

FINANCIAL SERVICES AND GENERAL GOVERNMENT APPROPRIATIONS FOR FISCAL YEAR 2011

THURSDAY, MAY 20, 2010

U.S. SENATE,
SUBCOMMITTEE OF THE COMMITTEE ON APPROPRIATIONS,
Washington, DC.

The subcommittee met at 3:03 p.m., in room SD-192, Dirksen Senate Office Building, Hon. Richard J. Durbin (chairman) presiding.

Present: Senators Durbin and Collins.

FEDERAL TRADE COMMISSION

STATEMENT OF HON. JON LEIBOWITZ, CHAIRMAN

OPENING STATEMENT OF SENATOR RICHARD J. DURBIN

Senator DURBIN. Good afternoon.

I am pleased to welcome you to this hearing before the Financial Services and General Government Appropriations Subcommittee.

And my apologies for running a few minutes late. We had a vote at 2:30 and had to wait until the end to make sure that everything turned out just right.

Today's hearing focuses on the Federal Trade Commission (FTC), both in the agency's budget request for fiscal year 2011 and on oversight.

Testifying before us this afternoon is the Chairman of the FTC, Jon Leibowitz.

Thank you for being here.

Mr. LEIBOWITZ. Thank you.

Senator DURBIN. I welcome my distinguished ranking member, Senator Susan Collins of Maine.

Consumers are affected every day by the Federal Trade Commission's work. Thanks to the Federal Trade Commission, consumers receive fewer telemarketing calls and e-mail spam, obtain free credit reports, receive identity theft victim assistance, can rely on truthful information on products and services, and benefit from competition in the marketplace through lower prices, more choice, and higher-quality products and services.

Funding provided to the FTC supports these successful outcomes. Over the past 3 years, the Federal Trade Commission saved consumers more than \$1.4 billion in economic injury by stopping illegal practices in the marketplace. Last year alone, the FTC took action against mergers likely to harm competition in markets, with

a total of \$22.3 billion in sales. Since 2006, the FTC's budget has grown to support a staff of 1,170, a cumulative 4-year staffing increase of 16 percent. New staff have enhanced the agency's ability to protect consumers and preserve competition. The growth of the staff and budget reflect a rapidly evolving and sophisticated marketplace. As technology continues to transform, consumers are enjoying revolutionary services and information unimaginable just a short time ago.

But, unfortunately, the risk from new technology has also increased, such as identity theft, privacy violation, and data security concerns. Newly hired FTC staff have been assigned to respond to these increased risks, not just through enforcement, but also through education of consumers and industry.

Funds provided to the FTC have also allowed the Commission to focus on risks from the current economic downturn. Unemployment and the foreclosure crisis have created prime opportunities for fraudsters to prey on financially vulnerable Americans. Since 2009, the FTC, working with States and other agencies, has been involved in bringing more than 200 cases against firms deceiving homeowners into paying for bogus mortgage modifications and foreclosure-avoidance schemes.

PREPARED STATEMENT

I am not going to go through the rest of my statement here, but make it part of the record, because I'm anxious to give my colleague a chance and then to open it up to questions.

[The statement follows:]

PREPARED STATEMENT OF SENATOR RICHARD J. DURBIN

Good afternoon. I am pleased to welcome you to this hearing today before the Financial Services and General Government Appropriations Subcommittee.

Today's hearing focuses on the Federal Trade Commission, both on the agency's budget request for fiscal year 2011 and on oversight of previously appropriated funds.

Testifying before us this afternoon is the Chairman of the FTC, Jon Leibowitz.

I welcome my distinguished Ranking Member Susan Collins, others who join me on the dais today and others who may arrive.

Consumers are affected every day by the FTC's work. Thanks to the FTC, consumers: receive fewer telemarketing calls and e-mail spam; obtain free credit reports; receive identity theft victim assistance; can rely on truthful information about products and services; and benefit from competition in the market through lower prices: more choice, and higher quality products and services.

Funding provided to the FTC supports these successful outcomes for consumers.

Over the past 3 years, the FTC saved consumers more than \$1.4 billion in economic injury by stopping illegal practices in the marketplace.

And last year alone, the FTC took action against mergers likely to harm competition in markets with a total of \$22.3 billion in sales.

Since 2006, the FTC's budget has grown to support a staff of 1,170, a cumulative 4-year staffing increase of 16 percent.

New staff have enhanced the agency's ability to protect consumers and preserve competition in the marketplace.

NEW TECHNOLOGIES, FINANCIAL FRAUD SPUR FTC GROWTH

The growth of FTC's staff and budget reflects a rapidly evolving and sophisticated marketplace. As technology continues to transform, consumers are enjoying revolutionary services and information unimaginable just a decade ago.

But unfortunately, the risks from new technology and capabilities have also increased, such as identity theft, privacy violations, and data security concerns. Newly-hired FTC staff have been assigned to respond to these increasing risks, not just through enforcement but also through education of consumers and industry.

Funds provided to the FTC have also allowed the FTC to focus on risks resulting from the current economic downturn.

Unemployment and the foreclosure crisis have created prime opportunities for fraudsters to prey on financially vulnerable Americans.

Since 2009, the FTC, working with states and other agencies, has been involved in bringing more than 200 cases against firms deceiving homeowners into paying for bogus mortgage modifications and foreclosure avoidance schemes.

To reduce mortgage-related scams in the long term, the FTC has initiated a rule-making proposing to prohibit companies from charging fees in advance of any loan modification services and to require specific disclosures so that consumers can make informed decisions.

MARKET MONITORING AND ANALYSIS PROMPTS FTC GROWTH

Staffing increases over the last several years have also enhanced the FTC's ability to monitor and review the competitiveness of increasingly complex industries. One of these is the petroleum market. Americans rely on this market for transportation and to heat and light our homes and businesses.

The FTC continuously monitors gas and diesel prices to track trends and potential market distortions. Just last year, the FTC created a new rule to prohibit fraud and deceit in wholesale petroleum markets. The FTC also educated businesses on compliance with the specific directives included in the new rules. Together these steps will enhance the competitiveness of the petroleum market.

FUTURE FUNDING

For fiscal year 2011, the FTC requests \$314 million. This is an increase of 7.6 percent over the fiscal year 2010 enacted level and would allow the FTC to hire 40 new staffers in similar growth areas from previous years. In particular, the FTC requests to add staff to handle the increasing workload related to financial practices, privacy and data security, and complex merger transactions.

I look forward to discussing these and other issues with you.

Senator DURBIN. But, Mr. Chairman, thank you for being here. My apologies, again, for running late.

Mr. LEIBOWITZ. No problem.

Senator DURBIN. Senator Collins.

STATEMENT OF SENATOR SUSAN COLLINS

Senator COLLINS. Thank you, Mr. Chairman.

I appreciate your holding this hearing on the budget request of the Federal Trade Commission.

As you pointed out, the FTC deals with issues that affect the economic life of all Americans. Through its administration of a wide variety of consumer protection laws, the FTC protects consumers from deceptive practices, such as fraudulent and predatory scams, identity theft, and credit fraud. The FTC also works to help American consumers by preventing unfair methods of competition in the marketplace.

I've long had an interest in combating consumer fraud. As the chairman may recall, when he was a member of what was then the Governmental Affairs Committee, we worked together on a lot of consumer fraud hearings.

Unfortunately, today we see that the incidence of fraud and predatory scams appears to be on the rise as con artists prey on citizens, particularly the elderly, who are facing financial hardship. And, unfortunately, in tough economic times, people seem to be more vulnerable to scams and schemes because, in many cases, they are in desperate financial straits. These con artists exploit these tough economic times to lure Americans into scams that look and sound legitimate.

At the Homeland Security Committee, we held hearings at which the FTC Chairman testified, looking at the scams associated with the stimulus bill last year. These con artists not only rob their victims of money, but also of their dignity. And that, in many cases, can make senior citizens reluctant to come forward and seek the help that they deserve.

I look forward to hearing from Chairman Leibowitz on the FTC's most recent efforts to identify and publicize these types of scams and other financial frauds.

I'm also very interested to learn more about the FTC's efforts to address anticompetitive pay-for-delay patent settlements, which keep lower-cost generic drugs off the market and cost consumers and taxpayers billions of dollars. And, judging from the charts before us, I think that the Chairman is going to address that issue, and I'm very glad that he is.

Finally, as I represent a State that borders Canada, I'm also interested to hear more about the Commission's effort to combat cross-border fraud, which periodically rears its ugly head in my State.

I also look forward to getting into a discussion about certain privacy issues, such as whether the FTC is investigating allegations against Google violating the privacy rights of our citizens as through its street view mapping activities. That's the allegation, and I look forward to discussing that, as well.

Thank you, Mr. Chairman.

Senator DURBIN. Thank you, Senator Collins.

Chairman Leibowitz.

SUMMARY STATEMENT OF HON. JON LEIBOWITZ

Mr. LEIBOWITZ. Thank you so much, Chairman Durbin, Ranking Member Collins, for inviting me to testify today, and for those very kind words about our agency.

As you know, the mission of the Federal Trade Commission is extraordinarily broad. And we pursue it vigorously, but with a very limited number of people.

For fiscal year 2011, we're requesting \$314 million and 1,207 FTEs. But, to put that into perspective, in 1979, when the population of the United States was only 225 million, before the Do Not Call list, before Internet scams, actually before the Internet, and a host of new statutory responsibilities, the FTC had nearly 1,800 FTEs.

With the active support of this subcommittee, we have been aggressive in our efforts to protect consumers from unfair and deceptive acts and unfair methods of competition. We look forward to doing even more in 2011. And we're going to have to do more, because, unfortunately, the recession has meant that American consumers are at an even greater risk than usual for financial frauds.

As scams have proliferated, we have tried to step up our efforts to stop them. Since the beginning of last year, the FTC has brought more than 40 cases against fraud targeting financially distressed consumers—and we're partnering more with the State attorneys general these days, although we always have—we've brought more than 300 cases to shut down foreclosure rescue scams, fake job of-

fers, and, as you mentioned, Senator Collins, phony access to Federal stimulus money.

These sorts of scams are not new. In the last decade, sadly, we've recovered nearly \$500 million for consumers who lost their money in the financial frauds area alone, which is a strikingly large amount of money.

The Commission has also used the rulemaking authority that you provided for us. In February, we proposed the rule that would ban advance fees by mortgage modification companies. And we expect to complete that rulemaking this summer. As we've seen in our law enforcement actions, far too often, consumers pay thousands of dollars in advance for these services, but they receive nothing in return. And that's often because these scams have 95 percent of their employees in sales and 3 percent of their employees doing modifications. The Commission has also proposed rules in the debt settlement and mortgage servicing and advertising areas.

We continue to prioritize consumer privacy and data security. We bring actions against companies that don't adequately protect consumers' personal information; we've brought 29 cases, to date. And we provide information to 15,000 consumers a week who call about identity theft.

Emerging technologies and business models, including social networking behavioral advertising, hold significant promise for consumer benefits, but also, as you mentioned, risks to privacy. So we are examining them closely. We've held a series of roundtables. We plan to share what we've learned and make recommendations later this year.

Do Not Call continues to be a success. I was almost going to say "ringing success," but I thought that would be a bad pun. But, I guess I did, and I guess it was. We anticipate that, by the end of June, 200 million numbers will be registered. The FTC took action in the past year against eight companies making robocalls. We've recovered \$40 million in fines over the past 5 years for Do Not Call violations. Just recently, we shut down one company—and the investigation was done out of our Chicago regional office—that alone placed more than 1 billion calls offering auto warranties.

Today, we're announcing a major case against AMS Financial for falsely representing that they could lower consumers' credit card interest rates and making illegal robocalls. We obtained a temporary injunction—or a restraining order in this case, freezing the defendant's assets. And we worked with several State attorneys general, including the wonderful Lisa Madigan, to do it.

We've also challenged hidden fees in prepaid telephone cards. And today we're announcing a \$500,000 settlement with Diamond Phone Card, which targeted the immigrant community. And you can see, this is their "Hasta la vista" card. It purports to give you a certain number of minutes for \$2, but, in fact, it gave consumers far less than that.

Protecting non-English speakers is a task we take very, very seriously. We produce most of our consumer educational material in both English and Spanish.

And we make extensive efforts to protect other vulnerable populations, including outreach activities to alert senior citizens to

fraud and reverse mortgages. We've brought multiple cases involving senior citizens in the last 1½ years.

And we have various initiatives underway to protect children. In the last year, we've distributed an online Internet safety guide called "Netcetera" to school districts—you may have copies on your desk; launched a kid-friendly campaign to teach kids how to evaluate advertising; and released our seventh entertainment-industry marketing report. And just as critically, pursuant to this subcommittee's direction, we are leading a multiagency task force on marketing food to children.

And, as you know, we also enforce the Federal antitrust laws in a wide range of areas, including healthcare, technology, energy, consumer goods and services, and the top priority, as you mentioned, Senator Collins, of the Commission's competition agenda—and we take a greatest-good-for-the-greatest-number-of-people approach—is stopping pay-for-delay settlements between brand name and generic drug makers. To be blunt, these are really sweetheart deals, and we estimate that it costs consumers about \$3.5 billion a year.

And here's what really is going on: A brand name drug company will sue a generic company. And they claim that the generic has violated their patent. And then they turn right around and they settle the case, literally by paying off the generic not to compete. So, the brand continues to charge monopoly prices. The generic companies collect a big fat paycheck. And consumers keep paying higher prices for much-needed medicines.

And so, it's win-win for the companies, but it is absolutely lose-lose for consumers. And because of a few misguided court decisions in 2005, as you can see, the problem has only gotten worse. There wasn't a single pay-for-delay deal in 2004. The two adverse decisions, which, of course, we disagreed with, came down at the end of 2005. And you can see, as our chart shows, there were a record 19 deals like this last year.

Every single Commissioner at the Federal Trade Commission supports ending these deals. And we're currently litigating two cases, with the hope of getting one to the Supreme Court. Today, we filed an amicus brief in the second circuit on a pay-for-delay case, along with 34 State attorneys general, including the State attorneys general of Maine and Illinois; they filed a companion brief.

A much quicker solution, however, would be legislation that ends this unconscionable practice. And so, we greatly appreciate the co-sponsorship of both you, Mr. Chairman, and you, Ranking Member Collins, of precisely that legislation. And we're hopeful, because the bill passed the Senate Judiciary Committee, the full House, and we have the endorsement of the President to abolish this practice, that it's possible we can get it done this year.

And I'd like—in my last 4 seconds, I ask unanimous consent for 15 additional seconds, just to mention one more—

Thank you so much, Mr. Chairman.

I'd like to talk about just one other area of particular focus for the Commission, and that's gasoline prices. When the price of gasoline hit \$4 a gallon in mid-2008, every household in the country felt the impact. Everyone in this room did. And we realize how important it is that petroleum markets remain competitive. So, in the

past year, we've added to our arsenal by adopting a rule prohibiting manipulation of wholesale petroleum markets and allowing us to fine violators.

PREPARED STATEMENT

We're doing a lot of other important work. I would be glad to talk about it, but I know I've exceeded my time, so I'm happy to answer questions.

[The statement follows:]

PREPARED STATEMENT OF JON LEIBOWITZ

INTRODUCTION

Chairman Durbin, Ranking Member Collins, and Members of the Subcommittee, I am Jon Leibowitz, Chairman of the Federal Trade Commission ("FTC" or "Commission").¹ I appreciate the opportunity to appear before you today, to testify in support of the Federal Trade Commission's fiscal year 2011 appropriation request and to share with you some of the work the agency has done and plans to do over the next year. The Commission thanks you for this opportunity and looks forward to working with you to protect American consumers and promote competition.

The FTC is the only Federal agency with both consumer protection and competition jurisdiction across broad sectors of the economy. It enforces the Federal Trade Commission Act, which prohibits anticompetitive, deceptive, or unfair business practices, as well as a broad range of other laws.² The FTC's Annual Report, released last month, is attached to this testimony. The report highlights the agency's efforts to protect consumers and promote competition, including initiatives to stop fraud targeting financially distressed consumers, protect privacy, and prevent anticompetitive practices such as "pay-for-delay" in the pharmaceutical industry, which costs consumers \$3.5 billion a year in higher drug costs.

