**Remarks by Deborah Platt Majoras**[1]

**Chairman, The Federal Trade Commission**

**Keynote Address**

**Current Topics in Antitrust Economics and Competition Policy**

**Charles River Associates**

**February 8, 2005**

## A Dose of our Own Medicine:
## Applying a Cost/Benefit Analysis to the FTC's Advocacy Program

Thank you. I am delighted to address you today.

Today's discussions, understandably, focus primarily on relevant issues that arise in antitrust enforcement: patent pools, loyalty discounts, the profit-sacrifice test for Section 2 cases. Now, I want to shift away from specific issues in enforcement and focus on a part of the FTC's mission that is rarely discussed: the promotion of competition principles to policymakers outside of the antitrust community. While the Commission's competition advocacy program is rooted in fundamental antitrust concepts and the same types of empirical economic evidence that undergird enforcement, our advocacy promotes these concepts in a variety of arenas in which competition concerns are vital but may be overlooked.

Whether behind the scenes or publicly, we, often in cooperation with the Department of Justice Antitrust Division, are continually advising federal and state legislatures, other agencies, and courts about the likely effects of their actions on consumers and markets. This activity can

---

[1] The views expressed herein are my own and do not necessarily represent the views of the Federal Trade Commission or of any other individual Commissioner.

nip a restriction on competition "in the bud" before it can blossom into something harmful for consumers. My flower metaphor may be misleading, however, because once enacted, these restraints are far hardier than any blossom. More like weeds, government-imposed restrictions are among the most durable and effective restraints on competition. They can exist in the daylight, rather than in the shadows, and those who attempt to evade the restraints may receive official punishment.

Despite its relatively low profile, the FTC's advocacy program has actually been in existence in one form or another for quite some time. While one can argue that the FTC has been in the advocacy business since its beginnings ninety years ago, the modern advocacy program has its roots in the mid-1970s under former Chairman Lewis Engman, and it became more formal in the 1980s under Chairman Jim Miller. Since 1980, we have filed more than 750 comments with various agencies.[2]

A 1989 American Bar Association Report observed: "Because ill-advised governmental restraints can impose staggering costs on consumers, the potential benefits from an advocacy program exceed the Commission's entire budget."[3] Of course, the advocacy program does not

---

[2] For some history of the competition advocacy program and various views of the program see James Cooper, et al., *Theory and Practice of Competition Advocacy at the FTC* (forthcoming, ANTITRUST L. J.), *available at* http://www.ftc.gov/ftc/history/040910zywicki.pdf. For a positive evaluation of the program at its zenith, see Andrew J. Strenio, Jr., Today's Menu: FTC Main Courses of Action, Address at the Food Marketing Institute (Jun. 8, 1987) *at* 5-14.

[3] REPORT OF THE AMERICAN BAR ASSOCIATION, SECTION OF ANTITRUST LAW, SPECIAL COMMITTEE TO STUDY THE ROLE OF THE FEDERAL TRADE COMMISSION, *in* 65 ANTITRUST AND TRADE REGULATION REPORT S-23 (Apr. 6, 1989). Previous qualitative evaluations of the advocacy program included work by Arnold Celnicker, who surveyed the recipients of state-level advocacy filings, finding that the comments were of value to the decision-making process. Arnold C. Celnicker, *The Federal Trade Commission's Competition and Consumer Advocacy Program*, 33 ST. L. UNIV. L. J. 379, 379-405 (1989). The FTC staff updated that survey about a year later with similar results.

expend the FTC's whole budget -- far from it.  But it is wise to evaluate whether our advocacy efforts are benefitting consumers more than it costs them as taxpayers.

Unfortunately, I cannot provide precisely what economists might like to see.  We do not have data defining the likely magnitude of the effects on market outcomes if a policymaker follows our advice.  Moreover, we cannot be certain that pro-competition outcomes would not result if the FTC had not filed a comment.  Still, we can subjectively evaluate the FTC's work in this area, recognizing that if we prompt decision-makers to think harder about what they are trying to accomplish and whether it can be done in a way that is less restrictive of competition, we likely have provided some benefit.

Our recent advocacy filings generally have sought to achieve one of three objectives:  (1) facilitating entry, (2) eliminating perverse market incentives, and (3) making it easier for consumers to get useful information.

