



# **Fulfilling the Original Vision: The FTC at 90**

**Federal Trade Commission  
April 2004**



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## Introduction

On September 26, 1914, President Woodrow Wilson signed the Federal Trade Commission Act. In its substantive mandate and unique array of adjudication, advocacy, investigation, and enforcement powers, the statute embodied the vision of Congress that the new agency would be a singularly effective means for serving consumer interests. In the weeks before the bill's enactment, Senator Albert Cummins, one of the legislation's chief sponsors, predicted that the Federal Trade Commission "will be found to be the most efficient protection to the people of the United States that Congress has ever given the people by way of a regulation of commerce."

This year marks the 90<sup>th</sup> anniversary of the legislation that gave life to the FTC and stirred hopes that the federal government would help consumers realize the benefits of a market economy. This milestone is an occasion to reflect on the agency's past work and to consider how it can best fulfill the vision that inspired its creation. This report reviews the latest chapter in the agency's work, covering its activities and accomplishments from April 2003 through March 2004. More than a mere list of cases, conferences, and studies, the report aims to explain the basis for the FTC's choice of initiatives and to describe the policies and priorities that motivate the use of its resources. Many activities are ongoing and constitute much of the agenda that the FTC will pursue in the coming years.

## A. Goals

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

Progress toward becoming the type of agency that Senator Cummins and his colleagues expected the FTC to be requires pursuing these overall objectives with an appreciation for and application of the distinctive institutional tools that Congress first gave the FTC in 1914 and supplemented in later legislation. Five principles guide the development of the agency's 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 anticompetitive 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. Highlights of Accomplishments**

During the past 12 months, the FTC applied its array of law enforcement and policy tools to address critical consumer concerns. Highlights of the agency's recent accomplishments include:

- **Bringing More Part 3 Cases.** Tackling a broad range of perceived competitive harms, the FTC has more competition cases in Part 3 administrative adjudication than at any time in recent history. As of late March 2004, the FTC had 11 cases at some stage of adjudication. Cases currently on the docket involve, among other issues, price fixing in physician services, collective rate setting in the household moving industry and the role of the State Action defense, alleged abuse of the standard-setting process and the *Noerr-Pennington* doctrine, and consummated mergers involving hospitals and high-tech markets. If fully litigated, the cases will yield detailed antitrust analyses through the

opinions of the Commission and the courts and provide guidance to businesses, the bar, and the public.

- **Launching “Do Not Call.”** At a Rose Garden ceremony on June 27, 2003, the President announced the opening of the FTC's National Do Not Call Registry. Within the first 72 hours of the Registry's operation, consumers had enrolled over ten million telephone numbers. By its effective date in October, the Registry contained over 53 million telephone numbers and now tops 58 million numbers. Although attacked in the courts, the Do Not Call Registry has withstood all legal challenges. A February 2004 Harris Poll® found the Registry to be “remarkably successful,” with over 90 percent of participating consumers reporting a reduction in telemarketing calls.
- **Balancing Competition and Patent Policy.** In October 2003, after extensive hearings, the agency released a report on the proper balance between competition and patent law and policy. Both competition in markets and patents for inventors can promote innovation, but each policy requires a proper balance with the other to achieve that goal. The report concluded that questionable patents are a significant competitive concern and can harm innovation. The report made ten recommendations for reducing the proportion of questionable patents that are issued and upheld.
- **Clarifying the State Action Doctrine.** After a two-year study, the FTC in September 2003 released a staff report on the reach

and applicability of the State Action doctrine, first articulated by the Supreme Court 60 years before. The report concluded that the doctrine has become unmoored from its original objectives and that overbroad interpretation has the potential to harm consumers by shielding major areas of commerce from the discipline of competition. The report makes detailed recommendations on clarifying application of this exemption to the antitrust laws. The agency also is pursuing enforcement matters to clarify the State Action defense. Recent matters include Part 3 proceedings against an intrastate mover association and the South Carolina Board of Dentistry.

- **Assessing the Horizontal Merger Guidelines.** To promote transparency in its decision-making processes and to assess the effectiveness of the Horizontal Merger Guidelines, the FTC, together with the Antitrust Division of the Department of Justice (DOJ), held a three-day workshop this past February. Before the workshop, the FTC released years of detailed merger data on proposed mergers, on both those that had been challenged by the agency and those that had not. Both efforts aim to promote a discussion among the agencies, the bar, the business community, and academia on existing merger policy and any need for clarification.
- **Surveying Consumers on Identity Theft.** Building upon the wealth of information obtained through databases of consumer complaints, the FTC this year undertook a comprehensive survey of consumers'

personal experiences with identity theft. The survey provided new data on the prevalence and types of identity theft in the marketplace, which will allow the agency to assess the effectiveness of its existing tools to identify and combat identity theft.

- **Employing A Broad-Based Approach Against Deceptive Health Claims.** Using a multi-pronged strategy, the FTC increased its attacks on deceptive health claims. The Commission brought 26 enforcement actions involving dietary supplements and other products – representing about \$1 billion in sales – that were alleged to be deceptively marketed for their purported ability to treat or cure a wide variety of health conditions. The agency also continued to work with the Food and Drug Administration through enforcement against deceptive dietary supplement marketing; advocating continued truthful advertising to consumers of prescription drugs; and suggesting changes to food labeling requirements to address concerns about obesity and to permit qualified health claims on food and dietary supplement products. Finally, the FTC challenged the media to help in the fight against deceptive weight-loss advertisements by publishing a guide showing the media how to identify and screen out bogus weight-loss claims.

The chapters below describe these and other accomplishments more fully. With only approximately 1,050 staff members, the FTC has reason to be proud of these extensive achievements. They are a tribute to the vision of the agency's five Commissioners and the hard work and dedication of the its talented staff.

## Chapter 1: Competition Law Enforcement and Guidance

The work of the FTC's competition mission is critical to protect and strengthen the free and open markets that are the cornerstone of a vibrant economy. Aggressive competition promotes lower prices, higher quality products and services, and greater innovation. The FTC has adopted a strategic framework to maximize the impact of its competition mission. Elements of that strategy include:

- Concentrate on segments of the economy that most affect consumers, such as health care and energy;
- Take full advantage of the FTC's uniquely broad set of powers and capabilities, including law enforcement, research and reporting, and advocacy;
- Seek appropriately comprehensive coverage of antitrust principles, such as by clarifying the boundaries of antitrust exemptions;
- Communicate FTC policies and enforcement standards to the public clearly to facilitate voluntary compliance; and
- Work with competition agencies throughout the world to improve the quality and consistency of multilateral enforcement efforts.

The competition mission continues to be highly productive. In the past 12 months, the Commission approved 36 antitrust enforcement actions, including 15 involving mergers and 21 involving anticompetitive conduct. The

Commission issued two administrative complaints and accepted six consent agreements in merger cases, and the parties abandoned an additional seven proposed mergers in light of the agency's antitrust concerns. Nonmerger enforcement included seven administrative complaints and 14 consent agreements. In addition, the Commission issued two adjudicative opinions. As described in Chapter 3, the agency's competition mission also pursued numerous non-enforcement initiatives, including conducting hearings, workshops, and research activities; issuing reports; submitting comments that urged other government entities to adopt competition-based policies; filing amicus briefs in significant private antitrust cases; and cooperating with and assisting competition authorities throughout the world.

### A. Administrative Adjudication

The FTC has significantly expanded the use of the administrative process under Part 3 of its Rules to adjudicate competition cases. In fiscal year 2003, the Commission approved more Part 3 complaints than in any year since 1985. (See Box 1.) Currently, nine competition cases are in adjudication before an FTC Administrative Law Judge (ALJ) (five cases) or the Commission (four cases). The agency also is defending final Commission adjudicative decisions in two additional cases before a U.S. Court of Appeals. Finally, during the past 12 months, the agency obtained relief in three cases after initiating Part 3 proceedings.

**Mix of Cases.** The increase in Part 3 proceedings is due in part to the reduced level of merger activity in recent years. Resources

previously diverted to merger review can now be focused on suspected anticompetitive conduct. While problematic mergers reported under the Hart Scott Rodino Act (HSR), when not resolved by a consent agreement, generally are litigated in federal court, conduct cases are usually litigated in administrative proceedings under Part 3. Moreover, the 2001 change in HSR filing thresholds has necessitated more focus on non-reportable (and often consummated) mergers, which normally are contested through administrative proceedings, instead of through injunctive actions in federal court.

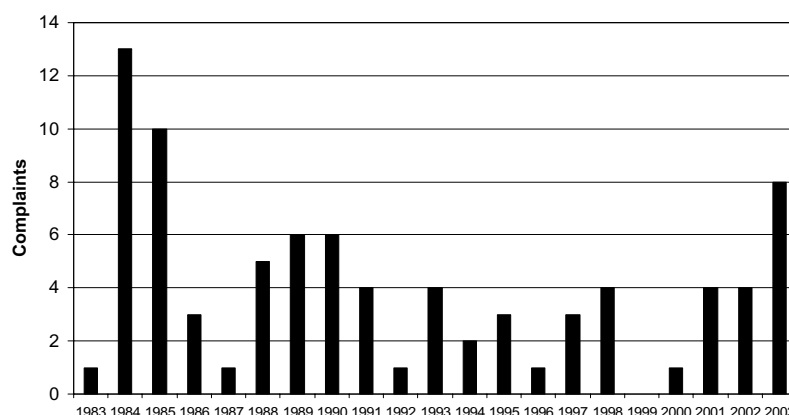
### Systematic Approach to Identifying Cases.

The FTC's expanded administrative docket is also a product of the agency's systematic approach to identifying serious misconduct, especially in key economic sectors. The staff working on the FTC's State Action, *Noerr-Pennington*, and Internet Task Forces have worked to identify problems, and the agency's focus on critical industries such as health care has led to more litigated cases. Many of these Part 3 cases involve complicated policy questions and cutting-edge issues.

**Advantages of Part 3.** Part 3 adjudicative opinions offer benefits that extend well beyond the relief obtained in a particular case. Consistent with congressional intent in passing the FTC Act, thoughtful and carefully written opinions issued by the Commission, a body with recognized expertise in competition law

**Part 3 Competition Complaints Issued by Fiscal Year (1983 – 2003)**

Box 1



and policy, can provide guidance to the bar, the business community, and the public on applicable standards and enforcement policy. Commission opinions also can influence courts and thereby help shape the development of antitrust jurisprudence.

### 1. Commission Decisions and Pending Appeals.

Under the FTC's Rules of Practice, the Commission can conduct a full *de novo* review of the ALJ's findings of fact and the legal conclusions in matters in which it hears an appeal. During the past year, the Commission issued Final Decisions in two Part 3 antitrust cases.

#### ● Polygram Holding (The Three Tenors).

The Commission issued a Final Decision in *The Three Tenors*, involving allegations that several 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 their most recent concert. The unanimous Commission opinion, upholding the ALJ's finding of illegality, provided a blueprint of how the Commission will analyze "inherently suspect" horizontal restraints, based on established case law principles. The Commission found that Respondents' agreements not to discount or advertise Three Tenors products were inherently suspect, and thus "presumptively anticompetitive" because restrictions of this sort generally pose significant competitive hazards. The Commission also rejected Respondents' claim that the moratorium on advertising and discounting served to prevent free-riding, stating that it instead simply eliminated interbrand competition. Respondents have appealed, and the case is now pending before the U.S. Court of Appeals for the District of Columbia Circuit.

- **Schering-Plough.** The Commission issued a final decision overturning the ALJ's dismissal of charges that Schering-Plough agreed to pay two generic drug manufacturers to delay a launch of generic versions of the Schering-Plough drug K-Dur. The delay harmed consumers because competition from generic equivalents of brand-name drugs helps to lower the rapidly rising cost of prescription drugs, saving consumers billions of dollars each year. K-Dur is a potassium chloride supplement used to treat high blood pressure. The opinion explained that the applicable substantive test of legality of horizontal restraints is not determined by bright lines of demarcation, but rather by a continuum "ranging from *per*

se condemnation of particularly egregious conduct to a detailed examination of more ambiguous behavior, responsive to the facts of individual cases." In this case, the Commission conducted a more detailed examination than was required in *Three Tenors*, but rejected the ALJ's conclusion that it was necessary to define markets indirectly because the Commission found direct evidence of anticompetitive effects. Schering has appealed the case to the U.S. Court of Appeals for the Eleventh Circuit.

## **2. New Part 3 Complaints.**

The Commission issued nine Part 3 complaints in the past 12 months:

- **California Pacific Medical Group (Brown & Toland).** The complaint charged this physicians' organization in the San Francisco area with fixing the prices and terms under which its doctors would contract with payors to provide services for preferred provider organization enrollees. The Commission recently accepted a consent agreement that bars Brown and Toland from negotiating with payors on physicians' behalf or taking other actions consistent with doctors' joint bargaining with payors.
- **Kentucky Household Goods Carriers Association, Movers Conference of Mississippi, and Alabama Trucking Association (Household Movers Cases).** The Commission issued three Part 3 complaints against associations of intrastate household movers in Alabama, Mississippi, and Kentucky. The complaints challenge the competing movers' collective filing of

rates for intrastate moving services, alleging violations of Section 5 of the FTC Act. The Alabama and Mississippi associations settled their respective cases, agreeing to stop filing tariffs containing collective intrastate rates, in accord with the relief requested in the Commission's complaint.

- **South Carolina Board of Dentistry.** The pending complaint alleged that the Board imposed anticompetitive restrictions on the ability of dental hygienists to provide in-school preventive dental services, including cleanings, sealants, and fluoride treatments. The complaint charged that the consequences of the Board's anticompetitive action fell particularly heavily on South Carolina's economically disadvantaged children. In the January argument before the Commission on a motion to dismiss, the Board argued, among other things, that its actions were exempt from federal antitrust liability under the State Action doctrine.
- **North Texas Specialty Physicians.** The complaint alleged that this physician group violated the antitrust laws by negotiating agreements among its participating physicians on price and other terms, refusing to deal with payors except on collectively agreed-upon terms, and refusing to submit payor offers to participating physicians unless the terms complied with the group's minimum fee standards.
- **Piedmont Health Alliance.** The complaint alleged that Piedmont Health Alliance violated the antitrust laws by collectively setting the

prices it demanded from payors on behalf of its 450 member physicians in North Carolina.

- **Aspen Technology.** The Commission challenged the merger of two of the three leading providers of engineering process simulation software for process industries. The complaint charged that, because customers for this technology include leading petroleum and pharmaceutical companies, the loss of competition resulting from the merger ultimately could affect prices for a range of products, including those used in the production of gasoline and prescription drugs.
- **Evanston Northwest Healthcare.** The Commission challenged the January 2000 acquisition of Highland Park Hospital by Evanston Northwest Healthcare (ENH), the owner of nearby hospitals in Cook and Lake Counties, Illinois. According to the complaint, the hospital's prices increased significantly following the acquisition. In addition, the complaint alleged that the parties combined a group of independent physicians previously affiliated with Highland Park Hospital into a group of physicians employed by ENH and that joint negotiation by these physicians with insurers constituted illegal price fixing.