This past year, the staff of the FTC has handled a growing workload, which includes its strong and effective law enforcement program. The additional funding that Congress provided over the past fiscal year, for which we are grateful, has enabled us to increase the staff who are working to protect consumers from deceptive practices, particularly fraudulent schemes that have proliferated during these challenging economic times.

This testimony first describes some of our work under both our consumer protection mission and our competition mission and then summarizes the FTC's budget request for fiscal year 2011. To meet the challenges of the next fiscal year, the FTC requests \$314 million which will support 1,207 FTE. This request represents an increase of \$22.3 million and 40 FTE over the fiscal year 2010 enacted levels.

CONSUMER PROTECTION MISSION

The FTC Is Protecting Consumers During the Economic Downturn

With the economic downturn, the Commission has increased its emphasis on protecting consumers in financial distress. In the past year, the FTC has brought almost 40 law enforcement actions to stop scams that prey on consumers suffering from the financial downturn, and the agency is also engaged in rulemaking and consumer education efforts related to financial services. In the financial services area alone, the FTC has filed more than 100 actions against providers of financial services over the past 5 years, and obtained nearly \$500 million in redress for consumers of financial services in the past 10 years. By working closely with state attorneys general, we have expanded the reach of law enforcement efforts to help consumers in economic distress through hundreds of additional cases.

Helping Distressed Homeowners: Challenging Mortgage Modification and Foreclosure Relief Scams and Writing New Mortgage Rules

Since 2008, the Commission has filed 28 law enforcement actions focused on stopping mortgage loan modification and foreclosure relief scams. Companies operating these scams make deceptive claims about their abilities to modify the terms of consumers' loans and prevent foreclosure. During 2009, as these scams proliferated, we

¹ While the views expressed in this written statement represent the views of the 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 Commission currently enforces or otherwise implements more than 60 laws.

partnered in sweeps with Federal and state law enforcement agencies to collectively file more than 200 lawsuits to combat these scams.³ For example, in one case, the FTC obtained a preliminary injunction that prevented defendants from falsely representing in Spanish-language radio and magazine ads that they would obtain mortgage loan modifications or stop foreclosure in all or virtually all instances.⁴ Consumers paid more than \$3.3 million to these defendants, and the FTC is seeking consumer redress.

To curb deceptive and unfair practices in the mortgage industry, the FTC is also considering rules on three mortgage-related topics:

—*Mortgage Assistance Relief Services.*—In March 2010, the Commission published a notice of proposed rulemaking covering loan modification, foreclosure relief, and other mortgage assistance relief services.⁵ If adopted, the proposed rule would ban providers from collecting fees prior to delivering promised results, prohibit misrepresentations in marketing, and require affirmative disclosures. The FTC expects to complete this rulemaking proceeding within the next 90 days.

—*Mortgage Servicing Practices.*—The Commission published an advance notice of proposed rulemaking addressing mortgage servicing practices and plans to determine in the near future whether to propose such a rule.⁶ Commission cases in this area have targeted core servicing issues such as failing to post payments upon receipt, charging unauthorized fees, and engaging in deceptive or unfair collection tactics. For example, in September 2008, the FTC settled charges that EMC Mortgage Corporation and its parent, The Bear Stearns Companies, LLC, violated Section 5 of the FTC Act and the Fair Debt Collection Practices Act in servicing mortgage loans, including debts that were in default when EMC obtained them.⁷ The EMC settlement required the defendants to pay \$28 million in consumer redress, and the Commission has sent checks to more than 86,000 consumer victims.

—*Mortgage Advertising Practices.*—The Commission published an advance notice of proposed rulemaking addressing mortgage advertising practices and plans to determine in the near future whether to propose such a rule.⁸ FTC cases in this area have targeted mortgage lenders and brokers for deceptive marketing of loan costs or other key loan terms, such as the existence of a prepayment penalty or a large balloon payment due at the end of the loan. For example, the Commission announced settlements with three mortgage lenders charged with advertising low interest rates and low monthly payments, but failing to disclose adequately that those rates and payments would increase substantially after a short period of time.⁹

Helping American Workers: Stopping Employment Opportunity Scams, Bogus Government Grants, and Get-Rich-Quick Schemes

In February 2010, along with state and Federal partners, the Commission announced Operation Bottom Dollar, a sweep that involved 69 civil and criminal actions against organizations making false promises of employment or employment placement opportunities.¹⁰ Last July, the FTC announced Operation Short Change, another Federal-state crackdown that challenged 120 schemes selling bogus government grant opportunities, illusory get-rich-quick plans, job opportunity scams, and phony debt-reduction services.¹¹

In addition, in October 2009, MoneyGram paid \$18 million to settle FTC charges that its money transfer system helped con artists trick U.S. consumers into wiring

³See FTC Press Release, Federal and State Agencies Target Mortgage Relief Scams (Nov. 24, 2009), www.ftc.gov/opa/2009/11/stolenhope.shtm; FTC Press Release, Federal and State Agencies Target Mortgage Foreclosure Rescue and Loan Modification Scams (July 15, 2009), www.ftc.gov/opa/2009/07/loanlies.shtm.

⁴See *FTC v. Dinamica Financiera LLC*, No. 09–CV–03554 (C.D. Cal. preliminary injunction issued June 3, 2009).

⁵Mortgage Assistance Relief Services Notice of Proposed Rulemaking, 75 Fed. Reg. 10,707 (Mar. 9, 2010).

⁶Mortgage Acts and Practices Advance Notice of Proposed Rulemaking, 74 Fed. Reg. 26,118 (June 1, 2009).

⁷*FTC v. EMC Mortgage Corp.*, No. 4:08–CV–338 (E.D. Tex. final order Sept. 9, 2008).

⁸Mortgage Acts and Practices Advance Notice of Proposed Rulemaking, 74 Fed. Reg. 26,118 (June 1, 2009).

⁹See FTC Press Release, Three Home Loan Advertisers Settle FTC Charges; Failed to Disclose Key Loan Terms in Ads (Jan. 8, 2009), www.ftc.gov/opa/2009/01/anm.shtm.

¹⁰See FTC Press Release, FTC Cracks Down on Con Artists Who Target Jobless Americans (Feb. 17, 2010), www.ftc.gov/opa/2010/02/bottomdollar.shtm.

¹¹See FTC Press Release, FTC Cracks Down on Scammers Trying to Take Advantage of the Economic Downturn (July 1, 2009), www.ftc.gov/opa/2009/07/shortchange.shtm.

them money in connection with fake lottery schemes, secret shopper scams, and bogus guaranteed loans. In April the FTC sent more than 34,000 checks to consumers identified as victims in these schemes.¹²

Halting Scams Promising to Relieve Consumers of Debt or Repair Their Credit Histories

Many consumers faced with mounting debt have turned unwittingly to scam artists for help. Since 2008, the Commission has brought ten lawsuits challenging sham nonprofit credit counseling firms, debt settlement services, and debt negotiators. During the same period, the FTC filed a dozen lawsuits against credit repair organizations that falsely misrepresented their ability to remove negative but accurate information from credit reports.¹³

To curb ongoing abuses in the debt relief industry, in August 2009 the Commission proposed a rule to, among other things, prohibit debt relief service providers from charging consumers a fee until they have delivered the promised results.¹⁴ The FTC expects to complete this rulemaking proceeding within the next 60 days.

Protecting Consumers in the Online World

The Commission devotes significant resources to protecting consumers in a high-tech world by promoting data security, preventing identity theft, and protecting online privacy.

To date, the FTC has brought 29 enforcement actions against businesses for failing to protect consumers' personal information. For example, in the past 7 months, the Commission has (1) announced a settlement with restaurant chain Dave & Buster's arising from a data breach that allegedly compromised the credit card numbers and expiration dates of approximately 130,000 customers;¹⁵ (2) in a case where a mortgage broker threw out consumer credit reports in a dumpster, obtained the first civil penalty for violation of a new Commission rule that requires companies to adequately dispose of sensitive credit report information;¹⁶ and (3) obtained a stipulated modified order against ChoicePoint after charging that the company failed to implement a comprehensive information security program, as required by a 2006 Federal court order.¹⁷

The FTC also helps consumers avoid identity theft and responds to 15,000 consumers each week who call the FTC identity theft hotline. Under Federal law, consumers have a right to a free credit report to help them detect identity theft and errors in their credit reports, which are used not only to obtain credit but also for employment, housing, and insurance. In recent years, however, companies have offered so-called "free" credit reports that are conditioned on enrollment in a costly plan, often an identity theft protection plan. To protect consumers from this confusing and deceptive marketing, the FTC amended the Free Credit Report Rule to require prominent disclosures for advertising of these supposedly "free" credit reports.¹⁸ Now, consumers will be better able to avoid supposedly "free" offers that actually cost money. In addition, in one of the largest FTC-state coordinated actions, the FTC and Illinois Attorney General Lisa Madigan jointly announced a settlement with LifeLock, Inc., which advertised its identity theft prevention service, claiming that it was "the first company to prevent identity theft from occurring."¹⁹ The order

¹² See FTC Press Release, MoneyGram to Pay \$18 Million to Settle FTC Charges That it Allowed its Money Transfer System To Be Used for Fraud (Oct. 20, 2009), www.ftc.gov/opa/2009/10/moneygram.shtm; FTC Press Release, FTC Mails Redress Checks to Fraud Victims Who Lost Money Through MoneyGram's Money Transfer System (Apr. 28, 2010), www.ftc.gov/opa/2010/04/moneygram.shtm.

¹³ See prepared statement of the Federal Trade Commission on The Debt Settlement Industry: The Consumer's Experience, before the Senate Committee on Commerce, Science, and Transportation (Apr. 22, 2010), www.ftc.gov/os/testimony/100422debtsettlement.pdf; prepared statement of the Federal Trade Commission on Financial Services and Products: The Role of the Federal Trade Commission in Protecting Consumers, before the Senate Committee on Commerce, Science, and Transportation (Feb. 4, 2010), www.ftc.gov/os/testimony/P064814financial-services.pdf.

¹⁴ Telemarketing Sales Rule Proposed Rule, 74 Fed. Reg. 41,988 (Aug. 19, 2009).

¹⁵ *Dave & Busters, Inc.*, FTC File No. 082-3153 (proposed consent order Mar. 25, 2010).

¹⁶ *FTC v. Navone*, No. 2:08-CV-01842 (D. Nev. final order Dec. 29, 2009).

¹⁷ *U.S. v. ChoicePoint, Inc.*, No. 1:06-CV-0198-JTC (N.D. Ga. final order Oct. 14, 2009).

¹⁸ The Credit Card Accountability Responsibility and Disclosure Act of 2009 required the Commission to issue a rule to prevent deceptive marketing of "free credit reports." The amended rule went into effect on April 2, 2010. See Free Annual File Disclosures Final Rule, 75 Fed. Reg. 9,726 (Mar. 3, 2010).

¹⁹ *FTC v. LifeLock, Inc.*, No. 2:10-cv-00530-NVW (D. Ariz. final order Mar. 15, 2010). See also State of Illinois Press Release, FTC, 35 States Reach Agreement with LifeLock for Misleading Advertising (Mar. 9, 2010), www.illinoisattorneygeneral.gov/pressroom/2010_03/20100309.html.

requires LifeLock to pay \$11 million to the FTC for consumer redress and \$1 million to 35 state attorneys general co-plaintiffs. The order also bars the company from making deceptive claims that its services offer absolute prevention against identity theft and requires it to take more stringent measures to safeguard the personal information it collects from customers.

The FTC also has brought numerous cases to meet the challenges of protecting consumers and their privacy while they are using the Internet. For example, in June 2009, the FTC moved quickly to shut down a rogue Internet Service Provider that knowingly hosted and actively participated in the distribution of illegal spam, child pornography, and other harmful electronic content.²⁰ The FTC complaint alleged that the defendant actively recruited and colluded with criminals seeking to distribute illegal, malicious, and harmful electronic content. After the Commission shut down this ISP, there was a temporary 30 percent drop in spam worldwide.²¹ Just last month, the court ordered the operation to turn over \$1.08 million in ill-gotten gains to the Commission.

Also last summer, the Commission settled allegations that Sears failed to disclose adequately the scope of consumers' personal information collected via software that Sears represented would merely track their "online browsing."²² The FTC charged that the software, in fact, monitored consumers' online secure sessions as well—including those on third-party websites—and collected information such as the contents of shopping carts, online bank statements, e-mail headers and subject lines, and other sensitive data. Only deep in a lengthy end user license agreement did Sears disclose the extent of the tracking.

In an effort to examine privacy issues more broadly, FTC staff convened three public roundtables to explore concerns about consumer privacy and ensure that the Commission's approach to privacy keeps pace with the latest technologies and emerging business models.²³ Participants discussed developments in areas such as social networking, cloud computing, online behavioral advertising, mobile marketing, health privacy, and the collection and use of information by data brokers and other businesses. The Commission plans to release recommendations for public comment later this year.

Enforcement of the National Do Not Call Registry

The National Do Not Call Registry is an unqualified success. So far, there are more than 198 million unique numbers on the Registry. By the end of June 2010, the Commission anticipates we will reach 200 million telephone numbers. To protect these consumers' privacy, the Commission strictly enforces the Do Not Call list and fights other abusive telemarketing practices.

During the past year, the Commission filed eight new actions that attack the use of harassing "robocalls"—the automated delivery of prerecorded messages—to deliver deceptive telemarketing pitches that promised consumers extended auto warranties and credit card interest rate reduction services.²⁴ In addition, DIRECTV paid a \$2.3 million civil penalty to settle charges that it placed prerecorded calls to consumers who previously had told the company not to call them, and Comcast paid \$900,000 to settle charges that it called consumers who had specifically asked not to be called.²⁵

Stopping Deceptive Advertising of Prepaid Phone Cards

The Commission continues to protect consumers from hidden fees and false claims about how many minutes prepaid phone cards deliver. This type of deception often targets recent immigrants from Latin America, Africa, Asia, and elsewhere around the world. This week, the Commission announced a settlement with Diamond Phone Card, Inc., which agreed to pay \$500,000 to settle FTC allegations that it charged hidden fees and misrepresented the number of calling minutes delivered by its pre-

²⁰ *FTC v. Pricewert, LLC*, No. 09–CV–2407 (N.D. Cal. final order issued Apr. 4, 2010).

²¹ See Official Google Enterprise Blog, Q2 2009 Spam Trends, <http://googleenterprise.blogspot.com/2009/07/q2-2009-spam-trends.html>.

²² *Sears Holdings Mgmt. Corp.*, FTC File No. 082–3099 (final order Aug. 31, 2009).

²³ See generally FTC Exploring Privacy web page, www.ftc.gov/bcp/workshops/privacyroundtables/index.shtml.

²⁴ See, e.g., FTC Press Release *FTC Sues to Stop Robocalls With Deceptive Credit Card Interest-Rate Reduction Claims* (Dec. 8, 2009), www.ftc.gov/opa/2009/12/robocall.shtm.

²⁵ *U.S. v. DIRECTV, Inc.*, No. 09 2605 MRP FMOx (C.D. Cal. final order May 14, 2009); *U.S. v. Comcast Corp.*, No. 2:09–cv–01589–HB (E.D. Pa. final order Apr. 16, 2009). Last year, the FTC also charged satellite television provider Dish Network with causing telemarketing calls—including robocalls—to be made to numerous consumers whose numbers are on the National Do Not Call Registry. See *U.S. v. Dish Network, LLC*, No. 3:09–cv–03–73–JES–CHE (C.D. Ill. filed Mar. 25, 2009) (action brought jointly with the Attorneys General of California, Illinois, Ohio, and North Carolina).

paid cards.²⁶ In total, the FTC has obtained more than \$4 million from companies charged with deceptive marketing of prepaid calling cards.

Protecting and Educating Children Through New and Innovative Initiatives

Promoting the Marketing of Healthier Foods to Children

The Commission continues its efforts to combat childhood obesity. Since 2005, the FTC has hosted three public forums on food marketing to children and childhood obesity. At an event in December 2009, the Interagency Working Group on Food Marketed to Children²⁷ suggested possible voluntary nutrition standards. Experts also presented new research on the impact of food advertising on children's food choices, discussed the legal ramifications of possible restrictions on food advertising to children, and assessed food industry self-regulatory efforts to impose nutritional standards on their advertising to children.²⁸

FTC staff is working on a follow-up report to the FTC 2008 Report on Marketing Food to Children and Adolescents. The 2008 report reviewed industry expenditures and activities in marketing foods and beverages, including integrated advertising campaigns that combine traditional media, such as television, with previously unmeasured forms of marketing, including packaging, in-store advertising, sweepstakes, Internet, and cross-promotion with movies.²⁹ The follow-up report, expected in 2011, will analyze marketing activities and expenditures in 2009 by dozens of food and beverage companies in promoting their products to children and teenagers. It will be an important tool to track the marketplace's response to childhood obesity and identify areas where more action is needed. The report also will examine the nutritional quality of those products and compare them to the nutritional quality of products marketed to children and teenagers in 2006.

