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FEDERAL TRADE COMMISSION REAUTHORIZATION

HEARING

BEFORE THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION UNITED STATES SENATE

ONE HUNDRED TENTH CONGRESS

SECOND SESSION

APRIL 8, 2008

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ONE HUNDRED TENTH CONGRESS

SECOND SESSION

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FEDERAL TRADE COMMISSION REAUTHORIZATION

TUESDAY, APRIL 8, 2008

U.S. SENATE,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
Washington, DC.

The Committee met, pursuant to notice, at 10 a.m. in room SR–253, Russell Senate Office Building, Hon. Byron L. Dorgan, presiding.

OPENING STATEMENT OF HON. BYRON L. DORGAN, U.S. SENATOR FROM NORTH DAKOTA

Senator DORGAN. We will call the hearing to order. This is the hearing of the full Senate Commerce Committee.

The subject today is the Federal Trade Commission Reauthorization bill.

The Federal Trade Commission is a very important Federal agency, perhaps more important now than ever, and despite that, the Federal Trade Commission has been one of those agencies that has shrunk in size, despite the fact that it has a broader agenda in many ways.

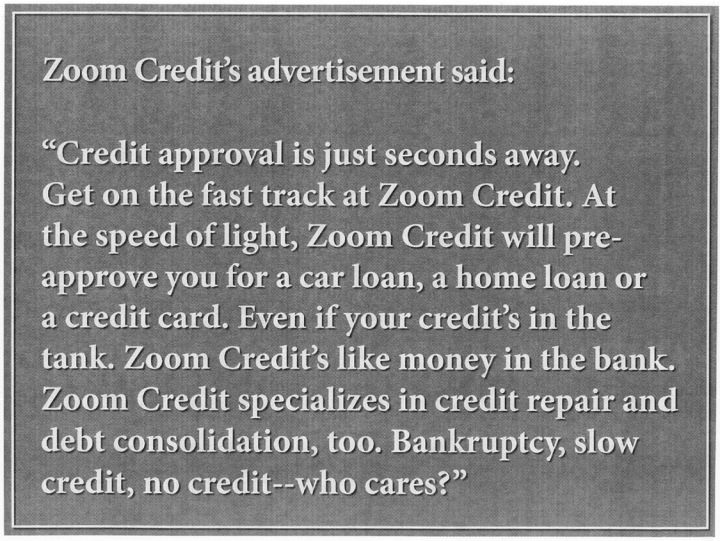
It has been reduced from a pre-1980 high of roughly 1,700 employees to now 1,100 employees. Its jurisdiction would have been or should be dealing with things like deceptive advertising and competition and subprime loans. All of us understand the nomenclature of subprime lending these days and what it has done to cause economic difficulties: oil pricing, consumer protection, mergers, trade.

All of these are very, very important issues and they have become even more important at a time when the Federal Trade Commission has a third less people than it did 25 years ago to do its work.

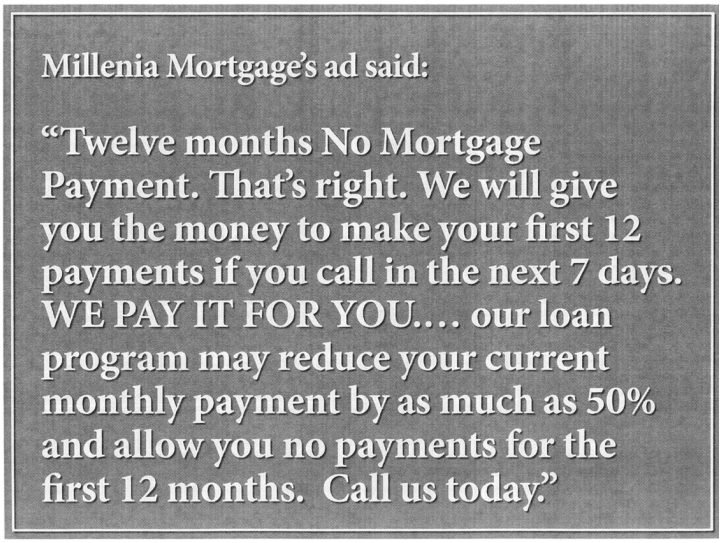
I want to put up a couple of posters, if I might, this morning. I especially want to talk about the importance of having a Federal Trade Commission that can establish a set of rules with respect to deceptive advertising, and I do this only because we have on the Floor of the Senate today the housing issue which relates to the subprime scandal and a lot of reasons and a lot of causes, but I want to describe some of them.

This is an advertisement that most of us have been treated to here in this country. It's from a company called Zoom Credit. I don't know who Zoom Credit is, but here's what they were telling us in advertising. "Credit approval is just seconds away. Get on the fast track at Zoom Credit . . . Even if your credit is in the tank,

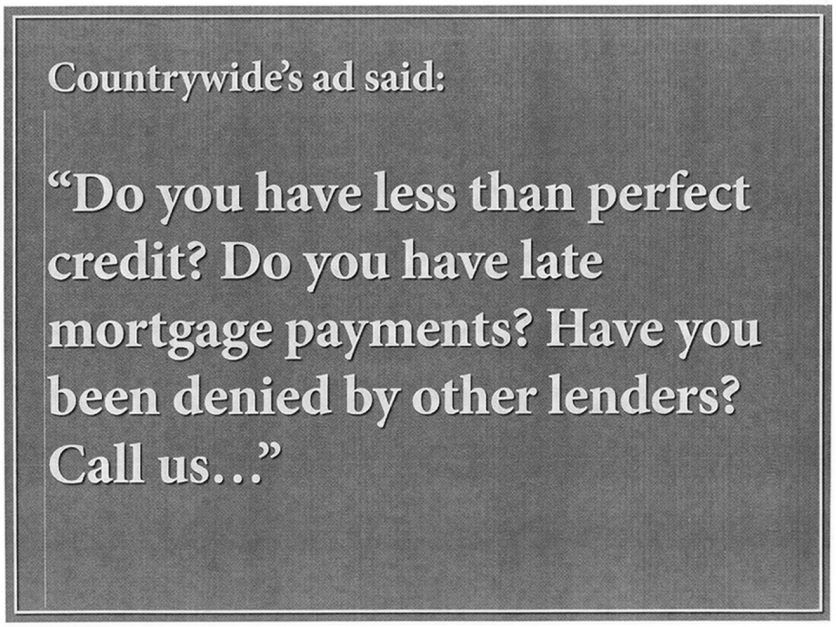
Zoom Credit's like money in the bank. We specialize in credit repair and debt consolidation. Bankruptcies, slow credit, no credit—who cares?" That's an advertisement to the American people.



Senator DORGAN. Next chart. Millennium Mortgage, "Twelve months No Mortgage payment. That's right. We'll give you the money to make your first 12 payments if you call in the next 7 days. We pay it for you. Our loan program may reduce your current monthly payments by as much as 50 percent and allow you no payments for the first 12 months." That's an advertisement to the American people by Millennium Mortgage. Didn't mention, of course, that the first 12 months goes in the back of the loan and actually increased the price of the house.

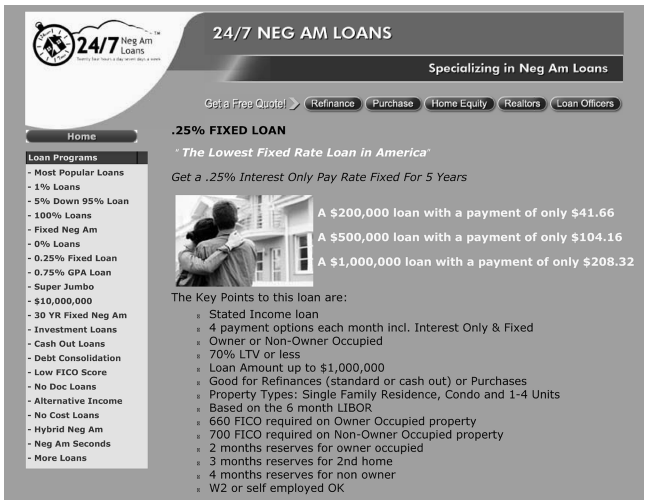


Senator DORGAN. Countrywide, the largest lender in this country, said this in their ad. "Do you have less than perfect credit? Do you have late mortgage payments? Have you been denied by other lenders? Call us." That's from the largest mortgage bank in this country.

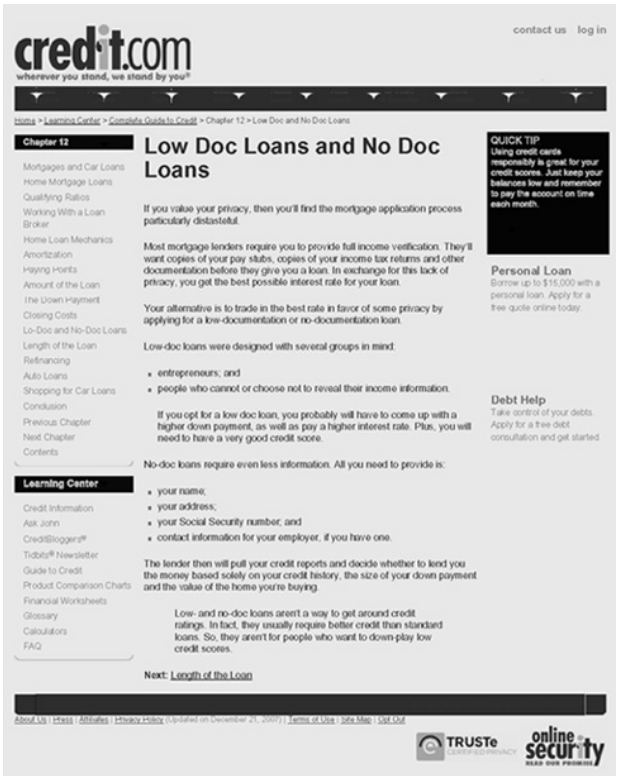


Senator DORGAN. And by the way, these are still on the Internet. We got some yesterday: 2,500 of a percent fixed loan. One-quarter of 1 percent rate for a fixed loan; $500,000, half a million loan, your payment's going to be a $104 a month. That's what they're advertising. They don't, of course, tell the person that there's much, much more here to this story than that.

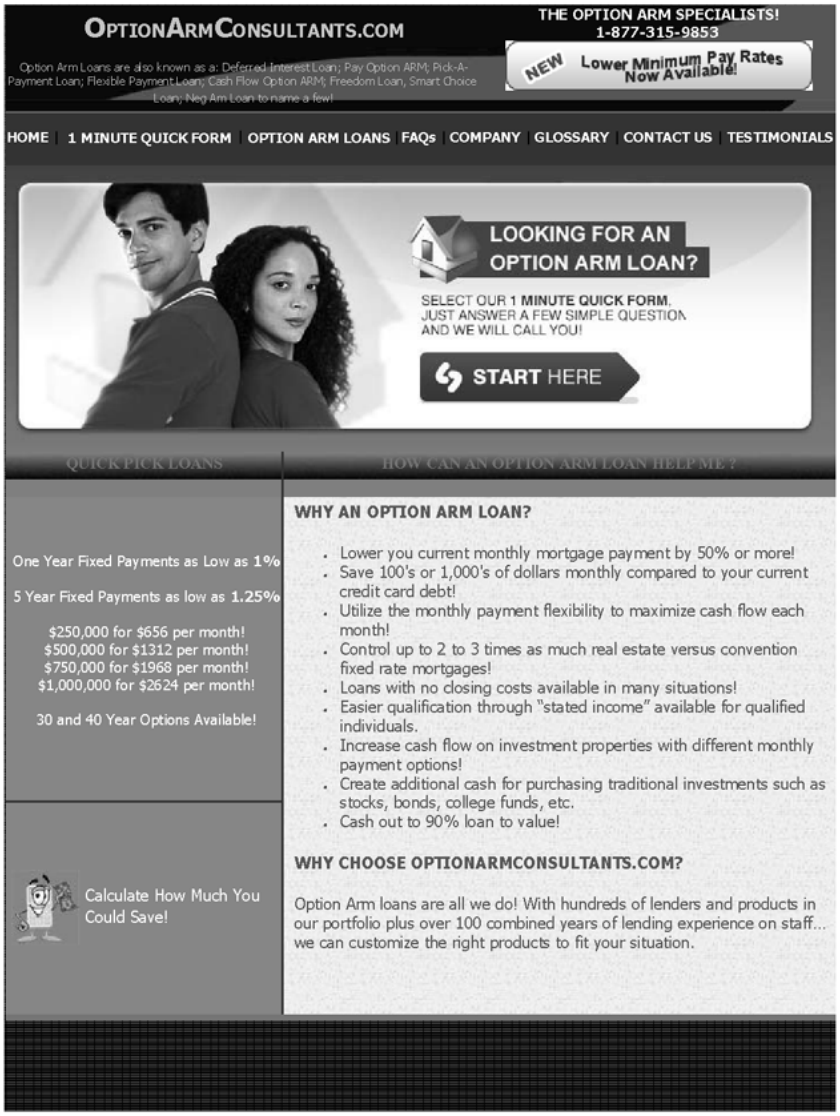
You want to get $200,000 to buy a house, your house payment will be $41 a month, according to this advertisement. Next one is *credit.com*. I'm just going to run through a couple of them just to describe for a moment the need I believe for expanded rulemaking authority by the Federal Trade Commission.



Senator DORGAN. This is *credit.com.* Low documentation loans and no documentation loans and this advertisement says that we are doing this to protect your privacy. You want to apply for a mortgage, you can do it either with no documentation of your income or low documentation of your income.

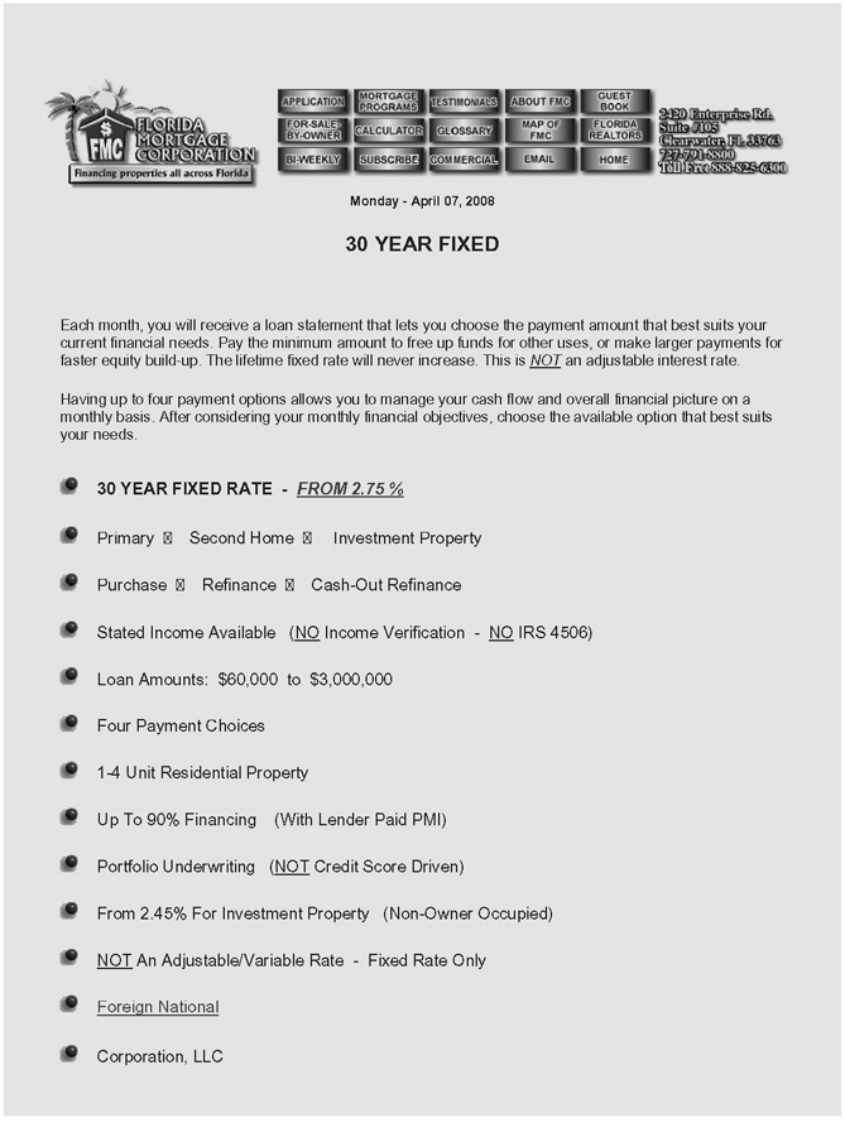


Senator DORGAN. This was on the Internet yesterday, still going. One year fixed payments as low as 1 percent. Five-year fixed payments as low as one and a quarter percent. You want a loan for your home and pay one and a quarter percent interest rate for five straight years. That's what this company's advertising. Pretty unbelievable when you think about it.



Senator DORGAN. They say get a loan like this and control up to two to three times as much real estate *versus* conventional fixed rate mortgages. Here's another one that is one of the more deceptive, it seems to me. Thirty-year fixed loan from 2.75 percent.

Does anybody in this room think you can get a 30-year fixed mortgage at 2.75 percent interest rate? Anybody believe that? By the way, this is on the Internet advertising to American people yesterday. I pulled that off the Internet yesterday. 2.75 percent interest rate, fixed rate, for 30 years.



Senator DORGAN. All right. The last one. This, too, was on the Internet yesterday, and it says these are perfect—this is a loan, perfect credit not required, no income verification loans. In fact, it says they are ideal for the self-employed.



Senator DORGAN. Well, you get my point. My point is there has been unbelievably deceptive advertising out there and it exists today while we sit here in this room talking about consumer protection.

Now I've introduced a piece of legislation with the Chairman of this Committee as a cosponsor and others to reauthorize the Federal Trade Commission. I welcome the Commissioners here today.

I want to start by particularly paying notice that we have a new Chairman of the Commission, Mr. Bill Kovacic. The Chairman congratulates you for assuming the chairmanship. You've been with

the FTC for many years but have just assumed these new responsibilities.

The previous Chairman of the Commission, Chairman Majoras, was with us in September to testify as we considered drafting the FTC Reauthorization bill in 2008, and this morning I introduced that bill with Senator Inouye. We're pleased to be introducing a bill that we believe gives the Federal Trade Commission the needed opportunities to protect consumers from unfair or deceptive practices and unfair methods of competition.

I want to briefly outline what the FTC Reauthorization Act does. First, it provides for a 7-year reauthorization, starting in 2009. We set the funding level at $264 million, increase it 10 percent per year. We do that because, as I indicated earlier, we're at a near 30-year low. We're still almost 30 percent below where we were two and a half decades ago at a time when we need much more muscle and capability in our Federal agency to regulate and investigate.

We give the FTC independent litigating authority so they won't have to refer in every case, in the cases they now do to the Department of Justice. We give the FTC authority to give preference in the hiring process to administrative law judges who have some experience in the issues.

We give the FTC the authority to commence a civil action to recover civil penalties in the district court for a violation of the FTC Act. We extend the jurisdiction to allow them to go after nonprofit entities as well, to investigate in cases where it is necessary, so that bad actors cannot hide behind a nonprofit status, and we allow them to go after those aiding and abetting an FTC violation.

We give them the authority, by majority vote of the full Commission, to waive their current rulemaking requirements for any rule involving a consumer protection matter. We require the FTC conduct a rulemaking under the Administrative Procedures Act which is faster than their current Magnuson-Moss authority in the area of subprime loans.

I know the Commission has sent 200 warning letters to mortgage advertisers and is conducting several investigations of mortgage advertisers and subprime lenders. In addition, they've brought 21 cases in the last decade, but they have not had the opportunity to review bad practices and create a rule on bad practices that would prevent their recurrence and that is absolutely essential.

We also repeal the common carrier exemption which the FTC has long been requesting and which I have been trying to accomplish.

I want to thank the FTC for its work in these many areas. As you know, here in the Congress, we have just passed a Do Not Call Registry piece of legislation that makes that list permanent. I want to thank you for your support of that. We don't want people having their mealtime interrupted by unwanted solicitation calls and we think we have accomplished that by permanently extending the list.

You had six settlement cases in November 2007 against companies that violated that Do Not Call List. I congratulate you for that.

Finally, I know you've hosted a workshop on behavioral advertising and you've released a set of proposed principles to guide the development of self-regulation in this area, and I believe you've

been seeking comments on those principles and those comments are due April 11, and I'll be studying those comments and looking at legislation in this area as well.

I just want to make one final point. I know that there are some who may look at these set of recommendations and say, well, this is once again giving a Federal agency some more authority and it's once again suggesting there should be some additional regulation.

You know, I think it's very interesting that the Federal Reserve Board and the American taxpayers have ponied up $30 billion to assume the risk of JPMorgan buying BearStearns. Why? Because we're told that BearStearns is too big to fail. If it is too big to fail, why is it not big enough to regulate? Why do we have—this is a different question, perhaps a different committee.

But why, if we have institutions that are too big to fail, do we not have effective regulation of the kinds of things that can be very detrimental to this country? I believe that there are certain times and cases where someone ought to look over the shoulder of an organization that's too big to fail and take a look at what they're doing and make sure that we put them back on track.

You, in the FTC, understand we've also asked a lot of questions about the price of gasoline and I would just say this to you as you take a new look at that. I believe that there's a lot happening in that area that bears watching. There's unbelievable speculation in the futures market for oil. We in the futures market buy and sell 20 times more oil every day than exists. There is just an unbelievable amount of speculation. Some believe that the price of gasoline and oil is about $20 or $30 a barrel for the price of oil above where it ought to be because of the unbelievable speculation in the futures market where you can operate on margins of five and 7 percent as opposed to the stock market which requires a margin of 50 percent.

All of this doesn't fall on your lap. My only point is that energy prices are a serious issue for the American people and I think there's a lot to investigate with respect to that as well.

I'm going to recognize the Commission in a moment, but I will call on my colleague from Minnesota for an opening statement.

