

What's Past is Prologue: FTC's Competition and Consumer Protection Priorities

Commissioner Julie Brill ABA Fall Forum Keynote Address Thursday, November 6, 2014

Good afternoon, and many thanks to the American Bar Association for inviting me to speak to you this afternoon about the FTC's enforcement actions and agenda, this past year and in the year to come.

The autobiographical nature of today's topic is apt. This week we are celebrating the FTC's centennial. We have been reflecting on our agency's past and, in the process, have become more aware of the foundation that supports our present strength and heralds our future promise. What is past truly is prologue.¹

President Wilson, Louis Brandeis, and the other Progressive Era leaders who built the FTC could not have envisioned the sort of high-tech, online, big data, big money cases with which the current Commission grapples – cybersecurity, patent assertion entities, accountable care organizations, mobile cramming. In 1914, no one could have imagined pulling a smartphone the size of a pocket-watch out of his waistcoat and using it to speak, in real time, to someone a continent away. As the author David Mitchell said recently in *The Atlantic*, “in the context of human history, [that] is a profoundly bizarre thing to be doing. An impossible thing to be doing, an unthinkable thing to be doing!”² Yet the founders of the FTC laid down a set of principles and practices for the agency so timeless, rational, and flexible that we have been able to accomplish our mission effectively and efficiently through one hundred years of “bizarre,” “impossible,” and “unthinkable” technological and economic change.

Perhaps that is because our architects lived in turbulent times too. As today, the economy at the start of the 20th century was struggling to overcome major financial shocks that had pushed down wages, pushed up unemployment, and pushed hardest against middle income and working families. At the same time, innovators and inventors were remaking the economic and societal landscape.

In 1914, the world's first electric red and green traffic lights were installed in Cleveland Ohio, and the Panama Canal opened in, of all places, Panama. Robert Goddard started building rockets, and W.H. Carrier patented the air conditioner. The first regularly scheduled airline passenger service began between St. Petersburg and Tampa; Charlie Chaplin made his film

¹ WILLIAM SHAKESPEARE, *THE TEMPEST*.

² Joe Fassler, *David Mitchell on How to Write: “Neglect Everything Else,”* THE ATLANTIC, Sept. 23, 2014, available at <http://www.theatlantic.com/entertainment/archive/2014/09/the-simple-profound-act-of-perceiving-the-world/380659/>.

debut; Babe Ruth began his professional baseball career; green beer was invented in the Bronx; and Europe toppled into the first World War.

Though the Internet, mobile phones, apps, and even meaningful health insurance were decades away, the world of 1914 was changing at a dizzying pace, at a pace that would have seemed bizarre, impossible, and unthinkable a century – even a decade – before. The FTC’s founders understood that change was and would be the current electrifying the economy. So they designed an agency that could operate in dynamic times – one that values decision-making based on consensus, and consensus based on documented facts and reasoned analysis. They gave us flexible, remedial authority, potent enforcement tools, and practical research capabilities. So equipped, the FTC has been able to pursue our mission – protecting competition and consumers – throughout the last century and is well positioned to tackle the challenges of the next.

Competition

I’d like to start our discussion about this year’s latest and greatest enforcement efforts where the FTC itself started: with antitrust. Louis Brandeis, arguably the FTC’s intellectual founder, led the crusade at the beginning of the 20th century against the large steel trusts and other monopolies that were engulfing this country’s economic system. His call to cut back on the economic power of the trusts became the central issue in the 1912 presidential election. After Woodrow Wilson won, he asked Brandeis to come up with some specific recommendations to solve the problem of the trusts. Brandeis conceived the FTC, and Wilson convinced Congress to enact it. At Brandeis’s urging, the FTC was empowered to investigate and prohibit unfair methods of competition (and 24 years later, unfair and deceptive acts and practices in commerce) with a “broad and flexible mandate, wide-ranging powers, and the ability, at its best, to respond to the needs of changing times.”³

Brandeis would have approved of the way we have used the tools he bequeathed to us in our recent actions supporting competition in the market for health care. Certainly, the medical care and health insurance markets have changed dramatically since 1914, when the federal government had virtually no role in providing health insurance. And while private health insurance was available early in the 20th century, health care itself was not very costly, and so insurance primarily paid lost wages for missed time away from work. Fast forward to today: the OECD estimates that the U.S. spends nearly 18% of its GDP on health care, far outstripping the other 33 OECD member nations.⁴ CMS estimates that, in 2013, total national health expenditure in the U.S. was around \$2.9 trillion and, by 2019, will exceed \$4 trillion.⁵

³ Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L. J. 1, 5-6 (2003).

⁴ Shirley S. Wang, *US Health Spending: One of These Things Not Like Others*, WALL ST. J., July 23, 2013.

⁵ *National Health Expenditure Projections, 2013-23: Faster Growth Expected With Expanded Coverage and Improving Economy*, HEALTH AFFAIRS 33, No. 10 (2014): 1841-1850 at 43, available at <http://content.healthaffairs.org/content/33/10/1841.full.pdf+html>.