Promoting Children's Internet Safety and Advertising Literacy

During the past year, the FTC developed additional resources for use by children, parents and teachers to stay safe online and learn about how advertising works. In response to the Broadband Data Improvement Act of 2008, the FTC produced the brochure *Net Cetera: Chatting With Kids About Being Online* to give adults practical tips to help children navigate the online world.³⁰ Since its release in late 2009, more than two million copies of *Net Cetera* in English and Spanish have been distributed nationwide.

At the end of April 2010, the FTC launched *Admongo.gov*, a campaign designed to help children think critically about online and offline advertising, and better understand the ads they see.³¹ Through this campaign, children learn to ask: Who is responsible for the ad? What is it actually saying? What does it want me to do? The FTC is working with schools, libraries, and other organizations to get this important education to kids, as well as their parents and teachers.

Protecting Children's Online Privacy

The Commission protects the safety and privacy of children online through enforcement and administration of the Children's Online Privacy Protection Act of 1998 ("COPPA") and its implementing rule.³² COPPA requires operators of websites and online services that target children under age 13 to obtain verifiable parental consent before they collect, use, or disclose personal information from children. The FTC engages in broad business and consumer education to ensure widespread knowledge of and adherence to COPPA. In the past 10 years, the Commission has brought 14 law enforcement actions alleging COPPA violations and has collected more than \$3.2 million in civil penalties. In light of significant changes to the online

²⁶ *FTC v. Diamond Phone Card, Inc.*, No. 09-CV-03257-NGG-VVP (E.D.N.Y. final order May 14, 2010). In 2009, the FTC resolved similar charges in two cases against prepaid phone card companies. See *FTC v. Clifton Telecard Alliance One LLC*, No. 2:08-CV-01480-PGS-ES (D.N.J. final order June 12, 2009) (imposing \$1.3 million judgment); *FTC v. Alternatel, Inc.*, No. 1:08-cv-21433-AJ (S.D. Fla. final order Apr. 1, 2009) (imposing \$2.25 million judgment).

²⁷ The Working Group is comprised of the FTC, the U.S. Department of Agriculture, the U.S. Food and Drug Administration and the Centers for Disease Control, and was established pursuant to Congress' (and this Subcommittee's) direction in the 2009 Omnibus Appropriations report.

²⁸ See generally *Sizing Up Food Marketing and Childhood Obesity* web page, www.ftc.gov/bcp/workshops/sizingup/index.shtml.

²⁹ *Marketing Food to Children and Adolescents: A Review of Industry Expenditures, Activities, and Self-Regulation* (2008), www.ftc.gov/os/2008/07/P064504foodmktngreport.pdf.

³⁰ See FTC Press Release, *OnGuardOnline.gov* Off to a Fast Start with Online Child Safety Campaign (Mar. 31, 2010), www.ftc.gov/opa/2010/03/netcetera.shtml.

³¹ See FTC Press Release, *FTC Helps Prepare Kids for a World Where Advertising Is Everywhere* (Apr. 28, 2010), www.ftc.gov/opa/2010/04/admongo1.shtml.

³² See Children's Online Privacy Protection Act of 1998, 15 U.S.C. §§ 6501-6508 (2009). The FTC's implementing regulations (the "COPPA Rule") are found at 16 C.F.R. Part 312 (2009).

environment, including the explosion of social networking and the proliferation of mobile web technologies and interactive gaming, the Commission recently initiated an accelerated review of COPPA's effectiveness.³³

Using Aggressive Law Enforcement to Combat Health Fraud

The FTC continues to protect consumers from false and misleading health claims involving products as diverse as cereals and cold remedies and claims as significant as cancer cures.

Last year, the Commission settled a case with Kellogg Company over charges that its advertising falsely claimed that Frosted Mini Wheats was clinically shown to improve children's attentiveness by nearly 20 percent.³⁴ The Commission also responded to the burgeoning area of immunity-boosting and cold and flu prevention and treatment claims when it investigated and reached a settlement with Airborne, Inc., the leading seller of effervescent tablets that purported to protect against exposure to germs in crowded environments. The Commission then settled similar charges against three major pharmacy retail chains that marketed their own store-brand "copycat" cold and flu products, and the manufacturer of these copycat products, requiring the companies to pay a total of \$9.8 million.³⁵

Importantly, the FTC also challenges claims that dietary supplements and devices treat, cure, or prevent cancer and other serious diseases. Last summer, a Federal district court ordered Direct Marketing Concepts to pay nearly \$70 million for consumer refunds for dietary supplements it claimed would treat, cure, or prevent cancer and other serious diseases.³⁶ In *FTC v. Roex, Inc.*, the FTC alleged that the defendants' nationally broadcast, live, call-in radio show made claims that an infrared sauna device could treat cancer and that various dietary supplements would treat, reduce the risk of, or prevent diseases such as cancer, HIV/AIDS, diabetes, strokes and heart attacks, Alzheimer's disease, and Parkinson's disease.³⁷ The defendants agreed to pay more than \$3 million for consumer redress and are prohibited from making such claims in the future.

Protecting Consumers from Cross-Border Fraud and Promoting International Consumer Protection

The FTC plays a leadership role in international consumer protection and privacy matters to better protect American consumers in a globalized world. The Commission's use of the U.S. SAFE WEB Act—which allows the sharing of information with our foreign sister agencies when working together to stop global scams—has directly benefitted American consumers because many of the foreign agency requests involved schemes directed at American victims. In December, the FTC submitted a 3-year report to Congress detailing its use of the powers Congress gave it to fight cross-border fraud. As explained in the report, the FTC has shared information in response to 38 requests from 14 foreign law enforcement agencies, resulting in more than 17 enforcement actions by U.S. and foreign authorities, and issued 26 civil investigative demands on behalf of 6 foreign agencies in 12 investigations.³⁸ The vast majority of these SAFE WEB information sharing requests resulted in actions against companies harming American consumers.

On the policy front, the FTC continues to shape international policies on issues such as electronic commerce, green marketing claims, and consumer economics to provide sound protection for American consumers in the global marketplace. This month, the Commission hosted a 2-day forum and "best practices" training session

³³ Although the Commission generally reviews its rules approximately every 10 years, the continued rapid-fire pace of technological change led the agency to accelerate its COPPA review by 5 years, to this year. See FTC Press Release, FTC to Host Public Roundtable to Review Whether Technology Changes Warrant Changes to the Children's Online Privacy Protection Rule (Apr. 19, 2010), www.ftc.gov/opa/2010/04/coppa.shtm.

³⁴ Kellogg Co., FTC File No. 082-3245 (final order July 27, 2009).

³⁵ Walgreens agreed to pay \$5,970,000 in consumer redress, CVS Pharmacy, Inc. agreed to pay \$2,783,047, Rite Aid Corp. agreed to pay \$500,000, and Improvita Health Products, Inc.'s principals agreed to pay \$565,000 to settle these matters. See FTC Press Releases, Walgreens Will Pay Nearly \$6 Million to Settle FTC Deceptive Advertising Charges, Suppliers of Airborne-like Cold-and-Flu Supplements Reach Separate \$565,000 Settlement (Mar. 23, 2010), www.ftc.gov/opa/2010/03/walgreens.shtm; CVS to Pay Nearly \$2.8 Million in Consumer Refunds to Settle FTC Charges of Unsubstantiated Advertising of AirShield "Immune Boosting" Supplement (Sept. 8, 2009), www.ftc.gov/opa/2009/09/cvs.shtm; Rite Aid to Pay \$500,000 in Consumer Refunds to Settle FTC Charges of False and Deceptive Advertising (July 13, 2009), www.ftc.gov/opa/2009/07/riteaide.shtm.

³⁶ *FTC v. Direct Marketing Concepts*, No. 04-CV-11136-GAO (D. Mass. final order Aug. 13, 2009).

³⁷ *FTC v. Roex, Inc.*, No. SACV 09-0266 (C.D. Cal. final order Mar. 4, 2009).

³⁸ See FTC Press Release, FTC Issues Report to Congress on Use of Its Enhanced Authority Under the U.S. SAFE WEB Act (Dec. 15, 2009), www.ftc.gov/opa/2009/12/safeweb.shtm.

of the International Consumer Protection and Enforcement Network for consumer protection officials from over 40 countries. Participants discussed global scams, electronic transactions, emerging trends and risks associated with social networking sites, and advance-fee fraud.

COMPETITION MISSION

Anticompetitive mergers, collusive behavior, and exclusionary conduct by monopolists can harm American consumers in dramatic, if sometimes less visible, ways. As our recent enforcement activity emphasizes, anticompetitive activity can raise the cost of prescription drugs, real estate services, and other consumer products and services, and can impede innovation that would bring better and more cost-effective products and services to American consumers. During fiscal year 2009, the Commission brought 25 competition enforcement actions, including filing a record seven merger challenges in Federal district court or in an administrative proceeding, and through the first half of fiscal year 2010, the Commission has already brought 16 competition enforcement actions.³⁹

Ending Pay-for-Delay Patent Settlements.

One of the Commission's highest antitrust priorities is stopping pay-for-delay patent settlements in the pharmaceutical industry, a practice that costs consumers \$3.5 billion each year.⁴⁰ In these deals (also known as exclusion- or reverse-payment settlements), the brand-name drug firm pays its potential generic competitor to abandon a patent challenge and delay entering the market with a lower-cost generic product. Such settlements limit competition at the expense of consumers, whose access to lower-priced, generic drugs is delayed—sometimes for many years—and raise the costs of prescription drugs for businesses and the government.⁴¹ We thank you, Mr. Chairman and Ranking Member Collins, for co-sponsoring a bill in the Senate to end these deals.

Since 2005, some court decisions have taken a lenient approach to such agreements in drug patent settlements. As a result, it has become increasingly difficult to halt pay-for-delay settlements through litigation, and such settlements have become a common industry strategy.

Because these settlements cause enormous consumer harm, the Commission devotes substantial resources to this problem. For example, we are appealing the U.S. District Court for the Northern District of Georgia's dismissal of our complaint in a pay-for-delay case against Solvay Pharmaceuticals regarding the drug Androgel, a testosterone replacement medication.⁴² We continue to conduct new investigations into pay-for-delay agreements.

Importantly, we have reason to believe that the tide may be turning. Just last month, an appellate panel in the Second Circuit, which had previously adopted a permissive legal standard on pay-for-delay settlements, took the extraordinary step of questioning its own standard and explicitly encouraging consumer plaintiffs to request the full court's consideration of the pay-for-delay issue.⁴³ And just 2 months ago, in March 2010, a Federal district court judge in Philadelphia denied a defense motion to dismiss the FTC's currently pending pay-for-delay case against Cephalon, the manufacturer of the drug Provigil, a sleep disorder medication with nearly \$1 billion in annual U.S. sales.⁴⁴

Beyond individual cases, we have employed our full expertise to attack pay-for-delay settlements. In the past year, we have issued studies measuring the scope of this problem, which found:

- The number of these agreements is increasing, from zero in fiscal year 2004 to 19 in fiscal year 2009;
- On average, the deals delay the availability of cost-saving generics by 17 months; and

³⁹ See FTC Competition Enforcement Database, www.ftc.gov/bc/caselist/index.shtml.

⁴⁰ See Pay-for-Delay: How Drug Company Pay-Offs Cost Consumers Billions, FTC Staff Study (Jan. 2010), www.ftc.gov/os/2010/01/100112payfordelayrpt.pdf.

⁴¹ In a mature market, generic drugs are 15 percent of their brand name equivalent. See id.

⁴² In *re Androgel Antitrust Litig.* (No. 11), 1:09-MD-2084-TWT (N.D. Ga. Feb. 22, 2010) (granting defendants' motion to dismiss).

⁴³ See *Ark. Carpenters Health & Welfare Fund v. Bayer AG*, Nos. 05-2851-cv(L), 05-2852-cv(CON) (2d Cir. Apr. 29, 2010) (affirming summary judgment for defendants but inviting plaintiffs to petition for rehearing en banc).

⁴⁴ *FTC v. Cephalon, Inc.*, No. 2:08-cv-2141 (E.D. Pa. Mar. 29, 2010) (denying motion to dismiss), www.ftc.gov/os/caselist/0610182/index.shtml.

—If not stopped, pay-for-delay deals will, conservatively, cost consumers \$3.5 billion a year.⁴⁵

Finally, we are continuing our efforts to encourage legislation that would more rapidly fix this enormous problem, working closely with Congress and the Administration.

Health Care

The healthcare system plays an important role in the lives and economic security of all Americans and has a significant impact on Federal, state, and local government budgets. Accordingly, it is one of the Commission's top priorities. Our efforts to protect and promote competition in the healthcare system are critical to reduce costs, improve quality, and encourage innovation.

The Commission has acted aggressively to stop anticompetitive healthcare mergers. In December 2009, the FTC trial team challenged, in Federal court, Ovation's acquisition of a drug for premature infants with congenital heart defects, introducing evidence showing that Ovation acquired its only competitor and took advantage of its monopoly to raise prices by 1,300 percent. The Commission is seeking a divestiture to restore competition and consumer recovery of Ovation's illegally obtained profits.⁴⁶ The FTC also reviewed several pharmaceutical mergers and required divestitures in Watson/Arrow, Merck/Schering Plough, and Pfizer/Wyeth to preserve competition that otherwise would have been lost.⁴⁷ In the past year, the Commission also has sued to block Talecris' acquisition of CSL, which the Commission alleged would have raised prices for plasma derivative protein therapies used to treat a variety of illnesses, including immunodeficiency diseases.⁴⁸ The parties abandoned the deal in the face of the FTC's challenge.

Merger enforcement also promotes innovation. In medical device markets, the Commission blocked Thoratec's proposed acquisition of Heartware, its only potential competitor for left ventricular assist devices. These devices are surgically implantable blood pumps that provide a life-sustaining treatment for patients with advanced heart failure.⁴⁹ Blocking the transaction ensures that the two companies will continue to compete to develop better devices, which will benefit consumers.

Pharmacy Benefit Management (PBM) services are a critical part of the healthcare industry, and the Commission has allocated substantial resources to enforcement, advocacy, and policy development in this area. PBMs can help healthcare plans manage the cost and quality of the prescription drug benefits they provide to their enrollees, but many have criticized PBMs for a lack of transparency in their operations, for improper use and inadequate protection of consumer information, and for utilizing their position in the market to undermine competition.

Last year, the Commission took action against CVS/Caremark, a leading PBM, in order to protect the personal information of consumers.⁵⁰ As CVS/Caremark has acknowledged, the Commission is currently investigating whether certain CVS/Caremark business practices may violate the FTC Act. This investigation is ongoing and has been structured as a joint effort of the Bureau of Consumer Protection and the Bureau of Competition so that the investigation can efficiently and effectively address both antitrust and consumer protection issues.

Energy

The petroleum industry plays a crucial role in our economy, and few issues are more important to consumers and businesses than the prices they pay for gasoline and energy to heat and light their homes and businesses. Accordingly, the Commission carefully monitors energy markets and devotes significant resources to maintain and protect competition across a wide range of industry activities. This work is undertaken by a large number of expert economists and attorneys who specialize in the energy sector.

Merger reviews are an essential part of this effort. In 2009, the Commission reviewed proposed acquisitions involving energy products under the Hart-Scott-Rodino ("HSR") Act and also monitored the industry for transactions that were not filed

⁴⁵ Pay-for-Delay: How Drug Company Pay-Offs Cost Consumers Billions, *supra* note 40.

⁴⁶ *FTC v. Ovation Pharm., Inc.*, No. 08-cv-06379 (D. Minn. complaint filed Dec. 16, 2008).

⁴⁷ *Watson Pharm., Inc.*, FTC File No. 091 0116 (final order Jan. 7, 2010); *Schering Plough Corp.*, FTC File No. 091-0075 (proposed order accepted for public comment Oct. 29, 2009); *Pfizer Inc.*, FTC File No. 091-0053 (final order Jan. 25, 2010).

