THE UNITED STATES FEDERAL TRADE COMMISSION PROMOTES BETTER MARKETS AND BETTER CHOICES: A Look At Health Care and Financial Services

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"Better Markets, Better Choices"

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Good afternoon. It is a privilege to have the opportunity to participate in this European Competition and Consumer Day in the United Kingdom. I want to recognize Sir John Vickers for his tremendous service to competition and consumers over the past 5 years. John, you have been a valued colleague and cherished friend, and we thank you. I also offer our sincerest condolences to the U.K. and the Competition Commission on the untimely death of Paul Geroski, a gifted economist who will be sorely missed by his friends in the competition community. Finally, I congratulate Philip Collins on his recent appointment as Chairman of the Office of Fair Trading, and John Fingleton on his appointment as OFT's Chief Executive. Both Philip and John are good friends and important members of the competition community, and we look forward to working with you in your new roles. (And, John, having recently spent ten wonderful days on holiday in Ireland, I am tempted to ask whether you are looking for a replacement?)

Protecting competition stimulates efficiency, resulting in lower prices, innovation, better products and services, and choice. In the crucible of a competitive marketplace, vendors have strong incentives to supply their customers and potential customers with reliable information

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

about their choices. But when those incentives are not enough, enforcement of the consumer protection laws promotes the provision of complete and accurate information and protects private information from unwanted and unknowing dissemination. Competition and consumer protection laws work in tandem with the other toward the ultimate goal of enhancing consumer welfare.

At the FTC, we employ a multi-pronged approach to protecting competition and consumers. We have an aggressive law enforcement program through which we litigate when necessary and negotiate settlements when they can fully resolve our competition and consumer protection concerns. We also inform our work through a vigorous research program, and we promote the benefits of competition and free markets through vigorous competition advocacy in all sectors of government. Finally, recognizing that informed consumers are empowered market participants, we implement a robust consumer education program, as well as an active program to educate businesses about what competition and consumer laws expect of them.

While we are charged, with few exceptions, with applying the FTC Act to all industries equally, there is no question that we devote more resources to the largest sectors of the economy. Today, I will focus on two large sectors of the U.S. economy, health care and financial services, and explain how the FTC implements competition and consumer protection policy to protect and promote consumer choice in these vital industries.

Protecting Competition and Consumers In Health Care

Most countries, of course, devote a substantial percentage of their resources to health care. American consumers paid nearly $1.8 trillion for health care in 2004 -- about 15 percent of gross domestic product. By far the fastest growing portion of that amount is expenditures for

pharmaceuticals. While we know that innovations in pharmaceuticals are saving lives, we also are coping with the fact that some consumers' budgets are strained or even broken by the prices of brand-name pharmaceuticals, which are unregulated in the United States. This has given greater urgency to the entry of generic drugs into the market, and the FTC has worked to ensure that such entry is not delayed through anticompetitive means.

Despite the enormous sums spent on health care, consumers typically do not have good information to help them make choices about their physicians and medical treatment. Last summer, the Commission, together with the Antitrust Division, issued a major report entitled *Improving Health Care: A Dose of Competition*, which was the culmination of a two-year project that began with public hearings.[2] Our report found that right now, "[t]he public has access to better information about the price and quality of automobiles than it does about most health care services."[3] Consumer information about the quality of health care providers is hard to find and not always reliable.[4] Without good, reliable information, patients are often at sea. Our report provided significant recommendations about the availability of information regarding the price and quality of health-care services, as well as physician collective bargaining; insurance mandates; hospital merger analysis; managed care organizations' bargaining power; and hospital group purchasing organizations.

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[2] FTC, IMPROVING HEALTH CARE: A DOSE OF COMPETITION (July 2004), *available at* http://www.ftc.gov/reports/healthcare/040723healthcarerpt.pdf.

[3] *Id.*, Executive Summary at 6.

[4] *Id.*, Ch. 1 at 18.

To ensure that U.S. health care markets remain competitive, and that consumers have the information they require about their choices so that they can make informed decisions about their health care, we serve health care consumers by battling anticompetitive restraints and by challenging false and misleading health care claims.

1. Mergers

We challenge proposed mergers that are likely to reduce competition in health care markets, including pharmaceuticals. For example, this July, the Commission acted to preserve competition when it accepted, subject to final approval, a consent order that required Novartis to divest the IP assets needed to manufacture and market three generic drugs as a condition of clearing Novartis' acquisition of Eon.[5] The order also requires Novartis to enter into a supply agreement with Amide, the firm to which Novartis will divest the assets, until it obtains FDA approval to manufacture the products on its own, so that Amide can market the drugs immediately following the divestitures. Novartis also is required to provide the technology assistance necessary to enable Amide to obtain FDA approval as quickly as possible. Of course, absent the merger, the FTC would not have required Novartis to share its IP with Amide. But because we believed the merger would have reduced competition in three drugs and that competition could be replaced by Amide having the IP, technology, and capacity to produce those drugs, we required divestiture of the IP.