The Affordable Care Act⁶ is designed to help rein in these costs. Antitrust enforcement, which prevents hospitals and other providers from gaining undue market power through mergers and acquisitions, is critical to ensuring that health care operates in a competitive marketplace to the benefit of U.S. consumers.⁷ In that way, both the FTC Act and the ACA share common goals of promoting high quality and cost-effective health care. The vast majority of health care provider mergers do not attract antitrust scrutiny. But the FTC will bring enforcement actions if a merger would likely result in higher reimbursement rates and reduced incentives to compete on clinical quality and other non-price features. The Commission has shown its willingness to challenge deals not only between general acute-care hospitals, but also in other provider markets, including physician services markets⁸ and outpatient services markets.⁹

In *FTC v. St. Luke's*, a federal district court made it clear that the ACA and antitrust are not at cross-purposes. The court granted the FTC, together with the Idaho Attorney General, a permanent injunction blocking the hospital and physician network St. Luke's Health System from acquiring Saltzer Medical Group, Idaho's largest independent, multi-specialty physician practice group. The FTC argued that the acquisition would combine the two largest providers of adult primary care physician services and create a firm with nearly 60 percent of the market.¹⁰ The federal court agreed, finding it "highly likely" that health care costs would rise as the merged organization "obtains a dominant market position," which would allow it to negotiate higher reimbursement rates from health insurance plans, which in turn would be passed on to consumers.¹¹

The defendants argued that the ACA's emphasis on integrated health care mandated a merger. But in finding that there was no proof that consolidation would achieve meaningful cost savings and quality improvements, the court noted that improving healthcare quality and lowering costs is not dependent on any specific organizational structure.¹²

The FTC's health care competition efforts made headlines again in April when the U.S. Court of Appeals for the Sixth Circuit upheld the Commission's 2012 decision finding that ProMedica Health System violated the U.S. antitrust laws when it acquired its rival, St. Luke's

⁶ Patient Protection and Affordable Care Act, 42 U.S.C. § 18001 et seq. (2010).

⁷ See, e.g., Keynote Address by Commissioner Julie Brill at 2014 Hal White Antitrust Conference, Competition in Health Care Markets (June 9, 2014), available at

http://www.ftc.gov/system/files/documents/public_statements/314861/140609halwhite.pdf.

⁸ See, e.g., Complaint at ¶¶ 24-26, *FTC v. St. Luke's Health Sys., Ltd.*, 1:13-cv-00116-BLW (D. Idaho filed Mar. 26, 2013) [hereinafter *St. Luke's Complaint*], available at

<http://www.ftc.gov/sites/default/files/documents/cases/2013/03/130312stlukescmpt.pdf>; Complaint at ¶ 36, *FTC v. OSF Healthcare Sys.*, 3:11-cv-50344 (N.D. Ill. filed Nov. 18, 2011), available at

<http://www.ftc.gov/sites/default/files/documents/cases/2011/11/111118rockfordcmpt.pdf>.

⁹ See, e.g., Complaint at ¶¶ 42-50, *In the Matter of Reading Health System*, Dkt. No. 9353 (Nov. 16, 2012), available at <http://www.ftc.gov/sites/default/files/documents/cases/2012/11/121116readingsurgicalcmpt.pdf>;

Complaint at ¶¶ 16-19, *In the Matter of Carilion Clinic*, Docket No. 9338 (July 24, 2009), available at <http://www.ftc.gov/sites/default/files/documents/cases/2009/07/090724carilioncmpt.pdf>.

¹⁰ *St. Luke's Complaint*, *supra* note 8, at ¶ 33.

¹¹ *FTC v. St. Luke's Health Sys., Ltd.*, 1:13-cv-00116-BLW, 2014 U.S. Dist. LEXIS 9264, at *6 (D. Idaho Jan. 24, 2014). This decision is on appeal in the Ninth Circuit.

¹² *FTC v. St. Luke's Health Sys., Ltd.*, Findings of Fact and Conclusions of Law, 1:13-CV-00116-BLW, at ¶¶ 46-47 (D. Idaho Jan. 24, 2014), available at <http://www.ftc.gov/system/files/documents/cases/140124stlukesfindings.pdf>.

Hospital in the Toledo, Ohio area.¹³ This decision was the first appellate court opinion on a health care provider merger in 15 years. And it upheld the FTC’s approach – developed in 2002 by then-Chairman Muris – to address a string of losses suffered by the FTC and DOJ in the hospital merger area.

In the health arena, the FTC also remains committed to ending anticompetitive “pay-for-delay” pharmaceutical patent agreements. These are deals in which a brand-name drug maker agrees to pay a generic rival – in cash or some other benefit – for the generic’s agreement to keep its lower-cost alternative off the market. The deals cost consumers billions of dollars annually, money that comes straight out of the pockets of Americans and businesses. In June of 2013, in *FTC v. Actavis, Inc.*, the U.S. Supreme Court held that these deals are subject to antitrust scrutiny,¹⁴ vindication for our longstanding, bipartisan campaign against them.

