

PREPARED STATEMENT OF
THE FEDERAL TRADE COMMISSION

on

FISCAL YEAR 2009 FUNDING REQUEST
AND BUDGET JUSTIFICATION

Before the

SUBCOMMITTEE ON FINANCIAL SERVICES
AND GENERAL GOVERNMENT
COMMITTEE ON APPROPRIATIONS

UNITED STATES SENATE

Washington, D.C.
May 14, 2008

I. INTRODUCTION

Chairman Durbin, Ranking Member Brownback, and Members of the Subcommittee, thank you for inviting us to testify today in support of the Federal Trade Commission's (FTC's) FY 2009 Appropriation request and to discuss some of the work we will be doing next year. The Commission looks forward to working with you to further the interests of American consumers.

The FTC, though small, is the one federal agency with both consumer protection and competition jurisdiction across broad sectors of the economy. It enforces, among a broad range of other laws, Section 5 of the Federal Trade Commission Act, which prohibits business practices that are harmful to consumers because they are anticompetitive, deceptive, or unfair.

The Report attached to this testimony, "The FTC in 2008: A Force for Consumers and Competition" provides a detailed overview of the scope of our work. The FTC has pursued a vigorous and effective law enforcement program in a dynamic marketplace that is increasingly global and characterized by changing technologies. Through the efforts of a dedicated staff, the FTC continues to handle a growing workload. This testimony summarizes the FTC's budget request for FY2009, and describes some of its major activities. To meet the challenges of our Consumer Protection and Maintaining Competition goals in FY2009, the FTC requests \$256,200,000 and 1,102 FTE. The FY2009 request represents an increase of \$12,336,000 and 18 FTE over the FY2008 enacted levels.

Looking farther into the future our success will require continued efforts to improve the institutional mechanism through which we execute our responsibilities. In the coming months we will undertake a program to identify the way ahead. Our focus will extend beyond the next

few years, and we will ask what the Agency should look like when our centennial arrives in 2014, and beyond. This self-assessment will include a combination of internal deliberations and external consultations in the United States and overseas with the community of government and non-government bodies that have an interest in competition and consumer protection policy.

II. CONSUMER PROTECTION MISSION

In the consumer protection area, the Commission is active in a variety of efforts to protect the public from unfair, deceptive, and fraudulent practices in the marketplace, including law enforcement targeting telemarketing fraud, deceptive marketing of health care products, consumer fraud against Hispanics, and business opportunity and work-at-home schemes. The Commission also has an active program of consumer and business education and outreach. This testimony highlights seven key priorities for the FTC in FY 2009: financial practices; technology (spyware, spam, and behavioral advertising); Do Not Call; privacy and data security; green claims; food marketing to children; and entertainment industry marketing to children.

A. Financial Practices

The Commission will continue its important work to protect consumers of financial services, focusing on every stage of the consumer credit life cycle, from the advertising and marketing of financial products to debt collection and debt relief. The Commission is particularly concerned at this time about the rise in mortgage foreclosures and delinquencies in the subprime market and its impact on communities.

In the past decade, the Agency has brought 22 actions focused on the mortgage lending industry, with particular attention to the subprime market, alleging that lenders and servicers have engaged in unfair and deceptive advertising and mortgage servicing practices. Through

these cases, the FTC has recovered more than \$320 million for consumer redress. In addition, these cases serve as notice to the industry generally not to engage in the practices identified as unfair or deceptive. Most of these mortgage cases are complex and take considerable resources to investigate and prosecute, often requiring considerable litigation, in order to obtain adequate redress for consumers and other remedies. The Commission continues its important work in this area.

The Agency is currently investigating the ads of a dozen companies for improperly promoting mortgage products, such as ads that announce low “teaser” rates without explaining that those rates apply for a short period of time and can increase substantially after the loan’s introductory period. Commission staff has reviewed hundreds of mortgage advertisements and sent warning letters to 200 mortgage lenders because their ads did not appear to comply with laws the Commission enforces. Staff is examining these companies’ more recent advertisements and, where they are noncompliant, the Commission will follow up by bringing cases.

