



Federal Trade Commission

The Vital Role of Truthful Information in the Marketplace

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I. Introduction

Good evening. It is my great pleasure to present tonight's Roy H. Park Lecture. Thank you to Professor Hoefges of the UNC School of Journalism and Mass Communication for inviting me to participate in this distinguished lecture series. I am particularly honored to be invited, given my lack of journalism credentials. I not only am an attorney, but, I hesitate to tell you, an attorney who graduated from UVa. Tar Heels and Wahoos aside, I am delighted to be here.

We, without a doubt, have become an information society. We are constantly sending, receiving, and absorbing bits and bytes of information – no matter where we happen to be, no matter what the time of day. Being connected 24/7 has dramatically reshaped how we work and play, and how we interact with the world around us. Fortunately, well before we had the

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

capacity to share songs wirelessly using devices like Zune or access the Internet with our iPhones, our constitutional drafters recognized, prominently and rightfully, that the free flow of information is critical to the functioning of a free society. The First Amendment protects citizens' rights to speak out on political issues and to petition their government, and it protects the press's vital role in informing citizens about the happenings of the day so that they can make responsible civic choices (or even just make decisions about what we think of Britney, Paris, Nicole, or Lindsay).

Of course, the First Amendment protects not just political speech, but also commercial speech, which includes, among other things, most advertising and marketing of products and services, as well as the labeling accompanying such offerings. Just as information is crucial to a well-functioning democracy, it likewise is crucial to a well-functioning market. As the Supreme Court recognized over thirty years ago, a "consumer's interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate."² It is a matter of public interest that consumers' marketplace decisions be "intelligent and well informed," and, thus, the free flow of commercial speech is "indispensable."³ Over the course of the past thirty years, there has been a clear trend in protecting commercial speech. Courts now require government restrictions on commercial speech – if it is not misleading and does not concern illegal activity – to satisfy the stringent requirement of restricting no more speech than is necessary to advance directly a substantial

² *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 763 (1976).

³ *Id.* at 765.

government interest.⁴

Commercial speech is everywhere – particularly in the online marketplace. But let’s be honest. We are not always fond of advertising; we may find it annoying or tacky. I recall earlier this year when I was speaking with an official from overseas about spam, and I reminded her that the First Amendment protects truthful speech. With a shake of her head, she muttered in disgust, “Oh yes, you Americans and your First Amendment.” “Yes,” I said, “we value it highly” – enough to put up with the annoying and tacky.

While you may not have thought of us this way, the FTC, through all of the statutes we enforce and policies we promote, is a protector and defender of commercial speech. The FTC is a small, independent agency of approximately 1100 employees, which has two core missions: promoting competition and protecting consumers. Thus, we enforce the federal antitrust laws, along with dozens of federal consumer protection laws. Our two missions are designed to accomplish the same goals: promoting efficiency, preventing consumer harm, and enhancing consumer welfare.

We accomplish these important goals in large part simply by ensuring and protecting truthful information in the marketplace. Our job is not to substitute our judgment for that of consumers or to save them from bad choices; it is to ensure that they get the information they need to make their own choices. We do so in four primary ways. First, we prevent and prosecute deceptive and misleading advertising. Second, we prevent private restrictions on the dissemination of truthful information that operate as restrictions on competition. Third, we protect competitive markets, which, when operating properly, provide consumers with valuable

⁴ *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 566 (1980).

information – like prices – necessary to making beneficial choices. Finally, we engage in advocacy to oppose undue government restrictions on truthful, non-misleading advertising.

II. Importance of Accurate Marketplace Information for Consumers

Fraud and deception harm consumers. When consumers are tricked into buying goods and services that they otherwise would not, they have been harmed. It is crucial to eliminate false and deceptive marketplace information but, in doing so, it is equally crucial to avoid restricting consumers' access to truthful marketplace information. In our free-market system, private economic decisions determine the allocation of scarce resources. When there are limits on the amount of truthful marketplace information available to consumers, markets do not work efficiently, and consumers suffer just as they do when they are deceived.

Not surprisingly, a good deal of empirical research has found that when consumers more easily can compare their marketplace options – for instance, by shopping online – prices tend to be lower and less variable.⁵ Correspondingly, several studies, some originated at the FTC, have shown that when states restrict truthful advertising, prices rise and quality can suffer.⁶ The

⁵ Several economists have found prices to be lower and less dispersed when consumers can more easily compare stores' prices. See, e.g., James C. Cooper, *Price Levels and Dispersion in Online and Offline Markets for Contact Lenses*, FTC Bureau of Economics Working Paper (2006), available at <http://www.ftc.gov/be/workpapers/wp283.pdf>; Jeffrey R. Brown & Austan Goolsbee, *Does the Internet Make Markets More Competitive? Evidence from the Life Insurance Industry*, 110 J. POL. ECON. 481 (2002); Alan T. Sorensen, *Equilibrium Price Dispersion in Retail Markets for Prescription Drugs*, 108 J. POL. ECON. 833 (2000); Erik Brynjolfsson & Michael D. Smith, *Frictionless Commerce? A Comparison of Internet and Conventional Retailers*, 49 MGM'T SCI. 563 (2000).

⁶ See, e.g., James H. Love & Jack H. Stephen, *Advertising, Price and Quality in Self-regulating Professions: A Survey*, 3 INT'L J. ECON. BUS. 227 (1996); Frank H. Stephen, *Advertising, Consumer Search Costs, and Prices in a Professional Service Market*, 26 APPLIED ECON. 1177 (1994); J. Howard Beales & Timothy J. Muris, *State and Federal Regulation of National Advertising* 8-9 (1993); James H. Love et al., *Spatial Aspects of Competition in the Market for Legal Services*, 26 REGIONAL STUD. 137 (1992); Deborah Haas-Wilson, *The Effect of Commercial Practice Restrictions: The Case of Optometry*, 29 J.L. & ECON. 165 (1986); John Kwoka, *Advertising and the Price and Quality of Optometric Services*, 74 AM. ECON. REV. 211 (1984); Timothy J. Muris & Fred S. McChesney, *Advertising and the Price and Quality of Legal Services: The Case for Legal Clinics*, 1 AM. B. FOUND. RES. J. 179 (1979); Roger Feldman & James Begun, *The Effects of Advertising: Lessons from Optometry*, 13 J. HUMAN RESOURCES 247 (1978); J.F. Cady, *An Estimate of the Price Effects on Restrictions on Drug Price Advertising*, 14 ECON. INQUIRY 490 (1976); Lee

bottom line is that although advertising can be annoying, excessive, and even tasteless in some cases, depriving consumers of the opportunity to understand what is available to them in the marketplace can have detrimental effects, just like failing to protect them from deception and fraud.

In an insight that garnered the Nobel Prize in economics for its originator, it is important to recognize that the price system itself is really a mechanism for transmitting information to those in the economy.⁷ Prices, when determined in competitive markets, are amazing forces; in one easily understandable data point, a price represents an economy's entire stock of knowledge of the relative scarcity of a particular good or service – knowledge that is dispersed among millions of different consumers and producers.

Take the example of the effect of the 2004 movie *Sideways*. Staged in California wine country, its main character, Miles, has a thing for pinot noir, famously describing its flavors as “the most haunting and brilliant and subtle and thrilling and ancient on the planet.”⁸ This movie eventually became quite popular, and even was nominated for an Oscar[®]. One result was that purchases of pinot noir skyrocketed.

So, what happened? Stores began to see bottles of pinot noir moving from their shelves much faster than they used to.⁹ Merchants ordered more cases of the wine from their

Benham, *The Effect of Advertising on the Price of Eyeglasses*, 15 J.L. & ECON. 337 (1972).

⁷ See F.A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519 (1945).

⁸ *SIDEWAYS* (Fox Searchlight Pictures 2004).

