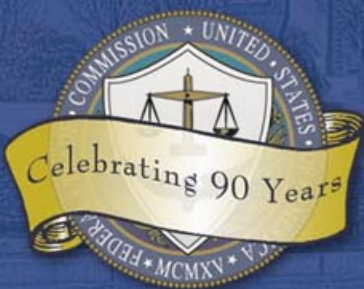




# The FTC in 2005: Standing Up for Consumers and Competition



Federal Trade Commission  
April 2005



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## Federal Trade Commission

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## Introduction

The Federal Trade Commission's (FTC) vital mission is to stand up for America's free market process and for its consumers, who benefit from competitive markets in which truthful information flows. Accordingly, the agency strives to develop and implement policies that recognize the remarkable consumer benefits inherent in our largely decentralized economic organization. Emphasizing the mutuality inherent in the relationship between consumers and business, the FTC's central aim is to make discriminating judgments that permit the agency to channel its resources toward preventing and halting private and public measures that injure consumers.

In September 2004, the FTC celebrated its 90<sup>th</sup> anniversary with a symposium, dinner, and other events. While the anniversary offered the opportunity to celebrate achievements and reflect on past work, its aim was emphatically forward-looking. New challenges to our economy abound: spam, spyware, and threats to information security; mergers that combine intellectual property; rising energy and health care costs; valuable innovations that present new consumer issues; and the proliferation of new laws overseas, to name a handful. While these challenges could not have been contemplated 90 years ago, the wealth of experience gained since that time teaches lessons that are valuable today.

One lesson is that the FTC functions at its highest level when it promotes both symmetry and synergy between its competition and consumer protection missions. Two parts of a greater whole, these missions complement each other in maximizing benefits for consumers – accurate information and consumer trust in the marketplace facilitate free and healthy competition. Emphasizing one to the exclusion of the other would produce a less efficient or robust market than consumers expect and deserve.

A second lesson is that a strong institution takes nothing for granted, save the need to improve. It works best when it continually evaluates its existing programs and enhances its capacity to perform effectively. Some examples of these efforts during the past year include the commitment to examine and improve the agency's process for reviewing mergers and its efforts to improve the international framework for implementing competition and consumer protection policy. Additional examples include public conferences to explore economic or legal issues or mechanisms that significantly affect consumers and businesses, such as the methodologies for assessing the accuracy of credit reports and possible ways to reform our patent system, and workshops to assess the impact of emerging technologies, such as peer-to-peer file-sharing software, email authentication, spyware, and radio frequency identification.

A third lesson is that institutions improve by explaining more fully the foundations for their policy and law enforcement choices. Providing a window on how the agency makes and implements its decisions is the mark of good public policy, and it also provides the basis for better-informed enforcement decisions. During the past year, for example, the FTC released a significant amount of merger enforcement data; developed a report on mergers, structural change, and antitrust enforcement in the petroleum industry; convened a conference to consider the effects of petroleum industry mergers on gasoline prices; and issued closing statements explaining the reasons why it had declined to take enforcement action in some merger investigations.

A fourth lesson is that the Commission functions best when it works cooperatively with organizations whose missions overlap and complement the FTC's. The FTC and the Department of Justice (DOJ) confer on an ongoing basis on competition enforcement questions, and the two agencies issued a report this past year on competition in the health care sector. In addition, the FTC has collaborated with a number of federal, state, and local law enforcement agencies in enforcement sweeps to address serious fraud, particularly scams involving business opportunities. One key dimension of this effort has been to engage criminal law enforcement agencies in prosecuting serious fraud as a crime. Using its Criminal Liaison Unit, the FTC has provided practical assistance to criminal law enforcers in developing criminal prosecutions. The agency also continues to work cooperatively with the Food and Drug Administration (FDA) in investigating false and deceptive claims for dietary supplements, and has worked closely with the federal bank regulators to develop rules and studies under the Fair and Accurate Credit Transactions Act.

This annual report reviews the latest chapter in the FTC's work, covering its activities and accomplishments during the last 12 months. More than a mere list of cases, conferences, and studies, the report aims to explain the basis for the FTC's choice of initiatives and to describe the policies and priorities that motivate the use of its resources. Many activities are ongoing and set forth much of the agenda that the FTC will pursue in the coming years.

## Highlights of Recent Accomplishments

As in past years, the FTC has continued to apply its array of law enforcement and policy tools to address critical consumer concerns. Among the many accomplishments in the past 12 months, the FTC has concentrated on:

- **Increasing the Focus on Mergers.** The FTC received 40 percent more merger filings compared to the previous year, with a commensurate increase in the number of mergers requiring investigation. As part of this increased attention on mergers, the FTC and the DOJ are currently working on a Commentary on the Horizontal Merger Guidelines. A three-day workshop, jointly sponsored with the DOJ, designed to assess the practical efficacy of the 1992 Merger Guidelines in light of 12 years of experience, revealed a strong consensus that the Guidelines work well and require no significant revision, but that further explanation of how the agencies apply the Guidelines would be helpful. The Commentary should bring greater transparency to the agencies' merger analysis.
- **Improving the Merger Review Process.** FTC Chairman Majoras has established a task force to recommend further improvements to the merger review process. While the FTC has implemented some improvements in the merger review process in recent years, the agency expects to adopt further improvements to ease the burden on affected parties and increase internal efficiency. The further improvements include seeking methods to identify relevant materials stored electronically, improving the agency's ability to receive electronic productions, developing instructions and specifications for electronic productions, and taking further steps to improve the timeliness and efficiency of the review process.

- **Addressing Significant Issues in Part 3 Commission Opinions.** The Commission has issued three adjudicative opinions during the past year that address difficult competition policy issues. These opinions, *Union Oil of California (Unocal)*, *South Carolina Board of Dentistry*, and *Chicago Bridge & Iron/Pitt-Des Moines*, contain detailed antitrust analyses and provide guidance to businesses and the public on how the Commission reviews mergers, potentially anticompetitive conduct, and antitrust defenses.
- **Enforcing the Do Not Call Program.** As of March 2005, consumers had registered more than 85 million phone numbers with the FTC. The national Do Not Call (DNC) Registry continues to be one of the government's most popular and effective consumer protection programs. The Registry protects consumer privacy by prohibiting commercial telemarketing to consumers who have listed their telephone numbers. Thus far, the FTC has filed five enforcement actions alleging calls to telephone numbers listed on the Registry, and the DOJ has filed two additional cases on the FTC's behalf. Although compliance with the program has been high, the FTC actively investigates and prosecutes violators.
- **Targeting Credit Reporting Problems and Identity Theft.** Identity theft was the number one topic of complaints to the FTC in 2004. The FTC completed 10 rules under The Fair and Accurate Credit Transactions Act of 2003 (FACT Act), proposed two additional rules, and published five studies during the year to combat identity theft and improve the accuracy of consumers' credit records. The FTC also oversaw the rollout of the free credit report program under the FACT Act.
- **Fostering Global Competition and Protection of Consumers.** The FTC has worked with competition agencies worldwide to promote best practices and minimize policy divergences to ease burdens on firms that operate across the globe. Two key venues for competition officials to work toward greater consensus are the Organization for Economic Coordination and Development (OECD) and the International Competition Network (ICN), a group launched two years ago by the FTC, the DOJ, and 13 other competition agencies that now numbers almost 90 member agencies. The FTC also promotes market-oriented policies. The FTC's goal is to ensure that consumer protection rules outside the U.S. focus on practices that distort consumer choice and raise a serious threat to the proper functioning of markets. The FTC also advocates discussion of linkages between competition and consumer policy around the world and has participated in two such discussions last year – a joint meeting of the OECD's competition and consumer policy committees and an academic roundtable that included heads of agencies with responsibilities for both competition and consumer protection issues.
- **Implementing the Hispanic Initiative.** In 2004, after releasing a consumer fraud survey that found that Hispanic consumers are disproportionately victimized by fraud, the FTC launched an Hispanic Law Enforcement and Outreach Initiative that has had immediate results. In May 2004, the FTC's national Hispanic Outreach and Law Enforcement Workshop brought together law enforcers, educators, and community-based organizations to develop strategies for effective consumer education and law enforcement collaborations to combat fraud against Hispanics. One outcome was a

Spanish-language fraud awareness campaign of print, online, and radio communications aimed at the Hispanic community in 11 media markets. The FTC also has brought 21 enforcement matters targeting Spanish-language fraud and has produced nearly 100 consumer and business education pieces in Spanish.

