/fy2007/m07-16.pdf>; OMB Memorandum, "Recommendations for Identity Theft Related Data Breach Notification" (Sept. 20, 2006), available at [http://www.whitehouse.gov/omb/memoranda/fy2006/task\\_force\\_theft\\_memo.pdf](http://www.whitehouse.gov/omb/memoranda/fy2006/task_force_theft_memo.pdf).

<sup>10</sup> See <http://www.ftc.gov/infosecurity/>.

data security conferences, has conducted a public workshop on consumer authentication,<sup>11</sup> has published an identity theft victim statement of rights on its website and at [www.idtheft.gov](http://www.idtheft.gov), and is leading the interagency study of the private sector usage of Social Security numbers.<sup>12</sup> The Department of Justice has forwarded to Congress a set of legislative recommendations that seek to close existing loopholes for the prosecution of some types of identity theft,<sup>13</sup> and is developing and presenting expanded training for their prosecutors and, in partnership with the FTC, for state and local law enforcement.

### 3. Education

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>14</sup> This program - Deter, Detect, Defend - has been very popular. The FTC has distributed over 2.6 million brochures, has recorded more than 3.2 million visits to the program's web site, and has disseminated 55,000 kits, which can be used by employers, community groups, Members of Congress, and others to educate their constituencies.

The FTC also sponsors an innovative multimedia website, OnGuard Online, designed to educate consumers about basic computer security.<sup>15</sup> The website provides information on

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<sup>11</sup> See <http://www.ftc.gov/bcp/workshops/proofpositive/index.shtml>.

<sup>12</sup> On July 30, 2007, the FTC issued a request for public comment on the uses of Social Security numbers in the private sector, and announced that it was planning to host one or more public forums on the issue in the coming months. See <http://www.ftc.gov/opa/2007/07/ssn/shtm>.

<sup>13</sup> See [http://www.usdoj.gov/opa/pr/2007/July/07\\_crt\\_522%20%20%20.html](http://www.usdoj.gov/opa/pr/2007/July/07_crt_522%20%20%20.html).

<sup>14</sup> 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>15</sup> Available at <http://onguardonline.gov/index.html>.

specific topics such as phishing, spyware, and spam. Since its launch in late 2005, OnGuard Online has attracted more than 3.5 million visits.

The Commission directs its outreach to businesses as well. This April, the Commission released a new business education guide on data security.<sup>16</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.

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

To enhance consumer protections in cases involving spyware, as well as those involving data security, the Commission continues to support provisions in pending bills that give the FTC civil penalty authority. Civil penalties are important in areas where the Commission's 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. As such, the Commission reiterates its support for civil penalty authority

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<sup>16</sup> Available at <http://www.ftc.gov/bcp/edu/microsites/idtheft/business/data-breach.html>.



in these areas and looks forward to continuing to work with this Committee to improve the Commission's ability to protect consumers.

## **1. Spam**

Since 1997, when the FTC brought its first case involving spam, the Commission has aggressively pursued deceptive and unfair practices involving these email messages through 90 law enforcement actions against 143 individuals and 100 companies, 26 of which were filed after Congress enacted the CAN-SPAM Act. These cases have focused on the core protections that the CAN-SPAM Act provides to consumers: opt-out mechanisms that function; message headers that are non-deceptive; and warnings, as appropriate, that sexually-explicit content is included. Through these 26 actions, the Commission has succeeded in obtaining strong injunctions and significant monetary relief. To date in the FTC's CAN-SPAM cases, federal courts have awarded the Commission more than \$10 million in disgorgement or redress and in excess of \$2.6 million in civil penalties.

The FTC continues to devote significant resources to fight spam. In June 2007, the Commission hosted a "Spam Summit" to explore the next generation of threats and solutions in the spam arena. The Summit panelists, nearly 50 in number, all confirmed that spam is being used increasingly as a vehicle for more pernicious conduct, such as sending phishing emails, viruses, and spyware. This malicious spam goes beyond mere annoyance to consumers – it can be criminal, resulting in significant harm by shutting down consumers' computers, enabling keystroke loggers to steal identities, and undermining the stability of the Internet. Due to strong spam-filtering, however, much of this spam is not reaching consumers' inboxes. The panelists also confirmed that malicious spam is a technological problem, driven largely by "botnets"

(networks of hijacked personal computers that spammers use to conceal their identities) and the exploitation of computer security vulnerabilities that allow spammers to operate anonymously. Industry is taking a leading role in developing technological tools, such as domain-level email authentication, to “uncloak” these anonymous spammers, and the Commission is encouraged by reported increases in the adoption rates for email authentication. Panelists also agreed that there is no single solution to the spam problem and encouraged key stakeholders to collaborate in the fight against spam. To that end, the Commission looks forward to continued collaboration with consumer groups, industry members, international bodies, Members of Congress, and criminal law enforcement authorities.

## **2. Spyware**

The Commission has brought eleven spyware enforcement actions in the past two 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 Direct Revenue, a distributor of adware, illustrates these principles.<sup>17</sup> According to the FTC’s complaint, Direct Revenue, 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

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<sup>17</sup> *In the Matter of Direct Revenue, LLC*, FTC Dkt. No. C-4194 (June 29, 2007), available at <http://www.ftc.gov/os/caselist/0523131/index.shtm>.

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 Direct Revenue 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 allegations, Direct Revenue 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 any subaffiliates) comply with the FTC's order. In addition, Direct Revenue agreed to disgorge \$1.5 million to the U.S. Treasury. The Commission will continue to monitor this area and bring law enforcement actions when warranted.

### **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>18</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 effects on consumers. The staff has incorporated what it has learned at the hearings into its enforcement and policy planning, will issue a report shortly, and will follow-up the hearings with a series of “town hall” meetings. The

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<sup>18</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>.

first such “town hall” meeting will take place on November 1-2 in Washington, D.C. and will address the issue of online behavioral marketing. Behavioral marketing involves the collection of information about a consumer’s activities online – including the searches the consumer has conducted, the Web pages visited, and the content the consumer has viewed. The information is then used to target advertising to the consumer that is intended to reflect the consumer’s interests, and thus increase the effectiveness of the advertising. The FTC will examine how behavioral marketing works, what types of data are collected, how such data are used, whether such data are sold or shared, and what information is conveyed to consumers about its use.

#### **4. Repeal of the Common Carrier Exemption**

To address the consumer protection challenges posed by technology convergence, the Commission continues to support the repeal of the telecommunications common carrier exemption.

Currently, the FTC Act exempts common carriers subject to the Communications Act from its prohibitions on unfair and deceptive acts or practices and unfair methods of competition.<sup>19</sup> This exemption dates from a period when telecommunications were provided by government-authorized, highly regulated monopolies. The exemption is now outdated. Congress and the Federal Communications Commission (“FCC”) have dismantled much of the economic regulatory apparatus formerly applicable to the industry, and in the current world, firms are expected to compete in providing telecommunications services.