⁹ See Mary-Colleen Tinney, *Retail Sales Analysis: Comprehensive Review of Sales and Trends for 2006*, Wine Business Monthly (Apr. 2007), available at <http://www.winebusiness.com/ReferenceLibrary/webarticle.cfm?dataId=47409> (pinot noir sales by volume have increased 111 percent since 2005, and dollar sales of pinot noir have increased by 117 percent since 2005); Dorothy J. Gaiter & John Brecher, *The Price of Pinot Noir's Success*, CHI. SUN TIMES, Sept. 20, 2006, at S6 (pinot sales by volume increased by nearly 40 percent between July 2005 and July 2006).

distributors, who in turn increased their orders to the winemakers. The price of pinot noir grapes took off, as did the retail price.¹⁰ Wine growers began to replace other plantings with pinot noir vines.¹¹ Winemakers in places like New Zealand responded to increased American demand by exporting their pinot noir.¹² Ultimately, wine producers and consumers did not have to see *Sideways*, or even have heard of this movie to respond. Rather, consumers looked at increasing prices and some economized, perhaps purchasing – much to Miles’ dismay – merlot instead. Vintners across the world looked at increasing demand and increased their pinot noir production. The market orchestrated this response, directing millions of actors to take the “correct” actions by conveying one piece of data – the price. As a result, although retail prices appear to have risen somewhat, that increase likely will continue to be tempered by the combination of consumer and producer responses in the marketplace.¹³

Imagine how this coordination would have to be accomplished without the information signaled by prices. A central planner first would have to gather data from millions of wine sellers and consumers to measure the magnitude of the increased interest in pinot noir. She would then have to arrange a supply response to satisfy this increased demand by directing wineries to increase their pinot noir production and ordering land currently in other use to be

¹⁰ See Wine Business Insider, *Napa Grapes: Oversupply or Undersupply?* (Sept. 2006), available at <http://www.winebusiness.com/html/PrinterVersion.cfm?dataID=44490> (pinot noir “was selling for only \$800 a ton . . . [n]ow it[’]s \$4,000 a ton. We knew Pinot was coming back, but after the movie (*Sideways*), all bets were off.”).

¹¹ See Bill Turrentine, *How Can U.S. Growers Compete with Low-Cost Imports?*, Wine Business Monthly (Jan. 2007), available at <http://www.winebusiness.com/html/PrinterVersion.cfm?dataID=46519>.

¹² See Dorothy J. Gaiter & John Brecher, *Charting the ‘Sideways’ Effect*, WALL ST. J., Sept. 7, 2007, at W3 (reporting that New Zealand is “making a big push for its Pinot”).

¹³ See Jerry Shriver, *Pinots from Heaven*, USA TODAY, Aug. 10, 2005, at D1 (noting that new plantings over the past two decades in California, Oregon, and New Zealand allowed producers to respond to increased demand quickly, which “helped keep prices in check”); Tinney, *supra* note 9 (“[B]ecause it’s so hot today, people are investing in it and putting in new plantings and grafting over vineyards to Pinot Noir. So, in four or five years there’s going to be an onslaught of Pinot Noir coming upstream.”).

planted with pinot noir grapes. This central authority also would have to figure out a way to ration the available pinot noir among those who wanted it: maybe first-come, first-served, a lottery, or nepotism? Somebody also would have to let New Zealand in on this as well. Of course, nothing is static, and any planner would have to adapt to changes like bad weather and warehouse fires. Clearly, nobody could ever accomplish this, even with the most powerful supercomputers. But, by allowing markets to work, prices choreograph this complex dance between producers and consumers, and our shelves are magically stocked with an ever-increasing variety of pinot noir. Prices provide crucial marketplace information that benefits consumers.

When markets aren't allowed to work – either through unwarranted government intervention or private anticompetitive behavior – prices do not reflect true scarcities. The signals become distorted because the information in them is false. Price ceilings signal relative abundance when there really is a scarcity, and price floors do the opposite. The results are all familiar: dilapidated housing from rent controls, long lines from gasoline price controls, and surplus cheese and grain from agricultural price supports. When interference with normal market forces results in prices that convey the wrong information, society's scarce resources are squandered, and consumers are worse off.

III. How the FTC Promotes the Provision of Accurate Information in the Market

A. Past

To examine how we work to promote and protect the provision of accurate information in the marketplace, I begin with what we should not do. During the 1960s and into the 1970s, the FTC at times tried to carry out its mandate through imposition of rigid, structural rules and tests,

with an insufficient appreciation of the dynamic nature of markets or consumers' ability to evaluate advertising and other marketplace information.¹⁴

Back then, the FTC sometimes assumed that consumers could not accurately evaluate some kinds of information or that they would make the “wrong” choices, even without deceptive or misleading advertising. The Commission used newly obtained authority to launch a spate of costly, ill-advised rulemakings – like drafting rules prohibiting the use of the term “waterproof,” because at some depth even a nuclear submarine will spring a leak, or rules prohibiting the use of the term “automatic” for sewing machines because you could not just turn them on and let them sew. Similarly, the agency ordered a company to remove its allegedly deceptive ads for a “permanent” hair dye because consumers' hair, as it grew in, would not be the same color as the dyed hair.

Then, in 1978, the FTC embarked on a particularly ill-fated regulatory venture – a rulemaking that came to be known as “kidvid.” Aimed at reducing tooth decay in children, the FTC undertook to craft rules restricting the television promotion of highly sugared foods to children – particularly those too young to understand either the nature of commercial advertising or the health risks (in particular, tooth decay) of excessive sugar consumption. One proposed rule would have banned all television advertising for any product that was directed to audiences with a significant proportion of children too young to understand the selling purpose of advertising. After three years, the kidvid matter was closed, and not one of the recommendations was adopted.

The record confirmed that there simply were no workable solutions that the Commission

¹⁴ On the antitrust side, the agency sought to reduce the market positions of dominant firms and deconcentrate industries, based merely on the existence of high market shares and without determining whether these high market shares translated into consumer harm.

could implement to effectively address the complex issues at stake. For example, an informational remedy was considered but ultimately determined to be ineffective for the very same reason that the advertising was perceived to be harmful to young children: their inability to understand the persuasive nature of advertising. Other, more practical problems included difficulties in identifying television shows for which the majority of the audience was young children. Audience composition data showed that if the advertising ban were to apply when children aged two to six comprised 50%, or even 30%, of the TV audience, only one network program, Captain Kangaroo, would have been affected.¹⁵ Of course, lowering the threshold audience share would have encompassed more programming; however, that would have meant banning truthful advertising on programs whose audiences were predominantly over age six and presumably able to understand such advertising.

That the Commission would even consider such an intervention angered the public and members of Congress, and the damage to the Commission from this venture was substantial. For a brief time, Congress allowed the agency's funding to lapse, and the agency was literally shut down. The *Washington Post*, normally a reliable supporter of the agency's consumer protection work, editorialized that the proposal was "a preposterous intervention that would turn the FTC into a great national nanny."¹⁶ The *Post* further observed:

[T]he proposal, in reality, is designed to protect children from the weaknesses of their parents – and the parents from the wailing insistence of their children. That, traditionally, is one of the roles of a governess – if you can afford one. It is not a

¹⁵ FTC Final Staff Report and Recommendation, *In the Matter of Children's Advertising* 37-39 (Mar. 1981).

¹⁶ Editorial, *The FTC as National Nanny*, WASH. POST, Mar. 1, 1978, at A22.

proper role of government.¹⁷

This experience taught our agency many lessons that, fortunately, we remember today.

B. The Present

Today, the FTC operates with a better appreciation of the ability of consumers and of markets to process information. To protect vital marketplace information, the FTC takes several, varied steps, including: (1) preventing fraud and deceptive advertising; (2) encouraging industry self-regulation, where appropriate; (3) combatting both private and public restrictions on the provision of non-misleading information, and (4) ensuring that prices convey accurate information.