With the rapid increase in mortgage delinquencies and foreclosures, the FTC has also intensified its efforts to protect consumers from mortgage foreclosure rescue scams. Most of these cases involve allegations of scammers who falsely promise that they can save consumers’ homes from foreclosure.¹ Since February of this year, the Commission has announced four cases targeting such foreclosure rescue scams.² Commission staff also continues to conduct outreach

¹ In testimony on February 13, 2008 before the Senate Special Committee on Aging on foreclosure rescue fraud, the Commission set forth a more complete description of the FTC’s efforts to address such fraud. The FTC’s testimony is available at <http://www.ftc.gov/os/testimony/P064814foreclosure.pdf>.

² *FTC v. Safe Harbour Foundation*, No. 08 C 1185 (N.D. Ill. filed Feb. 25, 2008), available at <http://www.ftc.gov/os/caselist/0823028/index.shtm>; *FTC v. Mortgage Foreclosure*

and to share enforcement resources with state and local authorities through seven regional task forces in cities with high foreclosure rates.

The Commission's actions to protect consumers of financial services extend beyond mortgage lending to a wide range of non-mortgage financial services. Earlier this year, the Commission announced that three payday lenders agreed to settle FTC charges that their advertising violated the Truth in Lending Act by failing to provide interest information required by federal law. This information helps consumers compare the costs of these payday loans to other payday loans and to alternative forms of short-term credit.³ The settlements have been accepted for public comment.

In this economy, consumers with high levels of debt are particularly vulnerable to debt collection abuses, as well as debt negotiation and debt consolidation scams. Last November, the

Solutions, Inc., No. 8:08 CV-00388 (M.D. Fla. filed Feb. 26, 2008) available at <http://www.ftc.gov/os/caselist/0823021/index.shtm>; *FTC v. National Hometeam Solutions, Inc.*, No. 4:08-CV-00067 (E.D. Tex. filed Feb. 26, 2008), available at <http://www.ftc.gov/os/caselist/0823076/index.shtm>. *FTC v. Foreclosure Solutions, LLC*, No. 1-08-CV-01075 (N.D. Ohio filed Apr. 28, 2008), available at <http://www.ftc.gov/os/caselist/0723131/index.shtm>. Last month, The Bear Stearns Companies, Inc. ("Bear Stearns") disclosed that FTC staff has notified its mortgage servicing subsidiary, EMC Mortgage Corporation ("EMC"), that the staff believes EMC and its parent Bear Stearns have violated a number of federal consumer protection statutes in connection with its servicing activities. Bear Stearns further disclosed that FTC staff offered an opportunity to resolve the matter through consent negotiations before seeking approval from the Commission to proceed with the filing of a complaint. According to the disclosure, EMC expects to engage in such discussions with Commission staff. Form 10-K, Bear Stearns Mortgage Funding Trust 2007-AR4 (CIK No. 1393708), at Item 1117 of Reg AB, Legal Proceedings (filed Mar. 31, 2008), available at www.sec.gov/Archives/edgar/data/1393708/000105640408001164/0001056404-08-001164.txt. The FTC cannot comment further on this ongoing law enforcement investigation.

³ *CashPro*, File No. 072-3203 (Feb. 2008); *American Cash Market, Inc.*, File No. 072-3210 (Feb. 2008); *Anderson Payday Loans*, File No. 072-3212 (Feb. 2008) (all available at <http://www.ftc.gov/opa/2008/02/amercash.shtm>).

Commission announced its largest civil penalty in a debt collection case – \$1.375 million.⁴ In addition, the Commission has prosecuted more than 60 companies engaged in deceptive debt negotiation, debt consolidation, and credit repair practices. The Commission plans to continue its important work in this area in FY2009.

B. Technology (Spyware, Spam, and Behavioral Advertising)

The Commission has been at the forefront of protecting consumers from such technological threats as spam and spyware. The Agency has brought more than 100 spam and spyware cases. Earlier this year, the Agency announced its largest civil penalty in a spam case – \$2.9 million – against a company allegedly using deceptive email to offer “free” gifts that were not, in fact, free.⁵

In addition, the Agency identifies and studies potential consumer protection issues raised by new technologies. For example, last week, the Commission hosted a town-hall meeting on mobile marketing, which examined such topics as consumers’ ability to control mobile applications; the challenges presented by small screen disclosures; practices targeting children and teens; evolving security threats and solutions; and next-generation products and services.

The Commission also continues to examine behavioral advertising, the practice of collecting information about consumers’ online habits in order to deliver targeted advertising.⁶ Following a workshop on behavioral advertising last fall, the Commission staff released a set of

⁴ *United States v. LTD Financial Services, Inc.*, Civ. No. H-07-3741 (S.D. Tex. filed Nov. 5, 2007), available at <http://www.ftc.gov/os/caselist/0523012/index.shtm>.