- **Promoting Competition in the Petroleum Industry.** In Fiscal Year (FY) 2004, the Commission reversed an Administrative Law Judge's (ALJ) dismissal of charges against Union Oil of California (Unocal) for actions that allegedly could cost California consumers hundreds of millions of dollars in higher gasoline prices. The Commission also took enforcement action in three petroleum industry mergers. In addition, the FTC released a landmark staff report on the petroleum industry, which studied 20 years of FTC investigations and industry structural changes, and concluded that FTC enforcement actions have helped to avoid potential anticompetitive harm.
- **Attacking Spam and Spyware.** To date, the FTC has filed 68 spam-related cases against 198 individuals and companies including cases against two spammers charged with clogging the Internet with millions of deceptive messages and generating nearly one million consumer complaints to the FTC. In FY 2004, the FTC issued two rules aimed at attacking spam. The first required spammers to identify sexually explicit content in the subject line of email, and the second established criteria to determine whether the email's primary purpose is commercial and therefore covered by the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (CAN-SPAM Act). Pursuant to the CAN-SPAM Act, the FTC also issued two reports to Congress in FY 2004: the *National Do Not Email Report to Congress* and *A CAN-SPAM Informant Reward System Report to Congress*. More recently the Commission has filed two cases attacking alleged spyware. In April 2004, the FTC held a public workshop to learn more about spyware and on March 7, 2005, the agency released a staff workshop report, *Monitoring Software on Your PC: Spyware, Adware, and Other Software*.

The chapters below describe these and other accomplishments more fully. With fewer than 1100 staff members, the FTC has reason to be proud of these extensive achievements. Each is a tribute to the vision of the agency's five Commissioners and the hard work of its dedicated and talented staff.



## Chapter 1 – Competition Law Enforcement And Guidance

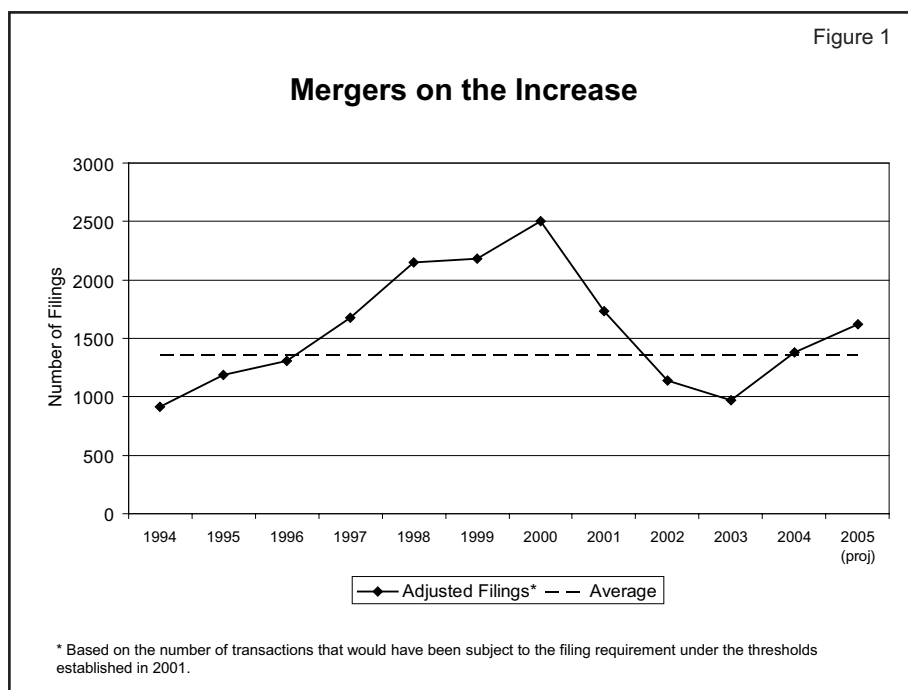
Competition is the ultimate consumer protection. The work of the FTC's competition mission protects and strengthens the free and open markets that are the cornerstones of a vibrant economy. Robust competition promotes lower prices, higher quality products and services, and greater innovation – all of which benefit consumers. The FTC operates within a broad consensus about the proper role of antitrust. The three primary principles are that antitrust enforcement should protect consumers, be guided by economic analysis, and focus particularly on possible problems arising from horizontal arrangements.

In addition to these core principles, the FTC has adopted fundamental strategies to maximize the impact of its competition enforcement activities. Elements of that strategy include:

- Make full use of the broad range of tools available to the agency, including law enforcement, hearings, conferences, workshops, research and reporting, and advocacy.
- Use a systematic approach to identify and address serious misconduct, providing special attention to harmful behavior in key economic sectors.
- Increase transparency by clarifying policies and enforcement standards; recognizing that it is a small agency with a large mission, the FTC encourages the cooperation of business to comply with legal standards.
- Facilitate cooperation among competition authorities worldwide to improve the quality and consistency of multilateral enforcement efforts.
- Improve the processes and institutions through which competition policy is developed and applied.

### A. Merger Enforcement

The FTC's merger enforcement program benefits consumers by preventing anticompetitive mergers that result in higher prices, while not stopping procompetitive mergers that might produce lower prices and other market improvements. Determining the likely effects of a proposed merger is a complex and demanding task to which the agency devotes



significant resources. Increases in the number of Hart-Scott-Rodino Act (HSR) merger filings submitted during FY 2004, and in economic activity generally, foreshadow the beginning of a trend toward a higher volume of FTC merger enforcement work. During FY 2004, the number of merger filings required under HSR increased by more than 40 percent over the previous year, with a commensurate increase in the number of mergers requiring investigation by the FTC or the DOJ. The total dollar value of merger transactions reported under HSR also increased substantially over the FY 2003 level, rising by about 54 percent.

### **1. Merger Review Process – Improvements and Greater Transparency**

The FTC has implemented a number of improvements in the merger review process in recent years to increase the effectiveness of the agency's law enforcement efforts to promote competition. To make further improvements, the agency is pursuing several initiatives both to ease the burden on affected parties and to increase internal efficiency. In addition, the Commission has continued its ongoing efforts to provide greater transparency in what it does in antitrust enforcement. Transparency serves the FTC's objectives because a full understanding of the kinds of transactions or conduct the FTC is likely to challenge, and why, enables the business and legal communities to make more informed and better judgments about the legal consequences of proposed business decisions. The FTC's initiative to promote transparency has proceeded on several fronts:

**Data on Merger Investigations and Challenges.** This past year, the FTC released two reports designed to give the public a clearer picture of its enforcement policies and standards. With the DOJ, the FTC released a report that summarized market concentration data sorted by market for both agencies' merger challenges over a five-year period (1999-2003). In February 2004, the FTC released a report that provided data on consumer complaints or "hot" documents (i.e., those revealing a party's expectation of decreased competition following the merger) for a total of 151 FTC merger investigations over eight years. In August 2004, the FTC supplemented that information with data on ease of entry. In February 2005, the FTC released an econometric analysis of the merger investigations data that showed, *inter alia*, that no structural shift in enforcement patterns had occurred over the eight years covered by the study.

**Merger Enforcement Workshop Follow-Up.** The FTC and the DOJ held a three-day workshop in February 2004, to assess the practical efficacy of the 1992 Horizontal Merger Guidelines in light of 12 years of experience. The workshop provided a forum for two-way information exchange – from the agencies to the public on application of the Guidelines, and from the public to the agencies on the strengths and weaknesses in the Guidelines and areas for clarification. Participants analyzed and discussed all sections of the Guidelines with a focus on whether their analytical framework (1) leads to accurate assessments about the likely effects of proposed mergers, and (2) provides adequate guidance to the business and legal communities. Following the workshop, the FTC analyzed the testimony and public comments and published these findings on its website. What emerged from this review was a consensus among antitrust practitioners that the analytical framework underlying the Guidelines was functioning effectively, but that some further explanation of the agencies' practical application of the Guidelines would be beneficial.

