

# The FTC in 2006: Committed to Consumers and Competition



Federal Trade Commission  
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## Federal Trade Commission

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Jon Leibowitz, Commissioner  
William E. Kovacic, Commissioner  
J. Thomas Rosch, Commissioner

**About the Cover**

The cover depicts stonework located over each entrance door to the historic Federal Trade Commission Building at 600 Pennsylvania Avenue, NW, Washington, D.C. 20580. The bas relief works represent agriculture, foreign trade, industry, and shipping. Photos and cover design by Jonathan Morgan.

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## Letter from the Chairman

The Federal Trade Commission is committed to working for consumers and championing competition in a world characterized by dynamic change. I am pleased to present an account of the agency's achievements and projects in this Annual Report. As the report shows, we have continued to use all of our available resources, creativity, talent, and determination to protect consumers and preserve competition.


The past twelve months have seen the departure from the Commission of two distinguished and respected colleagues, former Commissioners Thomas B. Leary and Orson G. Swindle, III. Both of these outstanding individuals left a lasting imprint on the agency. Commissioners Harbour and Leibowitz and I, along with FTC staff, were delighted, however, to welcome back to the agency our two newest Commissioners, Commissioner William E. Kovacic and Commissioner J. Thomas Rosch.

With a full complement of Commissioners this year, the FTC remains steady towards its goal – to enhance consumer welfare. Competition is the ultimate consumer protection. Yet, through its work, the FTC has learned that there are always those who oppose competition and view it as an inappropriate means of “organizing” the production and distribution of goods and services. More dangerous are those who profess to favor competition but want to chip away at it when it does not produce a particular result. While it would be optimal if the agency could convert all skeptics and opportunists, the agency must, regardless of its success, continue its commitment to consumer interests and to market-based competition, both at home and abroad. Although the outcomes of competition may sometimes seem harsh on incumbent firms, as stated so aptly in a recent opinion piece, “Living with competition is hard. Living without it would be harder.” (Robert J. Samuelson, *Competition's Anxious Victory*, The Washington Post, Feb. 2, 2005, at A-23.) Thus, we strive to foster a culture that embraces the benefits of the competition marketplace – a culture in which federal and state policymakers, the courts, and the public understand and support competition as the best way to protect consumers and promote economic growth.

When competition alone cannot deter those who would use deception or unfair practices, we remain steadfast in our commitment to protect consumers. Our challenge is to protect them in a time of tremendous technological change, which is fast bringing the global marketplace to the doorstep of each and every consumer.

While technology is bringing vast benefits to consumers, it likewise is presenting new privacy and fraud issues that range from identity theft to spyware. And even as we use law enforcement, consumer research, and education to attack these new problems, we still must actively battle “low tech” frauds, like deceptive lending practices, business opportunity scams, and deceptive health and weight loss claims. In addition to prosecuting these “fraudsters” aggressively and returning millions of dollars to consumers, we are seeking new ways to educate consumers about the dangers of unscrupulous marketers and privacy invaders. An educated consumer is an empowered consumer, and thus a “self-protected” consumer.

Confronting these challenges, the FTC remains committed to consumers and competition. We remain dedicated to maintaining excellence and improving our effectiveness for another year of achievement on behalf of American consumers.

  
Deborah Platt Majoras  
Chairman



## Introduction

To be effective in service to the public, a government agency must constantly take stock of its activities and goals: What is its core mission? What must it do to adapt – and readapt – to make sure it is performing that mission effectively in a constantly changing world?

The Federal Trade Commission (FTC) is committed to a process of continuous reassessment in performing its mission to enhance consumer welfare. It is well aware of the need to be alert and nimble as it deflects and combats the new schemes and arrangements that distort the fair and efficient operation of the global market. During the past year and in the years ahead, the FTC has made specific commitments in the performance of its mission to ensure that the agency is working at the highest level for the consumers it serves. The FTC is committed to:

- **Enforcement.** The primary job of the FTC is to enforce competition and consumer protection laws to promote a free and vigorous marketplace. The Commission continued an active enforcement agenda in 2005, including issuing opinions in three adjudicative matters. In *Kentucky Movers* and in *North Texas Specialty Physicians*, the Commission found that the parties had engaged in anticompetitive conduct, and in *Telebrands*, the Commission found that advertising claims were false and deceptive. During the year, the Commission had as many as nine different competition cases pending at some stage of administrative litigation. In addition, the FTC took action to protect competition and consumers in close to a dozen proposed mergers in a wide range of economic sectors; filed one complaint in federal court and approved consent orders in seven anticompetitive conduct cases; and pursued two cases to enforce compliance with the Hart-Scott-Rodino Premerger Notification Act's (HSR) regulations. On the consumer protection side, the FTC scored major victories for consumer privacy. It reached one settlement for more than \$5 million in civil penalties for alleged violations of the Do Not Call Rule, and another for a total of \$15 million in redress and penalties for alleged failures to take reasonable steps to protect sensitive consumer information. The agency also brought 60 actions in federal district court to protect consumers against unfair and deceptive trade practices, with allegations ranging from bogus weight loss claims to advance fee credit card scams.
- **Education.** Another essential mission of the FTC is to educate consumers, businesses, and its staff on rights, responsibilities, and the changing marketplace. The past year's major consumer education initiatives included protection against identity theft (reaching over 7 million consumers), safe Internet surfing (launching the "OnGuard Online" campaign), and an ambitious outreach program to the nation's Hispanic population. The FTC also has continued its efforts to advance knowledge of challenging legal issues. Critical areas examined in reports or workshops included competition in the real estate brokerage industry, the interface between antitrust and patent law and possible patent reforms, and the factors affecting retail gasoline prices. Upcoming projects include hearings with the Department of Justice (DOJ) to examine anticompetitive conduct under Section 2 of the Sherman Act, and hearings to explore the impact of technology and globalization on consumer protection issues.



- **Efficiency.** The FTC currently is actively examining its administrative procedures to ensure it is working efficiently in the public interest, always asking the question: Do these processes benefit consumers without unduly burdening legitimate business activity? One major focus during the past year has been on mergers. In February 2006, the FTC announced reforms to the merger review process, intended to streamline “second requests” under the HSR Act by instituting best practices. These reforms should allow the FTC to serve consumers and taxpayers better by reducing waste and inefficiency in the process. In addition, focusing on merger analysis, an FTC task force has been working with DOJ to bring greater transparency to the competitive analysis of proposed mergers and thus greater certainty to businesses and their legal advisors. In March 2006, the Agencies jointly published a Commentary on the Horizontal Merger Guidelines to explain their analytical approach and enhance the quality of communications between the government and merging parties during the merger review process.
- **Evolving Technology and Markets.** In these first years of the 21<sup>st</sup> Century, technological and market changes are occurring rapidly, and the FTC is committed to keeping pace. Competition investigations increasingly focus on high technology sectors of the economy. In pharmaceuticals, for example, the FTC has initiated a study on the circumstances in which innovator companies launch authorized generic drugs. High tech consumer spying in the form of spyware and other computer “badware” also continue to be a major focus and concern at the agency – during the past year, the FTC issued a major report on spyware and brought law enforcement actions to stop marketers who loaded unwanted and risky software onto consumers’ computers without their knowledge or consent.
- **Engagement Worldwide.** The FTC has stepped up its work with both competition and consumer protection agencies around the world. International cooperation not only can lead to more effective law enforcement against global scam artists but also can ease burdens on legitimate businesses that operate on a global basis. On the competition side, the FTC is working with international bodies, such as the Organisation for Economic Co-operation and Development and the International Competition Network, to strengthen and increase areas of policy agreement. The FTC continues to develop new enforcement partnerships and to strengthen existing ones. On the consumer protection side, the FTC continues its global focus, keenly aware that online fraud is not subject to national boundaries and can injure consumers on a global scale. Among other activities, the FTC co-chairs the London Action Plan, which includes representatives from approximately two dozen countries around the world, to promote international cooperation on spam enforcement.
- **Electronic Government.** The FTC continues to be a leader in the use of technology and the Internet to inform and interact with consumers and businesses. Starting in the mid-1990s, the FTC began building interlinked public consumer protection websites, many in connection with other domestic or foreign law enforcement agencies, to educate consumers and to collect and analyze data on a broad range of consumer protection issues, including high tech fraud and identity theft. During the past few

years, the agency has relied on electronic means for more efficient communication with its stakeholders, adding electronic filing for administrative litigation and for public comments on proposed rulemakings. The next electronic addition will be E-Premerger, expected in Spring 2006, which will permit electronic filing of all information about proposed mergers required under the HSR Act.

- **Excellence.** The FTC is proud of its reputation as both a premier federal government agency and a leader in the world community of competition and consumer protection agencies. Only by continuing to elicit excellence from its staff can the FTC do the best for the consumers it serves. During the past year, the agency invested significant resources in staff training and development. For example, the FTC held its first agency-wide new attorney and economist training program with skills workshops and substantive presentations on competition, consumer protection, and economics, as well as government ethics and professionalism.



## Chapter 1 – Competition Law Enforcement

Competition provides the foundation for a thriving economy. When rival businesses vie with one another to win consumer patronage, they seek out efficiencies to lower their costs and innovations to improve or expand their product offerings. This creative process – driven by competition – serves consumers by resulting in lower prices, goods and services of superior quality, and a broad array of choices.

The goal of the FTC’s competition mission is to remove the obstacles that impede competition and prevent its benefits from flowing to consumers. The FTC has adopted fundamental strategies to maximize the impact of its competition mission. Elements of that strategy include:

- Focusing efforts on sectors of the economy that have the greatest impact on consumers, such as energy and health care.
- Facilitating cooperation and voluntary compliance with the law by promoting transparency in enforcement standards, policies, and decision-making processes.
- Improving the processes and institutions through which competition policy is developed and applied.
- Emphasizing education and outreach and making full use of the broad range of policy instruments that Congress has provided to the agency.
- Working cooperatively with international colleagues to promote cohesive and sound competition policies worldwide.

The competition mission continues to be highly productive. In addition to pursuing a broad range of merger and nonmerger enforcement actions, the agency made a significant contribution to providing guidance and improving its processes.

### A. Guidance, Transparency, and Process Improvements

The FTC seeks to be efficient as well as effective in its law enforcement activities. Efficiency includes both using agency resources effectively and minimizing the burdens that law enforcement necessarily imposes on businesses. While the FTC has implemented a number of procedural improvements in recent years, it has made a concerted effort during the past year to do even more to streamline its processes.

Uncertainty is perhaps the primary enemy of efficiency in law enforcement. Ambiguous legal standards increase the likelihood that businesses either will forego activities that are both legal and procompetitive, or engage in questionable activities that lead to investigations or litigation, imposing substantial costs on both the business community and the government. Consequently, the FTC has worked to increase the clarity of the legal standards it enforces by providing explicit guidance to the business community and the bar and by explaining its policies and decisions as fully as possible.

In the past year, the FTC's ongoing efforts to enhance the guidance it provides and the transparency of its policies and decisions, and also to streamline its processes, have resulted in several noteworthy achievements.

## 1. *Guidance/Transparency*

**Commentary on the Merger Guidelines.** In March 2006, the FTC, jointly with DOJ, issued a Commentary on the Horizontal Merger Guidelines. The Agencies first issued the Horizontal Merger Guidelines in 1992, and then revised them in 1997 to add a section on the treatment of efficiencies in merger analysis. The new Commentary provides further guidance to the antitrust bar and business community by explaining how the government actually has applied the particular provisions of the Guidelines concerning market definition and concentration, competitive effects (including coordinated interaction and unilateral effects), entry conditions, and efficiencies. The Commentary includes short summaries of actual past investigations that enhance understanding of particular points under discussion in the narrative. A major point made by the Commentary is that Guidelines analysis is not invariably a linear, step-by-step progression that commences with market definition and concludes with efficiencies, but rather is an integrated process centered on determining a transaction's likely competitive effects.

Box 1

### **Guidance / Transparency / Efficiency**

In the past year, FTC competition enforcement has added greater guidance and transparency to decisionmaking and streamlined processes, including:

- Commentary on the Horizontal Merger Guidelines
- Reforms to the merger review process
- Explanations of investigation outcomes
- Testimony before the Antitrust Modernization Commission
- More electronic HSR process
- Improved litigation capability
- Post-hurricane expedited review of business collaborations

**Expedited Antitrust Review Procedure and Guidance for Post-Hurricane Relief Efforts.** The FTC and DOJ immediately recognized the urgency of relief efforts for communities affected by Hurricanes Katrina and Rita, and took action to help. In September 2005, the agencies announced an expedited procedure for providing antitrust guidance on the legality of collaborations of businesses working to rebuild those communities. Under these special procedures, the Agencies review proposed joint business activities relating to the relief effort, and decide whether the planned collaboration would warrant an antitrust challenge. The expedited procedure allows affected businesses to proceed promptly to aid those in need without the distraction of uncertain antitrust implications. The Agencies also emphasized their resolve to prevent unscrupulous competitors from preying on hurricane victims by fixing prices or allocating markets.

**Explanations of Investigation Outcomes.** The FTC has sought over the past several years to make its decisions *not* to challenge a particular merger or type of business conduct as transparent as its decisions to proceed with enforcement action by issuing statements explaining why it declined to act:

- **Omnicare/NeighborCare.** In June 2005, the Commission issued a unanimous statement explaining its decision not to challenge a merger of the largest and likely second-largest institutional pharmacies (IPs), which provide pharmacy and related

products and consulting services to skilled nursing facilities (SNFs). The Commission concluded that the merger was unlikely to harm consumers for several reasons. First, even though in some areas Omnicare had or would have had 50 percent or more of SNFs under contract, most of the remaining SNFs have three or more independent IPs within 100 miles that do compete for their business. Second, entry into the IP marketplace is relatively easy. Third, the Medicare Modernization Act would change payment structures for prescription drugs and related products, making it unlikely that the merged firm could extract above-market rates.

- **Federated/May Department Stores.** In August 2005, the Commission issued a statement explaining why it determined not to oppose the creation of the largest chain of traditional department stores in the United States. The Commission explained that its extensive, six-month investigation showed that Federated Department Stores, Inc.'s \$17 billion acquisition of the May Department Stores Company would not adversely affect consumers because of the breadth of the relevant product and geographic markets. The Commission noted that American retail markets have evolved to a point where other retailers' price and product selection decisions regularly affect those of the department stores. Conventional department stores are not a distinct market because these stores face competition from multiple retail formats for the merchandise they sell. Moreover, Federated, May, and other department stores set uniform prices for their stores throughout broad geographic areas, unlike the differing prices from one city to another that helped to establish the "office superstore" market in the FTC's *Staples/Office Depot* case. In concluding that the transaction posed no threat to consumers generally, the Commission noted that the ongoing separate investigations by several state antitrust agencies, together with the parties' announced plans to divest 75 stores, provided an appropriate vehicle for addressing any unique consequences based on local conditions.
- **Comcast/Time Warner/Adelphia.** In January 2006, the FTC closed its investigation into the acquisition by Comcast Corporation and Time Warner Cable Inc. (TWC) of the cable assets of Adelphia Communications Corporation, and into related transactions in which Comcast and TWC swapped various cable systems. Chairman Majoras and Commissioners Kovacic and Rosch issued a statement that explained that they agreed with the staff's decision to close the investigation because the evidence did not suggest that the proposed transactions were likely to lessen competition substantially in any geographic region in the United States. Commissioners Leibowitz and Harbour issued a separate statement explaining that they would have preferred for the Commission to have sought to require the parties' agreement to conditions concerning other cable and satellite companies' access to regional sports networks before allowing the transactions to proceed.
- **Shell Refinery Closure.** Because of the strong public interest in petroleum-related matters, the Commission issued a statement in May 2005, explaining the results of its comprehensive investigation into the decision by Shell Oil Products US to close its oil refinery in Bakersfield, California. The investigation focused on whether the stated rationale for the closure, declining profitability, was a pretext intended to mask an anticompetitive arrangement to reduce refining capacity and raise gasoline prices in

California. The staff reviewed confidential Shell documents, obtained sworn testimony from representatives of Shell and other refiners, interviewed crude oil suppliers and firms that had considered acquiring the refinery, and analyzed voluminous financial data. Based on the investigation, the Commission unanimously concluded that the evidence supported Shell's explanation for the closure, and that no evidence supported a conclusion either that Shell had obtained or exercised market power or that it had colluded with any other firm to close the facility. Shell has since sold the refinery to a subsidiary of Flying J, Inc., which intends to keep it operational.