### ***3. Other Pending Part 3 Matters.***

Three other cases also are pending decision after appeal to the Commission.

- **Rambus.** On March 1, 2004, Complaint Counsel filed an appeal with the Commission of an ALJ decision dismissing charges that Rambus monopolized a common form of computer memory. The complaint alleged

that, as a participant in an electronics industry standards-setting organization (SSO), Rambus intentionally subverted the SSO's purposes and processes by failing to disclose that it had a patent and several pending patent applications on technologies that eventually were adopted as part of the industry standard for the memory. Once the standard was adopted, Rambus allegedly was in a position to reap millions in royalty fees each year, and potentially more than a billion dollars over the life of the patents.

- **Unocal.** On March 10, 2004, the Commission heard oral argument in an appeal of the ALJ's dismissal of the complaint charging monopolization by the Union Oil Company of California (Unocal). The complaint alleged that Unocal made misrepresentations to the California Air Resources Board (CARB) and to industry participants concerning its research relating to low-emissions reformulated gasoline (RFG). Unocal's actions allegedly led to a regulatory standard that overlapped Unocal patents, giving Unocal a monopoly over the technology used to produce and supply California "summertime" RFG and costing consumers hundreds of millions of dollars. Unocal has argued that such conduct is protected from antitrust scrutiny by the *Noerr-Pennington* doctrine.
- **Chicago Bridge.** The Commission also is considering an appeal from an ALJ Initial Decision requiring that this combination of two builders of field-erected, industrial storage tanks be unwound because it violated Section 7 of the Clayton Act.

## **B. Nonmerger Enforcement**

The FTC began to restore its historic balance between merger and nonmerger enforcement beginning in 2001 when merger activity subsided substantially. In each of the last three years, the agency has opened at least twice as many new nonmerger investigations as it did in 2000. Consistent with its strategic focus, the agency identified priorities and sought systematically to develop cases in key areas. The areas of emphasis included health care, prescription drugs, standards setting, professional associations, and immunities from and exceptions to the antitrust laws.

The FTC's record in fiscal year 2003 revealed the success of its investment in these initiatives. During that year, the agency initiated 21 nonmerger enforcement actions, including multiple cases in each of the areas targeted as a priority. (See Box 2.) Among these cases are 14 consent agreements and seven Part 3 complaints. This record of enforcement exceeds that of any fiscal year in at least the past two decades.

### **1. Focus on Health Care.**

Promoting competition in the health care sector has been among the FTC's most prominent priorities since it brought its landmark *American Medical Association* case in the 1970s. The rapidly rising cost of health care is a matter of concern for consumers, employers, insurers, and the nation as a whole. Recently, the agency has redoubled its efforts to stop anticompetitive agreements among health care providers and other anticompetitive practices that raise the cost of health care.

**Collusion Among Physicians.** In the past year, the Commission has charged many groups of physicians with colluding to raise consumers' costs. The Commission obtained consent agreements in nine matters and issued administrative complaints against another two groups. These cases involve significant numbers of doctors, including:

- A settlement with two San Diego County, California anesthesiologists groups whose members work on approximately 70 percent of a San Diego area hospital's cases requiring anesthesiology services;
- A settlement with a Dallas/Fort Worth area physicians association with 1,000 members and a Part 3 complaint against a separate Dallas/Fort Worth physicians group of 600 members;
- A settlement with 900 faculty physicians and 600 community physicians serving St. Louis and surrounding areas; and
- An administrative complaint against an organization with more than 1,500 San Francisco physicians, and the subsequent settlement with that organization.

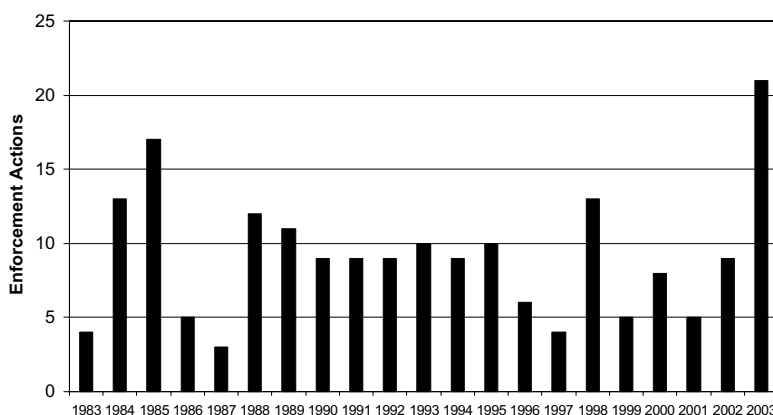
The FTC's enforcement actions stop, or seek to stop, allegedly collusive conduct that harms employers, individual patients, and health plans by depriving them of the benefits of competition in the purchase of physician services.

**Collusion Involving Hospitals.** In addition to the cases involving physician organizations, the Commission has pursued similar actions against organizations that include hospital services. For example, the Commission accepted a consent agreement with Maine Health Alliance (MHA), a group of 325 physicians and 11 hospitals, to resolve charges that MHA engaged in collusion that raised health care prices in a five-county area in Maine. In a similar consent agreement, South Georgia Health Partners, a group consisting of 15 hospitals and 500 physicians, settled charges that the group

collectively fixed prices. These two cases represent the Commission's first challenges to provider organizations allegedly engaged in collusive conduct in providing hospital services. In December, the Commission settled charges that Frye Regional Medical Center and its parent, Tenet Healthcare Corporation, were instrumental in facilitating price-fixing by local physicians in four North Carolina counties. This settlement represents the first case in which the Commission named a hospital

**Nonmerger Enforcement Actions Initiated  
by Fiscal Year (1983 – 2003)**

Box 2



as a participant in an alleged provider price-fixing conspiracy. The case against the physicians group remains in Part 3.

**South Carolina Board of Dentistry.** As mentioned above, the Commission issued an administrative complaint challenging a board regulation that prohibited licensed dental hygienists from providing basic preventive dental care services in a school setting unless the patient first had been seen by a dentist and a treatment plan had been established. According to the complaint, the South Carolina state legislature passed a law in 2000 that eliminated a statutory requirement for a dentist to examine a child before a hygienist was permitted to provide preventive care in schools, and the Board responded by issuing an emergency regulation reinstating and expanding the restrictions. The administrative complaint alleges that the Board's action artificially insulated dentists from competition that licensed and trained hygienists can provide, and thus deprived children – particularly economically disadvantaged children – of important preventive dental health care.

## **2. Seeking to Remove Public Restraints on Competition.**

Effective application of the antitrust laws involves not only fashioning and applying appropriate legal standards to govern marketplace conduct, but determining how widely the antitrust laws properly should apply. The State Action and *Noerr-Pennington* doctrines shield substantial areas of commerce from competition's beneficial discipline. Believing that some courts had expanded the protections afforded under State Action and

*Noerr-Pennington* beyond the standards that the Supreme Court articulated, the Commission has brought cases that may provide opportunities to clarify the legal standards.

**State Action - Clear Articulation.** The State Action doctrine confers antitrust immunity upon certain private conduct taken pursuant to state policy. The Supreme Court has ruled that otherwise illegal conduct is shielded from the antitrust laws if it is pursuant to a “clearly articulated” state policy to supplant competition and is “actively supervised” by the state. Some courts have broadened the “clearly articulated” prong to the point that a broad state authorization of certain acts or implementation of a regulatory scheme is deemed the equivalent of a clear articulation of a policy to restrain competition. The *South Carolina Board of Dentistry* case raises issues regarding the scope of clear articulation.

**State Action - Active Supervision.** An FTC task force has concluded that courts have not provided sufficient guidance on what constitutes “active supervision” under the State Action doctrine. Although courts have considered a variety of factors, not all of those factors were well-tailored to the principles underlying the standard. Overbroad application of the standard sweeps a variety of activities under the doctrine's protection to the detriment of consumers. A series of Commission enforcement actions aimed at associations of household goods movers have provided opportunities for clarification regarding the active supervision requirement. In the Analyses to Aid Public Comment accompanying the consent agreements in these actions, the Commission

identified three factors, based on the original principles established in the Supreme Court's jurisprudence, that are relevant to determining whether the state "actively supervised" the challenged conduct: (1) the development of an adequate factual record, including notice and opportunity to be heard; (2) a written decision on the merits that would provide analysis, reasoning, and supporting evidence that the private conduct furthers the legislature's objectives; and (3) a specific assessment – both qualitative and quantitative – of how the private action comports with the substantive standards established by the state legislature, particularly when the standards include competition or consumer welfare.

### ***Noerr-Pennington* - Unocal Part 3**

**Litigation.** The agency's challenge to Unocal's alleged misrepresentations to the California Air Resources Board and to Unocal's competitors is on appeal before the Commission after the ALJ's dismissal of the complaint. The ALJ based his decision in large part on his conclusion that the *Noerr-Pennington* doctrine insulates Unocal's conduct from antitrust challenge and rejected various arguments why *Noerr-Pennington* should not apply to Unocal's alleged misrepresentations.

## **C. Merger Enforcement**

### **1. Administrative Adjudication of Consummated Mergers.**

Amendments to the HSR Premerger Notification Act, effective in February 2001, raised the thresholds governing which proposed mergers must be reported to the antitrust agencies in advance. While the vast majority

of newly exempt transactions pose no antitrust concern, a small number do raise competition issues. Consequently, the FTC has placed more emphasis on identifying possibly anticompetitive mergers among those not reportable under HSR, relying on press accounts, industry knowledge, and other sources. In addition, while the agencies ordinarily identify possibly problematic combinations during the initial HSR review period, occasionally the agencies cannot identify significant competitive problems within that time period. In those cases, the agencies have a responsibility to challenge mergers that could harm competition even after the HSR review period has run. Finally, the FTC, as part of its ongoing "competition policy research and development," conducts periodic reviews of completed mergers to assess how well it has identified possibly anticompetitive mergers in advance.

- **Chicago Bridge.** This merger already had been consummated when the FTC concluded that it likely violated the Clayton Act. Thus, the Commission challenged the merger under Part 3 instead of seeking an injunction in federal court. Last June, the ALJ ruled that the merger was illegal and ordered that the deal be undone. The matter is now before the Commission on appeal. In December, after learning that Chicago Bridge had notified employees of its intent to close a plant it acquired as part of the acquisition, Complaint Counsel filed an emergency motion seeking authorization for injunctive relief to prevent Chicago Bridge from dissipating assets that are the subject of proposed divestiture relief. Subsequently, the

Commission approved an “interim consent order” that requires preservation of the acquired assets in a form that will facilitate divestiture, should the ALJ’s order be upheld.

- **Aspen Technology.** The Commission issued a Part 3 complaint alleging that Aspen Technology’s \$106.1 million acquisition of Hyprotech in 2002 was anticompetitive and led to the elimination of a significant competitor in the provision of process engineering simulation software for industry.
- **Evanston Northwest Healthcare.** The Commission’s administrative action challenging a hospital acquisition by Evanston Northwest Healthcare illustrates another facet of consummated mergers. In challenging this merger, the Commission may be able to examine actual price evidence instead of relying on predictions of price effects resulting from a merger.

## ***2. Continued Emphasis on Key Market Segments.***

The FTC continued to devote substantial resources in its merger enforcement program to sectors of the economy, primarily health care and energy, that have significant impact on the daily lives of American consumers.

**Health Care.** As in the nonmerger area, health care is a priority in merger enforcement. The FTC devotes special attention to mergers involving pharmaceuticals, hospitals, and other health-related markets. Two efforts stand out:

- **Pfizer/Pharmacia.** Rising prescription drug prices are a major concern for many consumers, and the FTC carefully monitors

pharmaceutical company mergers. Last year, the Commission ordered Pfizer, Inc., the largest pharmaceutical company in the world, and Pharmacia Corporation to make certain divestitures to resolve concerns that their \$60 billion merger would harm competition in nine separate and wide-ranging product markets, including drugs to treat overactive bladder, symptoms of menopause, skin conditions, coughs, motion sickness, erectile dysfunction, and three different veterinary conditions. The order requires divestitures to protect consumers’ interests in those markets, while allowing the remainder of the transaction to go forward.

- **Hospital Merger Retrospective.** The FTC is reviewing the effects of consummated hospital mergers in several cities. The administrative complaint challenging Evanston Northwest Healthcare’s acquisition of Highland Park Hospital, discussed above, stems from that effort.

**Energy.** The cost of energy affects every consumer. The FTC carefully reviews mergers in energy-related markets for possible adverse effects on competition. In the past year, the FTC considered mergers involving natural gas transmission and petroleum refining.

- **Southern Union (Panhandle Pipeline).** In July 2003, the Commission approved a final consent order designed to preserve competition in the market for the delivery of natural gas to the Kansas City area. The order allowed Southern Union Company’s \$1.8 billion purchase of the Panhandle pipeline from CMS Energy Corporation, after

Southern Union terminated an agreement under which one of its subsidiaries managed the Central pipeline, which competes with Panhandle in the market for the delivery of natural gas to the Kansas City area. The complaint alleged that the transaction would have placed the two pipelines under common ownership or common management and control, eliminating direct competition between them, and likely resulting in consumers paying higher prices for natural gas in the Kansas City area.

- **Sunoco/Eagle Point.** After investigation, the FTC concluded that Sunoco's proposed acquisition of Eagle Point Oil Company from El Paso Corporation would not threaten consumers' interests. Although Sunoco owned three Philadelphia-area local refineries, and the acquisition would add a fourth, the FTC's investigation identified significant sources of both reformulated and conventional gasoline that likely would prevent Sunoco and other area refiners from raising prices. In addition, according to the Commission's statement, Sunoco presented credible evidence that the acquisition likely would produce substantial merger-specific efficiencies relating to refinery synergies and optimization.

### 3. *Other Merger Enforcement.*

The agency continued to scrutinize and challenge proposed mergers across the economy when they threatened competition.

- **DSM/Roche.** The Commission acted to protect competition in the market for phytase – an enzyme important to the nation's food

supply – by obtaining a settlement that allows DSM N.V. to proceed with its \$1.89 billion acquisition of Roche Holding AG's Vitamin and Fine Chemical Division, but requires that DSM divest its phytase business. Phytase is added to poultry and swine feed to promote digestibility of phosphorous and other nutrients that are vital to livestock production.

- **GenCorp/ARC.** A final consent order involving GenCorp, Inc.'s \$133 million acquisition of Atlantic Research Corporation protects competition by requiring divestiture of ARC's in-space liquid propulsion business. The remedy fully resolved the agency's concerns about the transaction's impact on competition in markets for four types of in-space propulsion thrusters, while allowing the parties to complete the otherwise benign transaction.
- **GE/AGFA.** The Commission reached a settlement to resolve antitrust concerns arising from General Electric Company's \$437 million acquisition of Agfa-Gevaert N.V.'s nondestructive testing (NDT) business. The consent agreement requires GE to divest its ultrasonic NDT business within 20 days of its acquisition of Agfa's NDT assets. Ultrasonic NDT equipment is used for quality control and to inspect the tolerance of materials in manufacturing applications.