**Commentary on the Merger Guidelines.** Based on the results of the Merger Enforcement Workshop, FTC Chairman Majoras announced in November 2004 that the FTC, along with the DOJ, would develop a Commentary on the Merger Guidelines to bring greater transparency to the agencies' application of the Guidelines to merger analysis. The Commentary would clarify how the agencies apply the Guidelines in practice and would enhance the dialogue between the agencies, businesses, legal advisers, and the public.

**Explanations of Merger Investigation Outcomes.** In some cases, the FTC conducts an extensive investigation of a proposed merger before declining to take enforcement action. Explaining why the FTC decides not to take action in a particular case can provide useful information and guidance to the public.

- **RJR/Brown & Williamson.** In June 2004, the Commission outlined three reasons for its conclusions that the merger of these two firms was unlikely to harm competition in the U.S. cigarette market. It explained, first, that Brown & Williamson plays an increasingly minor role in the market, with that trend expected to continue. Second, the investigation found no markets in which the two firms are each other's closest competitors. Third, a majority of the Commissioners had reason to believe that the evidence indicated that the transaction was unlikely to facilitate or enhance coordination among the major U.S. cigarette manufacturers.
- **Victory/St. Therese.** In July 2004, FTC Commissioners issued two statements explaining their differing assessments of evidence obtained in an investigation of a consummated merger of Victory and St. Therese hospitals in the Waukegan, Illinois area, leading to a 3-2 vote to close the matter. The majority emphasized that the merged hospital had not had success in renegotiating contracts with payors, indicating a lack of market power, that post-merger price increases were no greater than those found at similar hospitals, and that the two hospitals had been steadily losing market share before the merger. Commissioners Thompson and Harbour dissented, stating that the empirical evidence on post-merger price increases was inconclusive, and that the totality of the evidence, including documents and testimony, supported an enforcement challenge.

**Model Second Request for Retail Industries.** This past year, the FTC continued to refine and improve the HSR investigation process. The agency, for example, published a Model Second Request specifically adapted for transactions involving retail industries.

**Electronic Discovery.** The FTC is working to improve its ability to receive and review Second Request and other discovery materials in electronic format, which it views as beneficial both for itself and for those producing documents to the agency. The agency also is adapting Model Second Request language to provide for electronic production, and is working internally and with the DOJ to determine the most effective methods for identifying responsive materials stored in various types of electronic formats.

**Additional Merger Procedure Reforms.** Further improvements to merger review are under consideration. FTC Chairman Majoras has established a task force to recommend improvements to the merger review process. The task force is currently assessing the FTC merger process in detail, examining such issues as the data requested on HSR Notification and report forms, the contents of the analysis to aid public comment issued when consent agreements



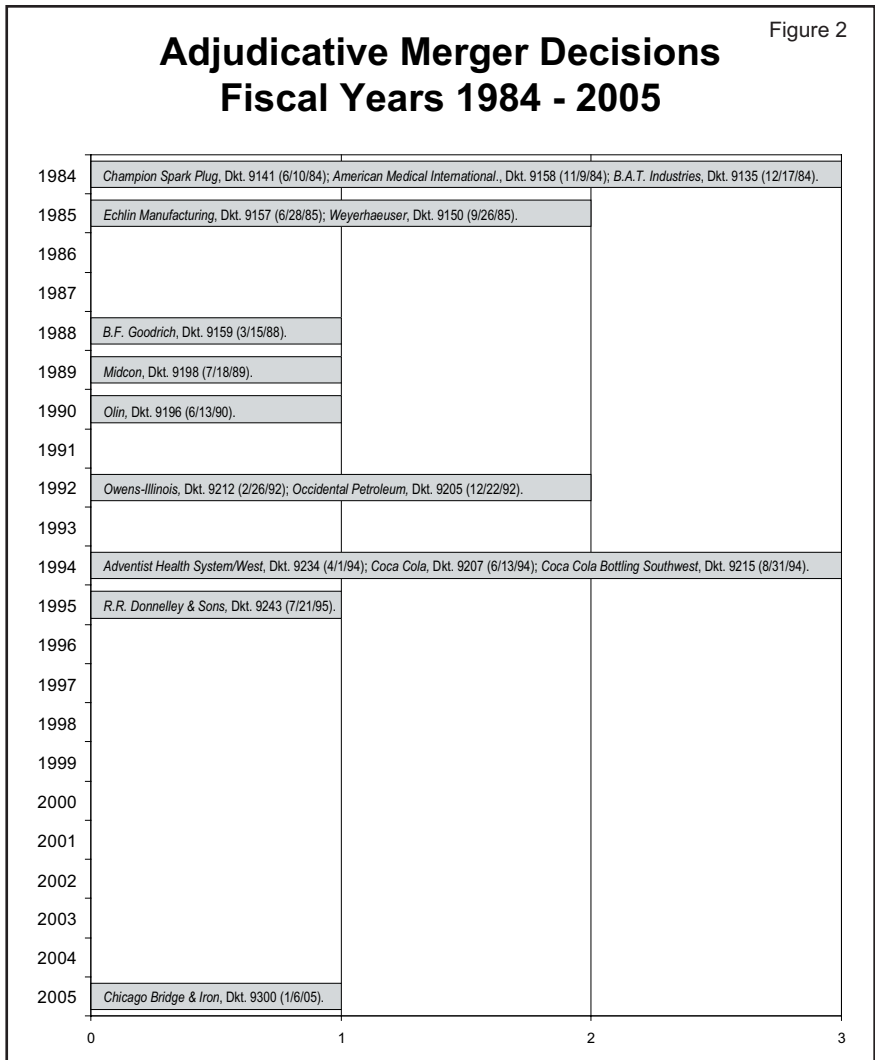
are accepted, and the second request compliance process and its impact on both the agency and practitioners. The task force is reviewing prior best practices and merger process initiatives to determine what has been implemented and whether those initiatives have worked. In addition to the task force, current initiatives include a possible release of an annotated Model Second Request to explain the rationale underlying certain information requests, and additional efforts to improve timeliness and efficiency.

## 2. Administrative Adjudication of Mergers

During the past year, the FTC had four merger cases in adjudicative status under Part 3 of its Rules of Practice (Part 3). Of those four, the Commission issued a final decision in one (*Chicago Bridge*), settled another (*Aspen Technology*), and a third is pending before an ALJ (*Evanston/Highland Park*). The Commission withdrew the fourth case from adjudication following an unsuccessful action in federal court for preliminary injunction and the subsequent consummation of the transaction, and will consider whether to return the matter to Part 3 adjudication following its review of staff's recommendation (*Arch Coal*).

- **Chicago Bridge.** In its first merger decision in administrative adjudication since 1995, the Commission ruled in January 2005 that Chicago Bridge illegally acquired its closest competitor in the design and construction of various types of field-erected specialty industrial storage tanks. The complaint alleged that the acquisition resulted in either a monopoly or a dominant firm in four U.S. markets, including markets for field-erected thermal vacuum chambers and storage tanks for various liquified gases. The Commission's order requires Chicago Bridge to create two new divisions that could compete independently in the relevant markets, and to divest one of those divisions within six months. Notably, the Commission's unanimous opinion, authored by Commissioner Swindle, includes an extensive discussion of the Commission's treatment of entry conditions.
- **Evanston/Highland Park.** Last year, as a product of its hospital merger retrospective project, the Commission issued an administrative complaint challenging a hospital acquisition in Chicago's northern suburbs by Evanston Northwestern Healthcare Corporation. The complaint alleges that the merger resulted in large hospital price increases compared to a control group at comparable hospitals. In addition to addressing the competitive implications of the transaction in question, this case likely will advance the economic learning regarding hospital mergers more generally. In a separate count, the Commission also alleged price fixing by some doctors associated with the hospitals. That count was recently removed from the ongoing litigation for the Commission to consider a settlement proposal.
- **Arch Coal.** Last spring, the Commission approved a preliminary injunction action to block Arch Coal's planned acquisition of Triton Coal Company, based on concerns that the merger would harm competition in the market for coal production from Wyoming's Southern Powder River Basin. That area supplies one-third of U.S. coal production and fuels electrical power generation in 26 states. The Commission also issued a Part 3 complaint against this transaction in April 2004. The district court denied the injunction, stating that the agency's concern over the likelihood of coordinated

interaction was based on a “novel theory” of output coordination and that the customer testimony had little or no probative value. In response to the Commission’s emergency motion, the U.S. Court of Appeals for the District of Columbia Circuit denied an injunction pending appeal. Although the court granted an expedited appeal, the parties consummated the transaction shortly after the court ruled. The appellate court’s per curiam order noted, however, that there was “nothing novel about the theory [the Commission] has advanced in this case.” Subsequently, the Commission withdrew the case from Part 3, in August 2004, to facilitate consideration of next steps.