1. Preventing Fraud and Deceptive Advertising

To protect marketplace information, the FTC prevents fraud and deceptive advertising with much success. There are challenges in this area, however, that raise tricky issues, including navigating the proper course between protecting consumers and not unduly restricting speech. Let me relate the story of one recidivist whom the agency has had several occasions to challenge in court. In 1998, the Commission filed a complaint against Kevin Trudeau charging him with making false or deceptive claims in infomercials for various products or systems purported to cause significant weight loss, reverse hair loss, achieve a photographic memory, and cure addictions to food, alcohol, tobacco, or narcotics.¹⁸ Trudeau paid half a million dollars in consumer redress and entered into a settlement that prohibited unsubstantiated representations for any product. In addition, he was required to disclose that his infomercials were in fact paid

¹⁷ *Id.* See also J. Howard Beales, III, Director, Bureau of Consumer Protection, Advertising to Kids and the FTC: A Regulatory Retrospective That Advises the Present (2004), available at <http://www.ftc.gov/speeches/beales/040802adstokids.pdf>.

¹⁸ *FTC v. Kevin Trudeau*, Civ. No. 98-C-0168 (N.D. Ill. 1998), available at <http://www.ftc.gov/opa/1998/01/megasyst.shtm>.

advertisements.

Notwithstanding the 1998 injunction, Trudeau claimed in subsequent infomercials that Coral Calcium Supreme, a dietary supplement purportedly made from marine coral, cured terminally ill cancer patients and enabled multiple sclerosis patients to get up out of their wheel chairs. In another infomercial, he claimed that Biotape, an adhesive strip, afforded permanent relief from severe pain. In 2003, Commission attorneys returned to court, filing a contempt action against Trudeau. In final settlement of that proceeding, Trudeau paid \$2,000,000 and agreed to another stipulated permanent injunction, this time banning him from appearing in, producing, or disseminating infomercials that advertise any product, service, or program. This broad ban contained only a narrow exception for infomercials connected to the advertising or promotion of a book or other publication, provided the book was not itself an advertisement for a product, program, or service, and provided the content of the book was not misrepresented.¹⁹

So what do you think he did next? You guessed it: he wrote a book. In the United States of America, we do not ban books! But, last month, the FTC charged Trudeau with violating the 2004 court order by allegedly misrepresenting in infomercials the contents of his book titled “The Weight Loss Cure They Don’t Want You to Know About.”²⁰ According to the Commission’s contempt motion, Trudeau claims that the weight-loss plan revealed in the book is easy, can be done at home, and ultimately allows readers to eat whatever they want without re-gaining weight. Contrary to the infomercial claims, however, the FTC alleges that the book’s weight-loss plan is complex and grueling. It requires, among other things, severe dieting (500

¹⁹ *FTC v. Kevin Trudeau*, Civ. Nos. 03-C-3904 & 98-C-0168 (N.D. Ill. 2004), available at <http://www.ftc.gov/opa/2004/09/trudeaucoral.shtm>.

²⁰ See FTC Press Release, *FTC: Marketer Kevin Trudeau Violated Prior Court Order* (Sept. 14, 2007), available at <http://www.ftc.gov/opa/2007/09/trudeau.shtm>.

calories a day), colon washes from a licensed therapist every other day for a month, daily injections of a prescription drug not easily obtained because it is not approved in the U.S. for weight loss, and lifelong dietary restrictions. This case is ongoing.

There are several points to be gleaned from the Trudeau saga. First, we consider the prevention of deceptive health-related advertising claims to be one of our highest priorities. We tenaciously pursue those who persist in making false and deceptive claims, particularly in important areas like health. Second, the FTC's targeted approach to preventing deception in the marketplace dovetails with First Amendment principles intended to promote the free flow of truthful and non-misleading commercial speech. Like the balancing that courts undertake in reviewing government restrictions on commercial speech, the FTC's approach strikes a balance that is rigorous enough to attack inaccurate or misleading claims, yet flexible enough to encourage accurate claims. This approach results in greater dissemination of valuable information with benefits for both consumers and competition. Third, although we rarely proceed against book authors on the basis of their book promotions, reference to a book does not afford a First Amendment shelter against false or deceptive advertising. Consumers are entitled to accurate information about advertised products, programs, and services – whatever form that information might take.

Unfortunately, the weight loss product industry is rife with deception. As you well know, we have an obesity problem in this country, and trying to lose weight has practically become an American pastime as 70 million of us are trying to lose weight. And as if it isn't enough to be tempted by food, we have to be bombarded with ads for products like "Fat Trapper" and "Exercise in a Bottle," which promise easy weight loss and claim that you can "eat

what you want and never-ever-ever have to diet again.”²¹ One company promoting a diet tablet claimed that it “works faster than a hunger strike! Even if you eat nothing, you won’t slim down as fast.”²² This past January, in a “New Year’s Resolution” press conference, the FTC announced cases against the makers of four significant and high-profile weight-control and weight-loss products, Trimspa, Cortislim, Xenadrine, and One-A-Day WeightSmart.²³

TrimSpa promised to make losing “30, 50, even 70 pounds painless.” Cortislim marketers attempted to disguise their ads as talk shows featuring an expert medical professional, even though they had no scientific basis for making their claims. Ads for Xenadrine EFX promised rapid and substantial weight loss despite the fact that one of their studies showed more weight loss in the placebo group than in the group taking Xenadrine. The Xenadrine ads also featured testimonials from extremely trim and muscular consumers – who failed to mention not only that they had been paid up to \$20,000 for their testimonials but also that their “after”-photo bodies were actually the product of rigorous diet and exercise programs. The marketers of all four products settled and, collectively, surrendered total cash and assets worth more than \$25 million.

In addition to our law enforcement efforts, the FTC endeavors to counter speech with speech by engaging in extensive consumer education regarding weight loss fraud. After years of frustration in trying to eliminate these claims in the face of so many consumers willing to believe

²¹ FTC Press Release, “Sellers of ‘Fat Trapper Plus’ and ‘Exercise in a Bottle’ Banned from Advertising Weight-Loss Products” (Jan. 18, 2005), *available at* <http://www.ftc.gov/opa/2005/01/enforma.shtm>.

²² FTC Press Release, “Defendants Who Deceptively Marketed the “Himalayan Diet Breakthrough” Settle FTC Charges” (June. 20, 2005), *available at* <http://www.ftc.gov/opa/2005/06/avsmarketing.shtm>.

²³ FTC Press Release, “Federal Trade Commission Reaches New Year’s Resolution with Four Major Weight-Control Pill Marketers” (Jan. 4, 2007), *available at* <http://www.ftc.gov/opa/2007/01/weightloss.htm>.

them, we tried to get creative. We developed an Internet “teaser” site – our name for a website that mimics fraudulent sites by peddling a fake product our staff created. Our fake product is Fat Foe. Made from eggplant extract, it promises effortless weight loss. After one click, though, the site teaches viewers that, had they ordered the product, the only thing they would have lost was their money. To date, more than 170,000 people have visited the site and hopefully have learned to be more cautious about falling for promises of easy weight loss.

In another effort to battle this fraud from all angles, we decided to enlist the help of the media. In 2003, the FTC published a guide that describes seven claims in weight loss ads that should raise red flags because they are always false.²⁴ For example, any claim that you can lose weight without diet or exercise is false. My predecessor, then-Chairman Muris and one of my former colleagues, Commissioner Leary, met with members of the media and asked that they “do the right thing” and refuse to run advertisements that make the “Red Flag” claims.²⁵ While many in the media protested at the time, an April 2005 report we issued based on data gathered in 2004 appeared to show that the media responded to our challenge.²⁶ We found that the number of ads with Red Flag claims had fallen from almost 50 to 15 percent. For some of the worst claims – like the promise of substantial weight loss without diet or exercise – the results were even better, down from a whopping 43 percent to 5 percent of weight-loss product ads.

²⁴ FTC, *Deception in Weight-Loss Advertising Workshop: Seizing Opportunities and Building Partnerships to Stop Weight-Loss Fraud*, (2003), available at <http://www.ftc.gov/os/2003/12/031209weightlossrpt.pdf>.