**I.  Opposing Unnecessary Barriers to Entry**

Much of our activity involves commenting on state and federal regulations or legislation that erect barriers to entry.  Often the rationale for legislation is the protection of consumers through restrictions on who may offer certain goods and services to consumers or (perhaps more honestly) the protection of traditional businesses by sheltering them from new forms of competition.  While firms generally profess a desire to keep government out of business, the instinct to seek protection from government is widespread.  As one commentator put it last week, "calls to restrict competition, through government regulations and import barriers, are understandable – and usually wrong."[4]  The biggest problem with cementing barriers into the law

[4] Robert J. Samuelson, *Competition's Anxious Victory*, THE WASHINGTON POST, Feb. 2, 2005, at A-23.

is that they are resistant to erosion by market activity.

When evaluating barriers to competition, the FTC favors a careful analytical approach that considers costs and benefits to consumers and relies on empirical evidence. We ask three basic questions:

First: What specific harm to consumers is the barrier designed to address?

The Commission looks for empirical evidence of consumer harm. Because states typically vary in the degree to which they regulate these activities, we often look for evidence of consumer harm occurring in states that allow the practice in question.

Second: Is the proposed restriction appropriately tailored to address that harm?

In endeavoring to answer that question, we look at whether, in addition to the activity the restriction attempts to prevent, it will curtail other pro-competitive activity.

Third: Does the consumer harm that the restriction seeks to prevent exceed the consumer loss from the restriction on competition?

Here, we help perform the cost-benefit analysis that all policymakers should perform, emphasizing that competition generally is more successful at protecting consumers than government regulation.

## A. The Unauthorized Practice of Law

One perennially active advocacy area for the FTC involves occupational regulation,[5] and a subset of that broad category is regulation of the professions. We have encountered restrictions on competition adopted by practitioners and their regulatory bodies that range from limits on advertising and commercial practices to expanded definitions of services that only professionals are permitted to provide. Economists are usually delighted to learn that one particular profession on which we have focused recently is the practice of law.

All states, having determined that competency and quality of service considerations justify limiting legal practice to trained professionals, regulate entry into the field. But many states also permit non-lawyers to compete with lawyers in performing certain services that do not require formal legal training. For example, forty-two states allow the lay provision of real estate settlement services, such as searching titles and issuing title reports, answering non-legal questions and witnessing signatures at closings, and disbursing funds.[6]

Last year, the FTC staff, together with the Antitrust Division, filed an amicus brief in the West Virginia Supreme Court, arguing that the court should reject a bar opinion that laypersons

---

[5] Over the years the FTC staff has filed dozens of comments on licensure regulations and codes of conduct for various professions and occupations.

[6] *See, e.g.*, Joyce Palomar, *The War Between Attorneys & Lay Conveyancers – Empirical Evidence Says "Cease Fire*," 31 CONN. L. REV. 423, 487-88 (1999) (noting that there are more states in which non-attorneys perform real estate transactions than in which attorneys perform them); Michael Braunstein, *Structural Change & Inter-Professional Competitive Advantage: An Example Drawn from Residential Real Estate Conveyancing*, 62 MO. L. REV. 241, 264-65 (1997) (reporting that in only eight states is it customary for an attorney to be involved in settlement).

performing real estate settlement services are engaged in the unauthorized practice of law.[7] The brief stressed that there is no evidence of consumer harm from lay settlements, which are common in a majority of states. The brief also asserted that such a ban would likely increase the price of both lay and attorney settlements for West Virginia consumers. Some of the empirical support for this claim derives from a study in Virginia, a state that permits lay settlement services. The study included a simple comparison based on survey evidence indicating that lay settlements (including title examinations) were on average about $175 less expensive than attorney settlements.

Evidence also suggests that, not only do lay settlement providers charge less than attorneys, but prohibiting competition from lay providers enables attorneys to charge more for settlement services. The record from an evidentiary hearing led the New Jersey Supreme Court to find that attorneys' real estate closing fees were significantly higher in northern New Jersey, where lawyers conducted almost all settlements, than in southern New Jersey, where lay settlements were common.[8] Thus, in West Virginia, we argued that absent countervailing benefits, broadening the scope of what constitutes the unauthorized practice of law, and thereby

---

[7] Brief Amici Curiae of the Federal Trade Commission and the United States of America, *McMahon v. Advanced Title Services Company of West Virginia*, Case No.: 31706 (Supreme Court of Appeals of the State of West Virginia) (filed May 25, 2004), *available at* http://www.ftc.gov/be/V040017.pdf.