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[5] Complaint, *Novartis, AG*, Docket No. 0510106 (July 19, 2005), *available at* http://www.ftc.gov/os/caselist/0510106/050719comp0510106.pdf; Decision and Order, *In the Matter of Novartis, AG*, Docket No. 0510106 (July 19, 2005), *available at* http://www.ftc.gov/os/caselist/0510106/050719do0510106.pdf.

The Commission's review of the Genzyme/Ilex transaction was another substantial merger investigation completed this year.[6] As originally structured, the transaction likely would have reduced competition in the already highly concentrated market for solid organ transplant (SOT) acute therapy drugs. Genzyme was the leading supplier; Ilex's product, Campath, was quickly gaining market share; and the two companies' products allegedly were each others' closest competitor. The approved consent order remedied the original transaction's alleged anticompetitive effects by requiring Genzyme to divest to Schering all rights to Ilex's Campath for use in SOT, including a fully-paid, and royalty-free worldwide license for SOT Campath, with the rights to sublicense all of Campath's intellectual property (including its patents, copyrights and trademarks) needed to make and sell Campath for SOT anywhere in the world. Because Schering already distributed and marketed Campath in the United States through an existing agreement with Ilex, it was well-positioned to provide effective competition in the market. While Campath is used in other markets, they did not raise competitive concerns, and thus the Commission required the divestiture only of the rights involved in the use of the drug for SOT acute therapy.[7]

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[6] Complaint, *Genzyme Corporation/Ilex Oncology, Inc.*, Docket No. C-4128 (Dec. 20, 2004), *available at* http://www.ftc.gov/os/caselist/0410083/041220comp0410083.pdf; Decision and Order, *Genzyme Corporation/Ilex Oncology, Inc.*, Docket No. C-4128 (Jan. 31, 2005), *available at* http://www.ftc.gov/os/caselist/0410083/050204do0410083.pdf.

[7] Both the Novartis and Genzyme/Ilex cases illustrate that not only do IP-intensive mergers require particular care in analyzing their competitive effects, but they also present new challenges in devising remedies. Our preference long has been for structural remedies to mergers that violate the antitrust laws to avoid unwarranted entanglement of the agencies in the day-to-day workings of the market. This is not always possible, however, in transactions that primarily involve IP rights. For example, a clean divestiture may not be viable if the divesting party needs to retain access to the IP to operate lines of business that do not raise competitive issues.

2. Pharmaceutical Agreements

The Commission also has focused on pharmaceuticals in its conduct investigations. Recently, the most complex of these matters have involved alleged restraints of competition agreed upon by a manufacturer of a brand and a manufacturer of a generic pharmaceutical. The U.S. Congress has sought to speed entry of generic drugs through the regime established in the Hatch-Waxman Act. Studies have shown that, when a generic competitor enters the market, it does so at a lower price than the brand-name firm and quickly gains market share.[8] Later generic firms enter at even lower prices. Hatch-Waxman offers a number of incentives for generic entry, including a six-month exclusivity period for the first generic on the market. Recently, the Commission has investigated several instances in which it appeared that brand and generic manufacturers circumvented the purpose of the Act through so-called "reverse payments" made by the brand manufacturer to the generic manufacturer, in exchange for the generic manufacturer's agreement to delay entry of its product.

The most prominent of these matters is the *Schering* case. In *Schering*, the FTC filed an administrative complaint against Schering-Plough, Upsher-Smith Labs, and American Home Products. The complaint alleged that the companies entered into anticompetitive agreements, complete with payments from Schering to the two generic manufacturers, that were aimed at keeping a low-cost generic version of a potassium chloride supplement off the U.S. market.[9] The

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[8] *See generally Generic Drug Entry Prior to Patent Expiration: An FTC Study* (July 2002), *available at* http://www.ftc.gov/os/2002/07/genericdrugstudy.pdf.

[9] Complaint, *Schering-Plough Corp.*, Docket No. 9297 (Apr. 2, 2001), *available at* http://www.ftc.gov/os/2001/04/scheringpart3cmp.pdf. *See also* Decision and Order, *Bristol-Meyers Squibb Co.*, Docket No. 4076 (Consent order settled charges that BMS delayed competition from generic versions of three major drug products, BuSpar, an anti-anxiety agent,

parties maintained that the settlements were lawful, in part, because they were legitimate settlements of patent litigation. In May 2002, an Administrative Law Judge ("ALJ") at the FTC issued an initial decision dismissing the FTC's complaint.[10] The staff appealed the ALJ's decision and in December 2003, the Commission reversed the ALJ and ruled against Schering and Upsher.[11] The companies then appealed the Commission's decision to the Court of Appeals for the Eleventh Circuit, which issued a decision in March 2005 that reversed the Commission's ruling and dismissed the charges. Last month, the Commission asked the Supreme Court to hear the case.[12]

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and two anti-cancer drugs, Taxol and Platinol.), *available at* http://www.ftc.gov/os/2003/04/bristolmyerssquibbdo.pdf.