- Aspen Technology/Hyprotech.** In another case reflecting an emphasis on high-technology matters, the parties resolved the challenge to the acquisition of the Hyprotech software assets by Aspen Technology just weeks before an administrative trial was set to begin last summer. The transaction was exempt from the HSR reporting requirements and thus the FTC challenged it administratively after consummation. The consent order, issued in July 2004, which fully remedies the concerns outlined in the Commission’s complaint, requires Aspen Technology to divest the overlapping Hyprotech assets and to take several other measures to ensure restoration of competition to premerger levels.

### 3. Energy Industry Merger Enforcement

Probably no sector of the economy touches consumers’ lives more than energy. Demand for petroleum products continues to increase, and consumers are acutely aware of price fluctuations. Consequently, the agency’s work to maintain competition in energy markets is critical. The

Commission approved consent orders requiring divestitures in three transactions in the petroleum industry in the past year:

- **Enterprise Products/GulfTerra Energy.** In September 2004, the Commission required several divestitures to protect competition in markets for propane and natural gas before allowing the \$13 billion merger of Enterprise Products Partners L.P. and GulfTerra Energy Partners L.P. to go forward. The Commission's consent order required divestiture of interests in one of two pipeline systems and interests in one of two propane storage facilities. In addition, the consent order includes a hold-separate provision to preserve the viability and marketability of the assets pending divestiture.
- **Magellan/Shell.** In September 2004, the Commission approved a consent agreement that will prevent anticompetitive price increases for gasoline in the Oklahoma City area by requiring Magellan Midstream Partners to divest a refined petroleum products terminal in that city within six months of the merger.
- **Buckeye Partners/Shell.** Like *Magellan/Shell*, this matter involves a purchase of selected petroleum pipeline and terminal assets. The September 2004 settlement preserves the agency's ability to intervene in the event of a future transaction raising concerns about petroleum terminals in the Niles, Michigan area (assets that were excluded from this transaction) even if the future transaction is not subject to HSR reporting requirements.

#### ***4. Health Care and Pharmaceutical Industry Merger Enforcement***

American consumers paid nearly \$1.8 trillion for health care in 2004 – about 15 percent of gross domestic product – through tax dollars, insurance premiums, or out-of-pocket payments. Thus, health care is another industry in which it is critical for the FTC to maintain competition. In the past year, the FTC reviewed a number of important pharmaceutical industry mergers and examined some completed hospital mergers, including the *Evanston/Highland Park* merger that is currently under challenge in administrative litigation. The FTC reviewed the following mergers in this important sector:

- **Sanofi-Synthélabo/Aventis.** In July 2004, the FTC acted to preserve competition by ordering divestiture of certain pharmaceuticals used to treat colon cancer and insomnia, and also used as anticoagulants to ensure the viable ongoing competition for these medications. The FTC conducted an extensive investigation of a complex \$64 billion combination of two of the world's largest pharmaceutical firms before allowing the acquisition to proceed. The Commission's order required divestitures of manufacturing assets, patents, and other intellectual property, and also required assistance with clinical trials and provisions to help ensure the availability of key employees to the acquiring firms to ensure viable ongoing competition for these medications.
- **Cephalon/Cima Labs.** In August 2004, the Commission obtained a novel consent agreement requiring the creation of a generic competitor to ensure competition for a breakthrough cancer pain medication. The Commission required Cephalon, Inc. to grant a no-cost, irrevocable license to manufacture and sell a generic version of its patented drug Actiq as a condition to allowing Cephalon to proceed with its acquisition



of Cima Labs, Inc. This provided consumers with a substantially lower-priced alternative and lowered the average price of the medication. This case reflects the FTC's continuing emphasis on the importance of generic prescription medications to limit the rapid escalation of pharmaceutical costs.

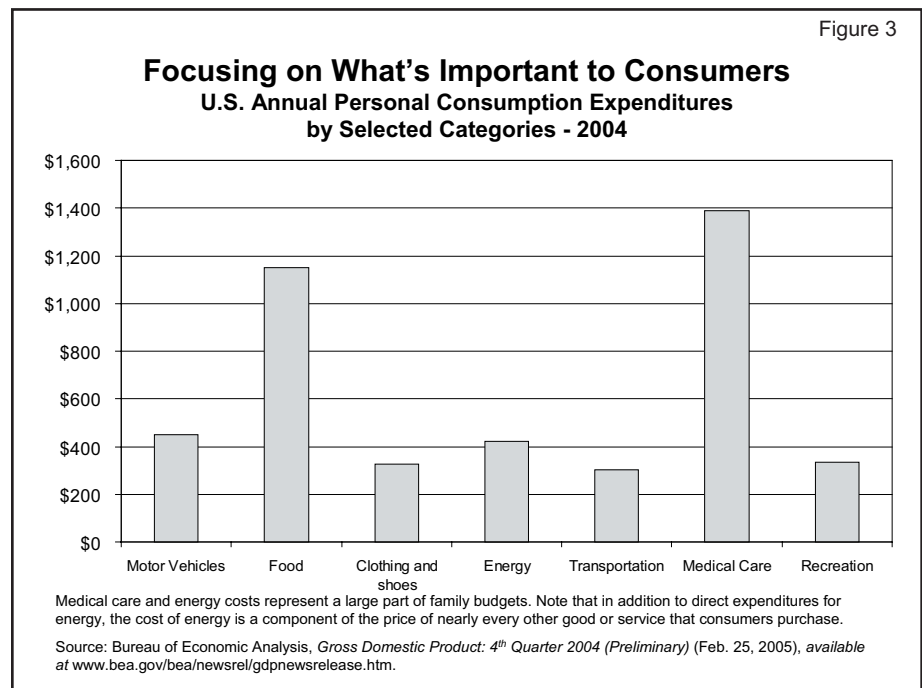
- **Genzyme/Ilex.** In December 2004, to preserve competition in the market for solid organ transplant (SOT) acute therapy drugs, the Commission required Genzyme, in its acquisition of Ilex, to divest to Schering the revenue stream in solid organ transplant therapy for one of its drugs, while allowing Genzyme to keep the revenues for other applications. To preserve competition, the Commission's order requires Genzyme to divest to Schering all contractual rights to Ilex's product, Campath for use in SOT acute therapy. Because Campath is used for other purposes, the order requires divestiture of all of the rights involved in the drug's use for SOT acute therapy only, while allowing Genzyme to market the product for other applications.

- **Victory/St. Therese.** As discussed above, the FTC took steps to ensure that hospital competition in Waukegan, Illinois was not weakened by investigating the 2000 merger of Victory

Memorial Hospital and Provena St. Therese Medical Center as part of its systematic review of several consummated hospital mergers. After reviewing extensive evidence obtained from numerous sources to determine whether anticompetitive effects resulted from this

transaction, the

Commission did not find sufficient evidence to support a likelihood of consumer harm from the transaction.



## 5. Other Merger Enforcement.

Over the past 12 months, the agency continued to scrutinize and challenge proposed mergers across the economy when they threatened competition:

- **L'Air Liquide.** The Commission obtained a consent order in April 2004 with two leading industrial gas producers, under which L'Air Liquide was permitted to proceed with its \$3.5 billion acquisition of Messer Griesheim GmbH, but was required to divest

significant assets to maintain competition in markets for liquid oxygen, liquid nitrogen, and liquid argon.

