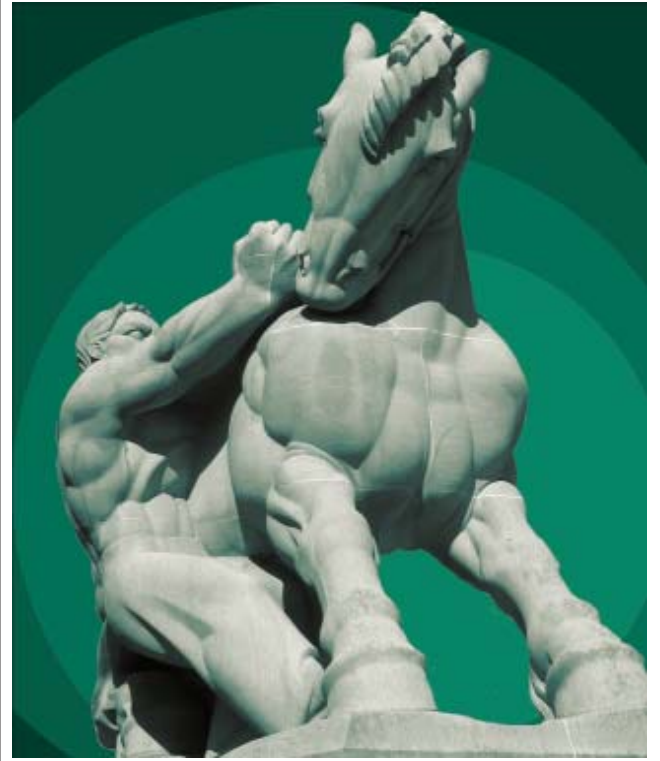




# A Positive Agenda For Consumers: The FTC Year In Review

**Federal Trade Commission**  
**April 2003**



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## **Federal Trade Commission**

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## Introduction

This report offers the competition policy and consumer protection communities an overview of the activities of the Federal Trade Commission (FTC) in the last twelve months. The report summarizes the agency's chief initiatives and describes the aims that motivate the use of its resources. In many areas, the discussion of matters begun in the past year also indicates the agenda that the FTC will pursue in the coming years.

### A. Goals

The FTC acts to ensure that markets operate efficiently to benefit consumers. The FTC's twin missions of competition and consumer protection serve a common aim: to enhance consumer welfare. The Commission's competition mission promotes free and open competitive markets, bringing consumers lower prices, innovation, and choice among products and services. The Commission's consumer protection mission fosters the exchange of accurate, non-deceptive information, allowing consumers to make informed choices in their purchases. Thus, these missions complement each other – accurate information in the marketplace facilitates fair and robust competition – and maximize benefits for consumers.

Five principles guide the development of the Commission's positive agenda for consumers. In exercising its competition and consumer protection authority, the FTC should:

- Promote competition and the unfettered exchange of accurate, non-deceptive information through strong enforcement and focused advocacy;
- Stop conduct that most threatens consumer welfare, such as horizontal agreements and fraudulent and deceptive practices;
- Employ a systematic approach for identifying and addressing serious misconduct, with special attention to harmful behavior in key economic sectors;

- Apply all elements of the agency's distinctive portfolio of policy instruments – prosecuting cases, conducting studies, performing research, holding hearings and workshops, engaging in advocacy before other government bodies, and educating businesses and consumers – to address competition and consumer protection issues; and
- Improve the institutions and processes by which competition and consumer protection policies are formulated and applied.

### B. 2002-2003 Highlights

In the past year, the FTC used its unique complement of enforcement and other policy instruments to address critical consumer concerns in several areas. Highlights include:

- **Health Care: Prescription Drugs.** Medical therapy increasingly relies on new pharmaceuticals as alternatives to more invasive treatments, such as surgery. To help ensure that anticompetitive practices do not injure consumers by reducing the availability or increasing the price of drugs, the FTC published a study examining the frequency of anticompetitive abuses to block market entry of lower-cost generic drugs; provided comments to the Food and Drug Administration (FDA) on the potential for misusing procedures under the Hatch-Waxman Amendments governing generic entry; and brought law enforcement actions against branded drug companies alleging improper efforts to delay generic entry. Among other significant matters, the Commission reached a settlement with Bristol-Myers Squibb (BMS) resolving charges that BMS abused the Hatch-Waxman process to obstruct the entry of generic competition for two anti-cancer drugs and an anti-anxiety agent.
- **Energy: Gasoline.** In an administrative complaint filed last month, the FTC alleged that Union Oil Company of California (Unocal) improperly manipulated the process by which the California Air Resources Board set regulations

for phase 2 reformulated gasoline. The agency contended that Unocal's anticompetitive conduct potentially could cost California consumers hundreds of millions of dollars per year in higher gasoline prices.

- **Privacy: "Do Not Call."** During the past year the Commission promulgated far-reaching amendments to its Telemarketing Sales Rule. Among the most important changes, the FTC launched its National Do Not Call registry, possibly the most significant consumer protection initiative in recent years. The registry will be a central database of telephone numbers of consumers who choose not to receive telemarketing calls. The agency will implement the system by making it operational in specific geographic areas over several months and expanding the system until it covers the entire nation. Once the registry is complete, telemarketers will be required to pay a fee to gain access to the registry and then to scrub their telemarketing lists against the telephone numbers in the database. This fall, consumers who have placed their telephone numbers on the registry will begin to receive fewer unwanted telemarketing calls.
- **Financial Practices: Deceptive Lending.** Last September, the Commission reached a settlement with Associates First Capital Corporation and Associates Corporation of North American to resolve charges that the firms had engaged in systematic and widespread deceptive and abuse practices involving subprime lending. Among other obligations, the companies agreed to pay consumers \$215 million in redress – the largest consumer protection settlement in FTC history.
- **E-Commerce: A Unified Approach to Maintaining Efficient Markets.** The Internet's development has created a bounty of consumer issues, requiring the FTC to draw on all of its competition and consumer protection capabilities. In the past year, the FTC formed an Internet Task

Force to analyze state regulations that may restrict the entry of new Internet competitors and to share its findings with bodies whose acts might affect the development of Internet commerce. The agency hosted a three-day public workshop to examine potential anticompetitive barriers to e-commerce in various industries. The Commission also brought significant law enforcement actions that continue its historical role of leading efforts to keep the Internet free from fraud, deception, and abuse.

The chapters below describe these and other initiatives more fully. These achievements attest to the vision and dedication of the agency's five Commissioners and its exceptional staff.

## Chapter 1 Competition Law Enforcement

The FTC's competition mission seeks to promote and protect rivalry in the marketplace to give consumers the benefit of robust price competition and the best possible array of product choices and prices. While some of its work involves responding to external developments, such as Hart-Scott-Rodino premerger filings and consumer and business complaints, the FTC nevertheless sets a positive competition agenda systematically. In deciding how to use its competition resources, the FTC considers several factors, including:

- the type of conduct involved and the danger it poses to consumer welfare;
- the economic sector involved and its importance to consumer welfare;
- the selection of the best policy tool to correct competitive problems; and
- the performance of competition policy research and development to improve the agency's understanding of marketplace phenomena and their impact on consumers.

Moreover, in carrying out its competition agenda, the FTC seeks to work as efficiently as possible,

both to stretch its resources and to limit the burden imposed on private parties.

The FTC's competition mission has flourished. In the past year, the FTC approved 31 antitrust enforcement actions, including two Part 3 administrative enforcement actions, four preliminary injunction actions, one temporary restraining order action, and 19 consent agreements (ten merger cases and nine nonmerger cases). In an additional five instances, FTC investigations led parties to abandon proposed mergers. The agency also pursued many non-enforcement initiatives – studying various markets and business practices, examining the intersection of antitrust with other areas of law, giving the bar and the business community guidance on compliance, performing competition advocacy before other government bodies, improving and streamlining FTC procedures, and cooperating with competition agencies worldwide.

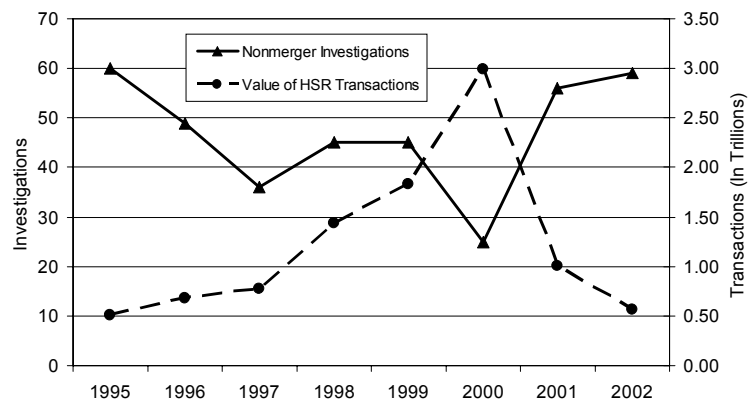
## A. Nonmerger Enforcement

The FTC's nonmerger program has been especially active in the past year. During the 1990s, a tidal wave of mergers forced the FTC to divert substantial resources from its nonmerger programs to scrutinize proposed transactions. The decline in recent years from the historically unprecedented peaks of merger activity in 1999 and 2000 has created opportunities for the Commission to re-emphasize nonmerger antitrust work.

### 1. Bringing More Nonmerger Cases

In 2001, the FTC began restoring balance between merger and nonmerger matters to its competition agenda. In 2001, the FTC staff opened 56 new nonmerger investigations, compared to 25 in 2000. In 2002, the staff opened 59 new nonmerger investigations. (See Figure 1.) Guiding the FTC's renewed focus on nonmerger matters is a systematic approach to case generation. Key areas of concern

Figure 1  
Relationship Between Merger and Nonmerger Enforcement



have included standard setting, professional associations, state boards, exceptions to and immunities from antitrust laws, and health care and prescription drugs. This approach has yielded a number of notable cases.

**Standard-Setting Cases.** Most standard-setting activities are legitimate and enhance the efficient operation of markets. On occasion, however, the standard setters, acting alone or in concert, manipulate the process to anti-consumer ends. Some standard setting involves quasi-governmental entities, and the anticompetitive conduct may resemble the abuse of governmental process. In the past year, two standard-setting matters led to administrative litigation.

- **Rambus.** Last June, the FTC filed an administrative complaint charging that Rambus, a participant in an electronics industry standard-setting organization, failed to disclose – in violation of the organization's rules – that it had a patent and several pending patent applications on technologies that eventually were adopted as part of the industry standard. The standard at issue involved a common form of computer memory used in personal computers and other electronic products. According to the complaint,



the inclusion of Rambus's patented technology in the standard allowed it to gain millions of dollars in royalty fees each year, and potentially more than a billion dollars over the life of the patents, all at the expense of consumers in the form of higher prices.

- **Unocal.** As mentioned above, the FTC recently issued an administrative complaint charging that Unocal subverted the process by which the California Air Resources Board (CARB) adopted regulations on phase 2 reformulated gasoline. The complaint alleges that Unocal made materially false and misleading statements to CARB and others, which led CARB unknowingly to adopt regulations requiring the use of technology covered by Unocal patents.

**Professional Association Cases.** The FTC pursued significant investigations involving the rules of conduct for various professional associations. Agreements among professionals that limit competition among themselves, often under the guise of professional association by-laws or codes of conduct, harm consumers much like "smoke-filled room" conspiracies. The FTC recently accepted two consent agreements from professional groups. The American Institute for the Conservation of Historic and Artistic Works settled charges that its Commentaries to the Guidelines for Practice condemn as unprofessional behavior the consistent undercutting of local or regional market rates. The National Academy of Arbitrators settled charges that its Code of Professional Responsibility violated the law in forbidding virtually all forms of advertising. The FTC is pursuing other potentially harmful restrictions imposed by professional associations, trade associations, or boards, using means including sophisticated "spider" software to search the Internet for restrictions of this kind.

## 2. *Focusing on Key Sectors of the Economy*

As part of its proactive approach, the FTC concentrates resources on anticompetitive conduct in areas of the economy that have a major impact on

the consumer budget, including health care and energy.

**Health Care.** Health-related products and services account for more than 15 percent of the U.S.'s gross domestic product, an increase of 25 percent since 1990. Without effective antitrust enforcement, those figures could grow even higher. In the 20 years since the Supreme Court affirmed the FTC's jurisdiction over health care professionals in the *American Medical Association* case, the agency has worked to remove artificial barriers to the development of new and more efficient arrangements for delivering and financing health care services. The FTC's major health care cases have involved physicians and prescription drugs.

**Physicians.** In the past year, the FTC accepted settlements with four groups of physicians for allegedly colluding to raise consumers' costs. The number of physicians involved ranged from 41 in one matter in the Denver area to more than 1,200 in a case in Dallas-Fort Worth. The FTC's orders will put a stop to collusive conduct by these physicians that harms employers, individual patients, and health plans by depriving them of the benefits of competition in the purchase of physician services. Similar cases are currently under investigation.