## 2. Process Improvements

**Merger Process Task Force.** In February 2006, the Chairman announced a series of substantial reforms to the merger review process. A central goal of the reforms is to lower the costs of merger investigations for both the FTC and the parties by reducing the volume of materials that the parties must produce to respond to a second request. The reforms also are designed to permit staff and the parties to identify more rapidly the relevant substantive issues and focus more quickly and effectively on the relevant documents and data. In recent years, the costs of complying with second requests have grown substantially, due in large part to the increase in the volume of electronic documents generated by companies and requested by the FTC and DOJ and the reduced reliance by the Agencies on structural presumptions in favor of direct analyses of competitive effects. The reforms provide that the FTC will establish presumptions that it will (1) require a party to search the files of no more than 35 of its employees when responding to a second request, provided that the party complies with specified timing conditions; (2) reduce the time period for which a party is required to search for documents from three to two years; (3) require a party to preserve backup tapes for only two calendar days, when responsive documents are available through more accessible sources; and (4) allow parties to provide significantly reduced amounts of information on their privilege logs.

**Electronic HSR Filings.** The FTC is adapting the HSR filing process to the era of e-government. Final amendments to the HSR Rules, announced in December 2005, will allow filers to provide an Internet address linking to electronic copies of certain documents required as part of the HSR reporting form, in lieu of providing paper copies. The agency also has developed instructions and specifications tailored to electronic productions. Furthermore, as part of the overall movement to make government more accessible electronically, the FTC will announce this spring the implementation of a sophisticated electronic system for filing HSR premerger notifications. The agency has made substantial investments in software and other resources to enable it to handle electronic data submitted by merger parties in a variety of different formats. E-filing should reduce substantially the burdens for both businesses and government involved in premerger notification.

Box 2

### Recent Reforms to the Merger Review Process

The goal is to streamline the process by instituting well-defined best practices to reduce costs for both the FTC and the parties by reducing the volume of materials produced in response to a second request. The reforms establish *presumptions* that:

- Limit search to files of 35 employees, providing the party complies with specified timing requirements;
- Reduce time period for responsive documents from three to two years;
- Require preservation of backup tapes for only two days when documents have other accessible sources; and
- Allow for significantly reduced information to be supplied on privilege logs.

**Improved Litigation Capability.** The FTC recently established a task force composed of talented antitrust litigators, whose mission is twofold: (1) to provide an experienced, guiding hand on those matters that go to litigation, and (2) more broadly, to provide training to improve the agency's capacity to litigate competition matters when necessary. This investment paid dividends in the past year, contributing meaningfully to litigation successes and settlements.

**Enhanced Communication with DOJ.** In April 2005, the FTC's Chairman and her competition advisors, the Director of the Bureau of Competition, the Deputy Directors, and the Assistant Directors joined their counterparts from DOJ's Antitrust Division at an off-site retreat. The event provided an opportunity for enhanced communication and sharing of best practices between the two agencies, which join in the common goal of enforcing the antitrust laws where necessary to protect competition. Together, the agencies are taking concrete steps to improve effectiveness and responsiveness to the needs of the public, and to minimize variance in the treatment of parties whose matters are subject to antitrust review.

## B. Merger Enforcement

Reviewing proposed merger transactions, investigating those that may threaten consumer interests, and taking action to prevent competitive harms comprise the largest segment of the FTC's competition mission. The agency's merger enforcement workload continued to expand in the past year, with the value of merger transactions reported under HSR jumping from \$630 billion in FY 2004 to \$1.1 trillion in FY 2005, accompanied by a greater than 25 percent increase in the number of mergers requiring investigation. The agency anticipates that the merger review workload in FYs 2006 and 2007 also will be demanding.

### 1. Energy Industry Merger Enforcement

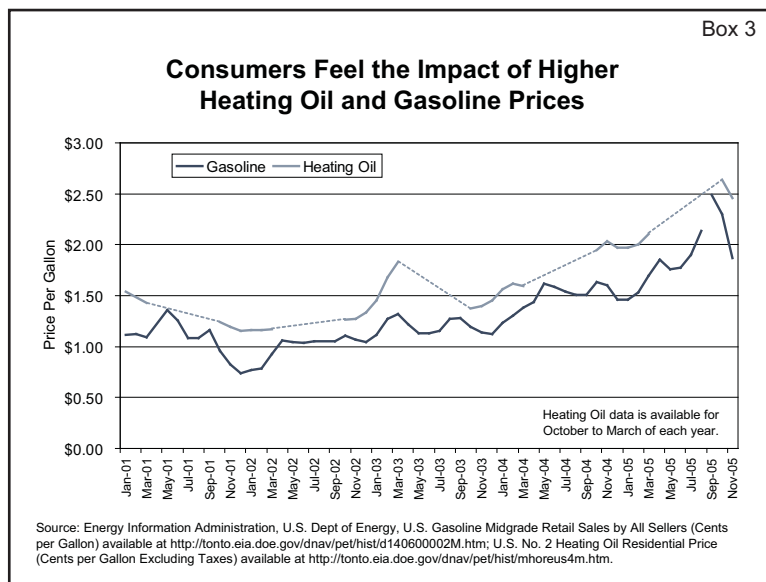
The petroleum industry occupies a crucial and highly visible role in the U.S. economy, affecting consumers both directly and indirectly. Consumers feel the impact directly when they pay their monthly fuel oil bills or fill their gasoline tanks. They are well aware of the price of gasoline – reports on gas prices fill the media almost daily, and gas prices loom in giant numerals on seemingly every street corner. Consumers also feel the impact indirectly in the prices they pay for travel or shipping when companies pass their higher fuel costs along to their customers. Transportation costs are not the whole story: natural gas fuels a major portion of electricity generation and residential heating. And when businesses incur higher utility costs, these costs are likely to ripple through the economy in the form of higher consumer prices. Finally, petroleum price increases also can have an impact beyond the energy sphere, because petroleum is a feedstock in the production of many products, such as plastics.

Given this central place in consumers' lives, the petroleum industry receives the highest level of scrutiny from the FTC. Since 1981, the FTC has taken action in 20 large petroleum industry mergers, curing antitrust concerns in hundreds of individual markets, mostly through divestitures, including the divestitures in Exxon/Mobil of over 2,000 retail stations and a refinery, the largest single divestiture order in FTC history. The agency has sought relief in petroleum mergers at significantly lower levels of concentration than have existed in other industries with mergers under review. Despite some increases over time, concentration for most markets of



the U.S. petroleum industry has remained low to moderate. During the past year, the FTC took enforcement action in three matters.

- Chevron/Unocal.** In June 2005, the Commission acted to save California consumers hundreds of millions of dollars in higher gasoline prices by accepting two consent orders to resolve the Commission's administrative monopolization complaint against Union Oil Company of California (Unocal) and antitrust concerns arising from Chevron's proposed \$18 billion acquisition of Unocal. While the settlements focused primarily on resolving allegations of monopolization through anticompetitive abuses of the regulatory process related to California reformulated gasoline in connection with certain Unocal patents, the merger also raised concerns that Chevron could use information obtained through patent licenses to facilitate coordinated interaction among itself and other refiners and marketers leading to higher prices for reformulated gasoline. By the terms of the order, the combined firm agreed not to enforce its relevant patents or collect royalties on those patents.
- Valero/Kaneb Services and Pipe Line Partners.** In July 2005, the Commission approved a final settlement requiring, among other terms, that Valero divest several oil terminals and a pipeline system to preserve competition in petroleum transportation and terminaling in Northern California, Pennsylvania, and Colorado. The settlement should protect consumers from anticompetitive price increases for gasoline and diesel fuel.
- Aloha Petroleum/Trustreet Properties.** Also in July 2005, the Commission authorized its staff to seek a preliminary injunction to block Aloha Petroleum's proposed acquisition of Trustreet Properties' half interest in import-capable terminal and retail gasoline assets in Hawaii. The FTC, in conjunction with the Hawaii Attorney General, filed the complaint in federal court in Hawaii. The proposed acquisition allegedly would have reduced from five to four the overall number of island gasoline marketers that had guaranteed access to supply, and from three to two the number of suppliers selling to unintegrated retailers. After Aloha subsequently announced a long-term agreement with a third party, Mid Pac Petroleum, that would give Mid Pac substantial rights to use the terminal to import gasoline into Hawaii, the court dismissed the FTC's complaint in response to the agency's request.



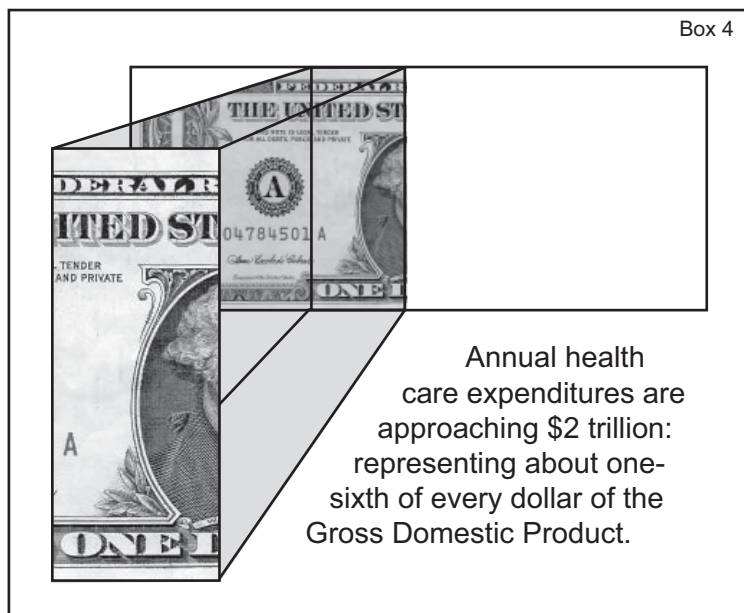
## 2. Health Care Merger Enforcement

Health care is a perennial FTC priority because of its huge impact on the American economy. Annual health care expenditures are approaching \$2 trillion, and now represent about one of every six dollars of GDP. Health care costs have been growing faster than the rate of inflation for decades: health care expenditures as a share of GDP have nearly doubled in the past 30 years. During the past year, the FTC devoted resources to seven significant proposed merger matters in the health care sector.

- **Evanston/Highland Park.** In an Initial Decision issued in October 2005, an Administrative Law Judge (ALJ) found that Evanston Northwestern Healthcare Corporation's completed acquisition of an important competitor, Highland Park Hospital, resulted in higher prices and substantially lessened competition for acute care inpatient services in parts of Chicago's northern suburbs. The hospital's appeal of the ALJ's decision and order requiring divestiture of Highland Park Hospital is now pending before the Commission.
- **Novartis/Eon Labs.** Competition from generic pharmaceuticals is a key factor in controlling escalating health care costs. The Commission acted to preserve competition for three pharmaceutical products by requiring the parties to divest three generic drugs that competed with Novartis' branded products before permitting a proposed \$1.72 billion acquisition of Eon Labs, Inc. to go forward in July 2005. The medications involved in the settlement include a tricyclic antidepressant, a muscle relaxant, and a drug used to treat tuberculosis, the branded versions of which account for \$30 million in annual sales. The selling price of the generic equivalents of these drugs – less than half that of the branded products – reflects the importance to consumers of preserving this competitive factor.
- **Teva/IVAX.** In a consent order finalized in March 2006, the Commission ordered Teva Pharmaceutical Industries and IVAX Corporation to divest 15 generic pharmaceutical products before allowing Teva's \$7.4 billion acquisition of IVAX to proceed. Among the drugs to be divested were forms of generic amoxicillin. The divestitures should protect consumers from higher prices that allegedly would have resulted from this merger by restoring competition in these markets.
- **Johnson & Johnson/Guidant Corp.** The Commission intervened on behalf of coronary artery disease patients in December 2005, by ordering divestitures to preserve competition for three life-saving medical devices used in coronary bypass surgery and implantation of medicated stents to open clogged arteries. The remedial provisions of the Commission's final consent order, approved in December 2005, would have alleviated the threats to competition posed by Johnson & Johnson's proposed \$25.4 billion acquisition of Guidant Corporation. (Johnson & Johnson later abandoned its bid for Guidant after being outbid by Boston Scientific.) This case, in which the FTC worked closely with its counterparts in the European Commission, Canada, and other countries, illustrates the valuable international collaboration that serves both the immediate and long-term public interest.

- **DaVita/Gambro Healthcare.** In November 2005, the Commission ordered divestitures to protect patients who require regular outpatient dialysis services from higher prices and reduced quality or service. Under the consent order, DaVita, Inc. will divest 69 dialysis clinics in 35 markets across the United States as a condition to proceeding with its \$3.1 billion acquisition of Gambro Healthcare Inc. The two firms were the second and third largest providers of dialysis services in the nation, and the divestitures would restore competition to localized markets that allegedly otherwise would have been lost in the merger.

- **Medicis/Inamed.** In March 2005, Medicis and Inamed announced a planned merger of these two marketers of dermal products used to treat facial wrinkles. As announced by the parties, the Commission issued a second request to investigate the potential overlapping products. In December 2005, Medicis and Inamed terminated their merger agreement, and Inamed entered into a merger agreement with Allergan, Inc. At the time, Inamed's board said that



Allergan's offer was superior to Medicis' offer, and Allergan's Chairman and CEO told Inamed's board members and shareholders that he expected easier FTC approval of the Allergan/Inamed deal because Allergan would agree immediately to give up Inamed's license to an overlapping wrinkle treatment product. Following Allergan's bid, Medicis announced that it would not raise its offer for Inamed, and the Medicis/Inamed deal was terminated.

- **Allergan/Inamed.** The Commission announced, in March 2006, a settlement requiring the return of development and distribution rights to a botulinum toxin product to its manufacturer before allowing Allergan's \$3.2 billion acquisition of Inamed. Allergan markets Botox, a botulinum toxin used by many consumers as a non-surgical treatment for wrinkles and lines that appear on a person's forehead. Inamed held the rights to Reloxin, a product in Phase III Clinical Trials with the Food and Drug Administration and the expected first competitor to Botox. Under the terms of the order, Inamed will return its development and marketing rights to Ipsen, the manufacturer of Reloxin.

### 3. *Other Merger Enforcement*

The FTC also investigated and took enforcement action, where necessary, in three other proposed mergers in a range of economic sectors during the past year.

- **Procter & Gamble/Gillette.** In September 2005, the Commission acted to ensure continued competition for a number of consumer personal care products by conditioning The Procter & Gamble Company's \$57 billion acquisition of rival consumer products manufacturer, The Gillette Company, on divestitures to cure allegedly anticompetitive overlaps. The affected product markets included at-home teeth whitening products, adult battery-powered toothbrushes, rechargeable toothbrushes, and men's antiperspirant/deodorant products.
- **Occidental Chemical/Vulcan Chemical.** In July 2005, the Commission approved a final consent order to preserve competition in markets for three chemical products used to make potassium inputs for food additives and nutritional supplements, and in the manufacture of televisions and computer monitors. The Commission allowed Occidental Chemical Company to purchase the chemical assets of Vulcan Materials Company, provided that it promptly divest a Vulcan facility to cure the antitrust concern.
- **Penn National Gaming/Argosy Gaming.** The Commission challenged an allegedly anticompetitive acquisition in the market for casino services in Baton Rouge, Louisiana. The consent order required Penn National to divest Argosy Gaming's river boat casino in Baton Rouge before proceeding with its \$2.2 billion acquisition of Argosy Gaming. Penn and Argosy operated the only two casinos in the Baton Rouge market.