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<sup>19</sup> 15 U.S.C. § 45(a)(2) exempts from the FTC Act “common carriers subject to the Acts to Regulate Commerce.” 15 U.S.C. § 44 defines the “Acts to regulate commerce” as “Subtitle IV of Title 49 (interstate transportation) and the Communications Act of 1934” and all amendments thereto.

Technological advances have blurred the traditional boundaries between telecommunications, entertainment, and information. As the telecommunications and Internet industries continue to converge, the common carrier exemption is likely to frustrate the FTC's ability to stop deceptive and unfair acts and practices and unfair methods of competition with respect to interconnected communications, information, entertainment, and payment services.

The FTC has extensive expertise with advertising, marketing, and billing and collection, areas in which issues have emerged in the telecommunications industry. In addition, the FTC has powerful procedural and remedial tools that could be used effectively to address developing problems in the telecommunications industry if the FTC were authorized to reach them.

### **C. Health**

Of course not all fraud is technology-related. Fraud in the marketing of health care products, 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>20</sup> and have found no effective cure or treatment. Seventy million Americans are trying to lose weight.<sup>21</sup> The FTC continues to take action against companies that take advantage of these consumers.

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<sup>20</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).

<sup>21</sup> E.g. Approximately two thirds of U.S. adults are overweight or obese. National Center for Health Statistics, *Prevalence of Overweight and Obesity Among Adults: United States, 2003-2004*. *available at* <http://www.cdc.gov/nccdphp/dnpa/obesity/faq.htm#adults>; and approximately 127 million adults in the U.S. are overweight, 60 million obese, and 9 million severely obese, American Obesity Association, *AOA Fact Sheet*, *available at* [http://obesity1.temppdomainname.com/subs/fastfacts/obesity\\_US.shtml](http://obesity1.temppdomainname.com/subs/fastfacts/obesity_US.shtml).

From April 2006 through August 2007, the FTC initiated or resolved 19 law enforcement actions involving 31 products making allegedly deceptive health claims.<sup>22</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>23</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>24</sup> The Commission's April 2006 report on the workshop urged industry to consider a wide range of options as to how self-regulation could

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<sup>22</sup> E.g., *FTC v. Window Rock Enters., Inc.*, No. CV04-8190 (JTLx) (C.D. Cal. 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>23</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>24</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>.

assist in combating childhood obesity.<sup>25</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>26</sup> And in November 2006, the Children's Advertising Review Unit, or "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>27</sup> Eleven leading food manufacturers – including McDonalds, The Hershey Company, Kraft Foods, and General Mills – are participants in this initiative. On July 18, 2007, at a forum on childhood obesity hosted by the FTC and the Department of Health and Human Services ("HHS"), these companies released the details of their pledges to voluntarily restrict their advertising to children under 12 on television, radio, print, and Internet. Each of the companies committed either to limiting 100% of their advertising directed to children to food products that meet certain nutrition criteria or to refrain from advertising to children.<sup>28</sup> Nutritional standards vary by company, but all are required to be consistent with established scientific and/or government standards. As part of the initiative, the companies also committed to restricting their use of third-party licensed

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<sup>25</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>26</sup> See Bruce Horovitz 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>27</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.

<sup>28</sup> The one exception is Cadbury Adams, LLC, which committed either to refrain from advertising to children under 12 or to devote at least 50% of such advertising to a product that offers a healthier dietary option. Bubblicious gum is currently the only product Cadbury Adams advertises to children under 12.

characters to products that meet these nutritional criteria and to websites promoting healthy lifestyles.

At the July 18 FTC-HHS forum, select food and media companies reported on the progress they have made to date in adopting nutritional standards for advertising to children and reformulating products to offer children products that comport with these nutritional standards. The FTC also reported on its own research. The FTC's Bureau of Economics discussed the results of a study of children's exposure to food advertising on TV, released in June 2007. The study compared children's exposure to advertising on television in 1977 and 2004. The study concluded that today's children see more promotional advertisements for other programming, but fewer paid ads and fewer minutes of advertising on television. The study also found that children are not exposed to more food ads on television than they were in the past, although their ad exposure is more concentrated on children's programming.

The FTC also updated the audience on its efforts to conduct a more comprehensive study of food industry marketing expenditures and activities targeted toward children and adolescents. Through this effort, the FTC is exploring not only traditional TV, print, and radio advertising, but all of the many other ways that the industry reaches children – through in-store promotions, events, packaging, the Internet, and product placement in video games, movies, and television programs. The Commission hopes to get a more complete picture of marketing techniques for which publicly available data have so far been lacking. The Commission will submit the aggregated data about children's food marketing in a report to Congress, as directed in the conference report on its 2006 appropriations legislation. This endeavor will be an important tool



for tracking the marketplace's response to childhood obesity and identifying where more action is needed.

#### **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. The FTC has focused recent efforts in this area on subprime mortgage lending, payment cards, debt collection practices, and credit and debt counseling services.<sup>29</sup>

##### **1. Mortgage Lending and Servicing**

In the last decade, the agency has brought twenty-one actions against companies and principals in the mortgage lending industry, focusing in particular on the subprime market.<sup>30</sup> Several of these cases have resulted in large monetary judgments, with courts ordering that more than \$320 million be returned to consumers.

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<sup>29</sup> The Commission also brings other law enforcement actions related to financial services, such as credit reporting, financial privacy, data security, and identity theft. For a description of some of these recent cases, see "The FTC in 2007: A Champion for Consumers and Competition," Federal Trade Commission, April 2007, at 24-25, <http://www.ftc.gov/os/2007/04/ChairmansReport2007.pdf> at 29-30, 37.

<sup>30</sup> *FTC v. Mortgages Para Hispanos.Com Corp.*, No. 06-00019 (E.D. Tex. 2006); *FTC v. Ranney*, No. 04-1065 (D. Colo. 2004); *FTC v. Chase Fin.Funding*, No. 04-549 (C.D. Cal. 2004); *United States v. Fairbanks Capital Corp.*, No. 03-12219 (D. Mass. 2003); *FTC v. Diamond*, No. 02-5078 (N.D. Ill. 2003); *United States v. Mercantile Mortgage Co.*, No. 02-5079 (N.D. Ill. 2002); *FTC v. Associates First Capital Corp.*, No. 01-00606 (N.D. Ga. 2002); *FTC v. First Alliance Mortgage Co.*, No. 00-964 (C.D. Cal. 2002); *United States v. Action Loan Co.*, No. 00-511 (W.D. Ky. 2000); *FTC v. NuWest, Inc.*, 00-1197 (W.D. Wash. 2000); *United States v. Delta Funding Corp.*, No. 00-1872 (E.D.N.Y. 2000); *FTC v. Barry Cooper Prop.*, No. 99-07782 (C.D. Cal. 1999); *FTC v. Capitol Mortgage Corp.*, No. 99-580 (D. Utah 1999); *FTC v. CLS Fin. Serv., Inc.*, No. 99-1215 (W.D. Wash. 1999); *FTC v. Granite Mortgage, LLC*, No. 99-289 (E.D. Ky. 1999); *FTC v. Interstate Res. Corp.*, No. 99-5988 (S.D.N.Y. 1999); *FTC v. LAP Fin. Serv., Inc.*, No. 99-496 (W.D. Ky. 1999); *FTC v. Wasatch Credit Corp.*, No. 99-579 (D. Utah 1999); *In re First Plus Fin. Group, Inc.*, FTC Docket No. C-3984 (2000); *In re Fleet Fin., Inc.*, 128 F.T.C. 479 (1999); *FTC v. Capital City Mortgage Corp.*, No. 98-00237 (D.D.C. 1998).

