

**Prepared Statement of
the Federal Trade Commission**

**Before the
Antitrust Task Force**

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

**Washington, D.C.
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I. Introduction

Chairman Conyers, Ranking Member Keller, and Members of the Task Force, I am Deborah Platt Majoras, Chairman of the Federal Trade Commission (“FTC” or “Commission”).¹ The Commission has great respect for the Congressional oversight process, and I am pleased to appear before you to present the testimony of the FTC providing an overview of the Commission’s recent antitrust enforcement activities.

Competition is the critical underpinning of the free and open markets that are the foundation of a vibrant economy. The goal of the Commission’s competition mission is to remove the obstacles that impede competition and prevent its benefits from flowing to consumers.

The Commission has been active in protecting consumers from anticompetitive mergers and anticompetitive conduct. Through 11 months of fiscal year 2007, the agencies have received 1967 premerger filings, an increase of 23 percent from the same time period of fiscal year 2006. Reflecting an increase in investigative activity, the number of requests for additional information issued by the Commission increased over the same period. The Commission’s merger enforcement actions also have increased this year. Thus far in fiscal year 2007, there have been 21 mergers in which the Commission brought merger enforcement actions to preserve competition or the parties abandoned proposed mergers after Commission staff expressed concerns about anticompetitive harm. This number includes three litigated preliminary injunction actions in federal district court seeking to block proposed mergers involving

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

petroleum refiners, natural gas companies, and premium natural and organic supermarkets. Also this year, the Commission has brought 12 nonmerger enforcement actions. The Commission continues to focus its enforcement efforts on sectors of the economy that have the greatest impact on consumers, such as health care, energy, retail, technology, and real estate.

II. Health Care

The health care industry plays a crucial role in the U.S. economy in terms of the impact that it has on consumer spending and welfare. Health care expenditures in the United States represent almost \$2 trillion and have been increasing steadily for the last 30 years. The Commission dedicates substantial resources to protecting health care consumers. The agency investigated, and challenged where appropriate, agreements among pharmaceutical companies and physicians that deprive consumers of lower prices and higher quality. The Commission also has challenged several mergers and achieved substantial relief for consumers in the areas of generic drugs, over-the-counter medications, injectable analgesics, and other medical devices and diagnostic services.

A. Pharmaceuticals

The Commission was particularly active in enforcing the antitrust laws in the pharmaceutical industry. In October 2006, the FTC challenged Barr Pharmaceuticals' proposed acquisition of Pliva.² In settling the Commission's charges, Barr is required to divest its generic antidepressant, trazodone, and its generic blood pressure medication, triamterene/HCTZ. Barr is also required to divest either Pliva's or Barr's generic drug for use in treating ruptured blood

² *In the Matter of Barr Pharms., Inc.*, FTC Docket No. C-4171 (finalized Nov. 22, 2006) (decision and order), *available at* http://www.ftc.gov/os/caselist/0610217/0610217barrdo_final.pdf.

vessels in the brain. Finally, Barr is required to divest Pliva's branded organ preservation solution.

Also in October 2006, the FTC protected competition for thirteen generic drug products by challenging Watson Pharmaceuticals, Inc.'s acquisition of Andrx Corporation. In settling the charges, the Commission issued an order requiring that Watson: (1) end its marketing agreements with Interpham Holdings, Inc.; (2) assign and divest the Andrx rights necessary to develop, make, and market generic extended release tablets that correct the effects of type 2 diabetes; and (3) divest Andrx's rights and assets related to the developing and marketing of 11 oral contraceptives.³

In December 2006, the Commission challenged Johnson & Johnson's proposed \$16.6 billion dollar acquisition of Pfizer's consumer health division to preserve competition for certain over-the-counter medications. The Commission order settling the charges requires that Pfizer sell its Zantac, Cortizone, and Unisom divisions as well as Johnson & Johnson's Balmex division. At issue in this matter was competition for non-prescription H-2 blockers, hydrocortisone anti-itch products, nighttime sleep aids, and diaper rash treatments.⁴

In January 2007, the Commission challenged Hospira Inc.'s proposed \$2 billion acquisition of rival drug manufacturer Mayne Pharma Ltd. The Commission's order requires the companies to sell assets used to manufacture and supply five generic injectable pharmaceuticals

³ *In the Matter of Watson Pharms., Inc., and Andrx Corp.*, FTC Docket No. C-4172 (finalized Dec. 12, 2006) (decision and order), available at http://www.ftc.gov/os/caselist/0610139/061212do_public_ver0610139.pdf.

⁴ *In the Matter of Johnson & Johnson and Pfizer Inc.*, FTC Docket No. C-4180 (finalized Jan. 16, 2007) (decision and order), available at http://www.ftc.gov/os/caselist/0610220/0610220c4180decisionorder_publicversion.pdf.

and thereby preserves competition in the markets at issue.⁵

In April 2007, the Commission challenged the Actavis Group hf.'s proposed acquisition of Abrika Pharmaceuticals, Inc., alleging that the transaction would create a monopoly in the U.S. market for generic isradipine capsules, a drug typically prescribed to patients to lower their blood pressure and to treat hypertension, ischemia, and depression. Under a consent order that allowed the deal to proceed, the companies divested all rights and assets needed to make and market generic isradipine capsules to Cobalt Laboratories, Inc., an independent competitor.⁶

1. Agreements that Delay Generic Entry

The Commission continues to be vigilant in the detection and investigation of agreements between drug companies that delay generic entry, including investigating some patent settlement agreements between pharmaceutical companies that are required to be filed with the Commission under the Medicare Prescription Drug, Improvement, and Modernization Act of 2003. In these “exclusion payment settlements” (or, to some, “reverse payment settlements”), a brand-name drug firm pays a potential generic competitor to abandon its patent challenge and delay entering the market. Such settlements restrict competition at the expense of consumers, whose access to lower-priced generic drugs is delayed, sometimes for many years. These anticompetitive patent settlement present one of the greatest threats American consumers face today.

Recent court decisions, however, have made it more difficult to bring antitrust cases to

⁵ *In the Matter of Hospira, Inc. and Mayne Pharma Ltd.*, FTC Docket No. C-4182 (finalized Mar. 21, 2007) (decision and order), available at <http://www.ftc.gov/os/caselist/0710002/070323do0710002.pdf>.

⁶ *In the Matter of Actavis Group*, FTC Docket No. C-4190 (finalized May 18, 2007) (decision and order), available at <http://www.ftc.gov/os/caselist/0710063/index.shtm>.

stop exclusion payment settlements, and the impact of those court rulings is becoming evident in the marketplace. These developments threaten substantial harm to consumers and others who pay for prescription drugs. For that reason, the Commission supports a legislative solution to prohibit these anticompetitive settlements, while allowing exceptions for those agreements that do not harm competition.⁷

In the meantime, the Commission continues to investigate, and challenge, where appropriate, anticompetitive agreements that limit consumer access to lower-priced generic drugs. The Commission's challenge to an alleged anticompetitive agreement involving Ovcon, a branded oral contraceptive product, has led to the introduction of lower priced generic products. In November 2005, in the case of *F.T.C. v. Warner Chilcott Holdings Company III, Ltd.*, the Commission filed a complaint in federal district court seeking to put an end to an agreement between drug manufacturers Warner Chilcott and Barr Laboratories that, by allegedly violating the antitrust laws, denied consumers the choice of a lower-priced generic version of Warner Chilcott's Ovcon 35.⁸ Under threat of a preliminary injunction sought by the FTC, in September 2006 Warner Chilcott waived the exclusionary provision in its agreement with Barr that prevented Barr from entering with its generic version of Ovcon. The next day, Barr announced

⁷ See *Anticompetitive Patent Settlements in the Pharmaceutical Industry - The Benefits of a Legislative Solution: Hearing Before the Senate Committee on the Judiciary* (2007) (Prepared Statement of the FTC, Presented by Jon Leibowitz, Commissioner), available at http://www.ftc.gov/speeches/leibowitz/070117anticompetitivepatentsettlements_senate.pdf.

⁸ *FTC v. Warner-Chilcott Holdings Co. III*, No 1:05-cv-02179-CKK (D.D.C. filed Nov. 7, 2005) (complaint filed), available at <http://www.ftc.gov/os/caselist/0410034/051107comp0410034%20pdf>.

its intention to start selling a generic version of the product.⁹ Under an agreement settling the case, entered in October 2006, Warner Chilcott must: (1) refrain from entering into agreements with generic pharmaceutical companies in which the generic agrees not to compete with Warner Chilcott and there is either a supply agreement between the parties or Warner Chilcott provides the generic with anything of value and the agreement adversely effects competition; (2) notify the FTC whenever it enters into supply or other agreements with generic pharmaceutical companies; and (3) for three months, take interim steps to preserve the market for the tablet form of Ovcon in order to provide Barr the opportunity to compete with its generic version.¹⁰ Though Warner Chilcott settled, the FTC's case against Barr is ongoing. Today, consumers are enjoying the full benefits of competition and are able to choose between Barr's generic product, an authorized generic product, and the original branded product.¹¹ The Commission is proud of this result and is actively seeking other cases where it can directly benefit consumers of generic drugs.