### 4. *Enforcing Compliance with the HSR Rules*

The HSR merger investigation process involves mutual obligations for the FTC and the merging parties. While the agency seeks to be flexible in order to minimize burdens on the parties and facilitate resolution of any issues, it will stand firm when necessary to obtain the information needed to review mergers and to protect the integrity of the HSR process.

- **Hollywood/Blockbuster.** In Spring 2005, the Commission authorized its staff to file an action under Section 7A(g)(2) of the Clayton Act, requesting the court to enjoin the Hollywood/Blockbuster merger because the parties allegedly had not "substantially complied" with the second request. This is only the second time in the FTC's history that it filed such an action. According to the complaint, Blockbuster, which sought to acquire Hollywood Entertainment, had failed to respond fully to the agency's request for pricing data. Because the missing material was important to the FTC's investigation, the agency filed suit to block consummation of the transaction. The parties resolved the issues before the court ruled on the merits, with Blockbuster agreeing to an extension of the HSR waiting period. Subsequently, the merging parties abandoned their proposed transaction before the FTC completed its investigation.

- **Durus Life Sciences Fund.** In September 2005, DOJ, at the request of the FTC, sued a hedge fund manager for allegedly failing to report under HSR several large stock purchases before they were made. Scott Sacane, the manager of the Durus Life Sciences Master Fund, agreed to pay a \$350,000 civil penalty to settle the government's charges.

## C. Nonmerger Enforcement

The past year has seen significant developments in agency nonmerger enforcement in the form of consent agreements, Commission administrative adjudications, and appellate court actions.

### 1. Appellate Decisions

Federal courts reviewed two of the agency's recent adjudicative decisions in the past year, with one resolved favorably for the agency, and the other still pending in the appellate process.

- **Three Tenors.** In July 2005, the U.S. Court of Appeals for the District of Columbia Circuit affirmed the Commission's decision in *Polygram Holding Inc.* (known as "the Three Tenors" case), validating the Commission's approach in analyzing horizontal conduct among competitors. The D.C. Circuit agreed with the Commission that although not a *per se* violation of antitrust law, the agreement among these horizontal competitors was presumptively unlawful and Polygram failed to rebut that presumption.
- **Schering-Plough.** Pending before the U.S. Supreme Court is a petition for *certiorari* filed by the Commission in August 2005, asking for review of the Eleventh Circuit's decision in *Schering-Plough*. The case arose out of 1995 applications by Upsher-Smith Laboratories, Inc. and ESI Lederle, Inc. for approval of generic versions of a potassium supplement product, along with their certifications that the products they intended to market were non-infringing generic substitutes. Schering brought patent actions against ESI and Upsher, but later entered into settlement agreements with both. The Commission issued an administrative complaint charging that, under these agreements, Schering made monetary payments to both firms in exchange for their agreement to delay generic entry, in violation of Section 5 of the FTC Act. ESI entered into a consent agreement with the Commission in April 2002, but Schering and Upsher proceeded to trial. In December 2003, the Commission ruled that Schering's agreements with Upsher and ESI were unlawful, concluding that the agreements amounted to payments to exclude generic competition to a greater extent than could have been done simply by relying upon the strength of the patent claims, and that Schering had shown no competitive justification for the resulting harm to consumers. The Eleventh Circuit reversed the Commission's decision, holding (incorrectly, in the Commission's view) that Schering's patent provided it with the legal right to exclude Upsher and ESI from the market until they proved either that the patent was invalid or that their products did not infringe upon the patent. The full Eleventh Circuit denied the FTC's petition for rehearing *en banc*.

## 2. Health Care

The FTC pursued several nonmerger matters involving health care to complement its merger enforcement work in this important industry. Notably, during the past year, the Commission filed a complaint against pharmaceutical manufacturers for allegedly delaying generic drug entry, approved consent orders in six cases requiring physician groups to stop fixing prices, and issued a decision in a seventh physician case, finding that the activity at issue amounted to unlawful price fixing.

- **Warner Chilcott/Barr Laboratories.** In November 2005, the FTC filed a complaint in federal district court seeking a permanent injunction to end an agreement between Warner Chilcott and Barr Laboratories that allegedly would eliminate beneficial generic competition for Warner Chilcott's oral contraceptive drug, Ovcon. The FTC's complaint alleges that the two firms agreed that, after Barr received final FDA approval for its generic version of Ovcon, Warner Chilcott would have the option of paying Barr \$20 million in return for Barr's agreement not to compete in the United States for five years. Also filing complaints in federal court challenging the Warner Chilcott-Barr agreement were 21 states and the District of Columbia.
- **Evanston Northwestern Healthcare.** The FTC announced a partial settlement of this administrative proceeding in April 2005, resolving Count III of the complaint, which alleged illegal collusion among approximately 900 doctors in Cook and Lake Counties, Illinois. The doctors agreed to cease and desist from any illegal collective conduct.
- **Partners Health Network, Inc.** In September 2005, the FTC approved a final settlement with this physician-hospital group, including about 225 physicians practicing in the Pickens County, South Carolina area.
- **Preferred Health Services.** In another matter involving a South Carolina physician-hospital group, the Commission, in April 2005, approved a final consent order with a group of about 100 doctors, comprising approximately 70 percent of the independently practicing physicians in the vicinity of Seneca, South Carolina.
- **San Juan IPA.** This final consent order, approved in May 2005, involves 120 physicians who make up about 80 percent of the doctors practicing independently in the area of Farmington, New Mexico.
- **New Millennium Orthopaedics.** In May 2005, the FTC settled charges with two small groups of orthopaedic physicians (with 22 and 10 members, respectively) in the Cincinnati area that had formed an independent practice association (IPA). In addition to prohibitions on joint negotiations, the Commission's order disbanded the IPA.
- **Health Care Alliance of Laredo.** In the sixth physician consent agreement of the past year, the Commission approved an agreement with a group of about 80 physicians practicing in a multi-specialty group in the Laredo, Texas area in February 2006.
- **North Texas Specialty Physicians.** In a seventh physician case, the Commission issued a unanimous decision in December 2005, upholding the allegations that a physician group, known as North Texas Specialty Physicians (NTSP), had negotiated

agreements among participating physicians on price and other terms, refused to negotiate with payors except on terms agreed to among its members, and refused to submit payor offers to members if the terms did not satisfy the group's demands. The Commission concluded that the group's contracting activities with payors "amount to unlawful horizontal price fixing." Following the methodology of the *Polygram Holdings, Inc.* case, as recently upheld by the D.C. Circuit Court of Appeals, the Commission considered the respondents' proffered justifications, but found that they were neither legitimate nor supported by evidence to justify NTSP's inherently suspect conduct. The physicians have appealed the decision to the U.S. Court of Appeals for the Fifth Circuit.

### 3. Energy

The FTC considers the energy industry to be among its highest priority targets for antitrust law enforcement. To protect consumers from anticompetitive practices, the agency devotes substantial resources to policing the petroleum and natural gas industries, including investigating potentially anticompetitive conduct and, when warranted, bringing law enforcement actions against such conduct. In addition to the panoply of investigative tools that the Commission would apply to any industry, the FTC's law enforcement arsenal in the energy industry includes the continuous monitoring of wholesale and retail gasoline and diesel fuel prices around the country. Thus, the FTC and its staff are in a state of high alert for any evidence of anticompetitive behavior among energy companies.

- **Chevron/Unocal.** As previously discussed, in June 2005, the Commission announced two consent orders to resolve an administrative proceeding alleging monopolization by Unocal, as well as any antitrust concerns arising from Chevron Corporation's then-proposed \$18 billion acquisition of Unocal. In both orders, the combined firm agreed not to enforce certain Unocal patents that could have raised the price of gasoline for California consumers by over \$500 million per year.
- **Gasoline and Diesel Price Monitoring.** In a project launched in 2002, the FTC continues to monitor retail gasoline and diesel prices in 360 cities and wholesale prices in 20 major metropolitan areas to identify unusual price movements that might indicate illegal activity. If the staff detects unusual price movements in an area, it researches the possible causes, including, where appropriate, through consultation with the state attorneys general, state energy agencies, and the Federal Energy Information Administration. The staff has not uncovered any evidence of antitrust violations through this project to date.
- **Gasoline Pricing Investigations.** In two separate laws, Congress directed the FTC to conduct an investigation to examine gasoline pricing. Section 1809 of the Energy Policy Act of 2005 directs the agency to investigate whether the price of gasoline is being artificially manipulated through refinery capacity reductions, price gouging, or "any other form of market manipulation." Section 632 of the Science, State, Justice, Commerce, and Related Agencies Appropriations Act directs the agency to investigate gasoline prices in the wake of Hurricane Katrina, and specifically requires the FTC to: (1) look for evidence of gasoline price gouging by any wholesaler or retailer of certain

sizes; (2) compare these companies' profits in pre- and post-hurricane time periods; (3) provide a summary of the "tax expenditures" to which the oil companies are entitled; (4) assess the impact of increased gasoline prices or price gouging on economic activity in the United States; and (5) gauge the overall cost of increased gasoline prices and price gouging on the economy, including the impact on consumers' purchasing power. The Commission has informed the Congress that it will take swift and decisive law enforcement action against any firm or individual shown by the investigation to have violated any law the agency enforces.

#### **4. Other Nonmerger Enforcement Activity**

During the year, the Commission took action against alleged anticompetitive conduct in other sectors of the economy. Two cases proceeded through administrative litigation; a third is being resolved through a consent order.

- **Kentucky Household Movers.** In June 2005, the Commission upheld an Initial Decision that found that the Kentucky Household Goods Carriers Association, Inc., consisting of competing firms, engaged in illegal price-fixing by jointly filing tariffs containing collective rates on behalf of its members, and that the association was not entitled to the state action defense against antitrust liability. The Commission ruled the state's role fell "far short of the active supervision required by [Supreme Court cases]," and thus the state action doctrine did not apply. Although the Kentucky Transportation Cabinet (KTC) is responsible for ensuring that carriers' rates are just and reasonable, the Commission found that there was no formula or methodology for making that determination, the KTC did not obtain basic data that would permit an assessment, and procedural elements consistent with active supervision were absent. In addressing whether the Kentucky Association's rate-making conduct, if not shielded by the state action doctrine, violated antitrust laws, the FTC concluded that the association's members had engaged voluntarily in collective tariff filings.
- **Rambus.** FTC staff's appeal of an ALJ's dismissal of the complaint in an administrative proceeding against Rambus, Inc. remains pending before the Commission. The June 2002 complaint charged that Rambus violated the antitrust laws by violating a requirement that it disclose its relevant intellectual property holdings to a standards-setting organization in which Rambus was a participant. In dismissing the complaint, the ALJ concluded that complaint counsel did not prove that Rambus violated the antitrust laws because its conduct did not violate Rambus' duties and was not exclusionary. Following issuance of the Initial Decision, the Commission reopened the record to admit relevant materials from two related court proceedings. Complaint counsel's appeal remains under consideration by the Commission.
- **Valassis Communications.** In March 2006, the Commission announced a consent order against Valassis Communications, Inc., settling charges that Valassis had invited its competitor to collude and eliminate price competition in violation of the FTC Act. According to the Commission's complaint, Valassis and News America Marketing are competitors in the American market for free-standing newspaper inserts, the multi-page booklets found in newspapers containing discount coupons for various products. The



Commission alleged that in a July 2004 public call with security analysts, Valassis invited News America Marketing to join a scheme to allocate customers and fix prices, thereby ending an ongoing price war between the two competitors and raising prices for the inserts. News America Marketing did not accept the offer. The Commission's consent order prohibits Valassis from inviting collusion and from actually entering into or implementing a collusive scheme.

## Chapter 2 – Consumer Protection Law Enforcement and Rulemaking

The FTC protects consumers throughout the nation against deceptive and unfair practices in the marketplace. The cornerstone of this mission is aggressive law enforcement. During the past 12 months, the agency focused on issues of critical importance to American consumers, including telemarketing fraud, business opportunity schemes, credit-related scams, deceptive health claims, data security, spam, and spyware. Additionally, the FTC's Criminal Liaison Unit works closely with criminal law enforcement partners to build cases and prosecute the worst offenders.

The FTC's law enforcement efforts are complemented and informed by sophisticated information gathering tools that help the agency stay at the forefront of emerging technologies and rapidly evolving fraudulent schemes. The FTC's tools include domestic and international databases, workshops, reports, and civil investigative demands. Using these tools, the FTC enforces the law, explores developing trends, and educates itself, industry, and consumers to promote a marketplace in which fraud and deception cannot easily flourish.

Box 5

### **“Visible Presence” to Promote Compliance with the Law in Critical Sectors**

During his nomination hearing before the Senate Committee on Commerce, Science and Transportation, Commissioner Tom Rosch discussed his perspective on the Commission's likely priorities over the next few years. In identifying energy, health care, and high tech (including biotech) as possible priority areas, he observed, “[t]o begin with, those three sectors collectively account for a huge share of this nation's economy. Second, there are unique challenges to effective law enforcement in those sectors. That said, there is a unifying principle, and that principle is visible presence.” By way of example, Commissioner Rosch mentioned the important role played by the highway patrol in monitoring the roadways and encouraging motorists to drive cautiously. He went on to note that “it's equally critical to effective law enforcement for the Commission to have a visible presence in these (as well as other) sectors.”

### A. Fraud and Deception

Fighting fraud and deception is one of the FTC's highest priorities because these practices bilk consumers out of billions of dollars each year. The FTC wages this battle through targeted law enforcement and the careful monitoring and analysis of trends. The FTC focuses on deceptive and unfair practices in which consumer economic losses are greatest and its actions can have the greatest impact.

#### **1. Law Enforcement**

The FTC pursues a vigorous law enforcement program that combats a wide range of fraudulent and deceptive practices. From April 2005, through February 2006, the FTC filed 60 actions in federal district court and obtained 66 judgments ordering defendants to pay \$590 million in redress to consumers. In many of these cases, the FTC worked with local, state, federal, and international law enforcement partners.

**Criminal Liaison Unit.**

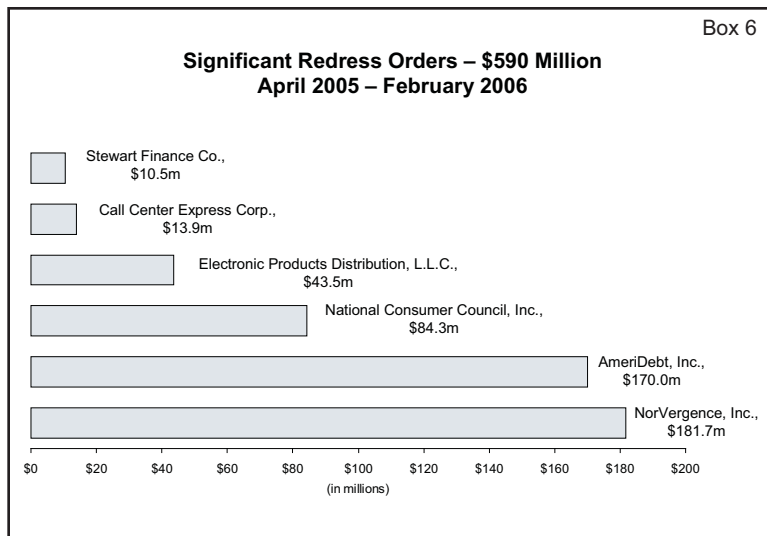
Working with criminal law enforcers remains a priority for the FTC, and the FTC’s Criminal Liaison Unit facilitates prosecution of consumer fraud by coordinating with law enforcement authorities. From April 2005 to March 2006, the FTC assisted in criminal prosecutions of 117 FTC defendants or their associates. Significant criminal referrals arose from these FTC matters:

- **Project “Biz Opp Flop.”**

The DOJ’s Office of Consumer Litigation and two FTC attorneys designated as Special Assistant U.S. Attorneys charged 32 business opportunity scam artists with felonies, including mail and wire fraud. Thus far, 18 defendants have pled guilty, and 13 of these have been sentenced to prison for terms ranging from 24 to 135 months.

