Prepared Statement of
The Federal Trade Commission

Before the
Subcommittee on
Antitrust, Competition, and Consumer Rights

of the Committee on the Judiciary
United States Senate

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presented by

Deborah Platt Majoras, Chairman

Before the

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Subcommittee on Antitrust, Competition, and Consumer Rights
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An Overview of Federal Trade Commission Antitrust Activities

March 7, 2007

Chairman Kohl, Ranking Member Hatch, and Members of the Subcommittee, 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 critical in order to protect and strengthen the free and open markets that are the foundation of a vibrant economy. The goal of the FTC's competition mission is to remove the obstacles that impede competition and prevent its benefits from flowing to consumers. In order to accomplish this mission, the FTC has focused its enforcement efforts on sectors of the economy that have the greatest impact on consumers, such as health care, energy,

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[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.

and real estate. In the past year, the Commission pursued a broad range of merger and nonmerger enforcement actions in these and other industries. The FTC has also facilitated cooperation and voluntary compliance with the law by promoting transparency in enforcement standards, policies, and decision-making processes.

In FY2006 there were 1768 premerger filings, a 28 percent increase from FY2004. Reflecting an increase in investigative activity, the number of requests for additional information issued by the FTC increased by 40 percent over the same period. During FY2006, the Commission or its staff identified sixteen transactions raising concerns for competition; we required relief in nine cases, while seven additional transactions were withdrawn, abandoned, or restructured by the parties. So far in FY2007, premerger filings are up seventeen percent from the previous year.

I. 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. In global terms, health care expenditures in the U.S. represent almost $2 trillion and have been increasing steadily for the last 30 years. During the past year, the FTC dedicated substantial resources to protecting consumers by vigorously reviewing proposed merger transactions in the health care industry, investigating potentially anticompetitive conduct that threatens consumer interests, and taking action to prevent anticompetitive effects from manifesting themselves. Specifically, the agency achieved substantial relief in seven mergers it reviewed by obtaining signed consent decrees in the areas of generic drugs, over-the-counter medications, injectable analgesics, and other medical devices and diagnostic services. In addition, the agency continued to investigate, and challenge where

appropriate, agreements among pharmaceutical companies and physicians.

A. Pharmaceuticals

The Commission was particularly active in enforcing the antitrust laws in the pharmaceutical industry. In March 2006, the FTC ensured continued competition for generic drugs by requiring a consent order to address competitive concerns raised by Teva Pharmaceutical Industries, Ltd.'s $7.4 billion acquisition of IVAX Corporation. The order required the parties to divest the rights and assets necessary to manufacture and market fifteen different generic pharmaceutical products, including the generic forms of widely-used penicillin antibiotics amoxicillin and amoxicillin clavulanate potassium, maintaining for consumers the benefits of competition in these important products that the merger would otherwise have eliminated.

In April 2006, the FTC challenged Allergan, Inc.'s $3.2 billion acquisition of Inamed Corporation. The FTC accepted a final consent order that required the parties to divest Inamed's rights to develop and market Reloxin, a potential rival to Allergan's Botox. Botox is the best-selling botulinum toxin in the United States, and the only such product approved by the FDA to treat facial wrinkles. At the time of the order, Reloxin was the only botulinum toxin product in Phase III of clinical trials and the next likely entrant to challenge Botox, with a substantial lead over other potentially-competing products. By requiring the parties to divest the U.S. rights to Reloxin, the FTC preserved for consumers the benefits of competition in cosmetic botulinum toxins.

In December 2006, the FTC approved a consent order regarding 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 vessels in the brain. Finally, Barr is required to divest Pliva's branded organ preservation solution.