B. Medical Devices and Diagnostic Systems

This past year, the Commission actively enforced the antitrust laws against transactions that it believes would have reduced competition for several types of medical devices and

⁹ FTC News Release, *Consumers Win as FTC Action Results in Generic Ovcon Launch* (Oct. 23, 2006), available at <http://www.ftc.gov/opa/2006/10/chilcott.htm>.

¹⁰ *FTC v. Warner-Chilcott Holdings Co. III*, No. 1:05-cv-02179-CKK (D.D.C. filed Oct. 23, 2006) (stipulated final permanent injunction and final order), available at <http://www.ftc.gov/os/caselist/0410034/finalorder.pdf>.

¹¹ FTC News Release, *Consumers Win as FTC Action Results in Generic Ovcon Launch* (Oct. 23, 2006), available at <http://www.ftc.gov/opa/2006/10/chilcott.htm>. Though Warner Chilcott settled in October 2006, the FTC's case against Barr is ongoing. *FTC v. Warner Chilcott Holdings Co. III*, No. 1:05-cv-02179-CKK (D.D.C. filed Oct. 23, 2006) (stipulated permanent injunction and final order), available at <http://www.ftc.gov/os/caselist/0410034/finalorder.pdf>.

diagnostic systems. In July 2006, the Commission challenged the \$27 billion acquisition of Guidant Corporation by Boston Scientific Corporation to preserve competition in markets for life-saving medical devices. These two companies are the largest market share holders in several coronary medical device markets in the United States, together accounting for 90 percent of the U.S. percutaneous transluminal coronary angioplasty balloon catheter market and 85 percent of the U.S. coronary guidewire market. The Commission order resolving the charges required the divestiture of Guidant's vascular business to an FTC-approved buyer.¹²

In August 2006, the Commission challenged Hologic, Inc.'s proposed acquisition of Fischer Imaging to preserve competition in the market for breast cancer diagnostics, specifically for prone stereotactic breast biopsy systems. The Commission consent order required the divestiture of the key biopsy system assets to Siemens, a company well-positioned to become a competitor in this market.¹³

In December 2006, the Commission challenged the proposed \$12.8 billion merger between Thermo Electron and Fisher Scientific. The Commission's order requires that Thermo Electron divest Fisher's Genevac division, thereby maintaining competition in the market for centrifugal vacuum evaporators, a tool used in the health care industry.¹⁴

¹² *In the Matter of Boston Scientific Corp. and Guidant Corp.*, FTC Docket No. C-4164 (July 21, 2006) (decision and order), available at <http://www.ftc.gov/os/caselist/0610046/060725do0610046.pdf>.

¹³ *In the Matter of Hologic, Inc.*, FTC Docket No. C-4165 (Aug. 9, 2006)(decision and order), available at <http://www.ftc.gov/os/caselist/0510263/0510263decisionandorderpubrecver.pdf>.

¹⁴ *In the Matter of Thermo Electron Corp.*, FTC Docket No. C-4170 (Nov. 30, 2006) (decision and order), available at <http://www.ftc.gov/os/caselist/0610187/061205do0610187.pdf>.

C. Hospitals and Clinics

The Commission has worked vigorously to preserve competition in local hospital markets. Last month, the Commission ruled that Evanston Northwestern Healthcare Corporation's acquisition of Highland Park Hospital was anticompetitive,¹⁵ upholding an October 2005 Initial Decision by an FTC Administrative Law Judge that the consummated acquisition of its important competitor, Highland Park Hospital, resulted in substantially higher prices and a substantial lessening of competition for acute care inpatient hospital services in parts of Chicago's northern suburbs.¹⁶ Several other hospital mergers have been announced within the past several months, and the FTC has active investigations pending.

In September 2007, the Commission protected competition for kidney dialysis patients by challenging an agreement between American Renal Associates, Inc. and Fresenius Medical Care Holdings, Inc. to close Fresenius clinics close to competing ARA clinics and for ARA to acquire other Fresenius clinics. The Commission alleged that this agreement would have eliminated direct competition between ARA and Fresenius and resulted in ARA operating the only dialysis clinics in certain local markets in Rhode Island and Massachusetts. The parties terminated their agreement after Commission staff objected. A proposed Commission order, subject to public comment through October 9, 2007, prevents the parties from entering into similar agreements in

¹⁵ *In the Matter of Evanston Northwestern Healthcare Corp.*, FTC Docket No. 9315 (Aug. 6, 2007) (Opinion of the Commission), available at <http://www.ftc.gov/os/adjpro/d9315/070806opinion.pdf>.

¹⁶ *In the Matter of Evanston Northwestern Healthcare Corp.*, FTC Docket No. 9315 (Oct. 20, 2005) (initial decision), available at <http://www.ftc.gov/os/adjpro/d9315/051021idtextversion.pdf>.

the future.¹⁷

D. Physicians and Dentists

The Commission continues to investigate and challenge unlawful price fixing and other restraints by health care providers that may lead to higher costs for consumers.

In August 2006, the Commission challenged agreements among 30 competing members of the Puerto Rico Association of Endodontists that the Commission believes led to higher costs for consumers. The Commission alleged that the members had agreed to set the prices they would charge dental insurance plans and had refused to deal with plans that would not accept the collectively determined prices. The Commission settled the matter by approving a final order that prohibited the members from engaging in such conduct.¹⁸

Also in August 2006, in the matter of New Century Health Quality Alliance, the Commission approved a final consent order settling charges against two independent practice associations and eighteen member physician practices in the Kansas City area. The Commission's Complaint challenged the independent practice associations' and physician practices' alleged refusal to deal with health care plans, except on collectively agreed-upon terms, including price.¹⁹

¹⁷ *In the matter of American Renal Associates, Inc.*, FTC File No. 051-0234 (complaint), available at <http://www.ftc.gov/os/caselist/0510234/index.shtm>.

¹⁸ *In the Matter of Puerto Rico Ass'n of Endodontists, Corp.*, FTC Docket No. C-4166 (finalized Aug. 24, 2006) (decision and order), available at <http://www.ftc.gov/os/caselist/0510170/0510170c4166praedecisionorder.pdf>.

¹⁹ *In the Matter of New Century Health Quality Alliance, Inc.*, FTC Docket No. C-4169 (Sept. 29, 2006) (decision and order), available at <http://www.ftc.gov/os/caselist/0510137/0510137nchqaprimeedecisionorder.pdf>.

In February 2007, the FTC challenged agreements among organizations representing more than 2,900 independent physicians in the Chicago area. The charges involved Advocate Health Partners (a “super-PHO” with numerous physician-hospital organizations as members), which, along with ten related parties, collectively set prices that otherwise independent physicians would charge to health plans, without any sort of efficiency-enhancing integration among the member practices that would justify their conduct. Specifically, the Commission alleged that AHP negotiated contract rates with health plans on behalf of its members, terminated member contracts with a health plan that rejected a proposed collective rate, and threatened that it would not contract with a health plan for hospital services unless that plan stopped contracting with individual physicians and agreed instead to a group contract. The Commission settled the charges and approved a consent order that prohibits AHP and the other named parties from engaging in such anticompetitive conduct in the future.

Some time after the allegedly unlawful conduct in this case began, AHP and the other respondents developed and implemented a clinical integration plan, seeking to integrate the member practices in such a way as to justify collective rate-setting. The Commission has made no determination on the legality of the plan, and although the order does not prohibit the parties from proceeding with it, it does contain mechanisms allowing the Commission to monitor the ongoing development, implementation, and results of the plan. The Commission fully intends to continue this monitoring, and retains the ability to challenge conduct related to the plan if it determines at any time that such a challenge is warranted and in the public interest.

In June 2007, the Commission announced a settlement of its 2003 administrative complaint charging that the South Carolina State Board of Dentistry, composed primarily of

practicing dentists, unlawfully restrained competition by adopting a rule that required a dentist to examine every child before a dental hygienist could provide preventive care. The South Carolina State Board of Dentistry's restriction resulted in far fewer children, particularly underprivileged children, receiving care. The Commission's action protected access to preventive dental services for children in school programs by requiring the Board to publicly announce its support for the current state policy – that hygienists can provide such care in public health settings without a dentist's examination – and to notify the Commission before adopting rules or taking other actions related to preventive dental services provided by dental hygienists in public health settings.²⁰

In July 2007, the Commission charged a Puerto Rico optometrists' group and two of its leaders with price fixing. The Commission's complaint alleged that a group representing all optometrists in Puerto Rico refused, and threatened to refuse, to deal with payors, unless the payors raised the fees paid to the optometrists. The consent order bars the group's doctors from jointly negotiating prices or terms of service, while allowing them to participate in legal joint arrangements.²¹

III. Energy

Few issues are more important to American consumers and businesses than the decisions being made about current and future energy production and use. The Commission plays a key

²⁰ *In the Matter of South Carolina State Board of Dentistry*, FTC Docket No. D-9311 (June 20, 2007) (decision and order), available at <http://www.ftc.gov/os/adjpro/d9311/070620decision.pdf>.

²¹ *In the Matter of Colegio de Optometras*, FTC Docket No. C-4199 (finalized Sept. 6, 2007) (decision and order), available at <http://www.ftc.gov/os/caselist/0510044/070911decision.pdf>.

role in maintaining competition and protecting consumers in energy markets. In doing so, the Commission has assembled vast competition policy and enforcement expertise in matters affecting the production and distribution of gasoline and natural gas liquids used in heating and other industrial applications. The agency invokes all the powers at its disposal – including investigation of possible antitrust violations, prosecution of cases, industry studies and analyses, and advocacy before other government agencies – to protect consumers from anticompetitive conduct in the energy sector. So far in 2007, the Commission has challenged three mergers in the energy industry.