**Prescription Drugs.** The growing cost of prescription drugs is another significant concern for consumers, employers, governments, and health plans. A major focus of the FTC's nonmerger enforcement program has been anticompetitive conduct to forestall generic entry. The agency has challenged three types of conduct that pharmaceutical firms allegedly have used to delay generic competition: (1) agreements between a brand-name drug manufacturer and a generic firm to keep the generic off the market for a period of time, (2) unilateral conduct by branded manufacturers to delay generic entry, and (3) agreements among generic drug manufacturers to divide the generic market.

- **Bristol-Myers Squibb (BMS).** Last month, the FTC reached a landmark consent agreement with BMS, mentioned above, to resolve charges that the company engaged in anticompetitive acts over the past decade to obstruct the entry of low-price generic competition for three of BMS's widely-used pharmaceutical products: two anti-cancer drugs, Taxol and Platinol, and the anti-anxiety agent, BuSpar. The complaint alleged that, over the course of the past decade, BMS engaged in various anticompetitive acts across the three drug products.

According to the complaint, BMS abused Food and Drug Administration (FDA) regulations to obstruct generic competitors; misled the FDA about the scope, validity, and enforceability of patents to secure listing in the FDA's Orange Book; breached its duty of good faith and candor with the Patent and Trademark Office (PTO) while pursuing new patents claiming these drugs; filed baseless patent infringement suits against generic drug firms that sought FDA approval to market lower-priced drugs; and paid a would-be generic rival \$72.5 million to abandon its legal challenge to the validity of a BMS patent and to stay out of the market until the patent expired. Alleged to be central to BMS's strategy was the abuse of the regulatory scheme arising under Hatch-Waxman Amendments, which govern the FDA's process for approving generics.

The FDA does not review whether patents listed in the Orange Book actually meet the statutory criteria. The FTC alleged that BMS repeatedly violated Orange Book listing criteria to trigger Hatch-Waxman's provision for a 30-month stay on FDA approval of generic drugs, extending without justification its monopoly power. The FTC's proposed consent order contains strong – and in some respects, unprecedented – relief. The relief includes a provision prohibiting BMS from triggering a 30-month stay based on any patent that BMS lists in the Orange Book after the filing of an application to market a generic drug. This provision, by itself, should protect consumers from the risk that

BMS will engage in many of the abuses set forth in the Commission's complaint.

The BMS case is the most recent in a series of cases alleging anticompetitive conduct to delay the introduction of lower-cost generic drugs. Others include:

- **Biovail.** In October 2002, the Commission approved a consent order resolving charges that Biovail Corporation (Biovail) illegally acquired a license to a patent and improperly listed the patent in the Orange Book as claiming Biovail's high blood pressure drug, Tiazac. Under current law, that action and the subsequent filing of a lawsuit by Biovail against a potential generic entrant triggered an automatic 30-month stay of FDA approval of the generic competitor to the branded product.
- **Biovail/Elan.** The Commission alleged that two generic competitors, Biovail and Elan Corporation, entered into an agreement that provided substantial incentives for the two firms not to compete in the markets for the 30 mg and 60 mg dosage forms of generic Adalat CC, an anti-hypertension drug. The Commission approved a consent order in August 2002 requiring the firms to terminate their agreement and prohibiting them from entering similar agreements in the future.
- **Schering (Settlement with American Home Products).** An April 2002 settlement resolves charges that American Home Products entered into an agreement with Schering-Plough Corporation to delay introduction of a generic potassium chloride supplement in exchange for millions of dollars. This action is related to the matter involving Schering Plough and Upsher-Smith, which remains in administrative litigation.

**Energy.** Antitrust enforcement helps ensure that the markets for gasoline and other refined petroleum products are, and remain, competitive. Although most FTC energy-related enforcement actions have

involved mergers, the nonmerger side also has been active. Notably, the FTC's recent administrative complaint against Unocal, described above, alleges that Unocal's anticompetitive conduct potentially could cost California consumers hundreds of millions of dollars per year in higher gasoline prices.

### 3. *Clarifying the Scope of Antitrust Coverage*

The state action and *Noerr-Pennington* doctrines immunize substantial areas of commerce from competition's beneficial discipline. While the core principles underlying these antitrust doctrines are valid, some lower court decisions have expanded their reach well beyond the precepts the Supreme Court originally articulated. The scope of these immunities remains ambiguous and controversial in some respects. Through study and analysis, and by bringing carefully selected enforcement actions, the FTC is seeking to clarify the scope of the state action and *Noerr-Pennington* immunities.

**State Action.** The state action doctrine confers antitrust immunity upon certain private conduct taken pursuant to state policy. When first articulated in *Parker v. Brown*, the doctrine rested on the notion that Congress did not intend to limit the states' sovereign regulatory power when it passed the antitrust laws. Since then, however, some courts have not considered whether the anticompetitive conduct in question was intended to be protected by the state legislature or was necessary to accomplish the state's aims. In other instances, courts have granted broad immunity to quasi-official bodies, including entities composed of market participants, with only a tangential connection to the state. The FTC is pursuing matters that should clarify the two prongs of the state action defense: a "clear articulation" of the state's intent to displace competition and "active supervision" of anticompetitive private agreements.

- **Indiana Household Movers and Warehousemen, Inc.** In a major attempt to clarify the requirements for state action immunity, the FTC last month announced a proposed settlement with Indiana Household Movers and

Warehousemen, Inc. (IHM&W). The settlement will bar IHM&W, which represents approximately 70 household goods movers doing business in Indiana, from filing collective intrastate rate tariffs with the Indiana's Department of Revenue. According to the Commission's complaint, in filing tariffs on its members' behalf, IHM&W illegally reduced competition for household goods moving services within Indiana by setting and maintaining collective rates to the detriment of consumers. The FTC concluded that, because Indiana did not actively supervise IHM&W's price fixing, the entity did not qualify for immunity. The proposed settlement and the agency's Analysis to Aid Public Comment give the business community significant guidance concerning the state action doctrine's scope and the standards that must be met to immunize anticompetitive conduct as an activity of the state.

**Noerr.** *Noerr* immunity shields certain efforts by firms to petition government bodies to suppress competition. *Noerr*, however, sometimes is invoked to shield efforts to exclude rivals through the misuse of governmental process. Such conduct is particularly harmful to consumers and beyond *Noerr*'s original scope. The FTC is developing cases that focus on issues such as:

- **Material misrepresentations to the government.** *Noerr* immunity rests on the assumption that the government knowingly has granted petitions for action having anticompetitive effects. Conduct that deceives the government should lack immunity. The FTC's Unocal complaint, mentioned above, alleges that Unocal defrauded CARB into adopting a standard for low emissions gasoline covered by the company's patents. Only after passage of the new standard did Unocal disclose the existence of its patent and demand royalties, according to the complaint. Similarly, the FTC complaint in the Bristol-Myers Squibb case alleged, *inter alia*, that the firm misled the government by taking inconsistent positions before two agencies – obtaining a patent by

Box 1

## Pursuing a Pattern

Acts on the fringe of possible *Noerr* protection become more troublesome when taken in combination. For example, the FTC's recently settled case against BMS relied on the alleged combination of the firm's inequitable conduct at the PTO, wrongful Orange Book listings, sham litigation, and payments for generics not to enter – all undertaken in an attempt to obtain or maintain monopoly power.

telling the PTO that its application claimed solely the use of the metabolite of buspirone and not the use of buspirone itself, while listing the patent in the FDA's Orange Book and affirming to the FDA that the patent did claim a method of using buspirone. (See Box 1.)

- **Merely triggering ministerial actions.** If *Noerr* protects petitioning, the immunity is inappropriate for conduct that merely triggers ministerial government action, as the party has not truly sought a discretionary decision. For example, a pharmaceutical firm's listing of a patent in the FDA's Orange Book, together with an infringement suit against a generic producer, would result in an automatic FDA stay on generic entry under current law. Because the result is automatic and therefore involves no government "decision," *Noerr* should not give the firm antitrust immunity.

## B. Merger Enforcement

Merger enforcement remains prominent, although merger activity has fallen and amendments to the Hart-Scott-Rodino (HSR) Act have lowered the number of reported mergers. In the past year, the FTC brought numerous merger enforcement actions, including actions against firms in the key industries of health care, energy, and food. The Commission authorized the staff to seek preliminary injunctions to block four mergers and authorized the staff to seek a temporary restraining order to stop a merger in a fifth case. The Commission also accepted consent agreements in ten merger cases. FTC investigations

also resulted in the abandonment of five other mergers.

### 1. Non-HSR Reportable Transactions

In the past year, the FTC investigated several nonreportable mergers, including Meade/Tasco. In addition, the Commission reached a consent agreement with MSC Software Corporation (MSC).

- **Meade/Tasco.** In May 2002, the Commission authorized the staff to seek a temporary restraining order and a preliminary injunction in federal district court to pre-empt any attempt by Meade Instruments Corporation, the leading manufacturer of performance telescopes and Schmidt-Cassegrain telescopes in the United States, to buy assets of Tasco Holdings, Inc.'s Celestron International (Celestron), the number-two performance telescope provider in the United States and the only other supplier of Schmidt-Cassegrain telescopes. According to the Commission, Meade's purchase of Celestron assets would have reduced competition in the performance telescope market and created a monopoly in the market for Schmidt-Cassegrain telescopes. Meade had indicated its strong interest in acquiring all or some of Celestron's assets, an acquisition that might not have been reportable. The parties subsequently abandoned the transaction.
- **MSC.** The FTC finalized a consent order to resolve competitive concerns at issue in the *MSC* case, which the Commission placed in administrative litigation in 2001. Under the settlement, MSC must divest at least one clone copy of its current advanced Nastran software, including the source code. The divestiture will be through royalty-free, perpetual, non-exclusive licenses to one or two acquirers. This case is notable because it requires MSC to divest not only the assets acquired but also additional assets that were needed to restore the lost competition.

Box 2

## Examining Vertical Mergers

Although vertical mergers are less likely to have anticompetitive effects than mergers between direct rivals, anticompetitive vertical mergers can occur. The FTC's review of the proposed *Cytc/Digene* and *Avant!/Synopsys* vertical mergers show how different facts lead to different outcomes.

*Cytc/Digene* involved the merger of two complementary cervical cancer screening tests. *Synopsys/Avant!* combined two complementary integrated circuit design software products. The FTC voted to block the former and to close the latter investigation. The theory of competitive harm in both cases involved the combined firm's incentive to use its market power in one product to harm competition in the complementary product. The method by which harm would occur, the incentives of the firms to act anticompetitively, and the potential impact on competition and consumers differed significantly between the cases, as did the FTC's ability to forecast the likelihood of future events.

The means by which the combined Cytc firm could harm rivals were well-defined. The theory was that Digene would not support rival liquid pap test suppliers in obtaining FDA approval necessary for use of the Digene product in combination with the rivals' products. In contrast, the *Synopsys* theory was that the firm would make improvements to its logical synthesis product that worked better with the *Avant!* place-and-route product than with rival products. Exactly what changes would occur was unclear. *Cytc/Digene* appeared to have strong incentives to act anticompetitively, while *Synopsys/Avant!*'s incentive to limit interoperability with its rivals (and antagonize customers) was unclear.

Moreover, in *Cytc*, *TriPath* (the other liquid pap test competitor) and new entrants allegedly would be substantially impeded without the merged firm's cooperation. In contrast, *Avant!* faced significant competitors downstream who would not be substantially impeded from competing. That those competitors might lose sales to *Avant!* post-merger did not show that the transaction would likely be anticompetitive. Another difference between the cases involved the timing of the anticompetitive threat. In *Cytc*, the alleged potential harm would occur in the short term; industry participants anticipated that *TriPath* could be severely threatened immediately. In contrast, the competitive harm in *Synopsys* was not anticipated to happen until sometime in the future, if at all.

Potential efficiencies and customer views also were important. *Synopsys/Avant!* had the strong ability to create an improved, more integrated product.

## 2. Mergers in Key Economic Sectors

A number of the FTC's merger cases involved economic sectors with major consumer impact.

**Health Care.** The FTC completed investigations of several health-related merger cases in the past year, including:

- **Cytc/Digene.** An action challenging Cytc Corporation's (Cytc) proposed \$420 million purchase of Digene Corporation (Digene), in which the FTC was prepared to allege that the merger of these two manufacturers of complementary cervical cancer screening tests would allow the combined firm to use its market power in one market to impede competition in another market – liquid pap tests. The parties abandoned the merger before the FTC staff filed a motion in a federal district court to enjoin the transaction. (See also Box 2.)
- **Amgen/Immunex.** A consent agreement requiring divestiture of assets and licensing of intellectual property rights in three biopharmaceutical markets to cure anticompetitive effects of Amgen Inc.'s \$16 billion acquisition of Immunex Corp.
- **Baxter/Wyeth.** A settlement in Baxter International Inc.'s \$316 million acquisition of Wyeth Corporation to preserve competition in markets for certain general anesthetics, neuromuscular blocking agents, antiemetics, and new injectable iron replacement therapies.
- **Quest/Unilab.** A consent agreement to resolve concerns that Quest Diagnostics, Inc.'s \$827 million acquisition of Unilab Corporation would harm competition for clinical lab services in Northern California.