In December 2006, the FTC approved a final consent order with Watson Pharmaceuticals, Inc. and Andrx Corporation that maintained competition for thirteen generic drug products. This order required 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 January 2007, the Commission protected competition for non-prescription drugs by entering a consent order regarding Johnson & Johnson's proposed $16.6 billion dollar acquisition of Pfizer's consumer health division. This order required 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

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

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

sleep aids, and diaper rash treatments.[4]

In January 2007, the Commission published a consent order for public comment regarding the proposed acquisition of Mayne Pharma Limited by Hospira, Inc. This order requires the sale of assets used to manufacture and supply five generic injectable pharmaceuticals, and results in the preservation of competition in the markets at issue.[5]

Outside of merger review, the Commission continues to be vigilant in the detection and investigation of agreements between drug companies that delay generic entry. 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.[6] 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

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

[5] FTC News Release, *FTC Challenges Hospira/Mayne Pharma Deal* (Jan. 18, 2007), *available at* http://www.ftc.gov/opa/2007/01/hospiramayne.htm; *In the Matter of Hospira, Inc. and Mayne Pharma Ltd.*, FTC Docket No. C-4182 (Jan. 18, 2007) (decision and order), *available at* http://www.ftc.gov/os/caselist/0710002/070118do0710002.pdf.

[6] *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.

prevented Barr from entering with its generic version of Ovcon. The next day, Barr announced its intention to start selling a generic version of the product.[7] 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.[8] Though Warner Chilcott settled, the FTC's case against Barr is ongoing.

Anticompetitive patent settlements between brand and generic companies present one of the greatest threats American consumers face today. The agency has directed significant efforts at antitrust challenges to what have come to be called "exclusion payment settlements" (or, by some, "reverse payments"). In these settlements, a brand-name drug firm pays a generic firm to delay entry of its competing product, effectively sharing the brand's profits that are preserved by an agreement not to compete. Recent court decisions, however, have made it more difficult to bring antitrust cases to stop exclusion payment settlements, and the impact of those court rulings is becoming evident in the marketplace. These developments threaten substantial harm to

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[7] 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.

[8] *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.

consumers and others who pay for prescription drugs. Despite the Supreme Court's decision not to grant the FTC's petition for *certiorari* in *Schering,*[9] we continue to be vigilant in the detection and investigation of patent settlements between drug companies that delay generic entry.

The Commission strongly supports the intent behind bipartisan legislation introduced by Senators Kohl, Leahy, Grassley, and Schumer, which was reported by this Committee last month, including the objective to adopt a bright line approach to addressing exclusion payments. The FTC submitted testimony to the Senate Judiciary Committee in January 2007, expressing its support for a legislative solution to the problem of anticompetitive patent settlements in the pharmaceutical industry.[10] We welcome the opportunity to continue working with you to advance a legislative remedy in this important area.

B. Medical Devices and Diagnostic Systems

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[9] *Schering-Plough Corp. v. Fed. Trade Comm'n,* 402 F.3d 1056 (11th Cir. 2005), *cert. denied* 126 S. Ct. 2929 (2006). In the *Schering-Plough* matter, the Commission sustained a challenge to two agreements into which Schering entered with generic drug manufacturers through which Schering paid the generics to delay the sale of their products. Schering argued, ultimately successfully in the Court of Appeals for the Eleventh Circuit, that the agreements were an appropriate way to settle the patent litigation and that, because the generics were potentially constrained by Schering's patents from entering, the payments to the generics to agree to accept an entry date did not violate the antitrust laws. In particular, the court ruled that a payment by the patent holder, accompanied by an agreement by the challenger to defer entry, could not support an inference that the challenger agreed to a later entry date in return for such payment, even if there was no other plausible explanation for the payment. The Commission sought *certiorari* in the Supreme Court because we believe that the court of appeals' ruling, contrary to antitrust law and Congress's intent in enacting Hatch-Waxman, essentially imposes a rule that a patentee is presumptively entitled to buy protection from all generic competition for the full patent term, even if such a payment effectively augments the patent's exclusionary power.

[10] Prepared Statement of the Federal Trade Commission Before the Senate Judiciary Committee on *Anticompetitive Patent Settlements in the Pharmaceutical Industry: The Benefits of a Legislative Solution* (Jan. 17, 2007), *available at* http://www.ftc.gov/speeches/leibowitz/070117anticompetitivepatentsettlements_senate.pdf.