⁵ *United States v. Valueclick*, No. CV08-01711 MMM (rzx) (C.D. Cal. filed Mar. 13, 2008), available at <http://www.ftc.gov/os/caselist/0723111/index.shtm>.

⁶ See <http://www.ftc.gov/bcp/workshops/ehavioral/index.shtml>.

proposed principles to guide the development of self-regulation in this area and sought comment on these principles.⁷ The deadline for comments was April 11; the Agency received numerous detailed and thorough comments, which it is currently reviewing.

C. Do Not Call

The Commission continues aggressively to implement and enforce the National Do Not Call Registry. The Commission is grateful that Congress made participation in the Do Not Call Registry permanent so that consumers will continue to enjoy its benefits without having to re-register. In November 2007, the Commission announced six new settlements and one new federal court action against companies that violated the Do Not Call provisions of the Telemarketing Sales Rule. The six settlements resulted in \$7.7 million dollars in civil penalties for Do Not Call violations.⁸

D. Privacy and Data Security

Privacy and data security continue to be high priorities for the Commission. In the past six months, the Commission announced six new data security cases,⁹ bringing the total number

⁷ See Press Release, FTC Staff Proposes Online Behavioral Advertising Privacy Principles (Dec. 20, 2007), available at <http://www.ftc.gov/opa/2007/12/principles.shtm>.

⁸ See Press Release, FTC Announces Law Enforcement Crackdown On Do Not Call Violators, Nov. 7, 2007, available at <http://www.ftc.gov/opa/2007/11/dncpress.shtm>.

⁹ *United States v. American United Mortgage Company*, No. 07C 7064 (N.D. Ill. filed Dec. 17, 2007), available at <http://www.ftc.gov/opa/2007/12/aumort.shtm>; *Life is good, Inc.*, Docket C-4216 (Apr. 2008), available at <http://www.ftc.gov/os/caselist/0723046/index.shtm>; *In the Matter of Goal Financial, LLC.*, Docket No. C-4216 (Mar. 2008), available at <http://www.ftc.gov/os/caselist/0723013/index.shtm> (settlement accepted for public comment); *United States v. Valueclick*, No. CV08-01711 MMM (rxx) (C.D. Cal. filed Mar. 13, 2008), available at <http://www.ftc.gov/os/caselist/0723111/index.shtm>; *The TJX Companies*, File No. 072-3055 (Mar. 2008), available at <http://www.ftc.gov/os/caselist/0723055/index.shtm> (settlement accepted for public comment); *Reed Elsevier, Inc. and Seisint, Inc.*, File No. 052-

of FTC data security cases to twenty. Most recently, the Commission announced cases against TJX and Reed Elsevier, the parent company of Lexis Nexis, alleging that the companies engaged in unfair practices by failing to employ reasonable and appropriate security measures to safeguard sensitive data. The settlements have been accepted for comment, and would require the companies to implement comprehensive data security programs and third-party assessments biennially for 20 years.¹⁰

The FTC has also been active on data security education. It has distributed more than 3 million copies of its consumer education publication *Take Charge: Fighting Back Against ID Theft*. The FTC also published a guide for businesses on data security, *Protecting Personal Information: A Guide for Business*, and launched an interactive, online video tutorial designed to educate businesses using real-life scenarios. The Agency has also begun to hold regional workshops for businesses on how to plan and manage data security. The first workshop took place April 15 in Chicago.

E. Green Marketing

In response to a virtual explosion of green marketing over the past year, the Commission has accelerated its review of its environmental marketing guidelines, also known as the Green

3094 (Mar. 2008), available at <http://www.ftc.gov/os/caselist/0523094/index.shtm> (settlement accepted for public comment).

¹⁰ *The TJX Companies*, File No. 072-3055 (Mar. 2008), available at <http://www.ftc.gov/os/caselist/0723055/index.shtm>; *In the Matter of Reed Elsevier, Inc. and Seisint, Inc.*, File No. 052-3094 (Mar. 2008), available at <http://www.ftc.gov/os/caselist/0523094/index.shtm>.