STATEMENT OF HON. AMY KLOBUCHAR,
U.S. SENATOR FROM MINNESOTA

Senator KLOBUCHAR. Thank you very much, Mr. Chairman. Thank you for holding this important hearing. Welcome to the Commissioners, and I know that this hearing is coming at a critical time for the FTC with the massive consumer protection challenges we are facing today. We certainly have seen it with the consumer issues with the toys in from China.

We've seen it in Minnesota with the problems we've seen with cell phone service and advertisements about no dropped calls and then it turns out, when we actually had a hearing on this, there was a big billboard for one of the companies and we were able to take a picture of that billboard where they said one of the best networks with a picture of their phone where there were no bars, and certainly in the pharmaceutical area, and I'll talk about that in a minute, we've been seeing problems with what I consider problematic trade practices.

Whether it be the subprime lending crisis, the record oil prices, the unsafe food and the products making their ways to our shelves, to the skyrocketing healthcare and pharmaceutical costs, American consumers are finding themselves under duress in an unprecedented way and at the same time, we are seeing a reduction from this Administration in the budgets for agencies. We certainly found that with the Consumer Product Safety Commission and it made what was already a problem worse.

If we look at the major issues the Senate has addressed in recent weeks, we see that consumer protection is among the public's greatest concerns. I was pleased with the work that the Senate did in the Consumer Product Safety Commission Reform Act and we are currently debating how to improve Federal regulation, as you know, in the mortgage area.

More and more Americans are worried about their economic future, about their ability to make ends meet, and they're outraged when they see companies engaging in deceptive or unreasonable pricing or sales schemes, and as we see a rockier picture for our economy, I can tell you, based on my experience as a prosecutor, whenever there are some difficult economic times, you see crime and fraudulent practices going up. People are used to a certain lifestyle. They want to keep it that way. So, they'll go across the line to be able to keep their own wallets full and what I'm concerned about here, as we've already seen because of all the imports coming in, more need for regulation of deceptive practices, and I think we're even going to see more going forward.

Hardly a week goes by that we don't get another report of a pharmaceutical company grossly inflating the price of a vital drug or a wireless company charging customers for invented fees hidden in their monthly bill or a mortgage lender offering deceptive home loans to low-income families.

The FTC's role in protecting against abuses of consumer trust and confidence has never been more important. Since the last reauthorization bill Congress passed in 1996, the Commission has done admirable work in responding to companies' unfair or deceptive actions and unfair methods of competition, but given the current climate and conditions, it is clear that the FTC must be granted enhanced and expanded authority and resources to carry out its mission and I appreciate that some of the Commissioners have highlighted areas in which your current ability to protect consumers is unnecessarily restricted and for continuing to push for greater authority.

I want to commend Senator Dorgan for his outstanding work in drafting the FTC Reauthorization legislation we're discussing today and I believe that this bill makes several important improvements to strengthen the FTC's oversight authority. I just want to tell you when you're done with your opening remarks, one area that I'm very interested in is what's going on with the pharmaceutical companies.

This year, I've heard from Children's Hospital in Minneapolis and consumers and other pediatric care providers regarding the drastic price increase of Indomethacin, which is a drug that's used to treat children's heart problems and it actually saves a lot of money because you don't need surgery.

Two years ago, Ovation Pharmaceuticals acquired the rights to this drug from Merck and the company increased the price within a year by 18 times the amount without improving the drug in any way. We had a meeting with a number of doctors in Minnesota and the head of the hospital as well as patients, parents of little babies who were there who had been saved by this drug, and I know that the FTC has engaged in investigations of this type of activity in the past. One of my lines of questioning will be about how this could take place, if you need additional authority to go after practices like this, and what the history is for these kinds of investigations.

Thank you very much, Mr. Chairman.

Senator DORGAN. Senator Klobuchar, thank you very much.

Mr. Chairman, we will hear from you first.

STATEMENT OF HON. WILLIAM E. KOVACIC, CHAIRMAN, FEDERAL TRADE COMMISSION

Mr. KOVACIC. Thank you very much, Chairman Dorgan, Senator Klobuchar.

I'm enormously grateful for the opportunity to serve as Chair of my agency and to appear today to discuss with you the reauthorization proposals that you've just described.

I want to emphasize that the growth and success of this agency, if we take it over a span certainly of its modern history, has been largely attributable to a very successful partnership between the Congress, this Committee, and the Commission in getting needed adjustments in its authority and resources over time.

It would be impossible to discuss the accomplishments both of you have alluded to without touching upon a number of instances, certainly dating back to 1970, in which this committee and the Congress have provided needed enhancements to authority.

So, it's an enormous privilege for me today to continue that conversation and to continue that partnership that will put this agency in a position to be successful in the future.

Let me take a moment to introduce my colleagues and to discuss the distribution of comments across us. I'll be talking a bit about resources and the common carrier exemption. My colleague, Commissioner Harbour will be discussing our recent experience in enforcement and policymaking. My colleague, Commissioner Leibowitz will be discussing the aiding and abetting and civil penalties elements of the reauthorization proposal, and my colleague, Commissioner Rosch will talk about independent litigating authority and rulemaking.

As a general observation, we welcome and encourage your efforts to continue to see that this agency is put on a footing that permits it to deliver effective competition and consumer protection programs in the future. I can only say that without the partnership that I referred to before, it would have been impossible for us to achieve the success that we have in many areas of our consumer protection and competition programs.

The reauthorization proposal today provides a wonderful occasion to continue that discussion.

I want to turn to the topic of resources which Chairman Dorgan mentioned just a moment ago. I think that the framework that the Committee has established is a very sensible one from several di-

rections. Whether or not the precise numbers come through the appropriations process over time, none of us can know. I think the basic framework is a sensible one, and in particular I like the fact that it takes a long-term focus.

So rather than thinking about how the Commission and its resources might go from year to year, it puts us in the position of beginning to think, in a very intelligent way about what our needs ought to be over the horizon.

Indeed, with my colleagues' approval, I've suggested internally, largely inspired by this approach, that we undertake our own basic self-assessment of our capacity of the position that we want to achieve, not simply in the short term, but when we reach our centennial, which is only 6 years away. Essentially, we now need to ask ourselves in a very careful way with consultations with others where the Commission should be at 100.

Another thing I want to underscore that, I think is particularly useful in this set of proposals, is the separate dedication of what might be called a capital budget for information technology.

If you look at the numbers Senator Dorgan mentioned before, you'll find that the trend from the late 1970s to the present basically has not affected the number of professionals we have. Those numbers have shrunk mainly because machines have replaced administrative support staff. That means, though, that the enhancement of our IT capability remains absolutely indispensable to what we do. We may not simply preserve its existing capacity; we must improve it over time.

I think the focus in the reauthorization measure to look at information technology, equipment, and facilities as being key ingredients to improving productivity is a very sensible way to go ahead.

Indeed, the only question I would have for you is that if the enhancements and authority that have been suggested take place, whether the numbers will be enough. I'm sure there will be occasions to revisit that in the future. I'd add again that with the encouragement of the Committee, if you look at the trend in our professionals, our lawyers and economists, going back basically over that 20-year period, your assistance has permitted us, going back to the early 1980s, to at least keep the number of lawyers and economists at the same level. Indeed, over the past decade we've seen modest increases to that capacity.

I think that the proposals with respect to resources keep us on that path.

I want to finish by saying that the common carrier adjustment is a necessary step. This was set in place when this agency was created in 1914. The exemption hasn't changed, but I think we all know that the industry has changed just a little.

Who could have imagined in 1914 the array of adjustments in what we now call the telecommunications sector? What the failure to revisit that exemption has done is that we almost every day of the week bump into limitations in our capacity to do exactly the kind of work that both of you have referred to. Senator Klobuchar, in particular, mentioned cellular telephony. That's an area that in many respects we can't touch. We're like the old county policeman who has to drive up to the border and stop when we bump into the jurisdictional hurdle of the common carrier barrier, and I think

that this, along with the not-for-profit proposal, again puts us in a good position to begin to rethink what I believe to be anachronisms in our statute that were set in place long ago and severely need a rethink.

I'll now turn to my colleague, Commissioner Harbour. I thank you, both.

[The prepared statement of Mr. Kovacic follows:]

PREPARED STATEMENT OF THE FEDERAL TRADE COMMISSION

I. Introduction

Chairman Dorgan, Vice Chairman Stevens, and Members of the Committee, the Federal Trade Commission ("Commission" or "FTC") is pleased to appear before you today to testify about the FTC's work to protect consumers and promote competition,[1] and S. _____, a bill to reauthorize the Commission. We look forward to continuing to work with you to further the interests of American consumers.

The FTC is the only Federal agency with both consumer protection and competition jurisdiction in broad sectors of the economy.[2] The agency enforces laws that prohibit anticompetitive mergers and acquisitions and business practices that are harmful to consumers because they are anticompetitive, deceptive, or unfair. The FTC also promotes informed consumer choice and understanding of the competitive process.

The FTC has pursued a vigorous and effective law enforcement program in a dynamic marketplace that is increasingly global and characterized by changing technologies. Through the efforts of a dedicated, professional staff, the FTC continues to handle a growing workload. This testimony highlights some of the FTC's accomplishments since the last FTC reauthorization hearing and provides some comments on the proposed "Federal Trade Commission Reauthorization Act of 2008."[3] We thank you for your proposed legislation, which is designed to ensure that the FTC can effectively confront the challenges of the 21st century.

II. FTC Accomplishments

The Commission testified on FTC reauthorization in September 2007.[4] That testimony summarized recent FTC accomplishments in such areas as data security and identity theft, energy, real estate, technology, health, financial practices, telemarketing fraud and Do Not Call enforcement.

Since September, the Commission has continued to be active on competition and consumer protection issues. In the competition area, we highlight a few recent enforcement developments. First, in the health care area, the Commission filed a case in February 2008, charging that Cephalon, a pharmaceutical manufacturer, engaged in illegal conduct to prevent competition for its branded drug, Provigil,[5] by paying four competing firms to refrain from selling generic versions of the drug until 2012.[6] The Commission's complaint alleges that Cephalon's conduct constituted an abuse of monopoly power that is unlawful under Section 5 of the FTC Act. We have several other exclusion payment ("pay-for-delay settlement") investigations ongoing.

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[1] The written statement represents the views of the Federal Trade Commission. Our oral presentations and responses to questions are our own and do not necessarily reflect the views of the Commission or any other Commissioner.

[2] The FTC has broad law enforcement responsibilities under the Federal Trade Commission Act, 15 U.S.C. § 41 *et seq.* With certain exceptions, the statute provides the agency with jurisdiction over nearly every economic sector. Certain entities, such as depository institutions and common carriers, as well as the business of insurance, are wholly or partly exempt from FTC jurisdiction. In addition to the FTC Act, the agency has enforcement responsibilities under more than 50 other statutes and more than 30 rules governing specific industries and practices.

[3] This testimony does not address very recent changes to the bill, particularly new sections 10 through 12, which were just made available to us. The Commission is examining these new provisions and how they intersect with other proposed provisions and indeed, the FTC Act as a whole. We look forward to working with you on these new provisions.

[4] *See Prepared Statement of the Federal Trade Commission Before the Subcommittee on Interstate Commerce, Trade, and Tourism Committee on Commerce, Science, and Transportation,* U.S. Senate (Sept. 12, 2007), available at *http://www.ftc.gov/os/testimony/070912reauthorization testimony.pdf.*

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

[6] *Federal Trade Commission* v. *Cephalon, Inc.,* No.: 1:08–cv–00244 (D.D.C. filed Feb. 13, 2008), available at *http://www.ftc.gov/os/caselist/0610182/080213complaint.pdf.*

Second, in the energy area, in January 2008, the parties abandoned Equitable Resources' proposed acquisition of the Peoples Natural Gas Company, a subsidiary of Dominion Resources, as an FTC challenge to the acquisition was on appeal.[7] Although the Federal district court in Pittsburgh denied the FTC's motion for a preliminary injunction and dismissed the complaint last year on state action grounds, in June 2007, the Third Circuit took the rare step of granting the Commission's motion for an injunction pending appeal. In February 2008, the Third Circuit granted a motion by the Commission to vacate the district court's ruling that had dismissed the complaint.[8] The Commission is continuing to examine and address a wide range of issues in the energy markets, including its new authority regarding manipulation of wholesale crude oil, gasoline, or petroleum distillate markets.

Finally, in January 2008, the U.S. Court of Appeals for the Fifth Circuit upheld a Commission order requiring Chicago Bridge & Iron Co., N.V. and its United States subsidiary (CB&I) to divest assets acquired from Pitt-Des Moines, Inc. used in the business of designing, engineering, and building field-erected cryogenic storage tanks.[9] In its 2005 order, the Commission had ruled that CB&I's acquisition of these assets in 2001, during a pending FTC investigation, would likely result in a substantial lessening of competition or tend to create a monopoly in four markets for industrial storage tanks in the United States, in violation of Section 7 of the Clayton Act and Section 5 of the FTC Act. The court endorsed the Commission's findings, based on an extensive review of many years of bidding data, that the merged firms controlled over 70 percent of the market, and that new entry was unlikely given the high entry barriers based on the incumbents' reputation and control of skilled crews.[10]

In the consumer protection area, we highlight five key FTC initiatives since the September reauthorization testimony. First, the Commission is grateful for Congress' swift legislative action to make participation in the Do Not Call Registry permanent so that consumers will continue to enjoy its benefits without having to reregister. In November 2007, the Commission announced six new settlements and one new Federal court action against companies that violated the Do Not Call provisions of the Telemarketing Sales Rule. The six settlements resulted in $7.7 million dollars in civil penalties for Do Not Call violations.[11]

Second, in the privacy and data security area, the Commission announced five new data security cases;[12] released a new online, interactive tutorial to educate businesses on sound data security practices;[13] and hosted workshops on the private sector use of Social Security Numbers[14] and behavioral advertising.[15] Following the workshop on behavioral advertising, the Commission staff released a set of proposed principles to guide the development of self-regulation in this area and is seeking comment on these principles.[16]

Third, in the area of financial practices, the Commission sent over 200 warning letters to mortgage advertisers and the media outlets that carried their advertisements for home mortgages. These letters stated that the mortgage advertisements identified may be deceptive, in violation of Section 5 of the FTC Act, or may violate the Truth-In-Lending Act. The Commission currently is conducting several investigations of mortgage advertisers and subprime lenders and will continue to monitor

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[7] *See Federal Trade Commission* v. *Equitable Resources, Inc.,* No. 07–2499 (3rd Cir. 2008), available at *http://www.ftc.gov/os/caselist/0610140/080204ftcmovacateequitabledecision.pdf.*

[8] *See id.* (order granted Feb. 5, 2008), available at *http://www.ftc.gov/os/caselist/0610140/080303order.pdf.*

[9] *Federal Trade Commission* v. *Chicago Bridge & Iron Co.,* No. 05–60192 (5th Cir. 2008) available at *http://www.ftc.gov/os/adjpro/d9300/080125opinion.pdf.*

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

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

[12] *United States* v. *American United Mortgage Company,* No: 07C 7064 (N.D. Ill. filed Dec. 17, 2007), available at *http://www.ftc.gov/opa/2007/12/aumort.shtm; In the Matter of Life is Good, Inc.,* File No. 072–3046, available at *http://www.ftc.gov/os/caselist/0723046/index.shtm; In the Matter of Goal Financial, LLC.,* File No. 072–3013, available at *http://www.ftc.gov/os/caselist/0723013/080304agreement.pdf; In the Matter of TJX,* File No. 072–3055, available at *http://www.ftc.gov/os/caselist/0723055/index.shtm; In the Matter of Reed Elsevier, Inc. and Seisint, Inc.,* File No. 052–3094, available at *http://www.ftc.gov/os/caselist/0523094/index.shtm.*

[13] *See www.ftc.gov/infosecurity.*

[14] *See http://www.ftc.gov/bcp/workshops/ssn/index.shtml.*

[15] *See http://www.ftc.gov/bcp/workshops/ehavioral/index.shtml.*

[16] *See* Press Release, "FTC Staff Proposes Online Behavioral Advertising Privacy Principles," December 20, 2007, available at *http://www.ftc.gov/opa/2007/12/principles.shtml.*

claims made in mortgage advertising. The Commission also announced three cases targeting mortgage foreclosure rescue scams,[17] and three settlements against "payday lenders" who failed to provide consumers with annual percentage rate information, as required by law.[18] Fourth, as part of a review of its environmental marketing guidelines, also known as the Green Guides,[19] the Commission is holding a series of public workshops on a number of emerging green marketing topics. The first such workshop took place on January 8, 2008, and addressed carbon offsets and renewable energy certificates. The second workshop, on green packaging, will take place on April 30, 2008. Finally, this fall, the Commission used its U.S. SAFE WEB Act authority to cooperate with foreign partners in two key matters; one involved a Canadian-based bogus lottery and prize-promotion scam,[20] and the other involved an international spam enterprise.[21] Since passage of the Act in 2006 and the promulgation of rules in May 2007, the SAFE WEB Act has enhanced the FTC's ability to cooperate with foreign law enforcement authorities on consumer protection enforcement matters that cross international borders.

III. Reauthorization Legislation

The remainder of this testimony addresses S. _____, the proposed "Federal Trade Commission Reauthorization Act of 2008." The Commission provides its views on the individual sections of the proposed bill below.

A. Section 2: Authorization of Appropriations

The Commission supports efforts to increase the agency's resources to meet its anticipated needs. For the past several years, the Commission has sought an increase in funds. We are grateful to Congress for increasing our funding over time.

The Commission's staff has worked hard over the past several years to fulfill its mandate, address new and emerging problems in the marketplace, enforce newly enacted laws, and complete the tasks Congress has entrusted us to address. In the last few years, Congress has passed a variety of significant new laws that the FTC is charged, at least in part, with implementing and enforcing, such as the CAN–SPAM Act, the Fair and Accurate Credit Transactions Act, the Children's Online Privacy Protection Act, the Gramm-Leach-Bliley Act, and the U.S. SAFE WEB Act.

Yet it is uncertain whether agency resources have grown apace with our enforcement obligations. To meet its growing challenges, the Commission anticipates needing additional resources, which might include, among other things, more staff, money to hire experts and consultants, additional office space, and improved infrastructure. The Commission understands the draft bill would authorize an additional $20 million for technology funding for 2009 through 2015, over and above the reauthorization amount set forth in Section 2(a) of the bill. We thank the Committee for specifically recognizing the Commission's needs for funding to improve its technology. We also appreciate the seven-year plan for resources which, if appropriated, would allow us to plan for the years ahead.

B. Section 3 and Section 5. Independent Litigating Authority and Civil Penalties for Violation of the Federal Trade Commission Act

Sections 3 and 5 of the proposed FTC reauthorization bill address two substantially intertwined aspects of the Commission's litigation: the availability of civil penalties in court actions, and independent agency litigating authority. This section of the Commission's testimony first provides an overview of the Commission's current authority to obtain monetary remedies, including civil penalties. Second, it discusses the proposed extension of the Commission's civil penalty authority. Third, it addresses the bill's proposal regarding independent litigating authority to obtain civil penalties. Fourth, it discusses Commission litigation before the Supreme Court.

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[17] *FTC* v. *Safe Harbour Foundation,* No. 08 C 1185 (N.D. Ill., filed Feb. 25, 2008), available at *http://www.ftc.gov/os/caselist/0823028/index.shtm; FTC* v. *Mortgage Foreclosure Solutions, Inc.,* (M.D. Fla., filed Feb. 26, 2008) available at *http://www.ftc.gov/os/caselist/0823021/index.shtm; FTC* v. *National Hometeam Solutions, Inc.,* (E.D. Tex., filed Feb. 26, 2008), available at *http://www.ftc.gov/os/caselist/0823076/index.shtm.*

[18] *In the Matter of CashPro,* No. 072–3203 (February 2008); *In the Matter of American Cash Market, Inc.,* No. 072–3210 (Feb. 2008); *In the Matter of Anderson Payday Loans,* No. 072–3212 (Feb. 2008), available at *http://www.ftc.gov/opa/2008/02/amercash.shtm.*

[19] *See* Press Release, "FTC Reviews Environmental Marketing Guides, Announces Public Meetings," Nov. 26, 2007, available at *http://www.ftc.gov/opa/2007/11/enviro.shtm.*

[20] *See* Press Release, "Court Halts Bogus Check Scam Targeting 'Lottery Winners;' Money Transfers Used to Defraud Consumers," Nov. 19, 2007, available at *http://www.ftc.gov/opa/2007/11/cashcorner.shtm.*

[21] *See* Press Release, "FTC Stops International Spamming Enterprise that Sold Bogus Hoodia and Human Growth Hormone Pills," Oct. 10, 2007, available at *http://www.ftc.gov/opa/2007/10/hoodia.shtm.*

1. Overview of Commission's Authority to Obtain Monetary Remedies

Although the Commission has authority to seek civil penalties in some instances,[22] for many violations—including violations of Section 5 of the FTC Act that involve fraudulent conduct—the Commission currently lacks general authority to seek civil penalties.[23] In the past year, the Commission has sought civil penalties in approximately 22 percent of the consumer protection cases it has brought; it has had the option of seeking civil penalties in approximately 21 percent of additional consumer protection cases.[24]

The Commission can seek other types of monetary relief, including consumer redress and other equitable remedies such as disgorgement of ill-gotten gains, from defendants, under Section 13(b) or under Section 19(b) of the FTC Act in certain circumstances, by filing Federal district court actions in its own name, without referral to DOJ.[25] The Commission has often used Section 13(b) of the FTC Act, particularly, to obtain restitution for consumers in consumer protection cases. In the past decade, the Commission has brought over 600 consumer protection law enforcement actions using Section 13(b) under the FTC Act, through which courts have ordered approximately $3 billion in redress for injured consumers.