In addition, the FTC in 2002 formed a Merger Litigation Task Force, whose mission includes investigating recently consummated hospital mergers. The antitrust agencies have not fared well in challenging proposed hospital mergers in recent

years. The Task Force is screening consummated mergers and, if it finds competitive problems, will consider recommending enforcement actions. The Task Force also is analyzing which litigation strategies worked and which failed in the previous hospital merger cases. The Task Force will report its findings regarding consummated mergers that it does not recommend be challenged.

**Energy.** In recent years, the FTC has investigated numerous oil mergers and has analyzed the competitive effects of these transactions in many individual product/geographic market combinations. When necessary, the agency has insisted on remedial divestitures to cure potential harm to competition. Matters in the last 12 months include *Conoco/Phillips*, a \$35 billion merger, for which the Commission accepted a settlement requiring the firms to divest two refineries and related marketing assets, terminal facilities for light petroleum and propane products, and certain natural gas gathering assets.

**Food.** The food sector has immense significance for American consumers. The FTC has carefully monitored mergers at all levels of this industry from production to retail sales.

- **Wal-Mart/Supermercados Amigo.** In the recent acquisition of Amigo, the largest supermarket chain in Puerto Rico, by Wal-Mart, the largest general merchandiser in the world, the Commission required the divestiture of four Amigo stores where direct competition would be eliminated between Wal-Mart club stores or a supercenter and Amigo supermarkets. Although in past cases the FTC has defined the relevant product market as supermarkets, evidence here indicated that Puerto Rico consumers use club stores interchangeably with full-service supermarkets and supercenters. The FTC modified its analysis in this case to incorporate an expanded market definition.
- **Kroger/Raley's.** Kroger's acquisition of 18 Raley's supermarkets in the Las Vegas, Nevada area last year also illustrates how the FTC accounts for facts specific to each transaction. The Commission authorized its staff to seek a temporary restraining order. After further analysis indicated that the merger was unlikely to harm competition, the FTC closed the investigation without requiring divestitures. Although the FTC had taken enforcement action in a Las Vegas supermarket merger in 1999, it found that substantial new competition in the market reduced Raley's significance as a competitive force.
- **Nestle/Dreyer's.** The Commission last month authorized the staff to seek a preliminary injunction to block the \$2.8 billion proposed merger of Nestle's and Dreyer's ice cream businesses. The FTC would allege that Nestle and Dreyer's along with Unilever, the marketer of Ben & Jerry's ice cream, account for about 98 percent of the sales of superpremium ice cream, and that acquiring Dreyer's would give Nestle alone 60 percent of this market. This matter highlights the importance of fact-intensive product market analysis, including the use of quantitative data, which in this case indicated the existence of a distinct superpremium ice cream market. The competitive importance of effective, not readily duplicatable distribution systems also was important in the staff's analysis.
- **Vlasic/Claussen.** The FTC last fall authorized the staff to seek a preliminary injunction to stop the proposed combination of Claussen, the dominant firm in the market for refrigerated pickles, with Vlasic, its most significant competitor in refrigerated pickles and also the largest national brand of shelf-stable pickles. The FTC's complaint alleged that the merger could reduce competition and raise prices in the pickle market because Vlasic's products acted as price constraints on Claussen. The parties abandoned the transaction after the Commission's action.

**Other Mergers.** Although health care, energy, and food dominated agency merger investigation resources during the past year, the FTC also resolved through consent orders challenges to proposed mergers in other sectors of the economy.

- **Bayer AG/Aventis CropScience Holdings.** In Bayer's \$6.2 billion proposed acquisition of Aventis CropScience, the Commission required divestitures in markets for new generation chemical insecticides, herbicides for spring wheat, and other products.
- **Shell Oil Company/Pennzoil-Quaker State Company.** In this \$1.8 billion acquisition, the FTC obtained a settlement requiring divestitures to preserve competition in the U.S. and Canadian market for a paraffinic base oil.
- **Solvay/Ausimont.** The FTC obtained a settlement requiring divestitures to modify a transaction that threatened competition in the world market for a fluoropolymer used in a wide variety of applications.
- **Dainippon/Bayer.** In a proposed merger between Bayer's high performance pigment business and Dainippon Ink and Chemicals, the Commission required the divestiture of Dainippon's perylene business to Ciba Speciality Chemicals.

*Bayer/Aventis* and *Solvay/Ausimont* also raised concerns in both the U.S. and Europe, and the FTC worked closely with the European Commission's Competition Directorate and the merging parties to obtain remedies satisfactory to both competition authorities.

### **3. Improving Merger Review and Resolution**

A major undertaking in the Bureaus of Competition and Economics has been to streamline the merger review process to make it faster, less burdensome, more transparent, and more effective.

**Premerger Notification.** As part of an overall movement to make government more accessible electronically, the FTC, working with the Department of Justice (DOJ), has accelerated efforts to complete an electronic system for filing HSR premerger notifications. E-filing will reduce burdens for both business and the government and create a valuable database of information on mergers to inform future policy deliberations. The FTC also has made available to the public a searchable database of thousands of letters memorializing advice from the agency staff in response to inquiries about interpretation of the HSR rules.

**Streamlined Investigations.** In 2002, the Bureau of Competition held a series of public workshops around the country on possible improvements in the merger investigation process. In December, the Bureau announced a new set of Guidelines for Merger Investigations, which incorporate the staff's learning from those workshops. The new measures include a host of reforms – prompt release of investigational hearing transcripts to testifying witnesses, simplification of Second Requests responses, more information about the standards used in evaluating Second Request compliance, and easier submission of electronic materials. The Bureau of Economics also released a statement on best practices for empirical analyses, encouraging those practices that facilitate effective incorporation of empirical analyses, while reducing the burden on parties in complying with data requests. Further efforts to improve the merger investigation process continue. Among other reforms, the staff is completing work on a revised Model Second Request, including industry-specific variations.

**Transparency of Decision Making.** Greater transparency about the types of conduct likely to be challenged helps to serve the FTC's objectives through greater deterrence: understanding fully what kinds of transactions or conduct the FTC is likely to challenge – and why – facilitates antitrust counseling, and prevents the proposal or implementation of many anticompetitive mergers. In the past year, the

FTC has sought new ways to expand public awareness and understanding of its actions in ways beyond the traditional adjudicative opinions, press releases, and analyses to aid public comment on consent agreements. In particular, the FTC has provided more insight into Commission decisions *not* to intervene by issuing statements in matters in which the agency conducted a significant inquiry but brought no enforcement action.

Notable examples of the FTC's increased commitment to transparency include the Commission-issued statement in the investigation into the competing proposed acquisitions of P & O Princess Cruises, plc, the press release issued in the Kroger/Raley's matter, the statements accompanying the decision not to prosecute in Synopsis/Avant!, and the detailed responses to comments received in response to the proposed settlement (now finalized) in the WalMart/Supermercados Amigo acquisition. These explanations follow recent FTC statements (in 2001) in the Phillips/Tosco and AmeriSource Health/Bergen Brunswig merger investigations. (See also Box 3.)

**Remedies.** Several of the merger best practices workshops held last spring focused on issues involved in fashioning remedies, especially in merger cases. Topics about which the FTC sought the public's views included identifying which assets should be divested and the terms of a proposed divestiture; criteria for evaluating proposed buyers; when "up front" divestiture is necessary or desirable; use of crown jewels provisions; third-party rights; pre-divestiture risks to competition; and divestiture success. The workshops provided further insights on the crafting of remedies in merger cases, which are included in a recent paper on merger remedy best practices.

### C. Part 3 Administrative Process

A unique feature of the FTC's antitrust law enforcement portfolio is its ability to bring cases before its administrative law judges. FTC administrative adjudication offers the opportunity for extensive analysis of complicated policy questions, often involving cutting-edge issues, by a body with

Box 3

### Efficiencies in Antitrust Review

In a speech in November 2002, Commissioner Thomas Leary discussed the treatment of efficiencies in antitrust law, providing a historical perspective on how antitrust policy concerning efficiencies has evolved over the past 25 years based on academic learning, rather than fluctuating as a result of political change. Commissioner Leary stated that the most significant issues in current efficiency analysis are the problems of quantifying and comparing predictions about the offsetting effects of higher concentration and greater efficiencies. He expressed concern that significant efficiencies may tend to be ignored because, while significant, they may be hard to quantify, or even identify. He concluded that there has been immense, continuing improvement by the antitrust agencies in efficiencies analysis over the last 25 years and there currently is near-universal agreement that efficiencies are important.

specialized expertise in how markets work. The resulting adjudicative opinions by the Commission, based on a thorough record and full briefing on the applicable legal issues, help to improve transparency in the Commission's decision-making and can give considerable guidance to the bar and the business community on applicable standards and enforcement policy.

The FTC's administrative docket expanded in the past year, and the recent trend toward more intensive use of this mechanism is expected to continue. Since last April, the Commission heard oral arguments in two competition cases, the staff litigated one merger before an administrative law judge, and the Commission voted out two new administrative complaints.

- **Schering-Plough.** The Commission heard arguments in *Schering-Plough Corporation* in January after FTC complaint counsel appealed the ALJ's Initial Decision to dismiss the complaint after a trial. The complaint alleges that Schering illegally paid Upsher-Smith Laboratories and American Home Products millions of dollars to delay marketing generic versions of K-Dur 20, a prescription potassium chloride supplement used



to treat patients with low blood potassium levels. In the spring of 2002, the Commission settled its charges against American Home Products.

- **Three Tenors.** The Commission heard oral argument in November 2002 in *Polygram Holding, Inc. (The Three Tenors)*, which involves allegations that music distribution companies entered into an illegal agreement not to advertise or discount earlier albums and video recordings of concerts featuring the Three Tenors in an effort to promote the recording of their most recent concert. The ALJ upheld the FTC's charges and ordered the respondents to cease and desist from entering into any agreement on price with wholesale producers or sellers of audio or video products. The Commission settled these charges with Warner Communications in July 2001.
- **Chicago Bridge.** During the past year, the FTC staff litigated this case, which involves a consummated merger, before an ALJ. This case involves the combination of two firms that construct field-erected specialty industrial storage tanks. A decision is expected later this year.
- **Rambus.** Last June, the FTC issued an administrative complaint charging that Rambus, a participant in an electronics industry standards-setting organization, failed to disclose – in violation of the organization's rules – that it had a patent and several pending patent applications for technologies that eventually were adopted as part of the industry standard. The hearing is expected to begin this spring.
- **Unocal.** Last month, the FTC issued an administrative complaint charging that Unocal subverted the process under which the California Air Resources Board (CARB) adopted regulations on phase 2 reformulated gasoline.

## Chapter 2

# Consumer Protection Law Enforcement and Rulemaking

The FTC's consumer protection mission promotes the agency's positive agenda by protecting consumers against fraud, deception, and unfair practices in the marketplace. The agency addresses current issues of importance to consumers, including identity theft, telemarketing fraud, Internet fraud, and credit reporting. The FTC uses targeted law enforcement and consumer and business education to ensure that consumers have accurate information for their purchasing decisions. More and more, the FTC is acting to safeguard consumer privacy.

The FTC uses various policy tools to set priorities for its consumer protection mission. The Commission's rich complaint databases inform the agency about consumer experiences in the marketplace; Internet surfs help single out the most serious online fraud and deception; and workshops, hearings, and conferences advance the public policy debate. As the FTC tracks trends using state-of-the-art technology, its fundamental mission remains the same: to *identify* the most egregious fraud and deception; to *enforce* the law acting alone and with other government authorities; and to *educate* the agency about emerging issues, industry about complying with the law, and consumers about protecting themselves against fraud and deception.

### A. Fraud and Deception

#### 1. Tools to Identify Fraud and Deception

Over the past year, the agency continued to improve its methods for identifying fraud and deception, thereby enhancing the implementation of its positive agenda for consumers. The FTC added thousands of consumer complaints to its internal databases, reached more groups of consumers, and recruited more law enforcement partners at home and abroad. The agency continued to use electronic tools extensively to ferret out fraud, especially in the cyberworld. For example, the FTC teamed up with law enforcement authorities nationwide to conduct

Box 4

## Top 10 Consumer Fraud Complaints

Calendar Year 2002

1. Identity Theft - 43%
2. Internet Auctions - 13%
3. Internet Services & Computer Complaints - 6%
4. Advance-Fee Loans & Credit Protection - 5%
5. Shop-at-Home/Catalog Sales - 5%
6. Foreign Money Offers - 4%
7. Prizes, Sweepstakes & Lotteries - 4%
8. Business Opportunity & Work-at-Home Plans - 3%
9. Telephone Services - 2%
10. Health Care - 2%

Internet “surfs” to find the latest frauds that afflict consumers.