This past year, the Commission actively enforced the antitrust laws against transactions that allegedly would have reduced competition for several types of medical devices and diagnostic systems. In July 2006, the FTC preserved competition in the markets for life-saving medical devices by requiring a consent order in the $27 billion acquisition of Guidant Corporation by Boston Scientific Corporation. These two companies are the largest market share holders in several coronary medical device markets in the U.S., together accounting for 90% of the U.S. PTCA balloon catheter market and 85% of the U.S. coronary guidewire market. The order required the divestiture of Guidant's vascular business to an FTC-approved buyer.[11]

In August 2006, the Commission ensured the maintenance of competition in the market for breast cancer diagnostics, specifically for Prone Stereotactic Breast Biopsy Systems, in the matter of Hologic, Inc.'s proposed acquisition of Fischer Imaging. The FTC approved a consent order that required the divestiture of the key biopsy system assets to Siemens, a company well-positioned to become a competitor in this market.[12]

In December 2006, the Commissions issued a consent order regarding the proposed $12.8 billion merger between Thermo Electron and Fisher Scientific. The Commisson's order requires that Thermo Electron divest Fisher's Genevac division, and thereby maintains competition in the

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[11] *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.

[12] *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.

market for centrifugal vacuum evaporators, a tool used in the health care industry.[13]

C. Hospitals and Other Institutional Providers

The Commission has worked vigorously to preserve competition among the nation's hospitals. In October 2005, an FTC Administrative Law Judge found that Evanston Northwestern Healthcare Corporation's completed acquisition of an important competitor, Highland Park Hospital, resulted in higher prices and a substantial lessening of competition for acute care inpatient services in parts of Chicago's northern suburbs.[14] In May 2006, the Commission heard oral arguments on the appeal in this matter. We are continuing to investigate other hospital mergers.[15]

D. Physician Price Fixing

During the past year, the FTC continued to investigate and challenge unlawful price fixing by physician groups. In three separate matters, the FTC challenged agreements between physicians as illegal, and successfully ended price fixing schemes. In August 2006, the FTC approved a final consent order settling charges that agreements among 30 competing members of the Puerto Rico Association of Endodontists were unlawful. The FTC charged that these

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[13] *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.

[14] *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.

[15] The Commission also challenged the merger of two of the top three operators of outpatient kidney dialysis clinics and required divestitures in 66 markets throughout the United States. *In the Matter of Fresenius AG*, FTC Docket No. C-4159 (June 30, 2006) (decision and order), *available at* http://www.ftc.gov/os/caselist/0510154/0510154dopublicversion.pdf.

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 FTC's complaint charged that the Association's actions led to higher costs for consumers.[16]

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 ("IPAs") 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.[17]

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), along with 10 related parties, collectively setting 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

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[16] *In the Matter of Puerto Rico Ass'n of Endodontists, Corp.*, FTC Docket No. C-4166 (Aug. 24, 2006) (complaint), *available at* http://www.ftc.gov/os/caselist/0510170/0510170c4166praecomplaint.pdf.

[17] *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/0510137/0510137nchqaprimedecisionorder.pdf.

individual physicians and agreed instead to a group contract. The FTC 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 continuing it, it does contain mechanisms allowing the Commission to monitor the continued 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.

II. 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 FTC plays a key role in maintaining competition and protecting consumers in energy markets. In doing so, the FTC 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 industry.

Consistent with past practice, the FTC 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 FTC 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.

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. The FTC was concluding its investigation of the proposed acquisition at the time, and USA Petroleum's president acknowledged that the parties abandoned the transaction because of resistance from the FTC.[18]

Also in November 2006, the FTC challenged EPCO's proposed $1.1 billion acquisition of TEPPCO's natural gas liquids storage businesses. The FTC approved a consent order that allowed the acquisition to be completed only if TEPPCO first divested its interests in the world's largest natural gas liquids storage facility in Mont Bellvieu, Texas to an FTC-approved buyer.[19]

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[18] *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.

[19] *In the Matter of EPCO, Inc., and TEPPCO Partners, L.P.*, FTC Docket No. C-4173 (Oct. 31, 2006) (decision and order), *available at* http://www.ftc.gov/os/caselist/0510108/0510108c4173do061103.pdf.

In May 2006, the FTC released its report on gasoline price manipulation and post-Katrina gasoline price increases.[20] This report contained the findings of a Congressionally-mandated Commission 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 FTC'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.

In December 2006, the Commission issued a report that examined the current state of ethanol production in the United States and measured market concentration using capacity and production data.[21] The study, which is the second in a series of annual reports, concludes that

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[20] 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.