Building on *Actavis*, two months ago, the FTC filed a complaint charging that several major pharmaceutical companies illegally blocked consumers’ access to lower-cost versions of the blockbuster testosterone drug, AndroGel. We alleged that pharmaceutical company AbbVie and its partner filed sham patent infringement lawsuits against potential generic competitors to delay the introduction of lower-priced generic versions of that drug.¹⁵ Further, we charged that, while these lawsuits were pending, AbbVie enticed its competitors to further delay generic competition against AndroGel¹⁶ by authorizing them to produce a generic version of the highly-profitable cholesterol drug TriCor.¹⁷ With that action, the Commission has offered its answer to a key question arising out of the *Actavis* decision: payments to delay generic competition do not have to be in the form of cash to qualify for scrutiny as unlawful pay-for-delay deals under *Actavis*.

Our recent significant antitrust enforcement actions have not been confined to the health care arena. Just last week, we announced that Blue Rhino and AmeriGas, the nation’s two leading suppliers of propane exchange tanks, agreed to settle FTC charges that they entered into unlawful agreements involving their plans to reduce the amount of propane in tanks sold to Walmart, a key customer.¹⁸ The proposed settlement will benefit consumers by prohibiting conduct that could lead to future agreements on price or other competitive terms.

We also delved into the glass bottle industry in our final order settling charges concerning the Ardagh Group’s \$1.7 billion acquisition of rival container manufacturer Saint-Gobain, which were the second- and third-largest U.S. glass container manufacturers, would violate the antitrust laws. We charged that the acquisition would increase the likelihood that the remaining two glass manufacturers, post-merger, would be able to successfully coordinate price and non-price terms.

¹³ *ProMedica Health Sys., Inc. v. FTC*, 749 F.3d 559 (6th Cir. Apr. 22, 2014).

¹⁴ 133 S. Ct. 2223 (2013).

¹⁵ Complaint at ¶¶ 5-8, *FTC v. Abbvie Inc.*, 2:14-cv-05151-HB (E.D. Pa. Sept. 26, 2014), available at <http://www.ftc.gov/system/files/documents/cases/140908abbviecmpt1.pdf>.

¹⁶ *Id.* at ¶¶ 9-10.

¹⁷ *Id.* at ¶ 117.

¹⁸ FTC, Press Release, Blue Rhino, AmeriGas Settle FTC Charges of Restraining Competition (Oct 31, 2014), available at <http://www.ftc.gov/news-events/press-releases/2014/10/blue-rhino-amerigas-settle-ftc-charges-restraining-competition>.

We also charged that the acquisition would have reduced direct, head-to-head competition between the merging parties.¹⁹ The settlement resolved the serious antitrust concerns raised by this transaction by requiring Ardagh to divest six of its nine manufacturing plants.²⁰

We've also taken on the nuts and bolts of municipal and regional water distributions – and I mean that quite literally. On January 30, 2014, the Commission issued its Opinion and Final Order against the largest U.S. supplier of ductile iron pipefittings used in such systems. In its opinion, the Commission affirmed in part and reversed in part a May 2013 Initial Decision by the administrative law judge finding that the supplier, McWane, unlawfully maintained its monopoly in the domestic pipefittings market through exclusionary conduct.²¹

Moving forward, you can expect the FTC to continue to enforce the antitrust laws, not just with respect to anticompetitive mergers and other practices that erode existing competition, but also where these activities impede future competition. The Commission required divestitures from pharmaceutical companies Endo Health Solutions and Boca Life Science Holdings in two generic markets that did not yet exist, because the merging parties were two of only a few likely future competitors.²² In another instance of protecting future competition, in September 2013, we charged that the merger between Nielsen and Arbitron would reduce future competition in services that measure audiences across multiple platforms – for example, television and online – leading to higher prices for advertisers and media programmers, and required the parties to divest assets to ensure future competition.²³

I believe Brandeis would have expected the future FTC to pursue future-focused enforcement actions like these, as he would have expected us to focus on the impact of intellectual property rights on competition and consumer protection. A few months ago, the Commission began an extensive examination of the activities of patent assertion entities – firms that make their money by purchasing patents to assert them against firms already using the patented technology.²⁴ The study will seek robust qualitative and quantitative information on PAE acquisition, litigation, assertion, and licensing practices. We will share our results with Congress, government agencies, academics, and others to inform sound policy decisions.

¹⁹ Complaint at ¶¶ 42, 46, *FTC v. Ardagh Group*, 1:13-cv-01021-RMC (D.D.C. July 2, 2013), available at <http://www.ftc.gov/sites/default/files/documents/cases/130717ardaghcmt.pdf>.

²⁰ FTC, Press Release, *FTC Approves Final Order Settling Charges that Ardagh's Proposed Acquisition of Saint-Gobain Would be Anticompetitive; Approves Ardagh's Application to Sell Six Glass Plants and Related Assets* (June 18, 2014), available at <http://www.ftc.gov/news-events/press-releases/2014/06/ftc-approves-final-order-settling-charges-ardaghs-proposed>.