²⁵ FTC Chairman Timothy J. Muris, *Do the Right Thing*, Remarks Before the Cable Television Advertising Bureau (Feb. 11, 2003), available at <http://www.ftc.gov/speeches/muris/030211rightthing.shtm>.

²⁶ FTC Staff, *2004 Weight-Loss Advertising Survey* (2005), available at <http://www.ftc.gov/os/2005/04/050411weightlosssurvey04.pdf>.

2. Encouraging Industry Self-Regulation, Where Appropriate

Self-regulation is an important concept that is often both misunderstood and underappreciated. It includes any attempt by an industry to moderate its conduct with the intent of improving marketplace behavior for the ultimate benefit of consumers. The universe of self-regulatory organizations includes industry-wide or economy-wide private groups that provide, among other things, certification, product information, complaint resolution, quality assurance, industrial standards, product compatibility standards, professional conduct standards, and complaint resolution. Under the right circumstances, industry-generated action can address problems more quickly, creatively, and flexibly than government regulation. And it does not raise the significant constitutional hurdles that government action carries when we seek to restrict otherwise truthful commercial speech.

One particularly effective self-regulation program is the Better Business Bureau's National Advertising Review Council (NARC). Since it was formed in 1971 to foster truth and accuracy in national advertising through voluntary self-regulation, NARC has earned a reputation as an effective industry self-regulation program. It sets FTC-like standards for truth and accuracy in advertising, which then are enforced through the National Advertising Division ("NAD"). NAD investigates challenges from other advertisers, as well as suspect advertising gleaned from monitoring of traditional and new media, including the Internet. NAD handles about 150 cases per year, and the product claims reviewed are quite broad, including pharmaceuticals, dietary supplements, vacuum cleaners, cosmetics, online dating services, toilet paper, and cat food. If, however, the advertiser is not satisfied with the NAD's decision, the matter may be appealed to the National Advertising Review Board. If an advertiser refuses to

comply with either decision, then the matter is sent to the appropriate government agency for review, often the FTC.

a. Childhood Obesity

Self-regulation is playing a prominent role tackling the complex problem of childhood obesity. Nearly 20% of children ages 6-11 in the U.S. are overweight,²⁷ and the consequent health problems are serious. For example, in the past decade, the incidence of Type 2 diabetes in children and youth has doubled. The causes of the problem, however, are complex, with numerous contributing factors. I have been candid that government regulation of truthful, non-misleading advertising is not the answer for primarily two reasons. First, any proposal for government regulations broadly restricting food advertising to children would have to pass muster under the First Amendment.²⁸ Under that test, the government would first have to convince the courts that advertising negatively affects children’s health, or at least that restricting food advertising to children would directly advance their health and would need to show that there are no options to protect children’s health that would not involve limiting speech. Because commercial speech, including advertising, is a valuable source of information to consumers, the Supreme Court clearly disfavors approaches that restrict speech.²⁹

Second, all segments of society – parents, schools, government, health care professionals,

²⁷ Centers for Disease Control and Prevention, “Overweight and Obesity: Childhood Overweight: Overweight Prevalence,” available at <http://www.cdc.gov/nccdphp/dnpa/obesity/childhood/prevalence.htm>.

²⁸ See *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557 (1980)(articulating a four-part test for evaluating whether government restrictions on commercial speech are constitutional under the First Amendment).

²⁹ See, e.g., *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 490-91 (1995)(stating that if government can achieve its interests in a manner that does not restrict speech, or that restricts speech less, it must do so); see also *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 507 (1996).

food companies, and the media – have an obligation to fight this public health crisis, and we will not conquer childhood obesity until we have succeeded in bringing about substantial, lasting, and holistic changes by all involved.

One of my priorities at the Commission has been to use the power of the food and media industries to tackle childhood obesity, guided by the First Amendment’s protection for commercial speech and the kidvid experience. In 2005, the FTC, together with the Department of Health and Human Services, convened a public workshop on Marketing, Self-Regulation, and Childhood Obesity, bringing together some of the largest food manufacturers and entertainment companies, as well as academics, consumer advocates, pediatricians, and government officials. Out of the workshop came a series of recommendations for enhanced self-regulatory initiatives, product reformulation, development of nutritional guidelines for foods marketed to kids, and use of popular TV and movie characters to promote nutritious foods.³⁰ In July 2007, when the FTC and HHS convened a follow-up forum to review progress in implementing self-regulatory and educational initiatives, we were pleased to showcase some of significant developments in the two-year intervening period.³¹

For example, nearly a year ago, the Council of Better Business Bureaus and the BBB’s National Advertising Review Council announced the Children’s Food and Beverage Advertising Initiative, a bold effort to change the profile of food advertising directed to children under 12 and

³⁰ FTC, *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* 50-54 (Apr. 2006), available at <http://www.ftc.gov/os/2006/05/PerspectivesOnMarketingSelf-Regulation&ChildhoodObesityFTCandHHSReportonJointWorkshop.pdf>.

³¹ FTC Workshop, *Weighing In: A Check-Up on Marketing, Self-Regulation, and Childhood Obesity* (July 2007), available at <http://www.ftc.gov/bcp/workshops/childobesity/index.shtml>.

to encourage healthier eating choices.³² To date, 12 major food companies – including McDonald’s, PepsiCo, and Kellogg, among others – have joined the Initiative. For nine of these companies, advertising directed to children under 12 – including, TV, radio, print, and Internet – will be limited to foods that qualify as “better for you” by meeting specified nutritional standards. These standards involve limitations on calories, fat, sugar, and sodium and/or providing certain nutritional benefits to children. Three companies – Coca Cola, Hershey, and Mars – have pledged to direct no advertising to children under 12. Other companies have separately committed to direct no advertising to children under ages 6 or 8. In addition, all of the companies have pledged to limit the use of licensed characters to ads for “better-for-you” products or to healthy lifestyle messages, not to seek product placements in child-directed media, not to advertise food or beverages in elementary schools, and to use only their “better-for-you” products in interactive games – or advergames – directed to kids. These pledges are a major step forward, and we are optimistic that they will produce a significant change in the children’s food marketing landscape.

At the same time, media and entertainment companies are using their considerable marketing power to reach young audiences with positive health messages. Even Cookie Monster has changed his tune – cookies are now a “sometimes” food. And Sesame Workshop executives have even joked that he may soon become “Pilates Monster.”³³ Disney, Nickelodeon, and Cartoon Network have adopted policies to limit the licensing of their characters to foods meeting certain nutritional guidelines. Disney has formed a partnership with Imagination Farms to

³² See, Council of Better Business Bureaus, *Children's Food and Beverage Advertising Initiative*, available at <http://www.cbbb.org/initiative/>.

³³ See Sesame Workshop 2005 Annual Report at 15 (quoting *Saturday Night Live's* “Weekend Update”), available at <http://www.sesameworkshop.org/aboutus/pdf/SesameWorkshop2005.pdf>

license favorite Disney characters to promote fresh fruits and vegetables, and Nickelodeon’s SpongeBob and Dora the Explorer now appear on packages of carrots and spinach. And when Dreamwork’s Shrek is featured in Ad Council messages urging kids to “Get up and play an hour a day,” there is a good chance that children will respond. Most recently, Ion Media Networks – which through a partner produces children’s weekend programming on NBC and Telemundo – made a commitment not to air advertising for less healthy foods and beverages on children’s programs and to create story lines that promote good eating habits and physical activity.

As these initiatives are being launched, the FTC is undertaking its own research on food marketing to kids. At the request of Congress, the agency is conducting a comprehensive study of food industry marketing expenditures and activities targeted toward both children and teenagers. We will explore what is happening not only in the traditional measured media – TV, radio, and print – but also in the many non-traditional, and often unmeasured, promotional activities targeted to kids. These include, among many others: the Internet, including advergames; other digital advertising, such as cell phones; product placements in movies, videos, or TV programs; character licensing and toy co-branding; and word-of-mouth marketing. Because these media are largely “unmeasured,” other researchers often have not been able to gain access to the relevant data. The FTC, however, has the statutory authority to require industry members to file special reports or answers to specific questions.³⁴ In early August, compulsory process orders were sent to 44 food and beverage companies and quick-service restaurants,³⁵ and responses are due on November 1. The resulting report to Congress, also to be

³⁴ 15 U.S.C. § 46.