Guides.¹¹ In November 2007, the FTC published a Federal Register Notice seeking public comment on the Guides. Given the importance of green marketing and the proliferation of new claims, the Commission also announced that it would hold a series of workshops in aid of the Guide review. The Commission hosted the first of these events on January 8, 2008, addressing the marketing of carbon offsets and renewable energy certificates. The second workshop, on green packaging, took place on April 30, 2008, and a third workshop, on green claims related to textiles and building materials, is planned for this July. The Commission will use the information it receives at these workshops to inform its review of the Green Guides, conduct enforcement actions, and educate consumers.

F. Food Marketing to Children

The Commission continues its efforts to combat childhood obesity. In early August, the Commission issued compulsory process orders to 44 food and beverage companies and quick-service restaurants, asking for information on their expenditures and activities targeted toward children and adolescents. All of the targeted companies have submitted their responses, and staff is analyzing the submissions. Staff will prepare a report, submit it to Congress, and release it publicly this summer. The report will be an important tool for tracking the marketplace's response to childhood obesity and identifying where more action is needed.

G. Entertainment Marketing to Children

The Commission continues to monitor the marketing of violent entertainment to children and encourage industry self-regulation in this area. Since 2000, the FTC has issued six reports

¹¹ See Press Release, FTC Reviews Environmental Marketing Guides, Announces Public Meetings (Nov. 26, 2007), available at <http://www.ftc.gov/opa/2007/11/enviro.shtm>.

on the marketing of movies, music, and video games containing content that may not be appropriate for children.¹² The Commission's reports generally document improvement by all three industries in providing rating or labeling information in advertising. The Commission has also conducted five "undercover shops," in which underage teenagers try to purchase media rated or labeled as containing inappropriate content. These undercover shops have demonstrated steady improvement in retail enforcement of the age ratings.

Last week, the Commission released the results of its fifth undercover shop. These results show improvement, particularly by the video game industry, which denied sales of Mature-rated games to our underage shoppers 80 percent of the time. This is a dramatic improvement from where the industry started eight years ago, when nearly nine out of ten underage shoppers were able to buy these games. There are, however, still areas for improvement. For example, roughly half of our undercover shoppers were able to purchase R-rated or unrated DVDs and explicit content music. The Commission will continue to monitor self-regulatory efforts in this area.

¹² Moreover, in 2006, the Commission initiated and settled an action against Take-Two Interactive Software, Inc. and Rockstar Games, Inc., the creators and distributors of the popular Grand Theft Auto: San Andreas video game, because they advertised the Entertainment Software Rating Board ("ESRB") rating for the game but failed to disclose that the game discs contained potentially viewable sexually explicit content that was unrated by the ESRB. *Take-Two Interactive Software, Inc.*, No. C-4162 (July 21, 2006), available at <http://www.ftc.gov/os/caselist/0523158/0523158.shtm>.

III. COMPETITION MISSION

The Commission has an active enforcement agenda to promote and protect competition, focusing on areas that are highly important to consumers, such as health care, energy, real estate, and high technology and standard setting. The Commission scrutinizes mergers in many industries, filing actions to enjoin those that are likely to be anticompetitive and ordering divestitures where appropriate to preserve competition while allowing the beneficial aspects of the merger to proceed. The Commission also polices anticompetitive conduct, with a particular focus on competitor collaboration and exclusionary conduct. Additionally, the Commission promotes sound competition policy through myriad research and reports, studies, hearings, workshops, advocacy filings, and *amicus* briefs. The Commission is also very active on the international front, developing strong working relationships with foreign antitrust agencies, cooperating on cross-border cases, promoting convergence on competition policies, and offering technical assistance to countries with relatively new competition laws.

This portion of the testimony highlights several important recent developments in the Commission's competition agenda.

A. Health Care (Pay-For-Delay Settlements and Hospital Mergers)

In the health care area, the Commission is continuing its efforts to prevent brand name drug companies from paying generic competitors to stay out of the market, thereby depriving consumers and other payers of significant savings. In February 2008, the Commission filed a case charging that Cephalon, a pharmaceutical manufacturer, engaged in illegal conduct to

prevent competition for its branded drug, Provigil,¹³ by paying four competing firms to refrain from selling generic versions of the drug until 2012.¹⁴ The Commission's complaint alleges that Cephalon's conduct constituted an abuse of monopoly power that is unlawful under Section 5 of the FTC Act. The Commission also has several other exclusion payment ("pay-for-delay settlement") investigations ongoing.