⁴⁸ *FTC v. CSL Ltd.*, No. 09-cv-1000 (D.D.C. complaint filed May 28, 2009).

⁴⁹ *Thoratec Corp.*, FTC File No. 091-0064 (administrative complaint dismissed Aug. 11, 2009).

⁵⁰ *CVS Caremark Corp.*, FTC File No. 072-3119 (final order Jun. 18, 2009). Respondent independently agreed to pay \$2.25 million to resolve Department of Health and Human Services allegations that it violated HIPAA, the Health Insurance Portability and Accountability Act of 1996.

under HSR. In particular, the Commission investigated acquisitions involving refined petroleum products pipelines and terminals, liquefied petroleum gas (propane), lubricant oils, natural gas, and natural gas liquids storage and transportation.

In addition, the Commission continues the “Gas Price Monitoring Project” that began in 2002. The monitoring project is a daily, in-depth review of retail and wholesale prices of gasoline and diesel fuel in 20 wholesale regions and approximately 360 retail areas across the United States. The project provides information that allows the Commission to investigate potentially anticompetitive conduct in fuel markets and serves as an early-warning system to alert our experts to unusual pricing activity.⁵¹

Last November, the Commission added another tool to its arsenal. Pursuant to authority granted by Congress under the Energy Independence and Security Act of 2007, the Commission issued the Petroleum Market Manipulation Rule, which prohibits fraud or deceit in wholesale petroleum markets.⁵² The agency conducted an extensive rulemaking proceeding to decide whether and how to craft such a rule, holding a public workshop with participants representing industry, government agencies, academics, and consumers; conducting numerous meetings with consumer groups, trade associations, and businesses; and considering over 150 written comments from consumers and businesses. The Commission worked diligently on this issue for 16 months and now has instituted a rule that meets the goal of Congress. Importantly, the rule specifies that statements that intentionally omit material information and are likely to distort petroleum markets are violations of the rule. Commission staff has prepared and made available a compliance guide for businesses, which explains the Rule in depth and provides examples of the type of actions that would violate it.⁵³ These examples include descriptions of potential violations, such as false public announcements of planned pricing or output decisions, false statistical or data reporting, and wash sales intended to disguise the actual liquidity of a market or the price of a particular product. The Market Manipulation Rule has only been in effect for a short time, and the agency plans to aggressively enforce the rule as needed.

In addition to these actions, Commission economists and attorneys utilize their expertise to provide reports on energy matters, including market statistics and trends for use by Congress and other policymakers. For example, the Commission issues semi-annual reports on oil and gas activities and an annual report on ethanol. The Commission also has submitted multiple comments to the Federal Energy Regulatory Commission (FERC) on a broad range of competition-related issues, including, among others, ways to assess the competitive effects of partial acquisition of electric power providers, efforts to encourage consumer price responsiveness, and appropriate metrics to measure the performance of electric regional transmission organizations.⁵⁴

Technology Markets

Technological advances are critically important to growing our economy, creating jobs, and introducing more efficient products and processes into the marketplace, and the Commission focuses significant resources on promoting competition in technology sectors. In December 2009, the Commission charged chip manufacturer Intel Corporation with illegally using its position to stifle competition, strengthen its monopoly, and raise prices to consumers in violation of the FTC Act.⁵⁵ Trial is expected to start in September.

The Commission also monitors business relationships between firms with competing technology products. Section 8 of the Clayton Act prohibits, with certain exceptions, the same person from serving as a director or officer of two competing corporations. After an FTC investigation raised concerns about two individuals serving

⁵¹ See Gasoline and Diesel Price Monitoring, www.ftc.gov/ftc/oilgas/gas_price.htm.

⁵² See FTC Press Release, New FTC Rule Prohibits Petroleum Market Manipulation (Aug. 6, 2009), www.ftc.gov/opa/2009/08/mmr.shtm; 74 Fed. Reg. 40686 (Aug. 12, 2009).

⁵³ Guide to Complying with Petroleum Market Manipulation Regulations, www.ftc.gov/os/2009/11/091113mmrguide.pdf.

⁵⁴ See Comment of the Federal Trade Commission on Control and Affiliation for Purposes of the Commission’s Market-Based Rate Requirements Under Section 205 of the Federal Power Act and the Requirements of Section 203 of the Federal Power Act, FERC Docket No. RM09–16–000 (Mar. 29, 2010); Comment of the Federal Trade Commission on Control and Affiliation for Purposes of the Commission’s Market-Based Rate Requirements Under Section 205 of the Federal Power Act and the Requirements of Section 203 of the Federal Power Act, FERC Docket No. PL09–3–000 (Apr. 28, 2009); Reply Comment of the Federal Trade Commission on Transmission Planning Processes Under Order No. 890, FERC Docket No. AD09–8–000 (Dec. 3, 2009).

⁵⁵ Intel, FTC File No. 061–0247 (administrative complaint Dec. 16, 2009).

on the boards of both Apple and Google, these individuals each stepped down from the boards of one of the companies.

In addition to its enforcement role, the Commission also has been empowered by Congress to provide substantive policy analysis and guidance. During 2009, the FTC completed a series of eight hearings to explore the competitive dynamics of evolving markets for intellectual property, and FTC staff is drafting a report analyzing the competitive implications of information gathered at the hearings.

Consumer Goods and Services

The Commission works to protect competition in markets for consumer goods and services and has taken actions involving a variety of products, including recent cases involving real estate services, funeral and cemetery services, and soft drinks.

A home is one of the most important purchases, and usually the most expensive purchase, that Americans make. The Commission therefore has devoted substantial resources to ensure that home buyers benefit from competition. In November 2009, the Commission ruled that Realcomp II, Ltd., a real estate Multiple Listing Service (MLS) in Michigan, could not impede competition from non-traditional and discount brokers by prohibiting them from listing on popular real estate websites.⁵⁶ Such hurdles can raise the costs that home buyers pay for real estate services. The Commission has been particularly active in this market and has obtained consent orders with several other Multiple Listing Services throughout the United States (Texas, Pennsylvania, New Jersey, Colorado, Wisconsin, and New Hampshire) to protect the competition that discount brokers provide.⁵⁷

The funeral industry is also important to consumers and a focus of the Commission. In the past year, the Commission has taken action in two matters to preserve competition in cemetery and funeral services. When Service Corporation International (SCI) proposed to acquire Palm Mortuary, the third-largest provider of cemetery services in Las Vegas, Nevada, the Commission required SCI to first divest its existing cemetery and funeral home in Las Vegas.⁵⁸ When SCI proposed to acquire Keystone North America, the Commission ordered SCI to divest 22 funeral homes and four cemeteries in 19 areas throughout the country to preserve competition that otherwise would have been lost.⁵⁹

In another consumer sector, the Commission required PepsiCo, Inc. to restrict its access to the confidential business information of rival Dr Pepper Snapple Group, as a condition for proceeding with a proposed \$7.8 billion acquisition of Pepsi's two largest bottlers and distributors. Those bottlers also distribute Dr Pepper and Snapple Group soft drinks, and, without the restrictions, Pepsi would have had opportunities to obtain and use that information to reduce competition and harm consumers.⁶⁰

Industrial and Chemical Sectors

The Commission took action this year in several mergers between chemical companies that threatened to increase costs to manufacturers, state and local governments, and farmers, which might ultimately increase costs to end users. Commission staff successfully litigated a challenge against Polypore International Inc.'s acquisition of Microporous Products, securing an administrative order requiring complete divestiture of the acquired assets in order to restore competition in the manufacture of battery separators, a key component in car batteries, batteries for uninterruptible power supplies, and other flooded lead-acid batteries.⁶¹ The Commission also investigated mergers in other chemical markets and required

⁵⁶ Realcomp II, Ltd., FTC Dkt. No. 9320 (Opinion of the Commission Oct. 30, 2009).

⁵⁷ See West Penn MLS, FTC File No. 081-0167 (final order Feb. 13, 2009); Multiple Listing Serv., Inc., FTC File No. 061-0090 (final order Mar. 13, 2008); MiRealSource, Inc., FTC File No. 061-0266 (final order Mar. 20, 2007); Info. and Real Estate Servs, LLC., FTC File No. 061-0087 (final order Nov. 22, 2006); N. New England Real Estate Network, Inc., FTC File No. 051-0065 (final order Nov. 22, 2006); Williamsburg Area Ass'n of Realtors, Inc., FTC File No. 061-0268 (final order Nov. 22, 2006); Realtors Ass'n of N. Wisconsin, Inc., FTC File No. 061-0267 (final order Nov. 22, 2006); Monmouth County Ass'n of Realtors, FTC File No. 051-0217 (final order Nov. 22, 2006); Austin Bd. of Realtors, FTC File No. 051-0219 (final order Aug. 29, 2006). Indeed, due to pressure from the Commission and DOJ, the National Association of Realtors dropped its optional rule that prohibited affiliated Multiple Listing Services from transmitting prohibiting discount broker listings to public web sites on its web site.

⁵⁸ Serv. Corp. Int'l, FTC File No. 091-0138 (final order Jan. 6, 2010).

⁵⁹ Serv. Corp. Int'l and Keystone N. Am., Inc., FTC File No. 101-0013 (final order Apr. 30, 2010).

⁶⁰ PepsiCo, Inc. FTC File No. 091-0133 (proposed order accepted for public comment Feb. 26, 2010).

⁶¹ Polypore Int'l, Inc., FTC Dkt. No. 9237 (initial decision Mar. 1, 2010).

divestitures for high-performance chemical pigments, bulk de-icing salt sold to state and local governments, and anhydrous ammonia fertilizer used by farmers.⁶²

Promoting Transparency and Process Improvements

The Commission uses its resources to provide better guidance to companies and courts about when mergers are likely to run afoul of the antitrust laws and harm consumers. This provides businesses and their counsel a clearer understanding of the “rules of the road” and helps them to avoid anticompetitive conduct without the need for government intervention. It also helps judges to develop an appropriate framework to interpret and apply the antitrust laws. To this end, senior staff have been working with the Antitrust Division of the Department of Justice to jointly review, revise, and update the agencies’ Horizontal Merger Guidelines, which were released for public comment last month.⁶³ The Guidelines explain, in clear, plain language, how the Federal antitrust agencies evaluate the likely competitive impact of mergers and when the agencies are likely to challenge proposed mergers. The Guidelines were last updated in 1992, and since then advances in economic understanding and additional enforcement experience have gradually modified the way that the agencies evaluate and investigate mergers. The new version is intended to more accurately reflect current agency practice.

Policy and Research

The Commission promotes competition through research, reports, and workshops. A recent example is a series of workshops entitled “How Will Journalism Survive the Internet Age?”⁶⁴ The expansion of electronic commerce and media is challenging traditional news organizations, and many might not survive. This sea change may have implications for competition among media outlets and our democratic society. Our workshops have focused attention on this emerging concern, assessed the range of economic and policy issues raised by the changes in the market, and explored how competition can be used to enhance consumer welfare.

The workshops began in December 2009, and the opening session featured contributions from a diverse group of well-informed participants. Owners of news organizations, journalists, bloggers, technologists, members of Congress, economists, and other academics discussed the changing dynamics of the news business and considered what new journalism business models might evolve in the future. The workshops continued in March 2010, when experts in a variety of fields discussed certain proposals to reduce the costs of and increase the profitability of journalism. Next month, the Commission will hold a final public workshop to compare, contrast, and seek consensus about the policy options that have been proposed over the last 6 months. After evaluating the various issues raised, the Commission plans to issue a report in the fall.

The Commission also has issued reports studying the pharmaceutical industry. Last summer, the Commission released a report entitled “Follow-on Biologic Drug Competition,” which concluded that providing the U.S. Food and Drug Administration (FDA) with the authority to approve follow-on biologics would be an efficient way to bring lower-priced drugs to market.⁶⁵ Biologics—products manufactured using living tissues and microorganisms—are increasingly used to treat arthritis, cancer, diabetes, and other diseases.⁶⁶ The Commission also released a report analyzing the competitive impact of authorized generics, which are drugs approved by the FDA as brand-name drugs but that the brand subsequently chooses to market (or have marketed) as generic.⁶⁷

International Competition Activities

The Commission actively develops strong working relationships with foreign antitrust agencies, helping to ensure that markets around the world, in which U.S. com-

⁶² K+S Aktiengesellschaft, FTC File No. 091–0086 (final order Nov. 9, 2009).

⁶³ Horizontal Merger Guidelines For Public Comment (Apr. 20, 2010), www.ftc.gov/opa/2010/04/hmg.shtm. The proposed revisions are the result of a very open and public process, including public comments and input received during a series of five joint FTC/DOJ public workshops held over the past 6 months. The five workshops were open to the public and attended by attorneys, academics, economists, consumer groups, and businesses.

⁶⁴ Workshop information is available at www.ftc.gov/opp/workshops/news/index.shtml.

⁶⁵ Emerging Health Care Issues: Follow-on Biologic Drug Competition (June 2009), www.ftc.gov/os/2009/06/P083901biologicsreport.pdf.

⁶⁶ A follow-on biologic (FOB) is a drug that can be prescribed to treat the same condition as the branded product. To obtain FDA marketing approval the FOB applicant does not have to duplicate the safety and efficacy findings of the branded product; rather, it must show that it is biosimilar to the branded product.

⁶⁷ Authorized Generics: An Interim Report (June 2009), www.ftc.gov/os/2009/06/P062105authorizedgenericsreport.pdf.

panies compete, are fair and transparent. Now that over 100 jurisdictions have competition laws, it is more critical than ever that the Commission continue to promote sound antitrust policies and practices abroad. The agency uses a wide range of tools to accomplish these goals. The FTC promotes coordination and cooperation with foreign antitrust agencies to obtain necessary information and assistance for our investigations and to avoid divergent outcomes on cases that are reviewed in multiple jurisdictions. Over the past year, the FTC worked on almost 40 international antitrust investigations, including significant mergers such as Pfizer/Wyeth—a case in which agency staff worked with staff in the Australian, Canadian and EU competition agencies.

The FTC continues to build a strong network of cooperative relationships with our counterparts abroad, ranging from the EU and Canada to China and India. For example, the FTC recently signed a Memorandum of Understanding with the Russian Federal Antimonopoly Service. In addition, with congressional support, the Commission expanded its longstanding technical assistance program to help competition agencies in new market-based economies. More broadly, the Commission is a recognized leader in key multilateral competition fora, such as the International Competition Network (ICN), the competition committee of the Organisation for Economic Co-operation and Development, the experts committee of the United Nations conference on Trade, and the Development and Asia-Pacific Economic Cooperation.

NEEDED RESOURCES FOR FISCAL YEAR 2011

The FTC has a small staff to accomplish its consumer protection and competition goals. Today, the Commission's fiscal year 2010 budget supports 1,167 full-time equivalents (FTEs). This is considerably fewer than it had at its peak in 1979, when the Commission had approximately 1,800 FTEs.⁶⁸ While the U.S. population has increased by 35 percent since then, and the gross domestic product (adjusted for inflation) has more than doubled, the size of the agency staff has not kept pace. The FTC has done and will continue to do more with less, but it needs further resources to tackle the critical problems described above. The FTC appreciates the strong support it has received from Congress and the Appropriations Committees over the last decade. With additional funding, we look forward to doing even more to address the needs of American consumers and promote vigorous, competitive markets in the future.

The fiscal year 2010 enacted appropriation provides the FTC with \$291,700,000, which supports 1,167 FTE. The fiscal year 2010 appropriation enables the FTC to protect more consumers in areas including financial services, healthcare, and high-tech marketing, and to challenge anticompetitive mergers and business practices in the technology, healthcare, pharmaceutical, and energy industries. To meet these challenges going forward, the FTC requests \$314,000,000 which will support 1,207 FTE in fiscal year 2011. This request represents an increase of \$22,300,000 over the fiscal year 2010 enacted level and includes:

- \$11,962,000 in mandatory cost increases associated with contract expenses (CPI adjustment) and personnel (salaries and within-grade increases);
- \$6,164,000 for 40 additional FTE:
 - 23 FTE to staff high-priority consumer protection matters in such areas as financial practices, fraud targeting vulnerable Americans, privacy and data security, health fraud advertising, mobile marketing and new media, data analysis, forensic accounting services, and domestic and international outreach; and otherwise provide support for the effective operation of the consumer protection goal.
 - 17 FTE to meet the needs of increasingly resource-intensive merger investigations and litigation and to challenge anticompetitive business practices in the healthcare, pharmaceutical, energy, and technology sectors among others; promote convergence in competition policy of foreign enforcement practices; and otherwise provide support for the effective operation of the competition goal.
- \$4,174,000 to cover the costs of acquiring and outfitting a new building to replace the 601 New Jersey Avenue building upon the expiration of the lease in 2012, as well as interim space to house anticipated increased staff, which will occur over the next several years.