[21] 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.

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. By attributing the producers' market shares to marketers when producers make such agreements, FTC staff derived alternative estimates of market concentration. The staff also estimated market concentration using both capacity and production data. The study concluded that the level of concentration in ethanol production would 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. The report notes, however, that staff cannot rule out the possibility that future mergers within the industry may raise competitive concerns.[22]

III. Real Estate

Purchasing or selling a home is one of the most significant financial transactions most consumers will ever make. Given this fact, the FTC has actively investigated restrictive practices in the residential real estate industry, including efforts by private associations of brokers to impede competition from brokers who use non-traditional listing arrangements. In the past year alone, the agency has brought eight enforcement actions against associations of realtors or brokers who adopted rules that allegedly withheld the valuable benefits of the multiple listing services they control from consumers who chose to enter into non-traditional listing contracts with real estate brokers. These association policies allegedly limited the ability of home sellers to choose a listing type that best served their specific needs.

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

In July 2006, the Commission charged the Austin Board of Realtors with violating 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.[23] In September 2006, the FTC issued a final consent order settling charges against the Austin Board of Realtors. Under the terms of the settlement, the Austin Board of Realtors is prohibited both 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.[24]

In December 2006, the Commission protected consumers by requiring a series of consent orders in five matters relating to the operation of multiple listing services in parts of Colorado, New Hampshire, New Jersey, Virginia, and Wisconsin. These matters 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 (5) Information and Real Estate Services, LLC.[25] The complaints charged the associations

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[23] 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.

[24] *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.

[25] 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.

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 be open to all types of listing agreements.[26]

In October 2006, the agency filed administrative complaints against both RealComp II Ltd., and MiRealSource, Inc.[27] The complaints 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

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[26] *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.

[27] 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.

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.[28] In February 2007, the Commission approved a consent order for public comment in the matter of MiRealSource, in which MiRealSource agreed to provide its services to all member brokers.[29] The FTC is currently in the process of litigating the Realcomp II complaint.

IV. Defense

In October 2006, the FTC 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 FTC complaint alleged that, by combining the only two suppliers of U.S. government medium to heavy launch services, the joint venture as originally structured 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 Commission worked closely with the Department of Defense ("DoD"). The Commission's

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[28] *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.

[29] *In the Matter of MIREALSOURCE, Inc.*, FTC Docket No. 9321 (Feb. 5, 2007) (decision and order), *available at* http://www.ftc.gov/os/adjpro/d9321/070205decisionorder.pdf; *In the Matter of MIREALSOURCE, Inc.*, FTC Docket No. 9321 (Feb. 5, 2007) (agreement containing consent order), *available at* http://www.ftc.gov/os/adjpro/d9321/070205agreement.pdf.

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.[30]

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.[31]

V. Other Industries

The FTC ensured continued competition for funeral and cemetery services by entering

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[30] *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.

[31] *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 orders), *available at* http://www.ftc.gov/os/caselist/0610150/0610150agreement.pdf.

into a consent agreement with 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 in 47 markets for funeral or cemetery services, 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 third-party funeral homes affiliated with SCI.[32]

In March 2006, the FTC challenged Valassis Communications Inc.'s alleged invitation to collude with its direct competitor, News America Marketing, in the markets for free-standing newspaper inserts. The Commission charged that Valassis invited News America to allocate customers and fix prices, and thereby end an ongoing price war between the two companies. The Commission's consent order settling the charges bars Valassis from engaging in, or attempting to engage in, similar anticompetitive conduct in the future.

In September 2006, the FTC prevented a reduction in competition for industrial gases 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 (ASU's) and all other assets in 8 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

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[32] *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.

the markets for liquid oxygen, liquid helium, and bulk refined helium in several U.S. markets.[33]

In February 2007, the Commission issued a final opinion and order in the non-merger proceeding against technology developer Rambus, Inc.[34] 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. In addition to barring Rambus from making misrepresentations or omissions to standard-setting organizations again in the future, the FTC's order requires Rambus to license its SDRAM and DDR SDRAM technology and sets maximum allowable royalty rates it can collect for the licensing, bars Rambus from collecting or attempting to collect more than the maximum allowable royalty rates from companies that incorporated its SDRAM and DDR SDRAM technology, 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.[35] The Commission considers standard setting to have significant potential benefits for consumers, and it intends to be vigilant in challenging deceptive or unfair practices that may distort that process.