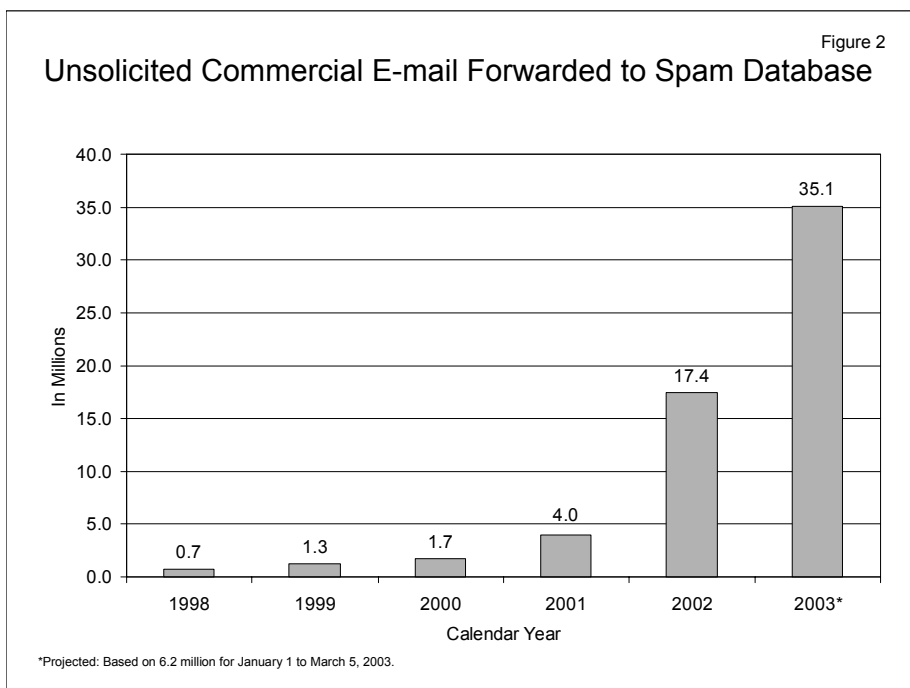
**Consumer Response Center (CRC).** The CRC responds to complaints and inquiries submitted by consumers using the FTC’s toll-free number (1-877-FTC-HELP), filing complaints online, and sending letters. In fiscal year 2002, the CRC added 680,000 complaints and inquiries to the FTC’s database, raising the total number of entries to 2.3 million.

**Consumer Sentinel.** Created by the FTC in 1997, Consumer Sentinel has grown to contain over one million fraud complaints. It is now available online to over 650 enforcement agencies across the United States, Canada, and Australia. Consumer Sentinel is the richest source of consumer fraud data available to law enforcement agencies. (See Box 4.) Consumers also can access publicly available sections of this Web site and find a wealth of statistics about fraud. This past year, Consumer Sentinel was one of 25 finalists to receive the Excellence.Gov award, which recognizes government programs that demonstrate excellence in E-Government innovation.

**Identity Theft Tools.** The FTC’s toll-free number (1-877-ID-THEFT) is

the central clearinghouse for ID theft complaints and provides a valuable source of consumer complaint data. Calls to the FTC have increased, from more than 100,000 calls in fiscal year 2001 to more than 185,000 in fiscal year 2002. The ID theft database now holds more than 430,000 entries. Building on its experience with Consumer Sentinel, the FTC began making the data available to law enforcement partners through an online database, and now more than 540 law enforcement agencies access the data. Working with the Secret Service, FTC investigators develop preliminary investigative reports that are referred to regional Financial Crimes Task Forces for possible prosecution.

**Spam Database.** “Spam,” the popular name for unsolicited commercial e-mail, is a growing problem for consumers and businesses alike. Since 1998, the FTC has maintained an electronic mailbox to which Internet customers are encouraged to forward spam (uce@ftc.gov). This database currently receives an average of 100,000 new pieces of spam *daily*. The total number of spam has grown from 700,000 in the first year to more than 30 million today. (See Figure 2.) The database is searchable, allowing the FTC staff to track trends and identify law enforcement targets.



**Military Sentinel.** In September 2002, the FTC and the Department of Defense (DOD) launched Military Sentinel, the first online consumer complaint database specifically tailored to the military community's unique needs. The system offers members of the military and their families a way to file complaints and gain immediate access to the FTC's large collection of educational materials and information. It also gives DOD and law enforcement officers secure access to the complaints entered.

**Cross-Border Fraud Web Site.** In September 2002, the FTC launched its redesigned "econsumer.gov" Web site. The complaints filed through [econsumer.gov](http://econsumer.gov) are accessible to the 17 member countries, which use this information to decide whether to take further action. This past January, the FTC unveiled a new Web site, [www.ftc.gov/crossborder](http://www.ftc.gov/crossborder), to help consumers spot, stop, and avoid cross-border fraud. New features on both Web sites make it easier for consumers to navigate the site and file their complaints.

**Internet Surfs.** The law enforcement Internet surf continues to be an essential tool for the FTC and other agencies to identify online scams. In the typical surf, the FTC first identifies a type of deceptive practice that warrants investigation. The FTC then recruits partners to search the Web for a specified time using a protocol tailored to the surf's subject matter. Surfs achieve two goals: they provide a window into online practices, and an opportunity to alert new Web site providers – some of whom are new entrepreneurs unaware of existing laws – if their sites appear to violate the law. In the last year, the agency conducted five surfs, focusing on claims about unsubscribing from spam, e-tailer holiday shopping, medical test kits, energy saving products, and on the harvesting of e-mail addresses for the purpose of sending spam to those addresses.

## 2. Law Enforcement

Drawing heavily on data obtained from Consumer Sentinel and Internet surfs, the FTC promotes its positive agenda for consumers by filing enforcement actions in federal court to stop fraud and deception.

While numbers tell only part of the story, they are impressive. Since April 2002, the FTC has brought 120 cases targeting fraud and deception. Of these, 66 cases resulted from eight sweeps conducted with over 100 law enforcement partners. The eight sweeps targeted Internet scams, telemarketing fraud, work-at-home opportunities, deceptive weight loss products, and advance-fee credit-related fraud. In the past year, the FTC obtained more than 55 judgments ordering more than \$650 million in consumer redress. In addition, the FTC is awaiting court approval of its settlement with The Associates First Capital Corporation and its successor, Citigroup, Inc., which requires the defendant to pay \$215 million to consumers to resolve allegations of deceptive lending practices and other law violations. (See Figure 3.) Key areas of consumer protection litigation have included:

**Deceptive Billing Practices.** In *FTC v. Access Resource Services*, the Commission charged promoters of "Miss Cleo" psychic services with deceptive advertising, billing, and collection practices. The defendants stipulated to a court order stopping all collection efforts on accounts or claims from consumers who purchased or purportedly purchased their pay-per-call or audiotext services and forgiving an estimated \$500 million in outstanding consumer charges.

**Netforce Regional Sweeps.** Last year, the FTC created a series of regional "Netforces" composed of law enforcement agencies that participated in the agency's Internet Fraud Investigations Training Program. This year, the FTC announced two regional Netforce sweeps. In the Midwest sweep, announced in July 2002, the FTC, the Federal Bureau of Investigation (FBI), the U.S. Postal Inspection Service (USPIS), the Securities and Exchange Commission (SEC), and the Commodity Futures Trading Commission (CFTC) joined ten state attorneys general and 11 other state and local law enforcement agencies to target scams on the Internet. Together, these agencies brought 19 civil and criminal law enforcement actions against cyberscammers who have bilked tens of thousands

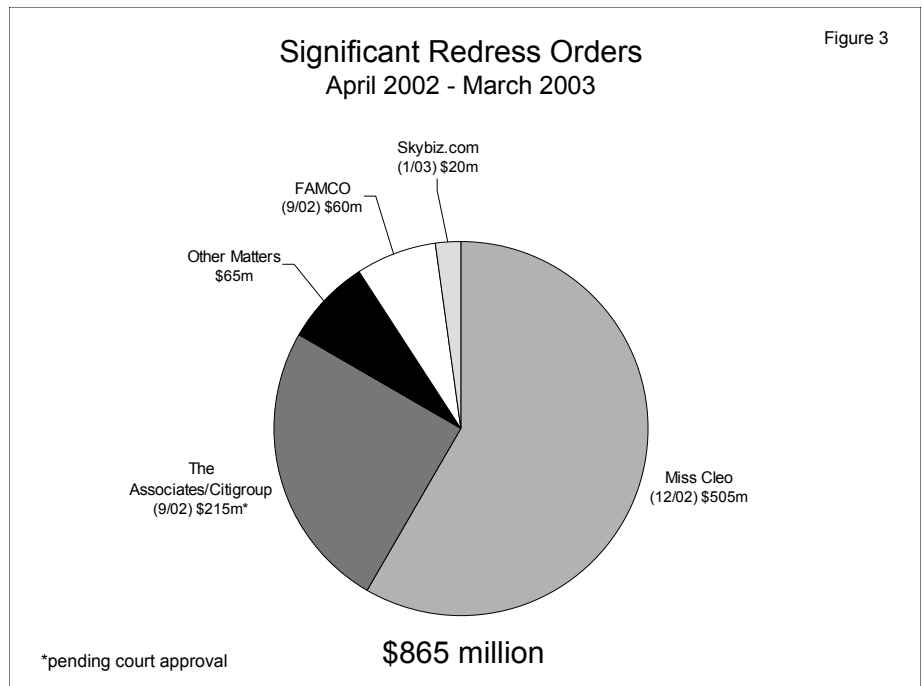
of consumers out of millions of dollars. The Northeast Netforce, announced in November 2002, also targeted various Internet frauds and deceptive spamming practices. The sweep's lead case marked the first time the FTC has attacked the practice of deceptively gathering sensitive financial information from consumers via spam.

**International Drivers Permit Sweep.** Operation License for Trouble is a nationwide law enforcement sweep targeting spammers and Web site operators who deceptively market fake international driving permits (IDPs).

Authentic IDPs, which cost about \$10, are intended simply to help ease language barriers for those who have a license and who want to drive while traveling abroad. The sellers of fake IDPs falsely represent that their alternative (which cost between \$65 and \$375) can be used to drive legally in the United States; to avoid sanctions for traffic violations; and as an identification document. The FTC filed six federal court actions against sellers of fake IDPs and obtained preliminary injunctions in all six matters.

**Deceptive Lending Practices.** Some unscrupulous lenders deceive consumers about loan terms, rates, or fees. The results can be severe, including the loss of a home. The FTC initiates cases to root out deception and other unlawful practices by lenders, especially in the subprime market (*i.e.*, borrowers whose credit ratings do not qualify them for prime loans). Last year, the FTC obtained settlements for nearly \$300 million in consumer redress for deceptive lending practices and other law violations.

- **The Associates/Citigroup.** As noted above, the FTC last September announced a settlement of its litigation with The Associates and its successor, Citigroup, Inc. The FTC's complaint charged that The Associates had deceptively



packed credit insurance into its loans, misrepresented loan terms, and engaged in violations of the Truth in Lending and fair credit statutes. The settlement, which requires court approval, compels the defendants to return approximately \$215 million to injured consumers.

- **First Alliance Mortgage.** The FTC finalized its settlement with First Alliance Mortgage Co. (FAMCO) and its principal, Brian Chisick, for the defendants' alleged deception in representing loan terms and origination fees. The settlement provides for injunctive relief as well as approximately \$60 million in consumer redress, \$20 million of which is to be contributed by the principals.
- **Mercantile Mortgage.** The FTC entered into a settlement with Mercantile Mortgage Co. for allegedly deceiving consumers about loan terms, including the existence of balloon payments. In addition to requiring \$250,000 in consumer redress, the settlement gives hundreds of consumers the opportunity to refinance loans at low or no cost. This case marks the first time the FTC has held a lender responsible for a mortgage broker's misconduct.

**Health and Safety Claims.** Truthful and substantiated health benefit claims in advertising can be an important source of information for consumers. For that reason, combating deceptive health claims, both online and off, continues to be a major focus of the FTC's positive agenda. In the past year, the agency sued in federal court marketers of dietary supplements, cosmetics, devices, and services, all of which purportedly improve the health or appearance of consumers. Highlights include:

- **Project ABSurd.** In May 2002, the FTC filed actions in federal court (still pending) to challenge advertising claims for three popular electronic abdominal ("abs") exercise belts. In three of the most frequently aired infomercials of early 2002, the abs belt promoters allegedly promised that users would get "six-pack" or "washboard abs" without exercise. The complaints allege false advertising for a variety of claims, including that the belts were safe for all users, could cause fat or weight loss, and could eliminate cellulite.
  - **Rexall Sundown.** In March 2003, Rexall Sundown, which manufactures and markets a variety of nutritional supplements and consumer health products, agreed to pay up to \$12 million to resolve charges that it made unsubstantiated claims about "Cellasene," a purported cellulite treatment product. The settlement also prohibits unsubstantiated claims regarding cellulite, body fat, or weight loss for drugs or dietary supplements.
  - **Blue Stuff.** In November 2002, the FTC announced a \$3 million settlement with Blue Stuff, Inc. The FTC alleged that, through nationally-televised infomercials and on the Internet, the defendants made unsubstantiated severe pain relief claims for two topical creams, Blue Stuff and Super Blue Stuff. The settlement also bars the defendants from making unsubstantiated health claims about dietary supplements and related products.
  - **Mark Nutritionals.** In December 2002, a federal court entered a preliminary injunction against Mark Nutritionals, Inc. to enjoin its allegedly deceptive ads for Body Solutions Evening Weight Loss Formula and to prohibit unsubstantiated use of the term "weight loss" in the product name. The FTC's complaint alleged that the defendants falsely claimed that Evening Formula would result in consumers losing as much as 20 to 40 pounds without the need to diet or exercise. The injunctions also freeze the defendants' assets to preserve them for potential refunds for consumers.
  - **FTC v. Dr. Clark Research Association.** In January of this year, the FTC filed a federal complaint against a Switzerland-based company and its U.S. counterpart, alleging that the defendants made unsubstantiated efficacy claims for various dietary supplements and devices marketed on the Internet for the treatment and cure of advanced and terminal cancers, AIDS, and other serious diseases. The ad also said the defendants' products rendered surgery and chemotherapy unnecessary for patients with advanced cancer.
- International Pyramid Scheme.** In January 2002, the FTC obtained a permanent injunction in *FTC v. SkyBiz* against an alleged massive international pyramid scheme. The final settlement includes \$20 million in consumer redress which will be distributed to both domestic and foreign victims. The settlement also bars the principal individual defendants for several years from multi-level marketing.
- Advance-Fee Credit Scheme.** In *FTC v. Assail*, the FTC alleged that the defendants operated an advance-fee credit card scam through a network of dozens of telemarketing boiler rooms, Canadian front men, and outsourced fulfillment and customer service centers. In this action filed in January 2003, the FTC has identified and shut down the hub of this fraudulent empire, which generated at least \$100 million in fraudulent revenues.