### D. **Transparency and Policy Guidance**

The FTC increases the effectiveness of its law enforcement efforts by facilitating public understanding of its enforcement policies and standards. Transparency serves the FTC's objectives because a full understanding of the

kinds of transactions or conduct the FTC is likely to challenge, and why, informs businesses, facilitates antitrust lawyers' counseling of their clients, and prevents harmful mergers or anticompetitive practices without need for government intervention. Each successful enforcement action not only promotes competition in the specific market at issue, but also communicates to the business and legal communities that the FTC can and will move successfully to challenge the type of merger transaction or conduct at issue. The FTC has sought to expand public awareness and understanding of its actions in several additional ways.

### **Explaining Decisions Not to Take**

**Enforcement Action.** Explaining why the FTC decided not to take action in a particular case can provide as much useful information to the public as the documents released when the agency initiates litigation or accepts a settlement. For this reason, the Commission has issued statements explaining why it declined to take action.

- **Sunoco/Eagle Point.** The Commission issued a statement when it closed this investigation, explaining that multiple sources of gasoline supply to the Philadelphia area, including other local refineries as well as shipments via a major petroleum products pipeline from Gulf Coast refineries, likely would prevent any anticompetitive result from Sunoco's acquisition of an additional Philadelphia-area refinery.
- **Genzyme/Novazyme.** In this investigation of a consummated merger of Novazyme

Pharmaceuticals and Genzyme Corporation, the FTC focused on the transaction's potential impact on the pace and scope of research into the development of a treatment for Pompe disease using enzyme replacement therapies (ERT). Pompe disease is a rare and often fatal disease affecting infants and children. There is currently no effective treatment for this affliction. Because Pompe disease affects few individuals, potential treatments fall under the Orphan Drug Act, which grants seven years of market exclusivity to the first treatment gaining FDA approval. In a statement presenting his views on the matter, closed by a 3-1 Commission vote, Chairman Muris noted that economic theory and research have not established a general causal relationship between innovation and competition, and that careful investigation of case-specific facts was therefore necessary. He explained that the agency's investigation uncovered no evidence that the merger caused a reduction in R&D spending or progress on either of the two Pompe disease ERT programs, and that the merger may in fact benefit patients. Commissioner Thompson also issued a statement in which he argued in favor of a challenge on the grounds that the merger was presumptively anticompetitive under the Horizontal Merger Guidelines and that it eliminated one of two rivals seeking to develop Pompe disease ERT. Commissioner Harbour did not participate in this matter but issued a statement expressing her general views on the relationship between competition and innovation.

- **Caremark.** The Commission issued a statement explaining the closing of its investigation into Caremark Rx, Inc.'s proposed acquisition of AdvancePCS. The firms are two of the largest providers of prescription benefit management (PBM) services in the United States. PBMs administer prescription benefits for most U.S. consumers under contracts with health plans or directly with employers. The Commission concluded that competition from the remaining national, independent, full-service PBMs, along with significant additional competition from several health plans and several retail pharmacy chains offering PBM services, and dozens of small, often regionally oriented PBMs, should prevent any adverse effect on consumers. The Commission also found no reason to expect PBM monopsony power over pharmaceutical manufacturers.

**Data on Horizontal Merger Investigations and Challenges.** Together with DOJ, the FTC released a report summarizing merger challenge data for the two agencies from 1999 through 2003. The report indicated the number of merger enforcement actions by post-acquisition Herfindahl-Hirschman Index (HHI) and change in HHI. In addition, the FTC recently released a staff analysis of horizontal merger investigations for fiscal years 1996 to 2003. The data show tabulated post-acquisition HHIs and change in HHIs associated with the FTC's investigations in 151 horizontal merger investigations involving more than 780 markets over the last eight years. (See Box 3.) For investigations involving three or fewer markets, the FTC staff also reported information on whether or not "hot documents" or "strong customer complaints" were identified during the investigation. This information should assist practitioners and businesses in evaluating

**Horizontal Merger Investigations  
Post Merger HHI and Change in HHI (Delta)  
All Markets by Fiscal Year (1996 - 2003)  
Enforced/Closed**

Box 3

		Change in HHI (Delta)								Total
		0-99	100 - 199	200 - 299	300 - 499	500 - 799	800 - 1,199	1,200 - 2,499	2,500 +	
Post Merger HHI	0 - 1,799	0/14	17/20	18/8	17/4	3/2	0/1	0/0	0/0	55/49
	1,800 - 1,999	0/4	5/4	5/3	12/1	12/2	0/0	0/0	0/0	34/14
	2,000 - 2,399	1/1	1/5	7/4	22/11	31/8	1/1	0/0	0/0	63/30
	2,400 - 2,999	1/1	4/1	4/3	13/4	41/11	25/3	0/0	0/0	88/23
	3,000 - 3,999	0/2	2/2	3/1	6/1	15/6	49/11	28/7	0/0	103/30
	4,000 - 4,999	0/0	0/2	1/1	3/0	8/1	6/0	42/2	0/0	60/6
	5,000 - 6,999	0/0	2/0	3/2	3/1	6/0	7/1	63/12	20/2	104/18
	7,000 +	0/0	0/0	0/0	1/0	2/0	5/0	11/1	81/2	100/3
Total		2/22	31/34	41/22	77/22	118/30	93/17	144/22	101/4	607/173

the likelihood of an antitrust challenge to a proposed acquisition.

**Disgorgement Policy Statement.** The Commission unanimously issued a policy statement on the use of monetary equitable remedies, such as disgorgement and restitution, in antitrust cases. The statement explained that, in determining whether to seek disgorgement or restitution, the agency would consider: (1) whether the underlying violation is clear, (2) whether there is a reasonable basis for calculating the amount of the remedial payment, and (3) the value of equitable monetary relief in light of other likely remedies, including remedies in private actions and criminal proceedings. The agency stated that it remains sensitive to potential duplicative recoveries by injured persons or excessive multiple payments by defendants for the same injury.

**Analyses to Aid Public Comment.**

Although the Commission routinely publishes Analyses to Aid Public Comment to explain a consent agreement, it recently has emphasized making them more informative. Besides assisting the public in interpreting and commenting on a proposed settlement, these documents can serve the more general purpose of outlining the agency's analytical approach and the enforcement standards that apply to specific conduct. In the Household Movers cases, for example, the Commission issued lengthy statements identifying specific elements of an active supervision regime that it will consider in determining whether the active supervision prong of the State Action doctrine is met and evaluating the facts of each case in light of those elements.

## **Achieving a Synthesis of Competition Policy and Consumer Protection**

Box 4

The Federal Trade Commission has the dual role of advancing competition policy and promoting consumer protection. In various articles and speeches, Commissioner Thomas B. Leary has emphasized that the combination of responsibilities requires coherent principles for exercising these functions and creates opportunities for exploring how insights achieved in one mission might inform policy in the other.

In a presentation in January 2004, Commissioner Leary considered tensions that might arise between industry self-regulation measures to combat fraud and traditional antitrust limits on collaboration among competitors. Commissioner Leary described how industry groups can achieve legitimate pro-consumer objectives while minimizing antitrust risks – for example, by ensuring that industry ethical codes are well-tailored to the purpose of preventing fraud, are premised on objective criteria, and are implemented through reasonable dispute resolution mechanisms. As he outlined practical steps that businesses collectively can take to reduce fraud, Commissioner Leary underscored the need for the FTC to consider and improve the conceptual links between its competition and consumer protection programs.

## **Chapter 2: Consumer Protection Law Enforcement, Rulemaking, and Guidance**

The FTC's consumer protection mission protects against fraud, deception, and unfair practices in the marketplace. During the past 12 months, the agency focused on issues of critical importance to consumers, including identity theft, telemarketing fraud, Internet fraud, credit reporting, and consumer privacy. The FTC targeted its law enforcement to combat the worst consumer harms and focused its consumer and business education to promote and provide accurate information to help consumers with their purchasing decisions.

The FTC uses various policy tools to set priorities for its consumer protection mission. The agency's complaint databases provide valuable information about consumer experiences in the marketplace; Internet surfs help single out the most serious online fraud and deception; and workshops, hearings, and conferences advance FTC knowledge and 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 or with other government authorities; and to *educate* the agency about emerging issues, industry about complying with the law, and consumers about how to protect themselves from fraud and deception.

## A. Fraud and Deception

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

Over the past year, the FTC continued to improve its methods for identifying fraud and deception. The agency added thousands of consumer complaints to its internal databases, recruited more law enforcement partners at home and abroad, and educated more businesses and consumers about how to avoid and fight fraud. The FTC continued to use electronic tools extensively to ferret out fraud, especially in the cyberworld. For example, the FTC identified and targeted the emergence of a new online technique for duping consumers into revealing personal information, known as "phishing." Using sophisticated technical investigation, close coordination with criminal law enforcement, and a variety of legal tools,

### Top 10 Consumer Fraud Complaints Calendar Year 2003

Box 5

1. Identity Theft - 42%
2. Internet Auctions - 15%
3. Shop-at-Home/Catalog Sales - 9%
4. Internet Services & Computer Complaints - 6%
5. Prizes, Sweepstakes & Lotteries - 5%
6. Foreign Money Offers - 4%
7. Advance Fee Loans & Credit Protection - 4%
8. Telephone Services - 3%
9. Business Opportunities & Work-at-Home Plans - 2%
10. Magazine Buyers Clubs - 1%

the FTC has begun to track down and stop the perpetrators of such schemes.

**Consumer Response Center.** The CRC continues to be a vital resource for both consumers and law enforcers at the FTC. The Center 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 2003, the CRC added 944,000 complaints and inquiries to the FTC's database. The total number of entries now exceeds 3.2 million.

**Consumer Sentinel.** Consumer Sentinel is the FTC's primary fraud database. Created in 1997, Consumer Sentinel now contains over 1.5 million fraud complaints and is available online to over 990 enforcement agencies across the United States, Canada, and Australia – an increase of more than 400 organizations since last year. Consumers also can access public sections of this Web site and find a wealth of statistics about fraud through [www.consumer.gov](http://www.consumer.gov). (See Box 5 for a list by category of the top complaints.)

## Providing Tools for Law Enforcement and Consumers to Combat Identity Theft

Box 6

Pamela Jones Harbour was sworn in as a Commissioner on August 4, 2003. In December 2003, Commissioner Harbour spoke at the Inside ID Conference, addressing the dangers of identity theft and detailing the FTC's ongoing ID Theft program. Emphasizing the Commission's continued commitment to provide consumers and law enforcement with the tools necessary to combat this rapidly-growing area of fraud, Commissioner Harbour noted, "The Commission, through its education and enforcement capabilities, is committed to reducing identity theft as much as possible. The Commission will continue its efforts to assist criminal law enforcement with their investigations, maintain a robust identity theft program to assist victims, and work with the private sector on ways to both prevent ID theft from happening and facilitate the process for regaining victims' good names."

**Identity Theft Tools.** The FTC employs two major tools in the fight against identity theft. First, the agency operates a toll-free number (1-877-ID-THEFT) and an online complaint form (at [www.consumer.gov/idtheft](http://www.consumer.gov/idtheft)) as portals to its complaint database. Complaints and inquiries to the FTC have increased from more than 185,000 in fiscal year 2002 to more than 321,000 in fiscal year 2003. Second, the FTC maintains an ID theft database, which is the central clearinghouse for ID theft complaints and for the collection of consumer complaint data. The database now holds more than 500,000 complaints. 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 890 law enforcement agencies access the data. Working with the Secret Service and the U.S. Postal Inspection 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, continues to be a 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](mailto:uce@ftc.gov)). This database currently receives an average of 250,000 new pieces of spam *daily*. The total number of spam received has grown from 700,000 in the first year to more than 94 million by mid-March 2004.

**Identity Theft Survey.** Concentrating on one of the most frequently reported consumer frauds, the FTC released the findings from this nationwide survey on identity theft, showing that 27.3 million Americans have been victims of identity theft in the last five years, including 9.9 million persons in the last year alone. (See Box 7.) According to the survey, identity theft losses to businesses and financial institutions totaled nearly \$48 billion, and consumer victims reported \$5 billion in out-of-pocket expenses for the year preceding the survey. One promising finding, however, was that the most serious form of ID theft, the opening of new accounts, is rising at a much lower rate than the misuse of existing accounts, which is easier to detect and repair.

**Cross-Border Fraud Web Site.** Among its newest tools to identify fraud is the FTC's "econsumer.gov" Web site, redesigned and launched in September 2002. Consumer complaints filed through [econsumer.gov](http://econsumer.gov) are now accessible to 18 member countries, with

Ireland as the newest addition. Through this site, the FTC also has established a six-month pilot program to link consumers with alternative dispute resolution providers to help resolve cross-border consumer disputes, especially e-commerce disputes.

## 2. Law Enforcement.

Drawing on all the above sources of information, the FTC targets the most pervasive types of fraud for law enforcement actions. During the past 12 months, the FTC and over 100 law enforcement partners brought more than 160 separate actions, including 20 filed by the FTC itself, through “sweeps” targeting work-at-home schemes, Internet scams, online auction fraud, and fundraising fraud. The FTC also has focused on the use of the Internet to disseminate fraudulent schemes, and brought 58 cases involving the Internet. In the past year, the FTC obtained 110 judgments ordering more than \$425 million in consumer redress.

In addition, the FTC is awaiting court approval of its settlement with Fairbanks Capital Corp., which would require the corporate defendants to provide \$40 million in consumer redress for violations of the FTC Act related to the servicing of subprime loans. (See Box 8.)

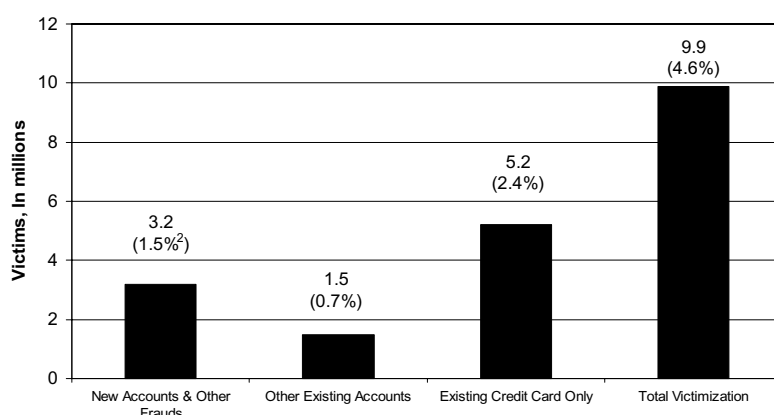
**Criminal Liaison Unit.** Coordination with criminal law enforcement agencies has long been a part of the FTC’s consumer protection efforts, through both formal and informal cooperation. In 2003, the FTC created the Criminal Liaison Unit (CLU), a dedicated staff of attorneys and investigators, whose function is to act as *the* point of contact for criminal law enforcement agencies whose work would be enhanced through cooperation or consultation with the FTC on consumer fraud issues. Specifically, the CLU identifies appropriate and interested law enforcement agencies and case agents for specific types of consumer fraud cases, educates criminal law enforcement authorities about the FTC and its mission, offers them training in areas of FTC expertise, and

coordinates training of FTC staff by criminal law enforcement to help the FTC prepare cases for referral and ensure the smooth progress of parallel prosecutions.