2. Additional Civil Penalty Authority

Section 5 of S. xxxx would give the Commission authority to seek civil penalties for knowing violations of Section 5 of the FTC Act. As explained above, currently the FTC has authority to seek restitution on behalf of consumers and disgorgement of ill-gotten gains, but can obtain civil penalties only for certain categories of violations.[26]

In bringing consumer protection law enforcement actions, the Commission's paramount goal is to stop unlawful practices and obtain restitution for injured consumers. It achieves this goal primarily by filing actions directly in Federal district court under Section 13(b) of the FTC Act. In many consumer protection cases, and most cases involving fraud, the Commission finds that the current equitable remedies of restitution and disgorgement give it the power to reach all of a defendant's

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[22] Primarily, the FTC can seek civil penalties against any entity that knowingly violates a trade regulation rule promulgated by the FTC or that violates a pre-existing final FTC order to which it is subject. Moreover, recognizing the importance of civil penalties, Congress has specifically authorized the FTC to seek civil penalties for violations of certain statutes, *e.g.,* the CAN–SPAM Act, 15 U.S.C. § 7701 *et seq.*

[23] It is unclear whether the proposed reauthorization language in the earlier draft of the bill is intended to provide civil penalty authority for consumer protection cases only or for both competition and consumer protection cases. Although civil penalty authority in competition cases might provide a similar deterrent effect, the discussion in Sections 1 and 2 is limited to civil penalty authority in consumer protection cases.

[24] Generally, as discussed below, the Commission cannot bring civil penalty cases in its own right without first presenting them to the Department of Justice ("DOJ") to bring on behalf of the Commission. Almost invariably, DOJ accepts the referral, but if it were to decline, in most instances, the Commission could bring the action in its own name. With one exception, the Commission cannot assess civil penalties in administrative proceedings. The exception is set forth in a provision of the Energy Policy and Conservation Act ("EPCA"), 42 U.S.C. § 6303(a). This provision (as adjusted pursuant to the Debt Collection Improvement Act of 1996, see FTC Rules of Practice, 16 C.F.R. §§ 1.97, 1.98) authorizes the Commission to assess administratively a civil penalty of not more than $110 for each violation of the Appliance Labeling Rule.

In some cases, we could obtain civil penalties, but we do not because our paramount goal is to return money back to consumers, and defendants do not have enough money to pay consumer redress and civil penalties. In other cases, as described on page 13, we are trading civil penalties for quicker relief.

[25] *See* 15 U.S.C. § 53(b); *see also* 15 U.S.C. § 57b.

[26] When the Federal Trade Commission was established in 1914, it did not have the authority to seek civil penalties. Federal Trade Commission Act of 1914, Pub. L. No. 63–203, 38 Stat. 717–24 (1914). In 1938, the Commission was given the authority to seek civil penalties in Federal district court through the Attorney General against a party for violations of a Commission order to which that party was subject. Wheeler-Lea Act, Pub. L. No. 75–447, 52 Stat. 114–15 (1938). When the Commission started promulgating rules in the 1960s, it did not have the authority to seek civil penalties for violations of such rules.

On February 4, 1970, the Commission testified before Congress in favor of allowing the FTC to assess civil penalties administratively against respondents who knowingly committed consumer protection violations. *See Hearings on H.R. 14931 and Related Bills before the Subcomm. on Commerce and Finance of the H. Comm. on Interstate and Foreign Commerce,* 91st Cong. 53, 54 (1970) (statement of FTC Chairman Caspar Weinberger). The Senate passed legislation to permit the FTC to seek civil penalties for such violations in Federal court proceedings, but it was dropped in conference. Ultimately, in 1975, Congress adopted legislation that authorized civil penalties for acts or practices previously determined by the Commission to be unfair or deceptive, through either a rulemaking proceeding or an administrative proceeding, and committed with actual or (for rule violations) constructive knowledge of the determination. *See* 15 U.S.C. § 45(m)(1).

available assets. In fact, in many of these cases, defendants do not have enough assets to cover consumer losses, and in such cases, the Commission usually takes the available assets and enters a suspended judgment for the remaining amount of consumer injury.

As the Commission has previously testified, however, in certain categories of cases restitution or disgorgement may not be appropriate or sufficient remedies. These categories of cases, where civil penalties could enable the Commission to better achieve the law enforcement goal of deterrence, include malware (spyware), data security, and telephone records pretexting.[27] In these cases, consumers have not simply bought a product or service from the defendants following defendant's misrepresentations, and it is often difficult to calculate consumer losses or connect those losses to the violation for the purpose of determining a restitution amount. Disgorgement may also be problematic. In data security cases, defendants may not have actually profited from their unlawful acts. For example, in a case arising from a data security breach enabled by lax storage methods, the entity responsible for the weak security may not have profited from its failure to protect the information; rather, the identity thief who stole the information likely profited.[28] In pretexting and spyware cases, the Commission has found that defendants' profits are often slim; thus, disgorgement may be an inadequate deterrent. Also in pretexting and spyware cases, lawful acts and unlawful acts may be intermixed; thus, it may be difficult to determine an appropriate disgorgement amount.[29] And in a whole host of cases brought under Section 5, when we are challenging hard-core fraud that could otherwise be prosecuted criminally, we should be able to seek fines against these wrongdoers.

3. Independent Litigating Authority for Civil Penalty Actions

As noted above, before bringing a civil penalty action, the Commission generally must notify the DOJ of the proposed action.[30] If the Department declines to participate in the name of the United States or otherwise fails to act within 45 days on such a referral, the Commission may file the case in its own name.[31] Section 3(1) of the proposed legislation would expand the agency's independent litigating authority to allow the FTC to bring actions for civil penalties in Federal court "in its own name by any of its attorneys," without mandating that DOJ have the option to litigate on the FTC's behalf, as is currently required in most cases. Section 3(1) would require the Commission to "notify the Attorney General of any such action" and would permit the Commission to "request the Attorney General on behalf of the Commission to commence, defend, or intervene in any such action." The Commission supports this provision.

Giving the FTC independent litigating authority when it seeks civil penalties would allow the agency with the greatest expertise in the FTC Act to litigate some of its own civil penalty cases, while retaining the option of referring appropriate matters to DOJ. Under current law, agency staff—who have both general expertise in FTC law and specific knowledge of cases they investigate and recommend for litigation—turn over such cases to the DOJ's Office of Consumer Litigation (OCL). While the FTC has an excellent working relationship with OCL on these matters, OCL also has responsibility for enforcement matters relating to the Food and Drug Administration, the Consumer Product Safety Commission, and the Department of

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[27] *See, e.g.,* Prepared Statement of the Federal Trade Commission, "Federal Trade Commission Reauthorization," Before the Subcommittee on Interstate Commerce, Trade, and Tourism of the Senate Commerce, Science, and Transportation Committee, 110th Cong., September 12, 2007, available at *http://www.ftc.gov/os/testimony/070912reauthorizationtestimony.pdf* ("To enhance consumer protection in cases involving spyware, as well as those involving data security, the Commission continues to support provisions in pending bills that give the FTC civil penalty authority."); Prepared Statement of the Federal Trade Commission, "Federal Trade Commission Reauthorization," Before the Senate Commerce, Science, and Transportation Committee, 110th Cong., April 10, 2007, available at *http://www.ftc.gov/os/testimony/P040101FY2008BudgetandOngoingConsumerProtectionandCompetitionProgramsTestimonySenate04102007.pdf* ("We believe the Commission's ability to protect consumers from unfair or deceptive acts or practices would be substantially improved by legislation, all of which is currently under consideration by Congress, to provide the Commission with civil penalty authority in the areas of data security, telephone pretexting and spyware.").

[28] Defendants likely do save some money from not complying with legal mandates. However, the cost savings of not instituting reasonable data security measures are, in many cases, small and not commensurate with the injury that resulted from the failure.

[29] Most state statutes provide for civil penalties for certain violations of state consumer protection laws. *See, e.g.,* Ala. Code § 8–19–11; Ark. Code § 4–88–13.

[30] *See supra* note 24. DOJ acts in a timely manner, filing cases on behalf of the Commission and working cooperatively with the Commission and its staff.

[31] *See supra* note 24.

Transportation's National Highway Traffic Safety Administration. In contrast, other independent Federal agencies are able to maximize the benefits of their own expertise by independently prosecuting administrative or judicial actions for civil penalties. For example, the Securities and Exchange Commission has independent authority to seek judicial civil penalties for any violation of the securities laws[32] or even to assess administrative civil penalties against registered entities.[33] Similarly, the Commodity Futures Trading Commission has independent authority to seek judicial civil penalties or assess administrative civil penalties.[34] Bringing the FTC's authority more in line with comparable agencies would ensure that civil penalty prosecutions fully benefit from the agency's expertise.[35]

Moreover, currently, there are instances in which the Commission confronts ongoing and injurious conduct that violates a rule or statute that provides for civil penalties, such as the Telemarketing Sales Rule or the CAN–SPAM Act. In such cases, the Commission can bring an action under Section 13(b) to obtain preliminary injunctive relief that halts the ongoing injury to consumers, or it can refer an action seeking civil penalties and other injunctive relief to DOJ. The Commission cannot, however, do both. In those instances where there is a need to bring ongoing deception or other economically-injurious conduct to a swift halt, and where justice requires both full equitable relief and appropriate civil penalties, the Commission should have the option of directly filing an action seeking both equitable and civil penalty relief. The proposed provision would give the Commission this option.

The proposed provision would also increase efficiency. Currently, once the FTC makes a referral, DOJ has 45 days to commence a civil penalty action. This process requires extra time and delay, even under the best of circumstances, and extra paperwork. Moreover, once DOJ accepts a referral, the FTC normally assigns one or more of its own staff attorneys, at DOJ's request, to assist in litigating the case. Despite excellent relations and coordination between staff at DOJ and the FTC, the use of personnel at two agencies inevitably creates delay and inefficiencies. This is particularly true in cases where the FTC is simply referring to DOJ a settlement to be filed.

4. Independent Litigating Authority Before the Supreme Court

Section 3(2) of the proposed legislation would allow the FTC to represent itself before the Supreme Court in the appeal of any litigation to which the FTC was a party. The Commission supports this provision. Currently, in any matter in which the Commission represented itself in the lower courts, the Commission may request that the Solicitor General of the DOJ petition for certiorari and represent the Commission before the Supreme Court.[36] If the Solicitor General agrees to represent the FTC, under the FTC Act, he may not compromise a Commission position or settle the case without Commission consent.[37] If the Solicitor General declines to represent the FTC, the Commission may petition the Court and represent itself.[38] Of course, in any matter the Court may request that the Solicitor General file a brief, or the Solicitor General may file an amicus brief without a Court request.[39]

C. Section 4. Specialized Administrative Law Judges

Section 4 would assist in providing the FTC with ALJs experienced in handling complex antitrust, trade regulation, and economic issues in adjudications that primarily involve uncharted circumstances or otherwise particularly call upon the agency's expertise. The FTC endorses the Committee's efforts to ensure that the agency's ALJs are equal to the highly complex task they face.

The Commission was created to develop and apply specialized expertise to matters concerning unfair methods of competition, and later unfair or deceptive acts or practices. The Commission may delegate its powers to ALJs (previously hearing examiners) to handle administrative trials, but ALJ findings and conclusions both of fact and law are subject to full Commission review, either on appeal or pursuant to its own decision to review a matter.[40]

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[32] 15 U.S.C. § 77t.
[33] 15 U.S.C. § 78u–2.
[34] 7 U.S.C. § 9; 7 U.S.C. § 13a; 7 U.S.C. § 13a–1.
[35] The proposed legislation would not authorize the agency to assess administrative penalties, which would give an agency more discretion to set policies for obtaining penalties than does the ability to seek penalties from a Federal district court.
[36] 15 U.S.C. § 56(a)(3)(A).
[37] 15 U.S.C. § 56(a)(3)(B).
[38] 15 U.S.C. § 56(a)(3)(A).
[39] Supreme Court Rules of Practice, 28 U.S.C. App. Rule 37.
[40] 5 U.S.C. App. Reorganization Plan No. 4 of 1961; 16 C.F.R. § 3.54.

The issues raised in antitrust matters in particular, the very substantial body of law in this area, and the nature of economic evidence, are often sufficiently complex to require a person familiar with the law and experienced in handling economic evidence offered in trials. Not every ALJ or aspirant to an ALJ appointment has such experience, and the current process for appointments excludes such experience as a factor in making applicants available to the agency. The ability to hire ALJs with that experience would help the FTC fulfill its role as a specialized, expert agency.

D. Repeal of FTC Act Exemptions

This section discusses proposed Section 6 and Section 13 of the proposed FTC reauthorization bill, both of which would repeal certain exemptions to the FTC Act. Section 6 would repeal the FTC Act's exemption for certain non-profit entities, and Section 13 would repeal the common carrier exemption. The Commission generally supports repealing these exemptions. In addition, Congress should examine other exemptions to the FTC Act to more broadly protect consumers and competition and to ensure consistent application of laws across economic sectors.

1. Section 6. Non-Profit Exemption

Section 6 of the proposed reauthorization legislation would subject charitable, religious, educational and other "section 501(c)(3)" organizations to the FTC Act. Currently, the FTC's jurisdiction over non-profits is limited. The FTC Act applies to "persons, partnerships, or corporations,"[41] and the Act defines "corporation" as an entity that "is organized to carry on business for its own profit or that of its members."[42] Under this framework, the agency can reach "sham" non-profits, such as shell non-profit corporations that actually operate for profit.[43] It can also reach entities falsely claiming to be affiliated with charitable organizations and entities who affirmatively misrepresent that "donations" collected will go to charity.[44] Further, the Commission has jurisdiction over organizations such as trade associations that engage in activities that "provide[] substantial economic benefit to its for-profit members," for example, by providing advice and other arrangements on insurance and business matters, or engaging in lobbying activities.[45] The Commission also has jurisdiction over most non-profits in several discrete areas, for example, under certain consumer financial statutes, such as the Truth in Lending Act and the Equal Credit Opportunity Act.[46] In addition, the Commission has jurisdiction over non-profit entities for purposes of the Clayton Act,[47] most notably Section 7, which prohibits mergers or acquisitions where "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."[48] The current definition of "corporation" in the FTC Act places substantial limits on the Commission's jurisdiction over non-profit entities. While such organizations pursue many worthy activities that advance important public purposes, on occasion they engage in business activities that harm consumers.

The Commission supports extension of its jurisdiction to certain non-profit entities.[49] In healthcare, an area in which the Commission takes the lead to maintain

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[41] 15 U.S.C. § 45(a)(2).

[42] 15 U.S.C. § 44.

[43] *See, e.g., FTC* v. *Gill,* 183 F. Supp. 2d 1171 (C.D. Cal. 2001) ("[W]hile certain nonprofit corporations are exempt from liability for violations of section 5(a)(1) of the FTC Act, the exemption does not apply to sham corporations that are the mere alter ego of the [defendant].") (citing *Community Blood Bank of Kansas City Area, Inc.* v. *FTC,* 405 F.2d 1011, 1022 (8th Cir. 1969)); *FTC* v. *Ameridebt, Inc.,* 343 F.Supp. 2d 451, 460–62 (D. Md. 2004) (denying motion to dismiss where FTC complaint alleged that purported credit counseling organization incorporated as a non-profit entity was a "de facto for-profit organization").

[44] *See, e.g.,* cases announced as part of "Operation Phoney Philanthropy," (May 2003), available at *http://www.ftc.gov/opa/2003/05/opp.shtm.*

[45] *See, e.g., California Dental Ass'n* v. *FTC,* 526 U.S. 756, 759, 765–69 (1999) (holding that FTC Act applies to anticompetitive conduct by non-profit dental association whose activities provide substantial economic benefits to for-profit members); *American Medical Ass'n* v. *FTC,* 638 F.2d 443, 447–448 (1980) (finding FTC jurisdiction over non-profit medical societies whose activities "serve both the business and non-business interests of their member physicians").

[46] 15 U.S.C. § 1607(c); 15 U.S.C. § 1691c(c).

[47] *See United States* v. *Rockford Mem. Hosp.,* 898 F.2d 1278, 1280–81 (7th Cir. 1990).

[48] 15 U.S.C. § 18.

[49] The Commission would be pleased to work with Congressional staff on crafting appropriate language. The Commission notes that, as drafted, Section 6 would reach only those non-profit entities that have tax-exempt status under section 501(c)(3) of the Internal Revenue Code. The Commission would benefit from broadening this provision to cover certain other nonprofits, such as Section 501(c)(6) trade associations. The Commission has previously engaged in protracted litigation battles to determine whether such entities are currently covered under the FTC Act. *See, e.g., California Dental Ass'n* v. *FTC,* 526 U.S. 756, 765–69 (1999) (holding that FTC Act

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competition, the agency's inability to reach conduct by various non-profit entities has prevented the Commission from taking action against potentially anticompetitive conduct of non-profits engaged in business. For example, the Commission generally cannot challenge price-fixing, boycotts, and other anticompetitive conduct by non-profit hospitals. Nearly forty years ago, a Commission order against an association of non-profit hospitals and a non-profit blood bank found to have unlawfully hindered the development of two commercial blood banks was vacated on the ground that the non-profit entities were beyond the FTC's jurisdiction.[50] In three recent enforcement actions, the Commission alleged that groups of physicians and hospitals had participated in unlawful price-fixing arrangements, but sued only the physicians and a for-profit hospital.[51] The healthcare sector includes a variety of other types of nonprofit entities, such as nonprofit health maintenance organizations (HMOs), health plans, and standard-setting organizations, whose activities can also raise significant competitive concerns.

The proposed legislation would also help increase certainty and reduce litigation costs in this area. Although the FTC has been successful in asserting jurisdiction against "sham" nonprofits and against non-profit trade associations, the proposed legislation would help avoid protracted factual inquiries and litigation battles to establish jurisdiction over such entities.[52]

2. Section 13. Common Carrier Exception

Section 13 would strike the telecommunications common carrier exemption from the FTC Act. This exemption bars the agency from reaching certain conduct by telecommunications companies. The Commission has testified in favor of the repeal of the common carrier exemption on several occasions,[53] continues to endorse its repeal, and thanks the Chairman for his continued support in this area.

The FTC Act exempts common carriers subject to the Communications Act from its prohibitions on unfair and deceptive acts or practices and unfair methods of competition.[54] This exemption dates from a period when telecommunications were pro-

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applies to anticompetitive conduct by non-profit dental association whose activities provide substantial economic benefits to for-profit members); *American Medical Ass'n* v. *FTC,* 638 F.2d 443, 447–448 (1980) (finding FTC jurisdiction over non-profit medical societies whose activities "serve both the business and non-business interests of their member physicians").

[50] *Community Blood Bank* v. *FTC,* 405 F.2d 1011 (8th Cir. 1969).

[51] *See Piedmont Health Alliance,* 138 F.T.C. 675 (2004) (consent order), available at *http://www.ftc.gov/os/adjpro/d9314/index.shtm; Tenet Healthcare Corp./Frye Regional Medical Center, Inc.,* 137 F.T.C. 219 (2004) (consent order), available at *http://www.ftc.gov/os/caselist/0210119/0210119tenet.shtm; Maine Health Alliance,* 136 F.T.C. 616 (2003) (consent order), available at *http://www.ftc.gov/os/caselist/0210017.shtm.*

[52] The Commission notes that, just as the First Amendment limits the FTC's ability to address certain practices of for-profit entities, it would also restrict certain FTC action concerning nonprofits. For example, in *Riley* v. *National Federation of the Blind of North Carolina, Inc.,* 487 U.S. 781 (1988), the Supreme Court struck down a North Carolina law that required fundraisers engaged in telemarketing on behalf of charities to disclose, during the call, the percentage of charitable contributions actually used for charitable purposes. The Supreme Court held that the for-profit fundraisers, like charities soliciting on their own behalf, were engaging in "fully protected expression" under the First Amendment, and the Court rejected the argument that these activities were less-protected "commercial speech." *Id.* at 796. The Supreme Court found the law to be an "unduly burdensome" prophylactic rule that violated the First Amendment. *Id.* at 800.

In 2003, the Court held that the First Amendment does allow a state to assert a fraud claim against a charity fundraiser for affirmatively misrepresenting to consumers where their money will go. *See Madigan* v. *Telemarketing Associates, Inc.,* 538 U.S. 600 (2003). The Court noted, though, that a fraud claim would be dismissed on First Amendment grounds if it were based simply on a fundraiser's failure to disclose fee arrangements or the percentage of donated funds that were retained by the telefunder. *Id.* at 617.

[53] *See Prepared Statement of the Federal Trade Commission,* Before the Subcommittee on Interstate Commerce, Trade, and Tourism Committee on Commerce, Science, and Transportation U.S. Senate (Sept. 12, 2007), available at *http://www.ftc.gov/os/testimony/070912reauthorizationtestimony.pdf;* Prepared Statement of the Federal Trade Commission On FTC Jurisdiction Over Broadband Internet Access Services, *Before the Committee on the Judiciary, U.S. Senate (Jun. 14, 2006), available at http://www.ftc.gov/opa/2006/06/broadband.shtm; The Reauthorization of the Federal Trade Commission: Positioning the Commission for the Twenty-First Century: Hearing Before the Subcomm. on Commerce, Trade and Consumer Protection of the H. Comm. on Energy and Commerce,* 108th Cong. (2003) ("FTC 2003 Reauthorization Hearing") (statement of the FTC), available at *http://www.ftc.gov/os/2003/06/030611reauthhr.htm;* see also FTC 2003 Reauthorization Hearing (statement of Thomas B. Leary, FTC Commissioner), available at *http://www.ftc.gov/os/2003/06/030611learyhr.htm; FTC Reauthorization Hearing: Before the Subcomm. on Consumer Affairs, Foreign Commerce and Tourism of the S. Comm. on Commerce, Science, and Transportation,* 107th Cong. (2002) (statement of Sheila F. Anthony, FTC Commissioner), available at *http://www.ftc.gov/os/2002/07/sfareauthtest.htm.*

[54] 15 U.S.C. § 45(a)(2) exempts from the FTC Act "common carriers subject to the Acts to Regulate Commerce." 15 U.S.C. § 44 defines the "Acts to regulate commerce" as "Subtitle IV of Title

vided by highly-regulated monopolies. The exemption is now outdated. In the current world, firms are expected to compete in providing telecommunications services. Congress and the Federal Communications Commission ("FCC") have dismantled much of the economic regulatory apparatus formerly applicable to the industry. Removing the exemption from the FTC Act would not alter the jurisdiction of the FCC, but would give the FTC the authority to protect against unfair and deceptive practices by common carriers in the same way that it can protect against unfair and deceptive practices by non-common carriers engaged in the provision of the same services.