Most recently, in 2006, the Commission filed suit against a mortgage broker for deceiving Hispanic consumers who sought to refinance their homes. The FTC’s complaint alleged that the broker misrepresented numerous key loan terms.<sup>31</sup> The alleged conduct was egregious because the FTC claimed that the lender conducted business with its clients almost entirely in Spanish, and then provided loan documents in English at closing containing the less favorable terms. To settle the suit, the broker paid consumer redress and agreed to a permanent injunction prohibiting it from misrepresenting loan terms.<sup>32</sup>

The Commission also has challenged deceptive and unfair practices in the servicing of mortgage loans.<sup>33</sup> For example, in November 2003, the Commission, along with the Department of Housing and Urban Development (“HUD”), announced a settlement with Fairbanks Capital Corp. and its parent company. Fairbanks (now called Select Portfolio Servicing, Inc.) had been one of the country’s largest third-party subprime loan servicers – it did not originate any loans, but collected and processed payments on behalf of the holders of the mortgage notes. The Commission alleged that Fairbanks failed to post consumers’ payments upon receipt, charged for unnecessary insurance, and imposed other unauthorized fees. The complaint also charged Fairbanks with violating federal laws by using dishonest or abusive tactics to collect debts, and by reporting to credit bureaus consumer payment information that it knew to be inaccurate. To resolve these charges, Fairbanks and its former chief executive officer paid over \$40 million in consumer redress, agreed to halt the alleged illegal practices, and implemented significant

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<sup>31</sup> *FTC v. Mortgages Para Hispanos.Com Corp*, *supra* note 28.

<sup>32</sup> Stipulated Final Judgment and Order of Permanent Injunction, *FTC v. Mortgages Para Hispanos.Com Corp.*, *supra* note 28, Sept. 25, 2006.

<sup>33</sup> *United States v. Fairbanks Capital Corp*, *supra* note 28; *FTC v. Capital City Mortgage Corp.*, *supra* note 28.

changes to company business practices to prevent future violations.<sup>34</sup> Just last month, the FTC announced a modified settlement with the company, which provided substantial benefits to consumers beyond those in the original settlement, including account adjustments and reimbursements or refunds of fees paid in certain circumstances.<sup>35</sup>

To leverage resources in the Commission's work on subprime mortgage lending, this summer it announced that it will cooperate in an innovative pilot project with federal banking agencies and state regulators to conduct targeted consumer-protection compliance reviews of selected non-depository lenders with significant subprime mortgage operations. The agencies will share information about the reviews and investigations, take action as appropriate, collaborate on the lessons learned, and seek ways to better cooperate in ensuring effective and consistent reviews of these institutions.

Finally, the Commission's Bureau of Economics recently announced results of a study that confirms the need to improve mortgage disclosures.<sup>36</sup> The research found: (1) the current federally required disclosures fail to convey key mortgage costs to many consumers; (2) better disclosures can significantly improve consumer recognition of mortgage costs; (3) both prime and subprime borrowers failed to understand key loan terms when viewing the current

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<sup>34</sup> Order Preliminarily Approving Stipulated Final Judgment and Order as to Fairbanks Capital Corp. and Fairbanks Capital Holding Corp., *United States v. Fairbanks Capital Corp.*, *supra* n.28, Nov. 21, 2003; Stipulated Final Judgment and Order as to Thomas D. Basmajian, *United States v. Fairbanks Capital Corp.*, *supra* n.28, Nov. 21, 2003.

<sup>35</sup> FTC News Release, *FTC, Subprime Mortgage Servicer Agree to Modified Settlement* (Aug. 2, 2007), available at <http://www.ftc.gov/opa/2007/08/sps.shtm>.

<sup>36</sup> FTC, Bureau of Economics Staff Report, James M. Lacko and Janis K. Pappalardo, *Improving Consumer Mortgage Disclosures: An Empirical Assessment of Current and Prototype Disclosure Forms*, June 2007. An earlier BE study addressed mortgage broker compensation disclosures. FTC, Bureau of Economics Staff Report, James M. Lacko and Janis K. Pappalardo, *The Effect of Mortgage Broker Compensation Disclosures on Consumers and Competition: A Controlled Experiment*, Feb. 2004, <http://www.ftc.gov/os/2004/01/030123mortgagefullrpt.pdf>.

disclosures, and both benefitted from improved disclosures; and (4) improved disclosures provided the greatest benefit for more complex loans, for which both prime and subprime borrowers had the most difficulty understanding loan terms. The Commission is working with federal regulators on next steps.

## **2. Payment Cards**

The Commission continues to bring law enforcement actions against marketers and distributors of payment cards within its jurisdiction. On July 30, the Commission obtained a temporary restraining order prohibiting EDebitPay and related companies from marketing reloadable prepaid debit cards<sup>37</sup> without adequately disclosing a processing and application fee of over \$150. Moreover, the FTC alleges that some consumers who did not apply for defendants' prepaid card nevertheless suffered unauthorized debits from their bank accounts. When consumers complained about the unauthorized withdrawals, defendants allegedly erected formidable barriers to obtaining refunds, including misrepresenting that consumers could not contest the debits as unauthorized.

The Commission has also been examining hidden expiration dates and dormancy fees on gift cards. This year, the Commission has announced two settlements in this area, one with Kmart Corporation and another with the national restaurant company, Darden Restaurants.<sup>38</sup> According to the FTC's complaints, both Kmart and Darden promoted their gift cards as equivalent to cash but failed to disclose that fees are assessed after two years (initially 15 months,

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<sup>37</sup> A prepaid debit card, also called a prepaid card, is typically a plastic stored valued card that uses magnetic stripe technology to store information about funds that consumers "prepay" or "load" onto the card. Consumers can use prepaid cards to make purchases or withdraw money from merchants and ATMs that accept the network brand on the card.

<sup>38</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>.

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 the existence of any fees 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.