**Deceptive Charitable Telemarketing.** Two months ago, the FTC announced settlements with five individual defendants in *FTC v. Mitchell Gold*. The FTC alleged that these defendants engaged in deceptive telephone solicitations for nonprofit organizations purporting to support police, fire fighters, veterans, and sick children. According to the FTC's complaint, between 1995 and 1999 the defendants raised more than \$27 million, but provided less than three percent of it to the nonprofits. The settlement bans further fundraising and further telemarketing (while still allowing one defendant to telemarket only upon posting a bond). Defendant Gold has agreed to a \$10 million judgment. He was indicted, pled guilty, and sentenced to 96 months in prison for his involvement in this and another fraudulent telemarketing scheme.

### Project Scofflaw.

The FTC created Project Scofflaw in 1996 to target individuals who flout Commission orders and continue to prey upon consumers. Since its inception, Project Scofflaw has resulted in 33 civil and/or criminal contempt actions; 54 years of incarceration or home detention for 14 defendants; and a total of \$58 million in penalties, fines, and redress. Individuals who have been sentenced this past twelve months include:

- **Robert Ferrara.** Sentenced last October to 125 months in prison for criminal contempt and ordered to pay over \$100,000 in restitution to the victims.
- **Dennis W. Vaughan.** Sentenced last August to 84 months in jail for criminal contempt of the final order in *FTC v. Parade of Toys*, conspiracy to commit wire fraud, and money laundering, and

ordered to pay over \$13 million to the victims of these criminal activities.

- **Robert Febre.** Sentenced last May to 14 months for criminal contempt of the final order in *FTC v. Robert Febre* for operating a new identity credit repair scam in direct violation of the order.

## B. Consumer Privacy

Consumer privacy is a key focus of the FTC's positive consumer protection agenda. As mentioned above, the FTC just launched its most far-reaching privacy initiative ever, the National Do Not Call Registry. (See Box 5.) The registry and other amendments to the Telemarketing Sales Rule will redefine the nature of telemarketing for both consumers and businesses. These amendments will protect consumers' privacy in their homes by putting

them in charge of the number of telemarketing calls they receive. The amendments also will give the agency new tools in the fight against fraudulent and deceptive telemarketing.

### 1. Law Enforcement

In the last year, the FTC continued its aggressive enforcement of existing laws to protect consumer privacy. Law enforcement actions ranged from a settlement with Microsoft addressing the privacy and security of its Passport single sign-on service, to cases attacking deceptive spam, to the largest civil penalties obtained in Children's Online Privacy cases.

**Personal Information.** In the past year, the FTC completed two matters involving the protection of personal information.

## From the White House

Box 5

*"The President commends the Federal Trade Commission for voting to create a national "Do Not Call" registry to allow consumers the option to stop unwanted telephone solicitations. Time with family is a precious commodity, and families should be given the tools they need to help prevent unwanted calls from telemarketers. Today's action by the FTC to approve the creation of a national "Do Not Call" registry will make it easier for consumers to stop getting the sales calls they do not want."*

White House Press Secretary, December 18, 2002

- **Microsoft.** In December 2002, the FTC finalized a consent agreement with Microsoft Corporation resolving charges about the privacy of personal information collected from consumers through its Passport web services. The complaint alleged that Microsoft misrepresented the security of consumers' personal information collected through the Passport services, the amount of information collected by the Passport system, and the control that the Kids Passport program provided parents over what information participating Web sites could collect from their children. The consent order bars any misrepresentation of information practices in connection with Passport and other similar services and requires Microsoft to implement a comprehensive information security program. Microsoft also must have its security program certified as meeting or exceeding the standards in the consent order by an independent professional every two years.
- **Eli Lilly.** In May 2002, the Commission accepted a final consent order resolving charges that Eli Lilly and Company unintentionally disclosed the e-mail addresses of users of its Prozac.com and Lilly.com Web sites by failing to take appropriate steps to protect the confidentiality and security of that information. The consent order requires Lilly to establish a security program to protect consumers' personal information against reasonably anticipated threats to its security, confidentiality, or integrity.

**Spam.** The FTC has brought 47 law enforcement actions targeting deceptive spam, half of them since February 2002. The following matters indicate the range of the Commission's spam-related enforcement measures. In *BTV Industries*, the FTC took action against a promoter of spam that claimed consumers had won a free Sony PlayStation 2 but "hijacked" them when they responded to an adult Internet site via a 900-number modem connection that charged up to \$3.99 a minute. Other spam cases challenge senders of spam for deceptively collecting sensitive financial information. In *Global*

*Mortgage Funding*, the FTC alleged that the defendants used the logos of well-known financial institutions (Radian Bank, Prudential, Fannie Mae) to induce victims to disclose sensitive financial information, such as income, mortgage balances, rates, and type. This was the first spam case challenging e-mail "spoofing" (forging the "from" or "reply-to" lines in email to disguise the email's origin), deceptive "remove me" promises, and alleged pretexting in violation of the Gramm-Leach-Bliley Act. In *30 Minute Mortgage Inc.*, the FTC alleged similar deceptive practices. Because the company represented itself as a national mortgage broker, the FTC also alleged another first – that the company had violated the Gramm-Leach-Bliley Privacy Rule.

**Children's Privacy.** Since April 2001, the FTC has brought eight cases to enforce the Children's Online Privacy Rule, which requires Web sites to obtain parental consent before collecting, using, or disclosing personal information from children under 13. The companies under order agreed to pay civil penalties totaling \$360,000. Most recently, Mrs. Fields Cookies and Hershey Foods Corporation agreed to settle charges that their Web sites violated the COPPA Rule by collecting personal information from children without first obtaining parental consent. Mrs. Fields will pay civil penalties of \$100,000, and Hershey Foods will pay civil penalties of \$85,000. The separate settlements, announced in February 2003, bar the companies from violating the Rule in the future and represent the biggest COPPA penalties awarded to date.

**Students' Privacy.** Since October 2002, the FTC has announced settlements with three companies that allegedly collected extensive personal information from millions of high school students and then sold that information to commercial marketers, despite promising that the information would be shared only with colleges, universities, and other education-related service providers. The consent agreements bar these companies from using student information for non-education-related marketing purposes and prohibit any further deceptive statements. Moreover, the

consent agreements will require these companies to disclose how the information will be used if they wish to employ it for non-education-related marketing purposes.

### **Credit Reporting and Debt Collection**

**Practices.** The FTC brought two important privacy-related credit cases last year. In *D.C. Credit Services*, the company and its co-owner, David Cohen, agreed to pay a \$300,000 civil penalty as part of a settlement of charges that they violated the Fair Credit Reporting Act (FCRA) and the Fair Debt Collection Practices Act (FDCPA). The consent decree permanently bans defendant David Cohen from engaging in debt collection activity. In *Quicken Loans*, the FTC acted against a Michigan mortgage lender for allegedly failing to comply with FCRA provisions that require credit grantors who take adverse action to notify the consumer when the action is based wholly or partly on the consumer's credit report. The proposed consent agreement would require Quicken to provide consumers with the adverse action notices, as required by FCRA.

## **2. Rulemaking**

Congress has directed the FTC to issue rules to implement a number of statutes that are critical to protecting the privacy of consumers. In the past year, the FTC exercised this authority in two particularly noteworthy instances.

**Telemarketing Sales Rule.** In addition to creating the National Do Not Call Registry, the Commission adopted other significant changes to the TSR that give consumers added protection against deceptive telemarketing and unwanted intrusions. The Rule requires telemarketers to transmit information to consumers' caller ID systems to increase accountability in telemarketing and assist in law enforcement. It also will greatly reduce abandoned calls that result in dead air. This change will help alleviate the obvious concerns that arise when a consumer picks up the phone and no one is there. The TSR now will apply to for-profit telemarketers who solicit contributions for charitable organizations. These telemarketers will have to

disclose promptly the identity of the charity for which they are calling and also state that they are soliciting a contribution, providing consumers with the information they need to determine whether to continue with the call.

**Gramm-Leach-Bliley Safeguards Rule.** In August 2002, the FTC finalized the Safeguards Rule to implement the GLB's security provisions and establish standards for financial institutions to maintain the security of customers' financial information. In October, the FTC issued a new publication, *Financial Institutions and Customer Data: Complying with the Safeguards Rule*, to help businesses understand and comply with the Rule.

## **Chapter 3 Special Policy Instruments for Assisting and Complementing Law Enforcement**

Congress has given the FTC a distinctive mix of litigation and non-litigation policy instruments to exercise its competition and consumer protection responsibilities. Consequently, the Commission performs numerous roles in addition to its law enforcement activities. (See Figure 4.) In the past year, the FTC has been especially active in holding hearings and workshops to study specific sectors, issuing reports of its findings, and providing advocacy comments on competition issues. The agency's consumer protection work has featured many business and consumer education projects.

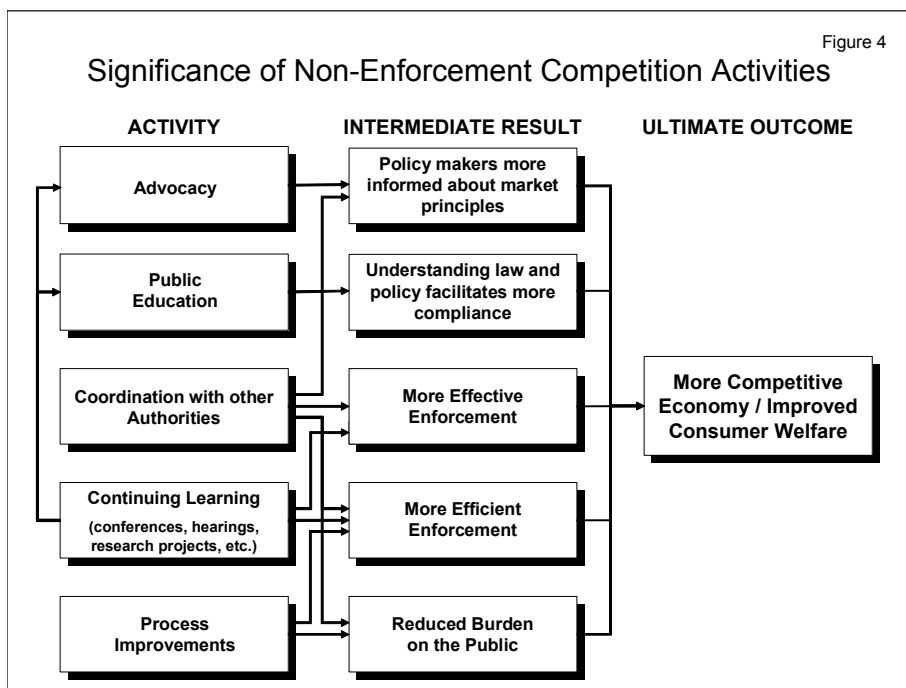
### **A. Competition Policy**

#### **1. Hearings, Workshops, Studies, and Reports**

Although the Commission has a rich tradition of performing research and preparing studies, the past decade has witnessed a true renaissance of the FTC's role in building the foundation of knowledge that supports the formulation of competition policy. The past year has continued and extended recent efforts along these lines.