Technological advances have blurred the traditional boundaries between telecommunications, entertainment, and high technology.[55] As the telecommunications and Internet industries continue to converge, the common carrier exemption is likely to frustrate the FTC's ability to stop deceptive and unfair acts and practices and unfair methods of competition with respect to interconnected communications, information, entertainment, and payment services.

The FTC has extensive expertise with advertising, marketing, billing, and collection, areas in which significant problems have emerged in the telecommunications industry. In addition, the FTC has powerful procedural and remedial tools that could be used effectively to address developing problems in the telecommunications industry if the FTC were authorized to reach them.

E. Section 7. Aiding and Abetting a Violation

The Commission believes that proposed Section 7, which would give the FTC the ability to challenge practices that aid or abet violations of the FTC Act, could be beneficial to the Commission's consumer protection law enforcement program. Implicit in this proposed provision is an understanding that effective law enforcement often requires reaching not only the direct participants in unfair or deceptive practices, but also those who support and enable the direct participants to violate the law. Since the Supreme Court's ruling in *Central Bank of Denver* v. *First Interstate Bank of Denver,* 511 U.S. 164 (1994), however, the Commission's ability to pursue those who assist and facilitate unfair or deceptive acts and practices has been compromised. The Supreme Court's broad reasoning in that case cast doubt on the argument that Section 5 of the FTC Act could reach "aiding and abetting" another person's violation. Although the Commission has developed alternative theories to reach secondary actors, these theories may make liability more difficult to prove than if the FTC had specific statutory authority in this area.[56] Indeed, in some cases, staff has decided not to name potential defendants because the conduct at issue did not fit neatly under one of the alternative "assistance" theories.[57]

The need for this authority has become particularly clear in the Internet era. Section 5 of the FTC Act's broad prohibition on unfair or deceptive acts and practices generally has given the agency ample authority to bring law enforcement action against those who engage in online fraud. Many of the new business models that are emerging on the Internet, however, involve numerous actors with murky and varying roles in complicated channels of distribution. Spyware distributors, for example, often use a complex system of affiliates and sub-affiliates to distribute harmful software to consumers, with each of these entities receiving a financial benefit from their role in its distribution. In addition, some online businesses located abroad

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49 (interstate transportation) and the Communications Act of 1934" and all amendments thereto.

[55] *See Letter from the Federal Trade Commission to John Villafranco and Lewis Rose re Sprint Corporation, http://www.ftc.gov/os/closings/staff/070808sprintnextelclosingltr.pdf.* (FTC letter closing investigation into non-common carrier activities of Sprint, a traditional provider of common carrier services, related to claims of unlimited web usage via mobile device).

[56] For example, the FTC has used the well-established doctrine that providing the means and instrumentalities by which unfair or deceptive practices occur is itself an unfair or deceptive practice in violation of the FTC Act. *See, e.g., FTC* v. *Winstead Hosiery Co.,* 258 U.S. 483, 494 (1922).

[57] One statute specifically gives the FTC express authority to pursue aiders and abetters. The Telemarketing and Consumer Fraud and Abuse Prevention Act allowed the Commission to promulgate rules to include within the definition of deceptive telemarketing those who "assist or facilitate" such telemarketing. 15 U.S.C. § 6102(a)(2). The Commission's Telemarketing Sales Rule ("TSR") in turn prohibits providing "substantial assistance or support to any seller or telemarketer when that person knows or consciously avoids knowing that the seller or telemarketer" is engaged in certain practices that violate the Rule. The Commission has included an "assisting and facilitating" allegation in at least 2 dozen cases since the TSR was adopted. *See, e.g., Federal Trade Commission* v. Assail, Inc., No. W03CA007 (W.D. Tex. final orders entered Jan. 2005); *U.S.* v. *DirectV, Inc.,* No. SACV05 1211 (C.D. Cal. final order entered Dec. 2005); *U.S.* v. *Entrepreneurial Strategies, Ltd.,* No. 2:06–CV–15 (WCO) (N.D. Ga. final order entered Jan. 2006).

who engage in unfair or deceptive acts and practices that harm American consumers rely on support from entities located in the United States. An FTC prosecution of the domestic entity supporting the foreign online business may be the most effective means of preventing harm to American consumers. Making it easier for the Commission to challenge those who provide assistance to others who are violating Section 5 of the FTC Act could help the agency attack the infrastructure that supports Internet fraud, such as in the circumstances described above.[58]

F. Sections 8 and 9. Rulemaking Procedure For Consumer Protection, Subprime Lending, and Nontraditional Mortgage Loans

Section 8 of the proposed FTC reauthorization legislation would allow the FTC to conduct rulemaking on any consumer protection issue (other than subprime lending and nontraditional mortgage loans) under the streamlined rulemaking procedures of Section 553 of the Administrative Procedures Act ("APA") that are generally available to Federal agencies. Congress has heretofore authorized the Commission to conduct general rulemaking only under the rigorous, complicated, and time-consuming procedures of Section 18 of the FTC Act. Section 18 includes requirements that the FTC must publish an advance notice of proposed rulemaking and seek public comment before publishing its notice of proposed rulemaking; it must provide an opportunity for a hearing before a presiding officer at which interested persons are accorded certain cross-examination rights; and where there are numerous interested persons, the FTC must determine which have similar interests, have each group of persons with similar interests choose a representative, and make further determinations about representation for those interests in the cross-examination process. These requirements are not ordinarily applicable to other Federal agencies for comparable rulemaking.

In addition, over the past 15 years, there have been a number of occasions where Congress has identified specific consumer protection issues requiring legislative and regulatory action. In these specific instances, Congress has given the FTC authority to issue rules using APA rulemaking procedures, and the Commission has supported this approach.

Section 9 would provide for the Commission to conduct rulemaking under the APA with respect to subprime mortgage lending and nontraditional mortgage loans. The Commission previously has supported proposals to permit all responsible agencies to promulgate consistent and comparable rules in the financial services area.[59] Current differences in rulemaking procedures may result in different regulatory requirements for financial service providers selling the same goods. To avoid the application of inconsistent standards, to improve interagency coordination on rulemakings, and to ensure that any FTC rulemaking does not lag years behind other financial regulators, the FTC believes that it should have the authority to use APA procedures to promulgate rules whenever the banking agencies and National Credit Union Administration commence rulemaking under the FTC Act.

Conclusion

Thank you for giving the Commission the opportunity to provide its views on the proposed FTC Reauthorization bill. We are grateful for Congress' confidence in the FTC's ability to protect consumers, and, through our enforcement and education efforts, we will continue to make sure that your confidence is well-placed. We look forward to working with the Committee as the bill moves forward.

Senator DORGAN. Thank you very much, Mr. Chairman.
Commissioner Harbour, you may proceed.

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[58] The Commission notes that Section 7 is drafted to include aiding and abetting "any provision of the Act or any other Act enforceable by the Commission," which would include aiding and abetting unfair methods of competition. It is unclear how this is intended to apply to competition cases, or whether application to competition cases is necessary.

[59] *See Prepared Statement of the Federal Trade Commission,* "Enhancing FTC Consumer Protection in Financial Dealings, with Telemarketers, and on the Internet," Before the House Committee on Energy and Commerce Subcommittee on Commerce, Trade, and Consumer Protection (Oct. 23, 2007), available at *http://www.ftc.gov/os/testimony/071023ReDoNotCallRuleEnforcementHouseP034412.pdf.*

STATEMENT OF HON. PAMELA JONES HARBOUR, COMMISSIONER, FEDERAL TRADE COMMISSION

Ms. HARBOUR. Thank you, Chairman Dorgan and Senator Klobuchar.

I'm pleased to appear before you today. In particular, I would like to highlight recent efforts and accomplishments of the Commission in both the competition and consumer protection areas.

Merger investigations are always a high priority at the Commission. This past January, the Commission enjoyed a resounding win on the merger front when the U.S. Court of Appeals for the 5th Circuit upheld a Commission Order in the Chicago Bridge & Iron Matter.

In 2005, the Commission had ruled that Chicago Bridge & Iron's acquisition of assets from a competitor was likely to substantially lessen competition or tend to create a monopoly in markets for cryogenic storage tanks used in a variety of industrial applications.

The Commission had ordered divestitures to undo the deal and restore competition. The 5th Circuit's recent opinion fully endorsed the Commission's findings.

Pharmaceutical markets have long been a critical area of focus for the Commission and we continue to be vigilant in protecting pharmaceutical competition. For example, this past February, the Commission filed a case charging that Cephalon, a pharmaceutical manufacturer, unlawfully blocked competition for a branded drug by paying four generic firms to stay off the market until the year 2012.

We are investigating similar exclusion payments involving other pharmaceutical firms as well.

Of course, we also pay close attention to a wide range of issues in energy markets. We are considering how best to use our new enforcement authority regarding the manipulation of wholesale crude oil, gasoline and petroleum distillate markets.

It is also worth noting the Commission's recent challenge of the proposed acquisition by Equitable Resources of the People's Natural Gas Company, a subsidiary of Dominion Resources. This transaction was abandoned by the parties in January of 2008.

In April of last year, we unsuccessfully attempted to keep gasoline prices from going up in Albuquerque, New Mexico. We sought a preliminary injunction in Federal court in New Mexico to stop Western Refining, Inc.'s, acquisition of Giant Industries, but unfortunately the district court did not believe the merger would cause gasoline prices to increase.

On the competition front, the Commission just announced settlements with retailer TJX and data broker, Reed, Elsevier and Seisint, settling charges that the companies failed to provide reasonable and appropriate security for sensitive personal information. These cases bring the total number of data security enforcement actions to 20, but rather than celebrate this milestone, we will use it to remind ourselves and the larger business community how much more work awaits us in this important area.

Our data security cases typically allege multiple and systemic security vulnerabilities that were easily and inexpensively avoidable. This suggests that companies must do more to protect sensitive consumer information.

The Commission will continue to educate consumers and businesses about protecting personal information and we will continue to hold companies accountable for their information security practices.

We are tremendously gratified that Congress expanded the Commission's ability to cooperate with our foreign counterparts through the U.S. SAFE WEB Act. The law added new enforcement-sharing tools into the Commission's law enforcement arsenal and allows us to pursue a wider range of cross-border enforcement matters. Since the rules went into effect in May 2007, the Commission has shared information 17 times with foreign agencies in cross-border consumer protection matters involving fraudulent telemarketing scams, deceptive mail schemes and spam cases.

The Commission has also used its new authority to provide investigative assistance to foreign agencies in multiple Internet-related investigations. In short, the increasing use of the FTC's new authority is removing some of the key roadblocks to effective international enforcement cooperation and the Commission will continue to focus on U.S. SAFE WEB in 2008.

Let me end with mortgage lending. It has long been a Commission priority. In the past decade, the agency, as you have correctly noted, Chairman Dorgan, brought 21 actions focused on the mortgage lending industry, alleging that mortgage brokers, lenders and servicers have engaged in unfair or deceptive acts and practices and these cases have collectively returned more than $320 million to consumers.

In February, the Commission announced three actions against companies that allegedly made false guarantees to homeowners that they would save their homes from foreclosure. In one case, the Commission charged that the company enticed consumers into a second mortgage or home equity line of credit on unfavorable terms without fully disclosing the risks, the costs and consequences of doing so.

In conjunction with these cases, the Commission launched a related consumer education effort which included a fact sheet on how to avoid foreclosure rescue scams, a series of radio PSAs in English and in Spanish, and warnings about foreclosure rescue schemes which we will place in the classified ad sections of English and Spanish language community newspapers.

And finally, the Commission likewise has been active in its efforts to protect consumers of non-mortgage financial services. The agency announced in February consent agreements with three Internet pay day lenders who advertised the cost of their loans without disclosing the annual percentage rate in violation of the Truth in Lending Act. This violation makes it far more difficult for consumers to comparison shop between pay day loans and other short-term forms of credit.

And the Commission has also, as you correctly mentioned, sent out warning letters to over 200 mortgage brokers and lenders and the media that carry their ads that their advertising claims may violate Federal law. As a follow up to the mortgage advertising sweep, the Commission is investigating a number of these mortgage advertisers and we will continue to monitor these claims and

if the Chairman desires, we can give you a private briefing at a later date.

I thank you very much, and I look forward to your questions.

Senator DORGAN. Commissioner Harbour, thank you very much.

Commissioner Leibowitz?

STATEMENT OF HON. JONATHAN D. LEIBOWITZ, COMMISSIONER, FEDERAL TRADE COMMISSION

Mr. LEIBOWITZ. Thank you very much, Senator Dorgan, Senator Klobuchar.

Let me begin by underscoring how much we appreciate your very ambitious legislation to reauthorize the Federal Trade Commission. My colleagues have asked me to focus on two provisions today: authority to bring civil enforcement actions against those who aid or abet illegal acts, and authority to seek civil penalties for violations of the FTC Act. Both provisions are designed to provide strong deterrence to would-be lawbreakers.

First, aiding and abetting. The Commission unequivocally supports Section 7 of the bill to the extent it would prohibit aiding or abetting a violation of any consumer protection statute enforced by the Commission.

For many years, our agency relied on Section 5 of the FTC Act to pursue not only direct violators but also those who assisted violations. The Supreme Court's ruling in *Central Bank of Denver* in 1994, however, compromised our ability to reach such aiders and abettors.

Since then, we have developed alternative theories to prosecute secondary actors, but as both of you are aware, sometimes it can be very difficult to prove liability. Indeed, in some cases, we have been unable to bring actions against potential defendants who enabled illegal behavior. Clear enforcement authority would certainly help.

In fact, we already have this authority for telemarketing fraud. Pursuant to a 1994 law, the FTC's Telemarketing Sales Rule prohibits assisting and facilitating violations. It has enabled us to successfully prosecute, for example, brokers who knowingly provided lead lists to scammers so they could easily find victims, and payment processors who electronically debited consumers' accounts on behalf of obviously fraudulent enterprises. But the rule is limited to telemarketing violations.

Now, why give a pass to facilitators of unlawful schemes that use the Internet or the mail—but not to those that use the telephone? To ask the question is to answer it. Authority to prosecute aiders and abettors would be an effective law enforcement tool, as well as a strong deterrent for malefactors and their accomplices.

Second, civil penalties. Section 5 of the FTC Act, which prohibits unfair or deceptive acts or practices, as well as unfair methods of competition, is the "bread and butter" of our law enforcement program. The FTC may seek equitable remedies for violations, including restitution for injured consumers and disgorgement of profits from violators. We use these remedial tools often and generally very successfully. But the Commission doesn't have authority to obtain fines for Section 5 violations.

The FTC's civil penalty authority is effectively restricted to three circumstances: violations of statutes that authorize civil penalties, like COPPA or CAN–SPAM; knowing violations of FTC rules; and violations of administrative cease and desist orders, that is, when we have you under order already. Thus, a wide range of deceptive or unfair conduct, including outright fraud, may not be subject to this sanction.

Your bill, Senator Dorgan, would authorize the Commission to seek fines for knowing violations of Section 5 of the FTC Act. The Commissioners all agree that we need additional civil penalty authority in certain categories of cases where the usual FTC monetary remedies, restitution and disgorgement, are inadequate. In recent years, we've testified in support of authorizing fines for spyware, for data security breaches and for telephone record pretexting. These are all instances in which it can be difficult to quantify consumer harm or in which the defendant's ill-gotten gains are often slim, non-existent or difficult to determine.

Admittedly, there is some debate about how far our civil penalty authority should extend. Some believe that Congress should authorize civil penalties piecemeal, in discreet areas, as problems arise, or that the broad liability for unfair or deceptive practices under the FTC Act should only be coupled with narrow remedies.

Others, however, support your bill's approach of permitting civil fines for a wide range of deceptive and unfair acts, as well as for antitrust violations. The authority you would give us would be tempered by allowing only Federal judges to impose the penalties and only for knowing violations.

In the early 1970s, the Commission, under former FTC Chairman Caspar Weinberger, recommended that Congress give the agency authority to assess civil penalties administratively for consumer protection violations. In testimony before this Committee, Chairman Weinberger called for, and I quote, "stronger and more comprehensive tools to make the threat of a Commission proceeding a real deterrent to a lawbreaker."

In response, this Committee and the Senate passed legislation authorizing the FTC to seek fines in Federal court, which is what your bill would do, but this provision was dropped in conference with the House.

We are all pleased that you are revisiting this issue today and, speaking for myself, I strongly support the proposed reauthorization, including the additional civil penalty authority. Your bill, I believe, will help give us the critical tools we need to successfully confront the antitrust and consumer protection challenges of the 21st century.

Thank you for letting me participate in this hearing, and I'd be happy to answer questions after my colleague speaks.

Senator DORGAN. Mr. Leibowitz, thank you very much.

Finally, we'll hear from Commissioner Rosch.

STATEMENT OF HON. J. THOMAS ROSCH, COMMISSIONER, FEDERAL TRADE COMMISSION

Mr. ROSCH. Chairman Dorgan, Senator Klobuchar, thank you very much for the opportunity to be before you today and testify about the proposed bill that would reauthorize the FTC.

I'd like to focus on two aspects of the bill that are of special interest to me. The first is granting the Commission independent litigating authority for civil penalties in matters before the Supreme Court, and the second is the agency's rulemaking procedures.

Commissioner Leibowitz has just described the agency's need for civil penalties. Speaking for myself, I favor the proposed legislation and along with my colleagues, I strongly favor granting the Commission's civil penalty authority in specific areas we've identified today and in prior testimony, like data security and spyware and pretexting.

But whatever the ultimate scope of civil penalty authority that Congress grants to the Commission, my fellow Commissioners and I believe that giving the agency the ability to independently litigate civil penalty actions is necessary for the agency to fully protect consumers.

Now I don't want to leave the impression that there's been a conflict with DOJ in litigating these cases. In fact, we've collaborated successfully on many civil penalty cases over the years, but there are two primary reasons why the current process in our opinion doesn't serve consumers well.

First, the Commission invests significant resources investigating and sometimes settling civil penalty matters before filing an action, and even after referral to DOJ, Commission staff are assigned to the case to assist in litigating the matter. So the referral process doesn't free up significant Commission resources, particularly in settlements, and in fact, sometimes leads to the duplication of efforts.

Second, the Commission's often faced with ongoing consumer harm in cases that violate both Section 5 of the FTC Act and one or more specific civil penalty statutes.

When the Commission exercises its independent litigating authority under Section 13(b), we can file an action immediately and seek a temporary restraining order and other immediate remedies to stop the violative conduct. In these types of cases, though, we must forego civil penalties all together and file the case seeking only redress and injunctive relief under Section 13(b) in order to get to court quickly.

I frankly have been appalled at the large sums of money that defendants take in from deceptive or unfair practices. So, I find it especially frustrating that at the end of a case, we may be unable to achieve the fullest possible measure of deterrence.

A related provision in the reauthorization bill gives the Commission authority to independently litigate its actions before the Supreme Court. I fully support the proposed legislation in this regard.

At the end of the day, I think the issue of litigation authority determines whether the Commission is truly an independent law enforcement agency.

Both in my prior tenure at the Commission and in my current tenure, I've understood that is what you, the Congress, wanted us to be. Giving the Commission independent authority to litigate civil penalty actions and to pursue our own appeals before the Supreme Court would help solidify the Commission's independent status.

Finally, I turn to the proposal to give the Commission authority to conduct rulemaking on a notice and comment basis. I was at the

agency when Magnuson-Moss was passed. At that time, none of us fully appreciated what a burdensome process Mag-Moss rulemaking would turn out to be as compared to the rulemaking procedures under Section 553 of the Administrative Procedure Act which are applicable to a whole host of other agencies.

We did understand that, given the breadth of Section 5 of the FTC Act, there may be a need to give some notice to industry of some of the practices that would trigger civil penalties, but we didn't envisage that the process would in effect make it difficult or impossible to enact rules in a timely manner to respond to consumer protection challenges.

I know there are differing opinions among the Commissioners on this point, but speaking for myself alone, I think that APA rulemaking authority for consumer protection matters would greatly increase the Commission's effectiveness in dealing with certain types of practices.

The subprime mortgage lending area, which is specifically mentioned in the reauthorization bill, is one prime example. Now to be clear, I'm not advocating wholesale and burdensome regulation of industries. I know the agency has learned from the past, particularly the Kid Vid controversy in the 1970s, but in this day and age, the ability to conduct streamlined APA rulemaking would be a valuable tool in our arsenal to respond more quickly to some difficult consumer protection problems.

Thank you for all of your time and your support of this agency and its mission, and I'm happy to answer any questions you might have.

Senator DORGAN. Commissioner Rosch, thank you very much.

I don't think we should worry too much about someone thinking we might want to impose some additional regulations. The fact is that we now see, as I said earlier, $30 billion of taxpayers' money ponied up to bail out an investment bank that was unregulated because it was too big to fail. Well, if it's too big to fail, it ought to be big enough to be regulated so that we could take a look at what they're doing and try to bring some of their practices back into some sensibility.

I want to ask a couple of questions about subprime and deceptive advertising especially. You have such a wide agenda, but I want to focus on this just for a moment.

The three charts that I showed previously, let me show them again quickly, and I'm going to ask you a couple questions because I pulled this one off the Internet yesterday. This is advertising as of yesterday on the Internet. It's April 7, 2008. You can get a 30-year fixed rate mortgage, two and three-quarters percent.

Does anybody believe that you can get a 30-year fixed mortgage for two and three-quarters percent? That's what was advertised on the Internet yesterday. It seems to me like that's clearly deceptive advertising.

Second one. Yes. Well, they also advertised that one of the wonderful things is you don't have to document your income. No doc and low doc. This is 5-year fixed payments for one and a quarter percent interest rate.

