

**Prepared Statement of the Federal Trade Commission**

**“Small Business Competition Policy:  
Are Markets Open for Entrepreneurs?”**

**Presented by William E. Kovacic**

**Chairman**

**Before The**

**Committee on Small Business  
United States House of Representatives**

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## **I. Introduction**

Thank you for the invitation to discuss small businesses and the antitrust work of the Federal Trade Commission (“Commission” or “FTC”). Competition is the lifeblood of the American economy; protecting open and competitive markets for businesses and consumers is one of our most important tasks.<sup>1</sup>

The FTC is a law enforcement agency with a statutory authority that covers a broad spectrum of the American economy, as well as businesses of all sizes. We have two distinct but related missions: to preserve competition in the marketplace, and to protect the consumer.<sup>2</sup> Through its Bureau of Competition the Commission enforces two main antitrust laws, the FTC Act<sup>3</sup> and the Clayton Act.<sup>4</sup> Under section 5 of the FTC Act, the Commission addresses “unfair methods of competition.” This includes, among other things, conduct violating the standards of the Sherman Act. The Commission shares jurisdiction with the Department of Justice under section 7 of the Clayton Act in prohibiting mergers or acquisitions that may “substantially lessen competition or tend to create a monopoly.”<sup>5</sup> The agency’s other litigating bureau, the Bureau of Consumer Protection, enforces the second part of the FTC Act, which prohibits “unfair or

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<sup>1</sup> My written statement presents the views of the Federal Trade Commission. My oral remarks represent my own views, and not necessarily the views of the Commission or any other Commissioner.

<sup>2</sup> The agency’s two main enforcement bureaus, the Bureau of Competition and the Bureau of Consumer Protection, supported by a third bureau, the Bureau of Economics, all work to fulfill our mission.

<sup>3</sup> 15 U.S.C. § § 41-58.

<sup>4</sup> 15 U.S.C. § § 12-27.

<sup>5</sup> 15 U.S.C. § 18.

deceptive acts or practices.” The Commission also shares its expertise by examining and reporting to the public on important issues in competition and consumer protection, and by providing advice and guidance to states and other policymakers.

The Commission’s goal is to ensure an honest and open marketplace where all businesses can compete for the consumer dollar. The Commission does not give preference to either large firms or small ones. Consumers choose the companies, products, and services they prefer. Our task is to help protect the competitive framework in which those choices can be made. These neutral actions nonetheless benefit small businesses in two specific ways. First, in a number of cases and through advocacy, the Commission has made it easier for small business to compete on the merits. Second, by protecting competition in industries that affect the operating costs of small firms, such as health care for employees, we help reduce their costs of doing business.

The work of our Bureau of Consumer Protection is also relevant to ensuring competitive opportunities for entrepreneurs. To the extent that the Commission brings law enforcement actions against deceptive or unfair practices engaged in by businesses, large or small, this assists the honest small businesses that compete in the same marketplace. Moreover, by policing the marketplace in this fashion the Commission helps to develop consumer confidence in small businesses generally.

This testimony addresses a number of topics. The first section reviews the factors that make small businesses important to a competitive marketplace. The second section – and the main part of the testimony – reports on recent antitrust activities of the FTC that have had a particular impact on small firms. The third section briefly mentions how the work of our Bureau of Consumer Protection is relevant to small businesses, including those that are planning to enter

new markets. The final section describes the FTC’s study and advocacy programs, which have been useful in, among other things, reducing unnecessary barriers to entry so that markets will be more open to all businesses.

## **II. The Goal of Consumer Welfare and the Role of Small Business**

The FTC’s core concern is protecting the economic interests of consumers. We believe that competition serves a wide range of consumer interests. The Supreme Court observed “ultimately competition will produce not only lower prices, but also better goods and services.”<sup>6</sup>

Small businesses are a key part of a competitive economy. They account for about half of all private sector employees, provide more than 45 percent of the total private payroll, and generate about 70 percent of new jobs.<sup>7</sup> They are also a driving force for innovation and technological change. According to the SBA, small firms produce 13 times more patents per employee than their larger counterparts.<sup>8</sup> Small businesses’ importance even transcends their direct economic impact. In a society where equal opportunity is an important social goal, small businesses have provided a route to financial independence for many members of minority groups.<sup>9</sup>

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<sup>6</sup> National Society of Professional Engineers v. United States, 435 U.S. 679, 695 (1978), quoting Standard Oil Co. v. FTC, 340 U.S. 231, 248 (1951).

<sup>7</sup> See U.S. Small Business Administration, Office of Advocacy, *FAQs: Advocacy Small Business Statistics and Research*, available at <http://app1.sba.gov/faqs/faqindex.cfm?areaID=24>.

<sup>8</sup> Id.