Offsetting collections will fund a substantial portion of the FTC's fiscal year 2011 budget request. HSR filing fees and Do Not Call fees will provide the agency with an estimated \$129,000,000 in fiscal year 2011. The General Fund in the U.S. Treas-

⁶⁸ Commissioner Kovacic believes the Commission will need additional resources but he disagrees with certain aspects of the analysis in Section IV of this testimony.

ury would make a direct appropriation of \$185,000,000 to fund the agency's operations.

CONCLUSION

The FTC very much appreciates the strong support it has received from Congress. We hope to continue to earn that support by vigorously and aggressively fulfilling our mission to protect American consumers and promote a competitive marketplace.

BEHAVIORAL MARKETING

Senator DURBIN. Well, Chairman Leibowitz—we can tell you're a former Senate staffer; you actually pay attention to the red light.

So, let me start with this "behavioral marketing," because it appears that what is happening is that many people are doing things, joining things, logging on to things, and, in the process, they are giving away their identities and their activities for people to use in a commercial way—or for other purposes, really.

But, tell me how far along this is, what you're doing about it, and how we keep ahead of the game.

Mr. LEIBOWITZ. Well, it's a great question.

With behavioral marketing, there are benefits and there are concerns. So, on the benefit side, consumers prefer to have targeted advertising rather than advertisements that they're not interested in. And the advertising supports the free content that we've all come to like and to expect.

On the other hand—imagine you were walking around a shopping mall and there was someone behind you. He's following you around, and he's taking notes on where you're going, and sending it off to where you're going later, saying "He has a platinum card. He's interested in a particular color shorts." It would be a little disturbing to you. And if the person being followed was a child, if it was my daughter, I'd want to punch that person out.

And, at some level—I don't mean to make light of this—but, at some level, that's exactly what's going on; information is being obtained by companies, and consumers don't know exactly where it's going. Sometimes those companies will change their policies in midstream, and they won't tell consumers about it.

So, we have sort of a two-track approach here—three tracks, actually. One is, we bring enforcement actions. And so, we brought a major enforcement action last year against Sears for illegal data mining. We believe they didn't give consumers adequate notice that they were getting a lot of sensitive information—bank account records, drug information, prescription information, things like that.

Another is, we try to think these issues through, and try to figure out where the marketplace is going, and try to understand it better. So, we did a series of workshops in the last few months under David Vladeck, our head of the Bureau of Consumer Protection, who's sitting right behind me, to look at privacy and to look at behavioral marketing. And we had stakeholders in from industry, from consumer groups, from academia. We held the workshops across the country—two in Washington and one on the west coast. And that's helping us think through these—

Senator DURBIN. Can I ask—

Mr. LEIBOWITZ. Yes, sir.

Senator DURBIN. Like just—let me give you a couple hypotheticals, and you—

Mr. LEIBOWITZ. Sure.

Senator DURBIN [continuing]. Tell me if there is a legitimate concern there.

Assuming that I use my credit card, and it's one of the two giant credit cards, for my purchases, is that information available to others, in terms of where I shop, what I buy, how often I pay?

Mr. LEIBOWITZ. Well, it depends on the terms and conditions of your credit card company. Now, my guess—

Senator DURBIN. Which we all pore over the details of—

Mr. LEIBOWITZ. Well, I mean—

Senator DURBIN [continuing]. Every single—

Mr. LEIBOWITZ. Look—

Senator DURBIN [continuing]. Month.

Mr. LEIBOWITZ [continuing]. We held a workshop a couple years ago on this issue, and it turned out, according to a submission, that people with Ph.D.s, when asked if they understood the privacy policies, only about 35 percent of the Ph.D.s and Ph.D. candidates knew that. And, of course—

Senator DURBIN. They have a tendency—

Mr. LEIBOWITZ [continuing]. Not everybody has a Ph.D.

Senator DURBIN. They have a tendency to exaggerate, anyway.

Mr. LEIBOWITZ. That's exactly right.

And if you think about how many times you read through the privacy policy, or we do. I mean, you're clicking and clicking and clicking.

So, most companies, to protect their brands, and because they think it's the right thing to do, won't trade this information or sell it—but, it is conceivable that some companies do, and that is very, very troubling. And if a company says, "We're not going to do anything with your information," and then it does, we think that's an unfair and deceptive act or practice.

Senator DURBIN. So, is this an opt-in or an opt-out, or none of the above, or both?

Mr. LEIBOWITZ. Well, there is a roiling debate about opt-in versus opt-out. It depends. We believe—or, speaking for myself—sometimes it's better to use opt-in, particularly when you're dealing with more sensitive information, so that the default is, you're not giving anyone your personal information.

But, you can have a good opt-out policy, as well, in which consumers understand what information they're giving. And a lot of consumers, particularly if the information is kept on the Web site you're looking at, and is limited, I think most consumers would be fine with that. But, it's very complicated.

Senator DURBIN. So, there's no uniformity—

Mr. LEIBOWITZ. There's no—

Senator DURBIN [continuing]. No standard.

Mr. LEIBOWITZ [continuing]. Uniformity. There is no uniformity.

Senator DURBIN. And I don't know—aside from my credit card, I don't know, if I buy something online, whether that information is going to be sold.

Mr. LEIBOWITZ. Right. I mean—I think the better companies will not sell that information. They don't want to do that. They want

to have a trust relationship with their customers—the people who buy from them. But you don't know. And so, we brought some cases in this area.

And of course the other issue, which we haven't talked about, is data security. And most companies will have reasonably good data security. But, we've seen so many breaches over the last few years. And we've brought major cases against TJ Maxx and Dave & Buster's for inadvertently allowing information to be released to the public or to malefactors, who just because they had inadequate security, bad guys go around and they try to mine the data. So, it's a very difficult area. We're going to try to write something up, particularly on social networking, in the fall, to give guidance to businesses. And, hopefully, most businesses will try to keep their information at a high standard. We go after the ones that don't.

FEDERAL TRADE COMMISSION BUILDING

Senator DURBIN. For the last minute of my first round, I will let you answer another question. A certain Congressman came to see me and said that it would be a great idea if you moved out of your building. He'd like to use it for the National Gallery. It's been a passion of his for a long time. So, are you ready to move?

Mr. LEIBOWITZ. We are not ready to move. And I think we left on your desk a copy of the photograph of Franklin Delano Roosevelt dedicating our building, the Federal Trade Commission building in 1937, in which he proclaimed it the permanent home of the FTC—for the FTC for all time.

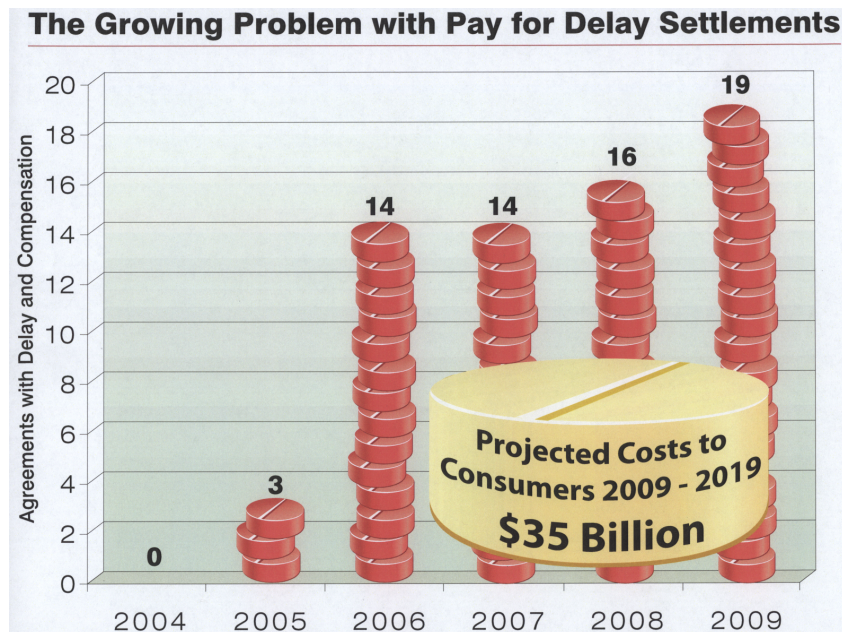


“May this permanent home of the Federal Trade Commission stand for all time as a symbol of the purpose of the Government to insist on a greater application of the Golden Rule to the conduct of corporations and business enterprises in their relationship to the body politic.”

Franklin D. Roosevelt
 Address at the Cornerstone Laying Ceremonies for the
 New Federal Trade Commission Building
 July 12, 1937

No. You know, this has been our home for more than 70 years. The General Services Administration (GSA) has called it “appropriate.” We can get you that information. And I’ve seen that Congressman’s proposal, and it is baffling where he is going to find the money for it. Because, you know, if you move us out of the FTC building, we have to go somewhere else. You can’t just put us on the street. And it costs a lot to buy a new building. It’s not clear whether the National Gallery would pay into the District fund or the Federal fund.

And so, we are as one, as a Commission, in opposing that.
 Senator DURBIN. Senator Collins.
 Senator COLLINS. Thank you, Mr. Chairman.



PAY-FOR-DELAY SETTLEMENTS

First, I want to commend the FTC for pursuing the pay-for-delay settlements. I think that's a huge issue. At a time when healthcare costs are spiraling out of sight, and the cost of prescription drugs is a major part of that, the idea that consumers are paying \$35 billion more, over the last—or over the next 10 years because of these settlements, is truly outrageous.

Your chart doesn't surprise me, however, because, I believe it was in 2002, we passed legislation that I was a cosponsor of—

Mr. LEIBOWITZ. You were.

Senator COLLINS [continuing]. With Senator McCain, Senator Schumer, and Senator—then-Senator Edwards—and, probably, my friend Senator Durbin was a cosponsor, as well—that was an attempt to end this practice.

Mr. LEIBOWITZ. Well, you did. And what we had asked for then—I wasn't at the Commission, it was in the Medicare Modernization Act—was just to get notice of these agreements. Because everyone believed at that time that the deals were per se illegal; absolutely illegal. And if we had notice of these deals in the same way we have notice of mergers, we would be able to go after the anti-competitive arrangements.

Because, of course, if a brand and a generic want to settle their dispute, we have no problem with settlements. We just have a problem with settlements where the brand pays the generic to sit it out.

Senator COLLINS. Exactly.

Mr. LEIBOWITZ. And so you gave us that authority. We review all of these deals. But, what happened after that, in 2005, was that

two courts ruled that these deals were generally permitted; they articulated very permissive rules. And after that, it became the new way of doing business, not for every pharmaceutical company, but for all too many.

Senator COLLINS. Well—

Mr. LEIBOWITZ. So, we see this as really just an extension to make it clear what the antitrust laws mean and what Hatch-Waxman was designed to mean, which is early entry of generic drugs. As you know, generic drugs cost about 15 percent, on average, of brands.

Senator COLLINS. Well, that's something that I'm sure we're going to continue to work on. Both of us are cosponsors of your former boss's bill.

I wonder where he got the idea for that bill. I just can't imagine.

GOOGLE COLLECTION OF DATA VIA WI-FI

Mr. Chairman, I want to turn next to an issue I mentioned in my opening statement, and that is: last Friday, Google issued a statement that it had engaged in the unauthorized collection of user data from Wi-Fi networks in connection with Google's street view mapping activities. And this was an admission by Google that it had accumulated an enormous amount of data; I believe it's some 600 gigabytes of data that was accumulated as its street view cars canvassed residential neighborhoods.

Is the FTC investigating this matter?

Mr. LEIBOWITZ. Well, we don't acknowledge investigations, unless the companies do, until those investigations are completed. But, I can certainly tell you, we're going to take a very, very close look at this.

And, in fact, Google has already come in to talk to our staff about precisely what happened.

Because, obviously, this is just one example of why consumers have very serious privacy concerns about data that's being collected. So, we are going to take a look at it, absolutely.

Because, who would have guessed, as those cars were going by, taking photographs for Google Maps, that, in fact, they were collecting all this personal data. That's just really troubling.

Senator COLLINS. It has this Big Brother connotation to it that is very disturbing.

Mr. LEIBOWITZ. It does. We've already received some letters from Members of Congress. And we will absolutely take a very close look at exactly what's going on.

Thank you.

HOSPITAL MERGERS

Senator COLLINS. I want to bring up a more local issue that has occurred in Maine and—in my State—and it involves hospitals attempting to do mergers. I—without naming the hospitals, I'm just going to read you the first sentence of this newspaper story. And it says that, "A small hospital and a larger hospital said that they expected their proposed merger to sail through the Federal Trade Commission. With one hospital having only 53 licensed acute-care beds, it is much smaller than other hospitals that had merged with the larger hospital, and well below the FTC guidelines that abbre-

viate reviews for small facilities. Other Maine hospital mergers have quickly gained Federal clearance, but not this time.” And it goes on.

I am not taking a position on whether or not this merger should be approved, but I am troubled about what happened in this case. Because, what happened is, the FTC sent what was perceived, at least, as being such a burdensome request for data that the two hospitals interpreted that as a signal that they should not go forward. The hospitals reported providing an additional 2,000 pages of documents required by the FTC. And furthermore, the cost of complying with the request from the FTC, they felt, would be so prohibitively expensive that they abandoned the plans.

Mr. LEIBOWITZ. Well, it’s a fair concern, generally. And with respect to this matter, I’ve talked to the head of the Maine Hospital Association. And I think there was maybe a little bit of miscommunication, because what we do when we go to second request is we try to find out more about a deal.

So, there is a safe harbor for acquisitions of small hospitals, but it’s a presumption. And you want to make sure that it’s within the safe harbor. We had a case in Texas where a hospital thought it was in the safe harbor. It turned out not to be. We actually let that deal go through anyway.

And you want to make sure that it won’t raise prices for payers and ultimately for consumers. And so, if they decide to restart this transaction, we will make sure, as we almost invariably do, that what we call a “second request” is not unduly burdensome. And our staff is going to reach out to that hospital group directly, to let them know about that.

Senator COLLINS. Thank you. That’s—

Mr. LEIBOWITZ. And we’re going to send back a letter to the Hospital Association. We’ll make sure that the subcommittee has it.

Senator COLLINS. That would be very helpful. Thank you.

Mr. LEIBOWITZ. Sure.

[The information follows:]

FEDERAL TRADE COMMISSION,
Washington, D.C., June 22, 2010.

STEVEN MICHAUD,
President, Maine Hospital Association,
33 Fuller Road, Augusta, Maine 04330.

DEAR MR. MICHAUD: Thank you for your letter to the Federal Trade Commission regarding the joint FTC/Department of Justice Statements of Antitrust Enforcement Policy in Health Care (“Statements”)¹ as they may relate to the Commission investigation of the proposed acquisition of Goodall Hospital by MaineHealth.²

In your letter, you raise three questions:

(1) “Why did the FTC staff decline to give clearance to the MaineHealth-Goodall Hospital transaction, given that Goodall Hospital qualified as a small hospital under the ‘safety zone’ guidelines?”

¹The Statements are available on the public Commission Website at <http://www.ftc.gov/bc/healthcare/industryguide/policy/index.htm>.

²I am able to confirm publicly the Commission’s investigation of the acquisition because at least one of the parties to the transaction “has publicly disclosed the existence of [the] transaction or proposed transaction in a press release or in a public filing with a government body.” *Federal Trade Commission Notice of Policy of Disclosing Investigations of Announced Mergers: Notice of Revised Policy*, 62 Fed. Reg. 18630 (Apr. 16, 1997); see also *Federal Trade Commission Policy Concerning Disclosures of Nonmerger Competition and Consumer Protection Investigations: Notice of Revised Policy*, 63 Fed. Reg. 63477 (Nov. 13, 1998).