In January 2007, the Commission challenged the terms of a proposed \$22 billion deal whereby energy firm Kinder Morgan would be taken private by its management and a group of investment firms, including The Carlyle Group and Riverstone Holdings.²² The Commission alleged in its complaint that Carlyle and Riverstone held significant positions in Magellan Midstream, a major competitor of Kinder Morgan in the terminaling of gasoline and other light petroleum products in the southeastern United States, and that the proposed transaction would threaten competition in those markets. In settling the Commission's charges, Carlyle and Riverstone agreed to turn their investment in Magellan passive and to restrict the flow of sensitive information between Kinder Morgan and Magellan.

This past spring, the Commission challenged Equitable Resources' proposed acquisition

²² FTC News Release, *FTC Challenges Acquisition of Interests in Kinder Morgan, Inc. by The Carlyle Group and Riverstone Holdings* (Jan. 25, 2007), available at <http://www.ftc.gov/opa/2007/01/kindermorgan.shtm>.

of The Peoples Natural Gas Company, a subsidiary of Dominion Resources.²³ Equitable and Dominion Peoples are each other's sole competitors in the distribution of natural gas to nonresidential customers in certain areas of Allegheny County, Pennsylvania, which includes Pittsburgh. In March, the Commission filed an administrative complaint against the acquisition, and in April, the staff sought an injunction in federal district court. Both actions alleged that the proposed transaction would result in a monopoly for many customers who now benefit from competition between the two firms. The district court denied the Commission's request for an injunction, asserting that because the Pennsylvania Utility Commission has the power to approve the merger, the Commission is banned from taking action under the state action doctrine. The Third Circuit has issued an injunction pending appeal, and the appeal will be argued on October 3, 2007.

In the most recent petroleum merger challenge, the Commission challenged Western Refining's acquisition of Giant Industries to preserve competition in the bulk supply of light petroleum products to northern New Mexico, an area of the country where the Commission alleged that the two companies are direct and significant competitors.²⁴ The Commission's complaint for a preliminary injunction filed in federal court and its subsequently issued administrative complaint alleged that, if it were not acquired by Western, Giant would soon increase the supply of gasoline to northern New Mexico, and that the transaction as proposed

²³ *FTC v. Equitable Resources, Inc., Dominion Resources, Inc., et al.*, No. 07-cv-490 (W.D. Pa. filed April 13, 2007) (complaint filed), available at <http://www.ftc.gov/os/adjpro/d9322/070413cmpltforpi-tro.pdf>.

²⁴ FTC News Release, *FTC Files Complaint in Federal District Court Seeking to Block Western Refining's Acquisition of Rival Energy Company Giant Industries, Inc.* (April 12, 2007), available at http://www.ftc.gov/opa/2007/04/westerngiant_tro.shtm.

would prevent this. The U.S. district judge in New Mexico denied the Commission's request for a preliminary injunction, and the Commission has withdrawn its administrative complaint in order to consider whether to continue the litigation.

In November 2006, Chevron and USA Petroleum abandoned a transaction in which Chevron would have acquired most of the retail gasoline stations owned by USA Petroleum, the largest remaining chain of service stations in California not controlled by a refiner. USA Petroleum's president acknowledged that the parties abandoned the transaction because of resistance from the FTC.²⁵

Consistent with past practice, the Commission continues to monitor retail gasoline and diesel prices in 360 cities and wholesale prices in 20 major markets across the country to identify possible anticompetitive activities and determine whether a law enforcement investigation is warranted. If Commission staff members detect unusual price movements in an area, they research the possible causes and consult, when appropriate, with state attorneys general, state energy agencies, and the federal Energy Information Administration. If evidence of anticompetitive conduct is found, the Commission will open an investigation and pursue all appropriate law enforcement action.

The Commission also actively monitors energy markets, and markets for related consumer products, for anticompetitive conduct. In June 2007, the Commission charged the American Petroleum Company, Inc. with illegally conspiring with its competitors to restrict the

²⁵ See Elizabeth Douglass, *Chevron Ends Bid to Buy Stations*, L.A. TIMES, Nov. 18, 2006, available at <http://www.latimes.com/business/la-fi-chevron18nov18,1,7256145.story?coll=la-headlines-business&ctrack=1&cset=true>.

importation and sale of motor oil lubricants in Puerto Rico, in an attempt to force the legislature to repeal a law that charged importers and others within the distribution chain an environmental deposit of 50 cents for each quart of lubricants purchased.²⁶ Specifically, the Commission alleged that American Petroleum agreed with its competitors to boycott the import and sale of lubricants into Puerto Rico beginning on the day the law took effect and to continue the boycott until the law was repealed. This per se illegal conduct hurt the consumers of Puerto Rico. The Commission's consent order bars American Petroleum from engaging in such conduct in the future.

On April 25, 2006, President Bush directed the Department of Justice ("DOJ") to join the FTC and the Department of Energy ("DOE") to inquire into "illegal manipulation or cheating related to the current gasoline prices."²⁷ Accordingly, staff of the FTC and the DOJ Antitrust Division, with assistance from the DOE's Energy Information Administration, conducted an economic analysis and investigation of the likely factors that led to higher national average gasoline prices during the spring and summer of 2006. This study identified six major factors that contributed to price increases during the spring and summer of 2006: (1) the market effects of the summer driving season; (2) an increase in the price of crude oil; (3) an increase in the price of ethanol; (4) capacity issues related to the transition to ethanol from methyl tertiary-butyl ether, a gasoline additive; (5) refinery outages; and (6) increased demand. A report detailing the

²⁶ *In the Matter of American Petroleum Company, Inc.*, FTC File No. 061-0229 (June 14, 2007) (decision and order), available at <http://www.ftc.gov/os/caselist/0610229/0610229decisionorder.pdf>

²⁷ President George W. Bush, Remarks to the Renewable Fuels Summit 2006 (Apr. 25, 2006), available at <http://www.whitehouse.gov/news/releases/2006/04/20060425.html>.

findings was sent to the President in August 2007.²⁸

In May 2006, the Commission released its report on gasoline price manipulation and post-Katrina gasoline price increases.²⁹ This report contained the findings of a Congressionally-mandated FTC investigation into whether gasoline prices nationwide were “artificially manipulated by reducing refinery capacity or by any other form of market manipulation or price gouging practices.” The report also contains the agency’s findings concerning gasoline pricing by refiners, large wholesalers, and retailers in the aftermath of Hurricane Katrina. In its investigation, the FTC examined evidence relating to a broad range of possible forms of manipulation. It found no instances of illegal market manipulation leading to higher prices during the relevant time periods, but found fifteen examples of pricing at the refining, wholesale, or retail level that fit the relevant legislation’s definition of evidence of “price gouging.” Other factors such as regional or local market trends, however, appeared to explain these firms’ prices in nearly all cases. The report reiterated the Commission’s position that federal gasoline price gouging legislation, in addition to being difficult to enforce, could cause more problems for consumers than it solves, and that consumers are likely to be better off if competitive market forces are allowed to determine the price for gasoline that drivers pay at the pump.

²⁸ “*Federal Trade Commission Report on Spring Summer 2006 Nationwide Gasoline Price Increases*” (August 30, 2006), available at <http://www.ftc.gov/reports/gasprices06/P040101Gas06increase.pdf>. Commissioner Leibowitz dissented from the Report. See <http://www.ftc.gov/speeches/leibowitz/P010401gas06dissent.pdf>.

²⁹ Federal Trade Commission, *Investigation of Gasoline Price Manipulation and Post-Katrina Gasoline Price Increases* (Spring 2006), available at <http://www.ftc.gov/reports/060518PublicGasolinePricesInvestigationReportFinal.pdf>. But see Concurring Statement of Commissioner Jon Leibowitz, available at <http://www.ftc.gov/speeches/leibowitz/060518LeibowitzStatementReGasolineInvestigation.pdf>.

In December 2006, the FTC issued a report that examined the current state of ethanol production in the United States and measured market concentration using capacity and production data.³⁰ The study, which is the second in a series of annual reports, concludes that U.S. ethanol production currently is not highly concentrated, and that market concentration has decreased over the past year by between 21 and 35 percent. The study also examined the possible effect on concentration of agreements between ethanol producers and third-party marketers. These findings on the level of concentration in ethanol production do not justify a presumption that a single firm, or a small group of firms, could wield sufficient market power to set or coordinate price or output levels. As the report notes, staff cannot rule out the possibility that future mergers within the industry may raise competitive concerns.³¹ The FTC is currently working on a 2007 study of the ethanol market.

IV. Real Estate

Purchasing or selling a home is one of the most significant financial transactions most consumers will ever make, and anticompetitive industry practices can raise the prices of real estate services. In the past year, the agency has brought eight enforcement actions against associations of competing realtors or brokers. The associations, which control multiple listing services, adopted rules that allegedly discouraged consumers from entering into non-traditional listing contracts with real estate brokers. These actions ensure that consumers who choose to

³⁰ FTC News Release, *FTC Issues 2006 Report to Congress on Ethanol Market Concentration* (Dec. 5, 2006), available at <http://www.ftc.gov/opa/2006/12/fyi0678.htm>.