²² FTC, Press Release, *FTC Puts Conditions on Endo Health Solutions' Acquisition of Boca Life Science Holdings* (Jan. 31, 2014), available at <http://www.ftc.gov/news-events/press-releases/2014/01/ftc-puts-conditions-endo-health-solutions-acquisition-boca-life>.

²³ FTC, Press Release, *FTC Puts Conditions on Nielsen's Proposed \$1.26 Billion Acquisition of Arbitron* (Sept. 20, 2013), available at <http://www.ftc.gov/news-events/press-releases/2013/09/ftc-puts-conditions-nielsens-proposed-126-billion-acquisition>.

²⁴ See, e.g., Melissa Lipman, *FTC Gets Approval to Launch Patent Troll Study*, COMPLAW 360, Aug. 13, 2014, available at <http://www.law360.com/articles/567060/ftc-gets-approval-to-launch-patent-troll-study>.

Consumer Protection and Privacy

Our history leaves no doubt that the FTC was established to play a critical role in combating anticompetitive conduct and mergers. But our twin mission of protecting consumers was also apparent from the beginning. True, Congress did not add the authority to pursue “unfair or deceptive acts or practices in or affecting commerce” until 1938. But from the beginning Brandeis also worried about the nefarious impact of uncontrolled newspaper and magazine advertising on rational consumer choice. And interestingly, the first two cases disposed of by the FTC involved deceptive advertising, brought under the guise of “unfair competition.” Settled in 1916, these both involved embroidery thread sold as “cilk” (spelled with a “c” rather than an “s”) when in fact it was cotton.²⁵

Today, while our cases about bamboo²⁶ and faux fur²⁷ clothing demonstrate that substantiation of claims about clothes continue to remain important,²⁸ our cases are more and more likely to be about consumer challenges in the wired (and wireless) world. One observer recently dubbed the FTC “Washington’s Most Powerful Technology Cop.”²⁹ That’s because we go where consumers go, and consumers are adopting new technologies in droves. Yet the principles behind our hi-tech consumer protection work remains the same as they were in 1914: businesses must deliver to consumers what they promise to deliver, and must not charge them without their knowledge and consent.

The past year has seen the FTC take significant enforcement actions in the areas of mobile in-app purchases, cramming, and throttling. We required Apple and Google to provide full refunds, totaling a minimum of \$32.5 million and \$19 million, respectively, to compensate consumers for unauthorized charges made by their children in kids’ mobile apps.³⁰ The

²⁵ FTC v. Yagle, *et al.*, trading as Circle Cilk Co., 1 F.T.C. 13 (1916); *see also* FTC v. Abbott & Co., 1 F.T.C. 16 (1916).

²⁶ *See* FTC, Press Release, Four National Retailers Agree to Pay Penalties Totaling \$1.26 Million for Allegedly Falsely Labeling Textiles as Made of Bamboo, While They Actually Were Rayon (Jan. 3, 2013), *available at* <http://www.ftc.gov/news-events/press-releases/2013/01/four-national-retailers-agree-pay-penalties-totaling-126-million>; FTC, Press Release, Maker of Rayon Clothes Barred from Deceptive "Bamboo" Claims (Oct. 22, 2009), *available at* <http://www.ftc.gov/news-events/press-releases/2009/10/maker-rayon-clothes-barred-deceptive-bamboo-claims>.

²⁷ *See* FTC, Press Release, FTC Approves Final Orders Settling Charges Against Retailers Accused of Marketing Real Fur Products as Fake Fur (Aug. 6, 2013), *available at* <http://www.ftc.gov/news-events/press-releases/2013/08/ftc-approves-final-orders-settling-charges-against-retailers>.

²⁸ *See also* The Textile Fiber Products Identification Act (Textile Act), 15 U.S.C. § 70, *et seq.* and The Fur Products Labeling Act (Fur Act), 15 U.S.C. § 69, *et seq.*; Wool Products Labeling Act of 1939 (Wool Act), 15 U.S.C. § 68, *et seq.*

²⁹ *See* Brian Fung, *The FTC Was Built 100 Years Ago to Fight Monopolists. Now, It’s Washington’s Most Powerful Technology Cop*, WASH. POST – The Switch (Sept. 25, 2014), *available at* <http://www.washingtonpost.com/blogs/the-switch/wp/2014/09/25/the-ftc-was-built-100-years-ago-to-fight-monopolists-now-its-washingtons-most-powerful-technology-cop/> (quoting Geoffrey Manne as saying “the Federal Trade Commission is becoming, for better or for worse, the Federal Technology Commission”).