[8] It was reported that the average cost of legal representation in northern New Jersey for a home buyer was $1,000 while the average cost of an attorney for the seller was $750. By comparison, buyers and sellers in southern New Jersey who chose legal representation spent, on average, $650 and $350, respectively, or $350 less for buyers and $400 less for sellers. *See In re Opinion No. 26 of the Comm. on Unauthorized Practice of Law*, 654 A.2d 1344, 1348-49 (N.J. 1995). Unless other factors are at play, the savings in southern New Jersey can be attributed to the constraint that the presence of competing non-lawyers places on attorney fees.

barring competition from non-attorneys, is likely to reduce consumer welfare.

The West Virginia court ultimately reversed the lower court's decision to uphold the bar opinion on the ground that there was an insufficient factual record to determine that the real estate services fall within the practice of law.[9] The court stated that such a public interest determination requires weighing considerations such as accountability, due care, and public safety. Although we lack firm estimates of the consumer savings resulting from preserving lay competition in real estate settlements, the evidence on costs, together with the mere fact that approximately 8 million consumers buy homes each year,[10] certainly suggests that these savings could be substantial. Since 2002, the FTC and the Division have filed similar comments in six other states.[11]

---

[9] *McMahon v. Advanced Title Services Company of West Virginia*, Case No.: 31706 (Supreme Court of Appeals of the State of West Virginia, Dec. 3, 2004).

[10] *See, e.g.*, FANNIE MAE (DAVID W. BERSON & ORAWIN VELZ), ECONOMIC & MORTGAGE MARKET DEVELOPMENTS (Jan. 18, 2005) (Housing Market Summary: Historical and Forecast), *available at* http://www.fanniemae.com/media/pdf/berson/monthly/2005/011205.pdf.

[11] *See* Letter from the Department of Justice and the FTC to the Kansas Bar Ass'n (Feb. 4, 2005), *available at* http://www.ftc.gov/be/v050002.pdf; Letter from the Department of Justice and the FTC to the Massachusetts Bar Ass'n (Dec. 16, 2004), *available at* http://www.ftc.gov/os/2004/12/041216massuplltr.pdf; Letter from the Department of Justice and the FTC to Indiana State Bar Ass'n (Oct. 1, 2003), *available at* http://www.ftc.gov/os/2003/10/uplindiana.htm; Letter from the Department of Justice and the FTC to the State Bar of Georgia (Mar. 20, 2003), *available at* http://www.ftc.gov/be/v030007.htm; Letter from the Department of Justice to Speaker of the Rhode Island House of Representatives and to the President of the Rhode Island Senate, et al. (Mar. 28, 2003), *available at* http://www.ftc.gov/be/V020006.htm; Letter from the Department of Justice and the FTC to Speaker of the Rhode Island House of Representatives, *et al*. (Mar. 29, 2002); Letter from the Department of Justice and the FTC to President of the North Carolina State Bar (Jul. 11, 2002); *available at* http://www.ftc.gov/os/2002/07/non-attorneyinvolvement.pdf; Letter from the Department of Justice and the FTC to the North Carolina State Bar (Dec. 14, 2001), *available at* http://www.ftc.gov/be/V020006.htm.

**B. Entry into Futures Trading Services (Eurex entry)**

Another example of a public entry barrier that could have stifled innovative services and led to higher prices was an attempt by incumbents to block the entry of a new futures trading exchange. In January 2004, the FTC filed comments with the Commodities Futures Trading Commission ("CFTC") on an application by Eurex, a German-Swiss exchange, to set up an all-electronic operation in the United States to compete with the Chicago Board of Trade and the Chicago Mercantile Exchange. Not surprisingly, the incumbent exchanges opposed the application, arguing that the new entrant could engage in predatory pricing.

Although we did not examine or endorse this particular applicant's submission, we argued that new entry would benefit consumers of futures trading services. In addition to reminding the CFTC of the benefits of competition and new entry generally, the comment pointed to economic studies showing that the presence of multiple exchanges increases competitive pressure and leads to significantly lower bid-ask spreads, thereby likely enhancing consumer welfare. Moreover, entrants with new business models might have a significant impact on prices and services, and electronic trading systems may lower the cost of executing trades.

The CFTC ruled in the applicant's favor. CFTC Commissioner Lukken indicated that he had placed great weight on the FTC's analysis in supporting the decision to designate another U.S. futures exchange.[12] Subsequent reports from the business press describe how the incumbent exchanges lowered their trading fees substantially in reaction to the new competitive threat in the

---

[12] *See* CFTC Release, *at* http://www.cftc.gov/opa/press04/opausferemarks.htm.

market for U.S. Treasury futures contracts.[13] Although the entrant has not yet garnered a significant market share given the competitive reaction of the incumbent exchanges, consumers have benefitted handsomely as trading volume increased, and the exchanges offered customers "bargain prices" for Treasury futures trades.

