

**Prepared Statement of
The Federal Trade Commission**

**Before the
Subcommittee on
Science, the Departments of State, Justice, and Commerce, and Related
Agencies**

**of the Committee on Appropriations
United States House of Representatives**

**Washington, D.C.
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I. Introduction

Chairman Wolf, Ranking Member Mollohan, I am Deborah Platt Majoras, Chairman of the Federal Trade Commission (“Commission” or “FTC”). I am pleased to appear before the Subcommittee today to testify in support of the FTC’s FY 2007 Appropriation request.¹ The Commission would like to thank Chairman Wolf, Ranking Member Mollohan, and members of the Subcommittee for their continued support of the agency’s mission.

The FTC is the only federal agency with both consumer protection and competition jurisdiction in broad sectors of the economy.² The agency enforces laws that prohibit business practices that are anticompetitive, deceptive, or unfair to consumers, and it promotes informed consumer choice and public understanding of the competitive process. The work of the FTC is critical in protecting and strengthening free and open markets in the United States.

The FTC consistently has pursued a vigorous and effective law enforcement program in a swiftly changing marketplace, with rapid growth in technology, and in an increasingly globalized economy. Through the efforts of a dedicated, professional staff, the FTC continues to handle an increasing workload. Our testimony today summarizes some of the major activities of the past year and describes some of the planned initiatives for FY 2007.

¹ The written statement represents the views of the Federal Trade Commission. My oral presentation and responses to questions are my own and do not necessarily reflect the views of the Commission or any other Commissioner.

² The FTC has broad law enforcement responsibilities under the Federal Trade Commission Act, 15 U.S.C. § 41 *et seq.* With certain exceptions, the statute provides the agency with jurisdiction over nearly every economic sector. Certain entities, such as depository institutions and common carriers, as well as the business of insurance, are wholly or partly exempt from FTC jurisdiction. In addition to the FTC Act, the agency has enforcement responsibilities under more than 40 additional statutes and more than 30 rules governing specific industries and practices.

To accomplish our mission in FY 2007, the FTC requests \$223,000,000 and 1,074 FTE. The FY 2007 request represents an increase of \$13,000,000 over the agency's FY 2006 enacted level.

During FY 2007, the FTC will address significant law enforcement and policy issues throughout the economy, devoting major portions of its resources to those areas in which the agency can provide the greatest benefits to consumers. This testimony in support of our FY 2007 appropriation highlights program priorities in the FTC's two missions. The focus of the consumer protection mission will be on broad efforts to fight fraud and deception, as well as on initiatives supporting consumer privacy and combating technology-driven threats such as spam and spyware. The focus of the competition mission will be on merger and nonmerger enforcement, particularly in health care, energy, high technology, and international competition. The testimony concludes with a summary of the agency's FY 2007 appropriation request.

The FTC's broad mission addresses a wide range of topical issues that affect consumers every day. In recognition of that fact, in 2005, *Washingtonian* magazine recognized the FTC as one of seven federal agencies on its annual list of "Great Places to Work." The *Washingtonian* observed that the FTC advises consumers "on the big issues of the day: identity theft, spam, the 'do not call' registry, the marketing of unhealthy foods to children," and touted the agency as one of the best places to work "if you like being part of the news."³

³ Lisa Daniel, "Great Places to Work," *Washingtonian* (Nov. 2005), at 36.

II. Consumer Protection

In fiscal year 2005, the FTC's Bureau of Consumer Protection filed 77 complaints in federal court aimed at stopping unfair and deceptive practices, 31 of which are pending final disposition. We obtained 103 orders requiring defendants to pay more than \$824 million in consumer redress and 15 judgments ordering payment of more than \$6.6 million in civil penalties.

A. Consumer Privacy, Data Security, and Identity Theft

Privacy continues to be an important national and international consumer concern, and protecting consumers' privacy and the security of consumer data is a key part of the FTC's consumer protection mission. The FTC's primary goal with respect to data security is to encourage all companies to put in place solid information security practices *before* a breach can occur.

Because of the importance of this issue, the FTC reorganized existing staff and created a Division of Privacy and Identity Protection in 2006. This division – which consists of over 30 staff with expertise in privacy, data security, and identity theft – addresses cutting-edge consumer privacy matters through aggressive enforcement, as well as rulemaking, policy development, and outreach to consumers and businesses.⁴

1. Law Enforcement

In January 2006, the Commission announced a settlement relating to consumer data broker ChoicePoint, Inc.'s high profile consumer data breach. In our complaint, we alleged that

⁴ This reconfiguration was approved by House Science, State, Justice and Commerce and Related Agencies Appropriations Subcommittee Chairman Wolf. *See* Letter from Rep. Frank Wolf (Sept. 8, 2005).

ChoicePoint failed to use reasonable procedures to screen prospective subscribers and monitor their access to sensitive consumer data, in violation of the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681 *et. seq.*, and the FTC Act. According to our complaint, ChoicePoint's failures allowed identity thieves to obtain access to the personal information of more than 160,000 consumers, including nearly 10,000 consumer reports. The FTC alleged that at least 800 cases of identity theft arose out of these incidents. The Commission obtained \$10 million in civil penalties for the FCRA violations – the highest civil penalty ever levied in a consumer protection case – as well as \$5 million in consumer redress for identity theft victims and significant injunctive provisions that require ChoicePoint to implement a variety of new data security measures.⁵

Over the past year, the Commission brought several additional cases involving alleged data security violations, including cases against DSW, Inc.,⁶ BJ's Wholesale Club, Inc.,⁷ and CardSystems Solutions, Inc., the processor allegedly responsible for the Visa and MasterCard breach last year that affected tens of millions of credit and debit cards, the largest known compromise of financial data to date.⁸

⁵ *United States v. ChoicePoint, Inc.*, Civ. No. 06-CV-019R (N.D. Ga. Jan. 30, 2006), available at <http://www.ftc.gov/os/caselist/choicepoint/choicepoint.htm>.

⁶ *In the Matter of DSW, Inc.*, Docket No. C-4157 (Mar. 7, 2006) (decision and order), available at <http://www.ftc.gov/os/caselist/0523096/0523096c4157DSWDecisionandOrder.pdf>.

⁷ *In the Matter of BJ's Wholesale Club, Inc.*, Docket No. C-4148 (Sept. 20, 2005) (decision and order), available at <http://www.ftc.gov/os/caselist/0423160/092305do0423160.pdf>.

⁸ *In the Matter of CardSystems Solutions, Inc., et al.*, FTC File No. 052 3148 (Feb. 23, 2006) (proposed consent agreement), available at <http://www.ftc.gov/os/caselist/0523148/0523148.htm>.

2. Education and Cooperation

The Commission also provides business education to promote better data security practices, consumer education and victim assistance, and coordination with other law enforcement through the Identity Theft Data Clearinghouse, a centralized database of victim complaints.

Our Consumer Response Center⁹ responds to roughly 15 to 20 thousand contacts per week from the toll-free identity theft hotline, 1-877-ID THEFT, or through our website or mail, from victims and from consumers who want to avoid becoming victims.

Our business outreach efforts include providing guidance on issues related to data security. For example, the agency disseminates guidance for businesses on reducing risks to their computer systems,¹⁰ as well as guidance for financial firms on complying with the Gramm-Leach-Bliley Act (“GLBA”) Safeguards Rule.¹¹ The FTC also operates the Identity Theft Data Clearinghouse, the nation’s central database of victim complaints designed to support law enforcement investigations nationwide. The database includes over one million complaints received directly from consumers as well as various state and federal agencies. It enables us to

⁹ In a consumer satisfaction survey of all government call centers – the American Customer Satisfaction Index – the FTC’s Call Center was ranked number one in the nation among all federal call centers providing similar services. ACSI Scores for the Federal Government, Dec. 15, 2004. These poll results are available at <http://www.theacsi.org/government/govt-04.html>.

¹⁰ The full text of the guidance for businesses can be found at <http://www.ftc.gov/bcp/online/pubs/buspubs/security.pdf>.

¹¹ See http://www.ftc.gov/privacy/privacyinitiatives/safeguards_educ.html.

gain a better understanding of how identity theft afflicts consumers and serves as a resource for over 1,300 law enforcement agencies.

