

PREPARED STATEMENT OF THE
FEDERAL TRADE COMMISSION

BEFORE THE
COMMITTEE ON COMMERCE, SCIENCE, AND
TRANSPORTATION

UNITED STATES SENATE

APRIL 10, 2007

I. Introduction

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

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

The FTC has pursued a vigorous and effective law enforcement program in a dynamic marketplace that is increasingly global and characterized by changing technologies. Through the efforts of a dedicated, professional staff, the FTC continues to handle a growing workload. Our testimony today summarizes some of the major activities of the past year and describes some of the planned initiatives for FY2008.

To meet the challenges in our Consumer Protection and Maintaining Competition efforts in FY2008, the FTC requests \$240,239,000 and 1,084 FTE.

¹ 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.

² 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.

During FY2008, the FTC will address significant law enforcement and policy issues throughout the U.S. economy and abroad, devoting major portions of its resources to those areas in which the agency can provide the greatest benefits to consumers. This testimony highlights program priorities in the FTC's two missions. The focus of the Consumer Protection mission will be on broad efforts to fight unfair and deceptive conduct involving data security, identity theft, Do Not Call enforcement, financial services, advertising, media violence ratings, childhood obesity, and new technology-driven threats such as spam and spyware. The focus of the Competition mission will be on merger and nonmerger enforcement, particularly in the health care, energy, and high technology industries. The testimony concludes with a summary of the agency's FY2008 appropriation request.

II. Consumer Protection

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

The FTC continues to build on this successful record. This testimony highlights key issues and initiatives for the agency's consumer protection mission in FY2008, as well as the methods the FTC will use to address them.

A. Consumer Privacy

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

1. Data Security and Identity Theft

In 1998, Congress passed the Identity Theft Assumption and Deterrence Act (“the Identity Theft Act”), which assigned the FTC a unique role in combating identity theft and coordinating government efforts.³ This role includes taking consumer complaints; implementing the Identity Theft Data Clearinghouse, a centralized database of victim complaints used by 1,300 law enforcement agencies; assisting victims and consumers by providing information and education; and educating businesses on sound security practices. The FTC continues to focus on combating identity theft primarily through law enforcement, participation in the Presidential Identity Theft Task Force, workshops, and education to assist the millions of Americans harmed by identity theft.

a. Law Enforcement

While the FTC, a civil enforcement agency, cannot enforce criminal identity theft laws, it can take law enforcement action against businesses that fail to implement reasonable safeguards to protect sensitive consumer information from identity thieves. Over the past few years, the FTC has brought 14 enforcement actions against businesses, including BJ's Wholesale Club, ChoicePoint, CardSystems Solutions, and DSW, for their failure to provide reasonable data security. These actions include cases against companies that allegedly threw files containing

³ Pub. L. No. 105-318, 112 Stat. 3007 (1998) (codified at 18 U.S.C. ' 1028).

consumer home loan applications into an unsecured dumpster; stored sensitive information in multiple files when there was no longer a business need to keep the information; failed to implement simple, low-cost, and readily available defenses to well-known Web-based hacker attacks; stored sensitive consumer information in unencrypted files that could be easily accessed using commonly known user IDs and passwords; and failed to use readily available security measures to prevent unauthorized wireless connections to their networks. The Commission continues to monitor the marketplace to encourage companies to implement and maintain reasonable safeguards to protect sensitive consumer information. In appropriate cases, the Commission will bring enforcement action.

b. Identity Theft Task Force

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

On September 19, 2006, the Task Force issued a series of interim recommendations. These recommendations include: development of government-wide guidance addressing whether and how to provide notice to individuals in the event of a government agency data breach; the development of a universal police report that identity theft victims can use to present their case to creditors and credit reporting agencies; and an accelerated review of government's

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

use of Social Security numbers.⁵ Following issuance of the interim recommendations, the Task Force solicited public comments to supplement its research and analysis, and to identify areas where additional recommendations may be warranted.⁶ The Task Force is in the process of reviewing the comments and will release a final strategic plan and recommendations this week.