- **Phoenix Avatar.** As a result of a criminal referral from this FTC case, the first defendant prosecuted under the criminal provisions of the CAN-SPAM Act pled guilty to three felony counts.

- **The Crescent Publishing Group.** In another referral, six defendants in an organized crime prosecution arising from this fraudulent credit card billing case pled guilty and received sentences ranging from 15 to 108 months.



Box 7

**Significant Civil Penalty Cases  
April 2005 - March 2006**

ChoicePoint	\$10.0 million
DirecTV, Inc.	\$5.3 million
K B Home	\$2.0 million
NBTY, Inc.	\$2.0 million

**Deceptive Lending Practices and Other**

**Credit Schemes.** The FTC pursues unscrupulous lenders who deceive consumers about loan terms, rates, and fees. The FTC also takes action against bogus organizations that target consumers with bad credit or significant debt, promising to help them obtain credit or manage their debt. These deceptive transactions can have a financially devastating impact on consumers who often face high-cost mortgage loans, ruined credit histories, foreclosure, or bankruptcy as a result.

- **Deceptive Credit Counseling Services.** In January 2006, the FTC settled its action against Andris Pukke, the founder of defendants AmeriDebt and DebtWorks, and the other remaining defendants. The FTC settlements shut down the corporate defendants, permanently banned Pukke from the credit counseling business, and imposed a \$172 million suspended judgment. In addition, Pukke agreed to relinquish virtually all of his assets for consumer redress, a fund that could ultimately total \$35 million.

- **Deceptive Mortgage Lending.** In November 2005, the FTC announced a settlement with the Stewart Finance Company and seven related companies. The defendants allegedly deceived tens of thousands of consumers by packing optional products, such as accidental death and dismemberment insurance, into the small consumer loans they financed. The settlement shut down the companies and imposed a \$10.5 million judgment.
- **Mortgages Para Hispanos.Com.** In January 2006, the FTC filed a complaint in federal district court against defendant Mortgages Para Hispanos.Com and its principal, Daniel Moises Goldberg, for allegedly making oral misrepresentations of key loan terms in Spanish while providing mortgage loans written in English to borrowers with little or no English proficiency. Borrowers were unable to read English-language loan documents that contained loan terms substantially different from what was promised.
- **Debt Collection.** In July 2005, the FTC won a \$10.2 million summary judgment against National Check Control and its principals, the largest award obtained by the FTC for violations of the Fair Debt Collection Practices Act. The FTC alleged that the defendants illegally harassed and falsely threatened consumers with criminal charges if they did not pay the debts. The judgment is currently on appeal to the U.S. Third Circuit Court of Appeals.
- **Deceptive Credit Repair Services.** In February 2006, the FTC announced Project Credit Despair, a sweep of cases against 20 different credit repair operations by the FTC, DOJ, U.S. Postal Inspection Service (USPIS), and eight state regulators. These actions targeted companies allegedly charging consumers in advance for credit repair services in violation of the Credit Repair Organizations Act and misrepresenting their services by, for example, claiming the companies could remove any and all bad items from consumers' credit histories, regardless of accuracy or timeliness.

**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, the FTC's enforcement program focuses on combating deceptive health claims, particularly weight-loss and serious disease-prevention claims. From March 2005 through February 2006, the FTC brought or settled 31 law enforcement actions in this area, including the following:

- **Tropicana.** In June 2005, Tropicana Products, Inc. settled charges that it made unsubstantiated claims about the health benefits of its "Healthy Heart" orange juice. The FTC challenged claims that drinking two to three glasses of juice a day would produce specific and dramatic effects on blood pressure, cholesterol, and homocysteine levels, thereby reducing the risk of heart disease and stroke. The settlement prohibits the company from making these or other false or unsubstantiated claims.
- **Myfreemedicine.com.** Many prescription drug companies offer free or low-cost drugs to people who do not have prescription drug coverage, cannot afford to pay for medication out of pocket, or have exhausted their insurance plan's annual allowance. In September 2005, the FTC alleged that Myfreemedicine.com, LLC and its principal lured low-income consumers with no insurance into spending \$199 each by falsely claiming that they would receive free prescription medication.

- **Gero Vita Health Products.** The FTC settled a federal district court case alleging that A. Glenn Braswell, Chase Revel, seven affiliated companies, two expert endorsers, and one additional individual sold dietary supplements to elderly consumers through deceptive ads masquerading as scientific journals. The FTC alleged that these defendants made false claims that their Gero Vita products could cure, prevent, or treat a number of serious conditions such as emphysema, diabetes, and Alzheimer’s disease. The settlement with Braswell bans him from direct response marketing of any foods, unapproved drugs, or dietary supplements, and requires him to turn over \$4.5 million in cash and other assets.

**Project Scofflaw.** As part of its law enforcement tools, the FTC secures orders against companies that allegedly have violated various consumer protection laws to protect consumers from any further fraud and deception. If these orders are violated, the FTC deploys the full range of powers available to stop repeat offenders and to deter other defendants from ignoring order provisions.

- **Prochnow.** A federal district court entered findings that awarded the government \$5.45 million in civil penalties and \$1.68 million in disgorgement against Richard Prochnow for his alleged violations of a 1996 FTC order and the Telemarketing Sales Rule (TSR) in connection with deceptive marketing of magazine subscriptions and buying club memberships.
- **NBTY, Inc.** A leading manufacturer and distributor of dietary supplements agreed to a \$2 million civil penalty to settle charges that it violated the terms of a 1995 FTC order by making false and misleading health claims about two products.

Box 8
<b>Project Scofflaw - 2005 Criminal Prosecutions</b>
<ul style="list-style-type: none"><li>• 7 defendants sentenced</li><li>• 47 years total confinement</li><li>• \$1.1 million total criminal restitution ordered</li></ul>

**Hispanic Law Enforcement Initiative.** The FTC’s 2004 Consumer Fraud Survey found that Hispanic consumers are victimized disproportionately by fraud. In response, the FTC launched an Hispanic Law Enforcement and Outreach Initiative and announced 34 law enforcement actions involving Spanish-language frauds. Eleven new cases were filed in the past year that include alleged scams involving disease cures, weight loss products, discount health cards, advance-fee credit cards, mortgage lending, business opportunity schemes, and prize promotions.

## 2. Tools to Identify Fraud and Deception

Over the past year, the FTC continued to improve its methods for identifying fraud and deception. These methods, which involve the collection and analysis of information about consumer experiences in the global marketplace, assist the agency in formulating and advancing its consumer protection agenda.

**Consumer Response Center.** The Consumer Response Center (CRC) remains a vital resource for both consumers and law enforcement. Each week, the CRC handles more than

30,000 contacts from consumers and businesses. These contacts come via the FTC's toll-free numbers (1-877-FTC-HELP and 1-877-ID-THEFT), the FTC's website, and the U.S. mail. The CRC also supports the efforts of other law enforcement agencies. For example, the CRC acts as the primary response center for USFIS's recent Internet fraud and cross-border fraud consumer education campaigns and for the Hurricane Katrina Fraud Taskforce.

**Consumer Sentinel.** Consumer Sentinel, the FTC's fraud and identity theft complaint database, now houses nearly 3 million complaint records. Sentinel provides about 1,500 law enforcement agencies across the globe with immediate access to these complaints. Sentinel also provides law enforcers worldwide with cyber tools to share information, coordinate investigations, and pursue leads.

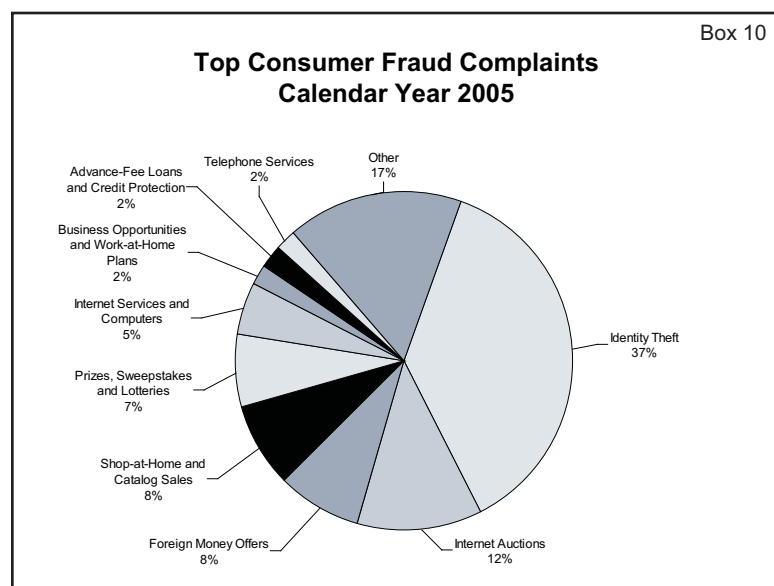
**Identity Theft Tools.** Identity theft continues to be the top consumer fraud complaint received by the FTC. Consumers file complaints and receive helpful information concerning identity theft from the FTC's toll-free hotline and website. In 2005, the FTC entered into an

#### FTC Call Center Ranked #1

Box 9

Annually, the American Customer Satisfaction Index ranks U.S. Federal Government call center services based upon the results of consumer satisfaction surveys gathered during the year. This year, the FTC's call center services on the FTC Help and ID Theft lines were ranked #1 among all federal call centers providing similar services.

agreement with The Identity Theft Assistance Center (ITAC), a cooperative initiative of the financial services industry, under which ITAC provides its identity theft complaint data to the FTC. Nearly 1,400 law enforcement agencies have access to this searchable database of complaints. The FTC also coordinates ID theft law enforcement training for state and local law enforcers. To date, the FTC, in cooperation with its partners, has conducted 20 training seminars attended by more than 2,880 officers from more than 1,000 agencies.



**Spam Database.** "Spam," the popular name for unsolicited commercial email, is a major concern for all Internet users. Since 1998, the FTC has maintained an electronic mailbox to which the agency encourages consumers and businesses to forward spam (spam@uce.gov). This mailbox now receives more than 300,000 pieces of spam daily. The total number of spam received by the FTC has grown by more than 100 million in the past year to more than 300 million. The database is instrumental in the development of the FTC's CAN-SPAM enforcement actions as well as cases brought by other state and federal agencies. For example, the DOJ's Child Exploitation and Obscenity Section used evidence from the spam database to obtain

federal grand jury indictments against three individuals on charges of violating the CAN-SPAM Act, along with federal obscenity, money laundering, and conspiracy charges.

**Cross-Border Fraud Website.** The FTC hosts [www.econsumer.gov](http://www.econsumer.gov) – a joint project of consumer protection enforcement agencies from 20 countries. Through this site, consumers around the world can file cross-border complaints that can be accessed by the participating government agencies. The FTC and its international partners use the complaint data to identify cross-border consumer fraud trends.

## B. Consumer Privacy

Consumers' privacy and data security continue to be important national and international consumer concerns, and protecting them is a key part of the FTC's consumer protection mission. In 2006, the FTC established a new Division of Privacy and Identity Protection. The new division – which consists of over 30 staff with expertise in privacy, data security, and identity theft – addresses cutting-edge consumer privacy matters through aggressive enforcement, as well as rulemaking, policy development, and outreach to consumers and businesses.

Box 11

### Privacy Is a Global Consumer Concern

“Durante más de una década, una de nuestras prioridades fundamentales ha sido la de proteger la privacidad de los consumidores estadounidenses. La privacidad, que continúa siendo un tema importante, se ha convertido en un asunto de significativa preocupación para los consumidores en la era informática.”

Chairman Deborah Platt Majoras addressing the issue of consumer privacy and security on February 1, 2006, in Mexico City, Mexico.

["For more than a decade, one of our top priorities has been protecting the privacy of American consumers. Privacy, while always important, has become an issue of significant concern to consumers in an information age."]

### 1. Data Security Law Enforcement

Concerns about data security have spiked with recent press reports about breaches of data security. The FTC has an active law enforcement program to address such breaches and encourage appropriate security. Over the past 12 months, the FTC expanded this program, deploying the agency's full arsenal of statutory tools to bring cases against companies that failed to implement reasonable measures to protect sensitive consumer information. The FTC has challenged security practices as unfair and deceptive in violation of the FTC Act. The agency has also challenged these practices as violations of the Fair Credit Reporting Act (FCRA) and the Gramm-Leach-Bliley Act (GLBA).

- **ChoicePoint.** In January 2006, the FTC announced a settlement with consumer data broker ChoicePoint, Inc., resolving allegations related to a security breach a year earlier. According to the complaint, the data of over 160,000 consumers had been compromised, including Social Security numbers and nearly 10,000 consumer reports. The FTC alleged that ChoicePoint's failure to employ reasonable procedures to protect sensitive consumer information was an unfair practice. The FTC further alleged that ChoicePoint violated the FCRA by not taking reasonable steps to ensure that the customers to whom they were selling consumer report information had a permissible purpose for obtaining it. The settlement includes a \$10 million civil penalty for the

alleged FCRA violations – the largest civil penalty in FTC history – and \$5 million in redress for consumers who suffered identity theft as a result of the breach.

- **BJ's Wholesale Club.** In June 2005, retailer BJ's Wholesale Club settled charges that it engaged in an unfair practice by failing to employ reasonable measures to secure sensitive consumer information. According to the FTC's complaint, credit and debit card information stored on BJ's computers was used by an unauthorized person to make millions of dollars of fraudulent purchases. The FTC charged that BJ's engaged in a number of practices which, taken together, failed to provide reasonable security for this sensitive data. The settlement requires BJ's to implement a comprehensive information security program and obtain third party audits of the program for 20 years.
- **DSW.** In December 2005, shoe discounter DSW Inc. settled FTC charges that it failed to take reasonable security measures to protect sensitive customer data. The complaint alleged that DSW's data-security failure allowed hackers to gain access to the sensitive credit card, debit card, and checking account information of more than 1.4 million customers. The consent order provides for strong injunctive relief similar to the requirements in the BJ's settlement.
- **CardSystems Solutions, Inc.** In February 2006, the FTC announced its first case to address alleged security failures by a credit and debit card processor. According to the complaint, CardSystems' breach involved up to 40 million credit and debit cards. Like the previous settlements in this area, CardSystems is required to implement a comprehensive information security program and obtain audits to show compliance.
- **Superior Mortgage Corp.** In September 2005, the FTC settled allegations that Superior Mortgage Corp. violated the GLBA Safeguards Rule. The FTC alleged that the broker failed to establish an information security program, as required by the Rule, and misrepresented that sensitive mortgage application information was encrypted before being sent by email. The order prohibits future violations and requires an information security program and third party audits. This is the third case to enforce the requirements of the Safeguards Rule and is part of the FTC's ongoing efforts to ensure compliance with the Rule.

## ***2. Do Not Call Registry Law Enforcement***

The FTC's National Do Not Call (DNC) Registry protects consumer privacy by prohibiting commercial telemarketing calls to consumers who register their telephone numbers. Since 2003, more than 122 million telephone numbers have been registered with the National Do Not Call Registry. Compliance with this law has been high and the Registry has been a significant success. Yahoo! ranked the launch of the FTC's Do Not Call website as one of the top 100 moments on the web over the last 10 years. The success of the DNC Registry has also caught the attention of the international community. Encouraged by the success of the Registry, Canadian and Mexican agencies have consulted with the FTC in developing their own do not call registry frameworks.

The FTC collects and aggressively monitors Registry-related complaints, which are shared with other federal and state law enforcers through Consumer Sentinel. Since October 2003,



the agency has filed 19 enforcement actions against 102 individual and corporate defendants, alleging that they had called consumers whose numbers were on the DNC Registry. In 12 of those cases, the FTC obtained settlements with orders requiring payment in the aggregate of more than \$6 million in civil penalties and more than \$5 million in consumer redress.