### 3. Debt Collection

The FTC is tackling the problem of unlawful debt collection practices in two ways. First, the Commission engages in aggressive law enforcement. In nineteen lawsuits filed since 1998, the FTC has alleged that the defendants – including collection agencies, collection law firms, companies that purchase and collect delinquent credit accounts, and credit issuers – used illegal debt collection practices.<sup>39</sup> In one such case, announced in February of this year, the Commission charged a collection agency, Rawlins & Rivera, Inc., and its principals with violating federal law by falsely threatening consumers with lawsuits, seizure of property, and arrest.<sup>40</sup> The court has

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<sup>39</sup> *FTC v. Rawlins & Rivera, Inc.* No. 07-146 (M.D. Fla. 2007); *United States v. Whitewing Financial Group*, No. 06-2102 (S.D. Tex. 2006); *FTC v. Check Investors, Inc.*, No. 03-2115 (D.N.J. 2003), *appeal docketed*, Nos. 05-3558, 05-3957 (3rd Cir. Aug. 2, 2005); *United States v. Capital Acquisitions and Management Corp.*, No. 04-50147 (N.D. Ill. 2004); *FTC v. Capital Acquisitions and Management Corp.*, No. 04-7781 (N.D. Ill. 2004); *In re Applied Card Systems, Inc.*, FTC Docket No. C-4125 (Oct. 8, 2004); *United States v. Fairbanks Capital Corp.*, *supra* n.14; *FTC v. Associates*, *supra* n.14; *United States v. DC Credit Services, Inc.*, No. 02-5115 (C.D. Cal. 2002); *United States v. United Recovery Systems, Inc.*, No. 02-1410 (S.D. Tex. 2002); *United States v. North American Capital Corp.*, No. 00-0600 (W.D.N.Y. 2000); *United States v. National Financial Systems, Inc.*, No. 99-7874 (E.D.N.Y. 1999); *Perimeter Credit, L.L.C.*, No. 99-0454 (N.D. Ga. 1999); *In re Federated Department Stores, Inc.*, FTC Docket No. C-3893 (Aug. 27, 1999); *FTC v. Capital City Mortgage Co.*, *supra* n.14; *United States v. Nationwide Credit, Inc.*, No. 98-2920 (N.D. Ga. 1998); *United States v. Lundgren & Associates, P.C.*, No. 98-1274 (E.D. Cal. 1998); *In re May Dep't Stores Co.*, FTC Docket No. C-3848 (Nov. 2, 1998); *In re General Electric Capital Corp.*, FTC Docket No. C-3839 (Dec. 23, 1998).

<sup>40</sup> *FTC v. Rawlins & Rivera*, *supra* n.34.

granted the FTC's request for a preliminary injunction,<sup>41</sup> and the litigation is continuing. In another case, in June 2007, the FTC obtained an injunction against defendants who victimized Spanish-speaking consumers by posing as debt collectors seeking payments consumers did not owe.

Second, given the rise in consumer debt levels, as well as consumer complaints, it is time to take another look at the debt collection industry. This fall the FTC will hold a workshop to examine debt collection practices thirty years after enactment of the Fair Debt Collection Practices Act. The Commission will examine changes in the industry and the related consumer protection issues, including whether the law has kept pace with developments.

#### **E. Telemarketing and Do Not Call**

Since the mid-1980s, the Commission has had a strong commitment to rooting out telemarketing fraud. From 1991 to the present, the FTC has brought more than 350 telemarketing cases; 240 of these cases were brought after 1995, when the FTC promulgated the Telemarketing Sales Rule ("TSR").<sup>42</sup> As one illustration of the Commission's robust enforcement program, in July, the FTC halted the allegedly unlawful telemarketing operations of Suntasia Marketing<sup>43</sup> which, according to the FTC's complaint, took millions of dollars directly out of consumers' bank accounts without their knowledge or authorization. Suntasia allegedly tricked consumers into divulging their bank account numbers by pretending to be affiliated with the consumer's bank and offering a purportedly "free gift" to consumers who accepted a "free

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<sup>41</sup> Order Granting Motion for Preliminary Injunction, *FTC v. Rawlins & Rivera*, *supra* n.34, Apr. 6, 2007.

<sup>42</sup> 16 C.F.R. § 310. The Commission promulgated the TSR following Congressional enactment of the Telemarketing and Consumer Fraud and Abuse Prevention Act in 1994. 15 U.S.C. §§ 6101-6108.

<sup>43</sup> *FTC v. FTN Promotions, Inc.*, No. 8:07-cv-1279-T-30TGW (M.D. Fla. July 23, 2007).

trial” of Suntasia’s products. The complaint alleges that, once consumers divulged their bank account number, Suntasia debited many of their accounts. At the FTC’s request, a court halted the scheme and froze the defendants’ assets to preserve the Commission’s ability to distribute redress to injured consumers, should the Commission prevail in this litigation.

The FTC also works closely with its Canadian counterparts to combat cross-border telemarketing fraud. One recent case resulted in a judgment of more than \$8 million against Canadian telemarketers of advance fee credit cards.<sup>44</sup> In this case, the FTC closely coordinated its action with other members of the Toronto Strategic Partnerships, a group of Canadian, U.S., and U.K. law enforcers whose mission is to cooperate in bringing telemarketing fraud cases.

As a complement to its anti-fraud work in the telemarketing arena, the Commission has an active program to enforce the Do Not Call provisions of the TSR. Consumers have registered more than 147 million telephone numbers since the Do Not Call Registry became operational in June 2003. The Do Not Call provisions have been tremendously successful in protecting consumer’s privacy from unwanted telemarketing calls. Because currently consumers’ registrations expire after five years, the Commission plans a significant effort to educate consumers on the need to reregister their phone numbers.

Most entities covered by the Do Not Call provisions comply, but for those who do not, tough enforcement is a high priority for the FTC. Twenty-seven of the Commission’s telemarketing cases have alleged Do Not Call violations, resulting in \$8.8 million in civil

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<sup>44</sup> *FTC v. 120199 Canada, Ltd.*, No. 1:04-CV-07204 (N.D. Ill.) (permanent injunction order entered Mar. 8, 2007).

penalties and \$8.6 million in redress or disgorgement ordered.<sup>45</sup>

The Commission understands that this Committee has passed S.781, the Do Not Call Implementation Act (“DNCIA”). The Commission supports this legislation and appreciates the Committee’s work on it. The Commission believes that the legislation, if enacted, will help ensure the continued success of the National Registry by providing the Commission with a stable funding source for its TSR enforcement activities. We also believe that the proposed legislation would benefit telemarketers, sellers, and service providers who access the Registry by providing them with a level fee structure.