c. Education

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

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

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

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

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

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

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

d. Workshops

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

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

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

¹⁰ See materials for the conferences *Protecting Consumers in the Next Tech-Ade* (Nov. 6-8, 2006), available at <http://www.ftc.gov/techade>; *Information Flows, The Costs and Benefits to Consumers and Businesses of the Collection and Use of Consumer Information* (June 18, 2003), available at <http://www.ftc.gov/bcp/workshops/infoflows/030618agenda.html>; *The eInformation Marketplace: Merging and Exchanging Consumer Data* (Mar. 13, 2001), available at <http://www.ftc.gov/bcp/workshops/infomktplace/index.html>; *Technologies for Protecting Personal Information Workshop 1: The Consumer Experience* (May 13, 2003), available at <http://www.ftc.gov/bcp/workshops/technology/agenda.htm>; *FTC Spyware Workshop* (Apr. 19, 2004), available at <http://www.ftc.gov/bcp/workshops/spyware>; *Radio Frequency Identification: Applications and Implications for Consumers* (June 21, 2004), available at <http://ftc.gov/bcp/workshops/rfid/index.htm>.

2. Pretexting

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

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

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

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

B. Technology

Although technology can play a key role in combating identity theft and improving consumers' lives, it also can create new consumer protection challenges. The Commission has worked aggressively to protect consumers from technological threats such as spyware and spam. In addition, the agency has focused on identifying new issues related to technology in order to better protect consumers in the next decade.

1. Spyware

The Commission has brought eleven spyware enforcement actions in the past 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.¹³ According to the FTC's complaint, DirectRevenue, directly and

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

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

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

2. Spam

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

¹⁴ In FY 2006, the FTC brought eight new law enforcement actions targeting deceptive and fraudulent spam email. *FTC v. Pacific Herbal Sciences, Inc., et al.*, No. CV-05-7242 (C.D. Cal. filed Oct. 6, 2005) (alleging false header information, deceptive subject lines, inconspicuous opt-out mechanism, non-functioning opt-out mechanism, inconspicuous solicitation, and omitted postal address); *FTC v. Zachary Kinion*, No. 05C-6737 (N.D. Ill. filed Nov. 29, 2005) (alleging false header information, deceptive subject lines, inconspicuous opt-out mechanism, non-functioning opt-out mechanism, and omitted postal address); *FTC v. Matthew Olson*, No. C05-1979 (W.D. Wash. filed Nov. 29, 2005) (alleging false header information, deceptive subject lines, inconspicuous opt-out mechanism, non-functioning opt-out mechanism, and omitted postal address); *FTC v. Brian McMullen*, No. 05C-6911 (N.D. Ill. filed Dec. 8, 2005) (alleging false header information, deceptive subject lines, inconspicuous opt-out mechanism,

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

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*.¹⁵ The FTC heard from more than 100 of the best and brightest people in the tech world about new technologies on the horizon and their potential effect on consumers.

non-functioning opt-out mechanism, and omitted postal address); *FTC v. William Dugger, et al.*, No. CV-06-0078 (D. Ariz. filed Jan. 9, 2006) (alleging false header information, relay of messages through computers without authorization, and failure to include adult-content label); *United States v. Jumpstart Technologies, LLC, et al.*, No. C-06-2079 (N.D. Cal. filed Mar. 21, 2006) (alleging false header information, deceptive subject lines, inconspicuous opt-out mechanism, failure to honor opt-out requests, and inconspicuous solicitation); *United States v. Kodak Imaging Network, Inc.*, No. 06-3117 (N.D. Cal. filed May 10, 2006) (alleging inconspicuous opt-out mechanism, non-functioning opt-out mechanism, and omitted postal address); and *United States v. Ice.com*, No. 8:06-CV-580 (N.D.N.Y. filed May 11, 2006) (alleging failure to honor opt-out requests).

¹⁵ 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>.

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

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

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

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

4. Civil Penalties

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

C. Health

Of course not all fraud is technology-related. Health fraud, for example, can still be found in the offline world as in the online world. Too often, consumers fall prey to fraudulent health marketing because they are desperate for help. Fifty million Americans suffer from a

chronic pain condition¹⁶ and have found no effective cure or treatment. Seventy million Americans are trying to lose weight.¹⁷ The FTC continues to take action against companies that take advantage of these consumers.

From April 2006 through February 2007, the FTC initiated or resolved 13 law enforcement actions involving 25 products making allegedly deceptive health claims.¹⁸ 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

¹⁶ 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.nmra.org/resources/Home_Health/Nurses_Tool_Kit_2006.pdf.