Now, why is this deceptive? Because anything you don't pay in the front end is put on the back end of this mortgage and will in-

crease the cost of purchasing that home. But, that's not there. That is nowhere in the advertisement. They say use these low rates to control up to two to three times as much real estate versus conventional fixed-rate mortgages.

What they're saying is come in and get a teaser rate and speculate. Deceptive advertising? Seems to me it probably is. Finally——

Mr. LEIBOWITZ. Well, let me just add, it may also be violative of the FTC Act because in fact they are telling you that you don't need to provide financial documents, right? That's also very troubling.

Senator DORGAN. They're not only telling you that, that's the way many of these subprime mortgages were given.

I mean, I was surprised to hear that——

Mr. LEIBOWITZ. That's right.

Senator DORGAN.—no doc and low doc means you can get a loan without having to document your income to the mortgage lender. I mean, obviously that sounds like a bunch of drunks out there playing a joke on somebody, but it's the way this system was working.

You pay a slightly higher interest rate for a no doc or a low doc, but let me just go with the last chart. This is one quarter of 1 percent interest only rate. That's for 5 years. So, they're saying a $200,000 loan for your house, you have a house payment of $41.66 a month. Now that's on the Internet today.

Now, I'm asking the question because everybody talks about, well, who's at fault here? These folks have got these mortgages. They're not victims. They knew what they were doing. But in many cases, brokers were cold calling people that were already in a home, saying we'll put you in a better mortgage. One-half of the new mortgages, subprime mortgages went to people who qualified for a prime mortgage, one-half went to people who qualified for a prime mortgage, and yet they were stuck in the subprime and stuck in a subprime in most cases with prepayment penalties and so on.

The point is this. In my judgment, there was massive deception going on, massive deception with respect to this question of mortgage advertising and they're all involved. I mean, I showed you Countrywide was the biggest. I showed you what they were advertising. They were saying to consumers, you have bad credit, you have credit problems, you've been bankrupt, come to us, let us loan you some money because this was very profitable and at the top, they were all grunting and shoving and, you know, like hogs in a trough and making lots and lots and lots of money.

So, how did this happen that all of this occurs without the Federal Trade Commission being able to step in and write a rule that relates to what is required with respect to this advertising? Tell me what the deficiency is with respect to your ability to have stepped in several years ago and see what's going on and say, wait a second, you've got to stop it or face substantial penalties if you don't.

Mr. Rosch?

Mr. ROSCH. I guess I have rulemaking. I would say that I draw a distinction between deception on the one hand and unfairness on the other. Both are covered by the FTC Act.

When you're talking about some of the ads that you've shown us today, you're talking about outright deception. We don't need a rule to go after that, and in fact we may be going after some of those companies already.

Where we do need a rule is where we're talking about unfairness. As you said before, some of these companies were actually delivering on what they said. They were loaning without any requirement whatever with respect to income, et. cetera.

Now that is arguably unfair, but what a rule would do is to prohibit companies from making those kinds of promises and granting loans on those conditions. What that does is it puts them on notice that we will consider this to be an unfair practice.

Now why is your bill so important? It's important because our Mag-Moss authority right now, which is the only rulemaking authority we've got, takes us anywhere from three to 9 years to make a rule. It's just impossible for us to be ahead of the curve on something like this.

With APA rulemaking, we can get a rule in place very quickly.

Senator DORGAN. I'm a little lost with respect to deceptive and unfair, and I suppose that those are terms of art, but it seems to me if you're advertising in a deceptive way, it's also unfair to the person that is receiving the message.

But what you're saying is as the subprime activity ramped up, and it happened in a big hurry over a period of three, five, six years, all of a sudden we saw this unbelievable mountain of subprime lending: no doc, low doc, interest only, partial interest only, defer some of the interest and the principal, all of these things. It seems to me almost all of the advertising I saw was deceptive. Nobody ever said and, oh, by the way, we'll stick all of this extra cost on the end of your mortgage and your house is going to cost more.

So, did you not have much authority? I know you've gone after some individually, but did you not have authority to write a rule in this process to say here's the rule that you've got to follow, here's the process you've got follow?

Mr. ROSCH. We did, but here's the beauty of your legislation, Senator. It is that the rulemaking authority that we had to make a rule required us to spend anywhere from three to 9 years making that rule.

What your authority would do, by giving us the authority to proceed under APA rulemaking, like most other agencies, it would allow us to shorten that rulemaking time very substantially.

Mr. LEIBOWITZ. So that we can help consumers and just following up on Commissioner Rosch's point, we have had discussions internally about whether to do a rule and it always ended with us determining that Mag-Moss rulemaking procedures will take us so long, it won't be worthwhile. For example, under Mag-Moss, which is an almost Medieval form of rulemaking—one that turns rulemaking on its head—opponents of the rule can ask for a referee. They have rights of cross examination.

When you're looking at a 9-year rule, an 11-year rule, with opposition from the entire industry, and you could be sure they'd be in opposition to what we wanted to accomplish. That's why I like your general grant of APA rulemaking authority when we see a major

problem like this, and that's why specifically with respect to the subprime mortgage crisis, that provision of your bill will be enormously helpful to us.

Senator DORGAN. I should make the point that, you know, there are some mortgage lenders out there that are doing it the right way. They've got good brokers. They're doing the right thing. Nobody can come up and say I'm going to buy a home and, by the way, here's the cash. You need home loans. You need mortgages. It's a very important industry to allow for homeownership.

But it is the case that if you look very deep into this system, in the last few years, four or 5 years especially, this thing spun way out of control with deception, with unfairness, a whole series of things, and it seems to me that you all didn't have the capability which is why we made a change in this law or proposed law. You didn't have the capability to write a rule to prevent this. You can go after them after the fact perhaps, but it seems to me you've got to be ahead of this to prevent the activity.

Ms. Harbour?

Ms. HARBOUR. Chairman, yes, I agree with that, and just stepping back a bit and looking at this in the historical context, the housing sector at one point was booming. We used to call this sort of behavior predatory lending and then it was changed to subprime lending.

Many consumers who were not able to buy homes were able to purchase them. However, because we didn't have the rulemaking capability under the APA, we were bringing these cases under our traditional Section 5 authority—we brought 21 cases over the past 10 years and returned $320 million to consumers.

But this new rulemaking ability will give us enforcement tools which we will be able to use to be more vigilant in this area.

Senator DORGAN. The 21 cases doesn't sound like much to me when I see what was out there.

Ms. HARBOUR. But you know what, Senator? These cases are very, very resource-intensive. So, in addition to the APA rulemaking authority that hopefully will be granted, also the funding and the monies to bring on extra attorneys to investigate and bring cases would be very helpful to the Commission.

Mr. KOVACIC. Senator, could I add that as these phenomena developed, I suspect it's largely recognized now that if the bubble had not burst and if the boom had continued, many of the problems would not have manifest themselves.

As a number of the practices came to our attention, in addition to bringing the cases that my colleague has just mentioned, we started programs to learn about what was taking place as this wave unfolded.

This was the purpose of the many workshops that we've spoken about in previous appearances. It's the reason that our Bureau of Economics turned their attention as dramatically as they did to doing empirical work and studies about mortgage lending. It's why for the agency, by my rough count of the 300 attorneys we now have working in the consumer protection part of our agency, roughly 50 of them now are spending their time on financial practices, financial services.

So, I would just add that, in addition to the litigation program, we're trying to learn as fast as we can about what was transpiring and to reposition the agency to deal with this.

Senator DORGAN. I understand. I'm just saying the lack of regulations, however, are costing this country hundreds of billions of dollars and if we can get this legislation passed, we're going to give you a new authority.

It's very important that the Federal agency like yours not be a potted plant. Giving you the authority is one thing, using it is quite another, and it's very important that it be used in the right way and used aggressively.

Mr. KOVACIC. And Senator, could I suggest that there's a model that you mentioned before that might be followed here?

The Do Not Call rule in many ways evolved in roughly the same way. The life cycle of our work was extensive litigation under the Telemarketing Sales Act, reflection, workshops, data-gathering, and then the time came where the Congress said go to it, here's a rule, proceed; I think a similar pattern could well unfold here with the authority you mentioned.

Senator DORGAN. All right. Senator Klobuchar?

Senator KLOBUCHAR. Thank you very much, Senator Dorgan. Hopefully there will be a second round here. I want to ask about the drug enforcement, but I first want to talk about one of the areas that this legislation would expand your authority in and you mentioned it, Commissioner Kovacic, and that would be in the area of the common carrier exemption.

This is something we've been talking about on this Committee. We held a hearing on the cell phone industry, about the fact that it started in its infancy with, you know, like the movie *Wall Street* with the big phone in a briefcase and now 200 million people have them, yet essentially there are not many rules that the cell phone companies have to follow. The two main things that we've identified as issues are the prorating of the early termination fees and how that works and some of the advertisements that are done to entice people to buy and then they find they're locked into a contract.

Then, the second thing is the, as I mentioned, advertisements of cell phone service working, fewest dropped calls, all those kinds of things, without really any back-up.

Could you first talk about how many complaints—do you get complaints on this, even though you don't have authority? Is this an area that you're interested in expanding into?

Mr. KOVACIC. It is, Senator. We do receive some complaints. I don't have a rough count in my mind, but we'll certainly supply that to you.

We also see in a variety of other forms of work we do the concern about advertising in the telecommunications sector. I would say one of the most important applications of the adjustment that is contemplated in the Reauthorization Act with respect to common carriers is that we could bring the large body of experience and enforcement capability that we have to bear on advertising issues in this area and it's not to slight other public agencies that have had a hand in this area. It's simply that we feel in the area of national advertising, and regional advertising, we handle these issues well.

I think it's fair to say when we observe the possibilities that might come about from the application of our authority in this area, we think there would be large benefits to be had in establishing broader national principles that we have applied in other sectors to overseeing this sector, too.

Senator KLOBUCHAR. Well, and I suppose one of the arguments that's made is the FTC has jurisdiction over this.

Could you just give me some examples of other areas where you have joint jurisdiction with other agencies where you focus on the advertising and they focus on the substance of the regulation?

Mr. KOVACIC. We share responsibility with the FCC in the area of pretexting; that is, we have overlapping responsibility. We cooperate very intensively on the Do Not Call List.

I realize, and you probably see them more than I do, there are inherent tensions that arise at any time that two Federal institutions have overlapping responsibility. At the same time, we've worked very hard with the FCC and with other institutions in which that circumstance exists to develop liaison arrangements to minimize tensions and to assure that we're not tripping over each other when we're operating in the same policy domain.

So, I would have a great deal of confidence that those types of cooperative relationships would continue, they'd be intensified, and we'd still be able to do the kind of work that we think we do particularly well.

Senator KLOBUCHAR. Commissioner Harbour, are you concerned about some of the advertising going on in this area and what you've heard?

I mean, everyone I know in my state has a cell phone story. So, go ahead.

Ms. HARBOUR. I'm glad you asked that, Senator, because the Federal Trade Commission will be hosting a town hall meeting on May 6 and 7 of this year called Beyond Voice: Mapping the Mobile Marketplace, where we will explore the evolving mobile commerce marketplace—it's called mCommerce these days, and see how that impacts consumer policy.

So, we'll have parties from all sides discussing this issue and we will likely issue a report thereafter.

Senator KLOBUCHAR. Very good.

Mr. LEIBOWITZ. Let me just add that we have some overlapping jurisdiction with the bank regulators. We have overlapping jurisdiction with the Antitrust Division, and we sometimes allocate industry areas with them.

But getting back to the common carrier issue, one area, and it's one we're going to be addressing at our workshop, that we're becoming concerned about is cell phone spam and we believe we have jurisdiction either under the CAN–SPAM Act or under the FTC Act to go after any malefactors there. But you can be sure that if we bring a case, the first defense they're going to raise is the common carrier defense.

They'll say, "we're a common carrier," and it will take us 6 months to get through the litigation and it will consume a lot of resources for us to prove that they aren't.

Senator KLOBUCHAR. Right now, we have a big blown-up picture of an ad saying we can connect you to the world and the cell phone

service doesn't work there or people are told, hey, on this map you're going to be—don't worry, you're going to get cell phone service there and then they don't and then they can't even terminate their contract without having to pay 200 bucks and so their frustration is that there's really no one minding the store when it comes to this right now.

Is this something where, if Senator Dorgan's exemption passed and the lifting of the exemption and we were able to get this done, that the FTC could look at?

Mr. LEIBOWITZ. Yes.

Senator KLOBUCHAR. Thank you.

Senator DORGAN. Senator McCaskill?

STATEMENT OF HON. CLAIRE MCCASKILL,
U.S. SENATOR FROM MISSOURI

Senator MCCASKILL. Thank you, Mr. Chairman. I'd like to talk a little bit about credit cards.

I firmly believe that credit cards are the next frontier of disaster as it relates to America's economy and some of the abuses going on and I understand Section 5 and the authority, and I know that you have done a lengthy study on consumer protections in the mortgage industry and have made recommendations to other financial services regulators and HUD about better consumer protections.

We have had a number of hearings on credit cards. We've had in the Permanent Subcommittee on Investigations, which I serve on, and we've some incredible factual information that's come to light about the credit card industry, and I think all of us have personal experiences that just make you want to wring someone's neck in terms of some of the practices.

I mean, one of my favorites is, Mr. Chairman, that some of these credit cards want you to get at your credit limit so they can raise your interest rate and that's one of the rationales they use for raising your interest rate, is that you're using credit at or near the limit they have set for you.

So, someone in my office had a personal experience with this and the irony is, is that the credit card company sent him a check made out for the amount it would take to get him to his credit limit. All he had to do was sign the check, bingo, he's there and they can raise the interest rate.

I am curious if you have considered doing a similar study to the study you have done for the credit card industry because I think the abuses that are in the credit card industry and the practices that are being used. I just came back from China where my jaw dropped when I learned the savings rate in China was 50 percent and the savings rate in our country is now net negative and a large amount of that is debt load. As we look at this subprime crisis and we look what the reality is of consumers and what they're doing out there, that the vast majority of this debt is being held in very expensive credit card debt and these are holes that the American consumers are not going to dig out of if they are doing what the credit card industry encourages them to do, which is minimum payment only.

Could you all speak to whether or not you've considered doing a long-term study about the effects of the credit card industry on the

American consumer and what could be done within your aegis in terms of looking at those abuses?

Uh-oh. I'm worried. Everybody's looking at somebody else.

Mr. KOVACIC. We had a rough division of labor by topic before, Senator. So, we wanted to make sure that, much like the infielders racing for the fly ball, that we didn't run over each other.

I would say we don't have a specific plan in place to do this at the moment. We're doing quite a bit of research on financial services and lending, but I would be happy to speak with your staff and I'd be happy to meet with you to talk about what a research agenda in this area might look like.

A second observation is that this is an area and maybe a topic for a fuller discussion another day where we do bump into some substantial jurisdictional limits.

The credit card issuers, we can examine, and those whom we prosecute are very much a function of the financial services statutory framework that we have. The basic distinction is whether the issuer is a bank or is not a bank, I know that the Congress is paying keen attention now to deciding how to retool and reconfigure the remarkable legacy-based financial services regulatory scheme that was put in place 50–60–90 years ago and in many ways hasn't been revisited.

So that's a potential limitation on what we do here as well, but I'd be delighted to meet with you——

Senator MCCASKILL. That would be terrific.

Mr. KOVACIC.—to discuss this.

Senator MCCASKILL. I think it's all hands-on deck time when it comes to the credit card industry and what's going on.

Mr. LEIBOWITZ. Yes, and let me just add to what the Chairman said, too.

We do have a major investigation going on of a subprime credit card issuer, it's a company called CompuCredit. I'm allowed to make that public because the company made it public in its SEC filings. If the Committee would like a briefing on that, we're happy to provide it for you.

Senator MCCASKILL. Mr. Chairman, if you would allow me one more question because I have to run back to the Armed Services hearing and I can't stay for the second round. Do you mind? Do my colleagues mind? OK. Thank you very much.

For a number of years, we have encountered problems in terms of marketing to seniors. I have sent you all a letter about the Craftmatic organization. I've not received a response from that yet, but there is incredible video footage of training going on in the area of marketing these beds to seniors, the adjustable beds. There is footage of the trainers teaching the salesmen, for gosh sakes, try to get them to cry and for God's sakes, don't let them talk to their loved ones, close the sale. It is incredibly—you know, it's just sickening this footage, and I'm anxious to get a response from you about the investigation. This company has now changed names and problems.

There's three areas I want to address and then I'll get to my question. Then there's reverse mortgages which hopefully we're going to get an amendment on the bill we're considering right now on the Floor as it relates to the marketing of reverse mortgages to

seniors. These are complicated and expensive financial tools and we have many instances—we had a hearing on this in the Aging Committee. Many instances where these companies are marketing deferred annuities in tandem with reverse mortgage. Now that, you know, takes chutzpah. That takes a lot of nerve.

Then we've got the *New York Times* article that was published in May 2007 where they documented the selling of lists to companies, saying these guys are suckers, these are old people that are lonely, you know, these are people who are buying lottery tickets and marketing these sales lists. In other words, you know, we've got a good hot list of elderly people you can prey upon.

What this all brings to mind is that I think we need a senior protection/senior advocate within the FTC that will corral the many different examples of where the elderly are particularly being victimized by unfair and fraudulent trade practices and I would want to work closely with your agency in working on legislation that might create this position because I do think that there is a body of work that needs to be focused.

If we going to prioritize our resources and prioritize what the FTC is doing, I could make a strong argument that that prioritization should begin with the bilking of the elderly and practices that are used against a vulnerable population where people are aware that these sometimes are people that don't have a lot of family around and want someone to talk to and if you can gain their confidence on one front, then you can do some things that are pretty outrageous.

I would appreciate your comments on your willingness to work with us in trying to create a senior protection/senior advocate within the FTC as part of this FTC reauthorization.

Mr. LEIBOWITZ. Well, I think we need to take a look at your proposal, but we're absolutely willing to work with you, Members of this Committee, Senator Kohl, Members of the Aging Committee. Absolutely. We're aware of the legislation that's pending on the Floor.

Just going back to Craftmatic, which was the first topic you raised, we are well aware of Craftmatic. Craftmatic is very well aware of us because we fined them over a million dollars for Do Not Call violations last year; $4.5 million, actually. It was a substantial fine and so we're aware of your letter. We will get back to you on that.

Senator MCCASKILL. Yes. Because this goes way farther than a phone call. I mean, this man couldn't read. I mean, he can't see and he signed—she guided his hand on the paper and this is all documented. They sent in a hidden camera into this training session. I mean, it is—as a former prosecutor, it looks like to me it's a slam dunk.

Mr. KOVACIC. Well, Senator, could I offer one additional possibility that I think matches some of your own concerns here? One thing that we've spent a great deal of time doing in our Fraud Program is to identify specific patterns and this often involves working with criminal prosecutors and with our state counterparts to identify the specific patterns of behavior that you mentioned, especially the development among the serious, in many instances, serious

criminals who use these techniques to develop lists and sell lists of individuals who might be particularly vulnerable.

One thing I would like to do in cooperation with my colleagues is to take a number of the things that we do that deal with the economically disadvantaged and deal with specific vulnerabilities that often are the consequence either of language asymmetries, poverty, other conditions, where we have programs now and to provide perhaps a more specific focus on them. I would like to take what we've learned in selected areas and apply them perhaps here as well.

This is another topic I would be glad to speak with you and your staff about.

Senator MCCASKILL. Thank you, Mr. Chairman, very much.

Senator DORGAN. Thank you. Senator Cantwell.

STATEMENT OF HON. MARIA CANTWELL,
U.S. SENATOR FROM WASHINGTON

Senator CANTWELL. Thank you, Mr. Chairman. It's great to see the Commissioners here to talk about what I think is a very important issue impacting our economy today and that's the high price of fuel.

In my state, both gasoline and diesel are in some parts already over $4 per gallon and I know that you made mention in your testimony to the new authority that has been given to the FTC, but I kind of sense it was passing focus, and what I really want to get at today in my questions is the point to which work will move much—I mean that the FTC will move much more quickly on an expedited rulemaking.

The reason I say this is because this is authority to help basically protect consumers from market manipulation and it is new authority, but we have been very successful with the SEC having this kind of authority to help on markets and in the 2005 Energy bill, we gave FERC similar authority to what we are giving to the FTC.

It took them 6 months to get the rulemaking for that rule and to date, FERC has used that expanded authority for 64 investigations, 14 of which have resulted in settlements. This is basically just on their technical and existing authority, and they basically were settlements for over $48 million in various civil penalties.

In addition, within 18 months of their rulemaking, FERC brought two major enforcement cases for market manipulation under their new authority which may total over $458 million in civil penalties.

So, my question is, is the FTC going to act as expeditiously as FERC did in taking this new authority to protect consumers in the area of market manipulation of gas prices and come up with a new rule?

In fact, what I'm really asking is whether you are going to be able to complete that rulemaking by the end of this year?

Mr. KOVACIC. Could I take a try at the question, Senator, and lay out for you what we see to be a way ahead on this issue?

The first thing we're doing, we do have an internal working group that's working on precisely this issue. Among the things we're trying to do and have been working on is to make sure that

we learn from precisely the experiences of the other authorities whom you've mentioned, CFTC, FERC, all of the others who've been dealing with manipulation-like authority in the energy area. That's going to inform our discussions.

We're also contemplating a process of public consultation because there are a number of thoughtful experts on the outside who have some very useful views, I think, about how this authority could be applied to help us make sure that in developing our authority that we don't simply take an off-the-rack solution from FERC or the CFTC that might not fit our own needs well. We want to consider making what adaptations they think are appropriate.

We have people who spend a lot of time looking on the outside at exactly the experience you've mentioned, so we think we can do a bit of learning about how that's gone, and my prediction would be that there will be an advanced notice of a rulemaking this year. I don't have a specific time table for you, but we are developing this and we're working on this quite quickly. This is a high priority for us. This is something that I would be quite willing, in addition to this hearing, to discuss with you.