### C. Barriers to E-Commerce: Wine

In July 2003, the FTC staff issued a report on state restrictions on the direct shipment of wine from out-of-state vendors to in-state consumers.[14] Direct shipment is a growing and potentially important alternative to the traditional tightly-regulated, three-tiered system of producers, licensed wholesalers, and retailers. Many states, however, ban or severely restrict the direct shipment of wine to consumers, thereby creating an entry barrier for numerous, particularly small, wineries seeking to sell their products online.

The staff report, reflecting the unique interest and sensitivity of the Commission both to competition and consumer protection concerns, concluded that states could significantly enhance consumer welfare by allowing the direct shipment of wine as a purchase option. The report supported this conclusion with a study conducted by FTC economists, which showed that many wines available to consumers online are not available in local retail outlets.[15] Specifically, the

---

[13] *Chicago Takes on Europe*, BUS. WEEK., Jul. 5, 2004, at 76-77.

[14] POSSIBLE ANTICOMPETITIVE BARRIERS TO E-COMMERCE: WINE, REPORT OF THE STAFF OF THE FTC (Jul. 2003), *available at* http://www.ftc.gov/os/2003/07/winereport2.pdf.

[15] The study appears as an appendix to the FTC staff report. It was published separately as an FTC Bureau of Economics Working Paper, Alan E. Wiseman and Jerry Ellig, How Many Bottles Make a Case Against Prohibition? (Mar. 2003) ( FTC Bureau of Economics Working Paper No. 258), and later published as Alan E. Wiseman and Jerry Ellig, *Marketing and Nonmarket Barriers to Internet Wine Sales: The Case of Virginia*, 6:2 Business and Politics 5

study of wine retailing in McLean, Virginia found that 15% of a sample of popular wines available online were not available in retail locations in or close to McLean. In addition, this small-sample study also found that consumers could save money by purchasing more expensive wines online. Assuming the least expensive shipping method is used, the study found that consumers could save an average of 8-13% on wines costing at least $20 per bottle, and an average of 20-21% on wines costing at least $40 per bottle.

The report also examined concerns about the direct shipment of wine to consumers, given that underage drinking is a serious health and safety issue.[16] The report concluded, however, that there is no systematic evidence of problems of Internet-related shipments to minors. Moreover, the report noted that safeguards, such as checking identification at delivery, may address these concerns, and that, in fact, some states have successfully followed this less restrictive approach.

The Supreme Court currently is considering whether state prohibitions on the direct shipment of wine from out-of-state sellers but not in-state sellers violate the dormant Commerce Clause of the Constitution in light of Section 2 of the 21st Amendment.[17] The parties seeking removal of these restrictions, including two Nobel Prize winners and other economists on behalf of the AEI-Brookings Joint Center for Regulatory Studies, have relied on the staff report to

---

(2004), *available at* www.bepress.com/bap/vol6/iss2/art4. The authors explicitly note that a full welfare analysis of the removal of restrictions would require additional data.

16 If the restrictions on direct sale of wine to consumers are motivated by concerns about underage drinking, it is curious that many of the states direct their restrictions only at out-of-state vendors, while allowing direct intrastate shipments from in-state vendors.

17 *Swedenburg v. Kelly*, 358 F.3d 223 (2d Cir.), *cert. granted*, 124 S. Ct. 2391 (2004).

support their arguments.[18]

### D. Gasoline Retailing Restraints

We also have attacked restrictions on gasoline retailing that tend to protect small, potentially inefficient, producers at a cost to consumers.[19] Some filings have addressed retail divorcement laws, which require integrated refiners to divest their downstream retailing operations.[20] As part of their empirical basis, these comments rely on a study by a member of the FTC's Bureau of Economics, which compared prices in states that require divorcement with those that do not.[21] After controlling for other factors that affect gasoline pricing in the states, the study found that prices were about 2.6 cents per gallon higher in those states that require

---

[18] Brief of the National Alcohol Beverage Control Association and the National Conference of States Liquor Administrators as Amici Curiae in Support of Petitioners, 2004 WL 389419 (Appellate Petition, Motion and Filing) (Feb. 26, 2004); Brief of Amicus Curiae Wine Institute in Support of Respondents, 2004 WL 2190366 (Appellate Brief) (Sep. 23, 2004).