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[33] *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.

[34] 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.

[35] *In the Matter of Rambus Inc.*, Docket No. 9302 (Feb. 5, 2007) (opinion of the Commission on remedy), *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.

VI. Guidance, Transparency, and Merger Review Process Improvements

During the 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 Antitrust Division of the Department of Justice ("DOJ") jointly released a commentary on the agencies' Horizontal Merger Guidelines.

In February 2006, the Commission announced the implementation of significant merger process reforms aimed at reducing the costs borne by both the FTC and merging parties.[36] 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 necessary; allowing the parties to preserve substantially fewer backup tapes; and allowing parties to submit privilege logs that contain much less detailed information.[37]

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

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[36] 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.

[37] *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.

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.[38] 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.

In June 2006, the FTC and the DOJ implemented an electronic filing system that allows merging parties to submit via the Internet the premerger notification filings required by the Hart-Scott-Rodino ("HSR") Act.[39] This new 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.

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

[39] 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.

In January 2007, the Commission 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.[40]

VII. Competition Advocacy

A significant tool for strengthening competition is the FTC's competition advocacy work. 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 the past year FTC commissioners and staff have testified before Congress 22 times, including ten times on antitrust-related matters including legislative proposals to prohibit gasoline price gouging,[41] real estate brokerage services,[42] contact lens sales

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[40] 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.

[41] *FTC Investigation of Gasoline Price Manipulation and Post-Katrina Gasoline Price Increases: Hearing Before the Senate Committee on Commerce, Science and Transportation* (2006) (Prepared Statement of the FTC, Presented by Deborah Platt Majoras, Chairman), *available at* http://www.ftc.gov/os/testimony/0510243CommissionTestimonyConcerningGasolinePrices05232006Senate.pdf.

[41] *Competition in the Real Estate Brokerage Industry: Hearing Before the H. Subcomm. on Housing and Community Opportunity* (2006) (Prepared Statement of the FTC, Presented by Maureen K. Ohlhausen), *available at* http://www.ftc.gov/os/2006/07/CompetitionintheRealEstate%20BrokerageIndustry%20estimony%20ouse07252006.pdf.

and distribution practices,[43] competition in group healthcare,[44] broadband and Internet competition,[45] and barriers to entry and competition by generic drugs.[46] Moreover, in recent months FTC commissioners, senior staff members, and I have testified before the Antitrust Modernization Commission to aid its examination of proposals to modify existing U.S. competition laws.[47]

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 positive consumer outcomes. In the past year, the agency has commented on issues related to

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42 *Consumer Protection and Competition Issues Concerning the Contact Lens Industry: Hearing Before the H. Subcomm. on Commerce, Trade, and Consumer Protection* (2006) (Prepared Statement of the FTC, Presented by Maureen K. Ohlhausen), *available at* http://www.ftc.gov/os/testimony/060915_v040010cpcicontactlensindustryhouse.pdf.

43 *Competition in Group Health Care: Hearing Before the Senate Comm. on the Judiciary* (2006) (Prepared Statement of the FTC, Presented by David P. Wales), *available at* http://www.ftc.gov/os/testimony/P859910CompetitioninGroupHealthCareTestimonySenate09062006.pdf.

44 *FTC Jurisdiction Over Broadband Internet Access Services: Hearing Before the Senate Comm. on the Judiciary* (2006) (Prepared Statement of the FTC, Presented by William E. Kovacic, Commissioner), *available at* http://www.ftc.gov/os/2006/06/P052103CommissionTestimonyReBroadbandInternetAccessServices06142006Senate.pdf.

45 *Barriers to Generic Entry: Hearing Before Senate Special Committee on Aging* (2006) (Prepared Statement of the FTC, Presented by Jon Leibowitz, Commissioner), *available at* http://www.ftc.gov/os/2006/07/P052103BarrierstoGenericEntryTestimonySenate07202006.pdf.