<sup>9</sup> Hispanic-owned firms comprise the largest minority business community in America; and firms owned by African Americans have had the highest rate of growth among small businesses in both the total number of enterprises and in their total receipts. U.S. Small Business Administration, Office of Advocacy, *The Small Business Economy 2007* (Dec. 2007). The figures for the growth of African American businesses are based on the period between 1997 and

A successful competitive economy requires open markets – markets that are open to new ideas, and to succeeding waves of innovation and entrepreneurs that will challenge old ideas and outdated ways of doing things. Small businesses can be an important vehicle for these competitive forces, but only if the antitrust laws protect, and require, open markets and competition for all. It is the Commission’s mission to do this – to protect competitive markets so that innovative and efficient businesses, whether large or small, can offer consumers the best goods and services at the best prices.

### **III. FTC Antitrust Initiatives Affecting Small Business**

Even though the Commission’s mission is to protect consumers by ensuring competitive markets, rather than any particular class or size of market participants, some of our cases inevitably have a greater impact on small businesses. In some markets and industries, even some dominated by large corporations, innovative small firms play an important role. Other markets and industries, notably those with low capital requirements and few economies of scale, are characterized by competition dominated by small firms. The Commission considers competition in industries populated by small firms to be every bit as important as competition in industries populated by large, multinational corporations. Our enforcement activity reflects that commitment.

A number of our recent actions, both in litigation and policy initiatives, have involved these kinds of markets. They have addressed real estate brokerage, health care, the business practices of professionals, slotting allowances in the grocery industry, and legal guidance for small businesses.

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## **A. Real Estate Brokerage**

Real estate brokerage is an example of a competitive industry populated by many small firms. To prosper, these firms must be able to enter, innovate, and serve their customers. Some have sought to do this by offering different services or lower commission rates – just what they should be doing in a competitive market. But their ability to act has frequently been harmed by larger or incumbent competitors and by the institutions that those competitors control. One key tool in real estate markets is the local multiple listing service (“MLS”) – an essential source of information and referrals. Without access to the MLS, a small brokerage firm may be unable to compete effectively. Commission investigations have shown that established brokerage firms have sometimes used MLS rules to exclude or disadvantage small firms that are offering innovative services or reduced prices.

The FTC has brought actions to address this kind of conduct. Most typically, we challenge direct attempts by incumbent firms to exclude discount brokers. Discount brokers commonly use “exclusive agency” listings – a special type of listing that allows property owners to save money on brokerage fees if they find the buyer for their home themselves. In a recent case involving a large association in Michigan, we charged that the association members had simply agreed not to allow exclusive agency listings on the MLS at all.<sup>10</sup> The association eventually agreed not to prevent its members from posting these kinds of listings; and that consent helped open the door to discount brokerage in the area. In recent years we have had to confront increasingly subtle tactics for keeping innovators at a disadvantage. In late 2006, the

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<sup>10</sup> See *MiRealSource, Inc.*, File No. 0610266 (press release March 23, 2007) (consent order). The FTC has a long history of challenging this particular practice. See, e.g., *Orange County [New York] Board of Realtors*, 106 F.T.C. 88, 90, 93 (1985) (consent order).

Commission brought seven cases against different local associations, alleging that they had a practice of keeping information about inexpensive, less-than-full-service listings from being transmitted from the MLS to popular Internet real estate sites.<sup>11</sup> Six of these associations have entered into consent agreements, and the last one continues in adjudication.<sup>12</sup> We continue to actively monitor this industry.

## **B. Protecting Competition in Health Care**

Rising health care costs hurt small business. The Small Business Administration reports that firms with under 100 employees paid \$50 billion in health premiums for their workers in 1997. By 2002, that amount had increased by 38 percent to \$65 billion.<sup>13</sup> Similarly, the Kaiser Family Foundation reports that in each year between 1999 and 2006, health insurance premiums for firms with under 200 employees grew faster than premiums for firms with 1,000 or more employees.<sup>14</sup> Rising health care costs raise the cost of doing business for small firms and make it more difficult for them to attract employees.

By promoting competition in health care, the Commission helps ease the costs of providing health care coverage, which helps small businesses become more competitive in their own marketplaces. For example, the Commission has devoted substantial resources to ensuring

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<sup>11</sup> Realcomp II Ltd., et al. (press release October 12, 2006).

<sup>12</sup> In re Realcomp II Ltd., Docket No. 9320, *schedule established for briefs to the Commission* (Jan. 4, 2008).

<sup>13</sup> *See Cost of Employee Benefits at Large and Small Business*, SBA Office of Advocacy (Aug. 2005), at 16, *available at* <http://www.sba.gov/advo/research/rs262tot.pdf>.

<sup>14</sup> *See Employer Health Benefits: 2007 Annual Survey*, at 27, Exhibit 1.10, *available at* <http://www.kff.org/insurance/7672/>.

that consumers receive the benefits from lower-cost generic products and has challenged so-called “pay for delay” settlements – in which the brand pharmaceutical company actually pays its generic competitor not to compete<sup>15</sup> – to ensure that consumers and small businesses have appropriate access to less expensive generic alternatives. Similarly, the Commission has challenged hospital mergers that it believes will lead to higher prices for consumers and will raise the premiums that all employers, including small businesses, have to pay.<sup>16</sup>

### **C. Advertising and Other Business Practices of Professionals**

A third area in which the Commission has been active involves the business practices of professionals. The professional offices involved – doctors, lawyers, accountants, and others – are usually small firms. Like other small firms, these offices have found that advertising and other innovative business techniques can be a useful competitive tool to help grow their practices. Sometimes, however, these initiatives have encountered barriers that have concerned the Commission.