³⁰ FTC, Press Release, Apple Inc. Will Provide Full Consumer Refunds of At Least \$32.5 Million to Settle FTC Complaint It Charged for Kids’ In-App Purchases Without Parental Consent (Jan. 15, 2014), *available at* <http://www.ftc.gov/news-events/press-releases/2014/01/apple-inc-will-provide-full-consumer-refunds-least-325-million>; FTC, Press Release, Google to Refund Consumers at Least \$19 Million to Settle FTC Complaint It Unlawfully Billed Parents for Children’s Unauthorized In-App Charges (Sept. 4, 2014), *available at*

settlement required both companies to change their billing practices to ensure that they have obtained express, informed consent from consumers for in-app charges – something that is sure to help parents stay in control before their kids go bonkers buying the latest exotic species for their online Tap Zoo. We are in the midst of a suit against Amazon³¹ in which we’re defending the same principle: companies need to get consumers’ consent before charging them for in-app purchases.

And kids aren’t the only ones unwittingly piling up online invoices. One month ago, the FTC entered into an historic settlement with AT&T in which we alleged that the company billed customers hundreds of millions dollars for unauthorized third-party subscriptions to text messaging services, a practice called mobile cramming.³² As part of a \$105 million settlement with the FTC, FCC, and state law enforcement officials, AT&T will pay \$80 million to the FTC to provide refunds to consumers. Our suit against T-Mobile for similar cramming activities is pending.³³ And, the FTC has taken action against many of the third parties who are fraudulently placing subscriptions on consumers’ mobile accounts.³⁴

Finally, just last week, the FTC filed its first broadband throttling case against AT&T.³⁵ We allege that AT&T failed to disclose adequately to its mobile customers with unlimited data plans that, in certain circumstances, AT&T drastically reduced their data speeds.

Changing technologies in the 21st century may make it more challenging for the FTC to enforce these basic consumer protection ideals, but that only means we are more determined to understand and monitor what is exciting and new, and make sure it adheres to principles that are proven and established. Keep that in mind if you are curious about what our next high tech consumer protection cases will be.

The same is true for our work to protect consumers’ privacy, another FTC priority that we can trace back to Brandeis. When, in 1890, he and Samuel Warren laid out the first formulation of the right of Americans “to be let alone,”³⁶ it was a technological development – the advent of snapshot photography – that was their impetus. Where previously, a photographic portrait was a staged affair that required the participation and patience of the subject, by 1890,

<http://www.ftc.gov/news-events/press-releases/2014/09/google-refund-consumers-least-19-million-settle-ftc-complaint-it>.

³¹ See Complaint, *FTC v. Amazon.com, Inc.*, 2:14-cv-01038 (W.D. Wash. July 10, 2014), available at <http://www.ftc.gov/system/files/documents/cases/140710amazoncmpt1.pdf>.

³² FTC, Press Release, AT&T to Pay \$80 Million to FTC for Consumer Refunds in Mobile Cramming Case (Oct. 8, 2014), available at <http://www.ftc.gov/news-events/press-releases/2014/10/att-pay-80-million-ftc-consumer-refunds-mobile-cramming-case>.

³³ See Complaint, *FTC v. T-Mobile USA, Inc.*, 2:14-cv-00967 (W.D. Wash. July 1, 2014), available at <http://www.ftc.gov/system/files/documents/cases/140701tmobilecmpt.pdf>.

³⁴ See, e.g., FTC, Press Release, Operator of Mobile Cramming Scheme Will Pay More Than \$1.2 Million in FTC Settlement (Aug. 5, 2014), available at <http://www.ftc.gov/news-events/press-releases/2014/08/operator-mobile-cramming-scheme-will-pay-more-12-million-ftc>.

³⁵ FTC, Press Release, FTC Says AT&T Has Mised Millions of Consumers with ‘Unlimited’ Data Promises (Oct. 28, 2014), available at <http://www.ftc.gov/news-events/press-releases/2014/10/ftc-says-att-has-mised-millions-consumers-unlimited-data>.

³⁶ Samuel D. Warren and Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890).

developments in camera technology had allowed photographers to snap a good picture of an individual without their knowledge or consent. Warren and Brandeis cited the appearance of such snapshots in an increasingly sensationalist press as their reason for calling on jurists to define and enforce the individual's right to privacy.

That is a mission to which the FTC also is devoted – and a mission that technological development continues to render one of our most challenging, particularly in the area of data security. Simply put, there is no privacy without appropriate data security. Given the avalanche of recent cases of security breaches involving large companies and millions of records, we have our work cut out for us on this front.

Data security quickly became an important consumer protection issue as the Internet became a mass commercial medium. Since 2002, the FTC has entered into more than 50 settlements with companies charged with failing to take reasonable measures to protect consumer data.³⁷ And we are currently litigating two other data security matters, involving Wyndham and LabMD.³⁸ While a number of the FTC's data security cases involved breaches of payment card data,³⁹ many others involved Social Security numbers,⁴⁰ account passwords,⁴¹ health data,⁴² and information about children.⁴³

³⁷ See FTC, 2014 PRIVACY AND DATA SECURITY UPDATE at 3 (last visited Nov. 5, 2014), available at http://www.ftc.gov/system/files/documents/reports/privacy-data-security-update-2014/privacydatasecurityupdate_2014.pdf.

