

PREPARED STATEMENT OF  
THE FEDERAL TRADE COMMISSION

on

FISCAL YEAR 2011 FUNDING REQUEST  
AND BUDGET JUSTIFICATION

Before the

SUBCOMMITTEE ON FINANCIAL SERVICES  
AND GENERAL GOVERNMENT  
COMMITTEE ON APPROPRIATIONS

UNITED STATES SENATE

Washington, D.C.  
May 20, 2010

## I. INTRODUCTION

Chairman Durbin, Ranking Member Collins, and Members of the Subcommittee, I am Jon Leibowitz, Chairman of the Federal Trade Commission (“FTC” or “Commission”).<sup>1</sup> I appreciate the opportunity to appear before you today, to testify in support of the Federal Trade Commission’s FY 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.<sup>2</sup> 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

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<sup>1</sup> 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.

<sup>2</sup> The Commission currently enforces or otherwise implements more than 60 laws.

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 FY 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 FY 2010 enacted levels.

## **II. CONSUMER PROTECTION MISSION**

### **A. 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 five years, and obtained nearly \$500 million in redress for consumers of financial services in the past ten 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.

#### **1. 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 partnered in sweeps with federal and state law enforcement agencies to collectively file more than 200 lawsuits to combat these scams.<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup> 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

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<sup>3</sup> See FTC Press Release, Federal and State Agencies Target Mortgage Relief Scams (Nov. 24, 2009), [www.ftc.gov/opa/2009/11/stolenhope.shtm](http://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](http://www.ftc.gov/opa/2009/07/loanlies.shtm).

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

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

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

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.<sup>7</sup> 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.<sup>8</sup> 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.<sup>9</sup>
2. 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.<sup>10</sup> Last July, the FTC announced *Operation Short Change*, another federal-state crackdown that

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

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

<sup>9</sup> See 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](http://www.ftc.gov/opa/2009/01/anm.shtm).

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

challenged 120 schemes selling bogus government grant opportunities, illusory get-rich-quick plans, job opportunity scams, and phony debt-reduction services.<sup>11</sup>

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 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.<sup>12</sup>

3. 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.<sup>13</sup>

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<sup>11</sup> See 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](http://www.ftc.gov/opa/2009/07/shortchange.shtm).

<sup>12</sup> 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](http://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](http://www.ftc.gov/opa/2010/04/moneygram.shtm).

<sup>13</sup> 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](http://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](http://www.ftc.gov/os/testimony/P064814financial-services.pdf).

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.<sup>14</sup> The FTC expects to complete this rulemaking proceeding within the next 60 days.

## **B. 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 seven 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;<sup>15</sup> 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;<sup>16</sup> 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.<sup>17</sup>

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

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

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

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

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.<sup>18</sup> 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.”<sup>19</sup> The order 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.

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<sup>18</sup> 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).

<sup>19</sup> *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](http://www.illinoisattorneygeneral.gov/pressroom/2010_03/20100309.html).

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.<sup>20</sup> 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 thirty percent drop in spam worldwide.<sup>21</sup> 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."<sup>22</sup> 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, email 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

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<sup>20</sup> *FTC v. Pricewert, LLC*, No. 09-CV-2407 (N.D. Cal. final order issued Apr. 4, 2010).

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

<sup>22</sup> *Sears Holdings Mgmt. Corp.*, FTC File No. 082-3099 (final order Aug. 31, 2009).

approach to privacy keeps pace with the latest technologies and emerging business models.<sup>23</sup>

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.

### **C. 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.<sup>24</sup> 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.<sup>25</sup>

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<sup>23</sup> See generally FTC Exploring Privacy web page, [www.ftc.gov/bcp/workshops/privacyroundtables/index.shtml](http://www.ftc.gov/bcp/workshops/privacyroundtables/index.shtml).

<sup>24</sup> 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.shtml](http://www.ftc.gov/opa/2009/12/robocall.shtml).

<sup>25</sup> *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,

#### **D. 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 prepaid cards.<sup>26</sup> In total, the FTC has obtained more than \$4 million from companies charged with deceptive marketing of prepaid calling cards.