Senator CANTWELL. I don't understand what you mean by if it's a high priority. Can you commit to having a rule done by the end of the year? If it's a high priority and consumers are obviously anxious—we just had a hearing, Mr. Chairman, that you attended in another Committee on looking at the lack of transparency in investments, particularly from the various financial institutions in these markets, and we came to the conclusion that nobody could predict anything about prices because there wasn't enough information that's readily available.

So, the authority given to FERC—to FTC, sorry, FERC already has this authority, but to FTC is critically important to be the regulator in the market, and if your analogy—I'm a big baseball fan. You know, your analogy about running into each other, I don't think you've fielded a team. We need you to field a team of investigators that are going to go after this issue of market manipulation and we can't wait until $4.50, at least in my area.

Ms. HARBOUR. I guess the tension here, Senator, is that a poorly drafted rule could have adverse effects on gas prices and consumers. So, if it's done, it has to be done correctly and so——

Senator CANTWELL. That's why I'm giving you what FERC has done. FERC did it in 6 months and their authority so far has stopped basically settlement cases in the millions and in some cases civil penalties might be in the hundreds of millions.

So, this is about saying that you will have a policeman on the beat, that somebody in the Federal Government is taking the oil markets and making sure that consumers are protected against market manipulation.

We've already done that in the natural gas markets and electricity markets post-Enron and guess what? The new authority that FERC is using seems to be producing good results. So, I'd be more than thrilled if you'd beat FERC with coming up with a new rule within 6 months.

Mr. KOVACIC. Senator, let me——

Senator CANTWELL. But I'll give you 6 months as well. I agree, you need to do it right, but the urgency, I think, would be to say

that that's your intention, to try to get it completed by the end of the year, given the extreme nature of what's happening in the markets today.

Mr. KOVACIC. Senator, I'd say we have a good team, a great team, none better. I'd add that, in addition to the new authority, they're on the field every day with respect to the existing authority we have to identify misconduct that would violate the antitrust laws and they're very busy on that front, too.

Senator CANTWELL. These are not antitrust issues. That's the whole problem. The new authority was given to you because it doesn't have anything to do with antitrust. It is not people coming together colluding about prices. It is about transparency in the market and moving supply.

I'm just again bringing it up, Mr. Chairman, because our state has asked the FTC for a longer investigation. Spokane, Washington, had the highest gas prices in the Nation and no one could say why. In fact, your initial investigation showed an anomaly in the marketplace but still couldn't understand what the anomaly was about and that's why you're doing a larger investigation.

Mr. KOVACIC. Yes.

Senator CANTWELL. So, my point is that this is new authority to get around what has been years and years of saying that this issue is about antitrust. It is not. It is about whether someone is manipulating supply, not shortage of supply for natural reasons but manipulation of supply, and we had a 101 case in this as it related to electricity in the West Coast and we certainly don't want to have another one of these cases as it relates to oil.

Mr. LEIBOWITZ. Senator Cantwell, if I can just add, as someone who supported your provision, including the price gouging provision that I think was removed in conference, we start many of our rulemakings with an ANPR, advance notice of proposed rulemaking, so I actually think this is a pretty meaningful commitment to start the ball rolling here and to look at the manipulation provision and move it toward a rule.

Senator CANTWELL. I thank you for that statement. I'm bringing this up because you didn't ask for this authority. This Committee initiated the legislation and passed it as part of the Energy bill.

So, we want to make sure you are going to implement the rule and that you're going to do it aggressively.

Mr. KOVACIC. Senator, I'm delighted, in addition to this hearing, to consult with you and all you need do is ask me——

Senator CANTWELL. Great.

Mr. KOVACIC.—about what we're doing.

Senator CANTWELL. Well, I will be sending a letter along with my colleague, Senator Dorgan, today asking you to expedite the rule and have it completed by the end of the year.

Thank you, Mr. Chairman.

Senator DORGAN. Thank you. Senator Snowe.

STATEMENT OF HON. OLYMPIA J. SNOWE,
U.S. SENATOR FROM MAINE

Senator SNOWE. Thank you, Mr. Chairman. Thank you for holding this timely hearing on an array of issues that certainly affect consumers, from subprime lending and the deceptive practices by

non-bank lenders, of course, to energy speculation as well as to identity theft, and so the FTC certainly is on the frontline in so many issues that are crucial and central to the consumers in America.

Mr. Chairman, Chairman Kovacic, I want to follow up on some of the questions regarding energy speculation and futures speculation within the energy market because certainly that has been a fundamental underpinning of some of the reasons as to why increases in energy prices have skyrocketed.

Why hasn't the FTC issued regulations since you've had the requirement to do so since December when this legislation became law? Even in your FTC report of 2007, it doesn't even acknowledge that futures speculation could be a contributing factor to the rising prices in energy, and frankly, you know, this is not just hearsay or hypothetical.

There have been two different studies that have been issued by the Permanent Subcommittee on Investigations of the Homeland Security and Governmental Affairs Committee that underscored this last year, that it can add $20 to $25 per barrel of oil in terms of futures speculation.

So, why hasn't the FTC pursued an aggressive approach and strategy with respect to this issue that seemingly can have a profound impact? I mean, the prices have increased since December with respect to oil and gasoline more than 20 percent and as we know, trucking companies and independent truckers are at a standstill across America. I mean diesel has gone beyond $4 a gallon.

In my State of Maine, $3.78 for a gallon of oil, I mean, is just absolutely prohibitive and so we've got to take every stance possible and pursue every measure possible as to what could be possibly contributing to these price increases and the fact is, many have indicated it's just not supply and demand that's been the instigator driving up these prices, but in fact it is futures speculation that has risen by more than 850 percent since 2001.

So, can you tell me, you know, exactly what the FTC is doing because I'm not sure that I was clear in your response to Senator Cantwell's question because you're in a position to issue regulations on this question. You didn't even acknowledge it in the 2007 FTC report that it could be a responsible factor for driving up these energy prices.

Mr. KOVACIC. The authority in question, of course, is relatively new and I think you might sense from my response and that of my colleagues that we're going to work as actively as we can to undertake the process that could lead to a rule.

I'd also say that in many instances, I don't know of another institution within the Federal Government that has spent more time in the past 10 years looking at these types of questions. I would say that with respect to futures markets and with respect to the aspect of speculation, a consequence of the jurisdictional boundaries that we've had is that's principally been an issue and a set of concerns devoted to other agencies. I think one thing that all of us are committed to do in this instance, in the process of developing perhaps a rule in this area is to make sure that the separate public institutions—I'm thinking about FERC: I'm thinking about the CFTC in

particular—that instead of having individual effort in these areas, have a deeper collaboration, so that as we undertake the process that's now possible under the new authority, our focus will be more intensely directed at precisely this kind of behavior.

Senator SNOWE. Well, to that point, Senator Feinstein and I have introduced legislation that passed the Senate unanimously as an amendment to the Farm bill that's pending in conference to provide, you know, the CFTC with the appropriate oversight of futures speculation, I mean oil futures speculation.

In fact, the CFTC reversed its position last Fall and unanimously requested that oversight authority because it is so crucial to this issue, but irrespective of that, and hopefully it will get done, I frankly would like to have it pulled out of the Farm bill and just, you know, advance on its own and go to the President for signature so we can address that question right now and the CFTC have the oversight for transparency and accountability where the various mechanisms now evade the oversight by the CFTC, whether it's Internet transactions, over-the-counter transactions, or international transactions.

But be that as it may, you have in the FTC within your purview to oversee both consumer prices and futures prices. So, while the CFTC does have responsibility, no question, in its oversight, you have the ability to look at the macro picture and the totality of the picture in terms of the impact on those prices and particularly on consumers.

So, I would ask you to adopt a sense of urgency with regard to this issue because people are suffering mightily under the weight of these price increases and we need to know why. We need to know why, what is driving up these prices, if isn't supply and demand.

So, I would urge you to do so because I think it is extremely critical.

Mr. KOVACIC. Yes, Senator, I understand that very clearly and I see part of our responsibility here. In addition to addressing specific issues that arise in this area, we need to draw attention and stimulate debate about all of the forces that affect the pricing and supply of energy as we see it today. I think that is an indispensable and critical ingredient of what we can do. As we identify the strengths and weaknesses of different policy tools at our disposal, we need to consider the effect of these price developments that you've mentioned. So, I see this as being a critical part of our responsibility.

Senator SNOWE. I appreciate that. Thank you.

Senator DORGAN. Senator Snowe, thank you very much. Mr. Chairman, let me ask you with respect to this issue of the futures market driving up the price of oil well beyond where supply and demand would have it, the top analysts from Oppenheimer & Company says this is like a 24/7 casino, open 24 hours a day.

You know, we had testimony from a couple of experts in front of the Senate Energy Committee saying that what is happening is that the futures market has now included substantial speculation by hedge funds and investment banks. Investment banks for the first time are actually buying oil storage capacity in order to buy

oil, take it off the market and then sell it later when oil is more valuable.

I mean, what kind of jurisdiction do you have, what kind of authority would the FTC have to be taking a look at that?

Mr. KOVACIC. I would say up to this point, we do have a broad charter that Congress has given us to do economic studies and research, and energy is certainly an area in which we've exercised that.

I would say as a matter of custom, questions related to commodities trading and the operation of the commodities market has received some attention from us, but because of, in effect, the rough distribution of authority that we have across the agencies that do this work, that is a responsibility that's principally been in the portfolio of another institution, the CFTC, but I would certainly expect as a consequence of the authority that's contained in the measure that Senator Cantwell was instrumental in having this body adopt, that that's inevitably, immediately going to become a more intense area of concern for us.

One of the things that the internal group we have, which has been working for some time on the measure in question in the roughly 3 months or so since the authority was given us, is to develop a much closer relationship with the other Federal regulators who do exactly this work.

Part of what I would anticipate as part of that process is that we create a greater degree of what I suppose could be interoperability so that we have greater direct and continuing access to the research they've already done.

Part of what we're seeking to achieve here, that is, in learning more about this dimension of the issue, is that we take the fullest possible advantage of work that our counterpart agencies have done.

So, I would say it has been a modest part of our responsibility to date but a major focus of the work we're doing internally in the run-up to proceedings in this area is to make sure that we learn in a meaningful way what our counterpart agency has done in this area.

Senator DORGAN. Yes, I would say, though, that your counterpart agency can't see what doesn't exist and what doesn't exist is that which is unregulated, behind the curtain, on the intercontinental exchanges and so on.

It's why a 32-year-old was able to control, what was it, 70 percent of the—was it natural gas? So, my point is, I wouldn't worry too much about your relationship with others and waiting for someone to do something. If somebody else is not doing it, not able to do it, I'd jump right in with both feet and start investigating and use all the authorities that you have.

There's something going on here that's wrong. I started this morning by talking about the substantial bail-out to the tune of tens of billions of dollars of institutions that are now adjudged to be too big to fail. If they're too big to fail, they are not too small to regulate, it seems to me, and whether it's hedge funds, investment banks, or whoever is engaged in these markets in very substantial amounts of speculation, I hope you'll use all the authority that you have and that this committee wants to give you in a way

that is not overly deferential to other agencies that may not be doing anything.

Mr. KOVACIC. Senator, I don't think you'll find any hesitation on the part of myself and my colleagues to exert ourselves vigorously, in particular where we may share responsibility with another institution that is less vigorous in doing so. So, there's no hesitation there.

My observation, in exercising that responsibility, is that I would like to see us do two things. Where there has been good work done that can form our own proceedings, I'd like to have the benefit of that. In particular, to think of Senator Cantwell's point again for a moment, where there has been experience, and we look forward to learning more about this experience, where there has been more experience with actual implementation, I expect that you would agree with me it would be foolish for us as we proceed again in a fast-paced way not to make sure that we have the benefit of that so that they can tell us——

Senator DORGAN. Mr. Chairman, I agree with that.

Mr. KOVACIC. So, and the last piece of it is there are a number of very wise outsiders who have been following exactly these trends. Some of them have been witnesses before your Committees. We'd like to talk to them some more as well.

Senator DORGAN. I don't disagree with you. I would say, though, that I don't know of a case where someone has effectively accused a Federal agency of speeding recently. Whether it's the FTC or a dozen other regulatory agencies, our frustration is, I showed you what I put up on the chart, on the board today, that even today you can go to the Internet and see unbelievably deceptive advertising trying to reach out and victimize another homeowner.

I just would say that we have written a piece of legislation that gives you in my judgment much needed new authority. Our purpose in doing that is to hope that you will be aggressive in using that authority at a time when we are surrounded by a whole series of practices that is now costing our country and our government a massive amount of dollars to try to clean up the mess.

Mr. KOVACIC. I would say, all I could say is that I know of a few Federal judges who have given us tickets for speeding and have told us to turn over our license in specific cases, but I specifically and completely understand the urgency of the message you give us today.

Senator DORGAN. Senator Klobuchar?

Senator KLOBUCHAR. Thank you very much. I want to now explore this issue of regulation of some of the conduct of the pharmaceutical industry and part of me wants to know if the legislation that's proposed will help at all in this area and then also just to explore, as someone who's new to the Senate, what we can do to try to get at this problem because I just want to help some babies in my state and some doctors in my state that want to do their jobs.

As I mentioned, there is a drug and I have it here called "intravenous indomethacin," and it's used to treat a disorder called Patent Ductus Arteriosus, which is known as PDA and it's a rare disorder that prevents holes from healing in the hearts of premature infants and they used to use surgery to do this. Since the 1970s,

this drug has been proven as a commonly used method for treating this problem and it actually is cost effective and works.

Well, Merck produced this drug and 2 years ago Ovation Pharmaceuticals acquired the rights. The company quickly increased the price more than 18 times. So, this used to sell for a $100 and then just in a matter of a few months it went up to $1,875 for three one milligram units of the drug.

Now even though this is an American company, the price that this company charges in the United States is 44 times higher than what they sell it for in Canada. Nothing can justify this kind of price disparity as far as I'm concerned.

I also want to point out that nothing was changed in this drug when they acquired it, yet they increased it 18 times. Now there's no generic equivalent of this drug on the market and there's only one other drug that's approved by the FDA to treat this problem and as it happens, Ovation is also the source of that drug in the United States and not surprisingly, the price that it charges for this medicine is nearly identical to what it charges for this medicine.

So you have a price that's 44 times higher than Canada and that went up in just a few months 18 times what it was originally and is the price that they charge for the other drug, and to me this looks like price gouging and exploiting vulnerable babies and a healthcare system that's already taxed to the maximum.

So, what I want to know and we wrote a letter to this company May 7. We've been in some communication with them and we will continue to do that. My guess is that this will end up on your desks. What I want to know is has the FTC conducted investigations of problems that are similar to this?

I know, Commissioner Harbour, you mentioned the current investigation that's going on with payments made to keep generics off the market. This is obviously, as far as we know, a different situation, but are there investigations that are similar to these and what has the outcome been?

Senator DORGAN. Senator Klobuchar, would you hold on that? I wanted to point out that I have to depart and Senator Cantwell will chair the remainder of this hearing.

I want to thank the Commissioners. I'm sorry I interrupted your question, but——

Senator KLOBUCHAR. That's all right. It was a dramatic moment. That's fine.

Senator DORGAN. I think perhaps the more dramatic moment will come in their answer.

Senator KLOBUCHAR. Very good.

Senator DORGAN. But I thank Senator Cantwell for being well to chair the meeting.

Mr. KOVACIC. May I thank you, Chairman Dorgan, for the chance again to discuss your proposals today? Thank you.

Senator DORGAN. Thank you.

Ms. HARBOUR. Senator Klobuchar, we are very aware of your news release and your interest in this area and asking the FTC to investigate this price increase.

In a public setting, we are not in a position to confirm, you know, or deny the existence of any such investigation——

Senator KLOBUCHAR. I understand.

Ms. HARBOUR.—but we do share the concerns of rapidly rising pharmaceutical prices and we will continue to be very, very vigilant in our enforcement. It is a common goal of ours to detect and stop these types of anticompetitive practices in this industry.

My colleague, Commissioner Leibowitz, has been on the forefront of working with Congress on legislation and I'm going to let him talk about some of our current initiatives.

Senator KLOBUCHAR. Excellent. If you could maybe, Commissioner Leibowitz, also if there's examples of other cases from the past that you have. Being new at this, I'd just like to know the path that this could go.

Mr. LEIBOWITZ. Well, we spend a lot of our time looking at pharmaceutical competition at our agency. We review many pharmaceutical mergers and one of our biggest initiatives on the "conduct side" is to try to stop these pay-for-delay settlements, where a brand pays the generic competitor to stay out of the market and consumers are left holding the bag or footing the bill, and there's legislation introduced by Senators Kohl, Grassley, Leahy and Schumer on that.

As for a legislative approach to this, why don't we take a look at it in a little more detail and get back to you and see where we need to go and whether legislation is necessary?

Senator KLOBUCHAR. Well, as far as legislation, I'm curious if—and we're waiting to talk to the company about this, but I'm just wondering what you would do with this if this came your way. What's the course? How long would it take? I'm trying to help these people in my state.

Mr. LEIBOWITZ. So, look, obviously this is a real problem and it's a drug that is only needed by a few people. They seem to have——

Senator KLOBUCHAR. Babies.

Mr. LEIBOWITZ.—raised the price, some would say unconscionably, and the disparity between the United States and Canada is, it's not a legal term but it seems appalling, and I understand why your constituents and probably people in other states are enormously concerned about this.

When you're dealing with unilateral conduct by a company, it's more complicated than if they were to sit in a smoke-filled room and conspire to fix prices. Investigations are very labor intensive.

There are many things that I happen to like about the reauthorization—but one of the areas where we are actually adding people is in our healthcare shop. We want to add more. The reauthorization would grow our agency considerably over a period of years.

I know that doesn't reach this particular circumstance, but it will help us when we have sufficient number of personnel and good attorneys——

Senator KLOBUCHAR. Just so—again——

Mr. LEIBOWITZ. It will help to stop these types of problems.

Senator KLOBUCHAR. Right. I'm not on some crusade against you on this.

Mr. LEIBOWITZ. I know, I know.

Senator KLOBUCHAR. I'm on a crusade to fix this.

Mr. LEIBOWITZ. You've always been very friendly.

Senator KLOBUCHAR. I want to know what would happen. We write a letter and we say this isn't fair, it's wrong, so then it goes into one of your rulemakings, and does the legislation change that? Is it going to take 9 years or, you know, what would happen? Not rulemaking. I apologize. But investigation.

What would happen and how long could it take?

Mr. LEIBOWITZ. Investigations could take, and usually do take a period of months. I think we would first—and we may be doing this—look at the issue generally and look specifically at this particular case, but again we can't talk in much detail——

Senator KLOBUCHAR. I don't want you to talk about this. I understand that as a lawyer.

Mr. LEIBOWITZ. Sure.

Senator KLOBUCHAR. I just need generally what's happened.

Mr. LEIBOWITZ. We'll get back to you on this question.

Senator KLOBUCHAR. So I can go tell the doctors back in Minnesota.

Ms. HARBOUR. I'm not speaking about this particular case, but in general, if this type of drug was a biologic, one that's made by a more natural process, perhaps a generic drug could emerge which would exert some sort of competitive pressure, but not specifically talking about this case, those are some of the things that we would look at as an agency. But this is an important issue and certainly this is something that is on our radar screen.

Mr. ROSCH. Let me just say one thing about this, if I may, Senator, and that is, that this is very fact intensive. We have actually litigated in the 11th Circuit and lost a very important case where the 11th Circuit held that if and to the extent that a biologic or a medicine is covered by a patent, then the patentholder, by virtue of the patent laws, is able to do just about anything they want to do.

So, frankly again, we've litigated this and we lost it. We tried to take it to the Supreme Court. We were unsuccessful in getting the Supreme Court to review it. So, the first issue that will arise in any of these cases is going to be whether or not it is patented and I don't know at this point what the avenue is in the case you have mentioned, I have not a clue, but I don't want to overpromise as to what we can do, consistent at least, with the 11th Circuit opinion.

Now frankly, we don't think they're right, but at the present time, that's the law.

Senator KLOBUCHAR. All right. Well, that's very helpful and we will continue. I'm sure you'll hear from us on this case and it would be nice if there was a generic to have some competition going with this area, but what I'm most interested in is this action that happened where it went up 18 times and the fact that, you know, we can refer it, again I don't want to get into the specifics of this.

Usually you say OK, there's a criminal violation, you refer it. It gets charged this way, it takes this long to go through the process, and these are the potential outcomes. So that's what I'm trying to figure out with something that to me seems outrageous.

What do I do with it, and how do I get some action, and if it's not the FTC, then maybe we need legislation.

OK. Thank you.

Senator CANTWELL. Thank you, Senator Klobuchar. Mr. Chairman Kovacic, I'm sorry, Kovacic, not to continue to talk about this issue, but I just want to explain one thing to make sure that we're clear and then ask you all another question about DTV.

On the market manipulation question, we're not—it's not confusing authority that we're giving to the FTC that is as it relates to other agencies. The CFTC authority is very clear. It's in the futures market. So, they look at futures commodities and——

Mr. KOVACIC. Yes.

Senator CANTWELL.—and that's why Senator Snowe's good work with Senator Feinstein is trying to close a loophole in the futures market as it relates to online trading and particularly ICE which is——

Mr. KOVACIC. Yes.

Senator CANTWELL.—a very big part of the trading futures market for oil that's basically not regulated in the United States, you might have some insight into it, but it's not an enforceable market mechanism by the CFTC. So that's a good idea to close a loophole in the futures market.

The FERC, the Federal Energy Regulatory Commission, has the ability in physical markets to investigate market manipulation of wholesale electricity and natural gas and as I said, that authority was given to them in 2005 and has worked very well in stopping the market from activities that they might have thought were OK to pursue.

In the grand scheme of Enron, we saw where somebody got very elaborate about what they thought they could do in the physical market and certainly if you listen to the testimony of many of those individuals in court cases, they thought they had the authority to do so. They literally thought that their perpetration of schemes, of taking supply down or moving it out from one state to another state or moving it around, was legal to do and that's why a very strong law on the books that says no, the physical manipulation for those purposes is wrong and so we are now giving and have given and passed, as I said, out of this committee to the FTC that new authority on the physical market for oil and distillates which doesn't exist.