³¹ Federal Trade Commission, *2006 Report on Ethanol Market Concentration* (Dec. 1, 2006), available at http://www.ftc.gov/reports/ethanol/Ethanol_Report_2006.pdf.

use discount real estate brokers will not be handicapped by rules intended to disadvantage the discount brokers.

In July 2006, the Commission charged that the Austin Board of Realtors violated the antitrust laws by preventing consumers with real estate listing agreements for potentially lower-cost unbundled brokerage services from marketing their listings on important public web sites.³² In September 2006, the Commission issued a final consent order settling charges against the Austin Board of Realtors. The order prohibits the Austin Board of Realtors from adopting or enforcing any rule that treats one type of real estate listing agreement more advantageously than any other listing type and from interfering with the ability of its members to enter into any kind of lawful listing agreement with home sellers.³³

In October 2006, the Commission, in its first antitrust law enforcement sweep, charged the operators of several multiple listing services in parts of Colorado, New Hampshire, New Jersey, Virginia, Wisconsin, and Michigan with anticompetitive conduct. In this sweep, the Commission filed administrative complaints against two groups: RealComp II Ltd., and MiRealSource, Inc.³⁴ Five other matters were resolved by consent order. The administrative

³² FTC News Release, *FTC Charges Austin Board of Realtors With Illegally Restraining Competition* (July 13, 2006), available at <http://www.ftc.gov/opa/2006/07/austinboard.htm>.

³³ *In the Matter of Austin Bd. of Realtors*, FTC Docket No. C-4167 (Aug. 29, 2006) (decision and order), available at <http://www.ftc.gov/os/caselist/0510219/0510219c4167AustinBoardofRealtorsDecisionandOrder.pdf>.

³⁴ FTC News Release, *FTC Charges Real Estate Groups with Anticompetitive Conduct in Limiting Consumers' Choice in Real Estate Services* (Oct. 12, 2006), available at <http://www.ftc.gov/opa/2006/10/realestatesweep.htm>.

complaints against RealComp and MiRealSource charged that these two real estate groups illegally restrained competition by limiting consumers' ability to obtain low-cost real estate brokerage services. The first complaint alleged that MiRealSource adopted a set of rules to exclude low-cost listings from its multiple listing service, as well as other rules that restricted competition in real estate brokerage services. The second complaint alleged that Realcomp II engaged in anticompetitive conduct by prohibiting information on Exclusive Agency Listings and other forms of nontraditional listings from being transmitted from the multiple listing service it maintains to public real estate web sites. The complaints alleged that the conduct was collusive and exclusionary, because in agreeing to keep non-traditional listings off the multiple listing service and/or public web sites, the brokers enacting the rules were, in effect, agreeing among themselves to limit the manner in which they compete with one another, and withholding valuable benefits of the multiple listing service from real estate brokers who did not go along.³⁵ In March 2007, the Commission entered a consent order in the matter of MiRealSource, in which MiRealSource agreed to provide its services to all member brokers.³⁶ The RealComp II matter is currently in administrative litigation, and closing arguments were held earlier this month.

The five other consent orders in this real estate sweep were: (1) Williamsburg Area Association of Realtors, Inc.; (2) Monmouth County Association of Realtors; (3) Northern New England Real Estate Network, Inc.; (4) Realtors Association of Northeast Wisconsin, Inc.; and

³⁵ *In the Matter of MIREALSOURCE, Inc.*, FTC Docket No. 9321 (Oct. 10, 2006) (complaint), available at <http://www.ftc.gov/os/adjpro/d9321/061012admincomplaint.pdf>; *In the Matter of REALCOMP II LTD.*, FTC Docket No. 9320 (Oct. 10, 2006) (complaint), available at <http://www.ftc.gov/os/adjpro/d9320/061012admincomplaint.pdf>.

³⁶ *In the Matter of MIREALSOURCE, Inc.*, FTC Docket No. 9321 (Feb. 5, 2007) (decision and order), available at <http://www.ftc.gov/os/adjpro/d9321>.

(5) Information and Real Estate Services, LLC.³⁷ The complaints in this sweep charged the associations with violating the FTC Act by adopting anticompetitive rules or policies that, when implemented, prevented properties with non-traditional listing contracts from being displayed on a wide range of public web sites. Each respondent, prior to the Commission's acceptance of the consent orders for public comment, rescinded or modified its rules to discontinue the challenged practices. The orders require that these services remain open to all types of listing agreements.³⁸

V. Technology and Defense

Technology is another area in which the Commission has acted to protect consumers by safeguarding competition. In February 2007, the Commission issued an opinion and final order on remedies in the legal proceeding against computer technology developer Rambus, Inc.³⁹

³⁷ FTC News Release, *FTC Charges Real Estate Groups with Anticompetitive Conduct in Limiting Consumers' Choice in Real Estate Services* (Oct. 12, 2006), available at <http://www.ftc.gov/opa/2006/10/realestatesweep.htm>; FTC News Release, *FTC Approves Final Consent Orders in Real Estate Competition Matters* (Dec. 1, 2006), available at <http://www.ftc.gov/opa/2006/12/fyi0677.htm>.

³⁸ *In the Matter of Information and Real Estate Servs., LLC*, FTC Docket No. C-4179 (Nov. 22, 2006) (decision and order), available at <http://www.ftc.gov/os/caselist/0610087/0610087do061201.pdf>; *In the Matter of Northern New England Real Estate Network, Inc.*, FTC Docket No. C-4175 (Nov. 22, 2006) (decision and order), available at <http://www.ftc.gov/os/caselist/0510065/0510065do061128.pdf>; *In the Matter of Williamsburg Area Ass'n of Realtors, Inc.*, FTC Docket No. C-4177 (Nov. 22, 2006) (decision and order), available at <http://www.ftc.gov/os/caselist/0610268/0610268do061128.pdf>; *In the Matter of Realtors Ass' of Northeast Wisconsin, Inc.*, FTC Docket No. C-4178 (Nov. 22, 2006) (decision and order), available at <http://www.ftc.gov/os/caselist/0610267/0610267do061130.pdf>; *In the Matter of Monmouth County Ass'n of Realtors*, FTC Docket No. C-4176 (Nov. 22, 2006) (decision and order), available at <http://www.ftc.gov/os/caselist/0510217/0510217do061128.pdf>.

³⁹ FTC News Release, *FTC Issues Final Opinion and Order in Rambus Matter* (Feb. 5, 2007), available at <http://www.ftc.gov/opa/2007/02/070502rambus.htm>.

Previously, in July 2006, the Commission determined that Rambus unlawfully monopolized the markets for four computer memory technologies that have been incorporated into industry standards for dynamic random access memory (DRAM) chips. DRAM chips are widely used in personal computers, servers, printers, and cameras.⁴⁰ In addition to barring Rambus from making misrepresentations or omissions to standard-setting organizations again in the future, the February 2007 order, among other things, requires Rambus to license its SDRAM and DDR SDRAM technology; with respect to uses of patented technologies after the effective date of the order, bars Rambus from collecting more than the specified maximum allowable royalty rates; and requires Rambus to employ a Commission-approved compliance officer to ensure that Rambus's patents and patent applications are disclosed to industry standard-setting bodies in which it participates.⁴¹ Rambus has appealed the Commission's rulings to the U.S. Court of Appeals for the District of Columbia Circuit.

In October 2006, the Commission entered into a consent order with the Boeing Company and Lockheed Martin Corporation regarding their proposed joint venture, United Launch Alliance, L.L.C. The Commission complaint alleged that, by combining the only two suppliers of U.S. government medium to heavy launch services, the joint venture as originally structured

⁴⁰ *In the Matter of Rambus, Inc.*, Docket No. 9302 (July 31, 2006) (opinion of the Commission), available at <http://www.ftc.gov/os/adjpro/d9302/060802commissionopinion.pdf>.

⁴¹ *In the Matter of Rambus Inc.*, Docket No. 9302 (Feb. 5, 2007) (opinion of the Commission on remedy) (Harbor, P, and Rosch, T, concurring in part, dissenting in part), available at <http://www.ftc.gov/os/adjpro/d9302/070205opinion.pdf>; *In the Matter of Rambus Inc.*, Docket No. 9302 (Feb. 2, 2007) (final order), available at <http://www.ftc.gov/os/adjpro/d9302/070205finalorder.pdf>.

would have reduced competition in the markets for medium to heavy launch services and space vehicles. During each stage of the investigation and in fashioning the relief in this case, the FTC worked closely with the Department of Defense. The Commission's consent order requires the parties to take the following actions: (1) United Launch Alliance must cooperate on equivalent terms with all providers of government space vehicles; (2) Boeing and Lockheed's space vehicle businesses must provide equal consideration and support to all launch services providers when seeking any U.S. government delivery in orbit contract; and (3) Boeing, Lockheed, and United Launch Alliance must safeguard competitively sensitive information obtained from other space vehicle and launch services providers.⁴²

In December 2006, the Commission challenged General Dynamics' proposed \$275 million acquisition of SNC Technologies, Inc. and SNC Technologies, Corp., and entered into a consent order. General Dynamics and SNC were two of only three competitors providing the U.S. military with melt-pour load, assemble, and pack (LAP) services used during the manufacture of ammunition for mortars and artillery. The Commission's consent order alleviated the alleged anticompetitive impact of the proposed acquisition by requiring General Dynamics to divest its interest in American Ordnance to an independent competitor.⁴³

⁴² *In the Matter of Lockheed Martin Corp. and The Boeing Co.*, FTC File No. 051 0165 (Oct. 3, 2006) (decision and order), available at <http://www.ftc.gov/os/caselist/0510165/0510165decisionorderpublicv.pdf>; *In the Matter of Lockheed Martin Corp. and The Boeing Co.*, FTC File No. 051 0165 (Oct. 3, 2006) (agreement containing consent order), available at <http://www.ftc.gov/os/caselist/0510165/0510165agreement.pdf>.