Advertising may be particularly important for new entrants who are not yet well known in the community. Although restricting false or deceptive advertising improves the marketplace, unnecessary restrictions can impede the ability of small businesses to compete and succeed.

The Commission has a long history of challenging advertising bans imposed by private professional associations. The modern history of this activity began with the agency’s

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<sup>15</sup> *See, e.g.*, Schering-Plough Corp., Docket No. 9297 (Dec. 8, 2003), *rev’d*, 402 F.3d 1056 (11<sup>th</sup> Cir. 2005).

<sup>16</sup> *See, e.g.*, Inova Health System Foundation, Docket No. 9326 (May 2008) (press release of May 9, 2008) (transaction subsequently abandoned); Evanston Northwestern Healthcare Corp., Docket No. 9315 (Aug. 2007) (press release of Aug. 6, 2007).



complaints against the American Dental Association and the American Medical Association in the mid-1970s.<sup>17</sup> Those cases and their successors eliminated most broad, near-total advertising bans. Since then we have built on that foundation, with our focus shifting, as it did with real estate brokers, to addressing more subtle attempts to restrict competition. A current issue involves distinguishing between association rules that appropriately prevent false or misleading advertising,<sup>18</sup> and those that suppress advertising in an unreasonably broad way and are merely cast in the form of rules against deception.<sup>19</sup>

The analysis changes when state licensing boards impose the restraints rather than private associations. The law then takes into account principles of federalism and the state's authority to regulate its own economy. State governmental bodies are allowed to regulate without being limited by the federal antitrust laws, provided that the state has clearly expressed an intent to

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<sup>17</sup> American Dental Ass'n, 94 F.T.C. 403 (1979) (consent order), *order modified*, 100 F.T.C. 448 (1982) and 101 F.T.C. 34 (1983); American Medical Ass'n, 94 F.T.C. 701 (1979), *aff'd as modified*, 638 F.2d 443 (2d Cir. 1980), *aff'd by an equally divided Court*, 455 U.S. 676 (1982).

<sup>18</sup> Because deceptive advertising distorts the operation of market forces, it has long been recognized that the proper regulation of such material can serve to promote competition.

<sup>19</sup> Commission enforcement action resulted in removal of advertising restraints in Virginia Board of Funeral Directors (press release Aug. 16, 2004) (consent order). The Commission's case against the California Dental Association illustrates the concern that professional societies may sometimes take an overly broad view of what is deceptive. California Dental Ass'n, 121 F.T.C. 190 (1996), *aff'd*, 128 F.3d 720 (9<sup>th</sup> Cir 1997), *vacated and remanded*, 526 U.S. 726 (1999), *rev'd and remanded*, 224 F.3d 922 (9<sup>th</sup> Cir. 2000). The Court of Appeals agreed with the Commission that the Association's suppression of various categories of price and non-price advertising was not justified on grounds of deception, although a narrowly divided Supreme Court held that a more thorough inquiry into the effects of the Association's restraints was required before reaching a conclusion that those restraints were anticompetitive.

displace competition with regulation with respect to the conduct in question.<sup>20</sup> These boards also have the potential for anticompetitive conduct, however, since they are sometimes dominated by members of the regulated profession. The Commission has, in several instances, challenged state boards that imposed restrictions on nondeceptive advertising that had not been clearly authorized through state legislation. Over twenty years ago the Commission brought such a challenge against the Massachusetts Board of Registration in Optometry. That board had banned the advertising of all discount offers without regard to whether they were truthful and non-deceptive.<sup>21</sup> The Commission ruled against the Board, finding its restraints were unlawful because they were not authorized by the state legislature, were anticompetitive, and were not justified by any countervailing public benefits. This ruling enabled new or innovative growing businesses to make greater use of truthful, nondeceptive advertising.

In subsequent years the Commission has challenged other state board restraints that are relevant to small businesses. A recent example involves the South Carolina State Board of Dentistry. In that case a dental board had, without proper authorization from the legislature, limited hygienists' ability to provide preventive care in school settings to low-income schoolchildren. The board eventually entered into a consent agreement acknowledging that such businesses could legally operate in the state.<sup>22</sup>

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<sup>20</sup> See *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985); *Parker v. Brown*, 317 U.S. 341 (1943).

<sup>21</sup> 110 F.T.C. 549 (1988).