[10] Initial Decision, *Schering-Plough Corp.*, Docket No. 9297 (May 29, 2002), *available at* http://www.ftc.gov/os/2002/06/spcuslahporder.pdf.

[11] Opinion of the Commission, *Schering-Plough Corp.*, Docket No. 9297 (Dec. 18, 2003), *available at* http://www.ftc.gov/os/adjpro/d9297/031218commissionopinion.pdf.

[12] Petition for a Writ of Certiorari, *Federal Trade Comm'n v. Schering-Plough Corp.*, (Aug. 29, 2005), *available at* http://www.ftc.gov/os/2005/08/050829scheringploughpet.pdf. In the same vein, the Commission has challenged other conduct that undermined the competitive goals of Hatch-Waxman. For example, in our action against Biovail Corporation, we argued that Biovail, by wrongfully listing a patent in the FDA's"Orange Book," improperly forestalled competition. Under Hatch-Waxman, would-be generic rivals who seek to enter prior to patent expiration must assert to the FDA that their drug does not infringe any valid patents that the brand firm has listed in the Orange Book. If a brand-name manufacturer with a patent listed in the Orange Book timely sues a generic for infringement, Hatch-Waxman awards the brand with an automatic 30-month stay of FDA approval of the generic's product. Biovail allegedly had acquired one 30-month stay this way, but – anticipating the expiration of that stay – improperly sought a second 30-month stay. It acquired and listed in the Orange Book a new patent, one that allegedly did not claim the drug's current formulation and therefore should not have been listed in the Orange Book. That compelled the generic to assert to the FDA – again – that its drug did not infringe any valid patents in the Orange Book, and offered Biovail an opportunity – again – to sue for infringement and obtain another 30-month stay. *See* Complaint, *Biovail Corp.*, Docket. No. C-4060 (Apr. 23, 2002), *available at* http://www.ftc.gov/os/2002/04/biovailcomplaint.htm; Decision and Order,

The Commission also has challenged anticompetitive conduct instigated by generic manufacturers. Like the brand and generic manufacturers, the first and second generic entrants also face mutual incentives to eliminate timely competition. The first generic enters at a lower price than the brand-name firm, but the second generic entrant often enters at an even lower price. At least in the short term, agreements between the first and second entrant that delay the second firm from entering can keep prices from falling. In 2004, the Commission settled charges against Perrigo and Alpharma for entering into such an anticompetitive agreement involving over-the-counter children's ibuprofen.[13] After the two entered into the agreement to limit competition, not surprisingly, prices went up. The consent order required the companies to disgorge $6.25 million to settle charges that they earned illegal profits from the agreement, and those funds will be used to compensate customers harmed by the companies' conduct.

3. Physician Price Fixing

No less important are the Commission's prosecutions of physician conduct that amounts to the collective naked setting of prices, without risk sharing or other integrative efficiencies. For more than twenty-five years, the FTC has challenged physician groups and other health care providers for allegedly entering into anticompetitive agreements – often involving price fixing – that raise the costs of health care for patients and their insurers. Since 2002 alone, the Commission has brought law enforcement actions against more than twenty physician groups.[14]

Biovail Corporation, Docket No. C-4060 (Oct. 2, 2002).

[13] Final Order and Stipulated Permanent Injunction, *FTC v. Perrigo Co.*, Civ. No. 4-1397 (D.D.C. 2004), *available at* http://www.ftc.gov/os/caselist/0210197.htm.

[14] *See, e.g.*, Complaint, *San Juan IPA, Inc.*, Docket No. C-4142 (June 30, 2005), *available at* http://www.ftc.gov/os/caselist/0310181/050705comp0310181.pdf; Complaint, *New*

The Commission does not oppose many physician networks and other health care joint ventures. As the FTC/DOJ Health Care Antitrust Enforcement Policy Statements[15] recognize, many physician and other health care networks produce significant efficiencies arising from risk- and cost-sharing and other forms of integration that benefit consumers. But our experience shows that physician price-fixing – without integrative efficiencies – will raise consumer health care costs considerably. It is to those arrangements that we direct our law enforcement.