The Commission's Office of Congressional Relations conducts outreach with congressional staff, particularly on safe computing practices, to encourage and support constituent services projects using FTC resources. During this Congress, the agency also mailed to all 535 Members' offices sample materials and other resources that are readily available for supporting or improving congressional outreach programs. Congressional staff have participated in regional workshops to learn about the Commission's law enforcement, education, and consumer assistance activities including events in Cleveland; Chicago; Kansas City; Miami; Los Angeles; Dallas; Atlanta; Philadelphia; Baltimore; Raleigh, North Carolina; Columbus, Ohio; and Birmingham, Alabama – meetings addressing safe computing practices, consumer tips for protecting personal information, available agency resources and help lines, and other topics. More than 100 Members now link to FTC online assistance, and many more have placed bulk orders for publications to distribute via their district offices.

B. High Technology Law Enforcement: Spam, Spyware, and Convergence

The FTC continues to direct substantial enforcement resources to fight computer-related fraud that plagues America's computer users, with the goal of finding and prosecuting malefactors and retaining consumers' trust in the Internet.

The Commission has embarked on an aggressive law enforcement program to fight spyware. In the past year, we initiated six law enforcement actions that successfully challenged

the distribution of spyware alleged to cause injury to consumers in the online marketplace.¹² To augment our efforts, several weeks ago, the FTC established a Federal-State Spyware Law Enforcement Task Force to foster federal-state cooperation on the important issue of spyware law enforcement.

The FTC continues to maintain an active program to attack fraudulent spam. To date, we have filed 85 spam-related cases against 237 individuals and companies. In the summer of 2005, we announced, together with the Department of Justice (“DOJ”), the filing of seven civil penalty cases against online operations supplying pornography that we alleged illegally exposed unwitting consumers to graphic sexual content, in violation of the FTC’s Adult Labeling Rule and the CAN-SPAM Act;¹³ these two laws require warning labels on emails that contain sexually explicit content.

In December 2005, our report to Congress on the effectiveness and enforcement of the CAN-SPAM Act concluded that, while the Act has helped to deliver some improvements,

¹² See *FTC v. Enternet Media, Inc.*, CV05-7777CAS, (C.D. Cal., filed Nov. 1, 2005); *FTC v. Odysseus Marketing, Inc.*, No. 05-CV-330 (D.N.H. filed Sept. 21, 2005); *In the Matter of Advertising.com, Inc.*, FTC File No. 042 3196 (filed Sept. 12, 2005), available at <http://ftc.gov/os/caselist/0423196/0423196.htm>; *FTC v. Trustsoft, Inc.*, Civ. No. H 05 1905 (S.D. Tex May 31, 2005); *FTC v. MaxTheater, Inc.*, File No.: 05-CV-0069 (E.D. Wash. Mar. 8, 2005); *FTC v. Seismic Entertainment, Inc.*, No. 04-377-JD, 2004 U.S. Dist. LEXIS 22788 (D.N.H. Oct. 21, 2004).

¹³ *United States v. Cyberheat, Inc.*, FTC File No. 052-3042; *United States v. APC Entertainment, Inc.*, FTC File No. 052-3043; *United States v. MD Media, Inc.*, FTC File No. 052-3044; *United States v. Pure Marketing Solutions, LLC*, FTC File No. 052-3045; *United States v. Impulse Media Group, Inc.*, FTC File No. 52-3046; *United States v. TJ Web Productions, LLC*, FTC File No. 052-3047; *United States v. BangBros.com, Inc.*, FTC File No. 042-3180. See FTC Press Release on sweep, available at <http://www.ftc.gov/opa/2005/07/alrsweep.htm>.

passage of the US SAFE WEB Act,¹⁴ continued education efforts, and improvements in anti-spam technology also are needed to further reduce the amount of spam reaching consumers' mailboxes.¹⁵

During this past year, the FTC launched a substantial campaign with 36 other governmental agencies from around the world against “spam zombies” and “botnets.”¹⁶ The purpose of this campaign was to prevent spammers from taking advantage of security weaknesses that enable them to install hidden software that turns consumer computers into mail or proxy servers. Persons who control infected computers (“spam zombies”) group them as “botnets,” which they rent or sell for bulk e-mailing. Botnets, which allow bulk e-mailers to conceal the source of their spam and evade spam filters, are used as “relays” or “proxies” that make it appear as if spam came from the zombies and not the source.

Educating consumers about how to avoid high-tech frauds remains a major priority for the FTC. In September, the Commission announced a partnership with cybersecurity experts, consumer advocates, online marketers and other federal agencies, through which we launched a dynamic consumer education initiative, OnGuardOnline. OnGuardOnline.gov is a new website that provides general information on online safety, interactive educational games that teach

¹⁴ Federal Trade Commission, *The US SAFE WEB Act: Protecting Consumers from Spam, Spyware, and Fraud: A Legislative Recommendation to Congress*, (June 2005). Full text available at <http://www.ftc.gov/reports/ussafeweb/USSAFEWEB.pdf>. The Senate recently passed the bill, introduced as S. 1608.

¹⁵ Federal Trade Commission, *Effectiveness and Enforcement of the CAN-SPAM Act: A Report to Congress*, (Dec. 2005). Full text available at <http://www.ftc.gov/reports/canspam05/051220canspamrpt.pdf>.

¹⁶ See FTC Press Release, *FTC, Partners Launch Campaign Against Spam “Zombies”* (May 24, 2005) available at <http://www.ftc.gov/opa/2005/05/zombies.htm>.

consumers how to spot online scams, and specific information on a range of topics, including spyware and phishing. Our OnGuard Online website is also available in Spanish, at <http://alertaenlinea.gov>.

The FTC continues to study and monitor consumer protection issues that arise as a result of the convergence of communication and information technologies. In the fall of 2006, the FTC will convene Hearings on Global Marketing and Technology.¹⁷ The agency held similar hearings in 1995, and will once again engage in a robust dialogue on the state of technology and the future of consumer protection, re-examine the risks presented by rapidly evolving technologies, and formulate policies to address these risks.

C. Media Violence

The Commission also has continued its efforts to monitor the marketing of violent entertainment to children and to encourage industry self-regulation. In July, the FTC issued a Consumer Alert to help parents understand the video game rating system and to inform them that sometimes content can be downloaded from the Internet that makes a game's content more explicit than the rating indicates.¹⁸

The FTC continues to conduct mystery shopper studies – performed by unaccompanied 13 to 16 years olds – to assess whether retailers are limiting the purchase of age-restricted video game products. Today, the agency is announcing the results of the first of two such studies for 2006. In this most recent study, we found that although retailers are doing a better job at not

¹⁷ See workshop announcement, available at <http://www.ftc.gov/bcp/workshops/globalmarketing/index.html>.

¹⁸ See full text of alert, available at <http://www.ftc.gov/bcp/online/pubs/alerts/videoalrt.htm>.

selling “Mature” rated videogames to children, there is still need for substantial improvement. The latest survey, conducted between October 2005 and January 2006, shows that 42 percent of the teenage shoppers were able to purchase M-rated games, a significant improvement from a 2003 survey in which 69 percent were able to purchase such products. Notably, the latest survey found that national sellers were much more likely to restrict the sales of M-rated games to the shoppers, with only 35 percent of shoppers able to purchase a game. In contrast, regional or local sellers sold games to the shoppers 63 percent of the time.

In addition, this year the FTC intends to survey parents and children regarding game ratings and will monitor the placement of ads for R-rated movies, M-rated games, and parental advisory-labeled music in media popular with children.

D. National Do-Not-Call Registry

Our National Do-Not-Call Registry now contains more than 120 million telephone numbers. While compliance has been high, we are vigilantly policing against telemarketers who violate the rule. In December, the FTC announced that DirecTV, one of the nation’s largest providers of digital and satellite television services, would pay a penalty of \$5.3 million for

allegedly violating the Do-Not-Call provisions of the Telemarketing Sales Rule.¹⁹ The FTC has also brought numerous other cases to enforce the National Do-Not-Call Registry.²⁰

Consumer surveys confirm the success of the National Do Not Call Registry. A January 2006 Harris Poll reported that 92 percent of those who registered reported receiving fewer telemarketing calls.²¹

E. Credit, Finance, and Retail

The FTC continues to implement and will enforce the Fair and Accurate Credit Transactions (FACT) Act. Consumers nationwide now are able to request a free annual credit report. In January 2005, the FTC issued a final regulation to improve required notices in prescreened offers for credit or insurance.²² And, in June 2005, a new rule required businesses and individuals to take appropriate measures to dispose of sensitive information derived from consumer reports.²³ The FTC also continues to work on the numerous additional rules and reports mandated by the Act.