[19] *See e.g.*, Comments of the Staff of the FTC to Kansas State Senator Les Donovan (Mar. 12, 2004), *available at* http://www.ftc.gov/be/v040009.pdf; Comments of the Staff of the FTC to Eliot Spitzer, Attorney General of New York (Jul. 24, 2003), *available at* http://www.ftc.gov/be/nymfmpa.pdf; Comments of the Staff of the FTC to Roy Cooper, Attorney General of North Carolina (May 19, 2003), *available at* http://www.ftc.gov/os/2003/05/ncclattorneygeneralcooper.pdf; Comments of the Staff of the FTC to Michigan Representative Gene DeRossett (Jun. 17, 2004), *available at* http://www.ftc.gov/os/2004/06/040618staffcommentsmichiganpetrol.pdf. Governor Pataki of New York vetoed one of the New York bills in 2003. The North Carolina comments also had an impact.

[20] *Competition and the Effects of Price Controls in Hawaii's Gasoline Market: Before the State of Hawaii, J. Hearing House Comm. on Energy and Environmental Protection et al.*, (Jan. 28, 2003) (testimony of Jerry Ellig, Deputy Director, FTC Office of Policy Planning), *available at* http://www.ftc.gov/be/v030005.htm; Comments of the Staff of the FTC to Gov. George E. Pataki of New York (Aug. 8, 2002), *available at* http://www.ftc.gov/be/v020019.pdf.

[21] Michael G. Vita, *Regulatory Restrictions on Vertical Integration and Control: The Competitive Impact of Gasoline Divorcement Policies*, 18 J. REG. ECON. 217-33 (2000).

divorcement.

While we cannot claim this result is precise, it does provide a rough measure of the magnitude of the potential effect of such restrictions. For example, in New York – a state that considered a restriction on refiner control of retailing – annual sales of gasoline at retail in 2002 totaled roughly 5.7 billion gallons. If consumers could save 2.6 cents on each gallon, then New York consumers would reap $148 million dollars annually from avoiding divorcement restrictions or other similarly costly restraints on vertical control of gasoline retailing.

The most recent FTC staff filings have addressed sales-below-cost laws, which prohibit gasoline sales priced below a specified level of costs. Although we do not have a study that reliably estimates the specific costs to consumers of sales-below-cost laws, we have argued that such laws discourage competitive pricing, by subjecting price-cutters to liability even when there is no likelihood of harm to competition. Those restraints have the potential to hamper competition and increase prices in a manner similar to that associated with divorcement.

## II. Incentive Structures and Effects

Preserving incentive structures that foster competition helps ensure that the market serves consumer interests, rather than producer interests. As in the case of entry barriers, the outcomes may sometimes seem harsh on incumbent firms; as stated so aptly in an opinion piece last week, however, "living with competition is hard. Living without it would be harder."[22]

### Any Willing Provider and Freedom of Choice Legislation

During the late 1980s and early 1990s, the FTC frequently commented on state

[22] *See* Samuelson, *supra* note 4.

legislation containing "freedom of choice" and "any willing provider" provisions for health care providers. More recently, in April 2004, staff filed a comment on bills in the Rhode Island state legislature containing such provisions for pharmaceutical sales.[23] The bills required health plans to allow consumers to choose freely among all sources of pharmaceutical services and to include in their networks any pharmacy willing to accept the contractual terms offered to other pharmacies. In other words, these provisions prohibited health plans from selectively contracting with pharmacies for inclusion in their networks.

Our comment explained that, while the bills purported to promote competition and greater choice for consumers, they were more likely to protect competitors instead of competition; *undermine* consumer choice; and lead to higher-cost pharmaceutical services. The comment cited economic studies showing that selective contracting intensifies competition – in the form of more aggressive bidding – among providers for inclusion in networks that offer them the prospect of much greater sales opportunities. It also observed that restricted provider panels may reduce administrative costs for health plans and lower unit costs for pharmacies by spreading fixed costs over higher sales volumes. Competition among health plans would cause these savings to be shared with consumers in the form of lower insurance premiums, lower out-of-pocket costs, or improved services.

Our comments cited an FTC economist's study, which found that states with highly restrictive any willing provider/freedom of choice laws for health care providers spent about two

[23] Comments of the Staff of the FTC to Patrick C. Lynch, Attorney General and Juan M. Pichardo, Deputy Senate Majority Leader, State of Rhode Island and Providence Plantations (Apr. 8, 2004), *available at* http://www.ftc.gov/os/2004/04/ribills.pdf.

percent more on health care than states without such policies, other things being equal.[24] Extrapolating that result to spending on pharmaceutical services in Rhode Island, enactment of the proposed legislation might have cost consumers on the order of $14 million annually.[25] Fortunately for consumers, the legislature did not pass the bills.