³⁵ The orders are available at http://www.ftc.gov/os/6b_orders/foodmktg6b/index.shtm.

made publicly available,³⁶ will provide a comprehensive picture of spending and techniques used to market food to children and adolescents in 2006. This data will provide the Commission, and others, an important benchmark against which to measure the effects of the industry self-regulatory initiatives I just described.³⁷

b. Media Violence – Truth in Labeling

Violence in entertainment products marketed to children – an issue once largely outside of the purview of the FTC – has become another area of focus in recent years. Like childhood obesity, it is a problem that can be addressed, in part, by industry self-regulation and increased availability of accurate information. Because movies, music, and video games are types of speech, and thus government regulation must be limited, effective self-regulation regarding the labeling and advertising of entertainment media products can play an important role. It permits industry to be creative while at the same time fulfilling the need of parents to have accurate information about entertainment products so they can make informed decisions for their families.

The FTC's role here has been to periodically assess entertainment self-regulation through public reports. Since 2000, the FTC has responded to requests from Congress and issued six reports on the marketing of movies, music, and video games that are rated or labeled as containing content that may not be appropriate for children.³⁸ Our first report documented

³⁶ The FTC will protect the confidentiality of sensitive company financial information, and financial data will be reported only in the aggregate.

³⁷ In June of this year, the FTC's Bureau of Economics published research comparing children's exposure to television advertising in 1977 and 2004. See FTC Staff, *Children's Exposure to TV Advertising in 1977 and 2004: Information for the Obesity Debate* (June 2007), available at <http://www.ftc.gov/os/2007/06/cabecolor.pdf>. The report concluded that children are not exposed to more food ads on TV than they were in 1977, although their ad exposure now is more concentrated on children's programming, particularly that on cable television. Of course, such advertising also has shifted to new technologies not available to advertisers in 1977, and that phenomenon will be explored in the study currently underway.

³⁸ The reports are available at <http://www.ftc.gov/ratings/>.

widespread marketing of movies, music, and video games with violent content to children that was inconsistent with the product ratings or parental advisories.³⁹ We also found that ads for such products frequently failed to contain rating and labeling information, and that children unaccompanied by an adult could purchase the products easily. Accordingly, the Commission recommended changes to and better oversight of industry self-regulatory programs.

Our follow-up reports demonstrated improvement by all three industries in providing rating or labeling information in advertising. In addition, the video game and movie industries now have limits on advertising M-rated games and R-rated movies to children under 17. Our follow-up “mystery shops” – where a youthful person is sent to attempt to buy a movie ticket or video game – also documented steady improvement in the enforcement of the movie rating system at theaters and the video game rating system at retail. There remains, however, substantial room for improvement.

c. Alcohol Advertising – Resolving Competing Interests

From fattening foods and violent videos, I will turn briefly to liquor. Alcohol advertising is a particularly tough issue, given the divergent interests of children and adults. Recent actions by Congress and the Surgeon General reinforce the fact that underage drinking is a matter of national concern.⁴⁰ Given the substantial risks posed by youth drinking, alcohol advertising

³⁹ FTC, *Marketing Violent Entertainment to Children: A Review of Self-Regulation and Industry Practices in the Motion Picture, Music Recording & Electronic Game Industries* (Sept. 2000), available at <http://www.ftc.gov/reports/violence/vioreport.pdf>.

⁴⁰ In April 2007, the Surgeon General issued a Call to Action on underage drinking, and in December 2006, the Congress enacted the Sober Truth on Preventing Underage Drinking Act. See U.S. Department of Health and Human Services, *The Surgeon General’s Call to Action to Prevent and Reduce Underage Drinking* (Apr. 2007), available at <http://www.surgeongeneral.gov/topics/underagedrinking/calltoaction.pdf>; see also *Sober Truth on Preventing Underage Drinking Act*, Pub. Law No. 109-422, 120 Stat. 2890 (2006), available at <http://npl.ly.gov.tw/pdf/5651.pdf>.

should not be directed, either by content or placement, to those under the legal purchase age. At the same time, for consumers age 21 and over, truthful advertising promotes a competitive alcohol marketplace, with benefits in the form of increased choice and price competition.

Given these competing concerns, the Commission has promoted effective industry self-regulation to reduce the likelihood that alcohol advertising and marketing target youth. Three major trade associations have promulgated voluntary codes of conduct that apply to the beer, spirits, and wine industries, respectively.⁴¹ Following formal studies in 1999 and 2003, the Commission recommended improvements in the codes.⁴² As a result, the trade associations modified the codes to require that at least 70% of the audience for alcohol ads be persons of legal drinking age, based on reliable demographic data.⁴³ In addition, the codes now provide for external review of complaints about code compliance, and ensure that the results of such reviews are made public.⁴⁴

For self-regulation to be fully effective, however, there must be oversight. The FTC staff monitors the progress of alcohol industry self-regulation, both formally and informally. In 2005, for example, informal monitoring led to a modification of the beer and spirits codes to end promotion of drinking games, like beer pong, that encourage binge drinking. In addition, this

⁴¹ For more information about alcohol industry self-regulation and the Commission's past recommendations for improvement, see FTC, *Alcohol Marketing and Advertising: A Report to Congress* (Sept. 2003) [hereinafter 2003 Alcohol Report], available at <http://www.ftc.gov/os/2003/09/alcohol08report.pdf> and FTC, *Self-Regulation in the Alcohol Industry: A Review of Industry Efforts to Avoid Promoting Alcohol to Underage Consumers* (Sept. 1999) [hereinafter 1999 Alcohol Report], available at <http://www.ftc.gov/reports/alcohol/alcoholreport.htm>. A new study of alcohol industry advertising self-regulation is underway.

⁴² See 2003 Alcohol Report and 1999 Alcohol Report, *supra* note 41.

⁴³ See 2003 Alcohol Report, *supra* note 41, at 13.

⁴⁴ For information regarding third-party review in the distilled spirits segment, see 2003 Alcohol Report, *supra* note 41, at 10. In addition, the Beer Institute and the Wine Institute established third-party review systems in 2006.

year the Commission began a new formal study to evaluate compliance with the 70% standard and the status of independent complaint review.⁴⁵ We issued compulsory process orders to the 12 largest alcohol advertisers, and expect to publish our report early next year.

3. Combating Private Restrictions on Providing Information

In addition to enforcement of the consumer protection laws against deceptive claims, the FTC, as part of its competition mission, combats private restrictions on providing information in the marketplace. In the last year, the agency has expended considerable efforts fighting such restrictions in the real estate area. Purchasing or selling a home is one of the most significant financial transactions most consumers will ever enter into. Thanks in part to the development of the Internet, the real estate brokerage industry has undergone substantial change in recent years. By placing more information in the hands of consumers, the Internet has facilitated the growth of real estate brokers using non-traditional business models that allow consumers opportunities to substitute their efforts for those of the broker, in many cases in return for lower fees. These lower fees reflect the lower cost of serving consumers who are easier to serve, in part, because they perform substantial online research themselves.⁴⁶

Not entirely surprisingly for an industry with changing business models, we have seen associations of traditional brokers make efforts to impede competition from brokers who use alternative business models by hampering their ability to provide information to consumers. In September 2006, the FTC brought our first case challenging such restrictions, alleging that the

⁴⁵ See Notice, 71 Fed. Reg. 62,261 (Oct. 24, 2006), available at http://www.ftc.gov/os/2006/10/P064505fnnotice_inforealcoholads.pdf.