¹⁹ *United States v. DirecTV*, Civ. No.SAVV05 1211 (C.D. Cal. Dec. 12, 2005), available at <http://www.ftc.gov/opa/2005/12/directv.htm>.

²⁰ *See, e.g., United States v. Bookspan*, Civ. No. 06 786 (E.D.N.Y. Feb. 23, 2006), available at <http://www.ftc.gov/opd/2006/02/bookspan.htm>; *United States v. Columbia House Co.*, Civ. No. 05C 4064 (N.D. Ill. July 14, 2005), available at <http://www.ftc.gov/opa/2005/07/columbiahouse.htm>.

²¹ The Harris Poll #13 (Jan. 12, 2006), available at http://www.harrisinteractive.com/harris_poll/index.asp?PID=627.

²² *See* FTC Press Release, *FTC Issues Final Rule on Prescreen Notices* (Jan. 24, 2005), available at <http://www.ftc.gov/opa/2005/01/050124factafrn.htm>.

²³ *See* FTC Press Release on *FACTA Disposal Rule Goes Into Effect June 1* (June 1, 2005), at <http://www.ftc.gov/opa/2005/06/disposal.htm>.

Further, the FTC actively pursues unscrupulous lenders who deceive consumers about loan terms, rates, and fees, and bogus organizations that target consumers with bad credit or significant debt, promising to help them obtain credit or manage their debt. In 2005, the FTC brought several cases against debt counseling, debt collection, and other financial services companies engaged in deceptive or illegal practices. In January 2006, the Commission settled its case against *Ameridebt*, the largest case the FTC has brought involving alleged deceptive credit counseling and debt management. The Commission obtained significant monetary redress and strong injunctive relief, banning the defendants from the credit counseling business permanently.²⁴

In July 2005, the FTC won a \$10.2 million judgment against a debt collection operation and its principals which, we alleged, illegally harassed and threatened consumers with claims that they owed money for checks returned for insufficient funds and falsely threatened that consumers could face civil or criminal charges if they did not pay the debts. This judgment amount represented the estimated amount of consumer injury. This was the largest judgment in FTC history for violations of the Fair Debt Collection Practices Act. In addition, a federal district court judge permanently banned the defendants from engaging in debt collection in the future.²⁵

In the coming year, the Commission will announce a series of workshops and other initiatives to address four consumer protection issues involving retail practices and mortgages:

²⁴ *FTC v. AmeriDebt, Inc.*, Civ. No. PJM 03-3317 (D. Md. Nov. 19, 2003) (settlement subject to court approval Jan. 9, 2006), available at <http://www.ftc.gov/opa/2006/01/andrispukke.htm>.

²⁵ *See FTC v. Check Investors, Inc.*, Civ. No. 03-2115 (JMB) (D.N.J. July 15, 2005) (summary judgment opinion), available at <http://www.ftc.gov/opa/2005/07/nationalcheck.htm>.

deceptive negative-option marketing, gift cards with inadequate disclosures, unfair or deceptive rebate practices, and consumer issues relating to “alternative” mortgage products in the marketplace, such as interest-only loans and “option” ARMs.

F. Health Fraud, Weight-Loss, and Childhood Obesity

The Commission also has an active advertising enforcement program that focuses on preventing false or misleading health and disease claims for foods, over-the-counter drugs, devices, and dietary supplements. The FTC has brought 14 cases over the past year and more than 100 cases over the past decade involving allegedly deceptive or unsubstantiated claims for dietary supplements and foods. In June 2005, the Commission obtained the largest monetary judgment ever obtained in an FTC health fraud case – up to \$20 million – to settle claims that Great American Products, Inc. made deceptive anti-aging claims for pills and sprays that promised human growth hormone benefits.²⁶ In another case, the Commission settled charges that Tropicana Products, Inc. made unsubstantiated claims that drinking two to three glasses of “Healthy Heart” orange juice per day would produce specific and dramatic effects on blood pressure, cholesterol, and homocysteine levels, thereby reducing the risk of heart disease and stroke.²⁷ The FTC also settled a federal district court case alleging that A. Glenn Braswell, Chase Revel, seven affiliated companies, two expert endorsers, and one additional individual made false claims that their Gero Vita products could cure, prevent, or treat a number of serious

²⁶ *FTC v. Great American Products, Inc.*, Civ. No. 3:05-CV-00170-RV-MD (N.D. Fla. May 10, 2005), available at <http://www.ftc.gov/opa/2005/06/greatamerican.htm>.

²⁷ *In the Matter of Tropicana Products, Inc.*, FTC File No. 042 3154, available at <http://www.ftc.gov/opa/2005/06/tropicana.htm>.

conditions such as emphysema, diabetes, and Alzheimer’s disease.²⁸ Among other provisions, the order in that case permanently bans Mr. Braswell from direct response marketing of foods, dietary supplements, and unapproved drugs.

In late 2003, the Commission provided the media with a list of Red Flag weight-loss claims that are always false – such as claims that a product causes substantial weight loss no matter what or how much the consumer eats – and asked the media to improve its screening of such ads.²⁹ An FTC staff survey in 2004 suggests that, compared to 2001, there has been a significant decline in the incidence of Red Flag weight-loss claims in the television, radio, and print advertisements included in the survey.³⁰

In July 2005, the FTC and the Department of Health and Human Services (“HHS”) held a public workshop on “Marketing, Self-Regulation, and Childhood Obesity.”³¹ Through this workshop, we provided a forum for sharing perspectives from all stakeholders on the marketing of food and beverages to children, on 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.

²⁸ *FTC v. A. Glenn Braswell, et al.*, Civ. No. CV 03-3700-DT (C.D. Cal. May 27, 2003), available at <http://www.ftc.gov/os/caselist/gerovita/gerovita.htm>.

²⁹ See FTC Press Release, *FTC Release Guidance to Media on False Weight-Loss Claims*, (Dec. 9, 2003), available at <http://www.ftc.gov/opa/2003/12/weightlossrpt.htm>

³⁰ Federal Trade Commission, *2004 Weight-Loss Advertising Survey: A Report from the Staff of the Federal Trade Commission*, (Apr. 2005). Full text available at <http://www.ftc.gov/os/2005/04/050411weightlosssurvey04.pdf>.

³¹ The workshop agenda, videocast, transcript, panelist presentations, and public comments received by the Commission are available at <http://www.ftc.gov/bcp/workshops/foodmarketingtokids/index.htm>.

G. Alcohol

Alcohol consumption by minors is a matter of significant national concern because of the substantial risks it poses. In the past year, the FTC has contributed to the overall government effort to reduce teen drinking and injury through promoting self-regulation and consumer education. Our efforts focus on concerns about advertising and youth. The Commission will continue to monitor alcohol industry self-regulation. Over the past year, we worked with companies to help them enforce compliance with voluntary codes limiting where alcohol ads appear. In response to earlier recommendations made by the Commission, the Beer Institute and Wine Institute established independent boards to review complaints about code compliance, and the Beer Institute modified its code to prohibit promotions for “drinking games.” This coming year, we will issue compulsory process to alcohol companies as part of a formal study of alcohol self-regulatory efforts.

H. Project Scofflaw and Criminal Referrals

As part of its law enforcement tools, the FTC secures orders against companies that allegedly have violated various consumer protection laws to protect consumers from any further fraud and deception. If these orders are violated, the FTC deploys the full range of powers available to stop repeat offenders and to deter other defendants from ignoring order provisions. For example, this past year, a federal district court awarded the government \$5.45 million in civil penalties and \$1.68 million in disgorgement against Richard Prochnow for his violations of a 1996 FTC order and the Telemarketing Sales Rule in connection with deceptive marketing of magazine subscriptions and buying club memberships.³² In another case, *NBTY, Inc.*, a leading

³² *United States v. Prochnow*, CV No. 1:02-CV-0917-JOS, (N.D. Ga. June 6, 2003).

manufacturer and distributor of dietary supplements, agreed to a \$2 million civil penalty to settle charges that it violated the terms of a 1995 FTC order by making false and misleading health claims about two products.³³

The Commission also is increasing its work with criminal law enforcers. From April 2005 to March 2006, the FTC assisted in criminal prosecutions of 117 FTC defendants or their associates. Indeed, working with our criminal law enforcement partners, 32 individuals from our 2005 Operation Biz-Opp Flop Sweep³⁴ were charged criminally, and of the 32 charged, 18 pled guilty to charges including mail and wire fraud. To date, 12 of the individuals who pled guilty have been sentenced to prison terms ranging from 24 to 97 months.