- Health Care.** Last September, the FTC held a workshop on competition law and policy in health care, featuring presentations by academics, providers, insurers, employers, patient groups, and representatives of the FTC, DOJ, and state attorneys general. The workshop, featuring five panels and more than a dozen speakers, focused on clinical integration, payor/provider issues, group purchasing organizations, generics and branded pharmaceuticals, and direct-to-consumer advertising of pharmaceuticals. Participants presented a broad range of views to the several hundred attendees. The workshop made clear there is a range of views on the role of enforcement agencies in improving the delivery of health care services. The workshop demonstrated the value of more extensive examination of these complex and interdependent issues, and the FTC and DOJ have undertaken an extended set of health care hearings. The hearings, which began in February and will run through the fall of 2003, will examine the state of the health care marketplace and the role of antitrust and consumer protection in satisfying the preferences of Americans for high-quality, cost-effective health care.
- Intellectual Property.** In November 2002, the FTC and DOJ concluded 24 days of hearings over nine months on *Competition and Intellectual Property Law and Policy in the Knowledge-Based Economy*. The hearings responded to the growth of the knowledge-based economy, the increasing role of dynamic, innovation-based considerations in antitrust policy, and the importance of managing the intersection of intellectual property and competition law to realize their common goal of promoting innovation. Later this year, the FTC and DOJ will issue a report that incorporates the insights of business persons, consumer advocates, inventors, practitioners, and academics who participated in the hearings, as well as other research.
- E-Commerce.** The Internet boom, heralded as the next industrial revolution, has great potential as an engine for commerce and offers consumers enormous freedom. Contrary to the perception of the Internet as an almost unfettered free market, the extension of new or existing state regulations to the Internet may limit cost savings and convenience severely without providing offsetting benefits. The FTC's Internet Task Force has been analyzing state regulations that may have pro-consumer or pro-competition rationales, but that nevertheless may restrict the entry of new Internet competitors. It also is examining barriers that arise when private parties employ potentially anticompetitive tactics, such as when suppliers or dealers apply collective pressure to limit online sales. This work has resulted in several investigations into possible anticompetitive curbs on e-commerce, and the Task Force has taken the lead in drafting FTC staff comments on several state regulations that affect electronic commerce. In October, the FTC hosted a three-day public workshop examining potential barriers to e-commerce in ten different industries.



- **Prescription Drugs.** In July 2002, the FTC released a report, *Generic Drug Entry Prior to Patent Expiration*, focusing on certain aspects of generic drug competition under the Hatch-Waxman Amendments. The study examined whether drug firm conduct that the FTC has challenged in several enforcement actions represents a typical pattern of behavior or only a few isolated instances. The study also examined more broadly how the process that Hatch-Waxman established to permit generic entry before the expiration of a brand-name drug product's patents has worked between 1992 and 2000. The report suggested certain changes to Hatch-Waxman's attempt to balance competition and intellectual property law, including permitting only one automatic 30-day stay per drug product for each Abbreviated New Drug Application (ANDA) to resolve infringement disputes over patents listed in the Orange Book prior to the filing date of the generic applicant's ANDA. President Bush cited the FTC report last October when he announced regulatory measures to foster competition in the pharmaceutical industry. (See Box 6.)
- **Energy.** The FTC is pursuing a number of projects involving the petroleum industry. First, in light of increased public concern about the level and volatility of gasoline prices, the agency is studying the main factors that may affect the level and volatility of prices of refined petroleum products and soon will publish findings from two public conferences. Second, a major revision of the 1982 and 1989 FTC Bureau of Economics staff reports on oil mergers is underway, as is an empirical study of the effects of various oil mergers of the past decade. Third, the agency continues to monitor wholesale and retail prices of gasoline, by far, the largest single refinery product. The Bureau of Economics staff inspects wholesale gasoline prices for 20 cities and retail gasoline prices for 360 cities across the country and seeks explanations of any pricing anomalies.

Box 6

## FTC Generic Drug Study Has Prominent Role

"For more than a year, the Federal Trade Commission has investigated delays and abuses in the process of bringing generic drugs to the market. I have reviewed the FTC findings and I am taking immediate action to ensure that lower cost, effective generic drugs become available to Americans without any improper delays.

By this action, we will reduce the cost of prescription drugs in America by billions of dollars and ease a financial burden for many citizens, especially our seniors ..."

– Remarks by President George W. Bush in the White House Rose Garden, Monday, October 21, 2002

### 2. Advocacy

When the FTC cannot use its enforcement authority to challenge competitive restraints, it seeks to persuade policymakers of the benefits of competition. Major advocacy efforts include:

- **Professions.** In many licensed professions, regulatory bodies and groups of practitioners regularly attempt to restrict advertising and prevent competition from those outside the profession. These restrictions often result in higher prices, less information, and fewer choices for consumers. The FTC and DOJ recently submitted a joint letter to the American Bar Association urging it to narrow substantially or reject a proposed model definition of the practice of law, which likely would reduce or eliminate competition from non-lawyers in providing certain services. Previously, the FTC submitted a joint letter with the Antitrust Division urging the North Carolina State Bar to approve a proposed opinion that explicitly would permit non-lawyers to compete in real estate and mortgage closing services, and in January, the North Carolina State Bar adopted an opinion permitting non-lawyers to obtain signatures on closing documents and receive and disburse funds for real estate transactions. The FTC and DOJ also recently

provided comments to the Georgia State Bar Association addressing concerns similar to those raised in the North Carolina proceeding. Other advocacy work involving professions during the past year included comments to the Alabama Supreme Court urging care in fashioning attorney advertising rules only to prevent unfair or deceptive acts or practices and an amicus brief in a private case seeking to overturn an Oklahoma law that permits only funeral directors to sell caskets.

- **Energy.** The FTC undertook three noteworthy advocacy initiatives involving energy. First, the Commission authorized its staff to provide comments to the Environmental Protection Agency in connection with its study of the impact of different environmental regulations on product distribution and, ultimately, on supply and price of products in various markets. Second, at the invitation of state officials, the FTC staff submitted comments on Hawaii's law establishing gasoline price controls and on proposed New York legislation that would have prohibited "below cost" gasoline pricing and would have banned construction of new company-operated gas stations within a certain distance of existing stations operated by franchised dealers. Third, the FTC staff addressed competition issues raised by the deregulation of electricity in four separate comments filed with the Federal Energy Regulatory Commission.
- **Connecticut Board of Examiners for Opticians.** In March 2002, the FTC filed a staff comment before the Connecticut Board of Examiners for Opticians, which currently is considering whether to require stand-alone sellers of replacement contacts to obtain Connecticut optician and optical establishment licenses. Working with the Connecticut Attorney General's Office, the FTC staff comment argued that such a requirement "would likely increase consumer costs while producing no offsetting health benefits," and that such a requirement in fact "could harm public health by raising the cost

of replacement contact lenses, inducing consumers to replace the lenses less frequently than doctors recommend." In June 2002, the FTC staff testified before the Board to discuss its comment.

### **3. Competition Policy "Research and Development"**

As the Supreme Court noted in the 1997 *Khan* case, Congress intended the antitrust laws to be evolutionary, "adapting to changed circumstances and the lessons of accumulated experience." The rapid changes in many markets require competition policymakers to conduct competition policy "research and development" to analyze these trends and derive new competitive strategies. Many activities described above, such as the generic drug study, are important examples of the FTC's investment in competition policy R&D. These initiatives are part of a larger set of R&D projects the FTC has undertaken to inform its decision making on antitrust issues. For example, to assess the efficacy of merger enforcement, the FTC is analyzing the effects of past enforcement actions, including non-enforcement decisions, and industry and firm-specific conditions relating to the potential for both procompetitive and anticompetitive effects.

In December, the Bureau of Economics held a Roundtable discussion assembling experts on mergers from economics departments, business schools, M&A consulting firms, antitrust law, and business. The goals included a better understanding of the M&A process in its entirety and obtaining a broader perspective on factors that make mergers succeed or fail. BE economists also published papers on topics such as the use of econometric evidence in merger investigations and the development of various policy issues under the Merger Guidelines.

## **B. Consumer Protection**

### **1. Workshops and Reports**

In addition to using electronic databases and Web sites to track consumer fraud, the FTC holds hearings and workshops to study marketplace developments and to learn from the experiences of

consumers, business persons, representatives from other government agencies, academics, and a host of other experts in various fields. The agency also conducts numerous studies of marketplace issues affecting consumers and publishes its findings in reports.

- Weight-Loss Advertising Report and Workshop.** Last September, the FTC released its staff report, *Weight-Loss Advertising: An Analysis of Current Trends*, which analyzed 300 weight-loss ads that ran in 2001. The report concluded that the use of false or misleading claims is rampant in weight-loss product advertising. To prepare the report, the FTC worked with the Partnership for Healthy Weight Management, a coalition of representatives from science, academia, the health care profession, government, commercial enterprises, and other organizations whose mission is to promote sound guidance for achieving and maintaining a healthy weight. To follow up, the FTC held a workshop in November 2002 in which participants – scientific and medical experts, industry members, and representatives of media organizations and outlets – discussed the current science of weight loss, deceptive weight-loss advertising, and possible ways for the media to screen weight-loss ads more effectively. (See Box 7.)
- Cross-Border Fraud Workshop.** In February 2003, the FTC held a public workshop on *Public/Private Partnerships to Combat Cross-Border Fraud*. Participants from Australia, Canada, Germany, the United Kingdom, the Organization for Economic Cooperation and Development (OECD), and the International Consumer Protection and Enforcement Network (ICPEN) joined American law enforcement officials, business representatives, and consumer advocates to discuss how the private and public sectors can cooperate to choke the growth of cross-border fraud. The workshop generated several proposals for the private and public sectors to work together to identify, stop, and bring effective enforcement actions against

Box 7

## The Need for a Broad-Based Approach

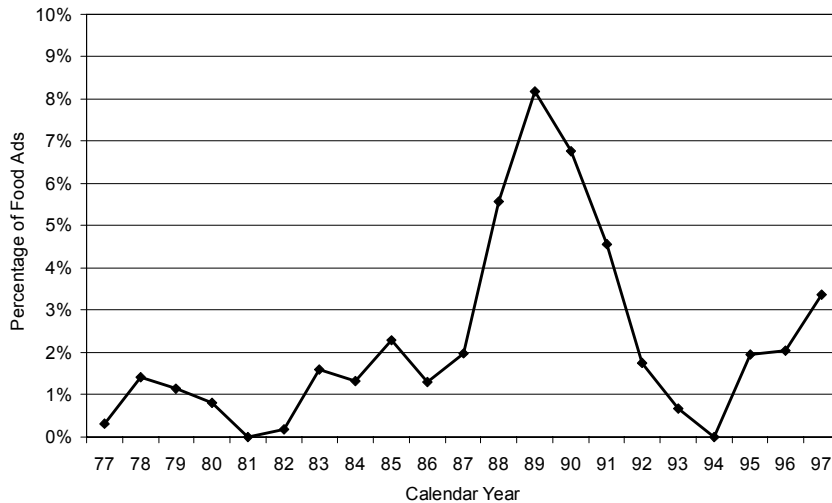
The FTC is continuing to discuss diet-ad issues with media representatives, and others, and plans to release another staff report and guidance to assist publishers and advertisers in avoiding false weight loss claims. Commissioner Sheila Anthony has been a leader on this issue, and has actively encouraged the media to screen deceptive weight loss ads. In an opinion piece in *Advertising Age*, Commissioner Anthony commented that the Commission cannot solve this problem alone and made clear that the industry and the media have a significant role to play. Sheila Anthony, "Let's clean up the diet-ad mess," *Advertising Age*, Feb. 3, 2003, at 18.

cross-border fraud operators and produced ideas for other measures that the private sector can take to help FTC combat cross-border fraud.

- Advertising Nutrition & Health: Evidence from Food Advertising 1977-1997.** The Bureau of Economics staff produced a report that reviews data on the types of nutrition and health claims made in over 11,000 advertisements taken from a sample of eight leading magazines between 1977 and 1997. The study documents an increased focus on diet and health advertising in the late 1980s and reviews how nutrition-related claims in advertising changed before and after the passage of the Nutrition, Labeling and Education Act of 1990 (NLEA). The results for heart disease and serum cholesterol claims are illustrative. At their peak in 1989, heart disease and serum cholesterol claims were made in 8.2 percent of advertisements, before dropping substantially in the early 1990s following the NLEA's passage. By 1997, heart disease and serum cholesterol claims had again risen somewhat, but still well below one-half of 1989 levels. (See Figure 5.) Together with other research on consumer food choices, this study should contribute to more informed policy choices on advertising and labeling policy.

Figure 5

## Heart and Serum Cholesterol Ad Claims in Food Advertising



- Information Security Workshop.** In May 2002, the FTC held a two-day workshop to explore the myriad issues raised by information security. The workshop discussion highlighted one very important and timely point: that good information security is everyone's responsibility – government, industry, and individual consumers. Workshop participants emphasized the importance of the FTC playing its traditional role to educate consumers and businesses and help create a "culture of security."
- Marketing Violent Entertainment to Children.** In June 2002, the FTC released its third follow-up report to its September 2000 report, *Marketing Violent Entertainment to Children: A Review of Self-Regulation and Industry Practices in the Motion Picture, Music Recording & Electronic Game Industries*. The June report found that the movie and electronic game industries were routinely including rating information in advertising, and that the music industry was now including a parental advisory in many of its ads. The review of advertising placements showed that, unlike the movie and electronic games industries, the music industry had not substantially altered its marketing practices since

the first FTC report. The Commission plans to release a fourth follow-up report.

- Mortgage Roundtable.** Last October, the Bureau of Economics hosted a research roundtable, *Economic Perspectives on the Home Mortgage Market*, with some of the nation's leading consumer mortgage experts. Discussion focused on the likely sources of problems in this market, the strength of the empirical support for key theories, and various regulatory and enforcement options for improving market performance.