## III. Information Regulation

Just as consumers are well-served by markets in which efficient entry is not deterred, they generally also are well-served by maximizing the amount of truthful information that markets can provide. Regulating information flow is a tricky proposition, however, and more information is not *always* better.

In many instances, requiring additional truthful information is valuable, especially when property rights to particular information are weak. When property rights are weak, private markets will often under-produce some information, such as metrics for making comparisons across sellers, like the APR for loan comparisons. In those instances, any firm privately providing information would be unable to reap rewards disseminating it, and government may play a role in providing, or mandating that sellers provide, such information. Indeed, the FTC enforces several laws and rules that provide such metrics. Examples include our R-value rule for insulation efficiency and various uniform lending disclosures.

---

[24] Michael G. Vita, *Regulatory Restrictions on Selective Contracting: An Empirical Analysis of "Any-Willing-Provider" Regulations*, 20 J. HEALTH ECON. 955, 955-66 (2001).

[25] In 1998, CMS listed Rhode Island prescription drug expenditures at about $400 million with annual growth of about 12.4%. *See* CENTER FOR MEDICARE AND MEDICAID SERVICES, 1998 STATE ESTIMATES – ALL PAYERS – PRESCRIPTION DRUGS, *available at* http://www.cms.hss.gov/statistics/nhe/state-estimates-provider/us70.asp. Based on this information, by 2004, Rhode Island expenditures on prescription drugs would total approximately $700 million. Two percent of that total is $14 million.

These are examples of information standards that provide benefits for consumers that exceed the costs of developing and implementing the standard. Knowing whether any particular information mandate or standard is a good idea, however, requires an analysis of the outcomes that would occur absent mandated provision of the information and an estimate of the costs of the mandate.

There are times when providing more information is not the better policy. First, the collection and dissemination of information can be expensive, and the benefits from providing additional information will not always outweigh its costs. Second, more information, even if truthful, sometimes misleads or overwhelms consumers and will not result in greater consumer comprehension. Finally, additional information shared among sellers may provide an opportunity for tacit collusion.

### A. Food Health Claims Information Regulation

In the food and nutrition area, we have pushed to allow manufacturers to provide more accessible and useable information to consumers. While we oppose unnecessary mandates, we want to ensure that the FTC and other government agencies, in the name of protecting consumers, do not block producers' incentives or ability to provide useful information to consumers and to compete on important nutritional attributes of their products.[26]

Our participation in the food health claims area stretches back to the proposed food rule in the 1970s and continues through the more recent health claims period that began with

[26] No one should misread my comments to say that I think markets solve all information problems. Clearly they will not.

Kellogg's 1984 efforts to advertise the potential health benefits of fiber in cereals.[27] Recently, we have actively worked with FDA on food regulation issues involving health claims and nutritional information. This is an important area in which regulators should strive to retain producer incentives to improve their products on health dimensions and be mindful that those incentives only remain strong if producers can tell consumers about the benefits of any product improvements.[28] Making lower-fat, reduced-calorie versions of good-tasting foods is expensive and risky. If producers cannot tout their advances in these areas, they will have little incentive to make the investments and take the risks.

The government also needs to be prepared to alter the information it requires as conditions change. For example, scientific knowledge about the effects of various types of fats has evolved over time. Over the past several years, it has become clear that trans fats were as detrimental to health as saturated fats. Yet, trans fats were not included as elements on the nutrition label, and firms were unsure what they could say about the presence of these fats. In 2003, we filed a comment supporting the FDA's Trans Fat Final Rule, which allows additional

---

[27] Much of the history of FTC involvement in food claims regulation is recounted in Luke Froeb et al., *Economics Research at the FTC: Information, Retrospectives, and Retailing*, 25 REV. OF INDUS. ORG. 353, 355-60 (2004). Such research has served as the basis for several advocacy comments over the past 15 years.

[28] For example, current FDA regulations require that foods have a 25% reduction of fat or calories before they can be labeled as a light or reduced product. For certain foods, however, this level reduction would make the food unpalatable. Depending on the product, 10 or 20% reductions may still be a substantial improvements in the product's healthfulness, but manufacturers lack the incentive to make such changes in they cannot inform consumers about them. Comments of the FTC Staff Before the FDA In the Matter of Obesity Working Group; (Dec. 12, 2003), *available at* http://www.ftc.gov/be/v040003text.pdf.

truthful information about trans fats in food labeling.[29] The comment also encouraged the FDA to approve specific health claims explaining the likely links between trans fats and heart disease. We followed these with additional comments on the form of the trans fat disclosure and recommendations that the FDA conduct consumer research to determine which disclosure format is most effective. FDA is still considering how to implement these changes, but has been receptive to our suggestions. Those who have worked in this area certainly think we have had a major impact in moving toward a more flexible standard, but that effect is one that would be very hard to quantify.[30]