- **Itron/Schlumberger Electricity:** In June of last year, the Commission prevented a near monopoly in the U.S. market for mobile radio frequency (RF) automatic meter reading (AMR) technologies for electric utilities by requiring Itron to grant a royalty-free, perpetual, and irrevocable license to Hunt Technologies for Itron's mobile RF AMR technology. This remedy allowed Hunt to become a significant competitor to Itron for these systems that allow utility companies to gather electric consumption data automatically and remotely from electricity meters.
- **GE/InVision.** The Commission permitted General Electric Company to acquire InVision Technologies, Inc. while requiring GE to divest an InVision subsidiary to preserve competition in the specialized market for X-ray nondestructive testing. This equipment is used for inspection of aircraft and automobile components and for other purposes. The order, dated September 2004, includes hold separate and asset maintenance requirements to preserve the viability of the business to be divested.
- **Cytec/UCB.** In March 2005, the Commission acted to preserve competition in a market affecting the manufacture of many consumer products by requiring Cytec Industries to divest UCB's amino resins business, before allowing Cytec's acquisition of UCB's Surface Specialties Business to proceed. The two firms were substantial competitors in the market for amino resins, which are used as industrial coatings in the manufacture of automobiles, appliances, and other products, and also to promote adhesion of rubber to other materials, such as in the manufacture of tires.

## **6. Ensuring Compliance with Rules and Orders.**

The Commission relies on firms to comply with the HSR reporting obligations and to fulfill obligations imposed under FTC orders. To preserve the integrity of the reporting process and the FTC's authority to order relief, it is important to prosecute violations vigorously. In the past year, the Commission obtained civil penalties for failures to file under HSR and for failure to comply with a Commission divestiture order.

**HSR Enforcement – William H. Gates, III.** In May 2004, the Commission announced the settlement of a federal court action against Bill Gates providing for payment of \$800,000 in civil penalties for violations of the HSR reporting requirements. Although Mr. Gates' failure to file apparently did not stem from any intent to violate, he was on notice of the HSR reporting obligations, due to a warning issued following a previous inadvertent failure to file in 2001. Thus, the Commission sought civil penalties for this second violation.

**Order Compliance – RHI AG.** In February 2004, the Commission finalized a settlement with RHI AG, based on its failure to comply with the various provisions of a Commission order issued in 2001, to resolve concerns surrounding RHI's acquisition of a competitor in the market for refractory bricks used in steel production. Under the settlement, RHI agreed to pay a civil penalty of at least \$650,000 for the violations and to conduct asbestos remediation at a divested plant, substantially beyond the remediation required in the original order.

## B. Nonmerger Enforcement

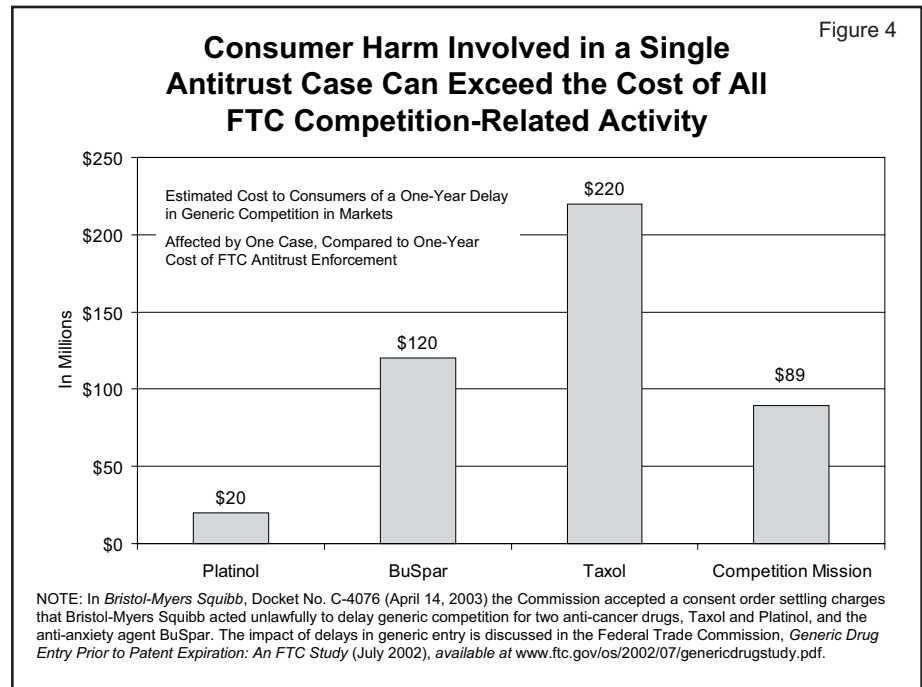
Consistent with its strategic focus, the FTC has identified priorities and sought systematically to develop nonmerger cases in key areas. As with mergers, the agency focuses on industries, including health care and energy, that matter most to consumers. The areas of emphasis include health care, prescription drugs, standards setting, professional associations, and immunities from, and exceptions to, the antitrust laws.

In the nonmerger area, continuing litigation of Part 3 cases that had been initiated in previous years has kept both the staff and the Commission very busy this year. The Commission issued two interim administrative decisions, one involving the State Action Doctrine and another involving *Noerr-Pennington* issues (*South Carolina Board of Dentistry* and *Unocal*, respectively); accepted a settlement in a physicians case (*Piedmont Health Alliance*); and is considering appeals from Initial Decisions in three additional cases (*Rambus*, *Kentucky Movers*, and *North Texas Specialty Physicians*).

In a horizontal collusion case, the Commission applied its 2003 policy statement on remedial use of disgorgement in accepting a multi-million dollar settlement of an alleged antitrust violation involving pharmaceuticals (*Perrigo/Alpharma*).

### 1. Continued Emphasis on Health Care

As noted above, healthcare is a major issue for consumers. Thus, in addition to its activity involving pharmaceutical and hospital mergers, the FTC has been active in prosecuting unlawful conduct in the health care and pharmaceutical industries. The FTC has continued to take action against groups of physicians and other health providers for agreements relating to prices. The agency obtained four settlements, including one in a case in Part 3 litigation (*Southeastern New Mexico Physicians*, *White Sands Health Care System*, *Preferred Health Services* and *Piedmont Health Alliance*). In a fifth physician matter, the Commission is now considering the appeal of an Initial Decision upholding the complaint (*North Texas Specialty Physicians*). The Commission also required two pharmaceutical firms to disgorge \$6.25 million in alleged illegal overcharges for children's pain medicine (*Perrigo/Alpharma*), and issued an order denying a motion to dismiss the FTC's challenge to alleged restrictions on competition for dental services in South Carolina (*South Carolina Board of Dentistry*).