## 2. Advocacy

Advocacy also was an important part of the FTC's consumer protection mission during 2002. The agency lends its expertise to other government agencies and intervenes in court proceedings when important issues affecting consumers are at stake.

**Class Actions.** Since January 2002, the FTC has intervened or appeared as an amicus curiae in three private class actions where the agency concluded that a proposed settlement was flawed – for example, when consumers would receive relief of little or no value or when class counsel would receive unreasonable fees. In *Erikson v. Ameritech*, the FTC, several state attorneys general, and other objecting parties convinced the judge to reject a settlement that would have provided relief of little or no value to consumers (and potentially harmful to many consumers) but would have provided class counsel with fees of about \$1 million. In *Carter v. ICR Services*, the FTC succeeded in getting the court to improve the claims process, but the court affirmed the attorneys' fees over the agency's objection. In *First Databank Antitrust Litigation*, which followed an existing FTC enforcement action, the court cut class counsel's fee in half in response to the agency's brief.

### **FDA Regulation and the First Amendment.**

Complementing the agency's own efforts to ensure that consumers have access to truthful information, the FTC staff responded to the Food and Drug Administration's request for comment on whether its regulations and practices continue to comply with the First Amendment in light of recent judicial decisions. The comment sets out the FTC's enforcement approach as a model that reflects the principles embodied in the First Amendment's commercial speech doctrine. The comment also discussed empirical research findings, which suggested that enforcement approaches that seek to maximize the free flow of truthful commercial speech promote consumer welfare as well as survive constitutional challenge.

**FDA Trans Fat Labeling.** The FTC staff continued efforts to ensure that consumers get accurate and useful health information by filing a comment on the FDA's proposed rule to govern trans fatty acid (trans fat) information in food labeling. In 2000, the FDA proposed to amend the Nutrition Facts panel on food labels to include trans fat information, and the FTC staff comment supported that change, noting that truthful information is an important factor for consumers seeking preventive health care. In 2002, the FDA reopened the comment period to allow feedback on a new proposal to require an asterisk on the label information on trans fat directing consumers to a footnote on the Nutrition Facts panel saying "Intake of trans fat should be as low as possible." The FTC staff comment again supported the FDA's efforts to allow more truthful information about fats in food labeling but also expressed concern that the footnote may suggest to consumers that there is a significant qualitative difference between saturated fats and trans fats, a suggestion that appears inconsistent with current dietary advice. Accordingly, the staff recommended that FDA conduct consumer research on the proposed footnote.

**HUD Mortgage Disclosure Rules.** In October 2002, the FTC staff filed a comment on a proposed rule of the Department of Housing and Urban

Development (HUD) to simplify the process of obtaining home mortgages and reduce settlement costs for consumers. The comment noted that HUD's general approach in these proposed changes is to require brokers and lenders to give consumers more information about the mortgage process or to provide information in a revised format. The FTC staff urged HUD to consider carefully whether the information disclosed would be useful to consumers and whether it would be disclosed in an easily understood way.

### **3. Consumer and Business Education and Outreach**

Consumer and business education continued to be a significant part of the FTC's positive agenda. Through publications, Web sites, media outreach, partnerships, and exhibits, the agency reached millions of consumers and business people. From April 2002 through February 2003, the FTC distributed more than 6.2 million publications in English and more than 126,000 in Spanish. The FTC logged more than 11.8 million accesses to the English-language publications on its Web sites and more than 207,000 accesses to the Spanish-language publications on its sites. The FTC distributed articles that were featured in literally thousands of community newspapers and reached more than 236 million readers in fiscal year 2002. The national media featured stories about consumer fraud and identity theft on a daily basis, citing the FTC's plain language, practical tips, as well as its Helpline numbers (1-877-FTC-HELP and 1-877-ID-THEFT) and Web site addresses.

Highlights of the past year include:

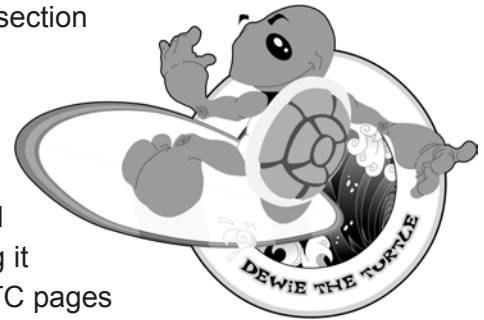
**Identity Theft.** Continuing a program initiated in March 2002, the FTC, the U.S. Secret Service, and DOJ conducted a series of training seminars for local and state law enforcement officers. To date, the FTC and its partners have conducted six regional training sessions for more than 600 law enforcement officers. The FTC also has conducted outreach to the business community on identity theft. In April 2002, the FTC held a roundtable discussion with representatives from universities, health care

providers, creditors, and banks to discuss the steps they could take to reduce the likelihood of ID theft in their institutions, and steps that can be taken following a compromise of personally identifying information to mitigate the victim's loss and inconvenience. The second phase of this effort will include a forthcoming business guide on ID theft. To date, the FTC has distributed more than 1,665 CDs of the booklet *Identity Theft: When Bad Things Happen to Your Good Name* to public and private sector organizations. The agency produced a video news release on ID Theft, which was broadcast more than 113 times on 60 stations, representing an audience of more than 5.3 million; updated the ID Theft and Military Sentinel Web sites to provide customized information to 530,000 TriWest customers whose personal information was stolen in December 2002; and co-produced *Identity Theft: Reduce Your Risk* with American Express. (See also Figure 6.)

**Information Security.** In September 2002, the Commission launched a consumer and business education initiative for information security, featuring Dewie, the e-turtle, and the FTC's consumer and business publications (in English and Spanish) on security, e-commerce, spam, online privacy, children's online privacy, and identity theft. A

dedicated Web site, [www.ftc.gov/infosecurity](http://www.ftc.gov/infosecurity), links to FTC press releases on security and other security-related Web sites, and includes a section for children.

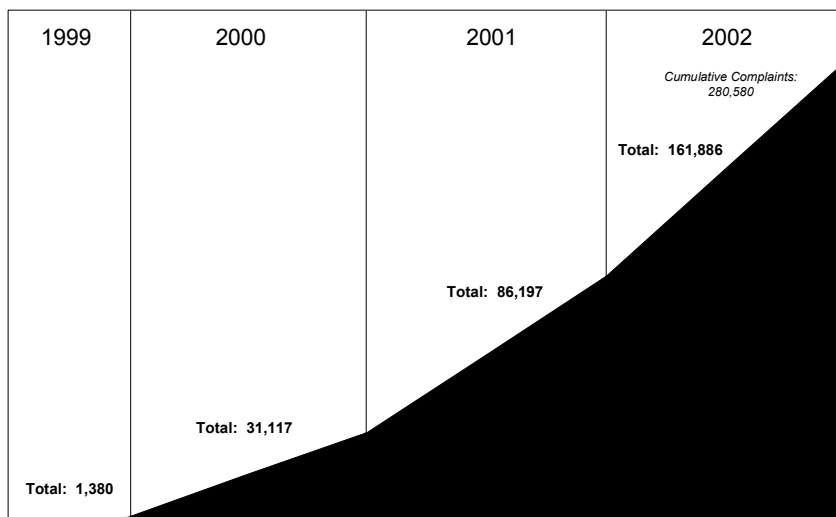
The site has registered 100,000 hits through the end of 2002, placing it in the top 15 FTC pages visited.



**Green Lights & Red Flags: FTC Rules of the Road for Advertisers.** Offering businesses practical guidance on FTC policies is an important priority. One key initiative, begun in 2001, is on federal truth-in-advertising standards. The agency has sponsored seminars in the San Francisco area, Cleveland, New York, and Chicago. Additional seminars have been conducted in New York, in conjunction with the Better Business Bureau of Metropolitan New York and the Association of the Bar of the City of New York, and in Chicago, in cooperation with the Electronic Retailing Association, the Promotion Marketing Association, and the Better Business Bureau of Chicago and Northern Illinois.

**National Consumer Protection Week.** This year, the FTC coordinated the fifth annual event, this year on the theme of information security, with a consortium of public and private-sector organizations. (See Box 8.) A dedicated Web site allowed consumers and businesses to access an Outreach Toolkit (ready-made press releases, public service messages, a letter to the editor, full-color Dewie poster, and banner ads and buttons.) The site logged more than 14,000 accesses at the end of NCPW, making it among the most popular sites on [www.consumer.gov](http://www.consumer.gov) that month.

Figure 6  
Complaints Entered Into the Identity Theft Data Clearinghouse



## A Culture of Security

Box 8

A major forum for the development of government policy concerning information security is Organization for Economic Cooperation and Development. In December 2001, Commissioner Orson Swindle became head of the U.S. delegation to the OECD Experts Group for Review of the 1992 OECD Guidelines for the Security of Information Systems. This Expert Group drafted and negotiated a revised set of OECD Security Guidelines in a matter of months, and the OECD issued the revised guidelines in July 2002. Commissioner Swindle also has addressed privacy and security issues at the OECD in Paris, the Global Business Dialogue on Electronic Commerce in Brussels, and the International Conference of Data Protection Commissioners in Cardiff. He also delivered a keynote address at the OECD-APEC Forum on the Digital Economy in Honolulu held in January 2003.

**Spam Harvest.** The FTC released a new publication to educate consumers and businesses on how e-mail addresses are harvested and how to reduce the amount of spam received.

**Gramm-Leach-Bliley.** The FTC released four publications for businesses to help them understand and comply with their obligations under Gramm-Leach-Bliley: *How to Comply with the Privacy of Consumer Financial Information Rule of the Gramm-Leach-Bliley Act; In Brief: The Financial Privacy Requirements of the Gramm-Leach-Bliley Act; Financial Institutions and Customer Data: Complying with the Safeguards Rule; Getting Noticed: Writing Effective Financial Privacy Notices.*

**COPPA.** To assist the operators of children's Web sites in drafting COPPA-compliant privacy policies, the FTC issued a new publication, *You, Your Privacy Policy and COPPA*, in April 2002. The agency also announced the results of an April 2001 COPPA compliance survey reviewing information collection practices on 144 children's Web sites. The 2001 survey follows up on an earlier 1998 survey and indicates that much progress has been made since the COPPA Rule has gone into effect.

**Hispanic Outreach.** Last October, the FTC posted a Consumer Complaint form in Spanish on its Web site, which already has yielded more than 2,000 complaints from Spanish-speaking consumers, and translated some 42 publications so far. The FTC also is managing an aggressive media outreach campaign that has resulted in staff interviews in major national dailies, major market dailies, and magazines, national radio and television, and local TV and radio stations.

**Do Not Call/Telemarketing Sales Rule.** The FTC created a new website at [www.ftc.gov/donotcall](http://www.ftc.gov/donotcall), which logged a record 127,689 hits in December (over 71,000 in its first day), and created several brochures for consumers and businesses about the provisions of the amended Rule.

**Cross-Border Fraud.** The FTC created a micro Web site – [www.ftc.gov/crossborder](http://www.ftc.gov/crossborder) – featuring information on the recent workshop that dealt with public/private partnerships to fight cross-border fraud.

**Alaska Native Art.** The FTC has published and distributed over 120,000 copies of a brochure, *Alaskan Native Art*, in cooperation with the Alaska State Council on the Arts, U.S. Department of Interior's Indian Arts and Crafts Board, and the Alaska Attorney General's Office to help consumers identify genuine Alaskan native art. The FTC also produced and distributed over 100,000 informational postcards featuring Alaskan Native art and consumer tips.

## Chapter 4 International Activities

The FTC has become increasingly involved with international activities. Since 1990, the international focus has expanded with participation in a growing number of bilateral and multinational cooperation initiatives and with efforts – which continue today – to assist new democracies in developing competition and consumer protection agencies in new market-



based economies. The growth of communications media and electronic commerce present new challenges – fraud and deception now know no borders. The FTC works more and more with other nations to protect American consumers who can be harmed by both anticompetitive conduct and frauds that are perpetrated beyond the water's edge.

## **A. Competition**

### **1. Cooperation in Enforcement and Policy Development**

Cooperation with competition agencies of other jurisdictions is a key component of an effective enforcement program. The FTC has broadened and deepened its cooperation with agencies around the world on individual cases and on policy issues. The FTC's relationships with counterparts in Brussels, Ottawa, and other capitals remain active as the agencies' staffs continue to work closely on investigations of mutual interest. For example:

- **Bayer/Aventis CropScience.** As noted above, the FTC, aided by the parties' confidentiality waivers, worked with the staffs of the European Commission (EC) and Canadian Competition Bureau to analyze the likely effects of the merger on a number of crop protection markets and to effect remedies tailored to the concerns in each jurisdiction to avoid subjecting the parties to conflicting demands.
- **P & O Princess Cruises.** In the cruise line cases, the FTC worked closely with the EC on Carnival's bid for P&O Princess lines and simultaneously with the United Kingdom's Office of Fair Trading and Competition Commission regarding Royal Caribbean's competing bid. Officials from these agencies later met to analyze the handling of the cases with a view toward further improving coordination.

The EC and the U.S. agencies also are generally working to streamline cooperation in merger cases. The agencies published merger process best practices to institutionalize and make more transparent the means by which the agencies, along

with the parties, can review more efficiently the merger cases subject to review on both sides of the Atlantic.