- **DirectTV.** In December 2005, the FTC announced the largest civil penalty to date in

a Do Not Call matter when it filed a complaint and stipulated order against DirectTV and several telemarketing firms. The complaint alleged that the telemarketers, calling on behalf of DirectTV, contacted consumers on the Registry. The complaint further alleged that DirectTV provided substantial support to one of the telemarketers, even though it knew (or consciously avoided knowing) that the company was violating the TSR. The settlement with DirectTV called for \$5.3 million in civil penalties. The orders against two of the telemarketers required them to pay civil penalties of \$25,000 and \$50,000.


- **The Broadcast Team.** The DOJ filed a civil penalty action, on the FTC's behalf, against The Broadcast Team (TBT), a Florida telemarketer. The complaint alleges that TBT called telephone numbers on the Registry to deliver prerecorded charitable solicitations, and also violated the "call abandonment" provisions of the TSR, which limit telemarketers' use of recorded messages by requiring that calls answered by a person be connected to a live representative within two seconds. The complaint alleges that TBT called more than one million Registry-protected numbers and caused more than 64 million abandoned calls.

## C. High Tech Law Enforcement

Increasingly sophisticated cyberscammers continue to wreak havoc over the Internet, using a range of technological tools to defraud consumers, steal their information, and invade their privacy. The FTC has taken the lead to protect consumers from technology-driven threats to the security of their personal data and information, personal computers, and email inboxes.

Box 12

**National Impact of the Do Not Call Registry**  
*Harris Interactive® Survey, released Jan. 12, 2006*



Three-quarters of all U.S. adults have signed up for the registry.

Findings:

- 94% of all adults have heard of the Registry.
- 76% of adults say that they have signed up for the Registry.
- 91% of those who have registered report receiving fewer telemarketing calls, including —
  - 18% who report they have received none,
  - 61% who report they have received some but far less than before, and
  - 12% who report they have received some, but a little less than before.

Source: [http://www.harrisinteractive.com/harris\\_poll/index.asp?PID=627](http://www.harrisinteractive.com/harris_poll/index.asp?PID=627)

**Spam.** Spam, a frequent source of fraudulent and deceptive sales pitches, now increasingly is used to deliver “spyware” and download viruses onto consumers’ computers, and often represents an unwanted intrusion into their privacy. To date, the FTC has filed 85 law enforcement actions targeting spam, including 22 cases since the enactment of the CAN-SPAM Act. These 85 cases targeted 237 defendants, and resulted in final orders requiring payment of an aggregate of nearly \$17 million in redress or disgorgement and \$1.1 million in civil penalties.

- **Button Pusher Sweep.** In 2005, the FTC spearheaded a cross-border law enforcement initiative targeting spammers – “button pushers” – who allegedly hijacked consumers’ computers and turned them into spamming machines that relayed the illegal spam while concealing the real sender. This CAN-SPAM sweep involved eight law enforcement actions: the FTC filed three actions halting alleged spam operations; the Canadian Competition Bureau settled two cases; and state agencies filed complaints seeking to block the alleged illegal spamming of three more operations.
- **Net Everyone.** In January 2006, the FTC sued three individuals doing business as Net Everyone – a company using so-called “botnets” to send pornographic spam, in violation of the CAN-SPAM Act and the FTC’s Adult Labeling Rule under the Act. A “botnet” consists of a multitude of spam zombies, often used to conceal the source of spam. A federal court issued an *ex parte* temporary restraining order halting the unlawful activities and freezing the defendants’ assets.
- **Adult Labeling Rule Crackdown.** In summer 2005, the FTC charged seven companies in a sweep enforcing the Adult Labeling Rule and the CAN-SPAM requirements to include warning labels on email that contains sexually-explicit content. Settlements in four of the cases require payment of an aggregate of \$1.1 million in civil penalties and impose strong injunctions that prohibit future law violations and require the defendants to monitor closely the activities of so-called “affiliates,” who send spam on their behalf to draw visitors to the defendants’ websites. The other three cases are still in litigation.

Box 13

### Fulfilling the Promise of the Internet

Commissioner Jon Leibowitz continues to play an active role in promoting initiatives to ensure the promise of the Internet and to safeguard online consumer commerce and privacy. Commissioner Leibowitz is particularly concerned about the substantial harm to consumers caused by spyware and nuisance adware that is downloaded onto Internet users’ computers without their knowledge or consent. In October 2005, Commissioner Leibowitz spoke about spyware and adware at a Direct Marketing Association Conference and pressed marketers to adopt “best practices” to promote responsible and ethical electronic marketing. Similarly, on competition issues, Commissioner Leibowitz has expressed strong interest in promoting and ensuring fair competition in markets affecting consumer access to the Internet. He has spoken out against efforts by incumbent cable and phone providers to enact state laws that prevent municipalities from providing broadband service to their residents.

**Spyware.** Over the past 12 months, the FTC expanded its enforcement against “spyware” and “adware” programs that are installed on consumers’ computers without their knowledge or consent and are used to monitor their computer use, take control of or damage their computer, or send them a blizzard of advertising. Since April 2005, the FTC filed four new cases focused

on preserving consumers' rights to decide which software programs to install and retain on their computers and preventing substantial harm from software programs installed or remaining against their wishes. On February 9, 2005, Chairman Majoras delivered the keynote address to the Anti-Spyware Coalition's first public workshop: *Defining the Problem, Developing Solutions*. During her remarks, the Chairman explained that the FTC's law enforcement actions reaffirm three key principles about spyware: (1) a consumer's computer belongs to him or her, not to the software distributor; (2) buried disclosures do not work, just as they have never worked in more traditional areas of commerce; and (3) if a distributor puts a program on a consumer's computer that the consumer does not want, the consumer must be able to uninstall or disable it.

- **Enternet Media.** In November 2005, the FTC filed a complaint alleging that the defendants, including Enternet Media, Inc., duped consumers into downloading and installing their exploitive software code by disguising it as innocuous, free software. The FTC obtained a preliminary injunction prohibiting the defendants from continuing their illegal spyware distribution and freezing over \$2 million in personal and corporate assets.
- **Trustsoft.** In June 2005, the FTC filed a complaint challenging allegedly bogus claims that the defendants' anti-spyware products removed all spyware from consumers' computers. Under a final settlement reached in January 2006, the defendants agreed to pay approximately \$1.9 million and to abide by a permanent injunction.
- **Advertising.com.** In September 2005, Advertising.com, Inc., settled FTC charges that it failed to disclose adequately that its Spyblast Internet security program included adware in violation of the FTC Act. The complaint alleged that the respondents offered consumers a free security software program, but disclosed only in the End User License Agreement (EULA) that the program was bundled with software that tracked consumers' Internet browsing and delivered pop-up advertising. The settlement requires that the company clearly and prominently disclose adware bundled with software advertised to enhance security or privacy.
- **Odysseus Marketing.** In September 2005, the FTC filed a complaint alleging that the defendants failed to disclose adequately to consumers that their anonymizer program also installed other, harmful programs. The complaint alleges that the existence of those additional programs was disclosed only in the middle of the EULA. The complaint also alleges that consumers could not remove the harmful software through any reasonable means. The defendants currently are subject to a preliminary injunction.

## D. Consumer Privacy and High Tech Rulemaking

In addition to aggressive law enforcement efforts, the FTC has an active rulemaking program to implement provisions of the Fair and Accurate Credit Transactions Act of 2003 (the FACT Act) and enhance compliance with the CAN-SPAM Act. The FTC's objective is to promulgate rules that carry out the intent of Congress – protect consumers' data and reduce unwanted intrusions in consumers' personal lives.

**The FACT Act.** The FACT Act provides important tools to protect consumer privacy, enhance the accuracy of credit report information, increase consumer access to such information, help prevent identity theft, and help assist identity theft victims. The Act required the FTC to promulgate 18 rules, in some cases alone and in others in consultation or jointly with other federal agencies. In 2005, the FTC issued a final rule requiring businesses that make firm offers of credit or insurance to consumers (often called “prescreened offers”) to provide enhanced disclosures of consumers’ right to opt out of receiving such offers. In addition, the FTC’s Disposal Rule, which requires entities to take reasonable steps to protect against unauthorized access to or use of consumer report information in connection with its disposal, became effective in June 2005.



The FACT Act also gave consumers the right to a free annual credit report from each of the three national consumer reporting agencies. After the completion of the program’s rollout in September 2005, the FTC launched an initiative against “imposter” websites that mimic the free annual report website. This initiative included warning letters to about 130 such sites, a new consumer education campaign, and the filing of a complaint and settlement with Consumerinfo.com, a company that offered “free” credit reports in conjunction with a credit monitoring service. The settlement requires Consumerinfo.com to make prominent disclosures about the terms of the offer and the fact that it is not associated with the FACT Act free report program. The company also agreed to pay refunds to consumers who may have been deceived by the offer.

**CAN-SPAM Discretionary Rulemaking.** In May 2005, the FTC issued a Notice of Proposed Rulemaking (NPRM) on a number of issues designed to enhance compliance with the CAN-SPAM Act of 2003. The NPRM contained proposals and clarifications affecting certain definitions under the Act, including those of “sender” and “valid physical postal address.” Among other things, the NPRM proposed shortening the deadline for senders to effectuate a recipient’s opt-out request, and clarifying that a recipient may not be required to do more than send a reply email message or visit a single Internet web page to submit a valid opt-out request.



## Chapter 3 – Policy Tools to Complement Law Enforcement

As a complement to its law enforcement actions, the FTC promotes competition and advocates on behalf of consumer interests through a wide variety of activities, such as research and reports, workshops, advocacy filings, *amicus* briefs, and educational outreach to consumers and businesses. Through these activities, the FTC educates itself about emerging issues and shares information with other policymakers, business leaders, the bar, and the general public, providing intellectual leadership on important issues within its jurisdiction. These activities also provide the FTC with unique opportunities to communicate the essential role of competition in the marketplace and to provide analysis on a wide variety of consumer protection issues.

### A. Competition Policy

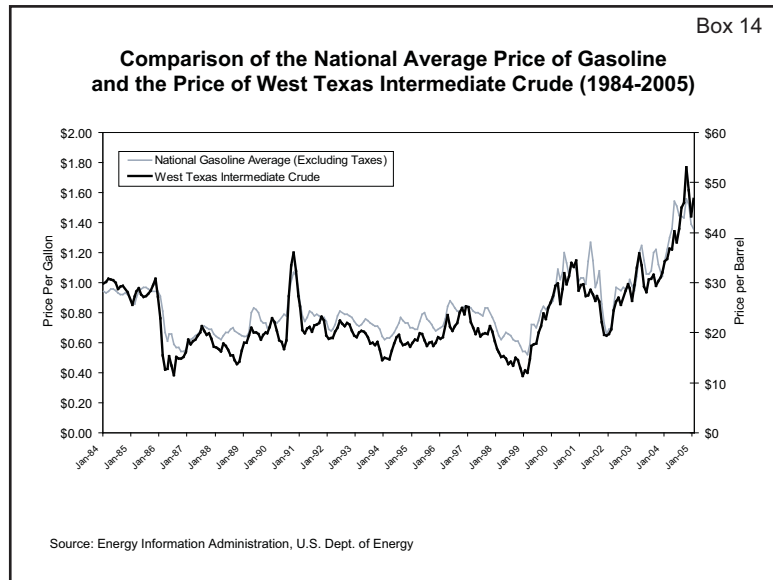
A vigorous policy agenda in the competition mission is especially critical to enable the FTC to monitor and often lead new developments in antitrust and economics scholarship and stay abreast of marketplace trends.

#### 1. Research and Reports

The FTC continues its historic role of performing research and issuing reports on a range of topics relevant to competition and the marketplace. These topics are of ongoing interest and importance to the economy, such as energy and health care.

- **Report on Ethanol Market Concentration.** This year, in response to a mandate of Congress, the FTC performed a market concentration analysis of the ethanol industry. The agency’s analysis, which was submitted to Congress and the Environmental Protection Agency in accordance with the Energy Policy Act of 2005, concluded that national ethanol production is not currently concentrated to a level that would raise antitrust concerns. The analysis also concluded that the likelihood of anticompetitive conduct in the future is low because barriers to entry are low and significant new entry in ethanol production and marketing is expected in the next year and is likely to continue for several more years.
- **Electricity Task Force.** Also in response to a directive of Congress, the Chairman appointed a staff member to the five-member interagency Electric Energy Market Competition Task Force. The Energy Policy Act of 2005 requires the task force to “conduct a study and analysis of competition within the wholesale and retail market for electric energy in the United States.” The task force has sought public comment on the critical elements for effective wholesale and retail competition, the status of each element, any impediments, and suggestions for overcoming such impediments.
- **Gasoline Price Changes Report.** In July 2005, the agency issued a report examining the wide range of factors that cause fluctuations in the prices that American consumers pay for gasoline. The report concluded that over the past 20 years, changes in the price of crude oil have led to the vast majority of the changes in the retail price of gasoline in the United States. Other important factors include increasing demand at both the

national and international levels; supply restrictions resulting from circumstances such as political instability, refinery fires, or hurricanes; federal, state, and local regulations, such as “clean fuel” requirements; and taxes. The report provides real-world examples of how short supplies can increase prices, which in turn moderate demand and prompt the influx of additional supplies, which then act to ease prices.



- **PBM Conflicts of Interest Study.** At the direction of Congress, the FTC considered whether ownership of mail-order pharmacies by pharmacy benefit managers (PBMs)

Box 15

**Improving the Institutional Foundations for Competition Policy and Consumer Protection**

Competition and consumer protection laws are only as effective as the institutions entrusted with implementing them. Since joining the FTC, Commissioner William E. Kovacic has emphasized the need to strengthen the institutional arrangements through which the FTC carries out its duties, especially if it is to continue to enjoy standing and influence in the global community. Current efforts include:

- *Ex Post Evaluations.* The FTC is continuing efforts to assess the impact of FTC merger policy in the petroleum industry and to refine techniques for conducting *ex post* review.
- *Process Improvements.* The FTC recently announced reforms to curb the cost and time to review proposed mergers.
- *Better Cooperation in Enforcement.* The FTC is striving to enhance its cooperation with law enforcement agencies at home and abroad, such as by supporting enactment of the US SAFE WEB Act.
- *Investing in Knowledge.* The FTC and DOJ have announced joint hearings to consider issues dealing with dominant firm behavior.

creates a conflict of interest. The FTC used its compulsory process authority under Section 6(b) of the FTC Act to gather detailed information and data. In September 2005, the Commission issued its report entitled, “*Pharmacy Benefit Managers: Ownership of Mail-Order Pharmacies: A Federal Trade Commission Report*,” concluding that, in 2002 and 2003, prescription drug plan sponsors generally paid lower prices for drugs purchased through PBM-owned mail-order pharmacies than for drugs purchased through mail-order or retail pharmacies not owned by PBMs.

**2. Hearings and Workshops**

Hearings and workshops are among the FTC’s most powerful policy “research and development” tools. They allow the agency to assemble experts from the business, government, legal, and academic communities to engage in an in-depth analysis of important and often contentious issues. These hearings

and workshops can lead to significant advances in cutting-edge knowledge of competition policy issues.