⁴³ *In the Matter of General Dynamics Corp.*, FTC Docket No. C-4181 (Feb. 7, 2007) (decision and order), available at <http://www.ftc.gov/os/caselist/0610150/0610150decisionorder.pdf>; *In the Matter of General Dynamics Corp.*, FTC Docket No. C-4181 (Dec. 28, 2006) (agreement containing consent

VI. Retail and Other Industries

The Commission also guards against anticompetitive conduct in the retail sector. In June 2007, the Commission sought a preliminary injunction in federal district court blocking Whole Foods' acquisition of its chief rival, Wild Oats Markets, Inc.⁴⁴ The Commission charged that the proposed transaction would violate federal antitrust laws by eliminating the substantial competition between these two uniquely close competitors in numerous geographic markets across the country in the operation of premium natural and organic supermarkets. On August 16, 2007, a judge for the U.S. District Court of the District of Columbia denied the FTC's motion for preliminary injunction, and on August 23, the Court of Appeals denied the FTC's emergency motion for an injunction pending appeal.⁴⁵ The matter remains in administrative litigation.

In June 2007, the Commission challenged Rite Aid Corporation's proposed \$3.5 billion acquisition of the Brooks and Eckerd pharmacies from Canada's Jean Coutu Group (PJC), Inc.⁴⁶ To remedy the alleged anticompetitive impact of the proposed transaction, the Commission ordered Rite Aid and Jean Coutu to sell 23 pharmacies to Commission-approved buyers to preserve the competition that would otherwise be lost in the merger.

orders), *available at* <http://www.ftc.gov/os/caselist/0610150/0610150agreement.pdf>.

⁴⁴ *FTC v. Whole Foods Markets and Wild Oats Markets*, No. 1:07-cv-01021 (D.D.C. filed June 5, 2007), (complaint filed), *available at* <http://www.ftc.gov/os/caselist/0710114/070605complaint.pdf>.

⁴⁵ *FTC v. Whole Foods Markets and Wild Oats Markets*, No. 07-1021 (D.D.C. Aug. 16, 2007); *FTC v. Whole Foods Markets and Wild Oats Markets*, No. 07-5276 (D.C. Cir. Aug. 23, 2007).

⁴⁶ *In the Matter of Rite Aid Corporation and The Jean Coutu Group*, FTC Docket No. C-4191 (June 4, 2007) (complaint filed), *available at* <http://www.ftc.gov/os/caselist/0610257/070604complaint.pdf>.

In March 2007, the Commission settled charges that the Missouri State Board of Embalmers and Funeral Directors illegally restrained competition by defining the practice of funeral directing to include selling funeral merchandise to consumers on an at-need basis.⁴⁷ The Board's regulation permitted only licensed funeral directors to sell caskets to consumers on an at-need basis, thereby restricting competition from other retailers. The Board ended the restriction last year and agreed that it will not prohibit or discourage the sale of caskets, services, or other funeral merchandise by unlicensed persons, thereby settling the Commission's challenge.

The Commission also challenged the proposed combination of the nation's two largest funeral home and cemetery chains, Service Corporation International and Alderwoods Group Inc. In its complaint, the Commission alleged that the proposed merger of the two companies would lessen competition for funeral or cemetery services in 47 local markets, leaving consumers with fewer choices and the prospect of higher prices or reduced levels of service. Under the consent agreement, SCI must sell funeral homes in 29 markets and cemeteries in 12 markets across the United States. In six other markets, SCI must sell certain funeral homes that it plans to acquire or end its licensing agreements with affiliated third-party funeral homes.⁴⁸

In September 2006, the Commission protected competition in the industrial gases market by approving a final consent order in the matter of Linde AG and the BOC Group PLC. The consent order required Linde to divest its air separation units and all other assets in eight

⁴⁷ *In the Matter of Missouri Board of Embalmers and Funeral Directors*, FTC File No. 061 0026 (Mar. 9, 2007) (proposed decision and order), available at <http://www.ftc.gov/os/caselist/0610026/0610026decisonorder.pdf>.

⁴⁸ *In the Matter of Service Corp. Int'l and Alderwoods Group Inc.*, FTC Docket No. C-4174 (Dec. 29, 2006) (decision and order), available at <http://www.ftc.gov/os/caselist/0610156/070105do0610156.pdf>.

localities across the United States. In addition, the order required Linde to divest its bulk refined helium assets to Taiyo Nippon Sanso Corporation. The consent order maintains competition in the markets for liquid oxygen, liquid helium, and bulk refined helium in several U.S. markets.⁴⁹

VII. Merger Review Process Improvements

The FTC works to facilitate cooperation and voluntary compliance with the law by promoting transparency in enforcement standards, policies, and decision-making processes. Last year, the FTC implemented reforms to the merger review process and electronic filing of Hart-Scott-Rodino pre-merger notification forms, both of which are aimed at streamlining the merger review process. To increase the transparency of the merger review decision-making process, the FTC and the DOJ Antitrust Division jointly released a commentary on the agencies' Horizontal Merger Guidelines.

The Commission continues to implement significant merger process reforms, first announced in February 2006, aimed at reducing the costs borne by both the FTC and merging parties.⁵⁰ These reforms include, most importantly: reducing the number of custodians from which parties must supply information to a maximum of 35 per party in most cases, provided the parties agree to certain conditions; reducing the time period for which parties are required to search for documents from three to two years in general; providing parties with the right to meet with the Bureaus of Competition and Economics management regarding data requests, if

⁴⁹ *In the Matter of Linde AG and The BOC Group PLC*, FTC Docket No. C-4163 (Aug. 29, 2006) (decision and order), available at <http://www.ftc.gov/os/caselist/0610114/0610114c4163LindeBOCDOPubRecV.pdf>.

⁵⁰ FTC News Release, *FTC Chairman Announces Merger Review Process Reforms* (Feb. 16, 2006), available at http://www.ftc.gov/opa/2006/02/merger_process.htm.

necessary; allowing the parties to preserve substantially fewer backup tapes; and allowing parties to submit privilege logs that contain much less detailed information.⁵¹

In March 2006, the FTC and DOJ jointly released a “Commentary on the Horizontal Merger Guidelines” (“Commentary”) that continues the agencies’ ongoing efforts to increase the transparency of their decision-making processes – in this case, with regard to federal antitrust review of “horizontal” mergers between competing firms. The analytical framework and standards used to scrutinize the likely competitive effects of such mergers are embodied in the Horizontal Merger Guidelines, which the agencies jointly issued in 1992, and revised, in part, in 1997. The Commentary explains how the FTC and DOJ have applied particular Guidelines principles in the context of actual merger investigations over the last thirteen years.⁵² The Commentary brings greater transparency to the Agencies’ merger analysis and greater certainty to businesses and merger practitioners, and enhances the quality of communications between the government and merging parties during the merger review process.

The Commission encourages merging parties to utilize an electronic filing system, implemented by the FTC and DOJ in June 2006, that allows parties to submit via the Internet the premerger notification filings required by the Hart-Scott-Rodino (“HSR”) Act.⁵³ This new

⁵¹ *Reforms to the Merger Review Process: Announcement by Deborah Platt Majoras, Chairman, Federal Trade Commission* (Feb. 16, 2006), available at <http://www.ftc.gov/os/2006/02/mergerreviewprocess.pdf>.

⁵² *Commentary on the Horizontal Merger Guidelines* (2006), available at <http://www.ftc.gov/os/2006/03/CommentaryontheHorizontalMergerGuidelinesMarch2006.pdf>.

⁵³ FTC News Release, *Federal Trade Commission and Department of Justice Allow Electronic Submission of Premerger Notification Filings* (June 20, 2006), available at <http://www.ftc.gov/opa/2006/06/premerger.htm>.

system eliminates the time and expense entailed in duplicating and delivering documents. Previously, parties were required to submit to both the FTC and the DOJ paper copies of their forms and documentary attachments. Under the new system, filers have three options: (1) complete and submit the form and all attachments in hard copy; (2) complete the electronic version of the form and submit the form and all attachments electronically; or (3) complete the electronic version of the form and submit it electronically while submitting all documentary attachments in paper copy.