<sup>22</sup> Docket No. 9311. During the proceeding the Board made an unsuccessful interlocutory appeal to the Fourth Circuit on state action grounds, which the court dismissed on the grounds that the issue did not involve an immediately reviewable collateral order. No. 04-2006, 2006 WL 1134136 (4<sup>th</sup> Cir. May 1, 2006). The Board then entered into a consent with the

#### **D. Slotting Allowances and Shelf Space**

A fourth area in which the FTC is active involves the slotting allowances that food manufacturers pay to grocery stores. Slotting allowances are one-time payments a supplier makes to a retailer as a condition for the initial placement of the supplier's product on the retailer's store shelves or for initial access to the retailer's warehouse space.<sup>23</sup> Some small manufacturers complain that these charges raise the costs of entry<sup>24</sup> and are therefore exclusionary. To explore these concerns the Commission held a two-day workshop in 2000, and issued a report in February 2001.<sup>25</sup> The Commission staff subsequently conducted a followup study that examined five selected product categories, and issued a further report on those findings in November 2003. The retailers that participated in this study suggested that slotting allowances legitimately help defray the costs and risks associated with introducing a new product into their systems.<sup>26</sup>

Workshops and studies of this sort are an important tool for educating the Commission and its staff, as well as for communicating information about emerging areas of interest to the

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Commission (press release, June 20, 2007).

<sup>23</sup> Federal Trade Commission, Staff Study, *Slotting Allowances in the Retail Grocery Industry: Selected Case Studies in Five Product Categories* (Nov. 3003), at i (Introduction and Executive Summary).

<sup>24</sup> Costs vary, but the introduction of a single new grocery product nationwide "could range from a little under \$1 million to over \$2 million, depending on the product category." FTC Staff Study, *supra*, at vii-viii. A new product line could involve several such products.

<sup>25</sup> See Federal Trade Commission, *FTC Staff Report on the Federal Trade Commission Workshop on Slotting Allowances and Other Marketing Practices in the Grocery Industry* (Feb. 2001).

<sup>26</sup> See FTC Staff Study, *supra*, at 9-11.

industry and the public. We used the knowledge gained from this workshop and study to evaluate a number of slotting complaints that have been the subject of non-public investigations, and the Commission remains alert for potential antitrust problems.

The FTC's case against McCormick & Co. involved issues related to shelf space in the grocery industry. The Commission alleged that McCormick typically required its customers to allocate the large majority of the spice shelf to its products; in some instances this requirement covered 90 percent of the supermarket's spice shelf space. McCormick also allegedly engaged in discriminatory pricing. The Commission challenged the firm's differential pricing practices in this context of high market share and apparent market power, reasoning that disadvantaged purchasers would not have a good alternative available. McCormick eventually entered into a consent agreement,<sup>27</sup> in which it agreed not to engage in improper discriminatory pricing in general, and also to keep detailed records of any facts on which it relied to justify particular discounts it thought necessary to meet competition. In this way we have helped ensure that smaller manufacturers have access to the market, and that smaller grocery stores receive the prices to which they are entitled.

#### **E. Outreach and Education**

A final ongoing antitrust initiative involves business guidance. The Commission tries to provide guidance on the main points of antitrust law, so that firms wanting to know their rights, or to voluntarily comply with their duties, can understand the basic factors involved and keep out of trouble without the expense of lawyers. To do this the Commission produced and posted on

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<sup>27</sup> McCormick & Co., Docket No. C-3939 (press release of March 8, 2000) (consent agreement).

our website the *FTC Guide to the Antitrust Laws*.<sup>28</sup> This publication was specifically designed for the needs of small business. It is succinct and addresses a number of practical, recurring questions. These include how to respond to manufacturer-imposed display requirements, exclusive dealing arrangements, and refusals to supply.

The Commission also offers a number of additional, more detailed antitrust guidelines on particular topics. One that might be particularly useful to small business is the Competitor Collaboration Guidelines, produced in cooperation with the U.S. Department of Justice, Antitrust Division.<sup>29</sup> Small entrepreneurs sometimes have to adapt creatively in order to function in a market that has grown accustomed to looking at larger firms. They may wish to carve out specialized niches for themselves, or enter into joint ventures to reach a scale that their customers demand. The enforcement agencies encourage procompetitive joint ventures by offering guidance on how the agencies enforce antitrust laws with respect to collaborative conduct. Our collaboration guidelines address joint ventures generally, and other, more specialized guidelines address various types of collaborations in, for example, the healthcare field in particular.<sup>30</sup>

#### **F. Little Need For Antitrust Exemptions**

There is one kind of initiative that we do not recommend. The Commission generally opposes proposals for legislative exemptions from the antitrust laws. Those proposing such

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<sup>28</sup> The guide can be found at <http://www.ftc.gov/bc/antitrust/index.shtm>.

<sup>29</sup> Federal Trade Commission and U.S. Department of Justice, *Antitrust Guidelines for Collaborations Among Competitors* (April 2000), available at <http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf>.