I. Telephone Records

Another important issue on our agenda is the practice of companies selling consumer telephone call records. There is a growing cottage industry of companies – many of which are online – that are selling cell phone and land-line call records. As the FTC recently testified before both House and Senate Commerce Committees,³⁵ obtaining consumers' telephone call records through false pretenses is a serious intrusion into consumers' privacy and could result in

³³ *United States v. NBTY, Inc.*, Civ. No. CV-05-4793 (E.D.N.Y. Oct. 5, 2005), available at <http://www.ftc.gov/opa/2005/10/nbty.htm>.

³⁴ 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/bizoppflop.htm>.

³⁵ See Prepared Statement of the FTC Before the Senate Committee on Commerce, Science, and Transportation Subcommittee on Consumer Affairs, Product Safety, and Insurance on Feb. 8, 2006, available at <http://www.ftc.gov/os/2006/02/commissiontestimonypretexting060208.pdf>; Prepared Statement of the FTC Before the House Committee on Energy and Commerce on Feb. 1, 2006, available at <http://www.ftc.gov/os/2006/02/commissiontestimonypretexting.pdf>.

stalking, harassment, and embarrassment. To combat this threat, Commission attorneys are actively investigating companies that appear to be obtaining consumers' phone records by pretexting, which is the use of false pretenses to obtain sensitive information. This practice not only violates Section 5 of the FTC Act, but it undermines consumers' confidence in the marketplace and in the security of their sensitive data.

J. Hispanic Law Enforcement Initiative

The FTC staff's 2004 Consumer Fraud Survey found that Hispanic consumers are victimized disproportionately by fraud.³⁶ In response, the FTC launched a Hispanic Law Enforcement and Outreach Initiative and announced 34 law enforcement actions involving Spanish-language frauds. Eleven new cases were filed in the past year, including alleged scams involving disease cures, weight loss products, discount health cards, advance-fee credit cards, mortgage lending, business opportunity schemes, and prize promotions.

Partnering with the United States Postal Inspection Service, the FTC also has held a series of Hispanic Law Enforcement and Outreach Forums across the country, including, most recently, in Los Angeles, San Diego, Phoenix, Dallas, Miami, and Cleveland. Additional forums are planned for Las Vegas and New York City. In addition, all of our new consumer education materials – and most of our older materials – are now available in English and Spanish.³⁷

³⁶ See Federal Trade Commission Staff Report, *Consumer Fraud in the United States: An FTC Survey* (Aug. 2004), available at <http://www.ftc.gov/reports/consumerfraud/040805confraudrpt.pdf>.

³⁷ See FTC Press Release *FTC Continues Campaign to Stop Scams Aimed at Hispanics* (Jan. 24, 2006), available at <http://www.ftc.gov/opa/2006/01/ohiorelease.htm>.

K. Advocacy

In addition to law enforcement, the Commission also pursues advocacy to enhance consumer welfare. A key element in promoting competition and preserving consumer choice is fostering the free flow of truthful and non-misleading information and avoiding unduly burdensome restrictions that might keep useful information from consumers and hamper competition. The FTC, through its enforcement against deceptive health-related advertising, has developed substantial experience in policy issues related to food and drug advertising and labeling, and staff has filed numerous comments with the Food and Drug Administration (“FDA”) on these topics. For example, FTC staff recently filed a comment with the FDA regarding consumer perceptions of health claims made for foods and dietary supplements. The comment analyzed the available research on consumer perceptions of health claims supported by limited scientific evidence and concluded that the FDA’s current formulation for unqualified and qualified health claims does not effectively differentiate among varying levels of scientific certainty. The comment suggested that it may be possible to craft more effective language for qualified and unqualified claims and that supplementary formats, such as report card graphics, should be explored.

The FTC also has intervened in court proceedings when important consumer interests are at stake. Most recently, the FTC filed an amicus brief recommending that the court reject a proposed class action settlement in litigation involving the online DVD rental provider Netflix.³⁸ The proposed settlement offered current customers one month of upgraded service and former members one free month of service. Class members who accepted the settlement, however,

³⁸ See FTC Press Release, *Announced Actions for January 6, 2006*, available at <http://www.ftc.gov/opa/2006/01/FYI0602.htm>

would be obligated to pay for the expanded or new service on a monthly basis after the conclusion of the free month, unless or until they cancel the service. The FTC's objection focused on this "negative option" feature, arguing that it would be disclosed inadequately and would serve more as a marketing vehicle than as a redress mechanism. In response to objections raised by the FTC and others, the parties restructured their settlement agreement to remove the negative option feature.

L. 2005 Hurricanes

In anticipation of Hurricane Katrina, the FTC updated materials specially prepared to address consumer issues that arise in the wake of disasters and determined what the agency could do to assist victims, knowing that after their basic needs were addressed by the first-responders, they would have to reclaim their financial lives. FTC attorneys immediately contacted the major credit card companies to discuss how hurricane victims with no working addresses and destroyed financial records would be able to retain their good credit and, ultimately, pay their bills. The FTC developed a website with valuable information and assembled educational materials and alerts regarding the home repair and other scams that would likely surface, as well as alerts to all Americans regarding charity scams.³⁹ We have worked with the DOJ and other agencies on the Hurricane Fraud Task Force to ensure the swift prosecution of those who used the hurricanes as a means to commit fraud, and we have served the Task Force as the national clearinghouse for complaints about hurricane-related fraud and identity theft.

³⁹ See FTC website for those affected by Hurricane Katrina or Hurricane Rita at <http://www.ftc.gov/bcp/online/events/katrina/index.html>.

III. Maintaining Competition

Competition provides the foundation for a thriving economy and the best protection for consumers. The goal of the FTC's competition mission is to remove the obstacles that impede competition and that prevent its benefits from flowing to consumers. The FTC has adopted fundamental strategies to maximize the impact of its competition mission. One such strategy is to focus on sectors of the economy that have the greatest impact on consumers, such as energy and health care. In the past year, the agency pursued a broad range of merger and nonmerger enforcement actions in these and other industries, and also invested significant resources in improving processes and sharing guidance with the public.

A. Energy

A fair and competitive petroleum industry is of vital importance to the national security and economic prosperity of the United States, as the effects from Hurricanes Katrina and Rita have confirmed. The Commission continues to use all of its available tools to promote competition and protect consumers in the petroleum industry, including effective challenges to mergers and practices that violate any laws that the Commission enforces, careful scrutiny of industry behavior to detect anticompetitive conduct, and comprehensive research to understand petroleum sector developments.

1. Enforcement and Investigations

During the past year, the FTC took enforcement action in three petroleum industry matters. First, in June 2005, the Commission acted to save California consumers hundreds of millions of dollars in gasoline prices by securing two consent orders to resolve the Commission's

administrative monopolization complaint against Union Oil of California (“Unocal”)⁴⁰ and antitrust concerns arising from Chevron’s proposed \$18 billion acquisition of Unocal.⁴¹ The settlements focused primarily on resolving allegations of monopolization through anticompetitive abuses of the regulatory process related to California reformulated gasoline, and prevented Unocal from enforcing certain patents that would lead to an increase of approximately a nickel per gallon at the pump. They also resolved concerns raised by the merger that Chevron would have been able to use information obtained through patent licenses to facilitate coordinated interaction among itself and other refiners and marketers, leading to higher prices for reformulated gasoline. By the terms of the order, the combined firm agrees not to enforce its relevant patents or collect royalties on those patents.⁴²

Second, the FTC ordered significant divestitures in the acquisition of Kaneb Services and Pipe Line Partners, companies that engaged in petroleum transportation and terminaling in a number of markets, by Valero L.P., the largest petroleum terminal operator and second largest operator of liquid petroleum pipelines in the United States. The FTC’s complaint alleged that the

⁴⁰ *In the Matter of Union Oil Company of California*, FTC Docket No. 9305, FTC File No. 011 0214 (Mar. 4, 2003) (complaint), available at <http://www.ftc.gov/os/2003/03/unocalcmp.htm>.