It doesn't exist with the CFTC. That doesn't exist with FERC. It now exists with the CFTC and the exact language is, it is unlawful for any person to directly or indirectly, to use or employ in connection with the purchase or sale of crude oil or gasoline or petroleum distillates at wholesale any manipulative devices or contrivances.

So, the point is that we are looking to you to look at what could be manipulative devices or contrivances, that's language based on the SEC's rule and court language that has been upheld, to focus on the notion, as my colleague Senator Dorgan was saying, somebody might move supply around. A hedge fund might hold supply off the coast of the United States for several days waiting for the price to go up even more and then put the product into the marketplace, thereby shorting the domestic U.S. supply, having the price rise and then benefiting from the sale of a higher price. That's what we want you to do.

We want you to do a rule and investigate that. It's not an authority that any other agency has. It's unique to the FTC.

Mr. KOVACIC. Thank you, Senator, and I would again like to invite you and your colleagues, where there are other scenarios of that type in mind to let us know. We would be happy to continue to discuss those with you so that we keep them clearly in mind for ourselves as we proceed.

Senator CANTWELL. Well, I'll look forward to that, and I hope that you are very aggressive about the physical market and making sure that there is someone looking at the physical market.

I do have a question about—the Committee is also having a hearing this afternoon on DTV transition and I'm curious as to what role the FTC thinks that they have in respect to the digital television transition.

I mean obviously the FCC and how they're pursuing this, there's a lot of consumer questions. For example, I recently met with the AARP representatives who told me that there is a 1–800 number, 1–800–DTV–2009, that consumers may think that they are actually calling to get help or assistance or an information hotline, but it is really a sales pitch for satellite television services and so what kinds of issues will the FTC be taking a lead on as it relates to the DTV transition?

Ms. HARBOUR. Senator Cantwell, staff has been in contact with the FCC, the agency overseeing this transition. The NITA, as you probably know, is implementing the program that is providing coupons to be used toward the purchase of these set-top converter boxes.

But in mandating the DTV transition, Congress didn't give a specific role to the FTC; but nevertheless, we are going to be working with these agencies to make sure that there is no unfair or deceptive conduct leading up to this transition.

Senator CANTWELL. So, what do you think about a 1–800 number that lures consumers into calling only to find out it's about a sales pitch for satellite purchase?

Ms. HARBOUR. A 1–800 number based at the Commission? Is that what you're asking? I didn't quite——

Senator CANTWELL. No, I'm not saying it's based at the Commission, but obviously there are a lot of people that are—we're going to have a gap this afternoon, I am sure, in what many of us think needs to be aggressively done to make sure that the transition goes as smoothly as possible, but without a vacuum of—I mean with a vacuum of that happening.

People are jumping in and filling this role and there are many seniors that are out there wondering exactly how they're supposed to proceed here and when they see this 1–800 number DTV, obviously I think that they think that they're really calling a 1–800 number for information but I'm happy to have you look into it.

But what I was asking generally was what do you think the role is of the FTC in protecting consumers, even to the extent of getting more directly involved, because of deceptive practices that may be occurring in this transition period or maybe even helping to outline what are the best practices to some of the major players that are going to be involved?

Ms. HARBOUR. I believe the Commission always has a role in looking out for the interests of consumers and if there's any deception or unfairness going on leading up to the transition, that is

something that we would be very interested in and would certainly like to be taking a look at.

Mr. LEIBOWITZ. We do have 800 numbers for consumer complaints and for identity theft victims, but I think it's sort of as you envision it, Senator Cantwell.

There are two agencies that are designated to be the lead agencies: the FCC and the NTIA. We stand ready to help and we will fill in any gaps as appropriate and we do consumer protection. That's what we're good at.

I also would add that on the antitrust side, we just received a petition and we take our petitions very seriously about an allegation that the company that holds the licensing rights to some of the technology needed for digital television has raised royalty rates beyond its commitment. That might be in violation of the antitrust laws. It's a petition we're taking a look at.

Mr. KOVACIC. And I would say, Senator, I think you're absolutely right with your colleagues to focus on industries in a transition of this type. To add to my colleagues' comments, I think there's also a role here for us to play with consumer education; that is, we've done quite a bit of work, in addition to the measures my colleagues have mentioned in posting alerts, doing publicity, working with our colleagues at the state level, too, to make sure that consumers have rough simple guidelines to keep in mind as this unfolds.

Senator CANTWELL. Thank you very much, Senator Snowe.

Senator SNOWE. Thank you, Madam Chairwoman. I wanted to ask questions related to identity theft and I know you probably addressed it earlier in your testimony, but I'm certainly concerned.

I mean, it's the Number 1 consumer complaint in America.

Mr. KOVACIC. Yes, Senator.

Senator SNOWE. We've seen a major transition from the traditional sources of fraudulent practices to online practices, deceptive practices, and I just would like to know exactly what the FTC is doing and being in the forefront with effective methods of beginning to challenge this significant issue, even to the point that the IRS advocate, national taxpayer advocate in testifying before the Senate Finance Committee recently indicating it's the most serious threat to the IRS and to taxpayers and is becoming more pronounced and that's why I've introduced antiphishing legislation with my colleagues, Senator Stevens and Senator Nelson, on this question because that's another dimension of identity theft that has escalated over this last year 57 percent from the previous year.

So, it continues to go on and in Maine and throughout the Northeast and in Florida, we had a major security breach with Hannaford Brothers Company, a supermarket food chain where more than four million consumers' debit and credit cards were breached recently from a period from December through early March. I mean, you know, it's significant major breach. I mean, it represented 165 stores in the Northeast and another 106 stores in Florida and 51 of those stores were in the State of Maine alone.

So, we need to have the FTC again on the forefront of this major question that is only going to increase in terms of practices, deceptive practices that, you know, we're finding the perpetrators engaged in.

Mr. KOVACIC. May I respond, Senator?

Senator SNOWE. Yes, you may.

Mr. KOVACIC. And I invite my colleagues as always, not that I could hold them back from adding their own thoughts as well.

I think several considerations come to mind. One strategy we've had has been an active litigation program which the Committee is aware of. Second, we have an intensive program of education for consumers so that they take basic precautions that, if taken, would serve to insulate them from some of the behavior. I think two other frontiers are worth mentioning as well.

My colleague, Commissioner Harbour, mentioned that to an increasing degree, we're working with our international counterparts to deal with this issue. As you know and in the work you've done on your legislative proposal, this is increasingly an international problem and the wrongdoers are technologically sophisticated. They're geographically adroit, and they appreciate the gaps in individual national systems of enforcement.

We have two countermeasures in mind there. One is to work with the authority that this body has given us, U.S. SAFE WEB, to work much more closely with our foreign counterparts and we're applying that vigorously. The second frontier is that ultimately, I think, civil sanctions for the wrongdoers are not enough and while we would welcome additional capacity to impose civil penalties on the wrongdoers, my impression is, and you may well have a different view of this, but my impression is, Senator, that most of the wrongdoers in fact are engaged in criminal behavior. They are criminals, and the only way to deal with the serious wrongdoers is to take their freedom away.

Our contribution to that as a body with civil enforcement authority has been to work much more closely with those with criminal prosecution power to exercise it. We prepare cases through our Criminal Liaison Unit which was created less than 5 years ago. We provide them to the Department of Justice and to state authorities.

I see this as the only way for the most serious cases, such as phishing, where we're going to get adequate deterrence with that is to engage the criminal enforcement powers of their jurisdiction and our foreign counterparts in taking away the freedom of the wrongdoers.

Senator SNOWE. Does anybody else have a comment?

Mr. ROSCH. Well, the only other comment I would make, Senator, is that, I'm sure you are aware of the fact that we've been very active in this area. We've brought more than 20 cases against—data security cases in the last 2 years since I've been at the Commission and we'll continue to do so.

However, one of the great things about the proposed legislation is that it gives us civil penalty authority. I quite agree with the Chairman that this is criminal conduct and it ought, for the most part, to be referred to criminal authorities, but we'd be greatly strengthened in our own battle against data security breaches if we had civil penalty authority and right now, the only time we can seek civil penalties for data security breaches is if it violates a specific statute that gives us civil penalty authority and in only one of those 20 cases, the ChoicePoint case, was there a specific statute that gave us that authority. That's one of the great things about this statute.

Mr. LEIBOWITZ. The reauthorization would give us civil penalty authority for violations of Section 5. That would help us with getting a strong deterrent here and they need a strong deterrent for the data security breach cases.

There's also legislation out of your Committee, I think, or that's been percolating in your Committee, that would give us specific data security civil penalty authority and that would be helpful, too. And as for phishing, I agree with my colleagues that it's criminal. We refer those cases to Justice. We looked at your bill. I know it also has a very interesting domain name registration provision. That's another issue.

Ms. HARBOUR. I completely agree with the civil penalty authority that we really could use in this area.

Just to back up for a moment and tell you some more about what we do in the area of identity theft, we train law enforcement authorities about how to handle ID theft. We have a victim assistance program. Ex-Chairman Majoras was a Co-Chair on the President's National Task Force on Identity Theft, which came out with 31 recommendations this year. We have new videos on YouTube educating consumers about phishing. We have numerous education programs to help consumers deter, detect and defend and so we've been very vigilant in this area.

Senator SNOWE. Well, I appreciate your comments, and I think it is important to know which tools are very effective and what we need to do in order to accomplish that and to move expeditiously and that's why I've introduced my legislation and it does impose civil, you know, penalty authority because it is important. The United States hosts 32 percent of these phishing sites and so clearly we're the top country in the world.

So, I just think that we have to do everything that we can and I appreciate your comments and that will be helpful to us as we move forward.

Thank you.

Senator CANTWELL. Thank you, Senator Snowe. Senator Klobuchar. We promise we are not keeping the FTC here all afternoon, but we are going to have another round of questions, if anybody has them, and then we'll conclude the hearing.

Senator Klobuchar.

Senator KLOBUCHAR. OK. Thank you. I have follow-up questions with some of the things that have already been raised.

The first was the area that Senator Dorgan explored with you about the subprime mortgages and we all remember the pictures he had blown up of what was going on there.

The proposed FTC Reauthorization bill would provide the authority to the state Attorneys General to in certain circumstances bring a suit for a violation of the subprime mortgage loan rules promulgated by the Commission or a violation of the Truth-in-Responsible Lending Act or the Homeownership-and-Equity Protection Act.

Yesterday, I received a letter from the Attorney General for the State of Minnesota expressing concerns that the states might not have the funding and personnel necessary to prosecute. It's not that they don't want to prosecute and I also heard this yesterday in Minnesota, I did a forum on the mortgage crisis in a suburban area with a number of experts in this area, and one of the county

commissioners came up and said that the prosecutor for the area that had been prosecuting the cases and doing a very good job also was concerned about resources and as you know, local and state investigative agencies are facing tremendous resource issues and given the scope of the problem that we're facing. Do you believe that state Attorneys General have the resources necessary to bring these suits against all violating parties and what role do you think the Commission could play in working with states to ensure that the appropriate legal actions are taken?

Ms. HARBOUR. I think the Commission would be very happy to work with the state agencies. It's always good for the American consumer to have another cop on the beat and if the states can work parallel investigations with the Federal Trade Commission, I think that benefits consumers.

In the past, we have had very cordial working relationships with the state Attorneys General in some of our competition cases and some of our consumer protection cases, and I see no reason why the agencies could not work together in this area as well.

Mr. KOVACIC. Senator, I don't know that any of us have had the chance, given the continuing evolution of the reauthorization draft, to consult with our colleagues in the states and talk about their resource capacity at the moment.

So, I don't know that I have a view, maybe my colleagues do, about where they are. I suspect your colleague from Minnesota has given you a good glimpse of that, but as Commissioner Harbour said, whatever the resource capacity, I think our modern history has been to work as closely as possible to make the best possible use of the resources they would have.

Mr. ROSCH. The only thing I would add, Senator, is that there is one aspect of that provision that I think is terrific and that is, that even if the states do bring actions, based upon this legislation, the Federal Trade Commission is supposed to be notified by the state that that action is pending and we have the right of intervention.

I think that's critical in terms of nationwide coordination of these actions. The worst thing that can happen is that we have a patchwork quilt.

Mr. KOVACIC. Could I add, Senator, that as part of an initiative that we've undertaken in the past 2 years, we've been having an event every Fall now on a specific topic with our state counterparts that do competition and consumer protection.

Our first year was gasoline. Last year it was pharmaceuticals and I would like to see us expand that framework so that again, as in the case of other matters we discussed before, we move away from a fragmentation of effort and responsibility to see that the individual public institutions that have shared interests work in a more collaborative way to make sure that we get the best possible results from the resources that all of us have.

This would be another area where I would expect that frontier of cooperation could continue.

Mr. LEIBOWITZ. Particularly because so much of this fraud, it's Internet-based, it transcends state borders. So, we need to work with them, they want to work with us, and this bill gives us the ability to do that.

Senator KLOBUCHAR. Do you think that a Federal licensing standard would impact the ability to avoid our housing crisis? This is an amendment by Senator Feinstein that I'm also cosponsor of. It's not yet been debated or voted on in the Senate.

But just based on what you've seen as people who protect the consumers' rights, do you think that would be helpful to have some kind of Federal licensing standard for mortgage brokers?

Mr. KOVACIC. I don't have an immediate reaction, Senator, but it's something that, if you would permit us, I'm sure we would be glad to address specific questions and give you a fuller reply. I don't have an immediate reaction, Senator.

Senator KLOBUCHAR. OK. Thank you. Then last, I just was asking before about the past price gouging cases, not trying to get into this situation, as we may be bringing it to your attention, but if you could just in writing afterwards look and see what past price gouging investigations have gone on that have been made public and what were the results of those investigations.

I know about in 1998, the 33-state Attorneys General. This was a generic drug investigation regarding Mylon and I think there was some kind of a $100 million settlement. I think the facts were different than the case I just talked about here, and I know that you mentioned another case, but if I could see the price gouging cases, the anticompetitive cases in the drug area just to gauge our chances, if we go this way or if we need to follow another route.

Mr. KOVACIC. Yes, Senator.

Senator KLOBUCHAR. Thank you. Appreciate it.

Senator CANTWELL. Thank you, Senator Klobuchar, and thanks to the FTC Commissioners for being with us here today. We appreciate your attention to the issues and the issues that we have brought up. We do look forward to working with you not just on the FTC reauthorization legislation but on the various topics that were brought up by my colleagues today.

So, thank you very much.

Mr. KOVACIC. Thank you, indeed, Senator. Thank you.

Senator CANTWELL. The hearing is adjourned.

[Whereupon, at 12:03 p.m., the hearing was adjourned.]

A P P E N D I X

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JOHN D. ROCKEFELLER IV TO THE FEDERAL TRADE COMMISSION

Question 1. We know that junk food advertisements have a negative effect on children's health and are one of the reasons we are seeing such a huge rise in the incidence of childhood obesity in our country. Over the past year and a half, the Senate and FCC Joint Task Force on Media and Childhood Obesity has been working to find voluntary industry solutions to the overexposure of children to junk food advertisements on television. One objective of the health and advocacy groups participating on the Task Force was to reach a compromise whereby television stations and cable channels would agree to a balance of healthy and non-healthy food advertisements during their children's programming. Rather than asking for a complete ban on junk food advertisements, the children's health and media advocates were willing to allow a full half of food advertisements to be for unhealthy foods. Yet after a year and a half of negotiations, the media and advertising companies were unwilling to make this compromise. Since voluntary industry action seems unlikely, what is the FTC willing to do to ensure that our children's health is not being compromised because they are being bombarded with advertisements for junk food?

Answer. We share your concern about the rise in childhood obesity in our country. The FTC has undertaken a study, at the direction of Congress, to learn about companies' expenditures and activities in marketing food and beverage products to children and adolescents.

Recognizing the First Amendment issues raised by regulation of truthful and nonmisleading commercial speech, the Commission continues to be a strong advocate of addressing the issues of advertising and childhood obesity through industry self regulation. The FTC has undertaken its own significant efforts to encourage self regulation in this area.[1] In 2005, the Commission and the Department of Health and Human Services convened a workshop on Marketing, Self-Regulation, and Childhood Obesity. That workshop—which brought together food manufacturers, entertainment companies, academic experts, consumer advocates, and government officials—produced a series of recommendations, including self-regulation to change the nutritional profile of products marketed to children.

In July 2007, the FTC and HHS convened a follow-up forum to review progress in the intervening 2 years. We learned that our 2005 workshop had provided a stimulus for various industry initiatives, in particular the Children's Food and Beverage Advertising Initiative announced in 2006 by the Council of Better Business Bureaus (CBBB). To date, 13 major food and beverage companies have joined the CBBB program with concrete pledges that when fully implemented—generally by the end of this year—will significantly alter the landscape of food marketing to kids. Most of these companies have committed either to not advertise directly to children under 12 or to limit such advertising—including TV, radio, print, and Internet—to foods that qualify as "better for you" by meeting specified nutritional standards. In addition, the companies have pledged to limit use of licensed characters in advertising to promote healthier products and lifestyles, not to seek product placements in child-directed media, not to advertise food or beverages in elementary schools, and to use their "better-for-you" products in interactive games ("advergames") directed to kids.

At the same time, some media and entertainment companies, including Disney, Nickelodeon, and Cartoon Network, have adopted policies to limit the licensing of their characters to foods meeting nutritional guidelines. Moreover, Ion Media Networks, a producer of children's weekend television shows, has committed not to air advertising for less healthy foods and beverages on children's programs and to create story lines that encourage good eating habits and physical activity. The Commis-

[1] The FTC is not part of the joint task force you describe.

sion expects that the CBBB Initiative, as well as the media and entertainment company efforts, will grow and expand coverage in the future.

Question 2. A recent *New York Times* article examined how food marketers use "casual games" or advergames on their websites to promote junk foods, and notes that all of the voluntary limits that food companies have placed on their food marketing to kids on television do not apply on the web. So it appears that while the industry is publicly showing restraint in their advertising of unhealthy food to kids on television, they are also working harder to push such advertising to kids online, where they spend an average of twenty minutes with such advertising instead of 30 seconds. Therefore, if it is found that the industry's voluntary solutions are not enough to protect children from being inundated by advertisements for unhealthy foods on the Internet, what are the FTC's plans to hold the media and advertising industries accountable?

Answer. As noted above, recognizing the First Amendment issues raised by regulation of truthful and non-misleading commercial speech, the Commission continues to be a strong advocate of addressing the issues of advertising and childhood obesity through industry self regulation. The Children's Food and Beverage Advertising Initiative discussed above covers the Internet and online games. As the member company pledges become fully implemented, we expect to see changes in websites directed to children. If a company publicly states that it will change its advertising to children, and then does not do so, that failure to match its promise with actions could constitute a deceptive practice, which is prohibited under Section 5 of the FTC Act.

Question 3. Back in the spring of 2006, the FTC, under the direction of Congress, initiated a comprehensive study of food marketing activities and expenditures directed at children and adolescents. Could you please state when the FTC is going to be prepared to release the food marketing study?

Answer. On July 31, 2007, after obtaining the necessary approval from OMB, the Commission issued compulsory orders to 44 food and beverage companies, seeking information on the companies' expenditures and activities in marketing food and beverage products to children and adolescents. The Commission's orders sought data not only for traditional, measured advertising media—television, radio, and print—but also for newer and/or unmeasured forms of marketing, including the Internet and other new electronic media, packaging and in-store displays, event or athletic sponsorship, premiums, product placement, character licensing, and in-school marketing. FTC staff received responses at the end of 2007, and is now analyzing the data and preparing the report. The Commission expects to issue its report this summer.

Question 4. Does the FTC consider an IP address to be personally identifiable information under COPPA? If not, does the FTC need greater authority to protect children from companies collecting information about children's interests and preferences and using that information to target ads to children even if they don't actually know the specific name of the child? What does the FTC think about the European Union's move toward considering IP addresses as personally-identifiable information?

Answer. Under the COPPA Rule, an IP address, by itself, is not personally identifiable information. The Rule defines "Personal Information," as individually identifiable information about an individual collected online, including such information as first and last name, street address, e-mail address or other online contact information, telephone number, and Social Security Number, or "a persistent identifier, such as a customer number held in a cookie or a processor serial number, where such identifier is associated with individually identifiable information . . ."[2] In the Rule's Statement of Basis and Purpose, the Commission specifically noted that: "The Commission believes that unless such identifiers [static IP addresses or process serial numbers] are associated with other individually identifiable personal information, they would not fall within the Rule's definition of 'personal information.'"

The Commission has authority beyond COPPA, pursuant to Section 5 of the FTC Act, to protect children from unfair or deceptive practices, both online and offline. The Commission staff is actively examining the legal and policy issues raised by online behavioral advertising—the practice of tracking consumers' activities online to target advertising to them. In November 2007, the Commission hosted a Town Hall, entitled "Ehavioral Advertising: Tracking, Targeting, and Technology," which brought together a diverse group of interested parties to examine key issues raised by the practice. Following the event and review of the public comments received, the Commission staff issued for comment proposed principles to guide the develop-

[2] 16 C.F.R. § 312.2.

ment of meaningful self-regulation of online behavioral advertising. The Commission staff has specifically sought comment on whether information collected about children's activities online should be treated as sensitive or otherwise given special consideration. The comment period closed on April 11, and staff is carefully reviewing the comments received.

The Commission staff is also looking at the European Union's position on IP addresses as a part of its examination of the privacy issues surrounding online behavioral advertising. The staff is actively conferring with technologists, industry, and privacy advocates on emerging technologies that may affect the discussion of this issue.

Question 5. If the FTC finds that an Internet company violated the behavioral advertising self-regulatory principles (such as having an overly confusing, technical, or lengthy privacy policy), would the Commission consider that to be a "deceptive or unfair trade practice" and consider an enforcement action?