<sup>30</sup> U.S. Department of Justice and Federal Trade Commission, *Statements of Antitrust Enforcement Policy in Health Care* (August 1996), available at <http://www.ftc.gov/bc/healthcare/industryguide/policy/intro.htm>.

exemptions frequently suggest that they are needed to make competition more fair. But the general antitrust laws are already sufficient to protect fair competition. Special-interest legislation often comes at a significant cost to consumers<sup>31</sup> and could eventually balkanize the national competition policy on an industry-by-industry basis. Because exemptions are generally sought by and benefit entrenched firms, giving one to a particular industry might also tend to harm the small businesses that deal with that industry.

In short, the Commission's varied antitrust activities, all aimed at protecting competition, frequently benefit the small business community.

#### **IV. FTC Consumer Protection Initiatives Affecting Small Business**

The FTC is the only federal agency that combines both antitrust and consumer protection responsibilities over broad sectors of the economy. Our consumer protection efforts complement our competition mission by ensuring that consumers have sufficient access to truthful and nondeceptive information about the marketplace. Markets work best when they operate free from fraud and deception. Some of the agency's consumer protection activities are specifically helpful to small business competition, particularly to those entrepreneurs who are acquiring the tools necessary to enter and compete in new markets. We highlight here three of our initiatives that have an important impact in this way – the Franchise Rule, suppression of Internet fraud, and the Commission's program of small business guidance.

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<sup>31</sup> Just last year the congressionally-created Antitrust Modernization Commission also urged Congress to exercise caution, noting that antitrust exemptions typically “create economic benefits that flow to small, concentrated interest groups, while the costs of the exemption are widely dispersed, usually passed on to a large population of consumers through higher prices, reduced output, lower quality, and reduced innovation.” U.S. Antitrust Modernization Commission, *Report and Recommendations* at 335 (April 2007), available at [http://govinfo.library.unt.edu/amc/report\\_recommendations/toc.htm](http://govinfo.library.unt.edu/amc/report_recommendations/toc.htm).

### **A. The Franchise Rule**

Many entrepreneurs set out to establish small businesses, not from scratch, but by buying a franchise. This can have many advantages when confronting a new market, especially one composed of well established competitors. The business model has already been worked out and the brand name popularized. But not all franchise offers are equally promising. The goal of the Commission's Franchise Rule<sup>32</sup> is to help purchasers, including small businesses, to make an investment with greater knowledge and confidence. Our rule requires the franchisor to disclose certain critical information before finalizing a contract.<sup>33</sup> This includes data on the background of the franchisor, any previous bankruptcies, the costs and fees associated with the franchise, restrictions on suppliers and sales territories, and the names of other current and former franchisees. Franchisors are not required to provide information on potential income or sales, but any claims they do make must have a reasonable basis and must be backed up with written substantiation provided to the franchisee.

### **B. Attacking Internet Fraud**

A second consumer protection initiative involves policing the Internet. The Commission is keenly aware of the development of the Internet as one of the transforming events of our time, with the potential to deliver goods and services more conveniently, faster, and at lower prices than traditional marketing methods. This development offers particular potential to small

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<sup>32</sup> Disclosure Requirements and Prohibitions Concerning Franchising, 16 C.F.R. Part 436.

<sup>33</sup> See Federal Trade Commission, "Buying a Franchise: A Consumer's Guide," available at <http://www.ftc.gov/bcp/edu/pubs/consumer/invest/inv05.shtm>.

businesses, since it brings national and even global access to potential customers – necessary for viability of some small businesses – within their reach.

Yet the sound development of this medium requires consumer confidence that it is not also a vehicle for fraud. Fraud on the Internet is an enormous concern for the Commission, and it has prompted a vigorous response using all the tools at the Commission’s disposal, including both law enforcement and education.<sup>34</sup> Consumer confidence in the ability to conduct transactions fairly is the lifeblood of e-commerce, as e-commerce can be the lifeblood of a small business. The FTC has challenged a wide variety of Internet-related threats, including deceptive claims delivered through spam<sup>35</sup> and distributors of adware and spyware.<sup>36</sup> Additionally, the Commission has challenged websites making allegedly deceptive health claims,<sup>37</sup> Internet-based

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<sup>34</sup> See, e.g. Prepared Statement of the Federal Trade Commission On the Commission's Law Enforcement and Consumer Education Efforts To Address Spyware and Other Malware (June 11, 2008) *available at* <http://www.ftc.gov/os/2008/06/P024522testimonyspyware.pdf>; Prepared Statement of the Federal Trade Commission On Peer-To-Peer File-Sharing Technology Issues (July 24, 2007), *available at* <http://www.ftc.gov/os/testimony/P034517p2pshare.pdf>.

<sup>35</sup> See, e.g., *FTC v. Sili Neutraceuticals, LLC*, No. 07C-4541 (N.D. Ill 2008) (Court orders spammers to pay more than \$2.5 million); *United States v. ValueClick, Inc.*, No. CV08-01711 (C.D. Cal. filed March 13, 2008) (stipulated permanent injunction imposes a \$2.9 million civil penalty).

<sup>36</sup> See, e.g., *In the Matter of Zango, Inc. f/k/a 180 Solutions, Inc.*, FTC Dkt. No. C-4186 (Mar. 7, 2007); *FTC v. Odysseus Marketing, Inc.*, No. 05-CV-330 (D.N.H. Oct. 24, 2006) (stipulated permanent injunction).