- **Workshop on Competition Policy and the Real Estate Industry.** Prompted by the substantial changes taking place in the real estate industry, as well as by consumers' interest in a competitive real estate marketplace, the FTC and DOJ co-hosted a public workshop in October 2005. The workshop provided an opportunity to hear from all sides on the many issues facing the industry, including, among others, the effect of various state regulations and private actions on emerging, nontraditional business models, such as Internet sales; the use of the Internet as an efficiency-enhancing tool; and empirical evidence on the state of competition in the real estate industry. In attendance were representatives from several real estate trade associations, real estate commissions from across the United States and Canada, and several different types of brokerage firms, including traditional, discount, and fee-for-service brokerage firms.
- **Workshop on Patent Reform.** Together with the National Academies' Board on Science, Technology, and Economic Policy, and the American Intellectual Property Law Association, the FTC co-sponsored several patent reform workshops, structured in a town meeting format. The final workshop addressed draft patent reform legislation, still under consideration in the House of Representatives, that would direct the implementation of a post-grant opposition system and modify the doctrine of willful infringement, as recommended in the FTC's 2003 report, *"To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy."*
- **Looking Ahead – Hearings on Conduct Under Section 2 of the Sherman Act.** In November 2005, the FTC and DOJ announced that they will hold a series of public hearings designed to examine the antitrust implications of certain exclusionary conduct under the antitrust laws. The primary goal of the hearings is to examine whether and when specific types of single-firm conduct are pro-competitive or benign, and whether and when they may harm consumers. The hearings will examine and analyze a wide range of legal and economic issues to help define the boundaries between legal and illegal conduct under Section 2.

### 3. Advocacy

An important complement to the FTC's efforts to prevent or eliminate private restrictions on competition are efforts to prevent or eliminate public impediments to competition that may reduce consumer welfare. Government-imposed impediments can be among the most durable and effective restraints on competition. Thus, in response to requests, the FTC advises state and federal entities, as well as the courts, on the potential competitive impact of pending governmental actions, focusing on the same critical economic sectors that receive emphasis in FTC law enforcement: energy, health care, and others that have a major impact on consumers' wallets.

- **Electricity.** The FTC filed two comments with the Federal Energy Regulatory Commission (FERC) in August 2005, concerning electricity transmission. In the first comment, FTC staff emphasized the importance of FERC's initiatives to reduce entry



impediments that stem from risks in obtaining transmission services in wholesale electricity markets. In the second comment, the FTC staff focused on methods of calculating the amount of available capacity and ways to prevent transmission discrimination within the electricity industry. The FTC staff filed an additional comment with FERC in January 2006, regarding economically sound ways to assess market power at the generation level in wholesale electricity markets.

- **Pharmacy Benefit Managers.** Concerned about likely cost increases in pharmaceutical markets, the FTC staff submitted a comment regarding the potential effects of legislation in North Dakota that would regulate PBM contracts with pharmacies. The comment explained that such regulation would prevent health plans from designing benefit plans to encourage participants to use network pharmacies that provide drugs at a lower cost than other network pharmacies, and also explained that the drug-substitution provisions of the bill likely would make safe and price-reducing substitutions less common, thereby likely increasing the price of drugs and health insurance premiums and reducing the availability of drug insurance coverage for consumers.
- **Pharmaceuticals.** Concerned that a proposed interpretation of FDA regulations would have significant negative implications for competition in the pharmaceutical industry to the detriment of consumers, the FTC submitted a response to a citizen petition filed with the FDA by IVAX Pharmaceuticals in connection with its attempt to gain approval for a generic version of the cholesterol drug, Zocor. The FTC argued against an interpretation of relevant FDA regulations relating to the approval of generic drugs that would restrict choices for consumers.
- **Optometrist Services.** In March 2005, the FTC staff submitted comments regarding the potential effects of three different eye care bills under consideration in the Virginia Assembly. Two of the bills would prohibit an optometrist from working in any location that provides direct access to a commercial establishment. The comments argued that such a prohibition would impair competition between commercial and independent optometrists, and likely would cause consumers to pay higher prices for eye examinations and optical goods without providing any countervailing benefits in the form of higher quality eye care. The third bill, conversely, would ease current restrictions in this area by eliminating prohibitions on optometrists working in a commercial establishment, likely benefitting consumers with lower prices without reducing the quality of eye care.
- **Real Estate Minimum-Service Requirements.** In 2005, the FTC and DOJ jointly advocated against the passage of laws and regulations in Michigan, Missouri, Alabama, and Texas that would have imposed minimum-service requirements on real estate brokers in those states. Under the proposed legislation, real estate brokers would have to provide certain services – including negotiation, assistance in closing, and advice on pricing – to consumers, regardless of whether consumers actually wanted such services. The agencies argued that the proposed legislation would restrict consumer choice and reduce competition between limited-service brokers, who typically offer consumers the option of purchasing only those services that they want for fixed fees, and traditional,

full-service brokers, who typically provide consumers with a full range of services in exchange for a commission on the sale price of the home.

- **Franchising.** During 2005, the FTC continued to analyze restrictions on the vertical relationships between alcoholic beverage producers and distributors. FTC staff provided a comment on proposed legislation regarding wine sales in Ohio. The proposed legislation, the staff noted, likely would increase wholesalers' incentives to lower prices and to undertake efforts to increase demand for wine suppliers' brands, thereby likely decreasing the costs of wine distribution and increasing competition among both suppliers and wholesalers of wine in Ohio. The staff also commented on proposed legislation that would prohibit California brewers from terminating, refusing to renew, or refusing to enter into agreements with wholesalers "except for good cause and good faith." The comments stated that the legislation likely would reduce wholesalers' incentives to provide important demand-enhancing services and to reduce competition among wholesalers to carry brewers' brands, to the ultimate detriment of California consumers.

#### 4. *Amicus Briefs*

This year, the FTC has continued to be active in providing *amicus* briefs to help courts resolve competition policy questions. During the past year, the FTC filed *amicus* briefs on issues concerning competition in the pharmaceutical industry, the proper antitrust analysis of joint ventures, the relationship between patents and market power, the analysis of alleged secondary line price discrimination in a commercial context where dealers are not in head-to-head competition for the same sales, and the applicability of American antitrust laws to transactions in foreign countries.

- ***In re Tamoxifen Citrate Antitrust Litigation.*** In this brief, the FTC supported plaintiffs' petition for a panel rehearing and rehearing en banc, in a case in which a divided panel of the U.S. Court of Appeals for the Second Circuit upheld the dismissal of an antitrust challenge to a patent settlement between the manufacturer of a branded drug and an FDA applicant for a generic counterpart. The FTC argued that the panel did not properly consider the Hatch-Waxman Act, which encourages challenges to pharmaceutical patents to facilitate the early entry of generic drugs, and that, if not corrected, the panel decision would permit the holder of a challenged drug patent substantially to harm competition, and thus consumers, by impermissibly paying a would-be generic rival to stay off the market. The court of appeals subsequently took the unusual step of directing the defendants to respond not only to the rehearing petition, but to the arguments of *amici*, including the FTC.
- ***Texaco, Inc. v. Dagher.*** After the U.S. Court of Appeals for the Ninth Circuit ruled that an agreement between the parents of a joint venture regarding the pricing of products sold by the venture could amount to a *per se* violation of the antitrust laws, the FTC and DOJ filed an *amicus* brief in support of the petition for *certiorari*, and later an *amicus* brief on the merits in support of reversal. The briefs argued that the pricing agreement did not qualify for *per se* condemnation because it did not eliminate any competition between petitioners in the sale of their respective brands of gasoline. The briefs

explained that the Ninth Circuit’s ruling failed to recognize that the formation of the joint venture had effectively merged the affected operations and terminated petitioners’ prior competition. Accordingly, the briefs argued, petitioners’ agreement was not “price fixing” in the antitrust sense, because it did not eliminate any competition that otherwise would have existed. On February 28, 2006, the Supreme Court unanimously reversed, in keeping with the position taken in the agencies’ brief.

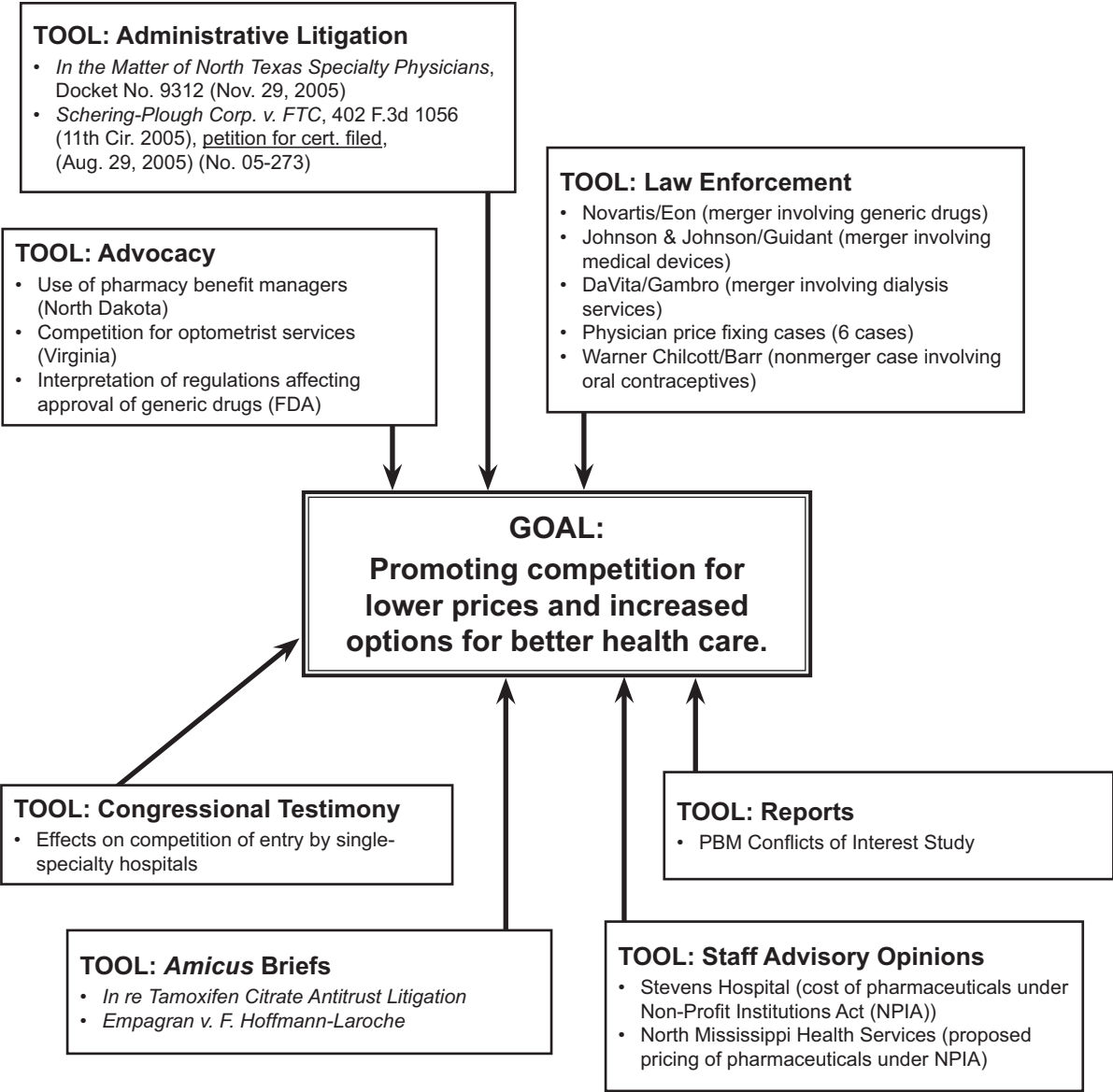
- ***Illinois Tool Works v. Independent Ink.*** In this case involving the alleged tying of a non-patented product (printer ink) to a patented product (printhead system), the U.S. Court of Appeals for the Federal Circuit ruled that, under its reading of two older Supreme Court cases, a patent is presumed to confer the necessary market power to establish a violation of Section 1 of the Sherman Act. The FTC and DOJ filed an *amicus* brief urging the Supreme Court to reverse, arguing that there is no economic basis for inferring any amount of market power from the mere fact that the defendant holds a valid patent, copyright, trademark, or other intellectual property right. The brief explained that a patented product, no matter how novel or unique for purposes of patent law, may – and often does – face competition from other products that consumers would substitute for the patented invention. The brief urged the Court to resolve any remaining doubt on the issue by squarely rejecting the presumption. On March 1, 2006, the Court unanimously reversed, in keeping with the position taken in the Agencies’ brief.
- ***Volvo Trucks North America v. Reeder-Simco GMC, Inc.*** The FTC and DOJ filed an *amicus* brief in this case, in which plaintiff alleged that Volvo violated Section 2(a) of the Robinson-Patman Act by failing to sell trucks to plaintiff on the same terms as it sold such trucks to other Volvo dealers. The record failed to show any episode in which Volvo discriminated against the dealer when it was competing for a sale against another Volvo dealer, and it failed to show any instance in which both plaintiff and a competing Volvo dealer actually purchased trucks at different prices for resale in direct competition with each other. The Supreme Court agreed with the government’s brief, and held that a manufacturer may not be held liable for secondary-line price discrimination in the absence of a showing that the manufacturer discriminated between dealers competing to resell its product to the same retail customer.
- ***Empagran v. F. Hoffmann-Laroche.*** The FTC and DOJ have filed several *amicus* briefs in this case, in which foreign purchasers of vitamins alleged to have been the subject of a worldwide price-fixing conspiracy sought damages under American antitrust laws. In 2004, the Supreme Court, in agreement with the government’s position, ruled that the Foreign Trade Antitrust Improvements Act of 1982 does not permit a plaintiff to maintain an American antitrust action based on an “independent foreign effect” of alleged unlawful actions, even if those same actions also had domestic effects. The Supreme Court remanded to the court of appeals, however, to address plaintiffs’ alternative theory that its injuries were in fact inextricably linked to the domestic effects of the conspiracy. On remand, the agencies again filed an *amicus* brief in the court of appeals, disputing plaintiffs’ alternative theory. As the brief pointed out, acceptance of that theory – based on the notion that vitamins are fungible and

easily transported, so that maintenance of high cartel prices in the United States was an essential prerequisite to maintaining the high foreign prices they paid – would vastly expand application of U.S. law to wholly foreign transactions, contrary to the reasoning of the Supreme Court. On June 28, 2005, the U.S. Court of Appeals for the D.C. Circuit agreed with the government’s position and dismissed the action.

### The FTC’s Integrated Approach to Competition Policy

Box 16

The FTC uses a variety of tools to achieve its policy goals, such as promoting competition in the health care industry to lower prices and increase options.



## 5. *Testimony to Antitrust Modernization Commission*

During the past year, the Chairman and FTC senior staff members have testified on a wide range of subjects before the Antitrust Modernization Commission (AMC), which is charged with examining how the antitrust laws can or should be modernized to benefit the American economy. Among the diverse topics addressed were: (1) civil remedies available to the FTC in antitrust cases; (2) federal merger enforcement, including the merger review process generally, the role of efficiencies in merger review, and the standards for preliminary injunctions in merger cases; (3) patent law reform and the relationship between competition and patent law; (4) the state action doctrine; (5) statutory immunities and exemptions; and (6) international issues, including the enhanced use of international antitrust comity, possible amendments to international antitrust statutes, and the authority of both the FTC and DOJ to fund technical assistance programs abroad.

## B. Consumer Protection Policy

In similar fashion, the FTC applied its distinctive mix of policy tools to complement its consumer protection enforcement. Working with other law enforcement agencies, industry, the media, and the public, the FTC distributed extensive information on preventing and remedying identity theft, developed even greater expertise in technological and legal issues related to spam, and provided important data and analysis on a variety of consumer protection issues.

### 1. *Reports and Research*

In addition to using electronic databases and websites to track consumer fraud, the FTC conducts research of marketplace issues affecting consumers and publishes its findings in reports. During the past year, the FTC continued to analyze compliance and other issues relating to the CAN-SPAM Act, as well as issues raised by the use of peer-to-peer file-sharing technology.