These deals are a growing problem due to two court decisions taking a lenient view of the practice. Between 2000 and 2004, there were no patent settlements in which the generic received compensation and agreed to stay off the market, but after the two court decisions in 2005, there were three such agreements in FY2005 and fourteen in FY2006. The Commission strongly supports legislation to address competitive problems with pay-for-delay settlements. We note that bills have been introduced in both chambers, and thank you, Mr. Chairman, for your sponsorship of the bipartisan Senate bill.¹⁵

Last week the Commission voted to challenge the Inova Health System's proposed acquisition of the Prince William Health System. The proposed merger would combine Inova, the largest hospital system in Northern Virginia, with the Prince William Hospital in Prince William County, Virginia. The Commission alleges that the merger would eliminate the existing, significant price and non-price competition between these hospitals, particularly in the

¹³ Provigil is used to treat excessive sleepiness in patients with sleep apnea, narcolepsy, and shift-work sleep disorder.

¹⁴ *FTC v. Cephalon, Inc.*, No. 1:08-cv-00244 (D.D.C. filed Feb. 13, 2008), available at <http://www.ftc.gov/os/caselist/0610182/080213complaint.pdf>.

¹⁵ Preserve Access to Affordable Generics Act, S. 316, 110th Cong. (2007) (as reported by S. Comm. on the Judiciary).

fast-growing western suburbs of Northern Virginia, leading to higher health care costs for the employers and residents of Northern Virginia.

B. Energy

The Commission shares the concerns of lawmakers, businesses, and American consumers about rapidly increasing prices for crude oil, gasoline¹⁶, diesel fuel, jet fuel, and natural gas, and currently engages in a wide range of activities to prevent improper industry conduct causing such price rises. Under new authority to promulgate regulations provided in Section 811 of the Energy Independence and Security Act of 2007 (EISA), this month the Commission issued an Advance Notice of Proposed Rulemaking (ANPR) regarding manipulation of wholesale crude oil, gasoline, or petroleum distillate markets. The ANPR, available on the Commission's website and in the Federal Register, solicits public comments on determining whether and in what ways the Commission should develop a rule defining and prohibiting market manipulation in the petroleum industry.¹⁷ The 30-day public comment period runs through June 6, 2008, and the Commission anticipates concluding the rulemaking process this year. In addition, Section 812 of that Act prohibits knowingly reporting false data to a federal agency under a mandatory reporting requirement, with the intention of affecting the agency's data compilations for statistical or

¹⁶ The Commission actively and continuously monitors retail and wholesale prices of gasoline and diesel fuel, looking for "unusual" price movements and then examining whether any such movements might result from anticompetitive conduct that violates Section 5 of the FTC Act. FTC economists have developed a statistical model for identifying such movements. The Agency's economists regularly scrutinize price movements in 20 wholesale regions and approximately 360 retail areas across the country.

¹⁷ FTC Seeks Public Comment on Rulemaking to Prohibit Market Manipulation in the Petroleum Industry, Press Release, May 1, 2008, *available at*: <http://www.ftc.gov/opa/2008/05/anpr.shtm>, 73 Fed. Reg. 25614 (May 7, 2008).

analytical purposes. The section provides for Commission enforcement with substantial penalties.

To protect and promote competition in the energy industry, the Commission reviews mergers and investigates pricing and other conduct.¹⁸ Over the past several years, the Commission has challenged many mergers in this industry, obtaining significant divestitures to preserve competition.¹⁹

In the past year, we have acted to block acquisitions in the natural gas and petroleum industries that we believed could raise prices to consumers. In January 2008, Equitable Resources abandoned its proposed acquisition of the Peoples Natural Gas Company, a subsidiary of Dominion Resources, after the Third Circuit took the unusual step of granting the Commission's motion for an injunction pending appeal, and vacated the District Court's ruling dismissing the Commission's complaint.²⁰ The Commission alleged that parties were each others' sole competitors in the distribution of natural gas to non-residential customers in the Pittsburgh area and the transaction would have resulted in a monopoly for many customers. Moreover, in May 2007, the Commission brought an enforcement action in the oil and gasoline industry when it issued an administrative complaint and initiated a federal court action to block

¹⁸ In 2005, the Commission settled an enforcement action charging that Unocal deceived the California Air Resources Board ("CARB") in connection with regulatory proceedings to develop the reformulated gasoline standards that CARB adopted. We believe the settlement continues to result in an estimated \$500 million of consumer savings at the pump each year. See the discussion in Section III.D below.

¹⁹ These include Mobil/Exxon, British Petroleum/Amoco, Chevron/Texaco, and Phillips Petroleum/Conoco.