#### **E. Protecting and Educating Children Through New and Innovative Initiatives**

##### **1. 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 Children<sup>27</sup> suggested

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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).

<sup>26</sup> *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).

<sup>27</sup> 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's (and this Subcommittee's) direction in the 2009 Omnibus Appropriations report.

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.<sup>28</sup>

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.<sup>29</sup> 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.

## 2. 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*

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<sup>28</sup> See generally Sizing Up Food Marketing and Childhood Obesity web page, [www.ftc.gov/bcp/workshops/sizingup/index.shtml](http://www.ftc.gov/bcp/workshops/sizingup/index.shtml).

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

*With Kids About Being Online* to give adults practical tips to help children navigate the online world.<sup>30</sup> 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.<sup>31</sup> 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.

### 3. 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.<sup>32</sup> 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 ten 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

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<sup>30</sup> 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.shtm](http://www.ftc.gov/opa/2010/03/netcetera.shtm).

<sup>31</sup> 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.shtm](http://www.ftc.gov/opa/2010/04/admongo1.shtm).

<sup>32</sup> 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.<sup>33</sup>

#### **F. 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 twenty percent.<sup>34</sup> 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.<sup>35</sup>

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<sup>33</sup> Although the Commission generally reviews its rules approximately every ten years, the continued rapid-fire pace of technological change led the agency to accelerate its COPPA review by five 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](http://www.ftc.gov/opa/2010/04/coppa.shtm).

<sup>34</sup> *Kellogg Co.*, FTC File No. 082-3245 (final order July 27, 2009).

<sup>35</sup> 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

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.<sup>36</sup> 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.<sup>37</sup> The defendants agreed to pay more than \$3 million for consumer redress and are prohibited from making such claims in the future.

#### **G. 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

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Airborne-like Cold-and-Flu Supplements Reach Separate \$565,000 Settlement (Mar. 23, 2010), [www.ftc.gov/opa/2010/03/walgreens.shtm](http://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](http://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](http://www.ftc.gov/opa/2009/07/riteaide.shtm).

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

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

December, the FTC submitted a three-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.<sup>38</sup> 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 two-day forum and “best practices” training session 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.

### **III. 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.

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<sup>38</sup> 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](http://www.ftc.gov/opa/2009/12/safeweb.shtm).

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.<sup>39</sup>

**A. 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.<sup>40</sup> 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.<sup>41</sup> 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.

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<sup>39</sup> See FTC Competition Enforcement Database, [www.ftc.gov/bc/caselist/index.shtml](http://www.ftc.gov/bc/caselist/index.shtml).

<sup>40</sup> 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](http://www.ftc.gov/os/2010/01/100112payfordelayrpt.pdf).

<sup>41</sup> In a mature market, generic drugs are 15 percent of their brand name equivalent. See *id.*

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.<sup>42</sup> 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.<sup>43</sup> And just two 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.<sup>44</sup>

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;

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

<sup>43</sup> *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).

<sup>44</sup> *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.shtm](http://www.ftc.gov/os/caselist/0610182/index.shtm).

- On average, the deals delay the availability of cost-saving generics by 17 months; and
- If not stopped, pay-for-delay deals will, conservatively, cost consumers \$3.5 billion a year.<sup>45</sup>

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

## **B. Health Care**

The health care 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 health care system are critical to reduce costs, improve quality, and encourage innovation.

The Commission has acted aggressively to stop anticompetitive health care 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 1300 percent. The Commission is seeking a divestiture to restore competition and consumer recovery of Ovation's illegally obtained profits.<sup>46</sup> The FTC also reviewed several pharmaceutical mergers and required divestitures in Watson/Arrow, Merck/Schering Plough, and Pfizer/Wyeth to

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

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

preserve competition that otherwise would have been lost.<sup>47</sup> 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.<sup>48</sup> 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.<sup>49</sup> 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 health care industry, and the Commission has allocated substantial resources to enforcement, advocacy, and policy development in this area. PBMs can help health care 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.

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<sup>47</sup> *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).

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

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

Last year, the Commission took action against CVS/Caremark, a leading PBM, in order to protect the personal information of consumers.<sup>50</sup> 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.

