

PREPARED STATEMENT OF
THE FEDERAL TRADE COMMISSION

on

FISCAL YEAR 2009 FUNDING REQUEST
AND BUDGET JUSTIFICATION

Before the

SUBCOMMITTEE ON FINANCIAL SERVICES
AND GENERAL GOVERNMENT
COMMITTEE ON APPROPRIATIONS

UNITED STATES SENATE

Washington, D.C.
May 14, 2008

I. INTRODUCTION

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

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

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

Looking farther into the future our success will require continued efforts to improve the institutional mechanism through which we execute our responsibilities. In the coming months

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

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

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

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

² *FTC v. S.H. & F.*, No. 08 C 1185 (N.D. Ill. filed Feb. 25, 2008), <http://www.ftc.gov/os/caselist/0823028/index.shtm>; *FTC v. M. & F.*

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

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

The Commission has been at the forefront of protecting consumers from such technological threats as spam and spyware. The Agency has brought more than 100 spam and spyware cases. Earlier this year, the Agency announced its largest civil penalty in a spam case –

⁴ *U.S. v. LTD F...*, Civ. No. H-07-3741 (S.D. Tex. filed Nov. 5, 2007), <http://www.ftc.gov/os/caselist/0523012/index.shtm>.

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

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

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

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

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

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

III. COMPETITION MISSION

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

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

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

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

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

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

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

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

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

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

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

B. Energy

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

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

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

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

²² For example, in November 2007, the Commission issued its third annual report on the

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

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

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

have saved 10.5 million barrels of oil at the pump.²⁵ In 2003, the U.S. Court of Appeals for the Fifth Circuit (Unocal v. FTC), No. 05-60192 (5th Cir. 2008), affirmed the Commission’s decision. <http://www.ftc.gov/os/adjpro/d9300/080125opinion.pdf>. <http://www.ftc.gov/opa/2008/01/cbi.shtml>

²⁵ *FTC v. Unocal Corp. & Int'l Cr. Co.*, No. 05-60192 (5th Cir. 2008) <http://www.ftc.gov/os/adjpro/d9300/080125opinion.pdf>. <http://www.ftc.gov/opa/2008/01/cbi.shtml>

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

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

IV. NEEDED RESOURCES FOR FISCAL YEAR 2009

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

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

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

- \$2,847,000 for 18 additional FTE
 - 10 FTE for Consumer Protection to protect consumers from unfair and deceptive practices in the financial services marketplace; protect consumers' privacy; improve compliance with FTC orders; pursue foreign-located evidence of fraud perpetrated against U.S. consumers; advocate the adoption of foreign data privacy laws and procedures that are compatible with American law; and provide support for the effective operation of this program; and
 - 8 FTE for Maintaining Competition to meet the increased workload required to challenge anticompetitive mergers and assure that the marketplace is free from anticompetitive business practices in the health care, pharmaceutical, energy, and technology sectors; promote convergence in competition policy of foreign