- **CAN-SPAM Act Reports to Congress.** The CAN-SPAM Act required the FTC to submit four reports to Congress. In 2005, the FTC completed the third and fourth reports. The *Report on Subject Line Labeling as a Weapon against Spam* concluded that such labeling would not be an effective way to curb spam. The *Report on the Effectiveness and Enforcement of the CAN-SPAM Act* concluded that, while the Act has helped to deliver some improvements, passage of the US SAFE WEB Act to improve the FTC's ability to trace spammers and sellers who operate outside the United States, as well as continued education efforts and improvements in anti-spam technology, are also needed to provide more effective protection for consumers.
- **Spam Studies.** The FTC staff conducted two spam studies in 2005. The *Top Etailers' Compliance With CAN-SPAM's Opt-Out Provisions* report assessed the opt-out practices of 100 top e-tailers – those who make significant use of the Internet to market their goods or services. This group demonstrated a high rate of compliance with CAN-SPAM's opt-out provisions. The *Email Address Harvesting and the Effectiveness of Anti-Spam Filters* study explored address harvesting – the automated collection of email addresses from public areas of the Internet, the effectiveness of spam filtering by

Internet Service Providers, and the effectiveness of using “masked” email addresses as a technique to prevent the harvesting of email addresses. The study concluded that spammers continue to harvest email addresses posted on websites, but email addresses posted elsewhere (e.g., in chat rooms or on message boards), were unlikely to be harvested.

- **Peer-to-Peer (P2P) File-Sharing Report.** In June 2005, FTC staff issued a report on *Peer-to-Peer File-Sharing Technology: Consumer Protection and Competition Issues*, which analyzes the consumer protection, competition, and intellectual property issues inherent in the use of P2P technology. The report urges industry to decrease the consumer protection risks associated with P2P use through technological innovation and self-regulation. The report also recommends that government continue to bring law enforcement actions where appropriate, and to work with industry on self-regulatory and consumer education initiatives. Finally, the report generally concludes that policymakers should balance the protection of intellectual property and the freedom to advance new technologies, thereby encouraging the creation of new artistic works, as well as economic growth and enhanced business efficiency.
- **Weight-Loss Advertising Survey.** In April 2005, FTC staff issued the results of the *2004 Weight-Loss Advertising Survey*, comparing certain weight-loss claims found in advertisements in major media outlets from January to May 2004, with ads appearing during the same period in 2001. The report evaluated the effect of the FTC’s “Red Flag” initiative, which encouraged the media to stop accepting advertisements that contained any of seven facially false weight-loss advertising claims. In general, the survey suggested that the incidence of the Red Flag false weight-loss claims declined significantly in television, radio, and print advertisements. Specifically, while nearly half of the comparable ads reviewed from the 2001 survey contained at least one Red Flag claim, only 15 percent of the 2004 weight-loss ads made one or more Red Flag claims.

Box 17

### Encouraging Effective Industry Self-Regulation

In presentations during 2005, Commissioner Pamela Jones Harbour emphasized that self-regulation – when done properly and effectively – benefits both consumers and businesses, because consumers are more likely to buy products from firms they trust. Companies should adopt “best practices” wherever possible, such as:

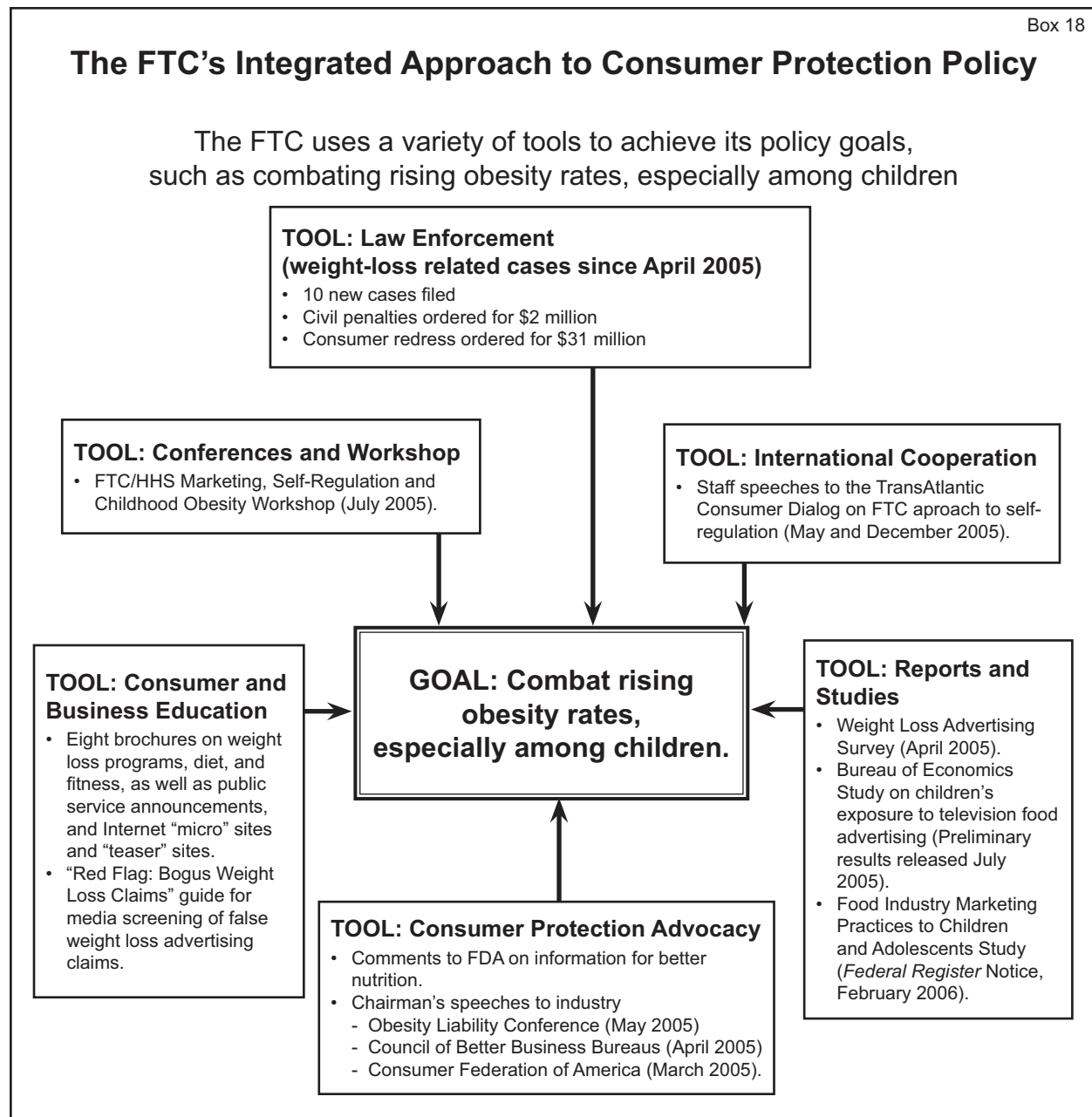
- marketing healthier food choices to children;
- ensuring that recommended high adult audience standards are met or even exceeded when advertising or showing alcohol in media;
- providing nationwide notification to victims of data security breaches when identity theft is a risk, even without a Congressional mandate; and
- maximizing the accuracy of consumer data collected for any purpose.

Commissioner Harbour warned that, where industry self-regulation does not go far enough, consumers may lose faith in the marketplace, and/or Congress may decide to legislate.

## 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, academia, other government agency representatives, and a host of other experts in various fields.

- Food Marketing to Children.** In July 2005, the FTC hosted a two-day public workshop with the Department of Health and Human Services (HHS) on *Perspectives on Marketing, Self-Regulation, and Childhood Obesity*. The workshop brought together stakeholders from government, academia, consumer groups, the food industry, and the media to explore the private sector's role in addressing the public health crisis of



childhood obesity. Discussion focused on industry self-regulatory efforts to ensure that foods are marketed responsibly to children, with an emphasis on the self-regulatory program of the Children's Advertising Review Unit of the Council of Better Business Bureaus. The workshop also examined efforts that individual companies are making, through product and packaging changes, advertising, and other marketing and outreach initiatives, to improve the diets and health of children.

- **Dispute Resolution and Redress.** The FTC has often provided redress to foreign victims of fraud perpetrated by U.S. businesses. Few other government agencies, however, can obtain redress for victims of fraud, much less obtain redress on behalf of foreign consumers. American consumers are often victimized by scammers abroad, and the FTC has encouraged other countries to provide redress mechanisms for these consumers. To this end, in April 2005, the FTC hosted a workshop sponsored by the OECD on *Dispute Resolution and Redress for Consumers*. Industry, government, consumer groups, and academics from all over the world participated. Panelists discussed various mechanisms through which consumers could obtain compensation for economic losses arising from transactions with businesses, particularly cross-border transactions.
- **Looking Ahead – Hearings on Global Marketing and Technology.** In 1995, the FTC held hearings for government policymakers to consider the risks presented by rapidly evolving technologies, such as the Internet, and to formulate policies to address these risks. In February 2006, the agency announced that in November 2006, the FTC will bring together experts from the business, government, and technology sectors, as well as consumer advocates, academicians, and law enforcement officials to explore the ways in which convergence and the globalization of commerce impact consumer protection. The upcoming hearings will examine changes that have occurred in marketing and technology, and garner experts' views on emerging challenges and opportunities for consumers, businesses, and government.

### 3. *Advocacy and Amicus Briefs*

Advocacy continues to be an important way to enhance consumer welfare. A key element in promoting competition and preserving consumer choice is fostering the free flow of truthful and non-misleading information and avoiding unduly burdensome restrictions that might keep useful information from consumers. Through its enforcement against deceptive health-related advertising, the FTC has developed substantial experience in policy issues related to food and drug advertising and labeling, and staff has filed comments with the FDA on these topics. The FTC also has intervened in court proceedings when important issues affecting consumers are at stake.

- **Qualified Health Claims.** In January 2006, FTC staff filed a comment with the FDA regarding consumer perceptions of health claims made for foods and dietary supplements. The comment analyzed the available research on consumer perceptions of health claims supported by limited scientific evidence and concluded that the FDA's current approach of using a series of pre-determined, "language only" qualifiers does not effectively differentiate among varying levels of scientific certainty. The comment



suggests that it may be possible to craft more effective “language only” qualifiers, and that other visual scoring formats (such as a report card format) should be explored. The comment encourages additional consumer research in this area.

- **Alcohol Labeling.** In September 2005, FTC staff filed a comment on the proposal by the Alcohol and Tobacco, Tax, and Trade Bureau (TTB) of the Treasury Department, to modify its labeling rules for alcoholic beverage products. The comment recommended that the TTB require that alcohol labels disclose alcohol and nutrient content per serving, because such information would help consumers select beverages consistent with their preferences and public health recommendations, and would encourage manufacturers to compete based on the nutritional attributes of their beverages. The comment also recommended that the TTB consult with public health agencies to resolve uncertainty about the quantity of alcohol in a standard “drink,” as described in public health guidelines, and allow marketers the option of making truthful, non-misleading representations comparing the amount of alcohol in a serving of their beverage to a standard drink or to dietary guideline recommendations.
- **Illinois Bill Establishing a Child Protection Registry.** In October 2005, FTC staff filed a comment regarding Illinois HB 0572, a bill designed to protect minors from unwanted commercial e-mails (spam) that advertise products or services they are prohibited from buying or that contain adult advertising or links to adult content. The bill would establish a Child Protection Registry and make it illegal to send such messages to registrants. The FTC staff’s comment noted that the registry could easily be abused by online child predators; that publishing a list of verified email addresses could unintentionally increase the amount of spam received by registrants; and that the bill’s substantial compliance costs could hamper Internet competition and prevent consumers from receiving legitimate and wanted information.
- **Chavez v. Netflix.** The FTC filed an *amicus* brief recommending that the court reject a proposed class action settlement in *Chavez v. Netflix*. The proposed settlement offered current customers one month of upgraded service and former members one free month of service. Class members who accept the settlement, however, would be obligated to pay for the expanded or new service on a monthly basis after the conclusion of the free month, unless or until they cancel the service. The FTC’s objection focused on this “negative option” feature, arguing that it would be disclosed inadequately and would serve more as a marketing vehicle than as a redress mechanism. The parties subsequently restructured their settlement agreement, eliminating this negative option feature.

#### 4. Consumer and Business Education and Outreach

Education enhances law enforcement efforts, empowers consumers, and ultimately, improves the quality and choice of goods and services in the marketplace. To promote consumer confidence, the FTC integrates its education and enforcement missions, delivering “news people can use” in conjunction with “news of the day” announcements about enforcement and policy issues. Since April 2005, consumers and businesses have ordered some 6 million print publications from the FTC, and have logged 35 million visits to [www.ftc.gov](http://www.ftc.gov).

- OnGuard Online.** The Internet provides access to countless services, but it also can create vulnerabilities, if consumers are not careful with their information and their computers. The FTC, other law enforcement agencies, the technology industry, and nonprofit partners together launched *OnGuard Online* ([onguardonline.gov](http://onguardonline.gov)), an interactive, multi-media resource for information, quizzes, and up-to-the minute tools on how to recognize Internet fraud, avoid hackers and viruses, shop securely online, and deal with identity theft, spam, phishing, and file-sharing. *OnGuard Online* modules are available in English and Spanish (*Alerta en Línea.gov*). The success of this initiative can be seen in the United States and beyond – a number of consumer protection agencies from other countries have adapted the *OnGuard Online* materials for their own use, even translating the materials for their own consumers.
- Hispanic Outreach.** Ever since the FTC’s benchmark consumer fraud survey showed that Hispanics are twice as likely as non-Hispanic whites to be victims of consumer fraud, the agency has placed a priority on outreach to Spanish speakers. During 2005, the FTC held its first-ever Spanish-only press conference for the launch of *Alerta en Línea.gov*. The FTC also launched *¡Ojo!*, a bilingual newsletter for Hispanic community-based organizations, and co-hosted a series of outreach and enforcement workshops with the USPIA. These one-day workshops brought together federal and local law enforcers, community leaders, and local media to discuss new ways to work together. In addition, the FTC promoted widely *Estableciendo Crédito* (Getting Credit), the FTC’s credit website and booklet that is aimed at Spanish-speaking young adults. As of March 2006, the FTC’s library of Spanish-language publications for consumers and businesses includes more than 100 publications.
- Hurricane Relief.** The FTC’s consumer education program provided a quick response to protect consumers made vulnerable by Hurricanes Katrina and Rita. The agency offered consumer education in print, on its website, and through broadcast public service announcements to prevent victims from being injured by the frauds and scams that proliferate following such disasters. Beyond the immediate need to prevent fraud and deception, the FTC also offered materials to assist hurricane victims in rebuilding their financial lives.
- Energy.** Whether trying to save money at the pump or buy the most energy-efficient appliances, consumers want guidance on how to lower their energy bills. A new website, [www.ftc.gov/energysavings](http://www.ftc.gov/energysavings), and a booklet, *Saving Starts @ Home: The Inside*

Box 19

**OnGuard  
Online** | YOUR SAFETY NET™

**STOP. THINK. CLICK.**

<p>Test Your Knowledge, Click to Play!</p> <p><b>ID THEFT FACEOFF</b></p>	<p><b>ESTAFAS DE PHISHING</b></p> <p>EVITE LA CARNADA</p> <p>Tome la prueba. Haga clic.</p>
<p>Tome la prueba. Haga clic.</p> <p><b>OJO CON EL SOFTWARE</b></p> <p>¡Aprenda más!</p>	<p><b>ONLINE LINEUP</b></p> <p>Test Your Knowledge, Click to Play!</p>

**Alerta  
en Línea** | SU RED DE SEGURIDAD™

**PARE. PIENSE. HAGA CLIC.**

*Story on Conserving Energy*, compile the FTC's most recent information on energy efficiency, making it easier for consumers to access the information.