- **Southeastern New Mexico Physicians.** In June 2004, a consent agreement resolved FTC charges that 73 percent of the physicians independently practicing in Roswell, New Mexico, collectively negotiated their fees with payers, resulting in prices above those prevailing elsewhere in the state. The consent order bars similar future conduct.
- **White Sands Health Care System.** In September 2004, a physician-hospital organization in New Mexico settled the Commission's allegations that it fixed prices charged to health plans for physician and nurse anesthetist services, agreeing to cease and desist such conduct.
- **Piedmont Health Alliance.** In August 2004, a 450 member group of North Carolina physicians agreed to settle price-fixing charges made by the Commission in a 2003 administrative complaint, just before the scheduled beginning of trial. The settlement included the full relief contemplated in the Commission's complaint.
- **Preferred Health Services.** Most recently, in March 2005, the Commission ordered another physician-hospital organization to stop collectively negotiating the prices its independent physician members charge health plans. In this matter, the group consisted of more than 100 physicians and the Oconee Memorial Hospital in northwestern South Carolina. The group's physicians allegedly make up approximately 70 percent of the independently practicing physicians in and around Seneca, South Carolina.
- **North Texas Specialty Physicians.** In November, an ALJ's Initial Decision upheld charges that this physician group negotiated agreements among participating physicians on price and other terms, refused to negotiate with payers 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 respondent's appeal, and complaint counsel's cross appeal on market definition and certain remedial issues, are pending before the Commission.
- **Perrigo/Alpharma.** The Commission required the disgorgement of \$6.25 million in allegedly illegal overcharges for an over-the-counter, store-brand of children's liquid Ibuprofen. Alpharma, Inc. and Perrigo Company signed an agreement under which Alpharma allegedly agreed not to compete in selling children's liquid Ibuprofen for seven years in exchange for an up-front payment and a royalty on Perrigo's sales of the product. The complaint further alleges that Perrigo raised its prices following the agreement. The Commission will use the \$6.25 million payment to reimburse consumers harmed by the alleged illegal conduct.
- **South Carolina Board of Dentistry.** The FTC fought restrictions against dental hygienists providing basic dental care to South Carolina school children – particularly those economically disadvantaged. In July 2004, the Commission denied the South Carolina Board of Dentistry's motion to dismiss the FTC's Part 3 complaint, rejecting the Board's contention that the State Action doctrine protected its actions against antitrust challenge. The Commission noted that the Board's actions were not pursuant to a clearly articulated policy of the state and appeared to have been contravened by the legislature. The Commission has agreed to stay the administrative proceedings pending the resolution of the Board's appeal to the Fourth Circuit of the Commission's decision.

## 2. Energy

The Commission's efforts to protect competition in the petroleum industry include a significant adjudicative matter involving the alleged acquisition of monopoly power in the technology market for producing a formulation of gasoline in California:

- **Unocal.** In an Opinion issued in July 2004, the Commission reversed an ALJ's initial decision that the *Noerr-Pennington* doctrine protected Union Oil of California from charges of monopolization, thus sending the matter back before an ALJ for a full trial on the merits. The Commission held that, in some circumstances, false petitioning does not enjoy *Noerr-Pennington* protection. According to the Commission, these circumstances include "when the petitioning occurs outside the political arena; the misrepresentation is deliberate, factually verifiable, and central to the outcome of the proceeding or case; and it is possible to demonstrate and remedy this effect without undermining the integrity of the deceived governmental entity." The Commission's complaint alleges that Unocal made misrepresentations to the California Air Resources Board (CARB) and to industry participants concerning its research relating to low-emissions reformulated gasoline (RFG). Unocal's actions allegedly led to a regulatory standard that overlapped with Unocal patents, giving Unocal a monopoly over the technology used to produce and supply California "summertime" RFG and costing California consumers hundreds of millions of dollars in higher gasoline prices. The case is awaiting the ALJ's decision following the completion of the administrative trial.

## 3. Other Nonmerger Enforcement

In the past year, the Commission accepted consents in two other nonmerger cases raising important conduct issues:

- **Clark County, Washington, Attorneys.** In June 2004, the Commission charged an attorneys' group in Clark County, Washington with price fixing. The group consisted of 43 independently practicing attorneys who represented criminal indigent defendants. According to the FTC's complaint, the attorneys formed a consortium through which they collectively demanded higher fees from the county for defending certain types of criminal cases and threatened to refuse to take additional cases of these types unless the county agreed to the higher fees. The Commission settled with the group and issued an order barring the attorneys from engaging in similar conduct in the future.
- **Virginia Board of Funeral Directors and Embalmers.** The Commission, in August 2004, charged the Virginia Board of Funeral Directors and Embalmers with violating the antitrust laws and restraining competition by prohibiting funeral directors from advertising discounts for "preneed" funeral planning and services. The parties agreed to a settlement, and an order bars the Board from prohibiting or restricting truthful price advertising, including enforcing any regulation that might prevent Board licensees from using truthful advertising to notify consumers of prices and discounts for funeral products and services.

Two additional nonmerger adjudicative matters are pending before the Commission following appeals from ALJ initial decisions:

- **Kentucky Movers.** In 2003, the Commission filed a complaint against several associations of household goods movers, charging that the associations, consisting of competing firms, each violated the FTC Act by jointly filing tariffs containing collective rates on behalf of their members. All but one of the matters have settled. In June 2004, the ALJ's Initial Decision upheld the complaint's allegations that the Kentucky association had engaged in horizontal price-fixing and that its conduct was not protected by the State Action Doctrine because the state had not actively supervised the association's rate-making activities. The Commission heard oral arguments on the matter in January 2005, and the matter is now awaiting a Commission decision.
- **Rambus.** The Commission also is considering an appeal from an ALJ's dismissal of the complaint in a Part 3 proceeding against Rambus, Inc. The complaint charged that Rambus violated the antitrust laws by knowingly failing to disclose its relevant intellectual property holdings to a standards setting organization in which it was a participant. In dismissing the complaint, the ALJ concluded that Rambus' conduct did not amount to deception or a violation of Rambus' duties and that complaint counsel did not prove that Rambus' conduct violated the antitrust laws. The Commission heard oral argument in December 2004, and a decision is forthcoming.



# 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 its enforcement efforts on issues of critical importance to American consumers, including telemarketing fraud, business opportunity schemes, credit-related scams, deceptive health claims, spam, spyware, and consumer privacy. Additionally, the FTC has established a special unit that works closely with our criminal law enforcement partners to build cases and prosecute the most recalcitrant 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 tool box includes databases, surveys, workshops, reports, and civil investigative demands. Using these tools, the FTC enforces the law, identifies developing trends, and educates itself, industry, and consumers to promote a marketplace in which fraud and deception cannot easily flourish.

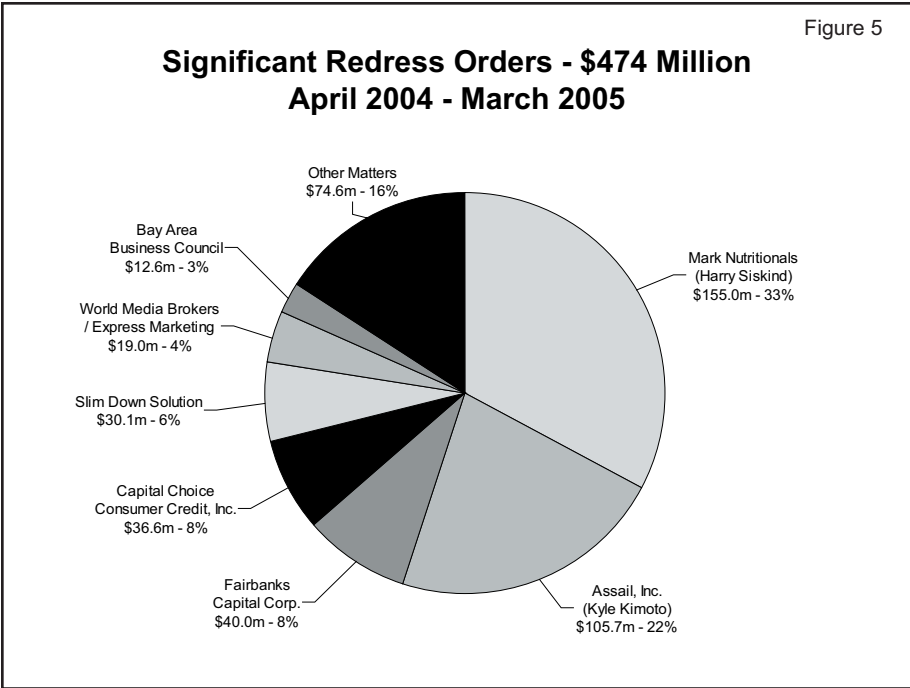
## A. Fraud and Deception

### 1. Law Enforcement.

The FTC targets the most pervasive types of fraud for law enforcement actions. From April 2004 through February 2005, the FTC filed 83 actions in federal district court and obtained 75 judgments ordering the return of more than \$474 million in redress to consumers. In many of these cases, the FTC worked with local, state, federal, and international law enforcement partners.