### **C. 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 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.

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<sup>50</sup> *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.

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.<sup>51</sup>

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.<sup>52</sup> 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

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<sup>51</sup> See Gasoline and Diesel Price Monitoring, [www.ftc.gov/ftc/oilgas/gas\\_price.htm](http://www.ftc.gov/ftc/oilgas/gas_price.htm).

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

the type of actions that would violate it.<sup>53</sup> 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.<sup>54</sup>

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<sup>53</sup> Guide to Complying with Petroleum Market Manipulation Regulations, [www.ftc.gov/os/2009/11/091113mmrguide.pdf](http://www.ftc.gov/os/2009/11/091113mmrguide.pdf).

<sup>54</sup> 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).

#### **D. 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.<sup>55</sup> 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 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.

#### **E. Consumer Goods & 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.

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<sup>55</sup> *Intel*, FTC File No. 061-0247 (administrative complaint Dec. 16, 2009).

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.<sup>56</sup> 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.<sup>57</sup>

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

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<sup>56</sup> *Realcomp II, Ltd.*, FTC Dkt. No. 9320 (Opinion of the Commission Oct. 30, 2009).

<sup>57</sup> 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 eliminated its optional rule that prohibited affiliated Multiple Listing Services from transmitting discount broker listings to public web sites.

Vegas.<sup>58</sup> 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.<sup>59</sup>

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.<sup>60</sup>

#### **F. 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.<sup>61</sup> The Commission also

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

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

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

<sup>61</sup> *Polypore Int'l, Inc.*, FTC Dkt. No. 9237 (initial decision Mar. 1, 2010).

investigated mergers in other chemical markets and required divestitures for high-performance chemical pigments, bulk de-icing salt sold to state and local governments, and anhydrous ammonia fertilizer used by farmers.<sup>62</sup>

### **G. 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.<sup>63</sup> 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.

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<sup>62</sup> *K+S Aktiengesellschaft*, FTC File No. 091-0086 (final order Nov. 9, 2009).

<sup>63</sup> Horizontal Merger Guidelines For Public Comment (Apr. 20, 2010), [www.ftc.gov/opa/2010/04/hmg.shtm](http://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 six months. The five workshops were open to the public and attended by attorneys, academics, economists, consumer groups, and businesses.

## **H. 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?”<sup>64</sup> 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 six 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,”

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<sup>64</sup> Workshop information is available at [www.ftc.gov/opp/workshops/news/index.shtml](http://www.ftc.gov/opp/workshops/news/index.shtml).

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.<sup>65</sup> Biologics – products manufactured using living tissues and microorganisms – are increasingly used to treat arthritis, cancer, diabetes, and other diseases.<sup>66</sup> 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.<sup>67</sup>

### **I. 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. companies 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

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

<sup>66</sup> 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.

<sup>67</sup> Authorized Generics: An Interim Report (June 2009), [www.ftc.gov/os/2009/06/P062105authorizedgenericsreport.pdf](http://www.ftc.gov/os/2009/06/P062105authorizedgenericsreport.pdf).

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.

#### **IV. NEEDED RESOURCES FOR FISCAL YEAR 2011**

The FTC has a small staff to accomplish its consumer protection and competition goals. Today, the Commission's FY 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.<sup>68</sup> 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.

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

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 FY 2010 enacted appropriation provides the FTC with \$291,700,000, which supports 1,167 FTE. The FY 2010 appropriation enables the FTC to protect more consumers in areas including financial services, health care, and high-tech marketing, and to challenge anticompetitive mergers and business practices in the technology, health care, pharmaceutical, and energy industries. To meet these challenges going forward, the FTC requests \$314,000,000 which will support 1,207 FTE in FY 2011. This request represents an increase of \$22,300,000 over the FY 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 health care, 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 FY 2011 budget request. HSR filing fees and Do Not Call fees will provide the agency with an estimated

\$129,000,000 in FY 2011. The General Fund in the U.S. Treasury would make a direct appropriation of \$185,000,000 to fund the agency's operations.

**V. 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.