For example, in January of this year, the Commission approved a consent order in a case that alleged that medical professionals who were members of the White Sands Health Care System, a physician-hospital association in south-central New Mexico, had unlawfully colluded. According to the Commission's complaint, White Sands' members included 80 percent of the independently-practicing physicians in the area, the only hospital in the area, and thirty-one non-physician health care providers, including all of the nurse anesthetists in the area. The Commission's complaint alleges that White Sands offered no efficiency-enhancing integration but rather simply facilitated horizontal agreements among member physicians and nurse anaesthetists on price and other terms. It further alleges that White Sands collectively negotiated

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Millennium Orthopaedics, LLC, Docket No. C-4140 (June 13,2005), *available at* http://www.ftc.gov/os/caselist/0310087/050617comp0310087.pdf; Complaint, *Preferred Health Services, Inc.*, Docket No. C-4134 (Apr. 13, 2005), *available at* http://www.ftc.gov/os/caselist/0410099/050302comp0410099.pdf; Complaint, *White Sands Healthcare Systems, L.L.C.*, Docket No. C-4130 (Jan. 11, 2005), *available at* http://www.ftc.gov/os/caselist/0310135/050114comp0310135.pdf; Complaint, *Southeastern New Mexico Physicians, IPA, Inc*., Docket No. C-4113 (Aug. 5, 2004), *available at* http://www.ftc.gov/os/caselist/0310134/040806comp0310134.pdf; Complaint, *California Pacific Medical Group, Inc., dba Brown and Toland Medical Group*, Docket No. 9306 (July 8, 2003), *available at* http://www.ftc.gov/os/2003/07/caadmincmp.pdf.

[15] DOJ/FTC Statements of Antitrust Enforcement Policy in Healthcare (1996), Statements 8 and 9.

with health plans, and that White Sands' members jointly refused to deal with health plans as individuals.

The result of the arrangement was predictable. Health plans faced higher prices from White Sands' members. That, in turn, raised the cost of medical care to patients in the area. Our consent decree sought to remedy this by prohibiting respondents from – among other things – entering into or facilitating agreements among health care providers to negotiate collectively with payors on the providers' behalf.

4. Deceptive Health Claims

The FTC also has promoted efforts to provide consumers with clear and accurate health care information by attacking fraud that plagues the marketplace.

One of the challenging health issues facing U.S. consumers – as well as consumers in many other countries – is the rapidly growing rate of obesity in adults and children. The latest data from the U.S. National Center for Health Statistics estimate that over 60 million adults in the United States are obese, and the numbers for children are even more sobering – 9 million young people between ages 6 and 19, with the percentage of overweight children tripling since 1980.[16]

Over the past decade, the FTC has brought more than 100 cases targeting deceptive weight loss claims, for a variety of pills, potions, patches, and lotions. Products like "Fat Trapper" and "Exercise in a Bottle" promise fast and easy weight loss with claims that you can

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[16] *"Overweight and Obesity: Home," Division of Nutrition and Physical Activity, Centers for Disease Control and Prevention* (Apr. 29, 2005), *available at* http://www.cdc.gov/nccdphp/dnpa/obesity.

"eat what you want and never – ever – ever have to diet again."[17] But wait, there's more! One marketer even promised that its product would work faster than a hunger strike! "Even if you eat nothing you won't slim down as fast," the ad promised, claiming the product would burn off "more fat than running 98 miles per week."[18] Not only do consumers lose money buying these useless products, but they use them in lieu of implementing effective diet and exercise programs. We have been successful in challenging these claims, in many cases getting the courts to issue temporary restraining orders, asset freezes, strong permanent injunctive relief, and substantial money judgments.

The Commission also has an active advertising enforcement agenda that focuses on preventing false or misleading health and disease claims for foods, over-the-counter drugs, devices, and dietary supplements. We focus on preventing these types of deceptive claims because they can cause harm not just to consumers' pocket books, but also to their health.

For example, ads for a liquid containing seaweed and colloidal silver — aptly named "Seasilver" — falsely claimed that drinking just one capful a day of the product could cure hundreds of specific diseases, ranging from chronic fatigue syndrome and diabetes to AIDS and cancer. Not only did these deceptive claims cause consumers to lose the money that they paid for an ineffective product, but more significantly, these claims also could cause consumers with serious diseases to forego effective treatments, thereby putting their health at risk. The FTC

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[17] These and other claims made in an infomercial for two dietary supplement products were challenged by the Commission as false and misleading. *See FTC v. Enforma Natural Prods., Inc.*, Civ. Action No. 04376JSL (CWx)(C.D. Cal. 2000)(stipulated final order).

[18] In the Commission's pending case against this marketer of the "Himalayan Diet Breakthrough" the court granted a preliminary injunction and asset freeze. *FTC v. AVS Marketing, Inc. et al.*, Civ. Action No. 04C-6915 (N.D. Ill. Nov. 19, 2004)(stipulated order).

obtained a temporary restraining order against the people and companies behind SeaSilver, froze their assets, halted the false claims, and ultimately obtained an order for $4.5 million in consumer redress.