In January 2007, the FTC published a report showing the trend in merger enforcement investigations for the fiscal years 1996-2005. The report promotes transparency in the Commission's merger enforcement by providing information on the market structures and other features of the investigations that resulted in Commission enforcement actions.⁵⁴

VIII. Competition Advocacy

The FTC's competition advocacy work is a significant tool for strengthening competition. The Commission and staff frequently provide comments to federal and state legislatures and government agencies, sharing their expertise on the competitive impact of proposed laws and regulations when they alter the competitive environment through restrictions on price, innovation, or entry conditions. In fact, Commissioners and senior staff of the FTC already have testified 18 times before the 110th Congress, including six times on competition matters covering

⁵⁴ Federal Trade Commission, *Horizontal Merger Investigation Data, Fiscal Years 1996-2005* (Jan. 25, 2007), available at <http://www.ftc.gov/os/2007/01/P035603horizmergerinvestigationdata1996-2005.pdf>.

petroleum industry consolidation,⁵⁵ gasoline prices,⁵⁶ intellectual property,⁵⁷ pharmaceutical patent litigation settlements,⁵⁸ and antitrust law enforcement.⁵⁹

Experience has shown that government-imposed restrictions are among the most effective and durable restraints on competition. Recent FTC advocacy efforts have contributed to several

⁵⁵ *Petroleum Industry Consolidation, Hearing Before the Joint Economic Committee* (2007) (Prepared Statement of the FTC, Presented by Dr. Michael A. Salinger), available at <http://www.ftc.gov/os/testimony/070523PetroleumIndustryConsolidation.pdf>.

⁵⁶ *Market Forces, Competitive Dynamics, and Gasoline Prices: FTC Initiatives to Protect Competitive Markets: Hearing Before the H. Subcomm on Oversight and Investigations* (2007) (Prepared Statement of the FTC, Presented by William E. Kovacic, Commissioner), available at http://www.ftc.gov/os/testimony/070522FTC_%20Initiatives_to_Protect_Competitive_Petroleum_Markets.pdf.

⁵⁷ *American Innovation at Risk: The Case for Patent Reform: Hearing Before the H. Subcomm. on Internet and Intellectual Property* (2007) (Prepared Statement of the FTC, Presented by Suzanne Michel), available at <http://www.ftc.gov/os/2007/02/02152007patenttestimonyhouse.pdf>.

⁵⁸ *Anticompetitive Patent Settlements in the Pharmaceutical Industry - The Benefits of a Legislative Solution: Hearing Before the Senate Committee on the Judiciary* (2007) (Prepared Statement of the FTC, Presented by Jon Leibowitz, Commissioner), available at http://www.ftc.gov/speeches/leibowitz/070117anticompetitivepatentsettlements_senate.pdf; and *On Protecting Consumer Access To Generic Drugs: The Benefits Of A Legislative Solution To Anticompetitive Patent Settlements In The Pharmaceutical Industry*, Hearing Before the United States House of Representatives Committee On Energy and Commerce, Subcommittee on Commerce, Trade, and Consumer Protection (2007) (Prepared Statement of the FTC, Presented by Jon Leibowitz, Commissioner), available at http://www.ftc.gov/os/testimony/P859910%20Protecting_Consume_%20Access_testimony.pdf.

⁵⁹ *An Overview of Commission Antitrust Enforcement Activities, Hearing before the Senate Committee on the Judiciary, Subcommittee on Antitrust, Competition Policy and Consumer Rights* (Prepared Statement of the FTC, Presented by Chairman Deborah Platt Majoras), available at <http://www.ftc.gov/os/testimony/P072104AntitrustEnforcementActivitiesTestimonySenate03072007.pdf>.

positive consumer outcomes. In the past year, the agency has commented on competition issues related to attorney advertising rules, real estate settlement services, real estate brokerage, gasoline prices, and pharmacy benefit managers.

In September 2006, the Commission authorized staff to file comments with the New York Unified Court System regarding the court's proposed rules governing attorney advertising. Staff was concerned that several provisions in the proposed rules were overly broad, could restrict truthful advertising, and could adversely affect prices paid and services received by consumers. Staff suggested that the court protect consumers from false and misleading advertising by revising the rules and using less restrictive means, such as requiring clear and prominent disclosure of certain information.⁶⁰ In January 2007, the court promulgated revised rules, adopting nearly all of the staff's recommendations.

In October 2006, FTC staff filed comments with the Virginia House of Delegates on the subject of pharmacy benefit managers. The staff argued that the proposed legislation, which would regulate some aspects of the contractual relationships between pharmacy benefit managers

⁶⁰ FTC Staff Comments to Michael Colodner, Counsel, New York State Unified Court System (Sept. 14, 2006), *available at* <http://www.ftc.gov/os/2006/09/V060020-image.pdf>. In the past year, FTC staff also has submitted comments to the Louisiana and Florida bars, the Indiana Supreme Court, and the Supreme Court of New Jersey concerning proposals that would restrict attorney advertising to varying degrees. *See also* FTC Staff Comments to S. Guy deLaup, President, Louisiana State Bar Association (Aug. 10, 2007), *available at* <http://www.ftc.gov/os/2007/08/V070013larules.pdf>; FTC Staff Comments to the Rules of Professional Conduct Committee, Louisiana State Bar Association (Mar. 14, 2007), *available at* <http://www.ftc.gov/be/V070001.pdf>; FTC Staff Comments to the Florida Bar (Mar. 23, 2007), *available at* <http://www.ftc.gov/be/V070002.pdf>; FTC Staff Comments to Ms. Lilia G. Judson, Executive Director, Indiana Supreme Court (May 11, 2007), *available at* <http://www.ftc.gov/be/V070010.pdf>; Brief of the Federal Trade Commission As *Amicus Curiae* Supporting Arguments to Vacate Opinion 39 of the New Jersey Supreme Court Committee on Attorney Advertising (May 8, 2007), *available at* <http://www.ftc.gov/be/V070003opinion39.pdf>.

and health benefit plans and pharmacies, might indirectly lead to higher drug prices for Virginia consumers.⁶¹ This proposed legislation was not enacted.

In April 2007, the Commission authorized the filing of comments with the New York State Assembly Committee on the Judiciary regarding proposed legislation to expand the scope of activities constituting the unauthorized practice of law. These comments were prepared jointly with the Antitrust Division of DOJ. The Agencies were concerned that the proposed legislation, which was identical to legislation introduced last year and addressed by the Agencies in a June 2006 letter,⁶² would prevent non-lawyers from competing with lawyers in situations where there is no clear showing that non-attorney services have caused consumer harm.⁶³ Shortly

⁶¹ FTC Staff Comments to Terry G. Kilgore, Member, Commonwealth of Virginia House of Delegates (Oct. 2, 2006), *available at* <http://www.ftc.gov/be/V060018.pdf>. FTC staff also filed comments with the New Jersey Assembly in April 2007, expressing its concerns regarding proposed legislation that would limit the ability of pharmacy benefit managers, health benefit plans, and pharmacies to enter into efficient, mutually advantageous contracts and potentially increase pharmaceutical prices in New Jersey. FTC Staff Comments to Assemblywoman Nellie Pou, Chair, Appropriations Committee, New Jersey General Assembly (Apr. 17, 2007), *available at* <http://www.ftc.gov/be/V060019.pdf>.

⁶² Federal Trade Commission and United States Department of Justice Comments to Assemblywoman Helene E. Weinstein, Chair, Committee on Judiciary, New York State Assembly (June 21, 2006), *available at* <http://www.ftc.gov/os/2006/06/V060016NYUpIFinal.pdf>.

⁶³ Federal Trade Commission and United States Department of Justice Comments to Assemblywoman Helene E. Weinstein, Chair, Committee on Judiciary, New York State Assembly (Apr. 27, 2007), *available at* <http://www.ftc.gov/be/V070004.pdf>. FTC staff also submitted comments to the Rules Committee of the Connecticut Superior Court regarding its proposed definition of the practice of law, recommending that the Committee revisit its proposed definition to avoid unnecessary restraints on attorney/non-attorney competition. FTC Staff Comments to Carl E. Testo, Counsel, Rules Committee of the Connecticut Superior Court (May 17, 2007), *available at* <http://www.ftc.gov/be/V070006.pdf>.

after the Agencies filed their comments, the legislature rejected the bill, thereby preserving attorney/non-attorney competition in real estate settlement services in New York.

In May 2007, the FTC and DOJ sent a joint letter to Michigan Governor Jennifer Granholm in response to a request from her staff for our views on proposed legislation involving minimum-service requirements in the area of real estate brokerage. In the letter, the Agencies explained that, although the current version of the bill posed fewer competitive concerns than the prior version on which the Agencies had commented in 2005,⁶⁴ there still was no evidence that minimum-service requirements are needed to protect consumers. Further, the Agencies argued that a provision in the bill that restricted the manner in which certain discount brokers could market their clients' houses was likely to reduce competition in the real estate brokerage market.⁶⁵

Also in May 2007, FTC staff submitted comments to the Connecticut House of Representatives regarding proposed legislation that would require gasoline retailers to base their price on historic gasoline costs and would ban zone pricing. The staff observed that limiting retailers' ability to react to wholesale price increases is likely to harm consumers by reducing the market's ability to ameliorate supply shortages and by causing retailers to hold smaller inventories of gasoline than they otherwise would. Further, staff explained how zone pricing can allow refiners and lessee-dealers to share risk more efficiently. Staff noted that, by allowing

⁶⁴ Federal Trade Commission and United States Department of Justice Comments to Alan Sanborn, Michigan State Senate (Oct. 18, 2005), *available at* <http://www.ftc.gov/os/2005/10/051020commihousebill4849.pdf>.