#### **F. Media Violence**

The Commission has continued its efforts to monitor the marketing of violent entertainment to children and to encourage industry self-regulation. Since it began examining the issue in 1999, the Commission has issued six reports on the marketing of violent entertainment products to children. In April 2007, the Commission issued its latest report, which concluded that the movie, music, and video game industries generally comply with their own voluntary standards regarding the display of ratings and labels. Entertainment industries, however, continue to market some R-rated movies, M-rated video games, and explicit-content recordings on television shows and websites with substantial teen audiences. In addition, the FTC found that while video game retailers have made significant progress in limiting sales of M-rated games to children, movie and music retailers have made only modest progress in limiting sales of R-rated and unrated DVDs and explicit content music recordings to children. The report also

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45 These Do Not Call cases are included in the 240 TSR cases noted above.



provides the results of a Commission survey of parents and children on their awareness and use of the video game rating system.

#### **G. “Green” Marketing**

The Commission continues to monitor marketplace developments to identify new consumer protection issues. In monitoring developments in the energy and environmental areas, the Commission has observed that new “green” claims, such as claims for carbon reduction, landfill reduction, and sustainable packaging are entering the market daily. These claims can be extremely useful for consumers; however, the complexity of the issues involved creates the potential for confusing, misleading, and fraudulent claims. Given this potential, in the coming months, FTC staff plans to conduct research, develop consumer and business outreach, and bring appropriate enforcement actions in this area. As part of the research process, the Commission plans to host a series of public workshops to seek input from consumers, industry representatives, environmental groups, academics, and other government agencies on how to prevent fraud and deception in this marketplace, while at the same time encouraging innovation and competition on the basis of truthful claims.

#### **H. Aiding Criminal Enforcement**

This testimony has highlighted various deceptive and unfair practices pursued by the Commission, from spam to spyware to health fraud to telemarketing fraud. These frauds that the FTC pursues civilly are also often criminal violations. The FTC’s Criminal Liaison Unit, or “CLU,” has stepped up cooperation with criminal authorities – an 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. Since October 2006, based on CLU referrals to

criminal agencies, 115 FTC defendants or their associates have been charged, pled guilty, or were sentenced in criminal cases. The FTC's criminal referral program continues to be a high priority.

### **III. Maintaining Competition**

In addition to addressing unfair and deceptive conduct, the Commission is charged with protecting consumers by protecting 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.

#### **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.

##### **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.

Recent court decisions, however, have made it more difficult to bring antitrust cases to stop exclusion payment settlements, and the impact of those court rulings is becoming evident in the marketplace. These developments threaten substantial harm to consumers and others who pay for prescription drugs. For that reason, the Commission supports a legislative solution to prohibit these anticompetitive settlements, while allowing exceptions for those agreements that do not harm competition.

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 prevented Barr from selling a lower-priced generic version of Warner Chilcott's Ovcon 35, a branded oral contraceptive.<sup>46</sup> Under threat of a preliminary injunction, in September 2006, Warner Chilcott waived the exclusionary provision in its agreement with Barr that prevented Barr 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, giving consumers the benefits of price competition.<sup>47</sup>

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<sup>46</sup> *FTC v. Warner Chilcott Holdings Co. III*, No. 1:05-cv-02179-CKK (D.D.C. filed Nov. 7, 2005), available at <http://www.ftc.gov/os/caselist/0410034/051107comp0410034%20.pdf>.

<sup>47</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 three 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.

## 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 Commission challenged the terms of Actavis Group hf.'s proposed acquisition of Abrika Pharmaceuticals, Inc., alleging that the transaction would create a monopoly in the U.S. market for generic isradipine capsules, a drug typically prescribed to patients to lower their blood pressure and to treat hypertension, ischemia, and depression. Under a consent order that allowed the deal to proceed, the companies divested all rights and assets needed to make and market generic isradipine capsules to Cobalt Laboratories, Inc., an independent competitor.<sup>48</sup> The FTC also challenged Barr Pharmaceuticals' proposed acquisition of Pliva.<sup>49</sup> In settling the Commission's charges that the transaction would have increased concentration and led to higher prices, Barr was 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 challenged several other pharmaceutical mergers, including: Watson Pharmaceuticals/Andrx Corporation;<sup>50</sup> Teva Pharmaceutical Industries/IVAX Corporation;<sup>51</sup> Johnson & Johnson's acquisition of Pfizer's consumer health

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<sup>48</sup> *In the Matter of Actavis Group*, FTC Docket No. C-4190 (May 18, 2007) (decision and order), available at <http://www.ftc.gov/os/caselist/0710063/index.shtml>.

<sup>49</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>50</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/0610139/061212do\\_public\\_ver0610139.pdf](http://www.ftc.gov/os/caselist/0610139/061212do_public_ver0610139.pdf).

<sup>51</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>.

division;<sup>52</sup> and Hospira, Inc./Mayne Pharma Limited.<sup>53</sup> Recent FTC medical devices and diagnostic systems cases include: the FTC's challenge of the proposed \$27 billion acquisition of Guidant Corporation by Boston Scientific Corporation, in which the FTC required the divestiture of Guidant's vascular business to an FTC-approved buyer;<sup>54</sup> and the FTC's challenges of mergers affecting markets for biopsy systems and for centrifugal vacuum evaporators used in the health care industry.<sup>55</sup>

FTC staff also has initiated a study on authorized generic drugs.<sup>56</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.

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<sup>52</sup> *In the Matter of Johnson & Johnson and Pfizer In c.*, 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>53</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>54</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>55</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/0510263/0510263decisionandorderpubrecver.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>56</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>.

### 3. Hospitals and Physicians

The Commission has worked vigorously to preserve competition in local hospital markets. Last month, the Commission ruled that Evanston Northwestern Healthcare Corporation's acquisition of Highland Park Hospital was anticompetitive,<sup>57</sup> upholding an October 2005 Initial Decision by an FTC Administrative Law Judge that the consummated acquisition of its important competitor, Highland Park Hospital, resulted in substantially higher prices and a substantial lessening of competition for acute care inpatient hospital services in parts of Chicago's northern suburbs.<sup>58</sup> Several other hospital mergers have been announced within the past several months, and the FTC has active investigations pending.<sup>59</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 challenged the practices of four physician groups alleging that the competing providers jointly set their prices and collectively agreed to refuse to deal with health care payers that did not meet their fee demands. The FTC charges against these groups were resolved by consent orders.<sup>60</sup>

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<sup>57</sup> *In the Matter of Evanston Northwestern Healthcare Corp.*, FTC Docket No. 9315 (Aug. 6, 2007) (Opinion of the Commission), available at <http://www.ftc.gov/os/adipro/d9315/070806opinion.pdf>.

<sup>58</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/adipro/d9315/051021idtextversion.pdf>.

<sup>59</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>60</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/0510170/0510170c4166praedecisionorder.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/0510137/0510137nchqaprimeiddecisionorder.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>.

Further, in June, the Commission accepted a consent order in *South Carolina State Board of Dentistry*,<sup>61</sup> resolving charges that the South Carolina State Board of Dentistry restrained competition in the provision of preventive care by dental hygienists, limiting access to care by children living in poverty.