Answer. In issuing the behavioral advertising principles for public comment, FTC staff intended to launch a public dialogue about the privacy issues raised by behavioral advertising, and to encourage meaningful self-regulatory efforts. The proposed principles, which are still being considered in light of the public comments received, should not be viewed as a regulation or as an interpretation of what constitutes a *per se* violation of the FTC Act.

Of course, we note that regardless of the principles, the FTC retains the authority to challenge unfair or deceptive practices that arise in the behavioral advertising area. Further, some of the principles—for example, the principles regarding reasonable security for data and material changes to privacy promises—have a basis in FTC enforcement precedent. The FTC has brought and can continue to bring enforcement actions against companies that fail to provide reasonable protections for consumer data.[3] The FTC can also bring enforcement actions against companies that use data in a manner materially different from promises made when the data was collected.[4] However, whether or not a particular behavioral advertising practice constitutes a deceptive or unfair trade practice will depend on the facts of each case.

Question 6. What are the types of behavioral marketing that are being used with children? Does the FTC believe that voluntary self-regulatory guidelines will be sufficient to protect children from these forms of marketing?

Answer. As indicated above, the Commission staff currently is examining the practices of online behavioral advertising targeted both to children and adults, through its request for public comment on proposed self-regulatory principles on behavioral advertising. We expect to learn more about the types of behavioral advertising associated with children through this process. In this regard, we note that one comment the staff received regarding the proposed principles raised the concern that children would be less likely to recognize behavioral advertising and less able to make informed choices about the practices. We also note, however, that we currently are not aware of any distinction between the behavioral advertising techniques used for children vs. adults and have no data on the products and services most promoted to children through behavioral advertising.

Well-constructed self-regulatory efforts are important to protecting children's interests, especially in dynamic marketplaces such as online advertising. The Commission staff's publication of the proposed behavioral advertising principles may spark further self-regulatory innovations. For example, the Network Advertising Initiative recently proposed a prohibition on behavioral advertising to children under the age of 13. In addition to any self-regulatory changes sparked by the proposed behavioral advertising principles, existing self-regulatory programs, such as the Children's Advertising Review Unit of the Council of Better Business Bureaus (CARU), apply to all forms of online marketing. CARU's guidelines and enforcement actions provide strong direction and incentive to industry to conduct responsible online advertising to children. Finally, as noted above, the Commission also retains its authority under Section 5 of the FTC Act to pursue cases of unfair or deceptive online marketing to children.

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[3] *See, e.g., In the Matter of The TJX Companies,* FTC File No. 0723055 (proposed consent agreement announced March 27, 2008); *In the Matter of Reed Elsevier Inc. and Seisint Inc.,* FTC File No. 0523094 (proposed consent agreement announced March 27, 2008), *http://www.ftc.gov/opa/2008/03/datasec.shtm.*

[4] *See, e.g, Gateway Learning Corp.,* Docket No. C–4120 (Sept. 10, 2004), *http://www.ftc.gov/opa/2004/07/gateway.shtm* (company made material changes to its privacy policy and allegedly applied such changes to data collected under the old policy; opt-in required for future such changes).

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. OLYMPIA J. SNOWE TO THE FEDERAL TRADE COMMISSION

Question 1. The FTC has stated that "phishing is a criminal endeavor that is best suited for criminal law enforcement." However, the FTC actively pursues and enforces activities such as spam, identity theft, spyware, data security breaches, and even pretexting. Clearly, phishing is directly related to SPAM and identity theft, it [spear phishing] also attributes to security breaches of companies' networks, and even phishing mirrors pretexting, which is obtaining telephone records using false pretenses. So why would phishing fall outside the purview and enforcement of the FTC when it is so closely tied to these other FTC related areas?

Answer. Phishing continues to be one of the most vexing problems facing consumers, but it is difficult to address through FTC enforcement for several reasons. First, the architecture of the e-mail system creates significant investigative hurdles for the FTC to identify those responsible for sending phishing messages. The Internet protocol for e-mail, known as SMTP, does not require the transmission of accurate routing information. The only piece of information that must be accurate in an e-mail is the recipient's address. Phishers exploit this flaw in SMTP, thereby making it virtually impossible to trace the source of a phishing e-mail using the e-mail message's header information. And because phishers are not generally delivering a product to a consumer or using their own account information for financial transactions that we can trace, there are few civil investigative tools we can use to find the phishers.

In addition, the nature of the illegal act also makes phishing better suited for criminal than civil enforcement. Indeed, in the phishing cases that the FTC has filed, the perpetrators of the schemes have been identified only with the considerable assistance of criminal investigative agencies and Federal prosecutors. Their efforts have included obtaining ISPs' records, most of which the FTC is prohibited from seeking by the Electronic Communications Privacy Act, and conducting stakeouts of addresses where items purchased by the phishers are being delivered. Moreover, because phishing involves the brazen theft of consumers' personal financial information, it is doubtful that a civil injunction will provide appropriate deterrence.

More specifically, phishing often differs from four of the areas that you mention:

Spam: Spammers making deceptive claims to sell products are generally more amenable to FTC enforcement tools than phishers. In cases involving deceptive spam, we often have civil investigative avenues that we do not have in phishing cases; there is often a product being delivered or a money trail that can be followed. These investigative avenues have enabled the FTC to bring a significant number of cases against deceptive spammers.[1]

Data Security: The FTC can also use its enforcement tools effectively in the data security area. The Commission's investigative targets in these cases are the companies that failed to take reasonable precautions to prevent breaches, not the identity thieves who could take advantage of their failures. Targets in our data security cases are concerned about their reputation in the marketplace; they often cooperate in FTC investigations and comply with FTC injunctions.

Pretexting: While phishers hide behind the SMTP protocol's cloak of anonymity and are engaged in outright theft, pretexters often operate in the open. Although they may provide their services to those who intend to do harm to others, they also may provide services to legitimate entities such as investigative firms, media, or even attorneys, and they operate from a physical location. Moreover, in addition to engaging in pretexting, many pretexters may also offer legitimate legal investigative services. Thus, we have been able to locate the pretexters that have been the subject of our law enforcement.

Spyware: Spyware can have characteristics of phishing as well as spam. The most egregious forms of spyware, such as keyloggers, share the same attributes as phishing: the perpetrators are extremely difficult to track down and are, at their core, nothing more than thieves. FTC enforcement against such spyware purveyors would likewise be futile. Other types of spyware, however, are more akin to the fraudulent and deceptive business practices that the FTC has traditionally tackled. For example, the FTC has successfully prosecuted a number of software developers and distributors who installed spyware on consumers' computers for the purpose of displaying advertising, or collecting data on con-

[1] In some cases, spam can be used for phishing or to disseminate spyware. In many of these cases, civil law enforcement is more difficult for the reasons described in the text.

sumers' Internet habits.[2] The FTC has also sued a number of software developers for using deceptive advertising designed to frighten or intimidate consumers into purchasing their products.[3] In these types of cases, the defendants openly and directly interacted with consumers, and operated as a business (*e.g.,* employing programmers, maintaining a corporate entity and corporate bank accounts, paying taxes on profits, etc.). Although these defendants caused massive consumer harm, they were not high-tech bank robbers (like phishers) but rather high-tech con men operating a fraudulent business. As a result, the FTC was able to leverage its investigative resources to locate and prosecute these defendants, and was able to deter future misconduct through injunctive relief and disgorgement.

Identity Theft: Phishing is more like identity theft, a clearly criminal act that the FTC does not prosecute. Although the FTC plays a significant role in keeping data out of the hands of identity thieves by, among other things, enforcing data security laws and conducting aggressive outreach and education, strong criminal enforcement is the best approach to effectively punish and deter identity thieves.

Although civil law enforcement may not be the most effective tool against phishers, the FTC has taken aggressive steps to curb the impact of phishing by encouraging industry to adopt anti-phishing technologies and by providing significant consumer education. Since 2004, the FTC has been urging ISPs and businesses that operate their own e-mail servers to adopt domain-level authentication technologies. With domain-level authentication, an ISP or other operator of an e-mail server will be able to verify that a message actually comes from the domain appearing in the "from" address. The FTC is encouraged by the rapid adoption of domain-level authentication technologies that is now taking place. Combined with other anti-spam technologies, domain-level authentication should reduce the likelihood that phishing e-mails will enter consumers' in boxes. And, as explained below, the FTC has an ambitious consumer and business education program aimed at combating phishing.

Question 1a. So why wouldn't the FTC want to ramp up its efforts and allocate more resources toward phishing since phishing scams are one of the top threats facing consumers?

Answer. Although the FTC does not plan to ramp up enforcement efforts for the reasons described above, it continues to devote resources to phishing. Consumer education is a key tool for helping to reduce the number of consumers who fall victim to phishing scams. The FTC has long engaged in phishing education through consumer alerts and its *OnGuardOnline.gov* computer education website, which includes information on phishing.

On April 1, the Commission held a workshop with approximately 60 experts from business, government, the technology sector, the consumer advocacy community, and academia to discuss strategies to reach and teach consumers about phishing. Several new initiatives for phishing education emerged from the workshop. First, the FTC launched new 30-second phishing education videos, and several participants agreed to place the videos on their websites and other channels. Second, the National Cyber Security Alliance announced that it is forming a Task Force on phishing education, and FTC staff plans to participate. Third, several participants supported the idea of using a landing page to educate consumers about phishing. Landing pages are web pages that ISPs and other entities would use to redirect consumers from sites identified as phishing sites to educational sites. Specifically, the Anti-Phishing Working Group will continue to develop informational phishing landing pages and will translate them into various languages for use by domestic—as well as foreign—ISPs.

Question 2. At the FTC's recent phishing education roundtable, one aspect that was addressed was the need for greater Internet safety and cyber security education in the K–12 school systems. Some research has shown that few school systems are teaching about these issues and as a result, teenagers and young adults are more susceptible to identity fraud because they're less likely to take the necessary precautions to protect themselves from various types of identity theft. Can Congress do more to assist the states to incorporate more school-based education on computer and cyber security? Would you support effective legislative efforts on this issue?

Answer. We agree that more school-based education on computer security, cyber safety, and cyberethics would be beneficial. Several participants at our phishing

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[2] *See, e.g., In the Matter of DirectRevenue,* LLC, FTC File No. 052 3131 (Jun. 26, 2007); *In the Matter of Zango, Inc.,* FTC File No. 052 3130 (Mar. 7, 2007).

[3] *See, e.g., FTC* v. *Trustsoft,* No. H 05–1905 (S.D. Tex. 2005); *FTC* v. *MaxTheater,* No. 05–CV–0069–LRS (E.D. Wash. 2005).

workshop pointed to the Virginia school system's legislatively-mandated Internet safety education program as a potential model program. *See http://www.doe.virginia.gov/VDOE/Technology/OET/internet-safety-guidelines.shtm.* The Commission has not taken a position on the respective roles of Congress and the states in directing education.

Question 3. Last fall, evidence surfaced that a broadband provider was blocking or, at the very least, slowing down a very popular peer-to-peer application. The provider had stated prior to this practice coming to light that it "does not block access to any applications."

In addition, the operator seemed to employ questionable practices in its traffic management of this application such as "spoofing" IP packets—inserting reset packets that purported being from the downloading P2P computer instead of from the operator—and may have infringed upon consumer privacy by inspecting IP packet headers and payloads to determine what was P2P traffic.

Has the FTC looked into this matter, since on the surface these actions (lack of disclosure and spoofing) may constitute a violation of Section 5—with respect to deceptive acts and practices to both commerce and competition?

Answer. Although the FTC cannot comment on the existence of a specific investigation, if an Internet service provider (ISP) misrepresents, or fails to disclose, material aspects of its services in advertising or marketing to consumers, it may be liable for violating Section 5 of the FTC Act.

For over a decade, the FTC has enforced the consumer protection and antitrust laws in numerous matters involving Internet access. In particular, the FTC has investigated and brought enforcement actions against ISPs for allegedly deceptive marketing, advertising, and billing of Internet access services.[4] The FTC has addressed Internet access and related issues in a number of merger investigations as well.[5] As increasing numbers of U.S. consumers have chosen to subscribe to broadband services, the FTC has been monitoring the claims made by broadband providers in marketing their services to consumers. In February 2007, the Commission held a workshop on broadband competition that focused on net neutrality questions, including questions of disclosure by Internet service providers.[6] In June 2007, Commission staff released a report on broadband connectivity competition policy.[7] The FTC has devoted and will continue to devote significant resources to protecting competition and consumers in the important area of Internet access.

Question 3a. Has the FTC received any formal complaints on broadband carriers blocking Internet applications?

The FTC receives complaints directly from consumers and from other agencies regarding a host of consumer protection issues. During the three calendar years 2005 through 2007, we received over 2.8 million consumer complaints, and over 60,000 of those complaints involved Internet access services. In an effort to locate consumer complaints that related specifically to broadband carriers blocking Internet applications, Commission staff searched the Internet access complaints for key words and combinations of words such as "application," "bandwidth," "block," "broadband," "discriminate," "Internet," "net," and "network" Staff found thousands of complaints containing these key words. Staff reviewed a small number of these complaints and found that they were unrelated to broadband carriers blocking Internet applications. It further refined the searches for complaints that included the word "neutrality," and found less than ten complaints, and for complaints that included the key word "block" with either the word "application" or the word "content." This search re-

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[4] *See, e.g.,* Am. Online, Inc. & CompuServe Interactive Servs., Inc., FTC Dkt. No. C–4105 (Jan. 28, 2004) (consent order), available at *http://www.ftc.gov/os/caselist/0023000/0023000aol.shtm;* Juno Online Servs., Inc., FTC Dkt. No. C–4016 (June 25, 2001) (consent order), available at *http://www.ftc.gov/os/caselist/c4016.shtm;* Am. Online, Inc., FTC Dkt. No. C–3787 (Mar. 16, 1998) (consent order), available at *http://www.ftc.gov/os/1997/05/ameronli.pdf;* CompuServe, Inc., 125 FTC 451 (1998) (consent order); Prodigy, Inc., 125 FTC 430 (1998) (consent order).

[5] *See, e.g.,* Am. Online, Inc. & Time Warner, Inc., FTC Dkt. No. C–3989 (Apr. 17, 2001) (consent order), available at *http://www.ftc.gov/os/2001/04/aoltwdo.pdf;* Cablevision Sys. Corp., 125 FTC 813 (1998) (consent order); Summit Commun. Group, 120 FTC 846 (1995) (consent order).

[6] The agenda for the workshop including presentations made at the workshop and the public comments filed in response to the workshop are available at *http://www.ftc.gov/opp/workshops/broadband/index.shtml.*

[7] *See* FTC, Broadband Connectivity Competition Policy (6/27/2007), available at *http://www.ftc.gov/opa/2007/06/broadband.shtm; see also* Concurring Statement of Commissioner Jon Leibowitz Regarding the Staff Report: "Broadband Connectivity Competition Policy," available at *http://www.ftc.gov/speeches/leibowitz/V070000statement.pdf* (noting the importance of transparency and disclosure for consumer rights on the Internet).

sulted in approximately 100 complaints from the past three calendar years. Staff reviewed the comments in each of these complaints and found that approximately ten complaints may be related to the issue of blocked Internet applications.[8]

In addition to receiving consumer complaints, the FTC at times receives more formal petitions from parties requesting the FTC to investigate potential violations of the FTC Act. The FTC has not, however, received a formal petition alleging the blocking of an Internet application by a broadband ISP. The FTC nonetheless remains vigilant to any ISP conduct that may violate the antitrust or consumer protection laws.

Question 4. Commissioner Leibowitz gave a speech to ICANN, back in June 2006, and stated that the WHOIS databases, which provide contact information of a domain name/website owner, are critical to the agency's consumer protection mission. He further mentioned that the FTC is concerned that any attempt to limit WHOIS would put its ability to protect consumers and their privacy in peril. Can you elaborate on the concerns the Commission has about WHOIS?

Answer. FTC staff has been using WHOIS databases for the past decade. As the Commission has noted, "WHOIS databases often are one of the first tools FTC investigators use to identify wrongdoers. Indeed, it is difficult to overstate the importance of quickly accessible WHOIS data to FTC investigations."[9]

When WHOIS information is available and accurate, it can provide us with a tremendous amount of information. For example, in our cases enforcing the CAN-SPAM Act and, in particular, the Adult Labeling Rule, accurate WHOIS information helped us identify the operators of pornographic websites that were promoted via illegal spam messages. In the recent *Media Motor* spyware case,[10] FTC staff used domain name registration information from WHOIS databases to identify the website operators who infected more than 15 million computers with destructive, intrusive spyware. In that case, the FTC charged that the defendants tricked consumers into downloading malware that changed consumers' home pages, tracked their Internet activity, altered browser settings, degraded computer performance, and disabled antispyware and anti-virus software. The WHOIS information was crucial to the FTC's efforts to locate—and ultimately stop—this sophisticated and expansive spyware operation.

Key to the utility of the WHOIS databases is our ability to access it in real time. The alternative to real-time access, compulsory process, is not always a viable option for three reasons. It is often too slow in the context of fast-moving Internet fraud; it risks disclosing the existence of an undercover investigation; and it may not be available or practical when the domain name registrar is located in a foreign jurisdiction.[11]

Although WHOIS databases continue to yield critical information in our investigations, their utility has been hampered by lack of real-time access to WHOIS records due to proxy registrations and due to inaccurate information.[12]

Question 4a. Has the FTC ever been hindered in its investigations due to the lack of accurate information or not having quick access to that information due to proxy services?

Answer. Yes. Proxy registration services shield the identity of a website operator. This layer of anonymity has posed an obstacle in our investigations.

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[8] The Commission staff replies orally or in writing to complaints it receives. In our responses, we explain that the Commission acts in the interests of all consumers, and therefore does not generally intervene in individual disputes. We also advise the consumers that the information they provide would be recorded in the FTC's complaint retention system and made available to numerous law enforcement agencies.

[9] Prepared Statement of the Federal Trade Commission Before the Internet Corporation for Assigned Names and Numbers Meeting Concerning WHOIS Databases, Marrakech, Morocco, June 2006.

[10] FTC Press Release, *FTC Permanently Halts Media Motor Spyware Scam; Trojan Program Downloaded Spyware, Adware, Porno Pop-Ups to Consumers' Computers* (Oct. 1, 2007), available at *http://www.ftc.gov/opa/2007/10/motorspyware.shtm.*

[11] Although the U.S. SAFE WEB Act gives the FTC tools to address problems of obtaining information from foreign sources, using these tools would still take additional time and resources. Particularly in the online world, any such delay could lead to frustration of an investigation.

[12] Some have expressed concern that public access to WHOIS databases compromises the privacy of domain name registrants. The Commission has recognized that non-commercial registrants may require some privacy protection from public access to their contact information, and that these registrants can be provided such protection without compromising real-time access by law enforcement agencies. *See* Prepared Statement of the Federal Trade Commission on Internet Governance: The Future of ICANN Before the Subcommittee on Trade, Tourism, and Economic Development of the Senate Committee on Commerce, Science, and Transportation, Washington, D.C., Sept. 20, 2006.

For example, in one FTC investigation, FTC staff encountered at least six websites that had proxy registrations, including one registered to a proxy service of a domestic domain name registrar and two others registered to proxies for foreign domain name registrars. Our inquiry into these websites was stalled by the need for compulsory process and, indeed, most of the websites closed down before we could pursue an alternative route. In the *Media Motor* case described above, the WHOIS results for a number of target websites identified a proxy service in place of the registrant's name. To identify the registrant, the FTC had to contact the registrar that operates the proxy service. This extra step lengthened the time it took for FTC staff to identify the true registrant and initiate law enforcement action to stop the ongoing spyware operation.

Even where access is not stymied by proxy registrations, much of the information in the WHOIS databases continues to be inaccurate or incomplete. FTC investigators can cite numerous instances where the WHOIS data has turned up domain names with facially false addresses and contact information, including websites registered to "God," and "Mickey Mouse," addresses listed as "XXXXXXX," and obviously fake telephone numbers, such as 111–111–1111. FTC investigators have had to spend many hours tracking down perpetrators of Internet fraud because of inaccurate WHOIS data—hours that could have been spent pursuing other targets.

Question 4b. Several law enforcement agencies have serious concerns about domain name registrars offering proxy or privacy services to domain name registrants, and NTIA even enforced the prohibition of proxy services for the .us TLD. What is the FTC's position on proxy services that are utilized by commercial websites?

Answer. The FTC has recognized that registrants of non-commercial websites might require some privacy protection from *public* access to their contact information, without compromising appropriate real-time access by law enforcement agencies. However, the FTC does not believe commercial websites have similar legitimate privacy concerns or a legitimate purpose to operate under a shroud of anonymity. As explained above, proxy registrations can either slow down or completely frustrate FTC investigations into the activities of commercial websites.

RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. JOHN ENSIGN TO THE FEDERAL TRADE COMMISSION

Question. Chairman Kovacic, in December 2006, ten of the country's leading jewelry industry trade associations petitioned the FTC to address the practice of marketing laboratory-created diamonds as "cultured diamonds" to consumers. It is my understanding that the term "cultured" has traditionally been used in the jewelry industry only to refer to organically produced materials, like pearls. These industry associations strongly believe that the FTC's Guidelines for the jewelry industry must be amended to protect consumers from deceptive or unfair business practices. It has been nearly one and a half years since that petition was filed and the petitioners have not yet received a response. Can you give us an update on the status of the FTC's response to this petition?

Answer. The FTC staff is currently reviewing the petition requesting that the Commission amend its Guides for the Jewelry, Precious Metals, or Pewter Industries to address the use of the term "cultured" to describe laboratory-created diamonds. The FTC staff's review includes a thorough analysis of the petition and the consumer perception data submitted in support of the petition, to determine whether the use of the term "cultured" to market laboratory-created diamonds constitutes an unfair or deceptive trade practice in violation of Section 5 of the FTC Act. In addition, the staff is considering how its proposed recommendation might affect domestic and international commerce. Following this analysis, the staff will recommend to the Commission a proposed response. The FTC's review will be completed as quickly as possible consistent with the serious attention the petition deserves.

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