The Commission has also brought several actions against the manufacturers of inaccurate home-use HIV test kits. The Commission tested these kits – which were generally sold on the Internet – and found that the test kits produced false negatives, meaning that when a sample of HIV-positive blood was tested, the faulty kits showed that the blood was negative. The health implications of such faulty test kits are clear. There are accurate and approved home-use HIV test kits on the market; acting quickly against the manufacturers of the faulty test kits was a particularly important priority for the FTC.

We also have challenged unsubstantiated health-related claims in national advertising for products. One recent FTC case involved a product that many of us consume, orange juice. Tropicana Products ran ads claiming that it had a clinical study that "proved" that drinking two glasses a day of its orange juice would drop one's blood pressure an astonishing ten points in just six weeks. Although there was some science on the relationship between orange juice consumption and blood pressure, we alleged that these claims exaggerated the benefits consumers were likely to receive.

Drinking orange juice, of course, is not a bad thing. On the contrary, it is an easy and convenient way for people on the run to get one of their daily servings of fruits and vegetables. The FTC has long encouraged food advertisers to provide consumers with truthful information about the relationship between good nutrition and lower disease risks, because such advertising and marketing can plan an important role in improving consumers' health. But if an advertiser

claims that science proves that a food confers a specific health benefit on consumers, the FTC requires that the advertiser have the science to back up its claim. If consumers are to rely on the information in the marketplace to make better-informed purchasing decisions, the information must be truthful and non-misleading.

5. Advocacy in Health Care Markets

As competition and consumer protection policy making continues into its second century in the U.S., we have found that it is increasingly important to devote resources to advocacy. Our advocacy program advances two objectives. First, while private actors can cause significant competitive harm through collusion or the unlawful exercise of market power, state action also can substantially reduce competition. Consequently, whether behind the scenes or publicly, often in cooperation with the Department of Justice's Antitrust Division, we are continually advising federal and state legislatures, other agencies, and courts about the likely effects of their actions on consumers and markets. This activity can nip a restriction on competition "in the bud" before it can blossom into a barrier that ultimately restricts consumer choice or raises prices. My flower metaphor may be misleading, however, because once enacted, these restraints are far hardier than any blossom. More like weeds, government-imposed restrictions are among the most durable and effective restraints on competition. They can exist in the daylight, rather than in the shadows, and those who attempt to evade the restraints may receive official punishment.

Second, competition advocacy aids in the development of what I call "a culture of competition." Such a culture encourages government officials, private business, and consumers to develop greater awareness of and commitment to the benefits of free markets.

The Commission has had an active competition advocacy program in the health care sector. In the last year, the Commission directed its attention most frequently to legislation proposed by states that would restrict pharmacy benefit management companies, known as PBMs. PBMs manage health care plans' prescription drug insurance coverage. They assemble networks of retail pharmacies so that a plan sponsor's members can fill prescriptions easily and in multiple locations by just making a copayment at the pharmacies. PBMs consult with plan sponsors to decide for which drugs a plan sponsor will provide insurance coverage to treat each medical condition.

In March, the FTC staff commented on proposed legislation in North Dakota that would regulate PBMs' contracts with pharmacies and prohibit certain drug substitutions.[19] The FTC explained that the proposed legislation contained provisions that would prevent health plans from designing plans to encourage participants to use pharmacies that provide drugs to the plan at a lower cost than other pharmacies, and would prevent a PBM from switching a prescription for one brand-name drug to a less-expensive equivalent, thus making safe and price-reducing substitutions less common and likely increasing the price of drugs. We were pleased when the North Dakota legislature removed these provisions from the legislation, and agreed to study the issue further.

Also to help ensure that consumers *get access* to the truthful, non-misleading information that can help them make better-informed decisions, we work with the Food and Drug Administration ("FDA") to help educate consumers about the foods they eat – and to facilitate

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[19] Letter from FTC Staff to Senator Richard L. Brown, North Dakota Senate (Mar. 8, 2005), *available at* http://www.ftc.gov/os/2005/03/050311northdakotacomnts.pdf.

competition based on a food's nutritional benefits. For example, in December 2003, FTC staff filed a comment with the FDA suggesting modifications to that agency's food labeling system. Consumers who want to reduce their calories benefit from truthful, non-misleading information about calories on food labels. Some of the calories-per-serving information on food labels, however, did not always give consumers accurate information about the calories they ingest with a product. For example, labels often treated a single twenty-ounce soft drink as two-and-a-half servings, even though consumers typically drink the entire soft drink. Staff suggested, among other things, that the FDA review whether the foods' listed serving sizes actually reflected the volume that consumers truly eat. In March 2004, the FDA embraced that FTC suggestion, along with many others.[20]