³⁸ FTC, Press Release, FTC Files Complaint Against Wyndham Hotels For Failure to Protect Consumers' Personal Information (June 26, 2012), available at <http://www.ftc.gov/news-events/press-releases/2012/06/ftc-files-complaint-against-wyndham-hotels-failure-protect>; FTC, Press Release, FTC Files Complaint Against LabMD for Failing to Protect Consumers' Privacy (Aug. 9, 2013), available at <http://www.ftc.gov/news-events/press-releases/2013/08/ftc-files-complaint-against-labmd-failing-protect-consumers>.

³⁹ See, e.g., The TJX Cos., Inc., No. C-4227 (F.T.C. July 29, 2008) (consent order), available at <http://www.ftc.gov/enforcement/cases-and-proceedings/cases/2008/08/tjx-companies-inc-matter>; Dave & Buster's, Inc., No. C-4291 (F.T.C. May 20, 2010) (consent order), available at <http://www.ftc.gov/enforcement/cases-and-proceedings/cases/2010/06/dave-busters-incin-matter>; DSW, Inc., No. C-4157 (F.T.C. Mar. 7, 2006) (consent order), available at <http://www.ftc.gov/enforcement/cases-and-proceedings/cases/2006/03/dsw-incin-matter>; BJ's Wholesale Club, Inc., No. C-4148 (F.T.C. Sept. 20, 2005) (consent order), available at <http://www.ftc.gov/enforcement/cases-and-proceedings/cases/2005/09/bjs-wholesale-club-inc-matter>.

⁴⁰ See, e.g., FTC, Press Release, Fandango, Credit Karma Settle FTC Charges that They Deceived Consumers By Failing to Securely Transmit Sensitive Personal Information (Mar. 28, 2014), available at <http://www.ftc.gov/news-events/press-releases/2014/03/fandango-credit-karma-settle-ftc-charges-they-deceived-consumers>; FTC, Press Release, Consumer Data Broker ChoicePoint Failed to Protect Consumers' Personal Data, Left Key Electronic Monitoring Tool Turned Off for Four Months (Oct. 19, 2009), available at <http://www.ftc.gov/news-events/press-releases/2009/10/consumer-data-broker-choicepoint-failed-protect-consumers>.

⁴¹ See, e.g., FTC, Press Release, FTC Accepts Final Settlement with Twitter for Failure to Safeguard Personal Information (Mar. 11, 2011), available at <http://www.ftc.gov/news-events/press-releases/2011/03/ftc-accepts-final-settlement-twitter-failure-safeguard-personal-0>.

⁴² See, e.g., GMR Transcription Servs., No. C-4482 (F.T.C. Aug. 14, 2014) (consent order), available at <http://www.ftc.gov/system/files/documents/cases/140821gmrdo.pdf>; CBR Sys., Inc., No. C-4400 (F.T.C. Apr. 29, 2013) (consent order), available at <http://www.ftc.gov/sites/default/files/documents/cases/2013/05/130503cbrdo.pdf>.

⁴³ See, e.g., FTC, Press Release, FTC Approves Final Order Settling Charges Against TRENDNet, Inc. (Feb. 7, 2014), available at <http://www.ftc.gov/news-events/press-releases/2014/02/ftc-approves-final-order-settlingcharges-against-trendnet-inc>.

Consumers are moving increasingly to mobile devices, and our data security enforcement is following suit. Earlier this year, the FTC settled complaints against Credit Karma and Fandango.⁴⁴ We alleged that these apps were vulnerable to “man-in-the-middle” attacks, in which a hacker could pose as a legitimate data recipient and collect highly sensitive information, such as credit card details, credit report data, and social security numbers.

One reason we are seeing so many more – and more damaging – data security breaches is that there is simply more data floating around the cyber-stratosphere that can be mishandled. We scatter bits of personal data whenever we talk on our phone, click on a “buy now” button, or monitor our sleep patterns on a fitness bracelet. As we advance into the age of the Internet of Things, the number of sensors collecting sensitive data about us is multiplying, and adding to the concerns about data security. A recent study by Hewlett Packard found that 90 percent of connected devices are collecting personal information, and 70 percent of them are transmitting this data without encryption.⁴⁵

We brought our first case in the Internet of Things area against TRENDnet, a company that we alleged had failed to secure its internet-connected video security cameras.⁴⁶ As a result of the company’s allegedly lax security practices, around 700 private video feeds, some of which included images of children and families going about daily activities in their homes, were hacked and publically posted.

The FTC hopes to get ahead of these issues by providing education, guidance, and policy proposals about privacy and data security concerns stemming from the Internet of Things. Earlier this year, we held a workshop where a wide variety of stakeholders dove deeply into these issues, and you can expect the report on our recommendations to come out in the near future.