## **B. Energy**

Few issues are more important to American consumers and businesses than high energy prices. 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 three mergers in the energy industry. This past spring, the Commission challenged Equitable Resources proposed acquisition of The Peoples Natural Gas Company, a subsidiary of Dominion Resources.<sup>62</sup> Equitable and Dominion Peoples 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. In March, the FTC filed an administrative complaint against the acquisition, and in April the staff sought an injunction in federal court. Both actions alleged that the proposed transaction would result in a monopoly for many customers who now benefit from competition between the two firms. The district court denied the FTC's request for an injunction, asserting that because the Pennsylvania Utility Commission has the power to approve the merger, the FTC is banned from

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<sup>61</sup> *In the Matter of South Carolina State Board of Dentistry*, FTC Docket No. 9311 (June 20, 2007) (decision and order), available at <http://www.ftc.gov/os/adjpro/d9311/070620decision.pdf>.

<sup>62</sup> *FTC v. Equitable Resources, Inc., Dominion Resources, Inc., et al.*, No. 07-cv-490 (W.D. Pa. filed April 13, 2007) (complaint filed), available at <http://www.ftc.gov/os/adjpro/d9322/070413cmpltforpi-tro.pdf>.

taking action under the state action doctrine. The Third Circuit has issued an injunction pending appeal, and the appeal will be argued in early October.

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.<sup>63</sup> The Commission alleged in its complaint 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 charges, Carlyle and Riverstone agreed to turn their investment in Magellan passive and to restrict the flow of sensitive information between Kinder Morgan and Magellan.

In the most recent petroleum merger challenge, the Commission challenged Western Refining's acquisition of Giant Industries to preserve competition in the bulk supply of light petroleum products to northern New Mexico, an area of the country where the Commission alleged that the two companies are direct and significant competitors.<sup>64</sup> The Commission's complaint for a preliminary injunction filed in federal court and its subsequently issued administrative complaint alleged that, if it were not acquired by Western, Giant would soon increase the supply of gasoline to northern New Mexico, and that the transaction as proposed would prevent this. The U.S. district judge in New Mexico denied the Commission's request for

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<sup>63</sup> FTC News Release, *FTC Challenges Acquisition of Interests in Kinder Morgan, Inc. by The Carlyle Group and Riverstone Holdings* (Jan. 25, 2007), available at <http://www.ftc.gov/opa/2007/01/kindermorgan.shtm>.

<sup>64</sup> FTC News Release, *FTC Files Complaint in Federal District Court Seeking to Block Western Refining's Acquisition of Rival Energy Company Giant Industries, Inc.* (April 12, 2007), available at [http://www.ftc.gov/opa/2007/04/westerngiant\\_tro.shtm](http://www.ftc.gov/opa/2007/04/westerngiant_tro.shtm).



a preliminary injunction.<sup>65</sup>

The Commission also actively monitors energy markets, and markets for related consumer products, for anticompetitive conduct. In June 2007, the Commission charged the American Petroleum Company, Inc. with illegally conspiring with its competitors to restrict the importation and sale of motor oil lubricants in Puerto Rico, in an attempt to force the legislature to repeal a law that charged importers and others within the distribution chain an environmental deposit of 50 cents for each quart of lubricants purchased.<sup>66</sup> The Commission's consent order bars American Petroleum from engaging in such conduct in the future.

On April 25, 2006, President Bush directed the DOJ to join the FTC and the Department of Energy to inquire into "illegal manipulation or cheating related to the current gasoline prices."<sup>67</sup> Accordingly, staff of the Commission and the DOJ Antitrust Division, with assistance

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<sup>65</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/0510108/0510108c4173do061103.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 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>66</sup> *In the Matter of American Petroleum Company, Inc.*, FTC File No. 061-0229 (June 14, 2007) (decision and order), available at <http://www.ftc.gov/os/caselist/0610229/0610229decisionorder.pdf>.

<sup>67</sup> President George W. Bush, Remarks to the Renewable Fuels Summit 2006 (Apr. 25, 2006), available at <http://www.whitehouse.gov/news/releases/2006/04/20060425.html>.

from the Department of Energy's Energy Information Administration, conducted an economic analysis and investigation of the likely factors that led to higher national average gasoline prices during the spring and summer of 2006, and to determine whether anticompetitive conduct may have occurred.<sup>68</sup> This study identified six major factors that contributed to price rises during the spring and summer of 2006: (1) the market effects of the summer driving season; (2) an increase in the price of crude oil; (3) an increase in the price of ethanol; (4) capacity issues related to the transition to ethanol from MTBE; (5) refinery outages; and (6) increased demand. A report detailing the findings was sent to the President in August.<sup>69</sup>

In May 2006, the FTC released a report titled *Investigation of Gasoline Price Manipulation and Post-Katrina Gasoline Price Increases*.<sup>70</sup> This report contained the findings of a Congressionally-mandated Commission investigation into whether gasoline prices 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,

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<sup>68</sup> The Commission and DOJ also extended an open offer to assist state Attorneys General with gasoline pricing investigations upon request. As part of its continuing law enforcement interaction with the states, through the National Association of Attorneys General, the Commission sponsored a federal/state enforcement conference in September 2006 to explore competition issues in petroleum markets.

<sup>69</sup> “*Federal Trade Commission Report on Spring Summer 2006 Nationwide Gasoline Price Increases*” (August 30, 2006), available at <http://www.ftc.gov/reports/gasprices06/P040101Gas06increase.pdf>. Commissioner Leibowitz dissented from the Report. See <http://www.ftc.gov/speeches/leibowitz/P010401gas06dissent.pdf>.

<sup>70</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>.

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>71</sup> Other factors such as regional or local market trends, however, appeared to explain these firms' prices in nearly all cases.<sup>72</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 discouraged consumers from entering into non-traditional listing contracts with real estate brokers. In seven of these matters, the Commission accepted settlements prohibiting multiple listing services from discriminating against non-traditional listing arrangements. The eighth matter, RealComp, is currently in administrative litigation; a trial was held in June and closing arguments are scheduled for September.<sup>73</sup> The result of these actions will allow consumers more choice and ensure that consumers who choose to use discount

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<sup>71</sup> Science, State, Justice, Commerce, and Related Agencies Appropriations Act, 2007, Pub. L. No. 109-108 § 632, 119 Stat. 2290 (2005) ("Section 632").

<sup>72</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>73</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>.

real estate brokers will not be handicapped by rules preventing other consumers from seeing their home 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 on remedies in the legal proceeding against computer technology developer Rambus, Inc.<sup>74</sup> 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 are widely used in personal computers, servers, printers, and cameras.<sup>75</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>76</sup> Rambus has appealed the Commission's rulings to the U.S. Court of

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<sup>74</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>.