²⁰ See *FTC v. Equitable Resources, Inc.*, No. 07-2499 (3rd Cir. 2008), available at <http://www.ftc.gov/os/caselist/0610140/080204ftcmovacateequitabledecision.pdf>.

Western Refining, Inc.'s \$1.4 billion proposed acquisition of rival energy company Giant Industries, Inc. The Commission brought the action in an effort to preserve competition in the supply of bulk light petroleum products, including motor gasoline, diesel fuels, and jet fuels, in northern New Mexico. After a week-long trial, the federal district court denied the Commission's motion for a preliminary injunction.²¹ The Commission is continuing to examine and address a wide range of issues in the energy markets.²²

C. Real Estate

In another area critical to consumers, the Commission continues to challenge realtor board rules that restrain competition and hinder consumer choice in markets throughout the country. The Commission's cases allege that associations of competing real estate agents have adopted rules that limit competition from non-traditional and discount brokers by restricting these brokers from, in part, placing listings on MLS Internet sites, thus harming consumers who may prefer to list with less expensive or non-traditional brokers. Six of our cases were resolved

²¹ The Commission subsequently dismissed its administrative complaint, concluding that further prosecution would not be in the public interest.

²² For example, in November 2007, the Commission issued its third annual report on the state of ethanol production in the U.S. The report noted that, as of September 2007, 13 firms had entered into the production of ethanol during the preceding year, bringing the total number of U.S. producers to 103. As new firms have entered, the market, which is unconcentrated by any measure of capacity or production, has become even more unconcentrated. 2007 Federal Trade Commission Report of Ethanol Market Concentration (Nov. 2007) *available at* <http://www.ftc.gov/reports/ethanol/2007ethanol.pdf>.

Additionally, the Commission is preparing its first report for the Committees on Appropriations summarizing the Commission's activities relating to ongoing reviews of mergers, acquisitions, and other transactions in the oil and natural gas industries, the investigation of pricing behavior or any potential anticompetitive actions in those industries, and the resources that the Commission has devoted to such reviews and investigations during the six-month period.

by consent order requiring each realtor board to discontinue enforcing the policies that, the Commission alleged, kept nontraditional brokers from competing. A seventh investigation led to an administrative complaint against a realtor group, which after a full administrative trial and dismissal of the complaint against the realtors by the ALJ is on appeal before the Commission. Oral arguments were held in April, and a Commission opinion is expected in the next months. The Commission also settled an action raising similar concerns with a Milwaukee-based realtor group in the past year.²³

D. High Technology and Standard Setting

The Commission continues to remain vigilant against mergers and conduct that would distort competition in the high technology industry. One such enforcement case that the Commission has brought is the case against Rambus. In June 2002, the Commission charged Rambus with unlawfully monopolizing four computer memory technologies that were incorporated into industry standards for dynamic random access memory chips, widely used in personal computers, servers, printers, and cameras. In July 2006, the Commission found that Rambus had illegally acquired monopoly power through exclusionary acts, and issued an order limiting the royalty rates Rambus may collect under its licensing agreements.²⁴ On April 22, 2008, the D.C. Circuit Court of Appeals set aside the Commission's Order and remanded the case for further proceedings before the Commission. The Commission is reviewing the Court of

²³ Press Release, FTC Charges Milwaukee MLS with Illegally Restraining Competition (Dec. 12, 2007), *available at* <http://www.ftc.gov/opa/2007/12/mls.shtm>.

²⁴ Press Release, FTC Issues Final Opinion and Order in Rambus Matter (Feb. 5, 2007), *available at* <http://www.ftc.gov/opa/2007/02/070502rambus.htm>.

Appeals opinion and will decide in the next few weeks whether to appeal the decision to the full D.C. Circuit or the Supreme Court.

The Commission has previously addressed the substantial consumer harm, including higher prices, that can result from the alleged abuse of standard-setting processes. In 2003, the Commission successfully challenged Unocal's alleged illegal acquisition of monopoly power in the technology market for producing Phase 2 "summer-time" gasoline – a formulation of low-emissions gasoline mandated for sale and use in California for up to eight months of the year – by misrepresenting that certain information was non-proprietary and in the public domain, while at the same time pursuing patents that would enable it to charge substantial royalties if the information was incorporated into California Air Resources Board ("CARB") standards. The complaint alleged that Unocal induced CARB to adopt standards for this gasoline that substantially overlapped with Unocal's patent rights. The Commission's success is estimated to have saved California consumers over \$500 million dollars per year at the pump.