46 *See, e.g., Antitrust Modernization Committee Hearing* (Mar. 21, 2006), (Prepared Statement of Deborah Platt Majoras, Chairman), *available at* http://www.ftc.gov/speeches/majoras/060321antitrustmodernization.pdf; *Antitrust Modernization Committee Hearing* (Sept. 29, 2005) (Prepared Statement of Maureen K. Ohlhausen).

attorney matching services, attorney advertising rules, real estate settlement services, pharmacy benefit managers, wine distribution, patent rules of practice, and on-line auction trading assistants.

The Commission authorized staff to file comments with the Professional Ethics Committee of the State Bar of Texas concerning on-line attorney matching services, which are designed to help consumers find attorneys who are able to handle their legal needs. FTC staff argued that online legal matching services have the potential to lower consumers' costs related to acquiring information about the price and quality of legal services, which is likely to lead to more intense competition among attorneys and will ultimately benefit consumers. At the same time, staff saw "no indication that consumers were likely to suffer harm" from online legal matching services that would justify banning them.[48] The Ethics Committee subsequently issued a revised opinion that largely followed staff's recommendation to require certain disclosures in connection with the use of on-line matching services, rather than banning all such services.

In September, 2006, the Commission authorized staff to file comments with the New York Unified Court System pursuant to a request from the court's Proposed Rules Governing Lawyer 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 New York Unified Court System 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. In

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[48] FTC Staff Comments to Mr. W. John Glancy, Chairman, Professional Ethics Committee for the State Bar of Texas (May 26, 2006), *available at* http://www.ftc.gov/os/2006/05/V060017CommentsonaRequestforAnEthicsOpinionImage.pdf.

January, 2007, the New York Unified Court System promulgated revised rules which adopted nearly all of the staff's recommendations.

In June 2006, 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 DOJ. The Agencies were concerned that the proposed legislation would prevent non-lawyers from competing with lawyers in situations where there is no clear showing that non-attorney services have caused consumer harm.[49] The legislative session ended without any action taken on the bill.

In October 2006, FTC staff filed comments with the Virginia House of Delegates on the subject of pharmacy benefit managers. The Commission argued that the proposed legislation, which would regulate some aspects of the contractual relationships between pharmacy benefit managers and health benefit plans and pharmacies, might indirectly lead to higher drug prices for Virginia consumers.[50] This proposed legislation also failed to be enacted.

In April 2006, FTC staff submitted comments to a Florida State Senator on a Florida bill concerning wine distribution. Staff argued that the bill would promote competition by providing greater access to more extensive wine varieties, and would lower consumer prices in the market.

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[49] 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/V060016NYUplFinal.pdf.

[50] 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.

However, staff noted that the provision which limits the ability of large producers to import wine into Florida would likely reduce the benefits to consumers.[51]

The FTC submitted comments in May 2006 with the U.S. Patent and Trademark Office ("PTO") regarding a January 3, 2006, statement of proposed rulemaking. The Commission supported the PTO's proposed rules on continuations – and urged their adoption – as they accommodate the legitimate uses of continuations, limit abuses that can harm the competitive process, and promote the patent system's ability to provide incentives to innovate to the extent that they reduce the pendency of patent applications.[52]

The FTC staff submitted comments supporting a bill under consideration by the Louisiana State Senate that would exempt on-line auction trading assistants from being required to attain an auctioneer's license prior to operating their businesses. The FTC argued that the bill will stimulate competition in the market for online retail services in the state by reducing barriers to entry and thus increasing consumer choices.[53] The staff's analysis was utilized during deliberations over the bill, which was ultimately signed into law.

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[51] FTC Staff Comments to The Honorable Paula Dockery (Apr. 10, 2006), *available at* http://www.ftc.gov/os/2006/04/V060013FTCStaffCommentReFloridaSenateBill282.pdf.

[52] Comments of the United States Federal Trade Commission Before the United States Patent and Trademark Office, In the Matter of Changes to Practice for Continuing Applications, Requests for Continued Examination Practice, and Applications Containing Patentably Indistinct Claims, Docket No. 2-5-P-066 (May 3, 2006), *available at* http://www.ftc.gov/os/2006/05/P052103CommissionCommentsRePTODocketNo2-5-P-066BeforethePatentandTrademarkOfficeText.pdf.