6. Research in Health Care Markets

We actively engage in research to help inform us and our sister agencies in our pursuit of policies that will foster a marketplace that is both vigorous and responsive to consumer needs. In addition to the comprehensive Report on competition and health care that I mentioned earlier, the Commission also has focused on PBMs in its research efforts. In response to a Congressional request, this month, the Commission issued a major report entitled *Pharmacy Benefit Managers: Ownership of Mail-Order Pharmacies*.[21] In the report, the Commission tested whether

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[20] *See* FDA Staff Report, Calories Count: Report of the Working Group on Obesity (March 2004), *available at* http://www.cfsan.fda.gov/~dms/owg-rpt.html#v; Comments of the FTC Staff Before the FDA In the Matter of Obesity Working Group (Dec. 12, 2003), *available at* http://www.ftc.gov/be/v040003text.pdf.

[21] FTC, PHARMACY BENEFIT MANAGERS: OWNERSHIP OF MAIL-ORDER PHARMACIES (Sept. 6, 2005), *available at* http://www.ftc.gov/reports/pharmbenefit05/050906pharmbenefitrpt.pdf.

Congressional concern that health care plans pay more for drugs when using a mail-order pharmacy owned by a PBM, as opposed to using a mail-order or retail pharmacy that the PBM does not own, was supported by the facts.[22]

In fact, the Commission's PBM report concluded that, in 2002 and 2003, prescription drug plan sponsors generally paid lower prices for drugs purchased through PBM-owned mail-order pharmacies than for drugs purchased through mail-order or retail pharmacies not owned by PBMs. It appeared that many plan sponsors had sufficient bargaining leverage that they could use a variety of contractual provisions to ensure that they aligned their PBM's interests with the sponsor's interests.[23]

In another example of our research efforts, this past July, the Federal Trade Commission and the Department of Health and Human Services held a public workshop on "Marketing, Self-Regulation, and Childhood Obesity." Through this workshop, we provided a forum for sharing perspectives from all stakeholders on the marketing of food and beverages to children, on

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[22] PBMs use mail-order pharmacies to manage prescription drug costs, and many plan sponsors have encouraged patients with chronic conditions who require repeated refills to seek the discounts that high-volume mail-order pharmacies can offer. PBMs maintain that they have greater control over the drugs dispensed through their own mail-order pharmacies and, therefore, can provide pharmaceuticals at lower cost. If a plan sponsor's agreement with a PBM, however, does not properly align the plan's interests with the PBM's incentives, there could be a conflict of interest where PBMs use their own mail-order pharmacies to increase costs and generate additional profits.

[23] The *Report* included the following major findings: (1) On average, large PBMs in 2002 and 2003 charged lower prices through their mail-order pharmacies than the prices charged by mail-order pharmacies not owned by large PBMs; (2) For a common basket of drugs (dispensed in December 2003), prices at retail pharmacies typically were higher than mail prices at both large PBMs and retailer-owned PBMs; and (3) The data did not suggest any significant differences, by therapeutic class, in generic dispensing rates between PBM-owned mail-order pharmacies and mail-order pharmacies not owned by PBMs.

industry self-regulatory efforts, and on recent initiatives by individual companies to respond to childhood obesity through changes in their products or their marketing methods. The Workshop provided an opportunity to examine what is and what is not working and what more can be done in marketing, product innovations, and other approaches to promote healthy food choices and lifestyles for our children. I anticipate that we will produce a report regarding the Workshop, which will describe the efforts being taken to address the problem and hopefully provide some recommendations as to more we can do going forward.[24]

7. Education in Health Care

Consumer and business education are the final critical tools we use. We regularly issue consumer alerts and education materials that remind consumers that they should be skeptical of products that promise quick cures and easy solutions to serious diseases. In 2003, we published a guide that describes seven claims in weight loss ads that should raise red flags because they are always false.[25] Our goal was to give the media an easy and efficient way to screen and reject advertisements that make the "Red Flag" claims, and we asked members of the media for their help. In March, we issued a report based on data gathered in 2004, which appear to show that the media have responded to our challenge.[26] We repeated our survey of weight loss advertisements

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[24] The FTC also provides to health care providers and others in the health care industry substantial amounts of antitrust guidance about proposed courses of conduct, through informal discussions as well as by written advisory opinions.

[25] 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.

[26] FTC STAFF, 2004 WEIGHT-LOSS ADVERTISING SURVEY (2005), *available at* http://www.ftc.gov/os/2005/04/050411weightlosssurvey04.pdf.

and, a year after first asking the media for help, we found that the number of ads with Red Flag claims had fallen from almost 50 to 15 percent. Fifteen percent is still too high, but the progress made is remarkable. For some of the worst claims – like the promise of substantial weight loss without diet or exercise, the results are even better – they are down from a whopping 43 percent to 5 percent of weight loss product ads.