**Deceptive Lending Practices and Other Credit Schemes.** For most consumers, access to credit is essential to full participation in the nation’s economy, including home ownership. Some unscrupulous lenders, however, deceive consumers about loan terms, rates, or fees. The

**Incidence of Identity Theft  
April 2002 – March 2003<sup>1</sup>**

Box 7

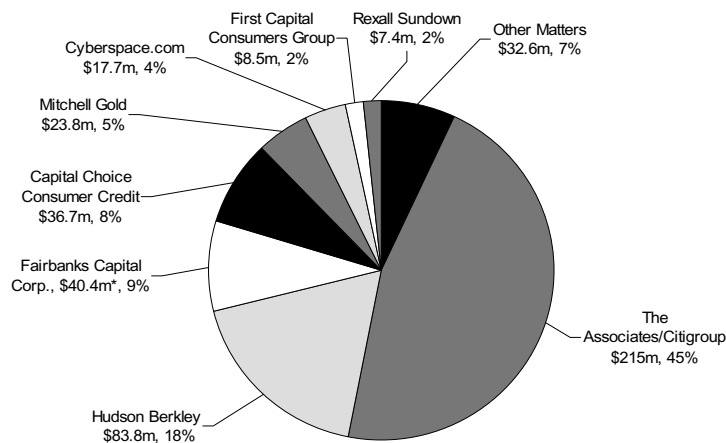


<sup>1</sup>Source: Identity Theft Survey Report conducted by Synovate for the FTC (March-April 2003).

<sup>2</sup>Based on the U.S. population age 18 and over (215.47 million) as of July 1, 2002 (Source: Population Division, U.S. Census Bureau; Table NA-EST2002-ASRO-01).

Box 8

### Significant Redress Orders - \$425 Million Total April 2003 - March 2004



\*\$40.0m is pending court approval.

results can be severe, including the loss of the consumer's home. Bogus organizations target consumers with bad credit or significant consumer debt, promising to help them manage their debt or obtain credit otherwise unavailable to them. Consumers may pay hundreds of dollars for these services, only to receive nothing in return, or worse, to see their credit damaged even further.

**Deceptive Subprime Lending.** The FTC has paid special attention to the subprime lending market in recent years, last year obtaining one of the largest judgments for consumer redress in agency history. This year, the FTC has continued its vigilant monitoring of the subprime lending market, which is directed at borrowers whose credit ratings and history do not qualify them for prime loans.

- **Fairbanks Capital.** In November 2003, the Commission announced settlements with Fairbanks Capital Holding Corp., its wholly-owned subsidiary Fairbanks Capital Corp.,

and their founder and former CEO, Thomas D. Basmajian. In separate settlements, the corporate defendants will pay \$40 million in redress to consumers (subject to final court approval), and defendant Basmajian will pay \$400,000 in redress. The agency charged Fairbanks with engaging in a variety of unfair, deceptive, and illegal practices in the servicing of subprime mortgage loans. According to the complaint, filed jointly by the Commission and the U.S. Department of Housing and Urban Development, the

defendants, among other things, failed to post consumers' mortgage payments in a timely manner and charged consumers illegal late fees and other unauthorized fees.

- **Mark Diamond.** In November 2003, Illinois-based mortgage broker Mark Diamond and his company, OSI Financial Services, Inc., settled charges by the Commission and the Illinois Attorney General that they misrepresented key loan terms to homeowners in the subprime market. Pursuant to the settlement, the defendants paid \$270,000 in consumer redress, which was distributed to all qualified claimants at the end of January 2004. The settlement also enjoins the defendants from misrepresenting loan terms, requires them to tape record future loan closings, and imposes other restrictions on their business practices.
- **Stewart Finance.** In September 2003, the Commission charged subprime lender

Stewart Finance Company, its owner John Ben Stewart, Jr., and nine related companies with violating federal lending laws. According to the complaint, Stewart Finance provided small personal loans to consumers in the subprime market, typically in amounts less than \$1,000 to be repaid in less than one year. The Commission alleged that Stewart Finance engaged in deception and other illegal practices to induce unwitting consumers to purchase add-on products, such as insurance and Car Club memberships, to obtain costly refinance loans, and to participate in a direct deposit program, which imposed additional fees. In October, the Commission obtained a preliminary injunction halting the allegedly abusive practices. This case also charted previously untested waters in a related bankruptcy reorganization case, where the FTC objected to the sale of Stewart Finance's branch offices free of the district court's injunction. As a result, the new (unrelated) purchasers agreed to honor the restrictions contained in the district court's preliminary injunction.

**Advance Fee Credit Scams.** Other deceptive schemes involve collecting fees with the promise of a credit card, which the consumer never receives. In November 2003, the Commission charged Platinum Universal, LLC, its principals, and its successor, Pulsar Data, Inc., with violating the FTC Act and the Telemarketing Sales Rule in connection with the offer of credit cards to consumers for an advance fee. The complaint alleged that the Florida-based defendants falsely represented

to English- and Spanish-speaking consumers that they would obtain a credit card after paying the defendants a fee, when, in fact, consumers did not receive a credit card. The defendants stipulated to a preliminary injunction entered by the court.

### **Deceptive Credit Counseling Services.**

Still other schemes that the FTC has fought involve deceptive credit counseling services. In November 2003, the Commission filed a complaint in federal court charging that AmeriDebt, a national organization that promotes itself as a non-profit credit counseling agency, is engaged in deceptive practices. According to the complaint, the defendants falsely represented that they charge no up-front fee, operate as a non-profit, and teach consumers how to handle their finances. Additionally, the complaint charged that AmeriDebt failed to provide privacy notices as required by the Gramm-Leach-Bliley Act.

**Law Enforcement Sweeps.** Sweeps continue to be an essential part of the FTC's law enforcement strategy. They provide a unique vehicle for partnering with other law enforcement agencies to make a greater impact on a particular type of fraud. By bringing multiple cases simultaneously against numerous scammers, law enforcement can provide greater relief to consumers. This year, the FTC announced four sweeps, each targeting a different kind of scam.

- **Operation "Pushing the Envelope."**

Targeting sellers of work-at-home schemes that take money out of consumers' pockets with their deceptive pitches, the FTC

announced in December 2003 a joint federal and state law enforcement sweep to crack down on purveyors of allegedly fraudulent envelope-stuffing business opportunities.

- **Southwest Netforce.** The Southwest Netforce, announced in May 2003, included more than 40 law enforcement actions by more than 20 federal, state, and local law enforcement agencies. Using training provided by the FTC in Internet investigation techniques, these agencies targeted a variety of allegedly deceptive spam messages and fraudulent Internet scams.
- **Operation “Phoney Philanthropy.”** Also in May 2003, the FTC announced a law enforcement and public education campaign with regulators of state charities to stop fraudulent fundraising. Fraudulent solicitors prey on the good will of donors, misrepresenting who they are and what they do with the money they raise. The Commission filed five actions targeting companies and individuals that allegedly used deception to exploit well-intentioned individuals and businesses. In addition, 34 states joined in the sweep by announcing law enforcement actions, consumer education, or new legislation.
- **Operation “Bidder Beware.”** This sweep targeted online auction fraud, consistently one of the top complaints the FTC receives. Cases challenged such scams as phony online escrow services designed to lull consumers into a false sense of security in high-dollar transactions, and schemes in which defendants used stolen identities to

sell nonexistent goods in online auctions, making it appear that innocent third parties were guilty of fraud. The FTC, along with 33 state and local law enforcers, announced 53 law enforcement actions, including criminal prosecutions against individuals and entities engaged in allegedly fraudulent activity in online auctions.

#### **Health, Safety, and Weight Loss 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 continues to be a major focus of the FTC’s enforcement program. In the past year, the agency sued marketers of dietary supplements, devices, and services, all of which purportedly improve the health or appearance of consumers. Highlights include:

- **Mark Nutritionals.** In October 2003, Mark Nutritionals, Inc., and two of its officers agreed to settle federal charges that they used false and unsubstantiated claims to sell their weight-loss product. The Commission sued the marketers of “Body Solutions Evening Weight Loss Formula” in December 2002. Separate settlements require Edward D’Alessandro, Jr. and Harry Siskind to pay \$140,000 and \$1 million, respectively, and prohibit all of the defendants from making false or misleading representations about the product or any other weight-loss product.
- **Ab Devices.** In October 2003, the Commission charged the marketers of the Ab Force electronic muscle stimulation belt with making the same type of false claims

in the marketing and sale of their product as those the FTC targeted in “Project Absurd” in 2002. The Commission alleged in a Part 3 administrative complaint that the respondents, through their advertisements and promotional materials, referenced the claims in infomercials previously targeted in Project Absurd, and thereby implied that their product would produce the same results expressly promised in those infomercials. The Commission alleged that the effect on consumers was the same, and thus that defendants had falsely claimed that the belt caused loss of weight, inches, and fat; caused well-defined abdominal muscles; and was an effective alternative to regular exercise.

- **BodyFlex.** The Commission sued the marketers of the BodyFlex+ System for falsely advertising that BodyFlex causes fast inch and fat loss. The November 2003 complaint alleged that the defendants falsely claimed that BodyFlex causes users to lose from four to 14 inches across six body areas in the first seven days without reducing calories; that BodyFlex causes users to burn enough body fat to achieve the claimed inch loss in seven days; and that a “clinical study” proves that BodyFlex causes significant fat and inch loss in the first seven days.
- **Cell Phone Radiation Protection.** During the past year, the Commission brought cases against firms marketing cell phone radiation protection devices, alleging that the firms falsely claimed that their products could reduce exposure to, or prevent penetration by, electromagnetic radiation emitted by

cell or cordless phones, or by video display units. The settlement agreements require the firms to have adequate scientific evidence to substantiate claims about the performance, efficacy, or benefit of any good or service they offer. The combined settlements garnered almost \$500,000 in redress for consumers.

- **Ephedra Weight Loss Products.** The Commission announced in July 2003 three enforcement actions against direct marketers of weight-loss products containing ephedra. The two settlements and one complaint filed in federal court targeted allegedly deceptive claims about efficacy, safety, and lack of side effects for weight loss supplements containing ephedra. The actions challenged claims that the ephedra supplements cause rapid, substantial, and permanent weight-loss without diet or exercise, and that “clinical studies” or “medical research” prove these claims. The agency also challenged claims that the ephedra weight-loss products are “100% safe,” “perfectly safe,” or have “no side effects.” An FDA rule banning the sale of weight loss and body building products that contain ephedra became effective in March 2004.
- **Coral Calcium.** Coral calcium was *the* diet supplement craze of 2003. In June 2003, the Commission charged the marketers of the Coral Calcium Supreme dietary supplement with making false and unsubstantiated claims about the product’s health benefits. The action is part of a series of initiatives that the FTC and the FDA are taking against

the purveyors of products with allegedly unsubstantiated health and medical claims.

- **Seasilver.** In June 2003, the Commission and the FDA announced coordinated actions against two companies – both charged with promoting the dietary supplement “Seasilver” – with unsubstantiated medical claims. The Commission alleged that the defendants promoted Seasilver through false claims that it was clinically proven to treat or cure 650 diseases, including cancer and AIDS. Under March 2004 settlements, the defendants will pay a total of \$4.5 million in consumer redress, and are banned from making false or unsubstantiated claims for any dietary supplement, food, drug, or device. In its settlement with the FDA, Seasilver agreed to destroy misbranded Seasilver product worth \$5.3 million and to discontinue manufacturing and distributing misbranded products in the future.
- **Q-Ray Bracelet.** In June 2003, the Commission charged the marketers of the Q-Ray Ionized Bracelet, a purported pain-relief product, with making false and unsubstantiated claims in an infomercial. The complaint alleged that the defendants deceptively claimed that the bracelet is a fast-acting effective treatment for various types of pain, as proven by tests, even though a study conducted at the Mayo Clinic showed that the Q-Ray Bracelet is no more effective than a placebo at relieving muscular and joint pain. Through a stipulated preliminary injunction, the court required the defendants to take the infomercial off the air and froze several million dollars of defendants’ assets.

- **Gero Vita.** In May 2003, the Commission charged Glenn Braswell and others with making false and misleading advertising claims for five dietary supplements promoted to cure respiratory disease, diabetes, Alzheimers, obesity, and erectile dysfunction. Braswell, who already is under a 1983 federal court order for violations of the FTC Act, is one of the largest and most visible direct mail dietary supplement marketers in the U.S., with sales since 1998 totaling at least \$800 million.

### **Electronic Payment Process Abuses.**

Advances in payment technology bring important efficiencies for industry and consumers, but they also pose new challenges for consumer protection. The Automated Clearinghouse Network (ACH) is a nationwide funds transfer system for clearing electronic payments among banks. The ACH payment mechanism replaces paper transactions with electronic payments. The volume of ACH payment transactions has grown substantially in recent years, in part because ACH offers a fast, inexpensive, and relatively safe payment mechanism for merchants and consumers. At the same time, the FTC is concerned that a number of ACH processors have failed to abide by the strict rules that govern this industry, and have agreed to process payments on behalf of fraudulent outbound telemarketers in violation of the ACH rules.

The Commission has filed two actions against ACH processors that allegedly assist these fraudulent transactions by providing a gateway into the electronic banking system. In both *FTC v. Electronic Financial Group* and

*FTC v. First American Payment Processing*, the Commission obtained temporary restraining orders against the defendants who, the agency alleged, knowingly processed electronic payments for telemarketers who deceptively sell advance-fee credit cards or who engage in other deceptive or abusive telemarketing practices. These processors allegedly harmed tens of thousands of consumers by processing charges on behalf of telemarketers engaged in abusive or deceptive practices, which ACH processing rules were designed specifically to prevent.

**Project Scofflaw.** Created in 1996, Project Scofflaw targets individuals who flout Commission orders and continue to prey upon consumers. Last August, the FTC issued its second report highlighting efforts to detect and prosecute violators of FTC-obtained court orders. Last year, courts ordered defendants to serve nearly 26 years of detention and pay \$54 million in restitution and other consumer redress.

## B. Consumer Privacy

Consumer privacy has grown in importance in the FTC's consumer protection agenda. In fact, the agency has dramatically increased the resources dedicated to this issue – from approximately \$4.5 million in fiscal year 2001 to \$19.3 million in fiscal year 2003. FTC initiatives to reduce the serious consequences that can result from the misuse of personal information fall into three major categories: vigorous enforcement of existing laws, additional rulemaking, and ongoing consumer and business education.

Box 9

### Harris Poll Highlights Success of National Do Not Call Registry

The effectiveness of the Do Not Call Registry was reinforced by a Harris Interactive® survey, released February 13, 2004, showing that more than half of all U.S. adults (57%) say that they have signed up for the registry.