<sup>37</sup> See, e.g., FTC Press Release, *FTC Sweep Stops Peddlers of Bogus Cancer Cures* (Sept. 18, 2008) (announcing 11 law enforcement actions against marketers of unsubstantiated cancer-treatment products), *available at* <http://www.ftc.gov/opa/2008/09/boguscures.shtm>.



pyramid schemes,<sup>38</sup> and websites promoting business opportunity schemes.<sup>39</sup> In many of these cases the FTC has worked cooperatively with its consumer protection counterparts across the globe. The FTC's goal in bringing these cases has been to help ensure that consumers are free from deceptive practices that undermine the promise of the Internet and the opportunities available to the honest firms that market on it.

### **C. Business Guidance**

A third consumer protection program improves the competitiveness of small businesses by giving readily understandable guidance on a variety of topics. Just as the business guidance program on the competition side walks small firms through the antitrust laws, the consumer protection guidance program helps businesses understand how to comply with consumer protection laws. The Commission distributes more than 70 brochures on a broad range of topics of interest to small business – everything from *Complying with the Telemarketing Sales Rule to Advertising & Marketing on the Internet: The Rules of the Road*. These publications are available at [www.ftc.gov](http://www.ftc.gov).<sup>40</sup> Small businesses can order these materials for their employees or customers at the FTC's bulk order site.<sup>41</sup>

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<sup>38</sup> See, e.g., *FTC v. BurnLounge, Inc.*, No. 2:07-CV-03654-GW-FMO (C.D. Cal. Filed June 8, 2007).

<sup>39</sup> See, e.g., FTC Press Release, *Federal, State Law Enforcers Complete Bogus Business Opportunity Sweep* (Dec. 12, 2006) (announcing a coordinated sweep of more than 100 law enforcement action challenging business opportunity schemes), available at <http://www.ftc.gov/opa/2006/12/falsehopes.shtm>

<sup>40</sup> The publications are also available by phone at (877) FTC-HELP.

<sup>41</sup> [www.ftc.gov/bulkorder](http://www.ftc.gov/bulkorder).

To get information into the hands of small businesses who need it, the Commission has used many creative channels of communication. It has coordinated outreach programs with Chambers of Commerce, associations of minority and women business owners, and other groups that have the ear of entrepreneurs. Virtually all FTC publications are now available from the website of the national Better Business Bureau. We also offer a series of one-day workshops called *Green Lights & Red Flags*. These offer guidance to local businesses on complying with truth-in-advertising standards, and are typically co-sponsored with state Attorneys General, bar associations, and other community organizations.<sup>42</sup> The FTC also uses more high-tech channels. For example, we offer a new 20-minute online tutorial that allows business owners to educate themselves – and to train their employees – about fighting identity theft by keeping consumer information secure.<sup>43</sup> The Bureau also posts alerts about the latest frauds and scams that are directed at entrepreneurs,<sup>44</sup> and litigates against such scams when they take place.<sup>45</sup>

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<sup>42</sup> Close to 3,000 business executives have attended *Green Lights & Red Flags* events hosted in Atlanta, Boston, Chicago, Cincinnati, Cleveland, Columbus, Dallas, Denver, Houston, Louisville, Minneapolis, Nashville, Phoenix, Raleigh, Santa Clara, St. Louis, and Seattle.

<sup>43</sup> *Protecting Personal Information: A Guide for Business*, available at [www.ftc.gov/infosecurity](http://www.ftc.gov/infosecurity). More than 25,000 visitors have watched the tutorial and the Bureau has distributed 250,000 copies of the accompanying 24-page brochure.

<sup>44</sup> See <http://www.ftc.gov/bcp/menus/business/fraud.shtm> (FTC site containing information alerting businesses to scams directed at them, including office supply scams and business directory scams); <http://www.ftc.gov/charityfraud> (information about charity frauds directed to businesses).

<sup>45</sup> See, e.g., *FTC v. Merchant Processing, Inc.*, No. CV07-0533 (D. Or. 2007), available at <http://www.ftc.gov/os/caselist/0523162/index.shtm> (defendants entered into a stipulated final order settling charges that they falsely promised small businesses that they would save hundreds to thousands of dollars per year in processing fees); *FTC v. Webservice Media, LLC*, No. H-06-1980 (S.D. Tex. 2006), available at <http://www.ftc.gov/os/caselist/webservice/index.shtm> (defendant who allegedly “crammed” unauthorized charges for website services onto the phone

## V. Competition Advocacy and Competition Studies

Finally, the Commission maintains programs of advocacy and competition studies. These serve complementary missions in informing policymakers and the public. The FTC's advocacy to federal, state, and local governments shares the antitrust and consumer protection knowledge of the agency with those who are making policy decisions elsewhere. The FTC's competition studies work to expand the stock of knowledge available for this and other purposes.