Protecting Competition and Consumers in Financial Services

In addition to health-related issues, the Commission has devoted substantial resources to attacking schemes that harm consumers' financial well-being – such as identity theft, deceptive credit counseling and debt management offers, and fraudulent business opportunities – and to protecting the privacy of consumers' financial data. Unfortunately, advances in technology, while providing greater choices for consumers, also have significantly increased the opportunities for deception, fraud, and in many instances blatant theft.

1. Credit Counseling and Debt Management Schemes

One area of attack is scam artists in the credit counseling, debt management, and debt negotiation industries who target disadvantaged consumers. Taking money from consumers who are already struggling to make ends meet, without providing the counseling and debt reduction services these schemes promise, is a particularly heinous practice. The Commission has now brought six cases involving alleged bogus credit counseling, debt management services, or debt negotiation services, and there are others in the pipeline.[27]

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[27] *FTC v. AmeriDebt, Inc.*, Civil. No. PJM 03-3317 (D. Md.) (filed Nov. 19, 2003), *available at* http://www.ftc.gov/opa/2003/11/ameridebt.htm; *FTC v. Debt Management Foundation Services, Inc.*, No. 8:04-CV-1674-T-17MSS (M.D. Fla.) (filed July 20, 2004) *available* at http://www.ftc.gov/opa/2004/07/dmfs.htm; *FTC v. Jubilee Financial Services, Inc.*, No. 02-6468 (C.D. Cal.) (filed Aug. 19, 2002) available at

2. Biz Opp Schemes

Another area of focus is business opportunity scams. These schemes appeal to the optimist in all of us, with their exhortations to "Be Your Own Boss!," and "Make Every Day a Vacation!" Unfortunately, the con artists who promote these shady business schemes take consumers' money without providing them the tools necessary to generate the promised earnings. Earlier this year, the FTC, the Department of Justice, the U.S. Postal Inspection Service, and 14 states announced an unprecedented law enforcement collaboration to target business opportunity fraud in which we announced more than 200 actions.[28] Working with our criminal law enforcement partners, 32 people in that sweep have been charged criminally, and four have been sentenced already with prison terms ranging from 57 to 81 months.

Our law enforcement efforts seek to restore both money and confidence to the victims of the schemes we have shut down. Recently, we received a letter from the victim of an earlier business opportunity scam who had just received a partial redress check from us. In her letter, she thanks the FTC for "looking out for 'sucker consumers' like me." She goes on to say, "At

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http://www.ftc.gov/opa/2002/09/opnocredit.htm; *FTC v. Better Budget Financial Services, Inc.*, No. 04-12326 (D. Mass) (filed Nov. 2, 2004) *available at* http://www.ftc.gov/opa/2004/11/bbfs.htm; *FTC v. National Consumer Council*, No. SA CV 04-0474 CJC (JWJx) (C.D. Cal.) (filed April 23, 2004) *available at* http://www.ftc.gov/opa/2004/05/ncc.htm; *FTC v. Innovative Systems Technology, Inc.*, No. CV04-0728 GAF JTLx (C.D. Cal.) (filed Feb. 4, 2004) *available at* http://www.ftc.gov/os/caselist/0323006/0323006.htm.

[28] *See* FTC Press Release, *Criminal and Civil Enforcement Agencies Launch Major Assault Against Promoters of Business Opportunity and Work-at-Home Schemes* (Feb. 22, 2005), *available at* http://www.ftc.gov/opa/2005/02/bizzoppflop.htm.

the time I was unemployed and grasping for anything that might provide an honest income . . . I am glad that someone is watching out and working for me, the consumer."

Letters like that underscore all that is at stake and why it is critical that we take action to stop the perpetrators of fraud and strip them of their ill-gotten gains.

3. Data Privacy

Perhaps no consumer protection issue has absorbed more time and resources this year than data security. Recent news reports about the release of consumers' sensitive information from large commercial information services, retailers, and major banks, demonstrate that, if this data is not adequately secured, it can fall into criminals' hands and cause serious harm to consumers. Currently, 10 million Americans are victims of identity theft each year.[29]

The FTC's primary goal is to encourage all companies to put in place solid information security practices *before* a breach can occur. We believe that our law enforcement efforts are focusing firms on the issue. To date, we have filed five cases challenging false security claims under the FTC Act. In each case, we alleged that the defendants promised that they would take reasonable steps to protect consumers' sensitive information, but failed to do so.[30]

We recently filed and settled our sixth case in this area, for the first time alleging that inadequate data security can be an unfair business practice under Section 5 of the FTC Act.[31] In

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[29] *See* Consumer Fraud in the United States: An FTC Survey, at ES-2 (Aug. 2004), *available at* http://www.ftc.gov/reports/consumerfraud/040805confraudrpt.pdf.