Of those registered, 92% report receiving fewer telemarketing calls, and 25% say they have received no telemarketing calls since signing up.

Humphrey Taylor, Chairman of The Harris Poll®, Harris Interactive stated, "In my experience these results are remarkable. It is rare to find so many people benefit so quickly from a relatively inexpensive government program."

#### 1. Law Enforcement.

The FTC continued its aggressive enforcement of existing laws to protect consumer privacy during the past year. Law enforcement actions ranged from cases involving deceptions aimed at eliciting personal information from consumers, to cases attacking deceptive spam. Highlights include:

**Internet and Spam.** In a continuing series of law enforcement initiatives targeting Internet fraud, the FTC, Department of Justice, Secret Service, Federal Bureau of Investigation, and Postal Inspection Service have filed more than 285 criminal and civil law enforcement actions targeting Internet scams and deceptive spam. In November 2003, the FTC announced federal court orders against ten individuals and five corporations. These matters represent an array of allegedly deceptive schemes and illegal scams, including Internet auction fraud, bogus business opportunities, deceptive money-making scams, and phony credit offers.

## Protecting Privacy in an Automated and Globalized Marketplace Box 10

The International Association of Privacy Professionals (IAPP) presented the 2004 Privacy Leadership Award to Commissioner Orson Swindle. The IAPP cited the Commissioner's deep understanding of the complexity of privacy and security in an increasingly automated and globalized marketplace as well as his positive influence on the shaping of public policy issues. From issues of online privacy and information security, to international privacy concerns and the fight against spam, the IAPP noted that Commissioner Swindle has provided thoughtful leadership in seeking effective solutions that balance the interests of a changing marketplace with the concerns of consumers.

In accepting the award, Commissioner Swindle stated, "The path to more effective privacy protection is a journey, not a destination. We need to be vigilant in enforcing the privacy laws we have on the books. At the same time, we in government, industry, and civil society must continue working together to keep the dialogue going with sharp focus on improving protection of individual privacy and reaping the benefits of the free flow of information."

**30 Minute Mortgage.** Entered in December 2003, a Commission settlement bars 30 Minute Mortgage, Inc., an Internet operation that advertised "3.95% 30 Year Mortgages" as a way to obtain sensitive financial information from consumers, from violating federal lending and privacy laws and from using or benefitting from personal information that was deceptively collected from consumers. The order further requires each of the operation's principals to post \$1 million bonds before sending unsolicited commercial e-mail in the future.

**"Pre-Registration" Scams for the National Do Not Call Registry.** A December 2003 U.S. district court order permanently bars Ken Chase from claiming that, for a fee, he can register or pre-register consumers for the FTC's National

Do Not Call Registry or any other do not call list through his two Web sites. The order also requires the defendant to verify all refunds provided to the more than 250 consumers who signed up for his service.

**Phishing.** In July 2003, an identity thief who allegedly used hijacked corporate logos and deceptive spam to con consumers out of credit card numbers and other financial data settled Commission charges that his scam violated federal laws. The complaint alleged that the scam, called "phishing," involved an individual posing as America Online and sending e-mail messages claiming that there had been a problem with the billing of consumers' AOL accounts. The e-mail warned consumers that they risked losing their accounts and Internet access if they did not update their billing information. The message directed consumers to click on a hyperlink, and when they did so, they landed on a site that contained AOL's logo, type style, colors, and real links to AOL web pages. While the site appeared to be AOL's billing center, it was not. The complaint alleged that the defendant used AOL's identity to spam consumers and to steal consumers' identities as well.

**Guess.com.** The FTC announced in June 2003 that in its third case targeting companies that misrepresent the security of consumers' personal information, designer clothing and accessory marketer Guess?, Inc., agreed to settle Commission charges that it exposed consumers' personal information, including credit card numbers, to commonly known attacks by hackers, contrary to the company's claims. The settlement requires that Guess? implement a

comprehensive information security program for Guess.com and its other Web sites.

## **2. Rulemaking.**

Congress has directed the FTC to issue rules to implement statutes critical to protecting the privacy of consumers. In late 2003, Congress imposed new responsibilities on the FTC to address spam, consumer credit, and identity theft.

**Telemarketing Sales Rule.** The major rulemaking effort for 2003 was the creation of the National Do Not Call Registry. The Commission also adopted other significant changes to the TSR that give consumers added protection against deceptive telemarketing and unwanted intrusions. Among other things, the amendments require that telemarketers transmit information to consumers' caller ID systems to ensure accountability in telemarketing. The amended rule also now restricts the use of preacquired account information, making it illegal to traffic in consumer account numbers, and requires the seller or telemarketer to obtain a consumer's express and informed consent prior to a purchase. In instances involving preacquired account information, the amendments heighten the requirements for showing consent also.

**CAN-SPAM Act.** The Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (CAN-SPAM Act), signed into law in December 2003, addresses a wide range of practices relating to spam. The CAN-SPAM Act prohibits falsifying either the content or the source of e-mail; prohibits abusive means of obtaining e-mail addresses to send a high volume of unwanted messages; requires that

commercial e-mail be so identified; requires senders of commercial e-mail to allow recipients to "opt out" of future e-mail messages; and requires a warning label for e-mail with sexually oriented material. The Act also directs the FTC to report to Congress on the feasibility of a Do Not E-Mail Registry and creates new enforcement approaches and penalties.

**FACT Act.** The Fair and Accurate Credit Transactions Act of 2003 (FACT Act), also signed into law in December 2003, makes sweeping changes and additions to the Fair Credit Reporting Act. The primary features of the FACT Act include making the existing preemption provisions permanent and adding several provisions to combat identity theft and enhance accuracy and consumer access to credit information. The FACT Act requires the FTC, among other things, to engage in several rulemakings. These rulemakings are underway and will proceed during 2004.

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

### **A. Competition Policy**

Over the past year, the FTC continued to make full use of its array of policy instruments to complement its enforcement authority. Through the use of hearings, workshops, research projects, reports, studies, advocacy filings, and amicus briefs – all in coordination with its enforcement initiatives – the agency can provide

intellectual leadership on competition issues and make extraordinary contributions on behalf of consumers.

### 1. Research and Reports.

Over the past decade, the FTC has revived its long tradition of performing research and issuing reports on a range of topics relevant to competition and the marketplace. The agency's investments in these activities inform the development of competition policy, both at the FTC and elsewhere. The FTC has concluded some key initiatives during the past 12 months.

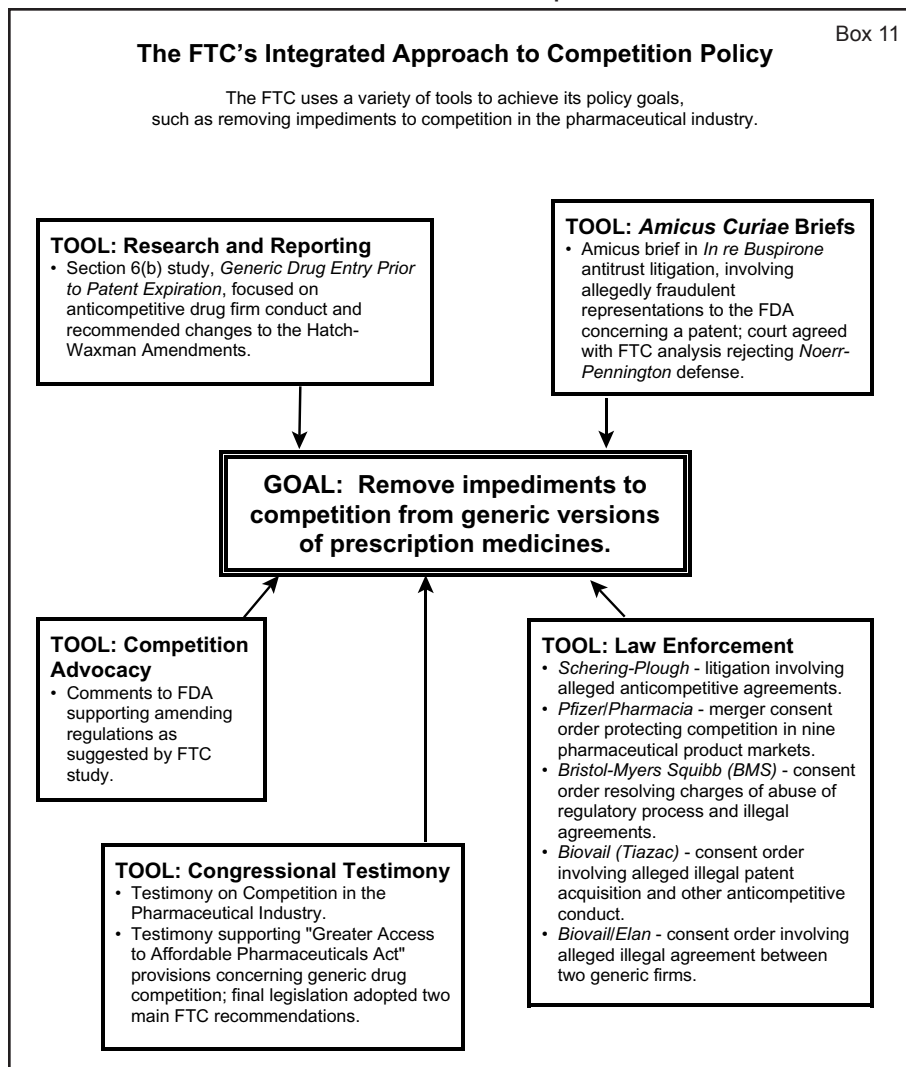
**State Action Report.** Last fall, the FTC Task Force on State Action issued a report

concluding that many courts have applied the doctrine too broadly and recommending several approaches the agency should take. The staff report concluded that courts have interpreted the "clear articulation" requirement too broadly, often focusing on the "foreseeability" test to find a general grant of authority to a local government entity to act in a specific area, while overlooking the substance of the state's policy choice. The report recommended a return to the principle that the authorizing statute must also evince an intent to displace competition with respect to the particular conduct at issue. The report noted that more guidance is needed on the "active supervision" prong of the doctrine and advocates

use of the three-part test adopted by the FTC in the *Indiana Movers* case. Finally, the report urged that courts consider "spillover" effects on citizens of other states in determining whether the State Action doctrine protects the alleged conduct, and that courts should impose an active supervision requirement on municipalities that participate in the marketplace in competition with private firms.

### Internet Wine Sales Report.

Last July, the FTC released a staff report, *Possible Anticompetitive Barriers to E-Commerce: Wine*, which concluded that e-commerce offers consumers lower prices and more choices in the wine market, and that states could expand e-commerce by permitting direct shipping of wine to consumers.



The empirical study found that state bans on direct shipping prevent consumers from saving as much as 21 percent on some wines and from conveniently purchasing many popular wines from suppliers around the country. The report also concluded that states can limit sales to minors through less restrictive means than an outright ban on direct shipping, such as by requiring that a supplier verify the recipient's age and obtain an adult's signature before delivering the wine.

**Contact Lenses Report.** In March 2004, the FTC released a staff report, *Possible Anticompetitive Barriers to E-Commerce: Contact Lenses*, which concluded that e-commerce offers consumers greater choices and more convenience in the contact lens market and recommended that policymakers rescind, or refrain from adopting, requirements that unnecessarily burden e-commerce, such as state professional licensing for online lens sellers. The report found that non-traditional contact lens sellers, such as Internet providers, represent a unique alternative distribution channel and offer some consumers a combination of price and convenience that they value highly. It also stated that adherence by eye care practitioners and contact lens sellers to the Fairness to Contact Lens Consumers Act's requirements should enhance consumer choice.

**Generic Drug Report - Follow-Up Activities.** This past year saw the implementation of specific recommendations made in the FTC's July 2002 report on generic drugs, entitled *Generic Drug Entry Prior to Patent Expiration: An FTC Study*. The FDA approved a final rule in June 2003 that eliminates multiple

30-month stays on FDA approval of generic drugs, which the FTC study had identified as harmful to consumers, and also limits the patents that can be listed in the FDA Orange Book, consistent with another FTC recommendation. Moreover, the Medicare Act passed in 2003 implements key FTC recommendations to facilitate entry of generic drugs and requires that the FTC be notified of certain agreements between branded and generic drug firms. The FTC published a notice outlining procedures for filing such agreements, and clarifying the kinds of agreements requiring notification.

**Retrospectives and Other Economic Studies.** The FTC also studies current or emerging topics to develop policy positions and inform its enforcement activities. For example, the FTC staff has been conducting retrospective studies of mergers involving hospitals and the oil industry. In *Experimental Gasoline Markets*, the authors investigated the competitive effects of zone pricing on consumers, retail stations, and refiners. In another paper, *The Economic Effects of the Marathon - Ashland Joint Venture: The Importance of Industry Supply Shocks and Vertical Market Structure*, FTC economists analyzed whether there were anticompetitive price effects from a merger cleared by the FTC. The learning derived from these studies facilitates better case selection and provides important economic support that helps the agency succeed in its enforcement initiatives.

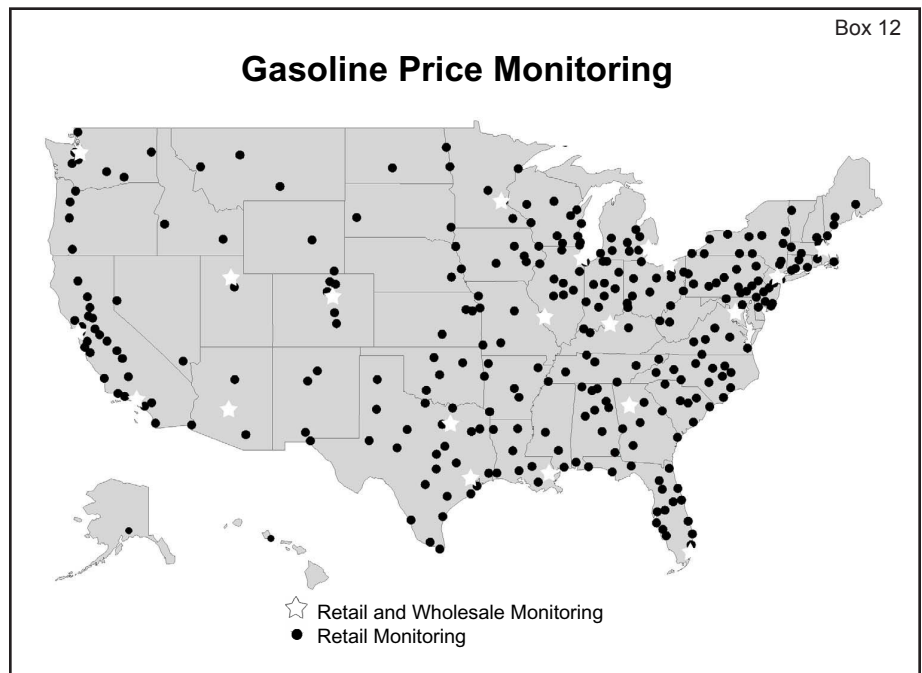
**Gasoline Price Monitoring and Investigation Initiative.** In 2002, the FTC initiated a project to monitor gasoline prices to identify unusual movements in prices and then examine whether any such movements might

result from anticompetitive activity. FTC economists developed a statistical model for the purpose of identifying such movements. This model uses standard statistical techniques and price data, updated daily, from the Oil Price Information Service (OPIS) for approximately 360 cities at retail and 20 key urban areas at the wholesale level. (See Box 12.) The staff incorporates into their analysis customer complaint data received from the states and the Department of Energy and also examines movements in the level of gasoline prices and the spread between the price of crude oil and the price of gasoline. If the staff detects unusual price movements, they research the possible causes, including, if appropriate, consulting with the staff of various federal and state agencies. The FTC staff also contacts the appropriate State Attorney General's Office to discuss the pricing anomaly and to discuss the appropriate course for further inquiry, including the possible opening of a law enforcement investigation.