(2) “What was so extraordinary about the circumstances of the MaineHealth-Goodall Hospital transaction to warrant a departure from the ‘safety zone’ guidelines?”

(3) “Will the FTC follow its guidelines for small hospital mergers going forward, or is the FTC abandoning its guidelines in practice without having yet formally announced that it has done so?”

With respect to your first two questions, I should note that a number of statutory prohibitions and the Rules of the Commission prevent me from disclosing the details of any nonpublic Commission investigation. As a general matter, of course, Congress has empowered the Commission to prevent mergers and acquisitions that may substantially lessen competition or tend to create a monopoly, in violation of Section 7 of the Clayton Act³ or Section 5 of the Federal Trade Commission Act.⁴ In carrying out these law enforcement responsibilities, the Commission and its staff seek to identify and challenge only those mergers or acquisitions which the Commission has a reason to believe violate the foregoing statutes.

In response to your third question, the Statements remain an accurate and current reflection of Commission policy. Of course, any determination as to whether a particular transaction falls within the “safety zone” set forth in the Statements is necessarily a fact-intensive inquiry that requires investigation by Commission staff. In addition to the Statements, both the Commission and the Department of Justice Antitrust Division in certain instances provide more specific guidance on particular proposals through the Commission’s advisory opinion procedure and the Department of Justice’s business review procedure. Information about the Commission’s advisory opinion procedure regarding healthcare proposals is posted on the Bureau of Competition part of the Commission Website at the following location: <http://www.ftc.gov/bc/healthcare/industryguide/adv-opinionguidance.pdf>.

I understand that you discussed this subject in a June 2, 2010 telephone conversation with Matthew Reilly, the Assistant Director within our Bureau of Competition whose office is involved with antitrust hospital merger reviews. Mr. Reilly would be happy to provide any additional information on this subject within the above-mentioned statutory and regulatory parameters. Mr. Reilly’s direct dial telephone number is (202) 326–2350. We appreciate your interest in this subject, and thank you again for your letter.

DONALD S. CLARK,
Secretary of the Commission.

UNSUBSTANTIATED HEALTH CLAIMS

Senator DURBIN. I’m trying to figure out what you don’t look at. And I assume that there are some areas where you clearly are—

Mr. LEIBOWITZ. Yes.

Senator DURBIN [continuing]. Precluded, under the law. But, one area that you have been involved in are false and misleading health claims.

Mr. LEIBOWITZ. Yes.

Senator DURBIN. And I know Kellogg’s was charged with going too far in claiming their Frosted Mini-Wheats made kids smarter, more attentive. I like Frosted Mini-Wheats, don’t get me wrong, but it hasn’t helped my I.Q.

Under another case, the FTC charged the company Roex and two individuals with making false or unsubstantiated claims for advertising products ranging from an infrared sauna for treating cancer to nutritional supplements to reduce the risk of a variety of medical conditions, like HIV and Alzheimer’s.

What resources do you have, when it comes in areas of health claims? How much do you work with other Federal agencies, like the Food and Drug Administration (FDA)?

Mr. LEIBOWITZ. So, our biggest resource is our staff, because they’re terrific in this area, whether it’s phony dietary supplements

³ 15 U.S.C. § 18.

⁴ 15 U.S.C. § 45.

or other sorts of phony healthcare products. And the other thing we do—and we’re very—I think we’re very good at it—is, we reach out to other agencies. So, we work with the FDA quite a bit. We work with the Department of Health and Human Services (HHS). And because—you know, you need to aggregate your resources, here. And we work with State attorneys general, too, because I don’t want to say we’re doing triage, because that’s not the case. But there are many more malefactors out there than we have resources to go after. And so, we try to prioritize the most important cases. And in the House financial reform bill, they gave us easier rule-making authority. And if we get some relief from our very burdensome Magnuson-Moss Act—it’s a sort of medieval form of rule-making, where rules take 8 to 10 years—unless Congress directs us to do standard notice and comment rulemaking, which you’ve done in some instances—then I think we can try to set standards and make things more efficient, and try to be even more useful in this area.

FREE CREDIT REPORTS

Senator DURBIN. So, since the FTC has worked to make certain we have access to free credit reports—

Mr. LEIBOWITZ. Yes?

Senator DURBIN [continuing]. When we see ads on television that a company is paying for to advertise free credit reports, does that put us on guard?

Mr. LEIBOWITZ. Well, you know, this has been a very complicated area from the beginning. We litigated a case against free credit reports. But, we were very supportive, and obviously drafted a rule that we recently released to require that free credit reports be given to consumers. Because, after all, if it says “free credit report,” you ought to be able to get it. Not every consumer knows that you should go to AnnualCreditReport.com.

Senator DURBIN. AnnualCreditReport.com?

Mr. LEIBOWITZ. Yes. AnnualCreditReport.com—or if you happen to go to FreeCreditReport.gov, we have that Web site, or that domain name, and we’ll send you right to AnnualCreditReport.com—free—

But, we’re going to stay on top of this area. We’re looking to see whether companies are following the new rule that we did pursuant to the Credit CARD Act. And if they’re not, we’ll go after them.

IDENTITY THEFT

Senator DURBIN. I’ve had personal experience with identity theft.

Mr. LEIBOWITZ. I know you have.

Senator DURBIN. And it’s an eye-opener, when you get that call. And it seems to me that there’s quite a strong likelihood that most identity thefts go unreported, that people don’t follow through. Do you have any statistics to indicate how many people realize it and do something about it, as opposed to those who—

Mr. LEIBOWITZ. Let me get back to you.

[The information follows:]

The Commission’s most recent identity theft survey reported that 43 percent of victims said that they contacted or were contacted by a company where an account was opened in their name or where an existing account was misused; 26 percent

of victims said that they had contacted the police; 21 percent of victims reported contacting one or more credit reporting agencies; and 4 percent of victims reported contacting the FTC. The survey also reported that 38 percent of victims said they did not contact anyone. This data, which is based on the responses of the 559 individuals surveyed who indicated that their personal information had been misused between 2001 and the date they were interviewed, includes both new account identity theft as well as existing account identity theft. See Federal Trade Commission, *2006 Identity Theft Survey Report: Prepared for the Commission by Synovate*, at 44–45 (November 2007), available at <http://www.ftc.gov/os/2007/11/SynovateFinalReportIDTheft2006.pdf>.

Mr. LEIBOWITZ. My instincts are the same as yours. We periodically do reports about how many people, annually, are victims of identity theft. The number is around 9.5 million victims a year—or instances of identity theft a year in America.

And, you know, if it's identity theft with a credit card, a lot of times consumers won't go to the police or they won't go to law enforcement authorities. They'll call the credit card company, of course. We're fortunate to have this identity theft hotline, and people use it. And that is a good thing.

And then, we also try to do things like bring data security cases, so companies have better data protection, making it harder—

Senator DURBIN. What are the most common sources of a person's identity if they're going to have it pilfered and exploited?

Mr. LEIBOWITZ. Yeah.

Senator DURBIN. What are the most common?

Mr. LEIBOWITZ. What are the most common sources? Probably credit cards more than anything else, or data breaches by companies, which often involve credit card information. Sometimes companies use Social Security numbers. You can buy them online. It's often done by people outside of the country that have a marketplace going, and they sell data for \$1 or \$5—credit card information, Social Security numbers. It's just extraordinary.

We try to do a lot to leverage our resources with our sister law enforcement agencies around the world. But, as you know, it is very hard to have extraterritorial reach, and it is very hard to tamp down on all instances of identity theft. But, we're working very, very hard. And when we see criminal cases, we of course give those to the criminal authorities, because identity theft is really a kind of fraud or—

GASOLINE PRICES AND THE OIL INDUSTRY

Senator DURBIN. I have a—

Mr. LEIBOWITZ [continuing]. Crime.

Senator DURBIN [continuing]. Standard press release that I put out at least once a year complaining that gasoline prices have just gone up way too high, not reflected in the price of a barrel of oil, and clearly these oil companies, once again, are taking advantage of consumers, and I'm calling on the FTC to investigate it right now. I issue that at least once or twice a year.

Mr. LEIBOWITZ. We try to be responsive.

Senator DURBIN. I know you do. But, we basically don't come up with much. At the end of a long investigation, people throw up their hands and say, "I guess we can't prove it, one way or the other." Is that about where it stands?

Mr. LEIBOWITZ. Well, you know, if you want to find an antitrust conspiracy you have to have people talking to each other. And we have done investigations. We continue to do investigations of the oil industry. A lot of the cost of a barrel of oil, as you know, is due to OPEC. Now, OPEC engages in output restrictions. If American companies did that, they would go to jail for an illegal, criminal antitrust cartel. And so, that's a part of it.

But, as for whether the American petroleum companies are engaged in anticompetitive behavior, violating antitrust laws, it is really hard to prove a criminal conspiracy or any kind of conspiracy. But, we will try to stay on top of this.

And we did pass our market manipulation rulemaking, which will give us a little more flexibility going forward.

Senator DURBIN. Senator Collins.

Senator COLLINS. Mr. Chairman, I'm glad that you brought up that last issue. I can't tell you how often my constituents say to me, "But, wait. Supply is ample. Why are prices going up?" And it's not the seasonal change that you see when different kinds of gasoline are refined. It seems to them, and I will say it seems to me, to be disconnected with supply or demand.

Mr. LEIBOWITZ. Well this is an issue that resonates with consumers. No one would be happier than me to be able to bring a case against the oil industry for a violation of the antitrust laws. And our staff would be very happy to. And we do, again, have some investigations in the pipeline. But, it is very hard to prove.

When my older daughter was 8 years old, or 9 years old, we were stopped at—on River Road, in Bethesda, and there were, like, four gas stations right around us, and she said, "Why do they all have the same price?"

And so, I think it is very baffling to many people. The truth is, if there's no meeting of the minds, there's no antitrust violation, even though the effect is the same on consumers.

Senator COLLINS. Yeah. It is a source of frustration, though, I think also—and this is an issue I've raised with the Commodity Futures Trading Commission (CFTC), which also comes before us—I also think that the way the futures markets are working, where we now have investment funds and pension funds chasing the product, when those markets were originally designed for producers and end users and not as an investment hedge, also has something to do with the fluctuations.

Mr. LEIBOWITZ. It may very well. And, you know, we periodically track prices. And so, we have done, in the last 2 or 3 years, investigations into anomalous prices in the Pacific Northwest, into western New England, and into the price of jet fuel, as you know. And it is sometimes hard to find the reasons why prices go up.

CONSUMER EDUCATION

Senator COLLINS. Speaking of the cost of heating oil—home heating oil or gasoline, there was a company in my State that was recently the victim of cybercrime because, unfortunately, the—one of the financial clerks responded to a phony Web site that was mimicking the bank that this company used, and, within moments, the accounts—the banking account of this company was drained, be-

cause she, unfortunately and naively, over the Web site, gave the password and other information.

I mention this because this is a fair-sized company in Maine, and it's not an unsophisticated business; it's a very well-run operation. And yet, it, too, was duped into—to a move that led to a loss of tens of thousands of dollars.

My question to you is, What does the FTC do to try to better publicize scams, whether they're via the Internet or coming through the mail, and educate small businesses and consumers in this area?

Mr. LEIBOWITZ. Well, we have a number of educational materials. I think we put a few of them on your desk. We're very proud of the educational work we do here. And to distribute educational materials, we often either co-brand with companies or community organizations, or we don't brand at all, we simply design them and let others distribute. I think you might have a copy of "Deter. Detect. Defend.," which is an identity theft brochure. So, that's a part of what we do.

And then when we bring cases—because part of this is alerting consumers to be more careful—we try to pair with State attorneys general, because if we do a joint announcement, very often it gets picked up, people read it in the papers, they see it on the television news, and they think a little bit more about it. And then we don't have—going back to Senator Durbin's earlier question, we don't have jurisdiction over banks, but we do try to bring cases involving inadequate data security. And that keeps companies on their toes.

And then, we do workshops and other things where we bring stakeholders together and we try to think through how to respond.

ADMINISTRATIVE PROCEDURES ACT RULEMAKING AND ADDITIONAL AUTHORITIES

Senator COLLINS. And finally, I'd like to pursue the issue that you raised about your rulemaking, because I was surprised that you don't use the Administrative Procedures Act (APA). Most agencies do. The Securities and Exchange Commission (SEC) does. A lot of the agencies that you deal with use the APA. Could you provide me with some information on, What is the history of why you don't use the APA?

Mr. LEIBOWITZ. Well, under the Magnuson-Moss Act, which was passed in 1974, Congress circumscribed our rulemaking in a way to slow it down. I don't think Congress meant to slow it down quite as much as they have. We haven't begun to make a new rulemaking under Magnuson-Moss since the late 1970s. And the reason why is because it can take 8 or 10 years to do a rule. And if a company or an entity—if it's within the ambit of the proposed rule—feels aggrieved, they can call, essentially, regulatory timeouts and ask for independent referees.

Now, in fairness, Congress has given us APA rulemaking for some specific instances. And we've used it in a very thoughtful way. In our mortgage modification rulemaking, it will take, from the time we put out an advance notice of proposed rulemaking (ANPR) to the time we finish it, about 15 months; a little slower than we wanted, but you want to do it deliberately so you can get it right.

But, it has been a real impediment for the Commission, and one that we're trying to get out from under the restrictions of. Because we think we can be more effective, on behalf of the consumers that we serve, if we had some degree of relief.

And the other proposal that's in the House bill that has garnered a little bit of attention is civil fining authority for violations of section V, or unfair or deceptive act and practices rule, and there, I think, more than 40 State attorneys general, who have baby FTC acts, have fining authority under that. We don't. And we're trying to go after real, hardcore malefactors. Because, essentially, sometimes we're going after people who are engaged in fraud because the criminal authorities don't have the capacity to bring those cases. We would like to have fining authority.

Casper Weinberger, when he was Chairman of the Federal Trade Commission in the early 1970s, called for that. And on this issue—I wouldn't say on this issue alone—but, on this issue, I think the vast majority of the Commission supports the Weinberger approach.

Senator COLLINS. Is this a problem where the cases that you develop may be under the prosecutorial guidelines, as far as dollar amount, that they're too—

Mr. LEIBOWITZ. Yes. Yeah, I mean—

Senator COLLINS [continuing]. Small for them to be brought—

Mr. LEIBOWITZ. Look—

Senator COLLINS [continuing]. At the U.S.—

Mr. LEIBOWITZ [continuing]. Criminal authorities—U.S. attorney's offices—and we do try to pair with U.S. attorney's offices whenever we can. And we have taken some of the worse frauds we've gone after and given to the criminal division, for example, in the Department of Justice. But, they have other priorities. And so, we pick up a lot of the sort of small-time—pick up a lot of the fraud against consumers. And, in the aggregate, it can be a fairly substantial amount. And it would be better if we had fining authority. We believe that we would have a more effective deterrent.

Senator COLLINS. Thank you.

PAYDAY LENDING AND DEBT COLLECTION

Senator DURBIN. Mr. Chairman, one of the things that I was disappointed in during the debate on the floor on financial reform was that I had hoped that we would be able to offer an amendment related to the so-called "title loans," or "payday loans," a type of predatory lending. And for reasons which are hard to explain to the normal population in America, we have not been able to get to that issue. That strikes me as one aspect of credit in America that is highly abusive to people in low-income categories and desperate situations. And I noticed that the number two complaint, second only to identity theft, at your agency relates to debt collection.

So, can you tell me what efforts have been made by the FTC to deal with this industry?

Mr. LEIBOWITZ. Yes. Well, it's a couple of things. With respect to payday lenders, we have brought cases. I think we've brought at least two in the last year. Usually, they don't involve too high a rate. The rates may be very, very high, but States have basically set per-State caps on what they can charge. And what we found,

though, is that sometimes they'll charge additional fees but they won't tell the consumers. And so, we brought a case in that area.

We brought another case involving the use of the data. The case was called, I think, "EDebitPay," and it was an online payday lender. And what they had done was fail to disclose certain things to consumers, and garnish wages, without telling the consumers that they were going to do that.

And then, we brought another case against several payday lenders who weren't giving the required statutory APR data. It's required by statute, under TILA, I think.

And so, we try to stay active in this area. And it is one where I think the complaints that we have gotten tell us that there are problems out there.

And, of course, they prey on the people at the lowest rung of the economic totem pole. Congress has—and I think you might have been involved in this—has capped the rates on payday lending outside of military bases.