⁴⁶ See Federal Trade Commission and Department of Justice, *Competition in the Real Estate Brokerage Industry* 25-26 (Apr. 2007) [hereinafter FTC/DOJ Real Estate Report], available at <http://www.ftc.gov/reports/realestate/V050015.pdf>.

board of realtors in Austin, Texas⁴⁷ violated the antitrust laws by effectively preventing consumers who have opted for potentially lower-cost unbundled brokerage services from marketing their listings on public, real estate-related Internet sites. The potential anticompetitive effects of such conduct are significant, as the Internet has now surpassed the yard sign as the most important marketing tool to reach consumers of real estate.

Then, in October 2006, the FTC filed a law enforcement sweep, in which we challenged similar restrictive rules adopted by seven groups of brokers operating multiple listing services. MLSs are local or regional joint ventures of real estate brokers who pool and disseminate information on homes available for sale in their particular geographic areas. As anyone who has been involved in a real estate transaction knows, the MLS is an important resource for sellers, buyers, and brokers of real estate. In the enforcement sweep, the FTC alleged that the seven broker groups adopted rules that withheld the valuable benefits of the MLSs they control from consumers who chose to enter into non-traditional real estate listing agreements. Six of the seven groups blocked non-traditional, less-than-full-service listings from being transmitted by the MLS to a wide variety of popular Internet sites, while the seventh blocked such non-traditional listings from the MLS entirely. The FTC reached settlements with six⁴⁸ of the groups

⁴⁷ *Austin Board of Realtors*, FTC Dkt. No. C-4167 (2006) (decision and order), available at <http://www.ftc.gov/os/caselist/0510219/0510219c4167AustinBoardofRealtorsDecisionandOrder.pdf>.

⁴⁸ *MiRealSource, Inc.*, FTC Dkt. No. 9321 (2007) (decision and order), available at <http://www.ftc.gov/os/adjpro/d9321/070323decisionorder.pdf>; *Northern New England Real Estate Network, Inc.*, FTC Dkt. No. C-4175 (2006) (decision and order), available at <http://www.ftc.gov/os/caselist/0510065/0510065do061128.pdf>; *Monmouth County Association of Realtors*, FTC Dkt. No. C-4176 (2006) (decision and order), available at <http://www.ftc.gov/os/caselist/0510217/0510217do061128.pdf>; *Williamsburg Area Association of Realtors, Inc.*, FTC Dkt. No. C-4177 (2006) (decision and order), available at <http://www.ftc.gov/os/caselist/0610268/0610268do061128.pdf>; *Realtors Association of Northeast Wisconsin, Inc.*, FTC Dkt. No. C-4178 (2006) (decision and order), available at <http://www.ftc.gov/os/caselist/0610267/0610267do061130.pdf>; *Information and Real Estate Services, LLC*, FTC Dkt. No. C-4179 (2006) (decision and order), available at <http://www.ftc.gov/os/caselist/0610087/0610087do061201.pdf>.

and is currently in litigation against the seventh.⁴⁹

4. Preventing Government Restraints on Providing Information

Of course, restricting the flow of information to consumers can have the same harmful effects, whether industry or the government imposes the restriction. Thus, as an important complement to the FTC's law enforcement activities, the agency regularly advocates on behalf of the consumer in Congress, state legislatures, other agencies, and courts, often targeting proposed government restraints on providing marketplace information.

Back in the 1970s and early 80s, nutrition-related claims in food marketing were the subject of considerable regulatory scrutiny, and food manufacturers were effectively prohibited from making truthful claims regarding how certain foods provide health benefits. In 1974, the FTC's Food Rulemaking was a broad effort to regulate food claims in advertising through explicit, industry-wide rules, and it initially included a proposed ban on all diet-disease claims as inherently deceptive. During this time, diet-disease claims in advertising also raised the risk of legal challenge by the FDA, as such claims allowed the FDA to declare the advertised product a "drug," and thus subject to drug law regulations. It was not until the mid-1980s that producers faced significantly less regulatory risk in making truthful claims about diet-disease relationships.

Over the last several years and in various contexts, the FTC staff has advocated to the FDA⁵⁰ that consumers benefit when its regulatory approach allows the dissemination of truthful

⁴⁹ Realcomp II Ltd., FTC Dkt. No. 9320 (2006) (complaint), *available at* <http://www.ftc.gov/os/adipro/d9320/061012admincomplaint.pdf>.

⁵⁰ The FTC and the FDA have overlapping jurisdiction to regulate advertising, labeling, and promotion of foods. Under a longstanding liaison agreement between the agencies, the FTC exercises primary responsibility for ensuring that food advertising is truthful and not misleading, while the FDA has primary responsibility for regulating the labeling of foods. Working Agreement between FTC and Food and Drug Administration, 4 Trade Reg. Rep. (CCH) ¶ 9,850.01 (1971).

and non-misleading claims about the nutrient content and health benefits of foods.⁵¹ As staff has observed, if food marketers can make truthful health and nutrient content claims for their products, consumers will become more aware of the significance of the nutrients in foods and will be prompted to review the nutrition facts panels to obtain more information. Comparative advertising among food marketers often highlights why one brand is more nutritious than a competing brand. This competition, along with consumers' heightened interest in purchasing more nutritious products, gives food marketers strong economic incentives to develop and market healthier products to satisfy consumers – so goes the cycle of the market.

Empirical evidence confirms that if consumers receive more and better information about nutrition and health, they are able to make better-informed choices about the food products they purchase. A study on the effects of the dissemination of health information in the ready-to-eat cereal market provides a concrete example of the consumer and competitive benefits of policies that allow health claims for food products.⁵² Prior to 1984, such claims were not allowed. That year, however, the Kellogg Company began claiming on labels and in advertising that its All Bran® cereal was high in fiber and that diets high in fiber could reduce the risk of cancer, claims that were consistent with the existing recommendations of the National Cancer Institute. Competing cereal manufacturers soon responded with similar claims for their own high-fiber

⁵¹ See, e.g., Comments of FTC Staff in the Matter of Draft Guidance for Industry and FDA Staff: Whole Grains Label Statements, FDA Dkt. No. 2006-0066 (Apr. 2006), available at <http://www.ftc.gov/os/2006/04/v060014FTCStaffCommentstotheFDAReDocketNo2006-0066.pdf>; Comments of FTC Staff in the Matter of Request for Comments on Nutrient Content Claims, General Principles, FDA Dkt. Nos. 1994P-0390 & 1995P-0241 (July 2004), available at <http://www.ftc.gov/be/V040020.pdf>; Comments of FTC Staff in the Matter of Food Labeling: Trans Fatty Acids in Nutrition Labeling, FDA Dkt. No. 03N-0076 (Apr. 2004), available at <http://www.ftc.gov/os/2004/04/040416foodlabeling.pdf>.

⁵² See FTC Staff, *Health Claims in Advertising and Labeling: A Study of the Cereal Market* (Aug. 1989), available at <http://www.ftc.gov/be/econrpt/232187.pdf>.

cereals.

The emergence of these health claims apparently led to significant changes in consumer cereal choices. Three years later, consumers had substantially increased their consumption of high-fiber cereals, with the greatest increase occurring in the groups that had previously consumed the least amount of such cereal. The profile of the cereal market changed as well, with the market share for high-fiber cereals increasing by almost four percentage points and more high-fiber cereals introduced into the market.⁵³ The dissemination of the fiber/cancer claims thus benefited consumers by providing important dietary guidance and by expanding the range of high-fiber cereal choices available to them in the market.