We have taken the same approach on another aspect of the big data economy – data brokers. In a report issued in May, the FTC detailed how these large firms, unknown to most consumers, collect billions of bits of information about them and turn it all into startlingly accurate profiles – often without our knowledge or consent. These profiles can end up containing information or inferences about our health, race, financial status, and other sensitive personal behavior and characteristics.⁴⁷

Data brokers’ clients sometimes use these profiles to send us advertisements we might be interested in, an activity that can benefit both the advertiser and the consumer. But these profiles can also be used to determine whether and on what terms companies should do business with us

⁴⁴ FTC, Press Release, Fandango, Credit Karma Settle FTC Charges that They Deceived Consumers By Failing to Securely Transmit Sensitive Personal Information (Mar. 28, 2014), available at <http://www.ftc.gov/news-events/press-releases/2014/03/fandango-credit-karma-settle-ftc-charges-they-deceived-consumers>.

⁴⁵ HP, *Internet of Things Research Study 2* (July 2014), available at

<http://h20195.www2.hp.com/V2/GetDocument.aspx?docname=4AA5-4759ENW&cc=us&lc=en>.

⁴⁶ See FTC, Press Release, FTC Approves Final Order Settling Charges Against TRENDNet, Inc., *supra* note 43.

⁴⁷ FTC, DATA BROKERS: A CALL FOR TRANSPARENCY AND ACCOUNTABILITY at 20 & n.52; *id.* at 24-25 & n.57, (2014), available at <http://www.ftc.gov/system/files/documents/reports/data-brokers-call-transparency-accountability-report-federal-trade-commission-may-2014/140527databrokerreport.pdf>.

and could result in our being treated differently based on characteristics such as our race, income, or sexual orientation.

Our report recommends an approach that encompasses both use restrictions for data brokers and their clients as well as meaningful notice and choice solutions for data brokers and their sources of information. Since most consumers have never heard of data brokers, we call on Congress to enact legislation that would lay out their activities and provide consumers with appropriate choices at a centralized portal, a solution I have long advocated through my “Reclaim Your Name” initiative.⁴⁸ The Commission followed up the data broker report and our recommendations with a conference in September that addressed the potential for big data analytics to promote economic inclusion or exclusion.⁴⁹

While the FTC is working to protect consumers in high-tech areas such as the data-driven economy and the Internet of Things, we are also fully maintaining our longstanding commitment to combatting fraud in areas such as false advertising,⁵⁰ deceptive mortgage and other debt relief services,⁵¹ abusive debt collection practices,⁵² payday lending operations,⁵³ phony business opportunities,⁵⁴ and telemarketing.⁵⁵ Just last week, we took two significant actions in these

⁴⁸ See Keynote Address by Commissioner Julie Brill at the 23rd Computers Freedom and Privacy Conference, Washington, D.C. (June 26, 2014), available at http://www.ftc.gov/sites/default/files/documents/public_statements/reclaim-your-name/130626computersfreedom.pdf.

⁴⁹ See FTC, Conference Description, Big Data: A Tool for Inclusion or Exclusion? (last visited Oct. 29, 2014), <http://www.ftc.gov/news-events/events-calendar/2014/09/big-data-tool-inclusion-or-exclusion> (“[U]ses of big data are expected to create efficiencies, lower costs, and improve the ability of certain populations to find and access credit and other services”).

⁵⁰ See, e.g., FTC, Press Release, FTC Settlement Bans Marketer Behind ‘Fat Burner’ Diet Pills from Manufacturing, Marketing Weight-Loss Products (Sept. 11, 2014), available at <http://www.ftc.gov/news-events/press-releases/2014/09/ftc-settlement-bans-marketer-behind-fat-burner-diet-pills>; L’Oréal Settles FTC Charges Alleging Deceptive Advertising for Anti-Aging Cosmetics (June 30, 2014), available at <http://www.ftc.gov/news-events/press-releases/2014/06/loreal-settles-ftc-charges-alleging-deceptive-advertising-anti>.

⁵¹ See, e.g., FTC, Press Release, Mortgage Broker Targeting U.S. Servicemembers Will Pay Record \$7.5 Million to Settle Alleged Telemarketing Violations (June 27, 2013), available at <http://www.ftc.gov/news-events/press-releases/2013/06/mortgage-broker-targeting-us-servicemembers-will-pay-record-75>; FTC Charges Operation with Selling Bogus Debt Relief Services (June 3, 2014), available at <http://www.ftc.gov/news-events/press-releases/2014/06/ftc-charges-operation-selling-bogus-debt-relief-services>.

⁵² See, e.g., FTC, Press Release, FTC Stops Abusive Debt Collection Operation That Threatened Consumers with Legal Action and Arrest for Not Paying ‘Phantom’ Debts (Sept. 23, 2014), available at <http://www.ftc.gov/news-events/press-releases/2014/09/ftc-stops-abusive-debt-collection-operation-threatened-consumers>; FTC Puts Texas-based Operation Permanently Out of the Debt Collection Business After It Allegedly Used Deception, Insults, and False Threats against Consumers (May 19, 2014), available at <http://www.ftc.gov/news-events/press-releases/2014/05/ftc-puts-texas-based-operation-permanently-out-debt-collection>.