Through the advocacy program the agency responds to invitations and requests from policymakers to comment on proposed laws or regulations. Because our advocacy promotes consumer interests and competition, we often support outcomes that also benefit small businesses.

Commission and staff advocacies have provided analysis on a wide range of regulatory proposals, including mandatory operating permits, advertising restrictions, and licensing restrictions,<sup>46</sup> across a wide range of industries, including automobiles, alcoholic beverages, optometry practice, legal practice, contact lenses, dentistry, health care, real estate, and others.<sup>47</sup>

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bills of hundreds of thousands of small businesses and non-profit organizations agreed to pay \$4.1 million) (consent order).

<sup>46</sup> Recent examples of Commission competition advocacy filings include FTC Staff Comment Before the Department of Housing and Urban Development Concerning the Real Estate Settlement Procedures Act ("RESPA") (June 2008), *available at* <http://www.ftc.gov/os/2008/04/V080009florida.pdf>; and FTC Prepared Statement Before the Florida Senate Concerning Florida Certificate of Need Laws (Apr. 2008), *available at* <http://www.ftc.gov/os/2008/04/V080009florida.pdf>.

<sup>47</sup> For a complete list of FTC advocacy materials, please visit [http://www.ftc.gov/opp/advocacy\\_subject.shtm](http://www.ftc.gov/opp/advocacy_subject.shtm).

FTC advocacy letters often address the subject of professional services. When regulations distinguish, for example, between activities that require certain qualifications and licenses, and those that do not, competition is affected. Legislators who are asked to tighten licensing requirements may be told by proponents that stronger regulations will better protect consumer interests. We seek to inform their consideration of such issues by analyzing the extent to which the measures may also exclude or limit competition – often from small businesses – raise prices, and limit consumer choice. These tradeoffs should be recognized and the true extent of any benefits ascertained before such restrictions are put in place. We urge policymakers to avoid restricting competition unless there has been a clear showing that the restraint is necessary to provide consumers with something they value more than the benefits of the competition that will be lost.

The Commission recently offered this kind of analysis in the area of real estate settlement services, a business that involves the preparation and signing of certain home-sale closing documents. Much of this is fairly routine work. Most states allow non-attorney settlement firms to provide these services, and studies have shown that this results in substantial consumer savings with little if any additional risk of errors.<sup>48</sup> Despite the clear benefits from this competition, however, there have been efforts in a few states to require consumers to obtain such

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<sup>48</sup> See, e.g., Joyce Palomar, *The War Between Attorneys & Lay Conveyancers – Empirical Evidence Says “Cease Fire!”*, 31 CONN. L. REV. 423, n.5 at 520 (1999) (“[t]he only clear conclusion” is “that the evidence does not substantiate the claim that the public bears a sufficient risk from lay provision of real estate settlement services to warrant blanket prohibition of those services under the auspices of preventing the unauthorized practice of law”). See also *In re Opinion No. 26 of the Committee on the Unauthorized Practice of Law*, 654 A.2d 1344, 1349 (N.J. 1995) (evidence indicated that buyers and sellers in areas of New Jersey where lay-assisted closings were prevalent paid on average \$350 and \$450 less for closings, respectively, than did buyers and sellers in parts of the state where lay-assisted closings were less common).

services solely from lawyers and to prohibit non-attorney settlement providers. In 2006 and again in 2007, a state legislator in New York invited the FTC and Justice Department to comment on a bill that would have placed such restrictions on non-attorney providers.<sup>49</sup> The agencies sent a joint letter recommending that the bill be rejected, and the New York legislature ultimately declined to pass it. Our advocacy has supported similar decisions against restrictive legislation in Hawaii, North Carolina, and Kansas.<sup>50</sup>

The second part of this activity – competition studies – works to expand the total base of knowledge on competition issues. These studies serve several purposes: to support possible advocacies; help the agency decide what matters to target in litigation; suggest the best remedies to use; provide guidance to businesses; and encourage informed public discussion.

In recent years the Commission has conducted workshops and hearings, and has engaged in studies on such diverse topics as payments for shelf space, e-commerce, real estate, and health-care delivery.<sup>51</sup> Those studies, together with our experience in litigated cases, give us a factual

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<sup>49</sup> See two letters from the Justice Department and the FTC to the Committee on the Judiciary of the New York State Assembly (June 21, 2006 and April 27, 2007), *available at* [http://www.ftc.gov/os/2006/06/V060016\\_NYUplFinal.pdf](http://www.ftc.gov/os/2006/06/V060016_NYUplFinal.pdf) and <http://www.ftc.gov/be/V070004.pdf>.

<sup>50</sup> See, e.g., letter from the Department of Justice and FTC to the Hawaii Supreme Court (January 25, 2008) *available at* <http://www.ftc.gov/os/2008/01/V080004letter.pdf>; letter from the Justice Department and the FTC to Executive Director of the Kansas Bar Ass'n (Feb. 4, 2005) *available at* <http://www.ftc.gov/be/v050002.pdf>; letter from the Justice Department and the FTC to President of the North Carolina State Bar (July 11, 2002) *available at* <http://www.ftc.gov/os/2002/07/non-attorneyinvolvement.pdf>; letter from the Justice Department and the FTC to Ethics Committee of the North Carolina State Bar (Dec. 14, 2001), *available at* <http://www.ftc.gov/be/V020006.shtm>.