[53] FTC Staff Comments to The Honorable Noble E. Ellington, Louisiana State Senate (May 26, 2006), *available at* http://www.ftc.gov/os/2006/06/VO60015CommentstoLouisianaStateSenateImage.pdf.

VIII. Amicus Briefs

As in the past, the FTC 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 Section 2 cases, to price fixing matters, to vertical price restraints.

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 "necessity."[54] 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.

In June 2006, the FTC and DOJ filed a joint amicus brief in the case of *Latino Quimica-Amtex S.A., et al. v. Atofina S.A.*, which involved an international price-fixing conspiracy by manufacturers of two chemicals, sodium monochloroacetate and monochloroacetic acid, which are used in manufacturing foods, pharmaceuticals, herbicides, and plastics. At issue were the Sherman Act claims of several foreign companies that purchased the chemicals from

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[54] 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.

manufacturers located outside the United States, for delivery outside of the United States. In keeping with the position previously advanced in the *Empagran* litigation, the brief urged the Second Circuit to affirm the dismissal of the complaint for lack of jurisdiction.[55] Shortly after the brief was filed, the parties withdrew the appeal.

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 jurisprudence, and should be overruled.[56]

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

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[55] Brief for the United States and the Federal Trade Commission as Amici Curiae in Support of Defendants-Appellees and in Support of Affirmance of the Judgment, *Latino Quimica-Amtex S.A., et al. v. Atofina S.A.* No. 05-5754-cv (2d Cir. June 1, 2006), *available at* http://www.ftc.gov/os/2006/06/P062113LatinoQuimica-AmtexvAtofinaAmicusBrief.pdf.

[56] 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 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.[57]

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.[58] 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.[59]

IX. 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 other agency reports foster a deeper understanding of the complex issues involved in the economic and legal analysis of antitrust law.

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[57] 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.

[58] *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).

[59] *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).

In June 2006, the FTC and DOJ began holding a series of public hearings designed to examine the boundaries of permissible and impermissible conduct under Section 2 of the Sherman Act.[60] The primary goal of the hearings is to examine whether and when specific types of single-firm conduct are procompetitive or benign, and when they may harm competition. The agencies have already held fourteen days of hearings that have examined conduct such as predatory pricing, tying, price bundling, royalty rebates, refusals to deal, misleading and deceptive conduct, and exclusive dealing. The hearings have solicited input directly from businesses, business schools, and historians, as well as lawyers and economists with antitrust expertise. The hearings will continue through the spring, and will include sessions that examine issues relevant for identifying monopoly power and fashioning remedies. After the hearings conclude, staff from the agencies will prepare a public report that will incorporate the results of the hearings, as well as relevant scholarship and research.

A second major area of activity has involved intellectual property. The Commission is continuing to make use of the results of proceedings it commenced earlier this decade. In February 2002, the Commission and DOJ convened hearings to develop a better understanding of how to manage the issues that arise at the intersection of antitrust and intellectual property law and policy. The hearings took place over 24 days and involved more than 300 panelists. The agencies heard perspectives from business representatives, the independent inventor community, leading patent and antitrust organizations and practitioners, and scholars in economics and patent and antitrust law. In addition, the FTC received about 100 written submissions.

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[60] 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.

The Commission issued the first of two reports that stem from the hearings in 2003. The first report, *To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy*,[61] concluded that competition in markets and patents can work in tandem to foster innovation, but the report found that each policy requires a proper alignment with the other to do so. The FTC's first report analyzed and made recommendations for the patent system. The Commission and DOJ are nearing completion of the second report, which will describe and make recommendations for competition law and policy.

In March 2006, FTC staff initiated a study on authorized generic drugs.[62] 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. At this time, the Commission has given public notice regarding its proposed methodology, and staff is reviewing the public comments that have been received.

In September 2006, FTC staff released a report on the municipal provision of wireless internet access. The Commission recognizes that improving consumer access to broadband internet service is an important goal for federal, state, and local governments, and the report

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[61] Federal Trade Commission, *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.