⁴¹ *In the Matter of Chevron Corporation and Unocal Corporation*, FTC Docket No. C-4144 (July 27, 2005) (complaint), available at <http://www.ftc.gov/os/caselist/0510125/050802comp0510125.pdf>.

⁴² *In the Matter of Chevron Corporation and Unocal Corporation*, FTC Docket No. C-4144 (July 27, 2005) (decision and order), available at <http://www.ftc.gov/os/caselist/0510125/050802do0510125.pdf>.

acquisition potentially would increase prices in bulk gasoline and diesel markets.⁴³ The FTC's June 2005 divestiture order succeeded in maintaining import possibilities for wholesale customers in Northern California, Denver, and greater Philadelphia and precluded the merging parties from undertaking potential anticompetitive price increases.⁴⁴

Third, the Commission filed a complaint on July 27, 2005, in federal district court in Hawaii, alleging that Aloha Petroleum's proposed acquisition of Trustreet Properties' half interest in an import-capable terminal and retail gasoline assets on the island of Oahu would have reduced the number of gasoline marketers and could have led to higher gasoline prices for Hawaii consumers.⁴⁵ To resolve this case, the parties executed a 20-year throughput agreement that will preserve competition allegedly threatened by the acquisition.⁴⁶

Other energy-related investigations complement the FTC's proactive merger enforcement program in this important sector. Currently, the agency is conducting two related Congressionally mandated investigations into gasoline prices – one under Section 1809 of the Energy Policy Act of 2005 to determine whether the price of gasoline is being artificially

⁴³ *In the Matter of Valero. L.P., Valero Energy Corporation, Kaneb Services LLC, and Kaneb Pipeline Partners, L.P.*, FTC Docket No. C-4141 (June 14, 2005) (complaint), available at <http://www.ftc.gov/os/caselist/0510022/050615comp0510022.pdf>.

⁴⁴ *Id.* (decision and order), available at <http://www.ftc.gov/os/caselist/0510022/050726do0510022.pdf>.

⁴⁵ *Aloha Petroleum Ltd., et al. v. FTC*, FTC File No. 051 0131 (July 27, 2005) (complaint), available at <http://www.ftc.gov/os/caselist/1510131/050728comp1510131.pdf>.

⁴⁶ FTC Press Release, *FTC Resolves Aloha Petroleum Litigation* (Sept. 6, 2005), available at <http://www.ftc.gov/opa/2005/09/alohapetrol.htm>.

manipulated,⁴⁷ and the other focused on gasoline prices in the aftermath of Hurricane Katrina, pursuant to Section 632 of the Science, State, Justice, Commerce, and Related Agencies Appropriations Act of 2006.⁴⁸ These ongoing investigations are examining multiple levels of the petroleum industry in all geographic areas of the U.S. – from refining through product transportation, terminaling, marketing, and retailing. As Section 632 mandates, the Commission will spend at least \$1 million to conduct the investigations. The FTC has issued compulsory process – civil investigative demands and Section 6(b) orders – to obtain necessary information and has worked vigorously to ensure that the companies comply with the Commission’s information demands. Commission staff also has conducted investigational hearings (similar to depositions) to examine industry officials under oath regarding various relevant issues. FTC staff members have provided oral briefings for Congressional staff on a monthly basis and, on March 2, 2006, delivered a written interim staff report to relevant Senate and House committees. The interim report discussed the history, focus, and progress of the investigations and underscored specific issues raised in the investigations.⁴⁹ The Commission expects to submit its final written report on the investigations to the Congress in May 2006. We will take swift and decisive enforcement action if these investigations unearth violations of the laws that we enforce.

⁴⁷ Pub. L. No. 109-58, § 1809, 119 Stat. 594 (Aug. 8, 2005).

⁴⁸ Pub. L. No. 109-108, § 632, 119 Stat. 2290 (Nov. 22, 2005).

⁴⁹ Federal Trade Commission, *Interim Report on Gasoline Pricing: A Report to Congress*, (Mar. 2006). Full text available at <http://www.ftc.gov/os/2006/03/0510243GasolinePricesInvestigationInterimReporttoCongress.pdf>

2. Monitoring and Historical Reviews

Consistent with past practice, the FTC continues to monitor retail gasoline and diesel prices in 360 cities and wholesale prices in 20 major markets across the country to identify unusual price movements that might indicate illegal activity. If FTC staff members detect unusual price movements in an area, they research the possible causes and consult, when appropriate, with state attorneys general, state energy agencies, and the federal Energy Information Administration. Thus far, staff's examination of detected anomalies has found a market-driven explanation for each anomaly. If evidence of anticompetitive conduct is found, however, the Commission will open an investigation and pursue all appropriate law enforcement action.

In addition to our enforcement work, the Commission devotes substantial time to researching and reporting on petroleum sector developments. In July 2005, the agency issued a report explaining how fluctuations in the prices that U.S. consumers pay for gasoline result from a wide range of factors.⁵⁰ The report concluded that, over the past 20 years, changes in the price of crude oil have led to the vast majority of the changes in the retail price of gasoline in the United States. Other important factors include increasing demand at both the national and international levels; supply restrictions resulting from circumstances such as political instability, refinery fires, or hurricanes; federal, state, and local regulations, such as "clean fuel" requirements; and taxes. The report provides real-world examples of how short supplies can

⁵⁰ Federal Trade Commission, *Gasoline Price Changes: The Dynamic of Supply, Demand and Competition: A Federal Trade Commission Report*, (July 2005). Full text available at <http://www.ftc.gov/reports/gasprices05/050705gaspricesrpt.pdf>.

cause price increases, which in turn prompt additional supplies, which then act to ease prices.⁵¹

B. Health Care

The health care industry has an enormous impact on U.S. consumers. Annual health care expenditures are approaching \$2 trillion, and now represent about one of every six dollars of GDP. During the past year, the FTC continued to devote substantial resources to protecting competition in this vital sector of the American economy by challenging anticompetitive mergers and other conduct.

1. Pharmaceuticals

The Commission was particularly active in enforcing the antitrust laws in the pharmaceutical industry. In July 2005, the Commission acted to preserve competition by requiring Novartis and Eon Labs to divest three generic drugs that competed with Novartis' branded products before permitting Novartis' proposed \$1.72 billion acquisition of Eon Labs, Inc. to proceed.⁵² The three medications were a tricyclic antidepressant, a muscle relaxant, and a drug used to treat tuberculosis. The prices of the generic drugs for consumers were less than half that of the branded products.

This month (March 2006), the Commission approved a consent order that allowed Teva Pharmaceutical Industries Ltd. to acquire IVAX Corporation after the companies agreed to sell

⁵¹ FTC Press Release, *FTC Releases Report on "Gasoline Price Changes: the Dynamic of Supply, Demand and Competition* (July 5, 2005), available at <http://www.ftc.gov/opa/2005/07/gaspricefactor.htm>.

⁵² FTC Press Release, *Protecting Competition, the Federal Trade Commission Approves Novartis AG's Acquisition of Eon Labs* (July 19, 2005), available at <http://www.ftc.gov/opa/2005/07/novartis.htm>; see also *In the Matter of Novartis AG*, FTC Docket No. C-4150 (Sept. 21, 2005) (decision and order), available at <http://www.ftc.gov/os/caselist/0510106/0509236do0510106.pdf>.

the rights and assets needed to manufacture and/or market 15 generic pharmaceutical products.⁵³ The Commission's complaint alleged that, without the divestitures, the proposed acquisition would eliminate current and future competition between Teva and IVAX for the 15 generic products.⁵⁴ Among the drugs to be sold are several forms of generic antibiotic – amoxicillin and amoxicillin clavulanate potassium – that are widely used in the United States.

The Commission also continued its efforts to prevent anticompetitive agreements between brand and generic pharmaceutical manufacturers that deny consumers the benefits of low-cost generic drugs. In August 2005, the Commission filed a petition for *certiorari* with the Supreme Court that asked the Court to review the decision by the U.S. Court of Appeals for the Eleventh Circuit in *Schering-Plough Corp v. Federal Trade Commission*, 402 F.3d 1056 (11th Cir. 2005).⁵⁵ The case arose out of 1995 applications by Upsher-Smith Laboratories, Inc. and ESI Lederle for approval of generic versions of a potassium supplement product, along with their certifications that the products they intended to market were non-infringing generic substitutes. Schering brought patent actions against ESI and Upsher, but later entered into settlement agreements with both, in which it agreed to make monetary payments in exchange for their agreements to delay marketing their generic products. The Commission issued an administrative

⁵³ *In the Matter of Teva Pharmaceutical Industries Ltd. and Ivax Corporation*, FTC Docket No. C-4155 (Mar. 2, 2006) (decision and order), available at <http://www.ftc.gov/os/caselist/0510214/0510214do060307.pdf>.