E. Other

The Commission's efforts to maintain competition are not limited to high profile industries. In January 2008, the U.S. Court of Appeals for the Fifth Circuit upheld a Commission order requiring Chicago Bridge & Iron Co., N.V. and its United States subsidiary (CB&I) to divest assets acquired from Pitt-Des Moines, Inc. used in the business of designing, engineering, and building field-erected cryogenic storage tanks.²⁵ The Commission had ruled in 2005 that

²⁵ *FTC v. Chicago Bridge & Iron Co.*, No. 05-60192 (5th Cir. 2008) available at <http://www.ftc.gov/os/adjpro/d9300/080125opinion.pdf>.<http://www.ftc.gov/opa/2008/01/cbi.shtm>

CB&I's acquisition of these assets in 2001, would likely result in a substantial lessening of competition or tend to create a monopoly in four markets for industrial storage tanks in the United States. The court endorsed the Commission's findings that the merged firms controlled over 70 percent of the market, and that new entry was unlikely given the high entry barriers and based on the incumbents' reputation and control of skilled crews.

The Commission continues to appeal its case against Whole Foods Market, Inc.'s acquisition of its chief rival, Wild Oats Markets, Inc., on the grounds that the district court failed to apply the proper legal standard that governs preliminary injunction applications by the Commission in Section 7 cases. The Court of Appeals for the District of Columbia Circuit heard oral arguments on this case on April 23, 2008.

IV. NEEDED RESOURCES FOR FISCAL YEAR 2009

To meet the challenges of its Consumer Protection and Maintaining Competition goals in FY 2009, the FTC requests \$256,200,000 and 1,102 FTE. The FY2009 request represents an increase of \$12,336,000 and 18 FTE over the FY2008 enacted levels.

The Commission seeks these additional resources to continue to build on its record of accomplishments in enhancing consumer protection and protecting competition in the United States and, increasingly, abroad. The increase of \$12,336,000 that the Commission is seeking in FY2009 includes:

- \$7,989,000 in mandatory cost increases associated with contract expenses (CPI adjustment) and personnel (salaries and with-in-grade increases);

- \$2,847,000 for 18 additional FTE
 - 10 FTE for Consumer Protection to protect consumers from unfair and deceptive practices in the financial services marketplace; protect consumers' privacy; improve compliance with FTC orders; pursue foreign-located evidence of fraud perpetrated against U.S. consumers; advocate the adoption of foreign data privacy laws and procedures that are compatible with American law; and provide support for the effective operation of this program; and
 - 8 FTE for Maintaining Competition to meet the increased workload required to challenge anticompetitive mergers and assure that the marketplace is free from anticompetitive business practices in the health care, pharmaceutical, energy, and technology sectors; promote convergence in competition policy of foreign enforcement practices; and provide support for the effective operation of this program;
- \$1,500,000 for non-FTE program needs:
 - \$1,100,000 for Consumer Protection:
 - \$500,000 for "Green" marketing research, education campaign, and enforcement;
 - \$250,000 for high-tech tools to stop fraudsters;
 - \$250,000 for marketing and advertising of food to children; and
 - \$100,000 for privacy and identity theft and deceptive and unfair practices in mobile marketing; and

- \$400,000 for Maintaining Competition to meet the challenges of an increased enforcement agenda and associated litigation and outreach efforts.

The majority of the funding for the FTC's FY 2009 budget request will be derived from offsetting collections; HSR filing fees and Do Not Call fees will provide the Agency with an estimated \$189,800,000 in FY 2009. The FTC anticipates that the remaining funding needed for the Agency's operations will be through a direct appropriation of \$66,400,000 from the General Fund in the U.S. Treasury.

The FTC appreciates the strong support it has received from Congress to serve its critical mission of protecting the American consumer and ensuring competition in the marketplace. With the increased funding made available to the FTC in the FY2008 appropriation for high priority activities including subprime lending, identity theft, the U.S. SAFE WEB Act, market manipulation of petroleum, maintaining competition, and training and technical assistance for developing nations, the FTC will be able to address critical consumer problems at present and anticipate, adapt, and mitigate the challenges of the future.

V. CONCLUSION

We appreciate the opportunity to appear before you today to discuss the Commission's work and our FY2009 budget request, and look forward to continuing to work together.