**Law Enforcement Sweeps.** Sweeps continue to play an important role in the FTC’s law enforcement

strategy. In addition to the direct impact of bringing cases against wrongdoers, sweeps create public awareness about particular types of fraud, and provide a means to combine forces with other law enforcement agencies. This year, the FTC announced sweeps targeting two types of



fraud that have been of particular concern to the agency because of their impact on consumers: weight-loss products and business opportunity scams.

- **Project “Biz Opp Flop.”** Announced in February 2005, this sweep included law enforcement actions against more than 200 operations by federal agencies and enforcement agencies from 14 states. The sweep targeted promoters of fraudulent business opportunities (“biz opps”), including franchises and work-at-home plans. The FTC, together with the U.S. Attorney’s Office for the Southern District of Florida, the DOJ, the U.S. Postal Inspection Service (USPIS), and law enforcement agencies from 14 states, stepped up the attack on biz opp scams by applying more criminal law enforcement resources to this type of fraud than ever before. The U.S. Attorney’s Office announced criminal charges against 14 individuals and the USPIS arrested 28 suspects. This unprecedented cooperation between the FTC and criminal authorities sends a clear message to biz opp scammers that jail time may await them.
- **Operation “Big Fat Lie.”** In November 2004, the FTC announced federal court actions against six companies charged with making false weight-loss claims for various products, including pills, powders, green tea, topical gels, and diet patches. The sweep continued the FTC’s efforts to stop deceptive advertising and to redress consumers harmed by unscrupulous weight-loss advertisers; encourage media outlets to reject advertisements containing bogus weight-loss claims; and educate consumers about false claims promising miraculous weight-loss without diet or exercise.

**Criminal Liaison Unit.** Working with criminal law enforcers remains a priority for the FTC. The Criminal Liaison Unit (CLU), created in December 2003, has stepped up cooperation with criminal authorities. From April 2004 to March 2005, the FTC assisted in 38 matters involving criminal prosecutions of FTC defendants or their associates. This year, CLU initiated a new program to familiarize criminal law enforcement agencies with the FTC’s work and to provide hands-on assistance in selecting criminal prosecutions. As a result of greater cooperation, in February 2005, the FTC, the DOJ, the USPIS, and the U.S. Attorney for the Southern District of Florida jointly announced “Project Biz Opp Flop,” a sweep targeting business opportunity fraud. Other CLU accomplishments this year include:

- A joint consumer fraud training forum with the USPIS attended by more than 150 FTC and Postal Inspection Service staff from around the country;
- The appointment of two FTC staff attorneys as Special Assistant U.S. Attorneys for the Southern District of Florida to assist that office in consumer fraud prosecutions; and
- The creation of a criminal liaison fact book summarizing FTC jurisdiction and background on FTC enforcement matters for criminal enforcers, including prosecutors, FBI agents, Postal Inspectors, and local law enforcement, to facilitate inter-agency cooperation, information sharing, and joint enforcement efforts.

**Deceptive Lending Practices and Other Credit Schemes.** For most consumers, access to credit is essential for full participation in the nation’s economy. Some entities, however, take advantage of consumers’ need for credit. Bogus organizations target consumers with bad credit or significant consumer debt, promising to help obtain credit or manage their debt. As a result,

consumers may pay high fees for these services, only to receive nothing in return, or worse, to see their credit damaged even further. Unscrupulous lenders deceive consumers about loan terms, rates, and fees. The results can be severe, from damaged credit ratings to foreclosure.

- **Advance-Fee Credit Scams.** Many advance-fee schemes, which take fees for nonexistent loans or credit cards, now originate in Canada. The FTC works closely with the Toronto Strategic Partnership – a group of law enforcement agencies in the U.S. and Canada that collaborates to combat cross-border fraud – to identify, locate, and shut down these schemes. Over the past 12 months, the FTC has brought seven cases targeting this area of fraud. For example, in November 2004, the FTC, working with the Partnership, filed a complaint against Prime One Benefits, a Canadian company that allegedly promised consumers a “guaranteed” advance-fee credit card. The defendants stipulated to a preliminary injunction.
- **Deceptive Credit Counseling Services.** The FTC won two major victories this year in the *AmeriDebt* litigation. In November 2003, the FTC charged AmeriDebt with falsely promoting itself as a non-profit credit counseling organization. In September 2004, the district court rejected AmeriDebt’s argument that it was exempt from liability under the FTC Act because of its nominal status as a non-profit entity, finding that the FTC properly stated a claim against AmeriDebt as a *de facto* for-profit organization. Also, the judge presiding over AmeriDebt’s bankruptcy case allowed the transfer of AmeriDebt’s client accounts to a legitimate third-party credit counselor, protecting consumers who otherwise might be stranded if AmeriDebt goes out of business.
- **Deceptive Debt Negotiation Services.** In May 2004, the Commission charged a large network of debt negotiation companies, fronted by the National Consumer Council (NCC), with falsely claiming that they could stop creditors’ collection efforts and significantly reduce consumers’ debts with little or no consequences to consumers. The complaint also alleged that NCC called consumers whose telephone numbers were on the DNC Registry and failed to provide privacy notices as required by the Gramm-Leach-Bliley Act. The defendants stipulated to a preliminary injunction.
- **Deceptive Mortgage Lending.** In June 2004, the Commission charged PWR Processing with violating the FTC Act, the Truth in Lending Act, and Regulation Z. Defendants deceptively claimed that they could broker no-cost, low-rate refinances of consumers’ mortgages. In fact, the defendants left consumers stranded with high-interest loans, and in many cases, damaged credit. In January 2005, the court granted partial summary judgment for the FTC and entered a permanent injunction.
  - **Capital City Mortgage.** In February 2005, Capital City Mortgage, a mortgage lender and servicer, settled FTC charges that it deceptively induced consumers into taking loans secured by their homes, overcharged borrowers, and, in some instances, caused consumers to lose their homes. Among other things, the settlement prohibits defendants from engaging in certain deceptive and unfair loan practices, permanently bans the defendants from making or servicing any loans secured by homes, and requires them to pay consumer redress and other monetary relief totaling at least \$750,000.

**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 continues to focus on combating deceptive health claims, particularly weight-loss and serious disease-prevention claims. From March 2004 through February 2005, the FTC brought 42 law enforcement actions in this area. In addition to the “Operation Big Fat Lie” sweep, the agency targeted food and dietary supplement marketers making deceptive health claims.

- **Cortisol Control Products.** The “miracle pills” of 2004 were dietary supplements that supposedly caused significant weight-loss and prevented disease by reducing levels of the stress hormone cortisol. In September 2004, the Commission alleged that the marketers of CortiSlim and CortiStress made deceptive weight-loss and disease-prevention claims and used a deceptive infomercial format. An interim agreement filed with the complaint stopped all of the conduct alleged in the complaint. Staff also sent more than 40 warning letters to marketers of other similar products.
- **Kentucky Fried Chicken.** In June 2004, KFC Corporation settled charges that it made false health-related claims about its fried chicken in a national television advertising campaign. The FTC alleged that the company falsely implied that eating two KFC Original Recipe fried chicken breasts is better for a consumer’s health than eating a Burger King Whopper, and that eating KFC fried chicken is compatible with low carbohydrate diets. The settlement prohibits the company from making these or similar false or unsubstantiated claims about the nutritional value, weight-loss benefits, or other health benefits of its chicken.

**Effective Remedies Through Avalanche Clauses.** The FTC’s “avalanche clauses” are yielding results. These order provisions condition the Commission’s agreement to suspended judgments upon defendants’ truthful disclosures of their financial status. If defendants lie, the court can reopen the case and reinstate a judgment for the full amount of consumer injury. Over the last year, the Commission successfully obtained over a quarter of a billion dollars in avalanche clause judgments. In September 2004, the FTC won a \$106 million judgment against Assail, Inc. after the court found that Kyle Kimoto, its president, concealed more than \$3 million in assets he failed to disclose as part of his settlement with the FTC resolving allegations that defendants ran an advance-fee credit card scam. Also in September 2004, the FTC secured a new settlement reinstating a \$155 million judgment against Harry Siskind, who allegedly misrepresented \$600,000 in assets and failed to report \$300,000 in additional assets when he settled with the agency after allegedly selling worthless weight-loss supplements.