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

¹⁸ E.g., *FTC v. Window Rock Enters., Inc.*, No. CV04-8190 (JTLx) (C.D. Calif. filed Jan. 4, 2007) (stipulated final orders) (Cortislum), 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>.

and other assets collectively worth at least \$25 million and agreed to limit their future advertising claims.¹⁹

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.²⁰ The goal was to encourage industry to respond to the public concerns surrounding food advertising and marketing by taking strong action to modify their products, their marketing techniques, and their messages. The Commission's April 2006 report on the workshop pointed out that all segments of society – parents, schools, government, health care professionals, food companies, and the media – need to work to improve our children's health. The report urged industry to consider a wide range of options as to how self-regulation could assist in combating childhood obesity.²¹

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.²² And just a few months ago, the Children's Advertising Review Unit, CARU, which is administered by the Council of Better Business Bureaus, announced a new self-regulatory advertising initiative designed to use advertising to

¹⁹ See FTC News Release, *Federal Trade Commission Reaches A 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>.

²⁰ 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>.

²¹ *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>.

²² 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.

help promote healthy dietary choices and healthy lifestyles among American children.²³ Eleven leading food manufacturers – including McDonalds, The Hershey Company, Kraft Foods, and Cadbury Schweppes – committed to devoting at least 50% of their advertising directed to children under twelve to products that represent healthy dietary choices or that prominently include healthy lifestyle messages that encourage physical activity or good nutrition. They also committed to reducing their use of third-party licensed characters and to incorporating healthy lifestyle messages into their interactive games.

D. Financial Practices

As with health issues, financial issues impact all consumers – whether they are purchasing a home, trying to establish credit or improve their credit rating, or managing rising debt. Thus, protecting consumers in the financial services marketplace is a critical part of the FTC’s consumer protection mission. This year, the Commission will focus on the “ABCs” of financial practices: Alternative mortgages, Bad debt collection, and Credit-related deception.

1. Alternative Mortgages

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

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

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

2. Bad Debt Collection

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

The FTC is tackling the problem of unlawful debt collection practices in two ways. First, the Commission engages in aggressive law enforcement. In January, for example, the Commission filed an action to stop a debt collector’s allegedly repeated, egregious violations of the Fair Debt Collection Practices Act.²⁵ Second, this fall, the FTC will hold a workshop to take

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

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

stock of the debt collection industry. The Fair Debt Collection Practices Act was enacted 30 years ago. Given the rise in consumer debt levels, as well as consumer complaints, it is time to take another look at the industry. The Commission will examine changes in the industry and the related consumer protection issues, including whether the law has kept pace with developments.

3. Credit Deception

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

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

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

E. Do Not Call

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

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

F. Retail Practices

The FTC has been examining retail practices in several areas. In January 2007, the FTC hosted a workshop analyzing the marketing of goods and services through offers with negative option features – *i.e.*, offers where sellers interpret a consumer's failure to take an affirmative action to reject goods or services, or to cancel a sales agreement, as acceptance of the offers.²⁷ On April 27, 2007, the FTC will host a public workshop in San Francisco, California, to discuss

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

the issues surrounding the use of mail-in rebates by manufacturers and retailers.²⁸ One goal of the workshop will be to explore “best practices” in the offering and fulfillment of rebates.

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

G. Media Violence

The Commission has continued its efforts to monitor the marketing of violent entertainment to children and to encourage industry self-regulation. Since 1999, the Commission has issued five reports on the marketing of violent entertainment products. In April 2007, the

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

²⁹ 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>.

Commission will issue its sixth report on the entertainment industries' self-regulatory programs. In addition to updating the current state of industry practices, the report will include the results of a nationwide telephone survey of parents and children regarding their familiarity, use, and perceptions of the video game rating system. The report will also include the results of another nationwide undercover mystery shop of movie, game, and music retailers.