⁵⁴ *In the Matter of Teva Pharmaceutical Industries Ltd. and Ivax Corporation*, FTC Docket No. C-4155 (Jan. 20, 2006) (complaint), available at <http://www.ftc.gov/os/caselist/0510214/0510214complaint.pdf>.

⁵⁵ *On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit*, (Aug. 2005), available at <http://www.ftc.gov/os/2005/08/050829scheringploughpet.pdf>.

complaint, charging that Schering's agreements violated Section 5 of the FTC Act. ESI entered into a consent agreement with the Commission in April 2002, but Schering and Upsher proceeded to trial. In December 2003, the Commission ruled that Schering's agreements with Upsher and ESI were unlawful, concluding that the agreements amounted to payments to exclude generic competition to a greater extent than could have been done simply by relying upon the strength of the patent claims, and that Schering had shown no competitive justification for the resulting harm to consumers. The Eleventh Circuit reversed the Commission's decision, holding (incorrectly, in the Commission's view) that Schering's patent provided it with the legal right to exclude Upsher and ESI from the market until they proved either that the patent was invalid or that their products did not infringe upon the patent. The full Eleventh Circuit denied the FTC's petition for rehearing *en banc*.

Last year, the Commission also challenged an agreement between a brand and generic manufacturer of oral contraceptives. In November 2005, the FTC filed a complaint in federal district court in the District of Columbia seeking a permanent injunction to end an agreement between Warner Chilcott and Barr Labs that allegedly would eliminate generic competition for Warner Chilcott's oral contraceptive drug, Ovcon.⁵⁶ The FTC's complaint alleges that the two firms agreed that, after Barr received final FDA approval for its generic version of Ovcon, Warner Chilcott would have the option of paying Barr \$20 million in return for Barr's agreement not to compete in the United States for five years, and that Warner Chilcott subsequently exercised the option. Twenty-one states and the District of Columbia also filed complaints in

⁵⁶ *FTC v. Warner Chilcott Holdings Co. III, Ltd.*, FTC File No. 041 0034 (D.D.C. Nov. 7, 2005) (complaint), available at <http://www.ftc.gov/os/caselist/0410034/051107comp0410034%20.pdf>.

federal court alleging that the agreement violated the antitrust laws. The litigation is proceeding.

2. Medical Services and Devices

This past year, the Commission actively enforced the antitrust laws against transactions that allegedly would have reduced competition for several types of medical services and devices. In November 2005, the Commission ordered divestitures to protect patients who require regular outpatient dialysis services from higher prices and reduced quality or service.⁵⁷ Under the order, DaVita, Inc. will divest 69 dialysis clinics in 35 markets across the United States as a condition to proceeding with its \$3.1 billion acquisition of Gambro Healthcare Inc. The two firms were the second and third largest U.S. providers of dialysis services. The divestitures will restore competition to localized markets that allegedly otherwise would have been lost.

The Commission intervened in December 2005, on behalf of coronary artery disease patients, by ordering divestitures in Johnson & Johnson's attempted \$25.4 billion acquisition of Guidant Corporation to preserve competition for three life-saving medical devices used in coronary bypass surgery and implantation of medicated stents to open clogged arteries.⁵⁸ Johnson & Johnson later abandoned its bid for Guidant after being outbid by Boston Scientific. The Commission currently is reviewing Boston Scientific's proposed acquisition of Guidant.

This month, the Commission settled charges that Allergan, Inc.'s \$3.2 billion purchase of

⁵⁷ FTC Press Release, *FTC Accepts Settlement to Remedy DaVita's Acquisition of Rival Outpatient Dialysis Clinic Provider Gambro* (Oct. 4, 2005), available at <http://www.ftc.gov/opa/2005/10/davita.htm>; see also FTC Press Release, *Announced Action for November 18, 2005: Commission Approval of Final Consent Order* (Nov. 18, 2005), available at <http://www.ftc.gov/opa/2005/11/fyi0579.htm>.

⁵⁸ *In the Matter of Johnson & Johnson*, FTC Docket No. C-4154, FTC File No. 051 0050 (Dec. 21, 2005) (decision and order), available at <http://www.ftc.gov/os/caselist/0510050/051227do0510050.pdf>.

Inamed Corporation would violate federal antitrust laws.⁵⁹ Allergan manufactures Botox, while Inamed owns the rights to develop and distribute Reloxin, the most serious potential Botox rival. The FTC alleged that Allergan's purchase of Inamed would reduce competition and force consumers to pay higher prices for the botulinum toxin type A products used by millions of Americans to erase wrinkles. The FTC settlement provides that the companies will return the development and distribution rights to Reloxin to Ipsen Ltd., its U.K.-based manufacturer. Previously, the FTC had investigated Medicis Pharmaceutical Corp.'s attempt to acquire Inamed. Medicis abandoned the transaction in December 2005.

3. Hospitals

The Commission has worked vigorously to preserve competition among the nation's hospitals. On February 10, 2004, the Commission filed a complaint challenging Evanston Northwestern Healthcare Corporation's acquisition of an important competitor, Highland Park Hospital. In October 2005, an Administrative Law Judge ruled that the transaction violated the antitrust laws.⁶⁰ The ALJ found that the transaction had resulted in higher prices and substantially lessened competition for acute care inpatient services in parts of Chicago's northwestern suburbs. The hospital's appeal of the ALJ's decision and order requiring

⁵⁹ *In the Matter of Allergan, Inc. and Inamed Corporation*, FTC Docket No. C-4156 (Mar. 8, 2006) (decision and order), available at http://www.ftc.gov/os/caselist/0610031/0610031AllerganInamedDecisionOrder_PR.pdf.

⁶⁰ *In the Matter of Evanston Northwestern Healthcare Corporation*, FTC Docket No. 9315 (Oct. 21, 2005) (initial decision), available at <http://www.ftc.gov/os/adjpro/d9315/051021idtextversion.pdf>.

divestiture of Highland Park Hospital now is pending before the Commission.⁶¹

4. Physician Price Fixing

During the past year, the FTC continued to investigate and challenge unlawful price fixing by physician groups. In December 2005, the Commission issued a unanimous decision that held that a physician group, known as North Texas Specialty Physicians (“NTSP”), had violated the antitrust laws when it negotiated agreements among participating physicians on price and other terms, refused to negotiate with payers except on terms agreed to among its members, and refused to submit payor offers to members if the terms did not satisfy the group’s demands.⁶² The physicians have appealed the Commission’s decision to the U.S. Court of Appeals for the Fifth Circuit.

The Commission also entered into consent agreements that brought to a halt allegedly unlawful price fixing by six other physician groups. The member physicians of each group had coordinated the prices of some of their services, without sufficiently integrating their practices to achieve cost savings and other efficiencies. The physician groups that entered into the consent agreements are Health Care Alliance of Laredo (80 physicians in Laredo, Texas); New Millennium Orthopaedics (32 physicians in Cincinnati, Ohio); Partners Health Network (225 physicians in the Pickens County, South Carolina area); Preferred Health Services (100

⁶¹ In April 2005, the FTC entered into a partial settlement resolving Count III of the complaint, which alleged illegal collusion among approximately 900 doctors in Cook and Lake Counties, Illinois. The doctors agreed to cease and desist from the allegedly illegal collective conduct.

⁶² *In the Matter of North Texas Specialty Physicians*, FTC Docket No. 9312 (Dec. 1, 2005) (final order), available at <http://www.ftc.gov/os/adjpro/d9312/051201finalorder.pdf>, as amended by Order Modifying Opinion of the Commission (Jan. 20, 2006), available at <http://www.ftc.gov/os/adjpro/d9312/index.htm>.

physicians in Seneca, South Carolina); San Juan IPA (120 physicians in Farmington, New Mexico); and White Sands Healthcare Systems (45 physicians in the Alamogordo, New Mexico area).⁶³

C. Chemicals

In June 2005, the Commission announced a consent order that allowed Occidental Chemical Company's proposed purchase of the chemical assets of Vulcan Materials Company, provided OxyChem divested Vulcan's Port Edwards, Wisconsin, chemical facility and related assets.⁶⁴ The consent order alleviated the alleged anticompetitive impact of the proposed acquisition, as OxyChem and Vulcan were direct competitors in the markets for three chemicals.