So long as policy differences remain, there is potential for conflicting outcomes in cases reviewed by two or more jurisdictions. Given differences in laws, cultures, and priorities, it is unrealistic to expect complete convergence in the foreseeable future. However, areas of agreement far exceed those of divergence, and instances in which differences result in conflicting outcomes are likely to remain rare. The FTC and DOJ and their bilateral partners remain committed to addressing and minimizing policy divergences. The U.S. agencies and the EC, for example, have established several working groups that have contributed to a greater understanding and convergence in areas including competitive effects in conglomerate mergers, efficiencies, and remedies. Similarly, the U.S. agencies are working with the Canadian Competition Bureau on a number of policy and procedure initiatives.

### **2. Multilateral Competition Cooperation**

The FTC participates actively in various multilateral competition fora that further international cooperation and convergence.

- **ICN.** The International Competition Network (ICN) provides a venue for antitrust officials worldwide to achieve consensus on proposals for procedural and substantive convergence on best practices in antitrust enforcement and policy. The FTC and DOJ were among the 16 agencies that founded the ICN in 2001; its membership since has grown to 77 agencies from 67 jurisdictions. (See Figure 7.) In September 2002, the ICN hosted its inaugural annual conference to showcase its work on multi-jurisdictional merger control and the role of competition advocacy. Based on recommendations of the Merger Working Group's Subgroup on Notification and Procedures, which the FTC chairs, the members adopted a set of guiding principles for merger notification and review and endorsed three detailed recommended practices on merger

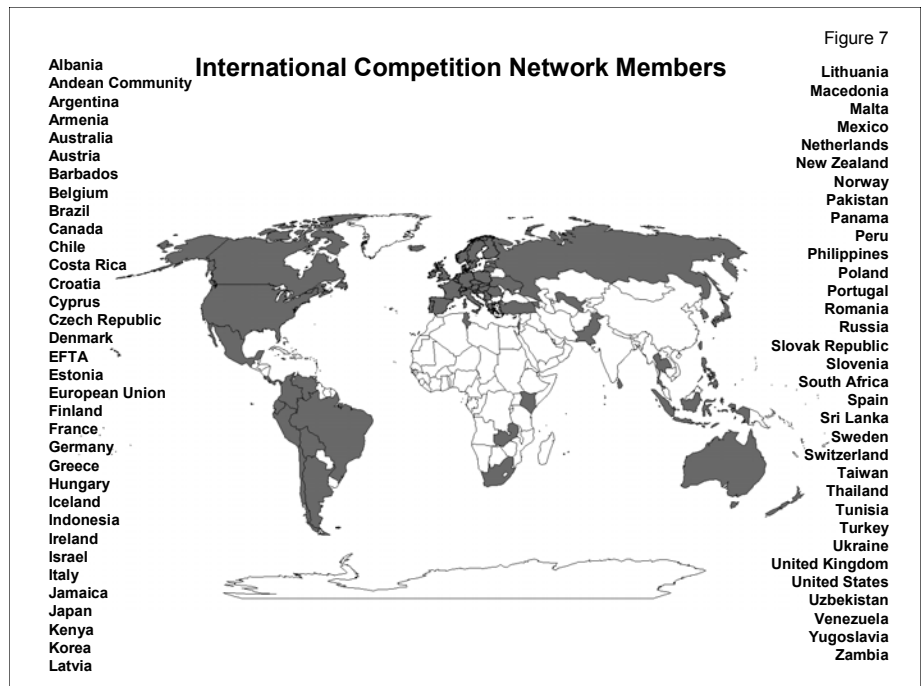
notification concerning jurisdictional nexus, clear and objective notification thresholds, and notification timing.

In November 2002, the U.S. antitrust agencies hosted a two-day ICN conference on merger investigative techniques. In preparation for the ICN's June 2003 annual conference, the Merger Working Group is preparing new recommended practices on the timing of review, initial information requirements, transparency, and periodic review of the merger regime, a paper and template on merger guidelines, and a manual on recommended practices in investigative techniques. The Competition Advocacy Working group is developing an online information and resource center, preparing a compilation of advocacy provisions, conducting sectoral studies of advocacy, and assembling a "tool kit" of competition advocacy mechanisms. The new working group on Capacity Building and Competition Policy Implementation is preparing a report on the challenges developing countries face in implementing competition policies and establishing credible enforcement agencies.

- **OECD.** The OECD is an important forum for competition officials from developed countries to share experiences and promote best practices. During the past year, the FTC has participated actively in the OECD's continuing work on, *inter alia*, merger process convergence, regulatory reform, and examining the issues at the trade and competition intersection.

### 3. Trade/Competition Fora

Trade agreements increasingly involve competition issues. In the World Trade Organization (WTO), the FTC and DOJ participate in the Working Group on the Interaction between Trade and Competition Policy, which is examining the issues



specified in the Doha Ministerial Declaration relating to the possible negotiation of a competition chapter to the WTO Agreement. The FTC, along with DOJ, has been working with the other nations in the Western Hemisphere to develop competition provisions for a Free Trade Agreement of the Americas. The U.S. antitrust agencies have completed negotiating competition chapters of proposed bilateral Free Trade Agreements with Chile and Singapore.

## B. Consumer Protection

### 1. Cross-Border Fraud

The globalization of the marketplace poses new and difficult challenges for consumer protection law enforcement. Developments in trade and technology have created unprecedented access to new products, information, and markets, providing consumers and businesses with considerable benefits. But fraud operators also have exploited these developments to deceive large numbers of consumers in numerous jurisdictions. Pyramid and lottery schemes, travel and credit-related ploys, and high-tech scams, such as modem and page hijacking, are examples of the types of frauds perpetrated across national borders that victimize consumers, harm legitimate businesses, and reduce consumer confidence in the global marketplace.

Consumer Sentinel statistics released by the FTC in February show total cross-border fraud complaints from U.S. consumers increased from 13,905 in 2001 to 24,213 in 2002. Total cross-border complaints have risen from 12 to 14 percent of all non-identity theft-related fraud complaints.

- **Five-Point Plan.** On October 31, 2002, Chairman Muris presented the FTC's Five-Point Plan for attacking cross-border fraud. Speaking before the Fordham Corporate Law Institute's 29<sup>th</sup> Annual Conference on International Antitrust Law and Policy in New York, Chairman Muris outlined that, under the Five-Point Plan, the FTC will:

1. advocate adoption of an OECD Recommendation on Cross-Border Fraud;
  2. seek legislative changes to improve the FTC's ability to fight cross-border fraud;
  3. hold a workshop on public/private sector cooperation to combat cross-border fraud;
  4. enter into new multilateral and bilateral agreements, and strengthen existing arrangements, to combat cross-border fraud through cooperation and coordinated enforcement activities; and
  5. provide targeted technical assistance to developing countries.
- Implementation of the Plan is underway.

- **Workshop on Public-Private Sector Cooperation to Combat Cross-Border Fraud.** As discussed above, in February 2003, the FTC held a workshop to explore *Public-Private Sector Cooperation to Combat Cross-Border Fraud*.

## 2. Other International Cooperation

Other cooperative activities of the FTC's consumer protection mission include:

- **econsumer.gov.** As mentioned above, the FTC continues to work with its international partners to develop the [econsumer.gov](http://econsumer.gov) project.

- **Bilateral Activities.** The FTC continues to strengthen its bilateral ties with consumer protection agencies in other countries. The FTC staff and the Competition Bureau of Industry Canada held a bilateral meeting at which the two organizations agreed on a work plan for future cooperation, a protocol for information-sharing, and a consumer education brochure. The FTC staff and the United Kingdom Office of Fair Trading and the United Kingdom Department of Trade and Industry held a bilateral meeting at which the agencies agreed on a work plan for future cooperation, a joint statement of principles for fighting cross-border fraud, and a protocol for information sharing.

- **Cross-Border Health Fraud.** The FTC participated in an international health claims surf day sponsored by ICPEN in spring 2002. The FTC's participation focused on Web sites specifically marketing products and therapies for arthritis, cancer, and HIV/AIDS, while other ICPEN surfing partners searched sites promoting weight loss and other products. The international surf identified over 1,400 questionable sites. Countries participating in the international surf included Australia, Austria, Belgium, Canada, Denmark, Ireland, Finland, France, Hungary, Japan, Korea, New Zealand, Norway, Poland, Portugal, Switzerland, Sweden, the United Kingdom, and the United States.

The FTC also has been active in the Mexico-U.S.-Canada Health (MUCH) health fraud task force, and has worked on developing an action plan to move forward in combating cross-border health care fraud in North America. One example of what cooperation on this front can produce is *FTC v. CSCT*. The FTC, in coordination with Canadian and Mexican officials, filed this case in February of 2003, charging a Canadian company offering treatments at clinics in Mexico with making false claims that it can treat cancer by using an electromagnetic device to kill cancer cells.

Box 9

## International Consumer Protection Cooperation

Recent years have featured the development of stronger international programs for cooperation on consumer protection issues. Commissioner Mozelle Thompson has played a highly active and visible role in representing the FTC in these international endeavors. Since March 2002, he has chaired the OECD's Committee on Consumer Policy. Under his leadership, the Committee has issued numerous documents on consumer protection issues, including a report on protections for payment card holders, a report on alternative dispute resolution for online consumer transactions, and an educational instrument for consumers considering the use of alternative dispute resolution. The Committee currently is drafting a Recommendation Concerning Guidelines on the Protection of Consumers From Fraudulent and Deceptive Commercial Practices Across Borders. Commissioner Thompson also heads the U.S. delegation to ICPEN.

### 3. Cross-Border Law Enforcement

The FTC has brought numerous enforcement actions over the past year in which it has received assistance from its counterparts abroad. For example, the FTC received substantial assistance from the Toronto Strategic Partnership, a group of U.S. and Canadian law enforcement partners, in *FTC v. STF Group* (credit-card loss protection); *FTC v. Pacific First Benefit* (advance-fee credit cards); and *FTC v. Efficient Telesales* (advance-fee credit cards). The FTC received substantial assistance from its British Columbia partners in *FTC v. D&C National Services* (lottery) and *FTC v. Royal Flush* (lottery); from the U.K. Office of Fair Trading in *FTC v. TLD Networks* (sale of bogus domain names) and *FTC v. BTV Industries* (prize scheme); and from numerous foreign consumer protection agencies in *FTC v. Skybiz International* (pyramid scheme). (See Box 9.)

### C. International Technical Assistance

For over a decade, the FTC has assisted transition economies that have made the commitment to market and commercial law reforms. With funding principally from the U.S. Agency for International Development (USAID), and in

partnership with DOJ, about 30 nations have received technical assistance with the development of their competition laws. In this past year, the technical assistance program was active in Asia, South and Central America, South Africa, and Southeastern Europe. The FTC began a new resident advisor program in Indonesia and, with DOJ, continued its resident advisor program in South Africa. The Commission's short-term programs have emphasized the development of investigative skills. These programs rely on a combination of resident advisors, regional workshops, and targeted short-term missions. The agency schedules these technical assistance activities to enable career FTC staff to share their expertise with their counterparts in the newer competition agencies of the world. In the past year, the FTC received funding to begin a new program of short-term assistance in North Africa and Eurasia and funding to continue ongoing programs in Southeastern Europe and the Andean Community.

To broaden international cooperation on consumer protection and ensure that no country becomes a haven for fraud, the FTC is conducting USAID-funded training missions in Eastern Europe. Last year, FTC staff conducted consumer protection training missions in Budapest, Hungary in April and in Ljubljana, Slovenia in November. These sessions trained more than 100 government officials from Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Estonia, Hungary, Latvia, Macedonia, Poland, Romania, the Slovak Republic, and Slovenia, covering such issues as basic consumer protections, consumer credit, advertising principles, advertisement interpretation, and advertising substantiation.

## **Conclusion**

# **Honoring the FTC's Past and Building Its Future**

Recent years have provided a number of occasions to reflect upon the Commission's rich history. In September 2001, the Commission celebrated the 25<sup>th</sup> anniversary of the enactment of the Hart-Scott-Rodino Antitrust Improvements Act of 1976. In 2001, the Commission inaugurated the Miles W. Kirkpatrick Award for distinguished service to the agency. Chairman Timothy Muris presented the inaugural Kirkpatrick Award to Basil Mezines in 2001 and bestowed the honor upon the second recipient, Robert Pitofsky, in 2002. Former FTC Chairman Caspar Weinberger assisted in the first presentation, and Ira Millstein, a prominent member

of the private bar, assisted in the second. Most recently, in February 2003, the FTC recognized the 100<sup>th</sup> anniversary of the creation of the Bureau of Corporations, which Congress incorporated into the FTC upon the passage of the FTC Act in 1914.

These events provide opportunities not only to honor the Commission's past but also to consider its future. Many of the measures summarized above demonstrate an awareness that future improvements in competition and consumer protection policy depend upon the agency's continuing investment in activities that strengthen the institution over the long term. The good case announced today typically is the result of efforts undertaken months or years before. The program described in this report seeks to make the best use of past investments and to ensure that future reports have equally impressive results to summarize.