**B. Mortgage broker fee disclosure**

The FTC has had a longstanding interest in mortgage markets, given our enforcement authority for a number of statutes related to lending.[31] In 2002, FTC staff filed a comment with the Department of Housing and Urban Development (HUD) on proposed changes to the Real Estate Settlement Procedures Act (RESPA). This comment raised concerns that a proposal to require mortgage brokers to disclose their fees from lenders (called a yield spread premium) might confuse consumers about the costs of mortgages from brokers vis-a-vis the costs of

---

[29] Comments of the FTC Staff before the FDA In the Matter of Food Labeling: Trans Fatty Acids in Nutrition Labeling, (Oct. 14, 2003), *available at* http://www.ftc.gov/os/2003/10/fdafattyacidscomment.pd; Comments of the FTC Staff before the FDA In the Matter of Food Labeling: Trans Fatty Acids in Nutrition Labeling (Apr. 15, 2004), *available at* http://www.ftc.gov/os/2004/04/040416foodlabeling.pdf.

[30] Even those who oppose the policy of a flexible health claim standard seem to think the FTC has had an impact on the debate. *See, e.g.,* MARION NESTLE, FOOD POLITICS 288 (2000).

[31] For example, the Commission enforces the Truth in Lending Act, 15 U.S.C. §§ 1601-1667f (as amended); the Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681(u) (as amended); and the FTC Credit Practices Rule, 16 C.F.R. §§ 444.1- 444.5.

mortgages directly from lenders.[32] Following up on this concern, the FTC staff subsequently released consumer research on the effect on consumers of disclosures of mortgage brokers' yield spread premiums.[33] The research revealed that the disclosure of the yield spread premium (which is only a small part of the total cost of a loan) distracted consumers from the bottom-line cost of the loan. As a result, consumers chose the higher cost loan more frequently when the broker fees were disclosed. Not only would the disclosure have fostered consumer confusion, it also would have distorted competition among different types of lenders. The confusing disclosure worked to the advantage of direct lenders, who, unlike brokers, did not have to disclose the implicit fees included in their loans.

The effectiveness and value of disclosures depends on whether the information disclosed is important to consumer choice and whether it distracts consumers from other, more important information. How much might this disclosure have cost consumers? It is hard to know for sure, but the effect on error rates was quite large. Without a broker disclosure, 90% of study participants chose the right loan, but only about 60-70% got it right when the broker disclosure was prominently displayed. FTC staff conducted a number of different comparisons, all of which tended to show large effects.

---

[32] Comments of the FTC Staff Before The Department of Housing and Urban Development In the Matter of Request for Comment on Proposed Amendments to the Regulations Implementing the Real Estate Settlement Procedures Act (Oct. 28, 2002), *available at* http://www.ftc.gov/be/v030001.pdf.

[33] JAMES M. LACKO and JANIS K. PAPPALARDO, THE EFFECTS OF MORTGAGE BROKER COMPENSATION DISCLOSURES ON CONSUMERS AND COMPETITION: A CONTROLLED EXPERIMENT, FTC BUREAU OF ECONOMICS STAFF REPORT (Feb. 2004).

**C. Pharmacy Benefit Managers**

Another recent advocacy analyzed the effect of an information mandate on the market for pharmacy benefit manager (PBM) services.[34] In an effort to enhance drug cost transparency, California proposed a law to require PBMs to disclose to individual consumers and insurance providers information about the PBM's costs, rebate programs, and drug formularies. Our comment argued that, if passed, the bill might have significant unintended consequences by making all drug substitutions, including those to lower-cost generic drugs, more difficult. It also noted that the disclosure of cost or rebate information has the potential to facilitate tacit collusion among drug manufacturers as they gain information about discounts granted by rivals. This might alter the bargaining posture of the PBMs relative to the drug manufacturers and reduce the savings available to the PBMs. If the bills did, indeed, inadvertently lead to higher drug prices, those higher prices would translate into higher insurance prices for consumers.

In vetoing the bill on September 30, 2004, Governor Schwarzenegger cited the FTC's arguments about the potential unintended effects of the bill as a key reason.[35] While a precise measure of the impact of our advocacy comment is not available, just to get some order of magnitude, note that the PBM market in California is likely in the $10-$18 billion range. Even a small beneficial effect in such a large market would be substantial.