H. Aiding Criminal Enforcement

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

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

I. Consumer Advocacy

Advocacy is another method used by the Commission to advance consumers' interests. The FTC frequently provides comments to legislatures and government agencies on the effect of proposed laws and regulations. The Commission also testified before the 109th Congress 31 times. Although consumers need to be protected from fraud and deception, unduly broad

restrictions on the dissemination of truthful and non-misleading information are likely to limit competition and consumer choice.³⁰

III. Maintaining Competition

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

³⁰ Through enforcement and advocacy with the Food and Drug Administration ("FDA"), the FTC has developed substantial expertise in policy issues related to food and drug advertising and labeling. Recently, the FTC staff provided comments to the FDA in response to a request for public comment regarding its draft guidelines for labeling statements about the whole grain content of food products. The staff suggested that the FDA expand on its guidance by reconsidering whether to allow certain claims (such as "good source" of whole grains) to be made by companies, providing additional guidance on the appropriate use of certain claims (such as "100% whole grain"), and conducting further research to determine how best to define whole grain-related terms and reduce consumer confusion. See FTC Staff Comment Before the Food and Drug Administration: *In the Matter of Draft Guidance for Industry and FDA Staff: Whole Grain Label Statements*, FTC file No. V060114 (Apr. 18, 2006) available at <http://www.ftc.gov/os/2006/04/v060114ftcstaffcommentofthefdarecketno2006-0066.pdf>. The FTC also recently has used advocacy to protect children from online child predators. FTC staff filed a comment regarding proposed legislation in Hawaii designed to protect minors from unwanted commercial e-mails (spam) that advertise products or services they are prohibited from buying or that contain adult advertising or links to adult content. The bill would establish a Child Protection Registry and make it illegal to send such messages to registrants. The FTC staff explained that, much as it did in commenting on similar legislation in Illinois in 2005, the registry easily could be abused by online child predators, publishing a list of verified email addresses could unintentionally increase the amount of spam received by registrants, and the bill's substantial compliance costs could hamper Internet competition and prevent consumers from receiving legitimate and wanted information. The Hawaii legislature ultimately did not adopt this bill. See FTC Staff Comment to The Honorable Carol Fukunaga Concerning Hawaii Senate Bill 2200, *A Bill To Create A Child Protection Registry and Prohibit Certain Unwanted Commercial Email Messages*, FTC File No. V060012 (Mar. 2006) available at <http://www.ftc.gov/os/2006/04/V060012FTCStaffCommentReHawaiiSenateBill2200Image.pdf>.

A. Health Care

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

1. Agreements that Delay Generic Entry

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

In addition, in November 2005, in the case of *FTC v. Warner Chilcott Holdings Company III, Ltd.*, the Commission filed a complaint in federal district court seeking to terminate an agreement between drug manufacturers Warner Chilcott and Barr Laboratories that denied consumers the choice of a lower-priced generic version of Warner Chilcott’s Ovcon 35, a branded oral contraceptive.³¹ Under threat of a preliminary injunction sought by the FTC, in

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

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.³²

2. Pharmaceuticals, Medical Devices, and Diagnostic Systems

The Commission is active in enforcing the antitrust laws in the pharmaceutical, medical devices, and diagnostic systems industries. For example, the FTC approved a consent order regarding Barr Pharmaceuticals' proposed acquisition of Pliva.³³ In settling the Commission's charges that the transaction would have increased concentration and led to higher prices, Barr is required to sell its generic antidepressant, trazodone; its generic blood pressure medication, triamterene/HCTZ; either Pliva's or Barr's generic drug for use in treating ruptured blood vessels in the brain; and Pliva's branded organ preservation solution. Last year, the FTC imposed conditions on several other pharmaceutical mergers, including: Watson Pharmaceuticals/Andrx Corporation;³⁴ Teva Pharmaceutical Industries/IVAX Corporation;³⁵ Johnson & Johnson's

³² 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.

³³ *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.

³⁴ *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.

³⁵ *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>.

acquisition of Pfizer's consumer health division;³⁶ and Hospira, Inc./Mayne Pharma Limited.³⁷

Recent medical devices and diagnostic systems cases include: the FTC's consent order regarding the proposed \$27 billion acquisition of Guidant Corporation by Boston Scientific Corporation, which required the divestiture of Guidant's vascular business to an FTC-approved buyer;³⁸ and consent orders in mergers affecting markets for biopsy systems and for centrifugal vacuum evaporators used in the health care industry.³⁹

FTC staff also has initiated a study on authorized generic drugs.⁴⁰ 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.