[62] 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.

describes a variety of options to reduce competitive risks arising from municipal provision of wireless internet access while still achieving benefits from increased broadband access.[63]

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'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.[64]

In February 2007, the FTC hosted a public workshop on "Broadband Connectivity Competition Policy."[65] This workshop brought together experts from business, government, and the technology sector, as well as consumer advocates and academics. The purpose was to explore competition and consumer protection issues relating to broadband Internet access, including so-called "network neutrality." The workshop 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 FCC's common carrier regulations.

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[63] Federal Trade Commission, *Municipal Provision of Wireless Internet* (Sep. 2006), *available at* http://www.ftc.gov/os/2006/10/V060021municipalprovwirelessinternet.pdf.

[64] Federal Trade Commission, *Enforcement Perspectives on the Noerr-Pennington Doctrine* (2006), *available at* http://www.ftc.gov/reports/P013518enfperspectNoerr-Penningtondoctrine.pdf.

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

In April 2007, the Commission will hold a three-day conference on "Energy Markets in the 21st Century: Competition Policy in Perspective."[66] The conference will bring together leading experts from government, the energy industry, consumer groups, and the academic community to explore a range of energy issues that are important to American consumers and the U.S. and global economies. Panels will discuss topics including: the relationship between market forces and government policy in energy markets; the dependence of the U.S. transportation sector on petroleum; the effects of electric power industry restructuring on competition and consumers; what energy producers and consumers may expect in the way of technological developments in the industry; the security of U.S. energy supplies; and the government's role in maintaining competition and protecting energy consumers.

X. International Coordination and Technical Assistance

In February 2007, I created the FTC's Office of International Affairs to coordinate more effectively the full range of the FTC's international activities. The move brings international antitrust, consumer protection, and technical assistance programs under one office.

FTC's cooperation with competition agencies around the world is a vital component of our enforcement and policy programs, facilitating our ability to collaborate on cross-border cases, and promoting convergence toward sound, consumer welfare-based competition policies.

Commission staff routinely coordinate with colleagues in foreign 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

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[66] 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.

FTC's views in connection with developing new policy initiatives. For example, during the past year, the FTC consulted with the European Commisssion ("EC") regarding its review of policies on abuse of dominance and remedies, with the Canadian Competition Bureau on merger remedies and health care issues, and with the Japan Fair Trade Commission on abuse of dominance and revisions to its merger guidelines. We will also be consulting with the EC on its new draft guidelines for the review of non-horizontal mergers. The FTC participated in consultations in Washington and in foreign capitals with top officials of, among others, the EC, the Japan and Korea Fair Trade Commissions, and the Mexican Federal Competition Commission. In 2006, I became the first FTC Chairman to visit China, establishing important relationships with officials involved in developing the first comprehensive competition law in China, and underscoring the importance of the FTC's and DOJ's work to provide input into the drafting process.

The FTC is an active participant in key multilateral fora that provide important opportunities for competition agencies to enhance mutual understanding in order to promote cooperation and convergence, including the International Competition Network ("ICN"), the Organization for Economic Cooperation and Development ("OECD"), the United Nations Conference on Trade and Development ("UNCTAD"), and Asia-Pacific Economic Cooperation ("APEC"). For example, over the past year, the FTC has served on the ICN's Steering Group, co-chaired its Unilateral Conduct working group and related objectives subgroup, chaired its Merger Notification and Procedures subgroup, and played a lead role in its working group on Competition Policy Implementation. In addition, the FTC also participates in U.S. delegations

that negotiate competition chapters of proposed free trade agreements, including in connection with negotiations with Korea, Thailand, and Malaysia during the last year.

The FTC also assists developing nations as they move toward market-based economies with developing and implementing competition laws and policies. These activities, funded mainly by the United States Agency for International Development and conducted in cooperation with DOJ, are an important part of the FTC's efforts to promote sound competition policies around the world. In 2006, the FTC sent 34 different staff experts on 30 technical assistance missions to 17 countries, including the ten-nation ASEAN community, India, Russia, Azerbaijan, South Africa, Central America, and Egypt. We also conducted missions in Jordan and Ethiopia, and concluded a highly successful program in Mexico.

XI. 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 Commission 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 & Gas, Health Care, Real Estate, and Technology. These 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 Subcommittee, 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 would be happy to answer any questions that you may have.