<sup>75</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>76</sup> *In the Matter of Rambus Inc.*, Docket No. 9302 (Feb. 5, 2007) (opinion of the Commission on remedy) (Harbor, P, and Rosch, T, concurring in part, dissenting in part), 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>.

Appeals for the District of Columbia Circuit.

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

The FTC also guards against anticompetitive conduct in the retail sector. In June 2007, the Commission sought a preliminary injunction in federal district court blocking Whole Foods' acquisition of its chief rival, Wild Oats Markets, Inc.<sup>77</sup> The FTC charged that the proposed transaction would violate federal antitrust laws by eliminating the substantial competition between these two uniquely close competitors in numerous geographic markets across the country in the operation of premium natural and organic supermarkets. On August 16, 2007, a judge for the U.S. District Court of the District of Columbia denied the FTC's motion for preliminary injunction, and on August 23<sup>rd</sup> the Court of Appeals denied the FTC's emergency motion for an injunction pending appeal.<sup>78</sup> The matter remains in administrative litigation. Also, this year in June, the FTC challenged Rite Aid Corporation's proposed \$3.5 billion acquisition of the Brooks and Eckerd pharmacies from Canada's Jean Coutu Group (PJC), Inc.<sup>79</sup> To remedy the alleged anticompetitive impact of the proposed transaction, the Commission ordered Rite Aid and Jean Coutu to sell 23 pharmacies to Commission-approved buyers to preserve the competition that would otherwise be lost in the merger.

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

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<sup>77</sup> *FTC v. Whole Foods Markets and Wild Oats Markets*, No. 1:07-cv-01021 (D.D.C. filed June 5, 2007), (complaint filed), available at <http://www.ftc.gov/os/caselist/0710114/070605complaint.pdf>.

<sup>78</sup> *FTC v. Whole Foods Markets and Wild Oats Markets*, No. 07-1021 (D.D.C. Aug. 16, 2007); *FTC v. Whole Foods Markets and Wild Oats Markets*, No. 07-5276 (D.C. Cir. Aug. 23, 2007).

<sup>79</sup> *In the Matter of Rite Aid Corporation and The Jean Coutu Group*, FTC Docket No. C-4191 (June 4, 2007) (complaint filed), available at <http://www.ftc.gov/os/caselist/0610257/070604complaint.pdf>.

defining the practice of funeral directing to include selling funeral merchandise to consumers on an at-need basis.<sup>80</sup> The Board's regulation permitted only licensed funeral directors to sell caskets to consumers on an at-need basis, thereby restricting competition from other retailers. 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, thereby settling the Commission's charges.

The Commission also has sought to protect customers by imposing conditions on mergers involving diverse industries such as launch services;<sup>81</sup> the manufacture of ammunition for mortars and artillery;<sup>82</sup> the nation's two largest funeral home and cemetery chains;<sup>83</sup> and liquid oxygen and helium.<sup>84</sup>

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

The FTC works to facilitate cooperation and voluntary compliance with the law by promoting transparency in enforcement standards, policies, and decision-making processes. Last year, the FTC implemented two important reforms that streamlined the merger review

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<sup>80</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>81</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>82</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>83</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>84</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>.

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>85</sup> In June 2006, the FTC and the DOJ 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 Act.<sup>86</sup>

### **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 outcomes for consumers. In the past year, the FTC has sought to persuade regulators to adopt policies that do not unnecessarily restrict competition in the areas of gasoline sales,<sup>87</sup> real estate brokerage,<sup>88</sup> real estate legal

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<sup>85</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>86</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>.

<sup>87</sup> FTC Staff Comments to Councilmember Mary M. Cheh, Chairperson, Committee on Public Services and Consumer Affairs, Council of the District of Columbia (June 8, 2007), available at <http://www.ftc.gov/os/2007/06/V070011divorcement.pdf>; FTC Staff Comments to Christopher R. Stone, State of Connecticut House of Representatives (May 2, 2007), available at <http://www.ftc.gov/be/V070008.pdf>.

<sup>88</sup> Federal Trade Commission and United States Department of Justice Comments to Governor Jennifer M. Granholm of Michigan (May 30, 2007), available at <http://www.ftc.gov/be/v050021.pdf>.

services,<sup>89</sup> attorney advertising,<sup>90</sup> and pharmacy benefit managers.<sup>91</sup>

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

The FTC's hearings, conferences, and workshops 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 and continuing through May 2007, the FTC and the DOJ Antitrust Division held hearings to discuss the boundaries of permissible and impermissible conduct under Section 2 of the Sherman Act.<sup>92</sup> The primary goal of the hearings was 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 issue a report with DOJ on the hearings.

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

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<sup>89</sup> Federal Trade Commission and United States Department of Justice Comments to Assemblywoman Helene E. Weinstein, Chair, Committee on Judiciary, New York State Assembly (Apr. 27, 2007), available at <http://www.ftc.gov/be/V070004.pdf>.

<sup>90</sup> FTC Staff Comments to Ms. Lilia G. Judson, Executive Director, Indiana Supreme Court (May 11, 2007), available at <http://www.ftc.gov/be/V070010.pdf>; Brief of the Federal Trade Commission As *Amicus Curiae* Supporting Arguments to Vacate Opinion 39 of the New Jersey Supreme Court Committee on Attorney Advertising (May 8, 2007), available at <http://www.ftc.gov/be/V070003opinion39.pdf>; FTC Staff Comments to the Florida Bar (Mar. 23, 2007), available at <http://www.ftc.gov/be/V070002.pdf>; FTC Staff Comments to the Rules of Professional Conduct Committee, Louisiana State Bar Association (Mar. 14, 2007), available at <http://www.ftc.gov/be/V070001.pdf>; FTC Staff Comments to the Office of Court Administration of the New York Unified Court System (Sept. 14, 2006), available at <http://www.ftc.gov/os/2006/09/V060020-image.pdf>.

<sup>91</sup> FTC Staff Comments to Assemblywoman Nellie Pou, Chair, Appropriations Committee, New Jersey General Assembly (Apr. 17, 2007), available at <http://www.ftc.gov/be/V060019.pdf>; 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>92</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>.



Access Task Force, the FTC recently addressed two issues of interest to policy makers.

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>93</sup> Second, in June 2007, the FTC released a staff report, *Broadband Connectivity Competition Policy*, which summarizes the Task Force's findings in the area of broadband Internet access, including so-called "network neutrality."<sup>94</sup> The report proposes guiding principles for assessing this complex issue, and makes clear that the FTC will continue to vigorously enforce the antitrust and consumer protection laws and expend considerable efforts on consumer education, industry guidance, and competition advocacy in the important area of broadband Internet access.

In April 2007, the Commission held a three-day conference on *Energy Markets in the 21st Century: Competition Policy in Perspective*.<sup>95</sup> The conference brought 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 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

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<sup>93</sup> FTC Staff Report, *Municipal Provision of Wireless Internet* (Sept. 2005), available at <http://www.ftc.gov/os/2006/10/V060021municipalprovwirelessinternet.pdf>.