## 2. Hearings and Workshops.

Hearings and workshops represent one of the FTC's most effective policy "research and development" tools. By bringing together experts from the business, legal, government, and academic communities, and devoting in-depth analysis to a carefully developed agenda, FTC hearings and workshops can lead to significant advances in state-of-the-art

Box 12



knowledge of competition policy issues. In the past year, the FTC completed two lengthy sets of hearings relating to intellectual property and health care, and also initiated a public dialogue on the application of the Horizontal Merger Guidelines.

**Hearings on Health Care and Competition Policy.** To explore developments in the dynamic health care market, the FTC, working with DOJ, commenced a series of hearings on *Health Care and Competition Law and Policy* on February 26, 2003. Over a seven-month period, the agencies held 27 days of hearings in a comprehensive examination of a wide range of health care issues involving hospitals, physicians, insurers, pharmaceuticals, long-term care, Medicare, and consumer information, among others. The hearings focused on the specific challenges and complications involved in applying competition law and policy to health care; issues involved in hospital merger cases and other joint arrangements, including geographic and product market definition; horizontal hospital networks

and vertical arrangements with other health care providers; the competitive effects of mergers of health insurance providers; and consumer information and quality of care issues. The agency expects to issue a report on these issues later this year.

### **Horizontal Merger Guidelines Workshop.**

In February 2004, the FTC and DOJ held a three-day workshop to discuss the Horizontal Merger Guidelines. The workshop had two objectives: (1) to increase understanding of current merger policy, consistent with other efforts to promote transparency for consumers and the business community, and (2) to obtain feedback on the Guidelines – their strengths and weaknesses and areas for possible clarification – from those who have used them most extensively and have studied them most carefully. The workshop followed closely the release of data on merger investigations from the last eight years.

### **3. Advocacy.**

The FTC complements its efforts to remove private restrictions on competition by working to eliminate *public* impediments to a competitive marketplace by persuading other government policy makers to apply competition principles as they make decisions affecting consumer welfare. As part of its coordinated strategy, the agency focuses on the same areas that receive its emphasis in law enforcement: energy, health care, and other sectors of the economy that have the greatest impact on consumers' pocketbooks.

**Energy - Motor Fuel.** The FTC staff submitted comments to the North Carolina Attorney General stating that amendments

## **FTC REPORT:**

Box 13

### *To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy*

Competition and patents stand out among the federal policies that influence innovation. Both can foster innovation, but errors or systematic biases in one policy's rules can harm the other policy's effectiveness in promoting innovation. A failure to strike the proper balance between them can harm innovation.

The FTC and DOJ held 24 days of hearings on this topic, with more than 300 expert panelists and 100 written submissions generating over 5,000 pages of transcripts. Many hearings participants reported that, although competition and patents often work well together, too many questionable patents are harming innovation and competition.

The Commission's October 2003 report makes ten recommendations to reduce the proportion of questionable patents. Among other steps, the report recommends new procedures for challenging patent validity, careful application of patent law to prevent or invalidate obvious patents, and thoughtful integration of economic insights into patent law and policy.

to the state's Motor Fuel Marketing Act could have significant potential to harm consumers by causing higher gasoline prices at the pump. Under current North Carolina law, it is illegal to sell gasoline below cost as a regular business practice with the intent to injure competition. Proposed amendments to the statute would have eliminated the "intent" and "business practice" requirements and would have redefined "cost" in a way that would not always reflect discounts to retailers. Because the proposal could make dealers liable for procompetitive price-cutting, the staff was concerned that it would deter aggressive competition, to the detriment of consumers. The FTC staff filed comments on similar proposals pending in Alabama, New York, and Kansas, and an existing law in Wisconsin.

### **Energy - Electricity and Natural Gas.**

The FTC continued to provide its expertise and assistance in connection with the ongoing process of opening electricity markets to competition. Agency staff submitted comments to the Federal Energy Regulatory Commission on Market-Based Rates and Authorizations, and on Remedying Undue Discrimination through Open Access Transmission Service and Standard Electricity Market Design. In addition, the staff submitted comments to the Illinois Commerce Commission on Asset Transfers Among Affiliated Companies, to the California Public Utilities Commission on Exit Fees and Distributed Generation, and to the Georgia Public Service Commission on Standards for Determining Whether Natural Gas Prices Are Constrained by Market Forces.

**Health Care.** Although the FTC typically uses its law enforcement authority to challenge potentially anticompetitive hospital mergers, the agency employed another of its tools to comment on the potential anticompetitive effects of the proposed acquisition of Slidell Memorial Hospital by Tenet Healthcare. Under Louisiana law, both the voters and the state Attorney General must approve the sale of a nonprofit hospital, such as Slidell, and the Attorney General requested the FTC's views on the transaction. In response, the FTC staff explained that the potential merger of the Slidell area's only two full-service hospitals raised concerns about increased prices. The analysis focused on the possible effects of the acquisition on health care plans, which ultimately must reimburse hospitals in whole or in part for services provided to covered patients. Seventy-

seven percent of area voters disapproved of the merger.

**Professional Services.** The FTC staff provided comments to the Indiana State Bar Association and the Rhode Island House of Representatives opposing proposals that would unduly limit the ability of non-lawyers to compete in the market for real estate closings. In a comment to the Tennessee legislature on proposed regulations for the practice of optometry, the FTC staff noted that consumers could end up paying more for eyeglasses because the operation of commercial optometry practices, especially chain optical stores, could be more difficult.

**Financial Services.** The agency recently submitted a letter urging the Commodity Futures Trading Commission to support more competition in the market for futures trading by allowing a new entrant to establish a competing U.S.-registered commodity futures exchange. The letter cited two recent studies that found that securities-based options listed on multiple exchanges, rather than a single exchange, have significantly lowered bid-ask spreads, a result consistent with the effects of multiple exchanges in equity markets. The letter also criticized public restraints, such as regulatory barriers, that impede competition, limit new entrants, stifle innovation, and raise prices. After receiving the FTC's letter, the CFTC voted unanimously to approve the new entrant's application, with one CFTC Commissioner issuing a statement acknowledging the FTC's analysis.

**Computer Reservation Services.** FTC comments to the Department of Transportation

urged that the Department use caution in applying monopoly leveraging and essential facilities theories in a proposed rulemaking on airline computer reservation systems and that conduct not be condemned on these grounds without a showing that it is exclusionary. DOT's final rule eliminated most of the proposed rules governing airline computer reservations systems and included a sunset provision to terminate the other rules later this year.

#### **4. Amicus Briefs.**

The Commission has been active over the past year in providing amicus briefs to help courts resolve important competition policy issues. Recent briefs have addressed the legal standard under Section 2 of the Sherman Act, the State Action doctrine, the exclusion of non-attorneys from real estate closings, and the jurisdiction of U.S. courts over anticompetitive conduct by foreign entities.

- **Verizon v. Trinko.** In its first antitrust decision in several years, the U.S. Supreme Court issued an opinion in *Trinko* in January, consistent with the joint amicus brief filed by the Commission and DOJ. The Court reversed the Second Circuit, which had permitted the case to go forward under Section 2 of the Sherman Act based on "essential facilities" and "monopoly leveraging" theories, despite the failure of the plaintiff to allege exclusionary conduct under general monopolization principles. The case involved a new entrant provider of local telephone service attempting to acquire access to the network operated by the incumbent local exchange carrier.

The government's brief argued that whatever access may be required under the Telecommunications Act of 1996, the antitrust laws can be used to require access only if the refusal to deal can be shown to be exclusionary or predatory, as is generally required to establish a monopolization violation under Section 2. The Court essentially agreed with the arguments filed by the government and held that the complaint had failed to state an antitrust claim.

- **Brentwood Academy v. Tennessee Secondary School Athletic Association.** In this case involving application of the State Action doctrine, the Commission argued that a district court erred in holding that the doctrine protected a private association of secondary schools that had been deemed a state actor for constitutional purposes. The brief explained that, in the antitrust context, "state action" narrowly refers only to actions undertaken in conformity with a policy clearly articulated by the sovereign state itself.
- **On Review of UPL Advisory Opinion.** The Commission and DOJ submitted a joint amicus brief urging the Georgia Supreme Court to reject a State bar committee ruling that only licensed attorneys may conduct real estate closings. The brief argued that allowing non-lawyers to conduct closings likely would lower prices and increase consumer choice and that no evidence indicated that such lay closings would harm consumers. The Georgia court rejected the federal agencies' position.

- ***Empagran v. Hoffmann-LaRoche.*** The Commission and DOJ jointly addressed the proper application of the Foreign Trade Antitrust Improvements Act in this amicus brief to the U.S. Supreme Court. The agencies asserted that the jurisdiction of a U.S. court is improper when a foreign plaintiff's claimed injury from an alleged antitrust conspiracy does not arise from the effects of that conspiracy on U.S. commerce.
- ***Dee-K Enterprises v. Heveafil Sdn.Bhd.*** The Commission and DOJ filed an amicus brief in the U.S. Supreme Court, arguing that the lower court should have determined whether an alleged price-fixing conspiracy with both foreign and domestic elements involved commerce within the reach of the Sherman Act, instead of whether it involved "primarily foreign or primarily domestic ... participants, acts, targets, and effects."

## B. Consumer Protection Policy

In similar fashion, the FTC applied its various policy tools to complement its consumer protection enforcement. Working with other law enforcement agencies, industry, the media, and the public, the FTC heightened media awareness of false advertising, provided important data and analysis on a variety of consumer protection issues, and developed even greater expertise in technological and legal issues related to spam.

### 1. Research and Reports.

In addition to using electronic databases and Web sites to track consumer fraud, the FTC conducts numerous studies of marketplace

### Red Flag: Bogus Weight Loss Claims

Box 14

A claim is too good to be true if it says the product will...

- Cause weight loss of two pounds or more a week for a month or more without dieting or exercise
- Cause substantial weight loss no matter what or how much the consumer eats
- Cause permanent weight loss (even when the consumer stops using the product)
- Block the absorption of fat or calories to enable consumers to lose substantial weight
- Safely enable consumers to lose more than three pounds per week for more than four weeks
- Cause substantial weight loss for all users
- Cause substantial weight loss by wearing it on the body or rubbing it into the skin

issues affecting consumers and publishes its findings in reports.

**Weight-Loss Advertising.** In December 2003, the FTC announced its "Red Flag" education campaign to assist media outlets in voluntarily screening weight-loss product ads containing claims that are too good to be true. (See Box 14.) The announcement is the culmination of a workshop held in November 2002 and meetings with trade associations and individual media outlets over the last year. To support the voluntary initiative, the FTC released a media reference guide entitled "Red Flag: Bogus Weight Loss Claims."

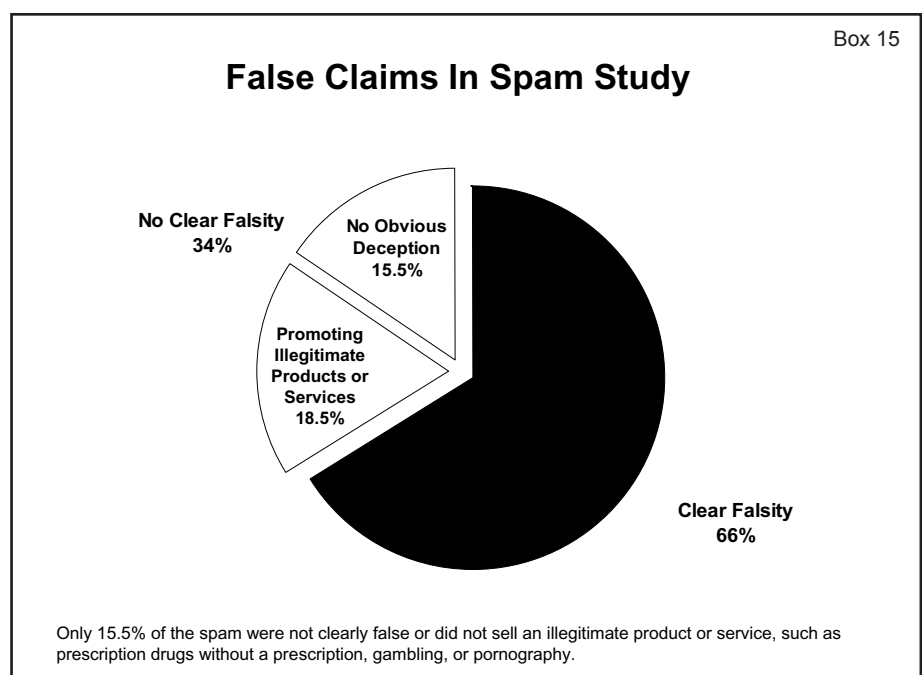
**Purchase of Inappropriate Material by Children.** Last October, the FTC released its 2003 nationwide undercover survey of stores and theaters. The survey was conducted to collect data on the extent to which retailers prevent children from purchasing entertainment products that have been rated or labeled by

the entertainment industry self-regulatory associations or entertainment producers as inappropriate for children. The survey showed that 69 percent of the teenage shoppers were able to buy M-rated games; 83 percent were able to buy explicit-labeled recordings; and 36 percent were successful in purchasing tickets for admission to an R-rated film at movie theaters. For the first time, the FTC also surveyed DVD retailers, where 81 percent of the teen shoppers were successful in purchasing R-rated movies on DVD.

**Alcohol Industry Self-Regulation.** In September 2003, the FTC issued a *Report on Alcohol Marketing and Advertising*. The report examined whether advertising for flavored malt beverages (FMBs) – beverages that combine characteristics of beer and distilled spirits – was targeted to underage consumers, as well as whether the alcohol industry had implemented self-regulatory recommendations made in the FTC’s 1999 Alcohol Report to Congress. The FTC investigated nine major alcohol advertisers, analyzing their advertisements, marketing plans, and consumer research. The report indicated a significant improvement in standards for the placement of alcohol ads and in the adoption of external advertising review mechanisms. The report also found no evidence of targeting underage consumers in the FMB market. The FTC’s report concluded that while advertising self-regulation is designed to reduce the number of ads seen

by minors, a comprehensive alcohol policy also should address underage access to alcohol.