D. Consumer Products

In September 2005, the Commission announced an order that permitted The Procter & Gamble Company's \$57 billion acquisition of rival consumer products manufacturer The Gillette

⁶³ *In the Matter of Healthcare Alliance of Laredo*, FTC File No. 041 0097 (Feb. 13, 2006) (decision and order), available at <http://www.ftc.gov/os/caselist/0410097/060213do0410097.pdf>; *In the Matter of New Millennium Orthopaedics, LLC, et al.*, FTC Docket No. C-4140 (June 13, 2005) (decision and order), available at <http://www.ftc.gov/os/caselist/0310087/050617do0310087.pdf>; *In the Matter of Partners Health Network, Inc.*, FTC Docket No. C-4149 (Sept. 19, 2005) (decision and order), available at <http://www.ftc.gov/os/caselist/0410100/050923do0410100.pdf>; *In the Matter of Preferred Health Services, Inc.*, FTC Docket No. C-4134 (Apr. 13, 2005) (decision and order), available at <http://www.ftc.gov/os/caselist/0410099/050419do0410099.pdf>; *In the Matter of San Juan IPA, Inc.*, FTC Docket No. C-4142 (June 30, 2005) (decision and order), available at <http://www.ftc.gov/os/caselist/0310181/050705do0310181.pdf>; *In the Matter of White Sands Healthcare Systems, L.L.C., et al.*, FTC Docket No. C-4130 (Apr. 13, 2005) (decision and order), available at <http://www.ftc.gov/os/caselist/0310135/050114do0310135.pdf>.

⁶⁴ FTC Press Release, *With Conditions, FTC Clears Occidental Chemical's Purchase of Vulcan's Chemical Assets* (June 3, 2005), available at <http://www.ftc.gov/opa/2005/06/vulcan.htm>; see also *In the Matter of Occidental Petroleum Corporation and Vulcan Materials Company*, FTC Docket No. C-4139 (July 13, 2005) (decision and order), available at <http://www.ftc.gov/os/caselist/0510009/050719do0510009.pdf>.

Company to go forward, provided the companies divest a variety of overlapping assets ranging from toothbrushes to antiperspirant/deodorants to ensure continued competition following the transaction.⁶⁵ Americans who use these products will be protected from anticipated higher prices in the wake of this acquisition.

E. Casino Services

In order to ensure continued competition in the market for casino services in Baton Rouge, Louisiana, the Commission in July 2005 announced a consent order that would permit Penn National Gaming, Inc.'s (PNG) \$2.2 billion acquisition of Argosy Gaming Company (Argosy), provided PNG sold Argosy's Baton Rouge casino to Columbia Sussex Corporation within four months of the order's becoming final.⁶⁶ Because PNG and Argosy then operated the only two casinos in Baton Rouge, the Commission concluded that the divestiture was necessary to preserve a competitive alternative.

F. Household Moving Services

In June 2005, the Commission upheld an ALJ's Initial Decision that found that the Kentucky Household Goods Carriers Association, Inc., consisting of competing household

⁶⁵ FTC Press Release, *FTC Consent Order Remedies Likely Anticompetitive Effects of Procter & Gamble's Acquisition of Gillette* (Sept. 30, 2005), available at <http://www.ftc.gov/opa/2005/09/pggillette.htm>; see also *In the Matter of The Procter and Gamble Company and The Gillette Company*, FTC Docket No. C-4151 (Dec. 15, 2005) (decision and order), available at <http://www.ftc.gov/os/caselist/0510115/051215do0510115.pdf>.

⁶⁶ FTC Press Release, *Preserving Competition for Casino Services in Baton Rouge, Louisiana, FTC Clears Penn National's Purchase of Argosy Gaming* (July 27, 2005), available at <http://www.ftc.gov/opa/2005/07/pngaming.htm>. See also *In the Matter of Penn National Gaming, Inc.*, FTC Docket No. C-4143 (Oct. 27, 2005) (decision and order), available at <http://www.ftc.gov/os/caselist/0510029/051101do0510029.pdf>.

moving services companies, engaged in illegal price-fixing by jointly filing tariffs containing collective rates on behalf of its members, and that the association was not entitled to the state action defense against antitrust liability.⁶⁷ The Commission ruled that the state's role fell "far short of the active supervision required by [Supreme Court cases]," and thus the state action doctrine did not apply. Although the Kentucky Transportation Cabinet (KTC) is responsible for ensuring that carriers' rates are just and reasonable, the Commission found that the KTC followed no formula or methodology in making that determination, the KTC did not obtain basic data that would permit a proper assessment, and procedural elements consistent with active supervision were absent.

G. Newspaper Inserts

In March 2006, the Commission announced a consent order against Valassis Communications, Inc. settling charges that Valassis had invited its competitor to collude and to eliminate price competition in violation of the FTC Act.⁶⁸ According to the Commission's complaint, Valassis and News America Marketing are competitors in the American market for free-standing newspaper inserts, the multi-page booklets found in newspapers containing discount coupons for various products. The Commission alleged that in a July 2004 public call with security analysts, Valassis invited News America Marketing to join a scheme to allocate

⁶⁷ *In the Matter of Kentucky Household Goods Carriers Association*, FTC Docket No. 9309 (Jun. 22, 2005) (Opinion and Final Order), available at <http://www.ftc.gov/os/adjpro/d9309/050622opinionofthecommission.pdf>.

⁶⁸ See FTC Press Release, available at <http://www.ftc.gov/opa/2006/03/valassis.htm>. See also *In the Matter of Valassis Communications Inc.*, FTC File No. 051 0008 (Mar. 14, 2006) (Decision and Order), available at <http://www.ftc.gov/os/caselist/0510008/060314do0510008.pdf>.

customers and fix prices, thereby ending an ongoing price war between the two competitors and raising prices for the inserts. News America Marketing did not accept the offer. The Commission's consent order prohibits Valassis from inviting collusion and from actually entering into or implementing a collusive scheme.

H. Merger Review Process Improvements

In February 2006, the agency initiated substantial reforms to the processes and procedures that the Commission uses to review mergers and acquisitions.⁶⁹ The reforms will lower the cost, increase the overall efficiency, and enhance the substantive effectiveness of the FTC's merger review process by formalizing well-defined "best practices" for the Commission and the parties to transactions.

Most significantly, the agency will implement a presumption that it generally will not require a party to search the files of more than 35 of its employees to respond to a Request for Additional Information, or a "second request." This presumptive limit will be contingent on the parties' providing staff with specified types of access to and information about its employees, which will enable staff to identify the appropriate employees for the parties to search.

Furthermore, the parties also must agree to produce the materials responsive to the modified second request 30 days before the parties formally certify that they are in substantial compliance with the second request. These procedures will streamline the merger review process by facilitating the rapid identification of the relevant issues, more focused second requests, and more consistent investigation timetables. The reforms also will improve the merger review process

⁶⁹ *Reforms to the Merger Review Process: Announcement by Deborah Platt Majoras, Chairman, Federal Trade Commission* (Feb. 16, 2006), available at <http://www.ftc.gov/os/2006/02/mergerreviewprocess.pdf>.

through the assignment of greater responsibility for deviations from the best practices.

In another recent merger process-related advance, the new Electronic Filing Application (e-Premerger) System permits electronic filing of required information about proposed mergers and acquisitions under the Hart-Scott-Rodino Premerger Notification Act. This single integrated system already is proving more efficient for business filers as well as taxpayers. Businesses need only file at a single location to provide the required information to both the FTC and the Department of Justice's Antitrust Division ("the Agencies"), and taxpayers do not need to support two redundant systems. The FTC has managed the development and deployment of this integrated bi-agency system and will operate this system on behalf of the Agencies.

I. Guidance, Transparency, and Competition Advocacy

Issued by the FTC and the DOJ's Antitrust Division in 1992, the Horizontal Merger Guidelines reflect the essential factors that are considered in sound merger analysis and describe how those factors should be considered. The Agencies have just issued a Commentary on the Guidelines, informed by the experience of the last thirteen years. The Commentary brings greater transparency to the Agencies' merger analysis and greater certainty to businesses and merger practitioners, and will enhance the quality of communications between the government and merging parties during the merger review process.