<sup>51</sup> For example, the workshop on Innovations in Health Care Delivery considered innovations that affected the opportunities for small providers as well as larger health care systems. See <http://www.ftc.gov/bc/healthcare/hcd/index.shtm>.

basis for comments that can be considered by state authorities before they embark on a program that restricts competition in a local market.

A particularly important subject for empirical study has been e-commerce. With the growth of the Internet over the past fifteen years, many new opportunities opened up for web-based small businesses, as discussed above. Many small startups have become household names, and the convenience and variety of Internet shopping has also empowered consumers.

Commission studies have helped identify unnecessary industry-specific regulation of e-commerce. As the Internet began to connect distant sellers and buyers, concerns arose that legally restricted products might be bought by people who were not authorized to have them, or that products might be unethically sold online when they actually required an in-person fit before they would work properly. Many jurisdictions adopted regulations limiting consumers' ability to buy certain goods and services online. The question these regulations posed was where to strike the balance between regulation and restraints on competition that affect consumers. To help answer this question the FTC organized several studies into how regulatory restraints in e-commerce actually affect competition and consumer safety. In 2003, the Commission produced a report entitled *Possible Anticompetitive Barriers to E-Commerce: Wine*,<sup>52</sup> followed by a report

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<sup>52</sup> Federal Trade Commission, Staff Report, *Possible Anticompetitive Barriers to E-Commerce: Wine*, available at <http://www.ftc.gov/os/2003/07/winereport2.pdf> (hereinafter "Wine Report").

on the online sale of contact lenses.<sup>53</sup> The FTC and the Antitrust Division jointly conducted a workshop and prepared a report on real estate brokerage services, including online services.<sup>54</sup>

Internet wine sales are a good example of the Commission's work in this area, and a relevant one for this Committee because many winemakers in America are small businesses. The Internet proved particularly beneficial to this group. Smaller vineyards, with limited distribution networks, gained the ability to market their wines directly to consumers around the country, and consumers became able to shop for a wider variety of products at competitive prices. But many states limited or prohibited direct wine sales over the Internet, ostensibly to advance temperance or prevent alcohol sales to minors. Our study found, however, that states could significantly enhance consumer welfare by allowing the direct shipment of wine to consumers. Further, we found that many states had adopted measures less restrictive than outright bans, and those still reported few or no problems with intemperance or direct shipment to minors.

In 2005, relying heavily on the FTC's Wine Report, the Supreme Court in *Granholm v. Heald* – a case initiated by “small wineries that rely on direct consumer sales as an important part of their businesses” – struck down several states' prohibitions on the direct shipment of wine by out-of-state wineries but not in-state ones.<sup>55</sup> This type of regulation discriminated against

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<sup>53</sup> See Federal Trade Commission, Staff Report, *Possible Anticompetitive Barriers to E-Commerce: Contact Lenses*, available at <http://www.ftc.gov/os/2004/03/040329clreportfinal.pdf>; *The Strength of Competition in the Sale of RX Contact Lenses: An FTC Study*, available at <http://www.ftc.gov/reports/contactlens/050214contactlensrpt.pdf>.

<sup>54</sup> Federal Trade Commission and U.S. Department of Justice, Staff Report, *Competition in the Real Estate Brokerage Industry*, available at <http://www.ftc.gov/reports/realestate/V050015.pdf>.

<sup>55</sup> 544 U.S. 460, 468 (2005).

interstate commerce and was a presumptive violation of the commerce clause. In their defense the states claimed that they needed particularly tight local control in order to properly collect taxes, prevent underage drinking, and serve other compelling social goals.<sup>56</sup> The Court, however, relying in large part on the FTC's study, rejected that argument, finding there was no evidence of harm that required discrimination against out-of-state producers, and thus that there was a commerce clause violation.<sup>57</sup> The Court then struck down the prohibitions at issue.

## **VI. Conclusion**

The Commission does not have programs that specifically favor small businesses. Our mission, instead, is to maintain a neutral marketplace for all participants, so that competition will determine the winners and losers, thus maximizing consumer welfare.

As part of fulfilling that mission, however, the Commission takes many actions that are of practical benefit to the small-business community – challenging anticompetitive conduct, educating both large and small businesses, promoting good practices that share truthful and nondeceptive information with consumers, encouraging policymakers to allow more competition, and studying issues that are of particular interest to the small business community. With that assistance, small business has the opportunity to thrive.

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<sup>56</sup> They also claimed that the Twenty-first Amendment, which gave states broad powers to regulate liquor sales within their borders, also gave them special latitude to discriminate against out-of-state suppliers. The Court rejected that argument.

<sup>57</sup> 544 U.S. at 490-91.