**False Claims in Spam.** In April 2003, the FTC issued a report on a survey of false claims in spam. Sample spam analyzed in the study came from multiple sources, including the FTC’s own spam database. In a random sample of 1,000 pieces of spam, 84.5 percent were deceptive on their face and contained apparently false “from” lines, “subject” lines, or message text, or advertised an illegitimate product or service. The remaining, 15.5 percent, although not necessarily truthful, were not deceptive on their face. (See Box 15.) This is the first systematic review of the likely truth or falsity of claims appearing in spam. The incidence of likely false claims in the text of spam varied considerably among types of offers. The highest category for signs of falsity in the sample, 90 percent, was for investment and business opportunities.



## **2. *Hearings and Workshops.***

As new developments arise in the marketplace, the FTC holds hearings and workshops to study emerging issues and to learn from the experiences of consumers, businesses, academics, other government agency representatives, and a host of other experts in various fields.

**Marketing Violent Entertainment to Children.** Besides the report described above, the FTC hosted a public workshop last October to examine issues about the marketing of violent entertainment to children. The workshop provided a forum for discussing the state of self-regulation in the entertainment industry and, in particular, children's access to products that have been rated as potentially inappropriate for them or have been labeled with a parental advisory.

**Spam Forum.** Building upon its research, education, and law enforcement efforts, the FTC held a three-day public forum from April 30 to May 2, 2003, on spam. At the forum, the FTC gathered representatives from many sides of the issue to explore and encourage progress toward potential solutions to the detrimental effects of spam. The consensus was that, while a solution to the spam problem is critically important, it cannot be found overnight. Instead, solutions must be pursued from many directions – technology, the law, and consumer action – and depend on the continued cooperative efforts between government and the private sector. The information gathered during this event will be an important resource as the FTC meets the mandates of the CAN-SPAM Act.

**Information Flows Workshop.** In June 2003, the agency held a workshop on "information flows" to examine the benefits and costs to consumers and businesses of the collection and use of consumer information. The goal is to balance the protection of consumer privacy interests with the promotion of the free flow of information that benefits the economy. The workshop featured participants with a range of perspectives, including executives from a variety of businesses that use consumer information extensively, academic researchers, consumer privacy advocates, and government officials. Panelists presented their original research and debated the appropriate methodology for evaluating information practices from consumer and business perspectives, including the appropriate use of cost-benefit analysis.

**Green Lights and Red Flags: FTC Rules of the Road for Advertisers.** In September 2003, the FTC, Kentucky Attorney General's Office, and Better Business Bureau of Louisville, Southern Indiana, and Western Kentucky presented a one-day back-to-basics workshop about complying with truth-in-advertising standards. The FTC has joined with other state and local officials to present similar workshops in Chicago, New York City, and Santa Clara, California, and expects to continue this education campaign through 2004.

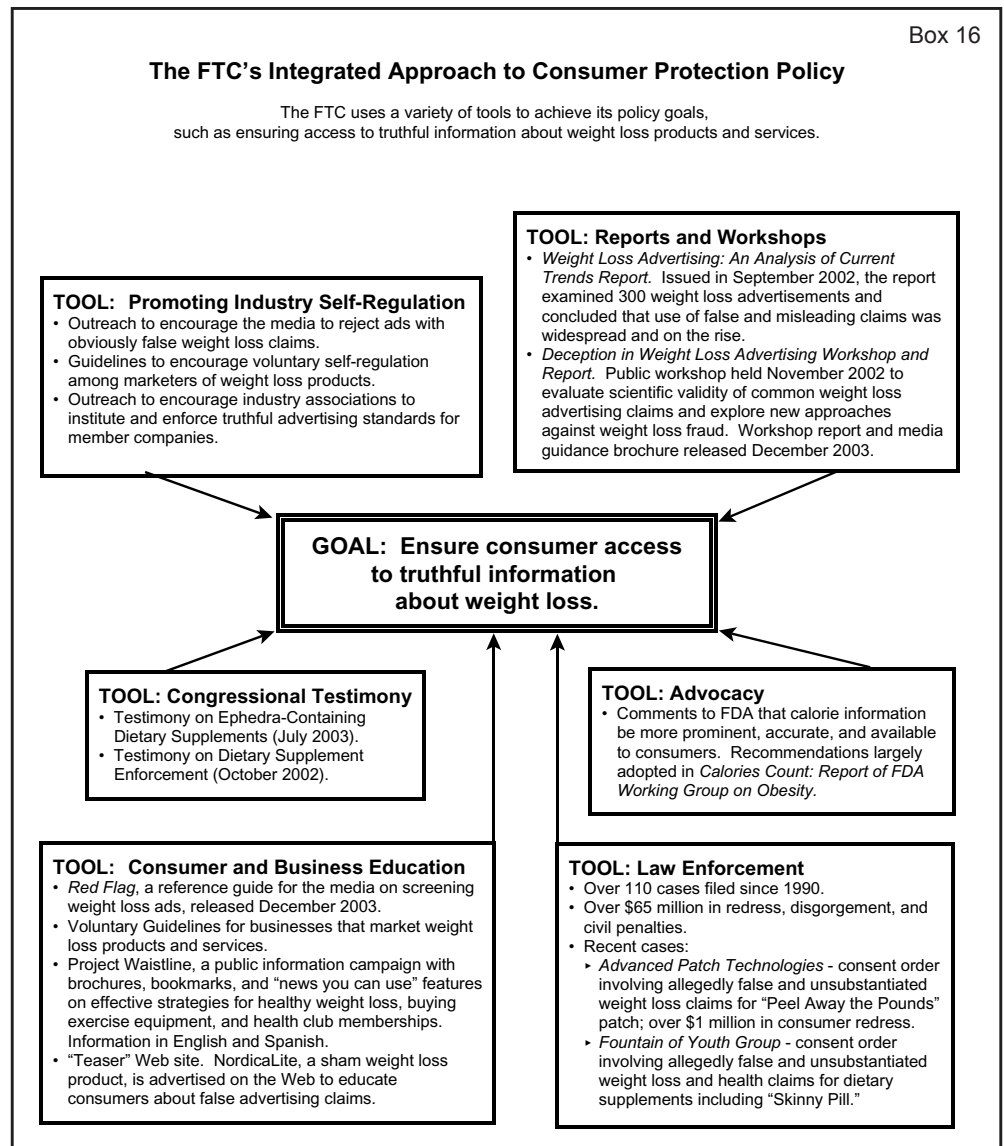
## **3. *Advocacy.***

Advocacy continued to be an important way to advance the FTC's consumer protection mission during 2003. The agency lends its expertise to other government agencies

and intervenes in court proceedings when important issues affecting consumers are at stake.

**Consultation with the FDA.** Complementing the FTC's own efforts to ensure that consumers have access to truthful information, the FTC staff responded to a number of requests from the Food and Drug Administration for comment on the FDA's current and proposed approaches to regulatory issues:

- **Direct to Consumer Drug Advertisements.** The FTC staff provided comments to the FDA advocating the continued consumer advertising of prescription drugs, and suggesting changes to make the current regulatory scheme less burdensome for industry and more effective for consumers.
- **Qualified Health Claims.** The agency also commented on the FDA's proposed regulations for "qualified health claims" for food and dietary supplements. Overall, the FTC staff supported allowing marketers to communicate truthful, non-misleading health claims for foods and dietary supplements when appropriately qualified to include the level of scientific support.



- **Food Labeling and Obesity.** Finally, the agency commented on food labeling and obesity, making specific recommendations regarding labeling requirements, including reviewing certain serving sizes, and removing the prohibition on calorie comparisons on food labels. The FTC staff noted that these changes would help consumers identify healthier, lower calorie food and encourage companies to develop and market more of these foods. As described in the briefing papers on food advertising and on obesity, the FTC continues to coordinate with FDA

on implementation of policies to permit qualified health claims for foods and dietary supplements through formal written comment and through participation on FDA's Qualified Health Claims Task Force

#### **4. Amicus Briefs.**

The Commission also files amicus briefs in appropriate cases to champion the interests of consumers. Last year, the Commission argued to the Ninth Circuit in *Rausch v. The Hartford Financial Services Group* that an insurance company takes "adverse action," as that term is defined in the Fair Credit Reporting Act, when the insurance company sets a price for insurance, based on information in a consumer report that is higher than the price it would have charged if the information had been more favorable. The brief argued that the district court misinterpreted both the wording of the Act and its legislative history when it held that an insurance company does not take "adverse action" with respect to a new customer when it offers that customer insurance on less favorable terms than it offers to others. In February 2003, the Commission filed a similar brief in the U.S. Court of Appeals for the Ninth Circuit in *Willes v. State Farm*.

As part of its efforts to monitor class-action settlements to ensure that the interests of consumers are adequately represented, the agency has filed amicus briefs opposing particularly objectionable class-action settlements. In *Schneider v. Citicorp Mortgage, Inc.*, the Commission objected to the use of low-value, or no-value, "coupon" compensation. Similarly, in *In re First Databank* and *Carter*

*v. IRC Services*, the Commission objected to excessive attorney fees, which divert needed compensation from injured consumers.

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

Consumer and business education serves as the first line of defense against fraud and deception. With each major consumer protection enforcement initiative, the FTC launches a comprehensive education campaign. During the past 12 months, the FTC issued or revised over 100 consumer and business education publications, and FTC consumer tips have appeared in every national newspaper, on every national television network (broadcast and cable), and in every newspaper in the top 100 media markets. Distribution also continued to rise. During fiscal year 2003, the FTC distributed more than 5.2 million printed publications and logged more than 22 million accesses to publications on its Web sites.

**Hispanic Outreach.** The FTC expanded its outreach to Hispanic consumers in the last year. The agency distributed more than 300,000 printed and 300,000 electronic publications to Spanish-speaking consumers, and received more than 5,400 Spanish-language complaints by phone and online – more than double what the agency received last year. The FTC also managed an aggressive media outreach campaign that led to staff interviews in major national dailies, major market dailies, magazines, national radio and television, and local TV and radio stations.

**www.consumer.gov.** The FTC continues to manage [www.consumer.gov](http://www.consumer.gov) and to recruit

new members to participate in the site, which offers one-stop access to federal consumer information. The number of members has grown to more than 180 agencies.

**Identity Theft Training.** Expanding on a program initiated last year with six regional training sessions, the FTC, the U.S. Secret Service, and DOJ conducted a series of training seminars for local and state law enforcement officers throughout the country, from Orlando, Florida and New York City to Seattle and Kansas City, Missouri. In the past two years, the agencies conducted 11 training sessions for more than 1,300 law enforcement officers and plan additional training sessions for the year ahead.

**Financial Literacy.** Title V of the FACT Act establishes a Financial Literacy and Education Commission (FLEC) to be chaired by the Secretary of the Treasury and composed of the FTC and 19 other federal agencies. The purpose of the FLEC is to develop a national strategy to promote financial literacy and education among all American consumers and to establish avenues, such as a Web site and toll-free hotline, to serve as clearinghouses that provide a coordinated point of entry for information about federal financial literacy. At the inaugural FLEC meeting, Chairman Muris spoke about the importance of financial education. FTC staff also are actively participating in the FLEC's working groups.

**National Consumer Protection Week.** This year's National Consumer Protection Week (NCPW), held this past February, focused on financial literacy. Consumers conduct financial

transactions that require an educated decision virtually every day. Without the right information, many of these transactions can be confusing and overwhelming. NCPW 2004, sponsored by government agencies and consumer advocacy organizations, including the FTC, aimed to help consumers learn more about their options in the marketplace and how to manage their finances better. The NCPW Web site, [www.consumer.gov/ncpw](http://www.consumer.gov/ncpw), contains helpful information for consumers in several languages, on a variety of financial topics, including credit and money management, saving and investing, insurance, retirement planning, and home ownership.

**Awards.** Two FTC outreach projects were honored for excellence. The Southwest Region's "Consumer College" – a series of free one-hour consumer classes for students of El Centro Community College in Dallas – was named one of three grand prize winners in the *College Planning & Management* magazine's first Community College Innovation Awards Program. The FTC's Alaska Native Art campaign was honored with an ACE award from the National Association of Consumer Agency Administrators, the second award for the campaign.

**Consumer Alerts.** The FTC continues to publish consumer alerts on a broad range of topical subjects. Some recent alerts are:

- **Federal and Postal Job Scams Advertising Campaign.** Ads have been running in the classified sections of newspapers, employment guides, and Web sites to alert vulnerable consumers to federal and postal job scams and how to avoid them. This

“information” remedy is funded by \$1.6 million recovered in the Career Information Services case. Since the ads began in October 2003, the number of related requests to the CRC have spiked, and the campaign site at [www.ftc.gov/jobscams](http://www.ftc.gov/jobscams) is logging almost 20,000 visits per month.

- **Post-Disaster Home Repair Rip-offs.** After a natural disaster, the demand for qualified contractors usually exceeds the supply. Because many legitimate companies are booked for months, frustrated consumers may not take the necessary precautions when hiring contractors. This alert, “After a Disaster: Repairing Your Home,” warns consumers of potential home repair rip-off artists who may overcharge, perform shoddy work, or skip town without finishing the job.
- **Online File Sharing.** The FTC’s alert “File Sharing: A Fair Share? Maybe Not” warns consumers about a number of risks associated with file sharing. The alert also lists suggestions to assist consumers to secure the personal information stored on their computers when using file sharing software.
- **Spam.** The FTC expanded its series of consumer alerts on spam e-mail. “Who’s Spamming Who? Could it Be You?” warns consumers that spammers are taking over home computers to send bulk e-mails by the millions. The alert gives tips on information security that can reduce the odds of an abuse.
- **Phishing.** “Is Someone ‘Phishing’ for Your Information?” alerts consumers about

“phishing” – a high-tech scam that uses spam to deceive consumers into disclosing their credit card numbers, bank account information, Social Security numbers, passwords, and other sensitive personal information.

## **Chapter 4: International Activities**

The FTC is involved in international activities that are increasingly critical to the achievement of the agency’s missions. The Commission has built a strong network of cooperative relationships with its counterparts abroad and plays a lead role in key multilateral fora. The FTC actively assists new democracies in developing competition and consumer protection agencies in new market-based economies. The growth of communication media and electronic commerce presents new challenges to law enforcement – fraud and deception now know no borders. The Commission works more and more with other nations to protect American consumers who can be harmed by both anticompetitive conduct and frauds that are perpetrated outside the U.S.