- **Identity Theft.** A new educational campaign on identity theft is showing consumers how to minimize their risk of falling victim to identity theft. The campaign encourages consumers to “Deter, Detect, and Defend” against identity theft by taking steps to reduce their risk, keep a close eye on their personal information, and move quickly to minimize the damage if identity theft occurs. Since 2000, the agency has distributed nearly 5 million paper copies of its two main identity theft publications, including its new and improved identity theft booklet, and recorded more than 3 million visits to the web versions of these publications.
- **Outreach to Business.** Through speeches, presentations, articles in industry newsletters and magazines, and the Business Briefcase, a handy new business card-sized CD with 67 of the agency's most important compliance publications, the FTC is reaching business people – and their attorneys – in large numbers. For example, the very popular Green Lights/Red Flags symposia, held in cooperation with local Better Business Bureaus and bar associations, explain the “science of compliance” to attorneys, marketing executives, and business owners.

## Chapter 4 – International Activities

The FTC works to promote cooperation and convergence toward best practices with competition and consumer protection agencies around the world. The FTC has built a strong network of cooperative relationships with its counterparts abroad, and plays a lead role in key multilateral fora. The growth of communication media and electronic commerce presents new challenges to law enforcement – fraud and deception now know no borders. The FTC works with other nations to protect American consumers who can be harmed by anticompetitive conduct and frauds perpetrated outside the United States. The FTC also actively assists new democracies moving toward market-based economies with developing competition and consumer protection laws and policies.

### A. Competition

#### 1. *Promoting Cooperation and Convergence Through Bilateral Relationships*

The FTC's cooperation with competition agencies around the world is a vital component of its enforcement program, facilitating its ability to collaborate on cross-border cases and to promote convergence toward sound consumer welfare-based competition policies. During the past year, the FTC participated in consultations in Washington and in foreign capitals with top officials of, among others, the European Commission (EC), the Japan Fair Trade Commission (JFTC), and the Russian Federal Anti-Monopoly Service, and, for the first time, in November 2005, held a joint consultation with the Canadian Competition Bureau and the Mexican Federal Competition Commission.

FTC staff routinely coordinate with colleagues in foreign agencies, promoting efficient and effective review of multijurisdictional mergers and conduct. Recent illustrative matters include:

- **Procter & Gamble/Gillette.** Procter & Gamble's \$57 billion acquisition of Gillette raised competition concerns regarding many consumer products, including tooth whiteners and antiperspirants. FTC staff worked closely with several foreign competition authorities, including the EC, the Canadian Competition Bureau, and the Mexican Federal Competition Commission. The FTC and the EC coordinated compatible remedies in oral health care products. Their decisions also addressed whether the merger would increase the merged firm's ability, when acting as a "category manager," to obtain premium retailer shelf space and exclude or disadvantage competitors in several brand categories. Canada determined that the divestitures obtained by the FTC and the EC would resolve its competition concerns, while Mexico and other authorities authorized the transaction.
- **Johnson & Johnson/Guidant.** Johnson & Johnson's proposed \$25 billion bid to take over Guidant raised concerns in several medical device markets, particularly stents and other devices used to treat vascular diseases. The FTC coordinated its review with the EC, the Canadian Competition Bureau, and the JFTC. The competitive situation

– and likely effects of the proposed merger – varied among jurisdictions, requiring close cooperation in the investigation and the negotiation of remedies. Pursuant to confidentiality waivers from the parties, EC staff participated in joint meetings with FTC staff, the parties, and third parties. In light of subsequent developments, the FTC and other agencies are monitoring the potential acquisition of Guidant by Boston Scientific.

The FTC promotes policy convergence through formal and informal working arrangements with other agencies, many of which seek the FTC's views in connection with developing new policy initiatives. For example, during the past year, the FTC consulted with:

- the EC regarding several aspects of merger policy, including the EC's review of its remedies policies and the EC's discussion paper on its policies regarding abuse of dominance;
- several EU Member States on competition in health care markets;
- the United Kingdom regarding synergies between competition and consumer protection policy;
- the Canadian Competition Bureau on cross-border information sharing policies; and
- the JFTC on exclusionary conduct and administrative procedures and remedies, and submitted comments on proposed JFTC Guidelines on Standardization and Patent Pool Arrangements.

The FTC had other productive contacts with foreign counterparts over the past year. It participated in working groups with the EC on mergers and the intellectual property issues related to competition policy, and with Japan, Korea, and Taiwan on intellectual property issues. The agency also places a high priority on maintaining a dialogue with officials involved in developing the first comprehensive competition law in China – FTC senior staff made several trips to China and, with the Antitrust Division, has been providing valuable input into the drafting process. Chairman Majoras met with members of the Mexican Senate responsible for considering revisions to that country's competition law and spoke with Mexican judges about the American experience in applying its antitrust laws. Finally, the FTC benefits from the views of its foreign counterparts on U.S. policies.

## ***2. Promoting Convergence Through Multilateral Competition Fora***

Multilateral competition fora provide important opportunities for competition agencies to enhance mutual understanding and promote cooperation and convergence. The FTC participates actively in, among others, the International Competition Network (ICN) and the Organisation for Economic Cooperation and Development (OECD).

**ICN.** The ICN, which includes 95 competition agencies from 84 jurisdictions, is an important venue for antitrust officials worldwide to work towards procedural and substantive convergence on best practices in antitrust enforcement and policy. In June 2005, the ICN hosted its fourth annual conference. Based on recommendations by the Merger Procedures Subgroup that the FTC chairs, the ICN adopted two new Recommended Practices for Merger Notification

and Review Procedures, one dealing with remedies and one with competition agency powers. These complement the 11 Recommended Practices and eight Guiding Principles for Merger Notification and Review that the ICN had previously adopted. The ICN also adopted a model form for waivers of confidentiality. In March 2006, the FTC co-sponsored with DOJ a successful workshop for competition officials around the world to promote greater understanding and further implementation of the Recommended Practices. The FTC also plays a lead role in the ICN's working group on Competition Policy Implementation, which helps new agencies strengthen their institutional capacity and performance. The agency looks forward to serving as a co-chair of a likely new working group on unilateral conduct.

**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 work on, among other topics, competition on the merits, barriers to entry, ex-post evaluation of competition initiatives, below-cost sales, regulatory reform, and the interface between trade and competition policy. The FTC has helped lead OECD initiatives exploring the synergies between competition and consumer protection policy through joint roundtables, and participates in the Global Forum on Competition, which includes representatives from many developing countries.

### ***3. Promoting Competition Policy Through Trade Fora***

Trade agreements increasingly involve competition issues. The FTC participates in U.S. delegations that negotiate competition chapters of free trade agreements, including during the last year in connection with negotiations with Peru and other Andean countries and with Thailand. The FTC also participates in the competition forum of the United Nations Conference on Trade and Development, which focuses on competition issues facing developing countries.

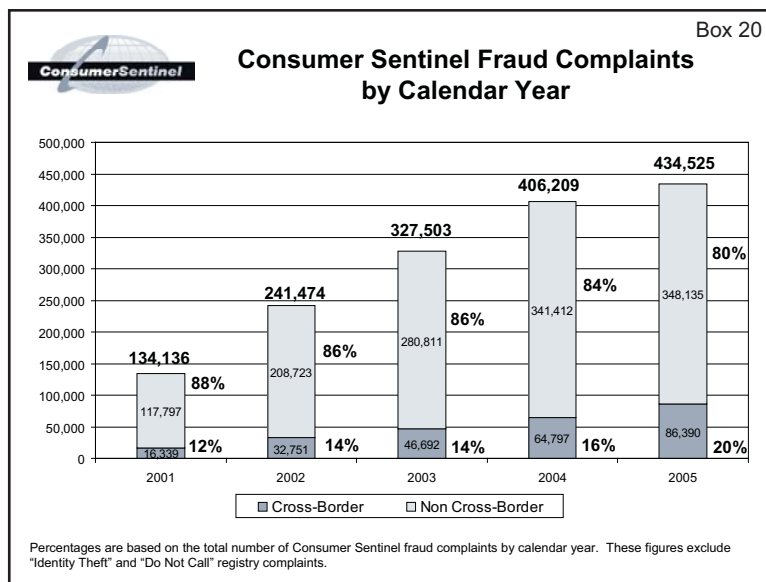
## **B. Consumer Protection**

In an era of increased globalization, the FTC has developed an increasingly international market-based approach to consumer protection that focuses on protecting consumers while maximizing economic benefit and consumer choice. The FTC has built an international network for cooperation to combat cross-border fraud and has promoted market-oriented consumer protection and privacy policies. In doing so, FTC staff met with over 200 foreign visitors to Washington on consumer protection issues in 2005. In addition, staff met with hundreds more foreign government representatives during official visits to 20 countries over the past 12 months.

### ***1. Cross-Border Fraud***

Spammers, spyware operators, fraudulent telemarketers, and other scam artists know no national boundaries, and can strike quickly on a global scale. Not surprisingly, an increasing number of complaints the FTC receives involve cross-border transactions, and an increasing number of law enforcement investigations the FTC undertakes involve some cross-border component. As a result, over the last few years, the Commission has launched a comprehensive program to combat cross-border fraud. Some highlights of the FTC's recent and ongoing efforts include the following.

**Legislative Proposals.** Last June, the FTC submitted a report to Congress recommending legislation called the US SAFE WEB Act – Undertaking Spam, Spyware, and Fraud Enforcement with Enforcers across Borders. The proposed legislation would enable the FTC to share key information with foreign partners, assisting international law enforcers in pursuing fraudulent conduct in their countries that impacts U.S. consumers. The legislation, among other things, would help the FTC fight deceptive spam and spyware by allowing the agency to investigate more fully messages transmitted through facilities outside the United States. On March 16, 2006, the Senate passed the US SAFE WEB Act.



**International Law Enforcement Cooperation.** The FTC continues to expand its partnerships with consumer protection law enforcers throughout the world. The FTC co-chairs the London Action Plan on international spam enforcement cooperation, which in 2005 added agencies and private sector representatives from India, China, Nigeria, Malaysia, Taiwan, Latvia, and Hungary as new members. In March 2006, the FTC signed a Memorandum of Understanding with the Costa Rican Ministry of Economy, Industry and Commerce (MEIC), which provides for enhanced cooperation and information-sharing between staff of the FTC and MEIC on consumer protection matters. The FTC also has invested significant resources expanding partnerships with Canadian regional entities to fight telemarketing fraud by Canadians targeting U.S. and Canadian Consumers, e.g., it helped establish a new partnership based in the Atlantic provinces and joined a Montreal-based partnership to combat cross-border telemarketing fraud. These efforts add to the successful four cross-border regional partnerships in which the FTC already participates, such as the Vancouver-based Project Emptor and the Toronto Strategic Partnership. These partnerships have resulted in productive cross-border enforcement. For example, in 2005, the Toronto Strategic Partnership activities led to 131 arrests, 107 criminal charges, and 56 court orders.

**Cross-Border Cases.** In 2005, the FTC's Bureau of Consumer Protection filed 14 new cases with a significant international component in the federal courts and continued to litigate and investigate dozens of other matters involving foreign defendants, witnesses, and evidence. The FTC contacted and received assistance from agencies in approximately 20 countries in these cases and investigations.

## 2. Promoting Market-Oriented Policies

The FTC promotes consumer protection policies abroad to help ensure that consumer protection rules focus on practices that distort consumer choice and threaten the proper functioning of markets. The American approach to consumer protection generally involves flexible, market-oriented standards backed by aggressive enforcement. This approach helps reduce compliance costs that would be passed on to consumers while at the same time provides a high level of consumer protection focused on preventing acts or practices that cause injury to consumers. Some examples of the FTC's work in this area over the past year include:

**Privacy and Emerging Technologies.** The FTC has undertaken a number of steps to strengthen international cooperation on privacy and security issues. For example, FTC staff is working with other U.S. agencies to implement a privacy framework endorsed by Ministers of the Asia-Pacific Economic Cooperation forum. FTC staff also is supporting work in the OECD to build international cooperation to enforce privacy laws. With respect to high tech scams, FTC staff is working on an OECD Toolkit to Combat Spam, a comprehensive report for developing countries that focuses on legislation, enforcement, education, technology, and public-private partnerships to combat spam.

**Economic Underpinnings of Consumer Protection.** FTC staff has led efforts within the OECD Committee on Consumer Policy to encourage countries to adopt an economics-based approach to consumer protection. Through this work, FTC staff has advocated that policymakers should weigh the costs and benefits of any proposed consumer protection measure. Last fall, several FTC staff participated in an OECD roundtable on this subject. Closely related to this work is FTC staff advocacy concerning the critical intersection between competition and consumer protection policies. Last year, FTC staff provided advice on this subject in a variety of venues. For example, it advised German authorities concerning effective consumer protection policies, commented on a U.K. government proposal to split competition and consumer protection functions into two distinct agencies, and sent comments to the United Nations Commission on Trade and Development on a draft consumer protection manual for developing countries.

## C. International Technical Assistance

Last year was a peak time in recent years for the FTC's international technical assistance program, which provides training and other education to developing nations. These activities, funded mostly by the United States Agency for International Development, included 28 missions to 18 countries, involving 35 different FTC staff experts. In addition, FTC staff maintained a resident advisor in Jakarta, Indonesia, assisting the member states of the ten-nation ASEAN organization. The FTC works in close cooperation with DOJ's Antitrust Division in conducting its antitrust activities in this program.

Since its inception in the early 1990s, the program has conducted hundreds of training missions in developing nations, employing the diverse expertise of agency lawyers and economists. In more recent years, the program has extended into consumer protection, where the legal and economic standards employed by the Commission have been embraced by several aid recipients. From 2005 to the present, the Commission has been most active in the five-nation



Andean Community, the ten-nation ASEAN community, India, Russia, Azerbaijan, South Africa, Egypt, Jordan, and Mexico. In a typical training mission, a lawyer and economist team conduct a three or four day interactive case simulation containing substantive and procedural issues likely to be encountered in a real investigation. Students are from the staffs of newly created enforcement entities unlikely to have real life experience investigating and building cases. Witnesses and documents are available for class participants to interview and examine, with students playing the roles of witnesses, interrogators, advocates, and analysts. Often the classes are divided into teams that ultimately argue for and against bringing an enforcement action, with the U.S. team playing the role of judges (or Commissioners).

## Conclusion

The FTC's varied accomplishments over the past 12 months foreshadow some of the agency's future undertakings and challenges in fulfilling its ongoing commitment to consumers and competition. The FTC will review thousands of proposed mergers to ensure they are not likely to harm competition and will continue to monitor, review, and investigate hundreds of arrangements, schemes, scams, and outright frauds to determine if they violate Section 5 of the FTC Act. In appropriate cases, these investigations will conclude in law enforcement actions with suitable remedies. But even when hours of investigative activity do not conclude in enforcement actions, the FTC still will be serving consumers by deterring possible fraud and anticompetitive behavior through its ever-watchful presence in the marketplace.

In addition to law enforcement, the agency will continue to monitor marketplace changes to keep abreast of new products, services, and ways of doing business – both legitimate and illegitimate. Hearings, studies, and workshops on a wide range of topics are planned. As always, the FTC will remain alert to both the opportunities and the threats that abound in our increasingly electronic and global marketplace, as we work to protect consumers and promote competition.

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Federal Trade Commission Annual Awards  
October 2005

Chairman's Award	Randolph Tritell
Louis D. Brandeis Award	Michael Bloom
Janet D. Steiger Outstanding Team Award	Hispanic Outreach Team Oil and Gas Studies Team US SAFE WEB Team
Richard C. Foster Award	Judy Burnam Mary Rushen Michael Verne
James M. Mead Award	Charles Clayborne Ethel Fischman Jonathan Morgan
Paul Rand Dixon Award	Sana Coleman Jeanne Crouse Philip Eisenstat Lisa Harrison Charles Pidano
Mary Gardiner Jones Award	Wilhelmina Thorpe
Award for Excellence in Supervision	C. Steven Baker Jeffrey Nakrin Geoffrey Oliver Thomas Pahl
Otis B. Johnson Award	Mary Draper Connelly Regina Duarte Jeffrey Smith Nathaniel Wood
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