Senator DURBIN. Yes, we're protecting military families; but not nonmilitary families, we don't protect all families when it comes to these bottom-feeders.

EMERGING INTERNET SCAMS

You've made reference to the Internet and services being offered. It seems like this adds a new level of challenge and complexity, that now certain things can be offered in the ether, on the Internet. And really the source of them might be hard to find, whether they're actually in the United States, North America, Europe, wherever they may come from. So, how do you cope with that Internet challenge?

Mr. LEIBOWITZ. Well, several years ago, you passed something called the SAFE WEB Act, which allowed us to do confidential investigations with our sister law enforcement agencies from around the world. We have to sign agreements with them, and we've done this with a number of jurisdictions. So, that's been helpful.

But, as you know, con artists all around the world are very, very smart, and they're very nimble. We had a foreclosure rescue scam case where the domain name was registered in Berlin, but the company was actually operating out of Orange County, California. And so sometimes it takes a long time to pierce through the corporate veil and find out who these real malefactors are. Now, we were fortunate enough to work with foreign law enforcement authorities to shut this company down. But it's very hard, although it's a challenge that we accept. That's what we're supposed to do.

Senator DURBIN. Do you have such an agreement with Nigeria?

Mr. LEIBOWITZ. We do not believe we have one with Nigeria. But, I do believe, at this point, American consumers are on top of most Nigerian scams.

Senator DURBIN. Thank you.

Senator COLLINS.

Senator COLLINS. Thank you.

Senator DURBIN. Chairman Leibowitz, thanks for being here.

ADDITIONAL COMMITTEE QUESTIONS

We'll work hard on your appropriation, try to find some more resources. You're doing important work. Thanks.

Mr. LEIBOWITZ. Thank you so much. Thank you.

Senator DURBIN. We may have some written questions.

[The following questions were not asked at the hearing, but were submitted to the Commission for response subsequent to the hearing:]

QUESTIONS SUBMITTED BY SENATOR RICHARD J. DURBIN

Question. The Energy Independence and Security Act of 2007 gave the Federal Trade Commission (FTC) authority to issue regulations prohibiting market manipulation involving wholesale transactions of crude oil, gasoline, and petroleum distillates. The FTC issued the Final Rule in August 2009 and provided guidelines to industry for compliance.

How does the "market manipulation" rule change, expand, or enhance the FTC's jurisdiction and enforcement authorities?

Answer. The market manipulation rule (MMR) is a fraud-based rule. The MMR prohibits persons from knowingly engaging in fraudulent or deceptive conduct connected with wholesale transactions of petroleum products. The MMR also prohibits persons from intentionally omitting material facts in statements whenever the omission can be expected to distort wholesale petroleum markets. Thus, in addition to the FTC's traditional enforcement program focused on anticompetitive conduct, including anticompetitive mergers and unfair business practices that result in a sustained diminution of competition, the MMR enables the Commission to prevent specific instances of fraudulent or deceptive conduct, even when that conduct does not have durable competitive consequences.

Question. How will the FTC monitor compliance with the new rule?

Answer. The Commission has established a dedicated e-mail and telephone MMR "hotline" to receive complaints from anyone who has information about conduct prohibited by the MMR. The Bureau of Competition also has a litigating section of approximately 25 attorneys who specialize in energy matters that will have the primary responsibility for bringing appropriate cases under the MMR. In addition, staff from both the Bureau of Competition and the Bureau of Economics regularly monitors the petroleum industry to discern any anomalous price movements that need further investigation to determine whether they are caused by shifts in market conditions or wrongful behavior.

Question. The FTC published an investigation of the increases in gas prices occurring in 2006, concluding that rising gas prices could be explained entirely by market forces and not illegal anticompetitive behavior. Will the new market manipulation rule change the standard for how the FTC will evaluate and reach conclusions on behavior in the petroleum market?

Answer. As noted above, the MMR targets fraudulent or deceptive practices that might not otherwise be reachable by Section 5 of the FTC Act. However, it does not alter the FTC's standard for evaluating behavior in the petroleum industry under either Section 5 or Section 7 of the Clayton Act. The FTC's long-established enforcement aim is to protect consumers from unfair methods of competition or unfair or deceptive business practices. The issuance of the MMR does not change that mission; rather it provides the Commission with an additional tool to fulfill it.

Question. The FTC shares concurrent jurisdiction with other agencies such as the Commodity Futures Trading Commission, the Securities and Exchange Commission, the Department of Justice, and the Food and Drug Administration.

Please describe the FTC's concurrent jurisdiction with these and other agencies and how such jurisdiction is either complementary or duplicative.

Answer. The FTC has concurrent authority with many agencies to a greater or lesser extent. The concurrence is broadly complementary; for example, the agencies may have generally consistent but different missions or goals (e.g., FTC with FDA, EPA, SEC, CFTC, CPSC), or divide up primary responsibility (e.g., FTC with FDA, FCC), or share enforcement over a very substantial number of entities or acts while arranging to avoid duplication (e.g. FTC with DOJ Antitrust Division), or aid each other with special expertise in certain areas (e.g. FTC with FDA, EPA, FCC), or can apply different remedies to the same or similar conduct, such as civil vs. criminal, injunction and restitution vs. seizing product (e.g., DOJ, U.S. Postal Inspector, EPA,

FDA). Attached is a brief summary of the FTC's primary areas of coordination with various Federal agencies.

Question. To curb fraudulent practices in the mortgage industry, the FTC plans to issue a rule banning upfront fees for mortgage modification or foreclosure rescue assistance. The FTC is also contemplating rules on advertising mortgages.

How would new rules related to mortgage advertising practices strengthen the FTC's authorities in the mortgage arena?

Answer. The Commission currently enforces mortgage advertising requirements under the FTC Act, the Truth in Lending Act (TILA), including the Home Ownership and Equity Protection Act (HOEPA), and Regulation Z rules written by the Federal Reserve Board (Board). The Commission lacks authority to obtain civil penalties for violations of these statutes and rules, with the exception of certain Regulation Z rules promulgated pursuant to HOEPA.

The Commission has not published a proposed or final mortgage advertising rule, so I cannot discuss the specific conduct that a final rule might prohibit or restrict. Generally, however, enacting new rules in this area would enable the Commission to protect prospective borrowers more effectively by establishing clearer standards for mortgage advertisers and giving the Commission more effective tools to stop and deter violations. As you know, the Commission is conducting the mortgage advertising rulemaking using the authority Congress granted to it in the Omnibus Appropriations Act of 2009, as clarified by the Credit Card Accountability Responsibility and Disclosure Act of 2009. Those laws authorize the Commission to enact rules with respect to unfair or deceptive mortgage practices, and to enforce those rules, with the states, through a variety of remedies including civil penalties.

Question. The proposed rule prohibiting upfront fees for mortgage modifications is being implemented around the same time as the rule prohibiting upfront fees for debt settlement. Does the FTC plan to prohibit upfront fees for other financial services, given that these fees have been a key tactic for deceiving consumers?

Answer. The Commission's amendments to the Telemarketing Rule governing debt relief services include a ban on the collection of advance fees. The FTC proposed rule on mortgage assistance relief services also would ban advance fees, but that rule is not yet final. With respect to the Telemarketing Rule's debt relief amendments, the Commission concluded that the collection of advance fees by debt relief providers, which often takes place in the context of transactions involving telemarketing that are permeated with deception, is an abusive practice under the Telemarketing Act. The record in the debt relief proceeding—including the public comments, a study by the Government Accountability Office, information gathered at a public forum, consumer complaints, and the law enforcement experience of the Commission and state enforcers—demonstrated widespread deception and substantial consumer injury in the provision of debt relief services. Consumers in the midst of financial distress suffer monetary harm—often in the hundreds or thousands of dollars—when, following sales pitches frequently characterized by high pressure and deception, they use their scarce funds to pay in advance for promised results that, in most cases, never materialize. In finding this practice abusive, the Commission applied the test for an unfair practice in section 5(n) of the Federal Trade Commission Act. The Commission found that the practice (1) causes or is likely to cause substantial injury to consumers, that (2) is not outweighed by countervailing benefits to consumers or competition, and (3) is not reasonably avoidable. The Commission relied on a similar analysis in prohibiting under the Telemarketing Rule the collection of advance fees for credit repair services, recovery services, and offers for certain loans.

At present, there are no other rulemaking proceedings in which the Commission has proposed or issued an advance fee ban. The determination of whether an advance fee ban is appropriate is very much dependent on the specific circumstances, including the extent to which the transactions at issue take place in the context of widespread deception.

Question. The FTC reports that Identity Theft was the number one consumer complaint during 2009. Consumers are worried that in an increasingly high-tech world, their personal data is being collected improperly and stored insecurely.

What responsibilities do Facebook and other companies have to their users to disclose their websites' privacy policy? What about changes to that policy over time?

Answer. Although there is no generally applicable requirement for social networking companies to disclose their privacy practices, they still must satisfy certain responsibilities with respect to privacy policy disclosures. First, any claims they make must be truthful. The Commission has brought one case against a social networking site—Twitter—for making a misrepresentation about the level of security provided. See *In the Matter of Twitter, Inc.*, FTC File No. 092 3093 (June 24, 2010) (consent order approved for public comment). Second, if websites collect information

from children, they must provide parents with notice and an opportunity to consent. The Commission has brought several cases against companies for violating the Children's Online Privacy Protection Act by not securing the required parental consent before collecting information from children through social networking websites. See *United States v. Xanga.com, Inc.*, No. 06-CIV-6853(SHS) (S.D.N.Y.) (final order Sept. 11, 2006); *United States v. Industrious Kid, Inc.*, No. 08-CV-0639 (N.D. Cal.) (final order Mar. 6, 2008); *United States v. Sony BMG Music Entm't*, No. 08-CV-10730 (S.D.N.Y.) (final order Dec. 15, 2008); *United States v. Iconix Brand Group, Inc.*, No. 09-CV-8864 (S.D.N.Y.) (final order Nov. 5, 2009). Third, if companies change their privacy policies in a way that materially affects data that consumers have already provided, they must provide clear notice and the opportunity for the consumers to provide their affirmative express consent to the change. See *In the Matter of Gateway Learning Corp.*, FTC Docket No. C-4120 (Sept. 10, 2004) (consent order).

Question. If users decide to cancel or restrict their accounts on Facebook, photo storage sites, or other sites where they have stored personal information, what assurances do they have that their personal information is completely removed and deleted from storage?

Answer. Several companies make specific disclosures to consumers about what happens to their data once they leave a site. If the disclosures are false, the FTC can bring an enforcement action under Section 5 of the FTC Act. In addition, if a website does not honor requests from parents to delete information being stored about their children, the FTC can bring an enforcement action under the Children's Online Privacy Protection Act.

We have also examined the issue of data retention as part of a series of roundtables we hosted on consumer privacy over the last several months. A number of roundtable participants and commenters emphasized the value of businesses' retaining data only as long as necessary to fulfill a specific business purpose. The Commission staff will make recommendations on this issue as part of an upcoming report on privacy, to be released later this year.

Question. Net Cetera is a guide published by the FTC to assist parents in talking to their children about the Internet.

How has the FTC distributed the Net Cetera guide?

What feedback has FTC received on the guide?

Answer. The FTC is working with outside groups to promote and distribute the booklet. For groups and individuals who want to share it with their families, friends, and communities, Net Cetera is available at OnGuardOnline.gov and in Spanish at AlertaenLínea.gov. People also can order free copies through the FTC's bulk order site, bulkorder.ftc.gov. Like all the FTC's consumer materials, Net Cetera is free and in the public domain. The FTC encourages groups and individuals to order as many copies as they can use, include sections of it in their newsletters and blogs, and grab the web button from OnGuardOnline.gov for use on their own websites.

Many schools use OnGuardOnline.gov and Net Cetera as part of their online safety programs. Because so much computer and other media use takes place in the home, pairing teachers and parents in these efforts more fully encourages safe and responsible online behavior, and reinforces consistent messaging.

Net Cetera has been available to the public since October 21, 2009. To date, the FTC has distributed more than 3,700,000 copies of the guide in English and more than 350,000 copies in Spanish. Distribution highlights include:

- Schools or school systems in all 50 states and D.C. have ordered copies of Net Cetera. This includes large orders by the Prince George's County (MD) Public Schools (~150,000), the Cobb County School District (~120,000), and the Cleveland Metropolitan School District (~50,000).
- Illinois schools, police departments, and community groups have ordered over 100,000 copies of the guide.
- Members in both Chambers signed and circulated letters about Net Cetera to their Hill colleagues, encouraging them to use the guide in their districts and to link to it from their websites. The FTC sent copies of the booklet to district offices as well, and will continue to work with Congress to spread the word about online safety.
- Companies including Facebook, MySpace, and Sprint are linking to Net Cetera from their safety or resources pages.
- Nonprofits such as the Boys and Girls Clubs of America and the Internet Keep Safe Coalition distributed the guide at events across the country.

As the order numbers illustrate, Net Cetera has been very well received by parents, educators, police officers, and online safety experts. The Online Safety and Technology Working Group highlighted Net Cetera as an "outstanding" project that

should be promoted as an opportunity for public-private partnerships in online risk prevention. Also, the FTC has secured opportunities to speak about Net Cetera at conferences for groups including the International Society for Technology in Education and the National Association of School Resource Officers.

Question. To stop advertisements from deceiving consumers into paying for so-called “free” credit reports, the FTC implemented a rule requiring that these advertisements contain a clear disclosure that the only authorized free credit report is available at AnnualCreditReport.com.

How is the FTC enforcing the new rule requiring that a disclosure is displayed on all commercial “free credit report” websites?

Answer. To determine compliance with the rule, the FTC monitors websites offering free credit reports. The FTC recently sent letters to 18 websites offering free credit reports, warning them that they must clearly disclose that a free report is available under Federal law. This campaign appears to have been effective: several of the websites have changed their practices. The Commission anticipates follow up law enforcement action against those companies that do not come into compliance.

Question. What other measures have been taken to inform consumers of AnnualCreditReport.com, and how effective have those measures been?

Answer. The Commission has made extensive outreach efforts to educate consumers about their right to a free credit report through the authorized source, AnnualCreditReport.com. When the free annual credit report program initially took effect in 2004, the FTC issued press advisories and radio public service announcements informing consumers of their new rights, and published a “how to” guide on ordering the Federally-mandated free reports. The Commission also has issued public warnings about “imposter” sites that pose as the official free report site, AnnualCreditReport.com. In addition, the FTC has created videos that highlight the differences between AnnualCreditReport.com and other sites that claim to provide “free” credit reports. Moreover, each time the FTC announces an enforcement action or new rule in the credit reporting area, it publicizes the AnnualCreditReport.com website. Most recently, it did so when it announced the warning letters described above. We believe these measures have been quite effective. Since 2004, consumers have obtained over 150 million free credit reports from the nationwide CRAs.

Question. Experian, the company that ran “Free Credit Report.com” has now shifted its strategy and set up “Free Credit Score.com.” Is the FTC continuing to monitor these companies to make sure they are complying with the new rule? Is there a plan to create a truly free credit score website similar to AnnualCreditReport.com?

Answer. The FTC generally monitors consumer reporting agencies and other companies for their compliance with the provisions of the FCRA and other applicable rules. The Free Credit Report Rule does not apply to credit scores and consumers do not have a general right to a free credit score under the FCRA. Instead, the FCRA provides consumers a right to purchase a credit score from consumer reporting agencies and to obtain a free credit score in specified circumstances, such as when they apply for certain home loans. In addition, under the Risk-Based Pricing Rules which take effect on January 1, 2011, creditors can provide a free credit score, along with information about that score, to all consumers, instead of providing risk-based pricing notices to specific consumers. Finally, the Consumer Financial Protection Act of 2010 will allow consumers turned down for credit or offered less favorable terms because of their credit report or score to get a free credit score disclosure with their adverse action notice. The FTC oversees compliance with all of these FCRA requirements for entities under its jurisdiction to ensure that consumers are able to obtain their credit scores as required by law.

Question. In April 2010, the FTC launched “Admongo,” an online video game where kids explore a virtual world filled with commercial messages to teach them to think critically about advertisements.

What was the cost of developing Admongo?

How does the FTC plan to evaluate the program’s effectiveness?

Are there ongoing costs associated with operating the online game?