### **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 the European Union, Canada, and other jurisdictions remain vital as the staffs continue to work together closely on investigations of mutual interest, including the following matters during the past year:

- **Pfizer/Pharmacia.** The resolution of the competition concerns raised by Pfizer's \$60 billion acquisition of Pharmacia involved close coordination between the FTC and the European Commission on two of the nine affected markets in which the FTC obtained remedial measures. The FTC also coordinated various antitrust aspects of the transaction with competition authorities in Australia, Canada, Mexico, and South Africa.
- **DSM/Roche.** DSM's proposed \$2 billion acquisition of Roche Vitamins and Fine Chemicals Division presented potential anticompetitive effects in the market for a critical enzyme in certain cattle feed. The remedy ultimately coordinated by the FTC and the EC required the unwinding of a joint venture, as well as assurances that the remaining venture partner would be capable of maintaining competition.
- **GE/Agfa.** The successful resolution of this merger investigation involved cooperation with the competition authorities of Ireland, Germany, and the EC. The cooperation demonstrated the value of the contacts that have developed among the agencies that enable them to respond quickly to multi-jurisdictional mergers. The parties reached settlements with the FTC and the EC that were announced within two weeks of each

other and within the time frame sought by the parties.

The FTC and its counterpart agencies seek to streamline cooperation in merger cases and remain committed to addressing and minimizing policy divergences in all areas. These efforts are exemplified by the "best practices" that the EC and the U.S. agencies issued in 2002 that institutionalize and make more transparent the means by which the agencies review mergers subject to review in both jurisdictions. During the past year, the U.S. agencies provided input into EC proceedings regarding merger policy and intellectual property regulations, the Japan Fair Trade Commission's proposed reform of rules relating to the treatment of "essential facilities," and proposed amendments to the Canadian Competition Act. Similarly, the U.S. agencies have benefitted from input from their foreign counterparts on policy reviews in the United States.

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

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

**ICN.** The International Competition Network, which has 86 member competition agencies from 76 jurisdictions, 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. (See Box 17.) In June 2003, the ICN hosted its second annual conference, highlighting its work on multi-jurisdictional merger review,

## International Competition Network Member Jurisdictions



Albania	EFTA	Kyrgyzstan	Slovak Republic
Andean Community	Estonia	Latvia	Slovenia
Argentina	European Union	Lithuania	South Africa
Armenia	Finland	Macedonia	Spain
Australia	France	Malta	Sri Lanka
Austria	Germany	Mexico	Sweden
Azerbaijan	Greece	Morocco	Switzerland
Barbados	Hungary	Netherlands	Taiwan
Belgium	Iceland	New Zealand	Tajikistan
Brazil	India	Norway	Thailand
Bulgaria	Indonesia	Pakistan	Tunisia
Canada	Ireland	Panama	Turkey
Chile	Israel	Peru	Ukraine
Colombia	Italy	Philippines	United Kingdom
Costa Rica	Jamaica	Poland	United States
Croatia	Japan	Portugal	Uzbekistan
Cyprus	Kazakhstan	Romania	Venezuela
Czech Republic	Kenya	Russia	Yugoslavia
Denmark	Korea	Senegal	Zambia

competition advocacy, and capacity building.

Based on recommendations of the Merger Working Group's Subgroup on Notification and Procedures, which the FTC chairs, the ICN adopted seven Recommended Practices on Merger Notification Procedures, which complement the eight Guiding Principles for Merger Notification and Review adopted the previous year. In preparation for the ICN's April 2004 annual conference, the Mergers Working Group has prepared new recommended practices on conduct of merger investigations, procedural fairness, confidentiality, and interagency coordination, and is preparing a manual on recommended techniques for merger investigations.

The ICN's Competition Advocacy Working Group developed an online information and resource center, prepared a compilation of advocacy provisions, conducted sectoral studies of advocacy, and assembled a "tool kit" of competition advocacy mechanisms. Its

work is continuing in the Capacity Building and Competition Policy Implementation Working Group.

The Capacity Building Group also prepared a report on the challenges developing countries face in implementing competition policies, and one of its subgroups, which the FTC co-chairs, is conducting a study on the types of technical assistance that work best in particular circumstances, examining ways to build broader support for competition policy and examining the relationship between technical assistance funding

agencies and their counterpart competition agencies. The Working Group on Antitrust Enforcement in Regulated Sectors, created in 2003, has subgroups compiling reports on the viability of antitrust law in regulated sectors, antitrust enforcement initiatives in regulated industries, and the manner in which antitrust authorities and regulators exercise authority in areas of overlap.

**OECD.** The OECD Competition Committee 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 intersection of trade and competition policy. The FTC was a leader in the OECD's first joint roundtable on competition and consumer protection, which explored the synergies between the two disciplines

in promoting consumer welfare. The OECD also hosted a Global Forum on Competition involving OECD members and representatives of approximately 30 non-members.

### 3. *Trade/Competition Fora.*

Trade agreements increasingly involve competition issues. The FTC co-chairs the U.S. delegation to the World Trade Organization Working Group on the Interaction between Trade and Competition Policy, which examined issues relating to the role of competition policy in the WTO. The FTC staff participated in the WTO Ministerial Conference in Cancun. The FTC has been working with other U.S. agencies and the other nations of the hemisphere to develop competition provisions for a Free Trade Agreement of the Americas. The FTC also participated in the U.S. delegation that negotiated the competition chapter of proposed Free Trade Agreement with Australia.

## B. Consumer Protection

Because the past few years have seen a dramatic rise in the number of consumer complaints and investigations that blur jurisdictional lines, the FTC has focused its international consumer protection efforts on cross-border fraud. Fraudsters use ever-evolving electronic media to scam consumers while hiding behind jurisdictional borders. As a result, the FTC has stepped up its commitment to fight these frauds, regardless of where they

may originate. As part of this effort, the FTC has increased its visibility and participation in international organizations such as the OECD's Committee on Consumer Policy and the International Consumer Protection Enforcement Network. (See Box 18.)

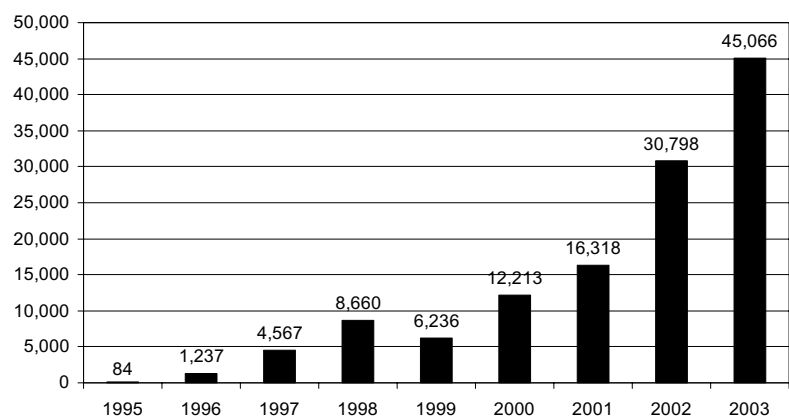
### 1. *Five-Point Plan to Fight Cross-Border Fraud.*

This past year, the FTC continued to move forward to implement the Five-Point Plan to Fight Cross-Border Fraud, first unveiled in 2002. The plan includes: (1) OECD guidelines on cross-border enforcement cooperation, (2) legislative proposals, (3) a workshop to explore public-private partnerships, (4) bilateral and multilateral cooperation arrangements, and (5) international technical assistance.

- **OECD Guidelines.** In June 2003, the OECD's Committee on Consumer Policy announced its "Guidelines for Protecting Consumers From Fraudulent and Deceptive Commercial Practices Across Borders,"

**Cross-Border Complaints  
By Calendar Year (1995 – 2003)**

Box 18



## Fostering International Cooperation in Consumer Protection

Box 19

Commissioner Mozelle W. Thompson is actively involved in the FTC's efforts to foster greater international cooperation on consumer protection issues. He continues to head the U.S. delegation to the International Consumer Protection and Enforcement Network (ICPEN); and in April 2003, he spearheaded a joint meeting between ICPEN and OECD's Committee on Consumer Policy. Since March 2002, he has chaired the OECD's Committee on Consumer Policy.

In June 2003, as a result of Commissioner Thompson's leadership, the OECD issued its "Guidelines for Protecting Consumers From Fraudulent and Deceptive Commercial Practices Across Borders." In announcing the Guidelines, Commissioner Thompson remarked, "Cross-border fraud, perpetrated through telemarketing, Web sites, and spam, harms consumers and consumer confidence in the global marketplace. The OECD Guidelines ... reflect an international commitment by consumer protection law enforcement agencies to work together to combat these schemes."

which reflect a commitment among member countries to work together to combat cross-border fraud. The Guidelines contain broad principles regarding law enforcement coordination, as well as specific information on how countries can work together in joint investigations. They also detail the authority of consumer protection agencies internationally, invite private-sector cooperation in anti-fraud efforts, and set the stage for future discussions regarding consumer redress.

- **Legislative Proposals.** The FTC has submitted proposals for legislative changes that would improve the FTC's ability to combat cross-border fraud. The recommendations focus primarily on improving the agency's ability to combat

fraud involving foreign parties, evidence, or assets. When enacted, the legislation would enable the FTC to share key information with foreign partners, which may enable them to pursue the fraudsters in their country who are targeting U.S. consumers. In particular, the legislation would help the FTC fight deceptive spam by allowing the agency to investigate more fully messages originating from outside the United States.

- **Public/Private Workshop.** In February 2003, the FTC held a workshop on public/private partnerships to fight cross-border fraud. The workshop delved into ways in which members of certain key industries (e.g., private mailbox operators, shipping companies, electronic payment processors, and Internet service providers) can help combat international consumer scams.
- **Bilateral and Multilateral Cooperation Arrangements.** The FTC has entered into several enforcement cooperation memoranda of understanding (MOUs) with key partners, such as Canada, Australia, the United Kingdom, and Ireland. These MOUs have helped streamline cooperation and coordinate joint actions against cross-border fraud involving these countries. In addition, the agency participates in several multilateral organizations, which allow networking and foster cooperation with foreign enforcement agencies from all over the world. Such groups include the International Consumer Protection and Enforcement Network, APEC's Electronic Commerce Steering Group, the Mexico-U.S.-Canada Health Fraud Task

Force, and the Informal Panamerican Dialogue.

- **International Technical Assistance.** The FTC's international technical assistance, detailed below, is also an important part of the fight against cross-border fraud.

## ***2. Cross-Border Telemarketing Fraud/ Canadian Partnerships.***

The FTC's international efforts have paid special attention to the U.S.'s neighbor to the north, Canada. The agency has forged partnerships with Canadian officials to coordinate law enforcement efforts in three places: the Ontario Strategic Partnership, coordinated by the FTC's Midwest Region to focus on Toronto-based telemarketing; "Project Emptor," coordinated by the Royal Canadian Mounted Police, the FTC's Northwest Region, British Columbia officials, and others, to target Vancouver telemarketing boiler rooms; and a new partnership focusing on the Canadian province of Alberta. Cases have targeted such areas as advance-fee credit cards and cross-border lottery schemes that target senior citizens.

## ***3. International Cooperation on Spam.***

The FTC is using its growing network of international contacts to build global partnerships against spam. This past February, the FTC staff gave a presentation on the agency's spam-related initiatives at the OECD Spam Workshop in Brussels. As a result, many foreign agencies with spam enforcement responsibilities (such as telecommunications and data protection

authorities) have expressed their interest in mutual cooperation on this issue.

## **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 US AID, and in partnership with DOJ, the FTC has provided technical assistance to over 40 nations in the development of their competition laws. In this past year, the FTC provided technical assistance on competition matters in Russia, Southeast Europe, Eurasia, the Andean Community, Egypt, Indonesia, Mexico, and South Africa. The FTC maintains a resident advisor program in Indonesia and, with DOJ, continues its resident advisor program in South Africa. The FTC'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 new programs of assistance to the ASEAN community of ten nations in Southeast Asia.

To broaden international cooperation on consumer protection and ensure that no country becomes a haven for fraud, the FTC is conducting US AID-funded training missions in Eastern Europe, Eurasia, and South America. Last year, FTC staff conducted consumer protection training missions in Hungary,

Slovenia, Romania, Ukraine, and Peru, covering such issues as basic consumer protections, consumer credit, advertising principles, advertisement interpretation, and advertising substantiation. A central feature is to assist with the detection and prevention of fraud in e-commerce and through the Internet. Although these nations are developing economically, some are home to the most sophisticated scam artists targeting U.S. consumers today. For instance, a significant amount of Internet auction fraud originates in Romania. The FTC's recent mission to Bucharest focused on training Romanian authorities on how to conduct Internet-related investigations and strengthening relationships with that country's cybercrime authorities.

## **Reflecting on Past Achievements and Considering the Future**

The past 12 months have provided occasion to recognize important people and events in the FTC's history. In summer 2003, Marc Winerman, a senior attorney in the Office of the General Counsel and an expert on the agency's history, published a seminal article on the early history of the FTC, entitled *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*. In September, the Bureau of Economics held a symposium in honor of the 100th anniversary of the Bureau of Corporations, the precursor to the FTC, which Congress later incorporated into the FTC upon its creation in 1914. The agency has continued many of the functions of the old Bureau of Corporations, such as collecting market information, conducting

industry and policy research, and preparing reports at the request of the Congress and the President. Finally, in December, the agency made the third presentation of the Miles W. Kirkpatrick Award for distinguished service, this time to Jodie Bernstein, former Director of the Bureau of Consumer Protection. Assisting Chairman Muris in making the presentation was former Chairman Robert Pitofsky, who served with Jodie Bernstein during separate tours at the agency.

During the coming 12 months, the FTC will have more reason to celebrate its past and consider its future. September 26, 2004 commemorates the 90th anniversary of the Federal Trade Commission Act, and March 16, 2005 marks the 90th anniversary of the day when the Chief Justice of the Supreme Court of the District of Columbia, the Honorable J. Harry Covington, administered the oath of office to the FTC's first five Commissioners, permitting the agency to begin operation. Next September, the FTC will host several events to observe this milestone. The 90-year mark will provide an opportunity for the FTC not only to reflect on past achievements but also to plan future initiatives to serve American consumers and fulfill the vision that inspired its formation.





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**Federal Trade Commission Annual Awards  
October 2003**

Chairman's Award	David Torok
Louis D. Brandeis Award	Rhett Krulla
Eleanor F. Greasley Award	Betty Moss Catherine Norris
Stephen Nye Award	Renard Francois April Tabor
Richard C. Foster Award	Sylvia Brooks Diane Reinertson
James M. Mead Award	Erin Malick Frances Williams Douglas McGuckin Dolores Wood
Mary Gardiner Jones Award	Doris Pressley
Outstanding Scholarship Award	Marc Winerman
Paul Rand Dixon Award	Michele Arington Jesse Leary Gregory Ashe Judith Moreland Ramona Elliott Steven Wernikoff John Jacobs
A. Leon Higginbotham, Jr. Award	Dean Forbes
Award for Excellence in Supervision	Joan Fina Peggy Twohig David Pender Michael Vita Robert Schroeder
Otis B. Johnson Award	Robin Overholt Colleen Tressler Enid Williams
Excellence in Economics Award	Christopher Taylor
Outstanding Team Effort Award	TSR Do Not Call Team 601 New Jersey Avenue Relocation Team Competition and Intellectual Property in the Knowledge- Based Economy Hearing and Report Team