---

[34] Comments of the Staff of the FTC to Representative Greg Aghazarian (Sept. 7, 2004), *available at* http://www.ftc.gov/be/V040027.pdf.

[35] Letter of Governor Arnold Schwarzenegger to Members of the California State Assembly Returning Assembly Bill 1960 Without Signature (Sept. 29, 2004), *available at* http://www.governor.ca.gov/govsite/pdf/vetoes/AB_1960_veto.pdf.

### D. Direct-to-Consumer Drug Advertising

Another instance of an FTC advocacy on mandated information disclosure involved the provision of a detailed "brief summary" of information available about a prescription drug. FTC staff filed a comment with the FDA regarding direct-to-consumer (DTC) advertising of prescription drugs.[36] The comment analyzed the economic effects of such advertising and suggested changes to the FDA's regulatory scheme to communicate information to consumers in a more accessible way. Thereafter, the FDA issued several draft guidance documents designed to improve the information that consumers and health care practitioners receive in advertising about prescription drugs and certain medical devices. The FDA chose to permit advertisers to convey more limited and focused "brief summary" information in DTC print advertisements for prescription drugs and to apply less burdensome regulatory standards to DTC broadcast ads for restricted medical devices. The FDA's decisions conform to the FTC staff's recommendations to allow advertisers to communicate information to consumers in a more accessible way.

## IV. Applying the cost/benefit test to the advocacy program

The recent advocacy program has had some fairly clear successes, and a few of those successes can be roughly quantified. If we are correct about the effects, it would not be hard to argue that a qualitative assessment could support the view that the benefits of the advocacy program alone could justify the FTC budget. I have attempted to give you some idea of the

---

[36] Comments of the FTC Staff Before the FDA In the Matter of Request for Comments on Consumer-Directed Promotion (Dec. 1, 2003), *available at* http://www.ftc.gov/be/v040002text.pdf; Comments of the FTC Staff Before the FDA In the Matter of Request for Comments on Agency Draft Guidance Documents Regarding Consumer-Directed Promotion (May 10, 2004), *available at* http://www.ftc.gov/os/2004/05/040512dtcdrugscomment.pdf.

extent of the benefits of this program, but thus far I have not provided you the costs. Our advocacy program currently uses less than one percent of the FTC's budget.[37] That is less than $2 million. How can it be so small? Many of our comments build on the experience and information we have obtained in the course of our enforcement and other policy development work, such as workshops. Also, we have been doing this for over 25 years, so we have some experience in making the program work. We focus on areas where we can make multiple comments; we avoid areas that are too contentious for us to reach consensus within the Agency; and we choose our battles carefully to focus on areas in which we have expertise and good empirical evidence to undergird our position. And, finally, we share this important workload with the Antitrust Division.

## V. Conclusion

There are always those who oppose competition and view it as an inappropriate means of "organizing" the production and distribution of goods and services. Indeed, on almost every issue on which we comment, there are those who find our advocacy positions vexing. More dangerous are those who profess to favor competition but want to chip away at it when it does not produce a particular result.[38] While it would be great if we could, through advocacy, convert

---

[37] The total time on the program is on the order of 5 to 7 work years spread over 10 to 12 individuals in various components of the Commission, such as the Office of Policy Planning, the Bureau of Economics and the Office of the General Counsel, with help from other staff with expertise in specific topics. At the peak of the program, in the mid-1980s, the cost might have been closer to 4% of FTC resources. See Andrew J. Strenio, Jr., Press Release, FTC's Advocacy Program is Effective and Efficient (Jun. 8, 1987).

[38] *E.g.*, Allocution de Monsieur Jacques Chirac, President of France (Jan. 4, 2005), *available at* http://www.elysee.fr/magazine/actualite/sommaire.php?doc=/documents/discours/2005/05VXFV.html. Presdident Chirac declares: "[L]et us favor competition. Not wild competition, which

those people, we must, regardless of our convert success, continue to stand up for the market. At a minimum, we should continue trying to convince the ultimate decision-makers to consider whether the cost of a proposed restriction outweighs its benefit. Over the years, we have been successful enough in this endeavor to demonstrate that the program is well worth the effort. The FTC's advocacy program will continue to stand up for consumer interests and market-based competition whenever they are threatened by ill-advised government proposals.

Finally, I would like to appeal to you, the economists, to engage in empirically-based research, particularly research that helps us and other policymakers estimate the benefits and costs of government actions at the state and federal level. Thank you.

---

destabilizes whole fields and endangers economic sectors, but rather regulated competition, to give more purchasing and economic power to consumers." *Id* (translation).