Additionally, the Commission frequently provides comments to federal and state legislatures and government agencies about the competitive impact of proposed laws and regulations when they explicitly or implicitly impact the antitrust laws, and when they alter the competitive environment through restrictions on price, innovation, or entry conditions.

Experience has shown that government-imposed restrictions are among the most effective and

durable restraints on competition. Recent FTC advocacy efforts have contributed to several positive consumer outcomes. In the past year, the Agencies have provided several state legislatures with advocacy comments urging the states not to adopt proposed legislation that would require real estate brokers to provide certain services to consumers, regardless of whether they actually want such services. We have argued in our advocacies that such minimum-service regulations – while presented as necessary to protect consumers – actually restrict consumer choice and reduce competition between limited-service brokers and traditional, full-service full-price brokers, resulting in home buyers and sellers likely paying higher prices for real estate brokerage services. Although we failed to sway all the state legislatures we contacted, we have had several successes in opposing these restrictions, with a number of states ultimately deciding not to adopt them.

The FTC also has significant experience in analyzing the impact of state laws on the distribution of alcohol, and in particular, the competitive effects of bans on direct-to-consumer wine shipping. An FTC staff report addressing such effects was cited a dozen times in last year’s Supreme Court decision in *Granholm v. Heald*,⁷⁰ which held that the laws of Michigan and New York that discriminated against out-of-state wine manufacturers and in favor of in-state wine manufacturers in the sale and shipping of wine within those states violated the Commerce Clause

⁷⁰ 544 U.S. 460 (2005).

of the United States Constitution. The FTC continues to monitor developments in this evolving area, with the staff having recently provided an advocacy comment to an Ohio legislator in favor of proposed legislation that would permit direct shipping of wine to consumers in that state.⁷¹

J. New Initiatives

In November 2005, the FTC and DOJ announced that they will hold a series of public hearings designed to examine the boundaries of permissible and impermissible conduct under Section 2 of the Sherman Act.⁷² The primary goal of the hearings is to examine whether and when specific types of single-firm conduct (and other conduct involving more than one firm) are procompetitive or benign, and when they may harm competition and consumers. The hearings will examine and analyze a wide range of legal and economic issues to help define the boundaries between legal and illegal conduct under Section 2.

In addition, FTC staff currently is initiating a study on authorized generic drugs. The study is intended to help the agency understand the circumstances under which innovator companies launch authorized generics, to provide data and analysis of how competition between generics and authorized generics during the Hatch-Waxman Act's 180-day exclusivity period has

⁷¹ FTC Press Release, *FTC Staff: Proposed Ohio Wine Legislation Would Enhance Consumer Welfare* (March 22, 2006), available at <http://www.ftc.gov/opa/2006/03/Ohiowine.htm>.

⁷² DOJ Press Release, *DOJ and FTC to Hold Joint Public Hearings on Competition Policy Related to Single-Firm Conduct* (Nov. 28, 2005), available at <http://www.ftc.gov/opa/2005/11/unilateral.htm>.

affected short-run price competition and long-run prospects for generic entry, and to build on the economic literature about the effect of generic drug entry on prescription drug prices.

IV. International Activities

The FTC works to promote cooperation and convergence toward best practices with competition and consumer protection agencies around the world. The FTC has built a strong network of cooperative relationships with its counterparts abroad, and plays a leading role in key multilateral fora. The growth of communication media and electronic commerce presents new challenges to law enforcement – fraud and deception now know no borders. We work with other nations to protect American consumers who can be harmed by anticompetitive conduct and frauds perpetrated outside the United States. The FTC also actively assists new democracies moving toward market-based economies with developing competition and consumer protection laws and policies.

A. Consumer Protection

In an era of increased globalization, the FTC has responded by developing an increasingly international market-based consumer protection model that focuses on protecting consumers while maximizing economic benefit and consumer choice. The FTC has built an international network for cooperation to combat cross-border fraud and promote market-oriented consumer protection policies, when such policies adequately address consumer harm. In doing so, FTC staff met with over 200 foreign visitors to Washington on consumer protection issues in 2005. In addition, staff met with hundreds more foreign government representatives during official visits to 20 countries over the past 12 months.

In an era of electronic commerce, it is easy for purveyors of spam, spyware, and fraud to locate outside the United States in an attempt to evade the Commission's enforcement jurisdiction. Indeed, because an increasing number of law enforcement investigations the FTC undertakes involve some cross-border component, over the last few years the Commission has launched a comprehensive program to combat cross-border fraud. To address limitations in the FTC's ability to investigate cross-border fraud, last June, the FTC submitted a report to Congress recommending enactment of the US SAFE WEB Act – Undertaking Spam, Spyware, and Fraud Enforcement with Enforcers across Borders. The proposed legislation would enable the FTC to share key information with foreign partners, which, among other things, will assist international law enforcers to pursue fraudulent conduct in their countries that impacts U.S. consumers. The legislation, among other things, also will help the FTC fight deceptive spam and spyware by allowing the agency to investigate more fully messages transmitted through facilities outside the United States.⁷³ The Senate passed the US SAFE WEB Act on March 16, 2006.

B. Competition

The FTC's cooperation with competition agencies around the world is a vital component of our enforcement program, facilitating our ability to collaborate on cross-border cases and to promote convergence toward sound consumer welfare-based competition policies. During the past year, the FTC participated in consultations in Washington and in foreign capitals with top officials of, among others, the European Commission, the Japan Fair Trade Commission, and the Russian Federal Anti-Monopoly Service. For the first time in November 2005, the FTC held a joint consultation with the Canadian Competition Bureau and the Mexican Federal Competition

⁷³ See *supra*, note 14.

Commission.

FTC staff routinely coordinate with colleagues in foreign agencies, promoting efficient and effective review of multi-jurisdictional mergers and conduct. The FTC promotes policy convergence through formal and informal working arrangements with other agencies, many of which seek the FTC's views in connection with developing new policy initiatives. FTC staff participated in working groups with the EC on mergers and the intellectual property issues related to competition policy, and with Japan, Korea, and Taiwan on intellectual property issues. The agency also places a high priority on maintaining a dialogue with officials involved in developing the first comprehensive competition law in China. FTC senior staff made several trips to China and, with the Antitrust Division, has been providing valuable input into the drafting process.

Trade agreements increasingly involve competition issues. The FTC participates in U.S. delegations that negotiate competition chapters of free trade agreements, including during the last year in connection with negotiations with Peru and other Andean countries and with Thailand. The FTC participates in the competition forum of the United Nations Conference on Trade and Development, which focuses on competition issues facing developing countries.

V. Needed Resources for Fiscal Year 2007

To accomplish the agency's mission in FY 2007, the FTC requests \$223,000,000 and 1,074 FTE (which is the same FTE level as FY 2006). This level of resources is needed to allow the FTC to continue its past record of accomplishments in enhancing consumer protection and protecting competition in the United States and, increasingly, abroad. The FY 2007 request represents an increase of \$13,000,000 over the FTC's enacted FY 2006 appropriation. The

increase includes:

- \$6,000,000 in mandatory salary and contract expenses;
- \$3,800,000 in consumer protection enforcement, analysis, and outreach and maintaining competition litigation support (including \$1,100,000 for Identity Theft and Information Security, \$1,000,000 for the FACT Act study on accuracy of credit reports; and \$1,000,000 for the toll-free number required by the Bankruptcy Abuse Prevention and Consumer Protection Act);
- \$1,400,000 in human capital, e-gov, and information technology initiatives;
- \$1,000,000 in records management, facility maintenance, and administrative needs; and
- \$800,000 in physical security initiatives.

The FTC's FY 2007 budget request is comprised of three funding sources. The majority of the funding will be derived from offsetting collections: HSR filing fees and Do Not Call fees will provide the agency with an estimated \$138,000,000 in FY 2007. The FTC anticipates that the remaining funding needed for the agency's operations will be funded through a direct appropriation of \$85,000,000 from the General Fund in the U.S. Treasury.

VI. Conclusion

Mr. Chairman, the FTC appreciates the strong support for its agenda shown by you and the Subcommittee. I would be happy to answer any questions that you and other Members may have about the FTC's budget request and programs.