<sup>94</sup> FTC Staff Report, *Broadband Connectivity Competition Policy* (June 2007), available at <http://www.ftc.gov/reports/broadband/v070000report.pdf>.

<sup>95</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>.

role in maintaining competition and protecting energy consumers. The Commission expects to issue a report detailing the findings of this conference.

Also in April of this year, the FTC and the DOJ issued a joint report, titled *Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition*, to inform consumers, businesses, and intellectual property rights holders about the agencies' competition views with respect to a wide range of activities involving intellectual property.<sup>96</sup> The report discusses issues including: refusals to license patents, collaborative standard setting, patent pooling, intellectual property licensing, the tying and bundling of intellectual property rights, and methods of extending market power conferred by a patent beyond the patent's expiration. This second report on antitrust and intellectual property joins a report issued in 2003 following extensive hearings on this important topic.

In May 2007, the Commission and the DOJ Antitrust Division released a joint report, *Competition in the Real Estate Brokerage Industry*. The purpose of the report is to inform consumers and other industry participants about important competition issues involving residential real estate, including the impact of the Internet, the competitive structure of the real estate brokerage industry, and obstacles to a more competitive environment.<sup>97</sup>

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<sup>96</sup> Federal Trade Commission and Department of Justice, *Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition* (April 17, 2007), available at <http://www.ftc.gov/opa/2007/04/ipreport.shtm>.

<sup>97</sup> Federal Trade Commission and United States Department of Justice, *Competition in the Real Estate Brokerage Industry* (Apr. 2007), available at <http://www.ftc.gov/reports/realestate/V050015.pdf>. To complement the report, the Commission simultaneously released a consumer education publication, *Buying a Home: It's a Big Deal*, which has tips for considering the services of a real estate professional and using the Internet as a source of real estate information. FTC Consumer Education, *Buying a Home: It's a Big Deal* (May 2007), available at <http://www.ftc.gov/bc/edu/pubs/consumer/alerts/zalt001.shtm>

## **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>98</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>99</sup> Health Care,<sup>100</sup> Real Estate,<sup>101</sup> and Technology.<sup>102</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.

## **III. 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

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<sup>98</sup> Available at <http://www.ftc.gov/ftc/antitrust.htm>.

<sup>99</sup> Available at <http://www.ftc.gov/ftc/oilgas/index.html>.

<sup>100</sup> Available at <http://www.ftc.gov/bc/healthcare/index.htm>.

<sup>101</sup> Available at <http://www.ftc.gov/bc/realestate/index.htm>.

<sup>102</sup> Available at <http://www.ftc.gov/bc/tech/index.htm>.

Protection and the Office of General Counsel. OIA brings increased prominence to the FTC's international work, and enhances the FTC's ability to coordinate its enforcement efforts effectively to promote sound enforcement and convergence toward best practices with the agency's 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 know no borders. The Commission works 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 and implementing 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 mass marketing 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 continue to implement the U.S. SAFE WEB Act of 2006, which was signed into law last December. Thanks to the actions of this Committee, 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 agencies in the area of cross-border fraud and other practices that are global and harm consumers, such as fraudulent spam, spyware, misleading health and safety advertising, privacy and security breaches, and telemarketing fraud. The FTC already has used the powers conferred by the Act to share information with foreign agencies in several investigations. The increasing use of these new tools will remove some of the key roadblocks to effective international enforcement 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. The Commission has worked hard to expand partnerships with Canadian law enforcement entities to fight cross-border mass marketing fraud 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. Already in 2007, the FTC, working with its foreign partners through the OECD, has developed a framework for privacy regulators and law enforcement authorities to facilitate cross-border privacy law enforcement cooperation and provide greater protection for consumers’ personal information. Most recently, in July 2007, the FTC, again working through the OECD, agreed with its partners on a set of principles to address the practical

and legal obstacles that many consumers face when trying to resolve disputes with businesses, in their own country or abroad, particularly in cross-border e-commerce transactions.

The FTC will 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 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 when 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, non-horizontal mergers, and merger remedies, with the Canadian Competition Bureau on merger remedies and health care issues, and with the Japan Fair Trade Commission on revisions to its Guidelines on Patent and Know-how Licensing Agreements under the Antimonopoly Act. We are closely following competition developments in China and have held

high-level meetings with the drafters of the antimonopoly law and with officials in China's Ministry of Commerce responsible for their pre-merger notification guidelines, and conducted a multi-day, hands-on seminar on merger process and analysis for Chinese officials. The FTC continues to play a lead role with respect to market-based competition and innovation issues in the US-China Strategic Economic Dialogue, including participation in the May 22-23 summit meeting in Washington. We have just held our annual bilateral meetings with the Japanese Fair Trade Commission, we participated in consultations in Washington and in foreign capitals with top officials of, among others, the Korean Fair Trade Commission and Mexican Federal Competition Commissions, and we will soon hold our annual consultations with the European Commission's Directorate General for Competition.

The FTC plays a lead role in key multilateral fora that provide important opportunities for competition agencies to promote cooperation and convergence. In the International Competition Network, the FTC serves on the Steering Group, and FTC officials hold leadership positions in working groups on unilateral conduct, mergers, and competition policy implementation. We are also active in the competition work of the OECD, UNCTAD, and APEC. The FTC participates in U.S. delegations that negotiate competition chapters of proposed free trade agreements, such as with Korea, Thailand, and Malaysia.

As competition enforcement has proliferated worldwide, the FTC's international competition program has promoted sound, coherent, and fair application of competition laws, to the benefit of American businesses and consumers.

### **C. International Technical Assistance**

The FTC assists developing nations that are moving toward market-based economies to develop and implement sound competition and consumer protection laws and policies. Our program is funded mainly by the United States Agency for International Development (“USAID”) and conducted in cooperation with the DOJ Antitrust Division. In 2007, the FTC sent 20 staff experts on 20 technical assistance missions to 14 countries, including the ten-nation ASEAN Community, India, Russia, Azerbaijan, South Africa, Central America, Tanzania, and Egypt.

Because USAID resources for these activities have been declining, the Commission may need to consider alternative funding sources. The Antitrust Modernization Commission recently recommended that Congress appropriate funds for use by the agencies directly for this important work.

### **V. Conclusion**

The Commission wants to ensure that the quality of our work is maintained despite the breadth of our mission and the challenges that have been described involving technological change and an evolving global economy. In the last several years, 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, the Children’s Online Privacy Protection Act, the Gramm-Leach-Bliley Act, and the U.S. SAFEWEB Act. In light of these new laws and challenges, the FTC appreciates the Committee’s continued support for providing the Commission with the authority, personnel, and



resources needed to ensure that the FTC vigorously protects American consumers and promotes a vibrant marketplace.

I would be happy to answer any questions that you and other Members may have about the FTC's reauthorization.