⁶⁵ Federal Trade Commission and United States Department of Justice Comments to Governor Jennifer M. Granholm of Michigan (May 30, 2007), *available at* <http://www.ftc.gov/be/v050021.pdf>.

refiners more easily to capture profits from retail locations, zone pricing can increase incentives to locate stations in currently less-competitive areas.⁶⁶ This proposed legislation was not enacted.

IX. Amicus Briefs

As in the past, the Commission has been active in providing amicus briefs to aid the courts in analyzing and resolving competition-related policy issues. The matters in which the agency has intervened range from cases arising under Section 2 of the Sherman Act, to price fixing matters, to vertical price restraints.

In January 2007, the FTC and DOJ filed a joint amicus brief with the U.S. Supreme Court in the case of *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, addressing whether an agreement between a supplier and dealer that sets the dealer's minimum retail price constitutes a *per se* violation of Section 1 of the Sherman Act, 15 U.S.C. 1, or is instead properly analyzed under the rule of reason. The brief argues that the *per se* rule against vertical minimum resale price maintenance established in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), is irreconcilable with modern economic analysis and the Court's modern antitrust

⁶⁶ FTC Staff Comments to Christopher R. Stone, State of Connecticut House of Representatives (May 2, 2007), available at <http://www.ftc.gov/be/V070008.pdf>. FTC staff also filed comments with the Council of the District of Columbia in June 2007, in support of proposed legislation that would repeal D.C.'s ban on jobber, or wholesaler, operation of retail service stations. FTC Staff Comments to Councilmember Mary M. Cheh, Chairperson, Committee on Public Services and Consumer Affairs, Council of the District of Columbia (June 8, 2007), available at <http://www.ftc.gov/os/2007/06/V070011divorcement.pdf>.

jurisprudence, and should be overruled⁶⁷ – a position later adopted in the 5-4 decision of the Court.

Also in January 2007, the FTC and DOJ filed a joint amicus brief in the case of *Credit Suisse First Boston v. Glen Billing*, addressing the application of the antitrust laws to activities subject to SEC regulation. The brief argues that collaborative underwriting activities occurring during the initial public offering of securities that are expressly or implicitly authorized under the securities laws, as well as conduct inextricably intertwined with such activities, are immune from the antitrust laws. At the same time, the brief cautions that not all underwriting activities occurring in connection with an initial public offering are exempt from the antitrust laws. The brief urges the U.S. Supreme Court to vacate the lower court rulings, neither of which struck the appropriate balance between the interests of the antitrust and securities laws.⁶⁸

In May 2007, the FTC and DOJ filed a joint amicus brief in the case of *In re DDAVP Direct Purchaser Antitrust Litigation* in the United States Court of Appeals for the Second Circuit. The brief was in support of plaintiffs-appellants, who were direct purchasers of the prescription brand-name drug DDAVP. Plaintiffs had brought this putative class action

⁶⁷ Brief of the United States as Amicus Curiae Supporting Petitioner, *Leegin Creative Leather Prods., Inc. v. PSKS, Inc* No. 06-480 (U.S. Jan. 22, 2007) (FTC and DOJ joint brief), available at <http://www.ftc.gov/os/2007/01/070122Leegin06-480amicusPDC.pdf>. The Commission vote approving the filing of the joint brief was 3-2, with Commissioners Pamela Jones Harbour and Jon Leibowitz voting no.

⁶⁸ Brief of the United States as Amicus Curiae Supporting Vacatur, *Credit Suisse First Boston v. Glen Billing* No. 05-1157 (U.S. Jan. 22, 2007) (FTC and DOJ joint brief), available at [http://www.ftc.gov/os/2007/01/070122creditsuisse05-1157amicus\).pdf](http://www.ftc.gov/os/2007/01/070122creditsuisse05-1157amicus).pdf).

under Section 4 of the Clayton Act, 15 U.S.C. § 15, alleging that defendants Ferring B.V. and Ferring Pharmaceuticals, Inc., who owned the patent for desmopressin acetate -- the active ingredient in DDAVP, and Aventis Pharmaceuticals, Inc., the patent's exclusive licensee in the United States, violated Section 2 of the Sherman Act, 15 U.S.C. § 2, by maintaining and enforcing a patent procured by intentional fraud on the Patent and Trademark Office (PTO). In their brief, the antitrust agencies urge the court of appeals to reverse the district court's holding that plaintiffs lacked antitrust standing to bring monopolization claims against defendant drug manufacturers arising out of the manufacturers' maintenance and enforcement of a patent allegedly procured through intentional fraud on the PTO (a so-called "Walker Process" antitrust claim).⁶⁹

In two joint amicus briefs, filed in May and August 2006, the FTC and DOJ urged the U.S. Supreme Court to grant *certiorari* and reverse the Ninth Circuit Court of Appeals decision in the case of *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber*. The Ninth Circuit held that the standard for a predatory pricing claim articulated by the Supreme Court in *Brooke Group Ltd v. Brown & Williamson Tobacco Corp.* did not apply to a case in which the plaintiff alleged “predatory bidding” in violation of Section 2 of the Sherman Act, and approved instructions that allowed a jury to find a violation based on assessments of factors such as “fairness” and

⁶⁹ Brief of the United States as Amicus Curiae Supporting Plaintiff-Appellants, *In re DDAVP Direct Purchaser Antitrust Litigation* No. 06-5525 (2d Cir. May 25, 2007) (FTC and DOJ joint brief), available at <http://www.ftc.gov/os/2007/05/DDAVPCommission-DoJBrief.pdf>.

“necessity.”⁷⁰ On February 20, 2007, the U.S. Supreme Court vacated and remanded the Ninth Circuit decision, and held that the *Brooke Group* test applies to predatory bidding claims.

The FTC also participated in discussions with DOJ and other federal agencies regarding the position taken by the United States as amicus in several cases involving intellectual property, which had important implications for competition and consumer interests.⁷¹ In the cases decided to date, the Supreme Court has vacated or reversed lower court rulings that threatened consumer interests by taking an unduly rigid approach to patent litigation and remedies.⁷²

⁷⁰ Brief for the United States as Amicus Curiae, *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber*, No. 05-381 (U.S. May 26, 2006) (FTC and DOJ joint brief), available at <http://www.ftc.gov/os/2006/05/P062112WeyerhaeuservRoss-SimmonsAmicusBrief.pdf>; Brief for the United States as Amicus Curiae Supporting Petitioners, *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber*, No. 05-381 (U.S. Aug. 25, 2006) (FTC and DOJ joint brief), available at <http://www.ftc.gov/ogc/briefs/05381weyerhaeuser217988.pdf>. The Commission vote authorizing the staff to file the brief jointly with the DOJ was 3-2, with Commissioners Jon Leibowitz and J. Thomas Rosch voting no.

⁷¹ See Brief for the United States as Amicus Curiae Supporting Respondent, *eBay Inc. and Halfcom, Inc. v. MercExchange, LLC*, 126 S.Ct. 1837 (2006) (No. 05-130); Brief for the United States of America Supporting Petitioner, *MedImmune, Inc. v. Genentech, Inc.*, 127 S.Ct. 764 (2007)(No. 05-608); Brief for the United States as Amicus Curiae Supporting Petitioner, *KSR In'l Co. v. Teleflex, Inc.*, No. 04-1350 (U.S. Aug. 2006).

⁷² See *MedImmune, Inc. v. Genentech, Inc.*, 127 S.Ct. 764, 777 (2007); *eBay Inc. and Half.com, Inc. v. MercExchange, LLC*, 126 S. Ct. 1837, 1838-39 (2006).

X. Hearings, Conferences, Workshops, and Reports

Hearings, conferences, and workshops organized by the FTC represent a unique opportunity for the agency to develop policy research and development tools. These events and agency reports foster a deeper understanding of the complex issues involved in the economic and legal analysis of antitrust law.

In May 2007, the FTC and DOJ concluded a series of public hearings designed to examine the boundaries of permissible and impermissible conduct under Section 2 of the Sherman Act.⁷³ The primary goal of the hearings was to examine whether and when specific types of single-firm conduct are procompetitive or benign, and when they may harm competition. During the 19 days of hearings, the FTC solicited input directly from businesses, business schools professors, and historians, as well as lawyers and economists with antitrust expertise. Now that the hearings have concluded, staff from the agencies are drafting a public report that incorporates the results of the hearings, as well as relevant scholarship and research.

Also in May 2007, the FTC and the DOJ Antitrust Division released a joint report, *Competition in the Real Estate Brokerage Industry*. The purpose of the report is to inform consumers and other industry participants about important competition issues involving residential real estate, including the impact of the Internet, the competitive structure of the real estate brokerage industry, and obstacles to a more competitive environment.⁷⁴ To complement

⁷³ Federal Trade Commission and Department of Justice Hearings on Section 2 of the Sherman Act: Single Firm Conduct as Related to Competition, *available at* <http://www.ftc.gov/os/sectiontwohearings/index.htm>.

⁷⁴ Federal Trade Commission and United States Department of Justice Report, *Competition in the Real Estate Brokerage Industry* (Apr. 2007), *available at* <http://www.ftc.gov/reports/realestate/V050015.pdf>.

the report, the FTC simultaneously released a consumer education publication, *Buying a Home: It's a Big Deal*, which has tips for considering the services of a real estate professional and using the Internet as a source of real estate information.