⁵³ See, e.g., FTC, Press Release, FTC Action Halts Payday Loan Scheme That Bilked Tens of Millions From Consumers By Trapping Them Into Supposed “Loans” They Never Authorized (Sept. 17, 2014), available at <http://www.ftc.gov/news-events/press-releases/2014/09/ftc-action-halts-payday-loan-scheme-bilked-tens-millions>; U.S. District Judge Finds that Payday Lender AMG Services Deceived Consumers by Imposing Undisclosed Charges and Inflated Fees (June 4, 2014), available at <http://www.ftc.gov/news-events/press-releases/2014/06/us-district-judge-finds-payday-lender-amg-services-deceived>.

⁵⁴ See, e.g., FTC, Press Release, Defendants Who Allegedly Took Millions from Consumers Trying to Launch Or Succeed in Home-Based Businesses Settle FTC Charges (June 24, 2014), available at <http://www.ftc.gov/news->

bread and butter areas. First, we sued Gerber Products Company for its advertising about its Good Start Gentle infant formula, which we alleged falsely claimed to prevent or reduce the risk of allergies for babies with a family history of allergies.⁵⁶ The *Gerber* case represents our 25th advertising substantiation case filed this year.

Second, the Commission rolled out its “Fraud Affects Every Community” initiative with a day-long conference examining how fraud occurs in groups or communities of different generations, languages, cultural habits, and ethnic backgrounds.⁵⁷

We hope to parallel these policy discussions with enforcement actions that pay particular attention to scammers who target certain communities. For example, just a couple of weeks ago, we brought suit against debt collectors who went after Spanish-speaking consumers, and often sought to collect debts that consumers did not actually owe.⁵⁸ We alleged that the defendants posed as government officials and threatened consumers with arrest, legal actions, and immigration status investigations if they did not make large payments or purchase hundreds of dollars in unwanted goods.

I think that Brandeis would have appreciated our renewed efforts to protect consumers in communities that are heavily affected by fraud. Before he beget the FTC or became a Supreme Court Justice, Brandeis proudly called himself the “people’s lawyer,”⁵⁹ doing similar community legal work in his adopted hometown of Boston.

I would also like to think he would have been proud of how today’s FTC has stayed true to the principles and practices with which he, President Wilson, and other Progressives imbued the agency. As our economy has exploded into an online, high-tech, hyperconnected, big data-driven world, it seems almost miraculous that the FTC has been able to continue to thrive as our founders’ envisioned, through enforcement actions, policy prescriptions, and research based on facts and bipartisan consensus. But as Brandeis himself said, “Most of the things worth doing in the world had been declared impossible before they were done.”⁶⁰ So if you are looking for a

[events/press-releases/2014/06/defendants-who-allegedly-took-millions-consumers-trying-launch-or](http://www.ftc.gov/news-events/press-releases/2014/06/defendants-who-allegedly-took-millions-consumers-trying-launch-or); FTC Halts Multi-Million Dollar Work-From-Home Business Coaching Scheme (Feb. 24, 2014), available at <http://www.ftc.gov/news-events/press-releases/2014/02/ftc-halts-multi-million-dollar-work-home-business-coaching-scheme>.

⁵⁵ See, e.g., FTC, Press Release, FTC Halts Fake Medicare Scheme that Took Money from Seniors’ Bank Accounts (Oct. 2, 2014), available at <http://www.ftc.gov/news-events/press-releases/2014/10/ftc-halts-fake-medicare-scheme-took-money-seniors-bank-accounts>; Marketer of Robocalling Services Banned from Telemarketing (Apr. 17, 2014), available at <http://www.ftc.gov/news-events/press-releases/2014/04/marketer-robocalling-services-banned-telemarketing>.

⁵⁶ FTC, Press Release, FTC Charges Gerber with Falsely Advertising Its Good Start Gentle Formula Protects Infants from Developing Allergies (Oct. 30, 2014), available at <http://www.ftc.gov/news-events/press-releases/2014/10/ftc-charges-gerber-falsely-advertising-its-good-start-gentle>.

⁵⁷ See FTC, Conference Description, Fraud Affects Every Community (last visited Oct. 29, 2014), <http://www.ftc.gov/news-events/events-calendar/2014/10/fraud-affects-every-community>.

⁵⁸ FTC, Press Release, FTC Takes Action to Stop Phantom Debt Scam that Targeted Spanish-Speaking Consumers Nationwide (Oct. 23, 2014), available at <http://www.ftc.gov/news-events/press-releases/2014/10/ftc-takes-action-stop-phantom-debt-scam-targeted-spanish-speaking>.

⁵⁹ Brandeis, Louis. *Opportunity in the Law*, address before the Harvard Ethical Society (May 4, 1905).

⁶⁰ Baron, Joseph L. *A Treasury of Jewish Quotations*. New York: Crown, 1956. 198. Print.

sense of what the FTC will do in the year ahead, look back over our last century. We will continue to do what's worth doing, what may seem impossible, but, trust me, what will get done. We will continue to protect competition and consumers – efficiently, effectively, and equitably – no matter what change the next year – or the next hundred years – brings on.