³⁶ *In the Matter of Johnson & Johnson and Pfizer Inc.*, FTC Docket No. C-4180 (Jan. 19, 2007) (decision and order), available at http://www.ftc.gov/os/caselist/0610220/0610220c4180decisionorder_publicversion.pdf; 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>.

³⁷ 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>.

³⁸ *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>.

³⁹ *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>.

⁴⁰ 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. In October 2005, an FTC Administrative Law Judge found that Evanston Northwestern Healthcare Corporation's consummated acquisition of an important competitor, Highland Park Hospital, resulted in higher prices and a substantial lessening of competition for acute care inpatient hospital services in parts of Chicago's northern suburbs.⁴¹ In May 2006, the Commission heard oral arguments on the appeal of this matter and a Commission opinion is forthcoming.⁴² Several other hospital mergers have been announced within the past several months, and we have active investigations pending.⁴³

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

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

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

⁴³ 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>.

⁴⁴ *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/0510137/0510137nchqaprimedecisionorder.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>.

B. Energy

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

So far in 2007, the Commission has challenged two mergers in the energy industry. Last month, the Commission filed an administrative complaint challenging Equitable Resource's proposed acquisition of The Peoples Natural Gas Company, a subsidiary of Dominion Resources. 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. The complaint alleges that the proposed transaction would result in a monopoly for many customers who now benefit from competition between the two firms. In January 2007, the Commission challenged the terms of a proposed \$22 billion deal whereby energy firm Kinder Morgan would be taken private by its management and a group of investment firms, including The Carlyle Group and Riverstone Holdings. The Commission's complaint alleged that Carlyle and Riverstone held significant positions in Magellan Midstream, a major competitor of Kinder Morgan in the terminaling of gasoline and other light petroleum products in the southeastern United States, and that the proposed transaction would threaten competition in those markets. In settling the Commission's complaint, Carlyle and Riverstone agreed to turn

their investment in Magellan passive and to restrict the flow of sensitive information between Kinder Morgan and Magellan.⁴⁵

In May 2006, the FTC released a report titled *Investigation of Gasoline Price Manipulation and Post-Katrina Gasoline Price Increases*.⁴⁶ This report contained the findings of a Congressionally-mandated Commission investigation into whether gasoline prices nationwide were “artificially manipulated by reducing refinery capacity or by any other form of market manipulation or price gouging practices.” The report also discusses gasoline pricing by refiners, large wholesalers, and retailers in the aftermath of Hurricane Katrina. In its investigation, the FTC examined evidence relating to a broad range of possible forms of manipulation. It found no instances of illegal market manipulation that led to higher prices during the relevant time periods,

⁴⁵ 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.

⁴⁶ 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."⁴⁷ Other factors such as regional or local market trends, however, appeared to explain these firms' prices in nearly all cases.⁴⁸

C. Real Estate

Purchasing or selling a home is one of the most significant financial transactions most consumers will ever make, and anticompetitive industry practices can raise the prices of real estate services. In the past year, the agency has brought eight enforcement actions against associations of competing realtors or brokers. The associations, which control multiple listing services, adopted rules that allegedly withheld valuable benefits from consumers who chose to enter into non-traditional, and often less expensive, listing contracts with real estate brokers. In seven of these matters, the Commission agreed to settlements prohibiting multiple listing services from discriminating against non-traditional listing arrangements. The eighth matter is currently in administrative litigation.⁴⁹ The result of these actions will allow consumers more

⁴⁷ Science, State, Justice, Commerce, and Related Agencies Appropriations Act, 2007, Pub. L. No. 109-108 § 632, 119 Stat. 2290 (2005) ("Section 632").

⁴⁸ 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>.

⁴⁹ 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>.

choice and ensure that if consumers choose to use discount real estate brokers they will not be handicapped by rules preventing other consumers from seeing their listings on the Internet.

D. Technology

Technology is another area in which the Commission has acted to protect consumers by safeguarding competition. In February 2007, the Commission issued an opinion and final order in the legal proceeding against computer technology developer Rambus, Inc.,⁵⁰ and the matter continues in litigation. Previously, in July 2006, the Commission had determined that Rambus unlawfully monopolized the markets for four computer memory technologies that have been incorporated into industry standards for dynamic random access memory (DRAM) chips. DRAM chips are widely used in personal computers, servers, printers, and cameras.⁵¹ 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.⁵² Our hope is that this case

⁵⁰ 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>.