Answer. The Federal Trade Commission has developed an interactive campaign to give kids the skills they need to understand how advertising works and to interpret the information that ads contain. The campaign, targeted to tweens (kids ages 8 to 12), is based on the website Admongo.gov, which teaches core ad literacy concepts and critical thinking skills through game play. Other elements of the campaign include in-school lesson plans, developed in cooperation with Scholastic, Inc., that are tied to state standards of learning for grades 5–6; sample ads that can be used at home and in the classroom; and teacher training videos.

Advertising literacy funding was approved for up to \$2.2 million per year for up to 4 years; the full amount was budgeted in the first year, but two subsequent years have seen funding set at \$2 million. Through June 2010, at the end of the second

year of funding, the cost of creating the website, all related lesson plans and materials, and the promotion of the site was approximately \$4.2 million. The ongoing costs to operate the game will include FTC staff time, web hosting fees, and occasional technical support from experts in web programming, as needed. The amount of money involved should be minimal.

Plans are underway now to evaluate the effectiveness of Admongo. FTC staff are initiating the Paperwork Reduction Act (PRA) approval process to conduct a study of student and teacher use of campaign resources. This will supplement the ongoing feedback we receive from teachers via the mailbox at admongo@ftc.gov and through conferences and meetings.

Question. The FTC anticipates reaching 200 million numbers on the Do Not Call List by this summer.

Has the FTC received complaints about unwanted text messages? Does the FTC need specific authority to create a “Do Not Text” list or can it bar messages under the Do Not Call List?

Answer. Since January 1, 2010, the Commission has received approximately 1,300 consumer complaints that primarily concern text messaging practices, including unsolicited text messages. In addition, approximately 5,600 of the more than 1 million Do Not Call complaints received during this period mention text messaging and may relate to unsolicited text messages. Including both groups, the total number of complaints concerning text messaging practices represents less than 1 percent of all complaints received by the Commission since the start of the year.

The Commission has not taken the position that sending an unsolicited text message violates the Telemarketing Sales Rule, which prohibits initiating an “outbound telephone call” to a person whose telephone number has been entered on the National Do Not Call Registry (DNC Registry). Moreover, it is not clear whether the rulemaking authority provided to the Commission under the Telemarketing and Consumer Fraud and Abuse Prevention Act (Telemarketing Act),¹ which was the basis for the DNC Registry, extends to text messages.²

The question whether a text message may fall within the provisions of the Telemarketing Act is muddled, among other reasons, by the facts that text messages typically lack an audio component, and that their dissemination can take many forms.³ Although some unsolicited text messages are sent from one phone to another, others are sent over the Internet to an e-mail address that has been automatically assigned to the subscriber’s account by his or her mobile carrier.⁴ For these reasons, the FTC’s authority under the Telemarketing Act to address text messages is uncertain.⁵

¹Public Law No. 103–297, 108 Stat. 1545 (1994). The Act defines telemarketing to mean “a plan, program, or campaign which is conducted to induce purchases of goods or services by use of one or more telephones and which involves more than one interstate telephone call.” Telemarketing and Consumer Fraud and Abuse Prevention Act, § 7, Public Law No. 103–297, 108 Stat. 1545 (1994).

²The Commission could seek to promulgate a rule establishing a “Do Not Text” registry under the rulemaking procedures of Section 18 of the Federal Trade Commission Act. Section 18 would be an impractical tool for addressing a Do Not Text registry, however, as it includes numerous burdensome and time-consuming requirements that typically have required from 3 to 10 years to complete. See prepared statement of the Federal Trade Commission on “Consumer Credit and Debt: The Role of the Federal Trade Commission in Protecting the Public” before the House Comm. on Energy and Commerce, Subcomm. on Commerce, Energy, and Consumer Protection at 21–23 (Mar. 24, 2009), available at <http://www.ftc.gov/os/2009/03/P064814consumercreditdebt.pdf>.

³The Commission has previously considered the limitations of its authority under the Telemarketing Act. For example, when creating the Telemarketing Sales Rule (TSR), the Commission considered a definition of “telemarketing” that would have covered campaigns involving fax machines, modems, or “any other telephonic medium.” This was rejected, however, upon the Commission’s conclusion that a narrower definition would “follow[] more closely the statutory definition set forth by Congress in the Telemarketing Act.” 60 Fed. Reg. 30411 (June 8, 1995). Instead, the statutory definition of telemarketing was incorporated almost verbatim into the TSR.

⁴Because an effective “Do Not Text” registry might involve the collection of e-mail addresses, the creation of such a registry would raise a number of the same concerns the Commission highlighted in its report to Congress regarding a National Do Not E-mail Registry. Federal Trade Commission, Report to Congress, National Do Not E-mail Registry (June 2004) (detailing security and privacy concerns, including the likelihood that an e-mail registry would be misused by spammers, thereby increasing rather than reducing the volume of spam emails).

⁵We note that the Federal Communications Commission has asserted that a text message is a “call” within the meaning of the Telephone Consumer Protection Act (TCPA), and thereby concluded that the TCPA prohibits the use of an automated dialer to send commercial text messages to a cellular telephone number without the prior consent of the recipient. See Federal

Some tools already exist that may minimize concerns about unsolicited text messages. Unlike telephone calls, text messages are not covered under common carrier regulations and therefore can be filtered by mobile carriers, which state that they block hundreds of millions of unsolicited messages every month.⁶ Consumers can also work with many carriers to block text messages entirely or just those messages from a particular unwanted source.⁷ In addition, consumers who have received certain types of unsolicited text messages may seek damages through a private right of action under the Telephone Consumer Protection Act.⁸

Moreover, to the extent the sending of unsolicited text messages is an unfair or deceptive practice, Section 5 of the Federal Trade Commission Act provides the agency with a flexible tool for addressing commercial practices that are unfair or deceptive. The Commission has pursued a vigorous law enforcement program against unfair or deceptive unsolicited commercial messages in a variety of contexts⁹ and will continue to bring the same resolve to the issue as more of this activity migrates to the arena of text messaging.

In short, while the DNC Registry has proven to be extremely effective in curbing unwanted telemarketing calls, it is not clear at this point that adopting a similar program for unsolicited text messages would be advisable. However, should the Congress determine that a Do Not Text registry would help consumers, we will be happy to assist you with legislative language.

QUESTIONS SUBMITTED BY SENATOR FRANK R. LAUTENBERG

Question. Manufacturers and retailers of electronic cigarettes (e-cigarettes) claim that they are safe, and even that these products can help smokers quit traditional smoking. However, there have been no clinical studies to prove these products are effective in helping smokers quit, nor have any studies verified the safety of these products or their long-term health effects. The World Health Organization (WHO) has stated that it has no scientific evidence to confirm the products' safety and efficacy.

What is the FTC doing to police health claims made in e-cigarette advertisements?

Answer. Electronic cigarettes are battery-powered devices that usually contain cartridges filled with nicotine and other chemicals. The devices are designed to convert the nicotine and other chemicals into a vapor to be inhaled by the user.

Electronic cigarettes are currently the subject of Federal court litigation, stemming from the Food and Drug Administration's (FDA) detention of certain of these products at ports of entry to the United States. Specifically, upon reviewing a number of electronic cigarettes, FDA determined that they qualified as both a drug and device under the Federal Food, Drug, and Cosmetic Act (FDCA), and that agency approval was therefore needed before the products could be marketed in the United States. Because such approval had not been obtained, FDA determined that their sale would violate the FDCA and denied them entry into the country.

In April 2009, a lawsuit challenging FDA's jurisdiction over electronic cigarettes was filed in Federal district court. In January 2010, the district court granted the plaintiff's motion for a preliminary injunction enjoining FDA from detaining or refusing admission into the United States of the plaintiff's electronic cigarette products on the ground that those products are unapproved drugs, devices, or drug-device combinations. *Smoking Everywhere, Inc., v. FDA*, 680 F. Supp. 2d 62 (D.D.C. 2010). The Department of Health and Human Services and the Food and Drug Administration appealed the court's order, and oral argument before the U.S. Court of Appeals for the D.C. Circuit is scheduled for September 2010.

Under the FTC Act, the Commission has jurisdiction over deceptive or unfair claims made in the marketing of most products, including electronic cigarettes, and the Commission has a strong record of exercising its enforcement authority to protect the health and safety of consumers. If the district court's ruling that FDA lacks

Communications Commission, Rule and Regulations Implementing the Telephone Consumer Protection Act of 1991, 69 Fed. Reg. 55765, 55767 (Sept. 16, 2004). The FCC's interpretation of the TCPA, however, does not resolve the separate issue of the FTC's authority under the Telemarketing Act.

⁶Federal Trade Commission, Staff Report, *Beyond Voice: Mapping the Mobile Marketplace* (Apr. 2009).

⁷*Id.*

⁸See, e.g., *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946 (9th Cir. 2009).

⁹E.g., *FTC v. Spear Systems, Inc.*, No. 07-5597 (N.D. Ill. 2007) (\$3.7 million judgment obtained against key players in an international spam ring); *United States v. ValueClick, Inc.*, No. 08-1711 (C.D. Cal. 2008) (\$2.9 million civil penalty).

jurisdiction over electronic cigarettes is sustained on appeal, FTC monitoring of the marketing claims made for these products would be appropriate. However, if FDA's assertion of jurisdiction over electronic cigarettes is ultimately upheld by the courts, sale (and, therefore, marketing) of these products will be prohibited pending agency approval under the FDCA.

Question. In 2003, the FTC recommended that the alcohol industry abide by a voluntary standard that required alcohol advertisements to be placed only in media in which at least 70 percent of the audience for each advertisement consisted of adults 21 and over. Since then, several reports have indicated that youth exposure to alcohol advertising is increasing.

Despite the reported increase in youth exposure to advertising, the FTC's 2008 report entitled "Self-Regulation in the Alcohol Industry" did not increase the advertising standard. I am concerned that the report based this conclusion on premises that are not supported by research or the public health community, or are contradictory to previous statements by the Commission.

Will you commit to reviewing the FTC's 2008 report, the process by which it was created, and any contradictions between the premises upon which the Commission relied and its earlier statements and those of the public health community?

How will you evaluate whether the industry should increase its advertising standards to reduce advertising exposure to those who are not legally permitted to purchase alcohol?

Answer. Underage drinking is a critical public health issue, contributing to risky behavior, injury, and an intolerable 5,000 deaths per year. Fortunately, reliable data show long-term, gradual declines in underage drinking. According to the Monitoring the Future survey, past 30-day alcohol use by 8th, 10th, and 12th graders, combined, has fallen by 27 percent over the past 14 years.¹⁰

Nonetheless, too many teens still drink. Federal, state, and local governments all play a role in reducing teen drinking. The FTC is a member of the Interagency Coordinating Committee to Prevent Underage Drinking. We have particular responsibility over alcohol marketing, and also engage in consumer education designed to help reduce teen access to alcohol, as further described below.

The FTC addresses issues related to underage appeal of alcohol ads by pressing for effective industry self-regulation, through studies and ongoing monitoring. Our 2008 Alcohol Report evaluated industry compliance with the 70 percent standard. It showed that 92.5 percent of ads placed during the study period complied with the 70 percent placement standard, and that when all audiences for all ads were aggregated, more than 85 percent of the audience consisted of adults 21 and older.

The 2008 Alcohol Report made a number of recommendations for improvement of the industry's voluntary standards. Among other things, it announced that industry had agreed to adopt a 70 percent standard, with buying guidelines, for Internet advertising; it recommended that the beer and wine industries apply a 70 percent standard to sports sponsorships (the spirits industry already had done so); it recommended application of the 70 percent standard to product placements in movies; and it recommended that industry consider the need to maintain an 85 percent aggregate audience composition when making placements. Although it did not recommend an immediate change in the baseline standard, the 2008 Alcohol Report placed the industry on notice that it will be necessary to do so when the 2010 census data are released.

Since 2008, the Commission has continued to press for additional changes in the self-regulatory standards. The staff has advised the industry that the baseline placement standard should be raised to 75 percent. Additionally, the staff has advised industry members that ads on sites that have registered users, such as Facebook, MySpace, and YouTube, should be delivered only to persons who have registered as being 21 and older.

This January, the Commission will begin the process of seeking Office of Management and Budget approval, under the Paperwork Reduction Act, to conduct another major study of alcohol marketing and self-regulation.¹¹ The study will evaluate the advertising practices of the major alcohol suppliers and consider the appropriateness of the placement standard. In the course of this study, the Commission will review the FTC's 2008 Alcohol Report, the process by which it was created, and the other issues you raise. Our analysis will be based on the record as a whole, including but not limited to public health concerns, any comments received during the study, the

¹⁰ Johnston, L.D., et al., *Monitoring the Future National Results on Adolescent Drug Use: Overview of Key Findings, 2009* (NIH Publication No. 10-7583), Table 3.

¹¹ OMB approval under the PRA is required in cases where the Commission sends identical information requests to 10 or more entities. See 44 U.S.C. § 3502.

available placement data, and the potential costs and benefits of a modified standard.

The Commission also knows that education is an important consumer protection tool. Data show that most teens who drink alcohol obtain it from social sources, such as older family members and friends. Accordingly, we developed a consumer education program to help parents protect their children from alcohol-related harm. The message of the "We Don't Serve Teens" (WDST) program is, "Don't Serve Alcohol to Teens. It's unsafe. It's illegal. It's irresponsible." Components of the WDST program include a website, www.DontServeTeens.gov; radio ads; and signs. WDST signage is used nationwide by alcohol retailers, police departments, schools, and mental health organizations.

ATTACHMENT

BRIEF SUMMARY OF THE FTC'S PRIMARY AREAS OF COORDINATION WITH VARIOUS FEDERAL AGENCIES

FDA: concurrent jurisdiction with respect to labeling and marketing of foods, OTC drugs, and devices; under a Memorandum of Agreement the FDA has primary responsibility for overseeing product labeling and the FTC has primary responsibility for non-label advertising; the agencies cooperate closely and frequently.

FCC: (1) broadly concurrent jurisdiction with respect to telemarketing; the agencies consulted on rulemaking, developed consistent rules; coordinate on enforcement; (2) concurrent jurisdiction with respect to advertising in broadcast media; under a liaison agreement the FTC has primary responsibility for unfair or deceptive advertising in media and provides that the FCC will take false and misleading advertising into account in licensing and other decisions; in this and other areas, the agencies consult and coordinate as applicable.

DOJ: nearly complete concurrent jurisdiction on antitrust matters; under a clear-ance agreement the agencies determine which one will examine any particular matter; FTC issues premerger review rules with DOJ concurrence; the agencies cooperate closely on these and other issues.

EPA: concurrent jurisdiction with respect to unfair or deceptive practices involving the environment, e.g., pesticides; the agencies consult and coordinate on scientific issues, such as those involved in the FTC Green Guides and business education and in amending the FTC Care Labeling Rule, and on enforcement as applicable.

SEC: concurrent jurisdiction with respect to unfair or deceptive practices involving securities and investment advice; FTC generally defers to SEC where securities expertise is needed; agencies coordinate on enforcement as applicable.

CFTC: some concurrent jurisdiction with respect to unfair or deceptive practices involving commodities futures; agencies consult as applicable, such as in the FTC's petroleum market manipulation rulemaking.

Postal Service/DOJ: concurrent jurisdiction with respect to mail fraud; agencies cooperate closely on enforcement, sometimes including parallel investigations and criminal referrals.

BATF: concurrent jurisdiction with respect to unfair or deceptive practices involving alcohol, tobacco, and firearms; agencies consult on matters as applicable.

CPSC: some concurrent jurisdiction with respect to unfair or deceptive practices involving product safety; agencies consult and coordinate on enforcement as applicable.

Depository institution regulators: parallel jurisdiction, and limited concurrent jurisdiction, with respect to unfair or deceptive practices and a number of consumer financial laws; agencies consult on rulemaking, and some has been conducted jointly or in coordination; agencies consult or coordinate on enforcement as applicable.

The new Consumer Financial Protection Bureau: concurrent jurisdiction with respect to some financial practices and entities; the statute provides for consultation and coordination on rulemaking, enforcement, and other matters.

CONCLUSION OF HEARINGS

Senator DURBIN. This meeting of the subcommittee will stand recessed.

Thanks, everybody, for attending.

[Whereupon, at 3:50 p.m., Thursday, May 20, the hearings were concluded and the subcommittee was recessed, to reconvene subject to the call of the Chair.]