[30] For documents related to these enforcement actions, see http://www.ftc.gov/privacy/privacyinitiatives/promises_enf.html.

[31] *See* FTC Press Release, *BJ'S Wholesale Club Settles FTC Charges* (June 16, 2005), *available at* http://www.ftc.gov/opa/2005/06/bjswholesale.htm.

that action, the Commission alleged that BJ's Wholesale Club, a Fortune 500 company with over $6 billion in annual sales, failed to maintain adequate security for such information, even though the company had not made an express promise to maintain such security. Our settlement required BJ's to establish a comprehensive and rigorous information security program, and to obtain regular security assessments of that program from a qualified independent auditor. Through this action, we wanted to provide clear notice to the business community that failure to maintain reasonable and appropriate security measures in light of the sensitivity of the information can cause substantial consumer injury and may violate the FTC Act.

The FTC also educates consumers and businesses about the risks of identity theft and assists victims and law enforcement officials. The FTC maintains a website and a toll-free hotline staffed with trained counselors to advise victims on how to reclaim their identities. We receive roughly 15 to 20 thousand contacts per week on the hotline, or through our website or mail, from victims and from consumers who want to avoid becoming victims. The FTC also facilitates cooperation, information sharing, and training among federal, state, and local law enforcement authorities fighting this crime.

Nor surprisingly, Congress has been debating whether to enact new protections for sensitive consumer data, and I now have testified four times on the issue.[32] The FTC has urged

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[32] Prepared Statement of the FTC, *Data Breaches and Identity Theft*, Before the Committee on Commerce, Science, and Transportation of the United States Senate (June 16, 2005), *available at* http://www.ftc.gov/opa/2005/06/datasectest.htm; Prepared Statement of the FTC, *Securing Electronic Personal Data: Striking A Balance Between Privacy and Commercial and Governmental Use*, Before the Committee on the Judiciary, United States Senate (Apr. 13, 2005), *available at* http://www.ftc.gov/opa/2005/04/financialdatatest.htm; Prepared Statement of the FTC, *Protecting Consumers' Data: Policy Issues Raised by ChoicePoint*, Before the Subcommittee on Commerce, Trade, and Consumer Protection of the Committee on Energy and Commerce, United

caution, lest overly broad protections impede the flow of information that has become vital to the fast-paced and efficient marketplace that consumers have come to expect. Slowing down the flow of credit and other information may restrict consumers' choices in ways that they will not view favorably. The Commission has opined that Congress should consider two new proposals: first, whether companies that maintain sensitive consumer information should be required to implement reasonable security procedures; and second,whether to require firms to notify consumers if sensitive information about them has been breached in a way that creates a significant risk of identity theft.

Hurricane Katrina

I would like to end on both a sad and hopeful note. Hurricane Katrina has visited enormous suffering on hundreds of thousands of our citizens. In the initial hours and days following the storm, food, shelter, and life itself were the all-consuming concerns. Now, as the waters recede and the days pass, people are beginning to restart their interrupted and shattered lives. The concerns of daily life ---- how to pay the bills, how to get credit, how to recreate financial records, how to rebuild --- are moving to the fore, and the FTC is stepping in, along with so many others, to help. We have prepared and distributed information to help the victims of Hurricane Katrina rebuild their financial lives, *i.e.*, how to use credit wisely, how to ask creditors for some forbearance on bills and debts, and how to avoid being revictimized by fraudsters who sadly but inevitably will exploit this tragic situation. The United States

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States House of Representatives (Mar. 15, 2005), *available at* http://www.ftc.gov/opa/2005/03/databrokertestimony.htm; and Prepared Statement of the FTC, *Identity Theft: Recent Developments Involving the Security of Sensitive Consumer Information*, Before the Committee on Banking, Housing, and Urban Affairs of the United States Senate (Mar. 10, 2005), *available at* http://www.ftc.gov/opa/2005/03/idthefttest.htm.

Department of Justice convened a special Hurricane Katrina Fraud Taskforce and invited the Federal Trade Commission's participation. This Taskforce will help us to work together with sister agencies to track down and prosecute fraudsters who attempt to exploit Katrina's victims. Our Consumer Response Center is handling fraud complaints, and our lawyers and investigators are prepared to respond swiftly to any actual frauds. We also issued an alert to help a generous nation make sure their donations for hurricane relief go to help victims and not line the pockets of fraudsters. We have taken these steps quickly because it is our job to do these very things -- educate the public, handle consumer complaints and problems, bring law enforcement action to stop fraud -- and while this circumstance may be more tragic than most, the response that is required is no more or less than what our agency was created to do.

Finally, I want to thank all of the nations and international organizations who have given so generously to the hurricane relief efforts.

Thank you again for the opportunity to speak to you today.