⁵¹ *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>.

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

will result in more accurate and useful disclosure of intellectual property in standard-setting bodies, which will improve product quality and lower costs to consumers.

E. Retail and Other Industries

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

The Commission also has sought to protect customers by imposing conditions on mergers involving launch services;⁵⁴ the manufacture of ammunition for mortars and artillery;⁵⁵ the

⁵³ *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>.

⁵⁴ *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>.

⁵⁵ *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>.

nation's two largest funeral home and cemetery chains;⁵⁶ and liquid oxygen and helium.⁵⁷

F. Guidance, Transparency, and Merger Review Process Improvements

The FTC also works to facilitate cooperation and voluntary compliance with the law by promoting transparency in enforcement standards, policies, and decision-making processes.

During the last year, the FTC implemented two important process reforms that streamlined the merger review process. In February 2006, the Commission announced the implementation of significant merger process reforms aimed at reducing the costs borne by both the FTC and merging parties.⁵⁸ In June 2006, the FTC and the Department of Justice Antitrust Division implemented an electronic filing system that allows merging parties to submit, via the Internet, premerger notification filings required by the Hart-Scott-Rodino (HSR) Act.⁵⁹

G. Competition Advocacy

The Commission frequently provides comments to federal and state legislatures and government agencies, sharing its expertise on the competitive impact of proposed laws and regulations when they explicitly or implicitly impact the antitrust laws, and when they alter the competitive environment through restrictions on price, innovation, or entry conditions. Recent FTC advocacy efforts have contributed to several positive consumer outcomes. In the past year,

⁵⁶ *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>.

⁵⁷ *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>.

⁵⁸ FTC News Release, *FTC Chairman Announces Merger Process Reforms* (Feb. 16, 2006), available at http://www.ftc.gov/opa/2006/02/merger_process.htm.

⁵⁹ 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>.

the FTC has sought to persuade regulators to adopt policies that do not unnecessarily restrict competition in the areas of wine distribution,⁶⁰ patent rules of practice,⁶¹ online auction trading assistants,⁶² attorney matching services,⁶³ real estate legal services,⁶⁴ and pharmacy benefit managers.⁶⁵

H. Hearings, Reports, Conferences, and Workshops

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

Beginning in June 2006, the FTC and the Department of Justice Antitrust Division have held hearings to discuss the boundaries of permissible and impermissible conduct under Section

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

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

⁶² FTC Staff Comments to The Honorable Noble E. Ellington, Louisiana State Senate (May 26, 2006), *available at* <http://www.ftc.gov/os/2006/06/VO60015CommentstoLouisianaStateSenateImage.pdf>.

⁶³ FTC Staff Comments to Mr. W. John Glancy, Chairman, Professional Ethics Committee for the State Bar of Texas (May 26, 2006), *available at* <http://www.ftc.gov/os/2006/05/V060017CommentsonaRequestforAnEthicsOpinionImage.pdf>.

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

⁶⁵ 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>.

2 of the Sherman Act.⁶⁶ The primary goal of the hearings is to examine whether and when specific types of single-firm conduct are procompetitive or benign and when they may harm competition. The Commission expects to complete the hearings in the second quarter of 2007.

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

In August 2006, the FTC convened the Internet Access Task Force to examine issues raised by converging technologies and regulatory developments, and to inform the enforcement, advocacy, and education initiatives of the Commission. Under the leadership of the Internet Access Task Force, the FTC recently addressed two issues of interest to 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.⁶⁷ Second, in February 2007, the FTC hosted a two-day workshop to explore the many competition and consumer protection issues relating to broadband Internet access, including so-called “network neutrality.”⁶⁸ Among the topics discussed at the workshop were the current and future state of competition in the market for broadband Internet access; the capabilities and incentives of broadband Internet

⁶⁶ 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>.

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

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

service providers to discriminate against, degrade, block, or charge fees for prioritized delivery of unaffiliated content and applications; and the potential effects of network neutrality regulation on innovation and competition in the market for broadband Internet access. The FTC intends to release a report of this workshop later this year.