Another area in which the FTC has been actively seeking to prevent government restrictions on the provision of marketplace information is attorney advertising. Much like weeds that return to our gardens each spring, restrictions on attorney advertising seem to turn up in the states every few years. To be sure, the recurring debate over attorney advertising involves important policy concerns, not least of which is preventing claims that would deceive or mislead lay people and thereby undermine public trust in lawyers and the legal system. FTC staff, however, has repeatedly expressed its view to various state supreme courts and bar associations that consumers are better off if concerns about potentially misleading advertising of legal services are addressed through restrictions that are narrowly tailored to prevent deceptive claims. In contrast, imposing overly broad restrictions that prevent the communication of truthful and non-misleading information that some consumers may value is likely to inhibit competition in

⁵³ *Id.* at 33, 42-47, 82-87. For a more recent study of the effects of food advertising, see FTC Staff, *Advertising Nutrition and Health: Evidence from Food Advertising 1977-1997* (Sept. 2002), available at <http://www.ftc.gov/opa/2002/10/advertisingfinal.pdf>.

the market for legal services and frustrate informed consumer choice.⁵⁴

Two aspects of the latest round of attorney advertising restrictions are particularly troublesome for consumers of legal services. First, some of these proposed restrictions have targeted online advertising, an increasingly important avenue for advertising legal services and, of course, many other offerings. The FTC recently authorized the filing of staff comments with the Florida Bar,⁵⁵ which had proposed applying various advertising restrictions on all computer-accessed communications, including Internet sites and emails. The staff expressed its concern about, among other things, the bar's proposed ban on reporting past successes on attorney or law firm homepages and electronic solicitations. As staff noted, many lawyers and law firms post on their homepages announcements, press releases, and other stories that involve client representation that consumers may find informative. Similarly, lawyers often announce their achievements via email or online blog. Such communications may be truthful and non-misleading and can help consumers in assessing the caliber, experience, or personal style of a lawyer or law firm.

Second, some of the recently proposed attorney advertising restrictions have included the prescreening of ads by bar associations, which, of course, are comprised of competitors. Beyond the potentially significant costs imposed by such prescreening requirements, FTC staff comments filed with these bar associations identified a significant risk to competition when one

⁵⁴ See, e.g., FTC Staff Comments to Ms. Lilia G. Judson, Executive Director, Indiana Supreme Court (May 11, 2007), available at <http://www.ftc.gov/be/V070010.pdf>; Brief of the Federal Trade Commission As *Amicus Curiae* Supporting Arguments to Vacate Opinion 39 of the New Jersey Supreme Court Committee on Attorney Advertising (May 8, 2007), available at <http://www.ftc.gov/be/V070003opinion39.pdf>; FTC Staff Comments to the Office of Court Administration of the New York Unified Court System (Sept. 14, 2006), available at <http://www.ftc.gov/os/2006/09/V060020-image.pdf>.

⁵⁵ FTC Staff Comments to the Florida Bar (Mar. 23, 2007), available at <http://www.ftc.gov/be/V070002.pdf>.

group of competitors regulates another: that is, attorneys reviewing advertisements and solicitations may have the incentive, and under the proposed regimes would have the ability, to limit advertising by competitors to soften the competition they may face, rather than to protect consumers.⁵⁶

5. Ensuring That Prices Convey Accurate Information

As I mentioned previously, the FTC, along with the U.S. Department of Justice, is charged with protecting consumers by maintaining competitive markets through enforcement of the antitrust laws. By challenging anticompetitive mergers and conduct, we seek to foster a marketplace in which consumers can count on having innovative and multiple choices, and lower prices. Put another way, the FTC works to make sure that prices reflect actual supply and demand conditions, thus conveying accurate signals to consumers.

I will use the petroleum industry as an example. Given that gasoline, in particular, is so important to U.S. consumers and our lifestyle, the Commission directs significant resources to work in this industry. The basic tools that the FTC uses to ensure competitive prices for consumers in that industry include: challenging potentially anticompetitive mergers, prosecuting nonmerger antitrust violations, monitoring industry prices and behavior to detect possible anticompetitive conduct, and researching petroleum sector developments.

The Commission has investigated every major merger in the petroleum industry over the past quarter century. The agency has carefully examined proposed mergers and has blocked or required revisions of any that have threatened to harm consumers by reducing competition. Indeed, the Commission has challenged mergers in the oil industry at lower levels of

⁵⁶ *Id.*; FTC Staff Comments to the Rules of Professional Conduct Committee, Louisiana State Bar Association (Mar. 14, 2007), available at <http://www.ftc.gov/be/V070001.pdf>.

concentration than in any other industry. In addition to scrutinizing mergers, the Commission carefully looks for anticompetitive conduct. For example, the Commission's economists monitor retail prices of gasoline and diesel in some 360 cities and wholesale prices in 20 major urban areas. If we identify "unusual" price movements, we then examine whether any such movements might result from conduct that violates the antitrust laws.

Gasoline prices have moderated somewhat from recent record highs, but still remain substantially above where they were a year ago. This gives us two critical pieces of information: first, that supplies of crude oil and refined petroleum products are limited; and, second, that consumer demand is high. But it is clear that we, as consumers, don't want to hear this message. All else equal, we would expect a substantial increase in prices to decrease consumption. During the summer of 2006, however, while gasoline prices averaged 26% higher than in the summer of 2005 and we heard screams of protest throughout our nation, we consumers still purchased 0.5% more gasoline.⁵⁷ Indeed, global energy demand has been rising steadily and will continue to rise. Potential reasons for this include population growth, an increase in miles driven, and an increase in the use of cars in places like China. The fact is, though, that increased demand over time will continue to place upward pressure on gasoline prices, and this trend will not likely reverse until we, as consumers, modify our lifestyles, our purchasing, and our consumption.

A frequent challenge for the FTC is to distinguish between markets corrupted by anticompetitive conduct and markets that are functioning competitively, even if they are producing results that we may not particularly like. Since the gasoline price spikes that occurred immediately before and after Hurricanes Katrina and Rita made landfall in 2005, there have been

⁵⁷ Federal Trade Commission Report On Spring/Summer 2006 Nationwide Gasoline Price Increases (August 2007) at 23, available at <http://www.ftc.gov/reports/gasprices06/P040101Gas06increase.pdf>.

numerous calls in Congress and elsewhere for investigations of so-called “price gouging,” particularly at the retail gasoline level, and for legislation making price gouging a violation of federal law. The FTC is acutely aware of the pain that these price increases have caused consumers and small businesses. Consumers understandably are upset when they face dramatic price increases within very short periods of time, especially during a disaster.

We repeatedly have made clear, however, that outlawing price gouging is not the answer. Although widely understood to refer to significant price increases (typically during periods of unusual market conditions), the term “price gouging” lacks an accepted definition in law and in economics. More importantly, our vast experience in the petroleum industry tells us that enacting federal price-gouging legislation would not help consumers; in fact, it more likely would harm them.

As I described earlier, prices play a critical role in our economy: they signal producers to increase or decrease supply, and they also signal consumers to increase or decrease demand. In a period of shortage – particularly with a product, like gasoline, that is sold in many markets around the world – higher prices create incentives for suppliers to send more product into the market, while also creating incentives for consumers to use less of the product. Our examination of what happened in the market after Hurricane Katrina provides a great example.

Just as economic theory would predict, in the months after Hurricane Katrina made landfall, normal forces of supply and demand in petroleum product markets mitigated the dramatic post-hurricane price spike. Not only did the sudden rise in gasoline prices curb consumer demand – and thus immediately relieve the upward price pressure experienced in the aftermath of the Gulf Coast hurricanes – but higher gasoline prices also signaled suppliers to

bring more product to the most severely affected areas of the country, further blunting the price increases. For example, imports of large quantities of gasoline to United States ports from European and other locations damped the price increases. In addition, because of increased refinery utilization and a shift in output from other products to gasoline, the production of gasoline increased at U.S. refineries outside the hurricane zone. This increase in gasoline production – which became profitable for these refineries precisely because of the post-hurricane gasoline price increase – ultimately led gasoline prices back down following the initial shock of the hurricanes.

If these price signals are distorted by price controls, consumers ultimately might be worse off because producers may manufacture and distribute an inefficient amount of goods and services, and consumers may lack the information necessary to properly value one product against another. Thus, if there is a “right” price for a commodity, it is not necessarily the low price; rather, it is the competitively determined market price. Relative to past prices, a competitive market price may sometimes be low, and it may sometimes be high; but it will send an accurate signal to producers to manufacture a sufficient amount of goods and services that consumers want to buy at that price, and an accurate signal to consumers to reallocate purchase decisions.