In April 2007, the FTC and the DOJ Antitrust Division issued a joint report, titled *Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition*, to inform consumers, businesses, and intellectual property rights holders about the agencies' competition views with respect to a wide range of activities involving intellectual property.⁷⁵ The report discusses issues including: refusals to license patents, collaborative standard setting, patent pooling, intellectual property licensing, the tying and bundling of intellectual property rights, and methods of extending market power conferred by a patent beyond the patent's expiration. This second report on antitrust and intellectual property joins an FTC report issued in 2003 following extensive hearings on this important topic.⁷⁶

Also in April 2007, the FTC held a three-day conference on *Energy Markets in the 21st Century: Competition Policy in Perspective*.⁷⁷ The conference brought together leading experts from government, the energy industry, consumer groups, and the academic community to participate on panels to examine such topics as: (1) the relationship between market forces and

⁷⁵ Federal Trade Commission and Department of Justice, *Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition* (April 17, 2007), available at <http://www.ftc.gov/opa/2007/04/ipreport.shtm>.

⁷⁶ Federal Trade Commission Report, *To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy* (Oct. 2003), available at <http://www.ftc.gov/os/2003/10/innovationrpt.pdf>.

⁷⁷ FTC Conference, *Energy Markets in the 21st Century: Competition Policy in Perspective* (Apr. 10-12, 2007), available at <http://www.ftc.gov/bcp/workshops/energymarkets/index.html>.

government policy in energy markets; (2) the dependence of the U.S. transportation sector on petroleum; (3) the effects of electric power industry restructuring on competition and consumers; (4) what energy producers and consumers may expect in the way of technological developments in the industry; (5) the security of U.S. energy supplies; and (6) the government's role in maintaining competition and protecting energy consumers. The Commission expects to issue a report detailing the findings of this conference.

In November 2006, the Commission released a report that provides enforcement perspectives on the *Noerr-Pennington* doctrine, which precludes application of the antitrust laws to certain private acts that urge government action. The report provides FTC staff's views on how best to apply the doctrine to conduct that imposes significant risk to competition but does not further the important First Amendment and governmental decision-making principles underlying the doctrine.⁷⁸

Last year, the FTC created an Internet Access Task Force to examine issues raised by converging technologies and regulatory developments, and to inform the enforcement, advocacy, and education initiatives of the Commission. Under the leadership of the Internet Access Task Force, the FTC staff recently addressed two issues of interest to policy makers.

First, in October 2006, the FTC released a staff report, *Municipal Provision of Wireless Internet*. The report identifies the potential benefits and risks to competition and consumers

⁷⁸ FTC Staff Report, *Enforcement Perspectives on the Noerr-Pennington Doctrine* (Oct. 2006), available at <http://www.ftc.gov/reports/P013518enfperspectNoerr-Penningtondoctrine.pdf>.

associated with municipal provision of wireless Internet service.⁷⁹ Second, in February 2007, the FTC hosted a public workshop on “Broadband Connectivity Competition Policy.”⁸⁰ This workshop brought together experts from business, government, and the technology sector, as well as consumer advocates and academics. The workshop examined competition and consumer protection issues relating to broadband Internet access, including “network neutrality.” It explored issues raised by recent legal and regulatory determinations that providers of certain broadband Internet services, such as cable modem and DSL, are not subject to the Federal Communications Commission’s common carrier regulations. Following this workshop, in June 2007, the FTC released a staff report, *Broadband Connectivity Competition Policy*, which summarizes the Task Force’s findings in the area of broadband Internet access, including so-called “network neutrality.” The report proposes guiding principles for assessing this complex issue, and makes clear that the FTC will continue to enforce vigorously the antitrust and consumer protection laws and expend considerable efforts on consumer education, industry guidance, and competition advocacy in the important area of broadband Internet access.⁸¹

⁷⁹ FTC Staff Report, *Municipal Provision of Wireless Internet* (Sept. 2005) available at <http://www.ftc.gov/os/2006/10/V060021municipalprovwirelessinternet.pdf>.

⁸⁰ *FTC Workshop, Broadband Connectivity Competition Policy* (Feb. 13-14, 2007), available at <http://www.ftc.gov/opp/workshops/broadband/index.html>.

⁸¹ FTC Staff Report, *Broadband Connectivity Competition Policy* (June 2007), available at <http://www.ftc.gov/reports/broadband/v070000report.pdf>.

In March 2006, FTC staff initiated an ongoing study on authorized generic drugs.⁸² The study is intended to help the agency understand the circumstances under which innovator companies launch authorized generics; to provide data and analysis of how competition between generics and authorized generics during the Hatch-Waxman Act's 180-day exclusivity period has affected short-run price competition and long-run prospects for generic entry; and to build on the economic literature about the effect of generic drug entry on prescription drug prices.

XI. International Coordination and Technical Assistance

In January 2007, the FTC established a new Office of International Affairs to coordinate more effectively the full range of the agency's international activities. The Office unites the FTC's international antitrust, consumer protection, and technical assistance programs, enabling us to take advantage of the synergies between our international functions and enhancing the prominence of the FTC's international work.

Cooperation with competition agencies around the world is a vital component of the FTC's enforcement and policy, facilitating our ability to collaborate on cross-border cases, and promoting convergence toward sound, consumer welfare-based competition policies. Our staff regularly coordinates with foreign antitrust agencies on mergers and anticompetitive conduct cases of mutual concern. The FTC promotes policy convergence through formal and informal working arrangements with other agencies, many of which seek the FTC's views in connection with developing their policies. For example, the FTC consulted with the European Commission regarding its review of policies on monopolization, its draft guidelines for the review of non-

⁸² FTC News Release, *FTC Proposes Study of Competitive Impacts of Authorized Generic Drugs* (Mar. 29, 2006), available at <http://www.ftc.gov/opa/2006/03/authgenerics.htm>.

horizontal mergers, and its draft revisions to its guidelines on remedies in merger cases. We provided our views to the Japan Fair Trade Commission on its proposed intellectual property licensing guides, to the Korea Fair Trade Commission on proposed new rules on excessive pricing, and to the Canadian Competition Bureau on merger remedies and health care issues. The FTC participated in consultations in Washington and in foreign capitals with top officials of the competition agencies of the European Union, Japan, and Korea, and Mexico.

We have engaged with Chinese officials regarding their Anti-Monopoly Act and merger review rules. In 2006, I became the first FTC Chairman to visit China, helping to build relationships with officials involved in developing their antitrust law and policies. We will closely follow the implementation of the law. The FTC also participates in the US-China Strategic Economic Dialogue to promote market-based competition and further the innovation agenda.

The FTC plays a lead role in key multilateral fora – including the International Competition Network, the Organization for Economic Cooperation and Development, the United Nations Conference on Trade and Development, and the Asia-Pacific Economic Cooperation -- that provide important opportunities for competition agencies to enhance mutual understanding and promote cooperation and convergence. We are a member of the ICN's Steering Group and lead its work on unilateral conduct, merger notification and procedures, and competition policy implementation. The FTC also participates in U.S. delegations that negotiate competition chapters of proposed free trade agreements, such as the recently signed agreement with Korea.

The FTC assists developing nations that are moving toward market-based economies with the development and implementation of competition laws and policies. Our program is

conducted jointly with the DOJ Antitrust Division and is funded primarily by the United States Agency for International Development. In 2007, the FTC sent 23 staff experts on 26 technical assistance missions to 20 countries, including the ASEAN community, Azerbaijan, Central America, China, Egypt, India, Philippines, Russia, South Africa, and Tanzania.

XII. Outreach Initiatives

The FTC is committed to enhancing consumer confidence in the marketplace through enforcement and education. This year, Commission staff launched a multi-dimensional outreach campaign targeting new and bigger audiences with the message that competition, supported by antitrust enforcement, helps consumers reap the benefits of competitive markets by keeping prices low and services and innovation high, as well as by encouraging more choices in the marketplace. The FTC is building a library of brochures, fact sheets, articles, reports and other products – both in print and online – in its efforts to reach consumers, attorneys and business people, and is planning to leverage its limited resources through a “wholesale/retail” approach to outreach that involves partnering with other organizations to disseminate information on its behalf.

The Commission’s website, www.ftc.gov, continues to grow in size and scope with resources on competition policy in a variety of vital industries. The FTC has launched industry-specific websites for Oil and Gas,⁸³ Health Care,⁸⁴ Real Estate,⁸⁵ and Technology.⁸⁶ These

⁸³ Available at <http://www.ftc.gov/ftc/oilgas/index.html>.

⁸⁴ Available at <http://www.ftc.gov/bc/healthcare/index.htm>.

⁸⁵ Available at <http://www.ftc.gov/bc/realestate/index.htm>.

⁸⁶ Available at <http://www.ftc.gov/bc/tech/index.htm>.

minisites serve as a one-stop shop for consumers and businesses who want to know what the FTC is doing to promote competition in these important business sectors. In the past year, the FTC also issued practical tips for consumers on buying and selling real estate, funeral services, and generic drugs, as well as “plain language” columns on oil and gas availability and pricing.

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Mr. Chairman and Members of the Task Force, we appreciate this opportunity to provide an overview of the Commission’s efforts to maintain a competitive marketplace for American consumers, and we appreciate the strong support that we have received from Congress. I am happy to answer any questions that you may have.