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

I. Competition Education Initiatives

The FTC is committed to enhancing consumer confidence in the marketplace through enforcement and education. This year, Commission staff launched a multi-dimensional outreach campaign, targeting new and bigger audiences, with the message that antitrust enforcement helps consumers reap the benefits of competitive markets by keeping prices low and services and innovation high, as well as by encouraging more choices in the marketplace.⁷⁰ As a part of this

⁶⁹ 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>.

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

effort, the Commission’s website, 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,⁷¹ Health Care,⁷² Real Estate,⁷³ and Technology.⁷⁴ These minisites serve as a one-stop shop for consumers and businesses who want to know what the FTC is doing to promote competition in these important business sectors. In the past year, the FTC also issued practical tips for consumers on buying and selling real estate, funeral services, and generic drugs, as well as “plain language” columns on oil and gas availability and pricing.

IV. International

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

The FTC has built a strong network of cooperative relationships with its counterparts abroad, and plays a leading role in key multilateral fora. The growth of communication media and electronic commerce presents new challenges to law enforcement – fraud and deception now

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

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

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

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

are without borders. We work with other nations to protect American consumers who can be harmed by anticompetitive conduct and frauds perpetrated outside the United States. The FTC also actively assists new democracies moving toward market-based economies with developing competition and consumer protection laws and policies.

A. Consumer Protection

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

In the coming year, the FTC will implement the U.S. SAFE WEB Act of 2006, which was signed into law last December. Thanks to the action of the Commerce Committee and of Congress, the U.S. SAFE WEB Act provides the FTC with updated tools for the 21st century. It allows the FTC to cooperate more fully with foreign law enforcement authorities in the area of cross-border fraud and other practices, such as fraudulent spam, spyware, misleading health and safety advertising, privacy and security breaches, and telemarketing fraud, that are global and that harm consumers. As the FTC begins to take advantage of these new tools, cooperation with foreign law enforcement agencies regarding information sharing and investigative assistance will be greatly improved, diminishing fundamental roadblocks to effective cooperation.

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

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

B. Competition

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

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

The FTC is an active participant in key multilateral fora that provide important opportunities for competition agencies to enhance mutual understanding in order to promote cooperation and convergence, including the International Competition Network (ICN), the OECD, the United Nations Conference on Trade and Development (UNCTAD), and APEC. For example, over the past year, the FTC has served on the ICN's Steering Group, co-chaired its

Unilateral Conduct working group and related objectives subgroup, chaired its Merger Notification and Procedures subgroup, and played a lead role in its working group on Competition Policy Implementation. In addition, the FTC also participates in U.S. delegations that negotiate competition chapters of proposed free trade agreements, including in connection with negotiations with Korea, Thailand, and Malaysia during the last year. All of this work ultimately benefits American consumers.

C. International Technical Assistance

The FTC assists developing nations as they move toward market-based economies with developing and implementing competition and consumer protection laws and policies. These activities, funded mainly by the United States Agency for International Development and conducted in cooperation with the Department of Justice's Antitrust Division, are an important part of the FTC's efforts to promote sound competition and consumer protection policies around the world. In 2006, the FTC sent 34 different staff experts on 30 technical assistance missions to 17 countries, including the ten-nation ASEAN community, India, Russia, Azerbaijan, South Africa, Central America, and Egypt. We also conducted missions in Jordan and Ethiopia, and concluded a highly successful program in Mexico.

V. Needed Resources for Fiscal Year 2008

To accomplish the agency's mission in FY2008, the FTC requests \$240,239,000 and 1,084 FTE. This level of resources is needed to allow the FTC to continue to build on its past record of accomplishments in enhancing consumer protection and protecting competition in the United States and, increasingly, abroad. The FY2008 request represents an increase of \$17,239,000 over the FTC's FY2007 budget request before Congress. The increase includes:

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

The FTC’s FY2008 budget request is comprised of three funding sources. The majority of the funding will be derived from offsetting collections: HSR filing fees and Do Not Call fees will provide the agency with an estimated \$163,600,000 in FY2008. The FTC anticipates that the remaining funding needed for the agency’s operations will be funded through a direct appropriation of \$76,639,000 from the General Fund in the U.S. Treasury.

VI. Conclusion

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

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