The troubling thing about proposals for price-gouging legislation is that they indicate that we do not learn from past mistakes. In April 2007, the FTC held a three-day conference on “Energy Markets in the 21st Century: Competition Policy in Perspective.”⁵⁸ The first panel discussion was entitled “Lessons from History: How Did the United States Deal with the Energy

⁵⁸ The conference agenda, transcript, and panelists’ presentations are *available at* <http://www.ftc.gov/bcp/workshops/energymarkets/index.shtml>.

Crises of the 1970s? What Did We Learn?” The 1970s oil crisis, one expert panelist explained, became serious largely because government officials turned to allocations and price controls. The inevitable result was an imbalance between supply and demand, long lines at gas stations, and forms of hoarding that actually compounded the problems. The clear lesson is that there is a role for government in dealing with such crises, but it consists not in efforts to dictate the final quantities of price or supply, but rather in adopting forms of regulatory flexibility that will allow firms to find effective responses to a situation.

Even if Congress outlaws price gouging, the law likely would be difficult to enforce fairly. The challenge in crafting a price-gouging statute is to be able to distinguish gougers from those who are reacting in an economically rational manner to the temporary shortages resulting from the emergency. This is more than just a problem for legislators and prosecutors. Gasoline suppliers may react to this difficulty in distinguishing gougers by keeping their prices lower than they rationally would. Consumers, in turn, may have no incentive to curb their demand as they would in response to a higher price. Other suppliers may have no incentive to send new supplies to the affected area, as they would if the price increased. The end result may be long gasoline lines or even rationing. For all of these reasons, the Commission remains persuaded that federal price-gouging legislation would unnecessarily hurt consumers. Enforcement of the antitrust laws is the better way to protect consumers.

IV. The Future

Looking to the future, we anticipate that the flow of marketplace information, both to consumers and *from* them, will only continue to increase. A few ongoing efforts at the FTC offer a glimpse of what the future may hold for our competition and consumer protection

missions and for consumers.

a. Tech-ade Hearings

Last November, the FTC held hearings on “Protecting Consumers in the Next Tech-ade.”⁵⁹ Over one hundred experts testified regarding the amazing changes in store for us over the coming ten years (to the extent anyone can predict). Many of the developments are rooted in the explosion of the Internet and other technologies that enable new methods of communication at speeds that could not have been imagined even a decade ago. The increased speed at which communication happens is only part of the equation, however. Speed, combined with the ability to receive this information virtually anywhere, has created an environment in which the average consumer, as one participant described it, demands “what I want when I want it.” The end result is that the amount of data flowing in the marketplace will likely continue to increase, consumers will be the source of much of this information in the new “user-generated content” paradigm, and the information produced will be more easily obtained by all those seeking it.

To illustrate this point, consider the way in which something as simple as shopping for a new dishwasher has changed just over the past few years. Consumers can now conduct research online, from home, work, or even the showroom floor. The sources of information have multiplied, and now, in addition to information compiled by professional sources, shoppers can readily find product reviews posted by individual consumers. Price comparisons are also available on the Internet, through a variety of research and shopping sites. And, consumers can complete the transaction with a few mouse clicks, never having to set foot in a store.

During the Tech-ade hearings, we also heard a great deal about how companies are

⁵⁹ FTC Workshop, *Protecting Consumers in the Next Tech-ade* (Nov. 2006), available at <http://www.ftc.gov/bcp/workshops/techade/index.html>.

leveraging available technology to improve their marketing efforts. The practice of behavioral targeting – that is, tracking consumers’ online activity to better target advertising – is one of the most important technology-driven developments we are following. In fact, on November 1-2, the FTC will hold a town-hall meeting, entitled “Behavioral Advertising: Tracking, Targeting, and Technology,”⁶⁰ to delve even more deeply into this topic. It is clear, however, that deployment of technology to develop in-depth profiles of consumers’ habits and preferences and to market to consumers using that data, has already occurred. This represents a significant evolution from the early days of direct advertising, when, as one of our Tech-ade presenters pointed out, geographic location was the main factor in determining which advertising consumers would receive. Today, in addition to geography, marketers can tailor their advertising based on information about consumers’ prior online and offline purchases, their online surfing habits, their self-reported interests, and very granular demographic data gleaned from data aggregators’ files. This development, though, has led to concerns about consumer privacy, and we will address those concerns at our town hall.

The positive effects of this flow of information, both to and from consumers, are likely to continue as the introduction and adoption of new technology advances in the coming years. The challenges for the FTC in monitoring increasing amounts of advertising, particularly when the messages may be customized and narrowcast, are significant, but it is essential that we fulfill this role to ensure not only that truthful information is conveyed to consumers, but also that consumers’ personal data is maintained and used in accordance with existing data security and privacy laws.

⁶⁰ FTC Workshop, *Behavioral Advertising: Tracking, Targeting, and Technology* (Nov. 2007), available at <http://www.ftc.gov/bcp/workshops/behavioral/index.shtml>.

B. Broadband Report

Let me next address an ongoing effort on the competition side. One of the single greatest sources of commercial (and non-commercial) information for consumers today – and for the foreseeable future – is, of course, the Internet. In August 2006, I 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. A few months ago, the FTC released a staff report,⁶¹ which summarizes the Task Force’s findings in the area of broadband Internet access, including the issue of “network neutrality.” For those of you unfamiliar with this ongoing debate, it generally involves the question of whether the transmission of data over the Internet should be subject to some type of regulation prohibiting or limiting certain practices by Internet service providers. For example, most net neutrality proposals would prohibit ISPs from providing priority data transmission to content and applications providers for a fee.

The bottom-line recommendation of the report is caution. Based on what we have learned through our examination of broadband connectivity issues and our experience with antitrust and consumer protection issues more generally, the report recommends that policy makers proceed cautiously in evaluating calls for net neutrality, for four principal reasons.

First, to date we are unaware of any significant market failure or demonstrated consumer harm from conduct by broadband providers. In general, policy makers should be wary of enacting regulation solely to prevent prospective harm to consumers. This is a particular concern where we do not know what the net effects of potential conduct by broadband providers will be on: (1) the prices that consumers may pay for Internet access, (2) the quality of Internet

⁶¹ FTC Staff, *Broadband Connectivity Competition Policy* (June 2007), available at <http://www.ftc.gov/reports/broadband/v070000report.pdf>.

access and other services that will be offered, and (3) the choices of content and applications that may be available to consumers in the marketplace.

Second, the broadband market is young and dynamic. We have seen evidence on a national scale that access speeds are increasing, prices – particularly speed-adjusted or quality-adjusted prices – are falling, and new entrants, including wireless and other competitors, are poised to challenge the incumbent cable and telephone companies.

My third reason for suggesting that policy makers proceed with caution is that regulation can have unintended negative consequences. Despite the good intentions of their proponents, industry-wide regulatory schemes – particularly those imposing general, one-size-fits-all restraints on business conduct – may well have adverse effects on consumer welfare, as certain unintended consequences may not be known until far into the future.

My final reason for suggesting that we proceed with caution is that the federal antitrust agencies – the FTC and the DOJ – and the FCC have the capacity and authority to address broadband access issues. Antitrust law, in particular, is well-equipped to deal with the competitive issues raised in the net neutrality debate. These competitive issues are not new to antitrust law, which is general, flexible, and able to analyze potential conduct and business arrangements involving broadband Internet access, just as it has been able to deal with such conduct and arrangements across many diverse markets.

V. Conclusion

To conclude, as I hope my comments this evening have made clear, the free flow of accurate, truthful, and non-misleading information is crucial to the well-being of consumers and a competitive economy. As the FTC pursues its competition and consumer protection missions, it will continue to expend considerable resources to protect this vital marketplace information.

Thank you. I would be happy to take any questions.