**Project Scofflaw.** Project Scofflaw seeks criminal and civil contempt sanctions against individuals who violate FTC orders. For example, the FTC settled two civil contempt actions against dietary supplement marketers, enjoining one set of defendants in *Enforma Natural Products* from selling any weight-loss products, and enjoining another defendant,

Figure 6

**Project Scofflaw - 2004 Criminal Prosecutions:**

- 6 defendants sentenced;
- 278 months confinement;
- \$40 million in criminal restitution;
- 9 individuals indicted in federal court, 1 in state court;
- 2 guilty pleas.



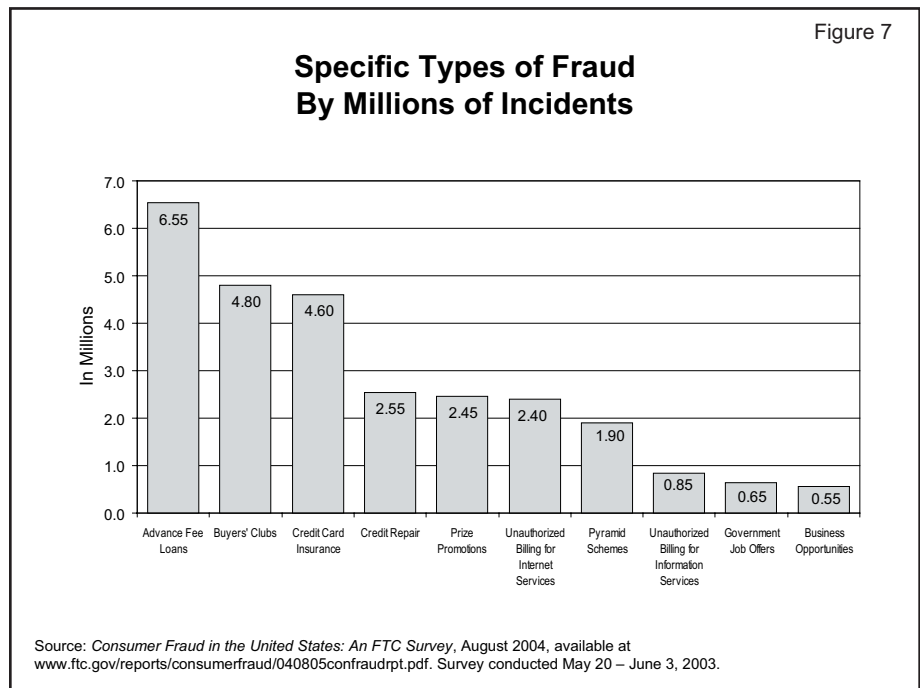
Kevin Trudeau, from appearing in, producing, or disseminating infomercials that advertise any product or service, except for truthful infomercials for informational publications. In addition, after referral for prosecution as part of the FTC's Busted Opportunity law enforcement sweep, Jeffrey and Terri Salley in January 2005 were sentenced, respectively, to 70 months incarceration and four years of probation. The Salleys, who pled guilty to criminal contempt of court, were indicted on 20 counts of criminal contempt for violating an order issued in *United States v. World Wide Coffee, Inc.* The order prohibited them from making false earnings claims in connection with business opportunities and from violating the FTC's Franchise Rule.

**Hispanic Law Enforcement Initiative.** The Hispanic Law Enforcement and Outreach Initiative, announced in April 2004, targets consumer fraud against Spanish-speaking consumers through law enforcement, media outreach, consumer education, and inter-agency cooperation. The Initiative monitors Spanish-language media and tracks Spanish-language complaints from the Consumer Sentinel database. The FTC has announced 21 cases involving alleged frauds using the Spanish-language, including scams involving green card lotteries, weight-loss products, international driving permits, work-at-home schemes, and junk computers.

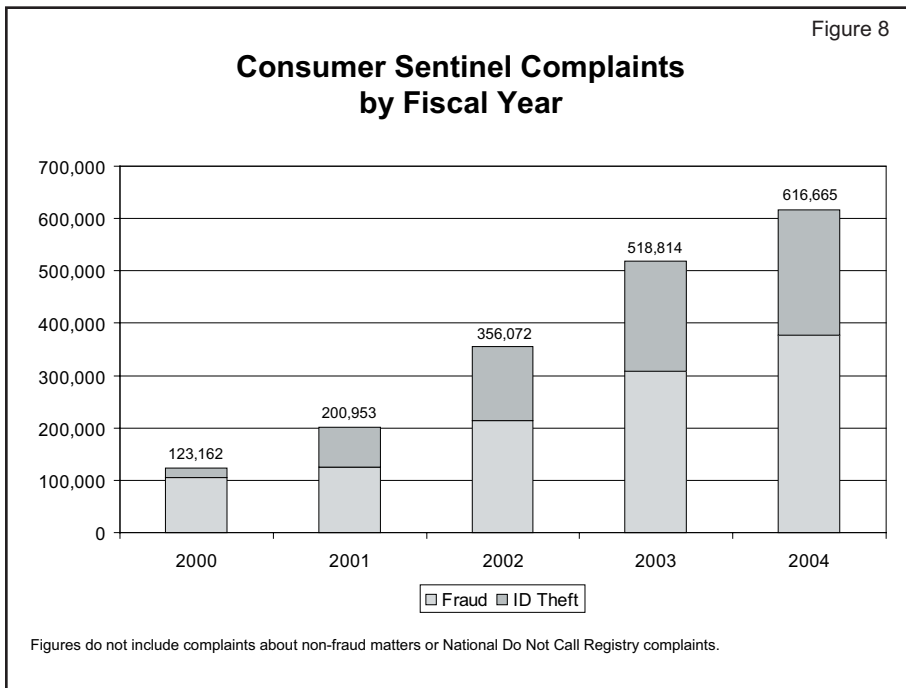
## 2. Tools to Identify Fraud and Deception.

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 marketplace, assist the agency in advancing its consumer protection agenda.

**Consumer Fraud Survey.** In August 2004, FTC staff released a survey of consumer fraud in the United States. Notably, the survey found that nearly 25 million adults – 11.2 percent of the adult population – were victims of one or more of the frauds covered by the survey during the year studied (2002-2003). In addition, the survey found that Hispanics, African Americans, and American Indian consumers were much more likely to be victims of fraud than non-Hispanic whites. By identifying the most prevalent frauds and the groups most affected by them, this survey is helping the FTC better serve fraud victims through law enforcement and education.



**Consumer Response Center.** The Consumer Response Center (CRC) remains a vital resource for both consumers and law enforcement by providing a forum for consumers to submit complaints on a variety of issues. Each week, the CRC handles more than 25,000 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 acted as the primary response center for the USPS’s recent “Dialing for Dollars” anti-telemarketing fraud consumer education campaign.



**Consumer Sentinel.** Consumer Sentinel is the FTC’s primary fraud database. Created in 1997, Consumer Sentinel maintains more than 2.2 million consumer fraud and identity theft complaints. This data is available online to more than 1,200 law enforcement agencies in the United States, Canada, and Australia – an increase of over 200 participating agencies over last year.

**Do Not Call Registry.** In addition to enabling consumers to limit

telemarketing calls they receive, the Do Not Call Registry has collected more than 800,000 consumer complaints. The FTC shares these complaints with other federal and state law enforcers through Consumer Sentinel. Most companies identified have a very small number of complaints lodged against them, which indicates widespread compliance.

**Spam Database.** “Spam,” the popular name for unsolicited commercial email, is still a top concern for consumers and businesses. 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 currently receives more than 300,000 pieces of spam *daily*. The total number of spam received by the FTC has grown from 94 million in March 2004, to more than 200 million in March 2005. In 2004, the FTC provided several law enforcement partners with direct access to its spam database. The database has been instrumental in the development of state and federal enforcement actions against major spamming operations such as the FTC’s case against Phoenix Avatar and the Texas Attorney General’s case *Texas v. PayPerAction, LLC*.

**Identity Theft Tools.** Identity theft is the top consumer fraud complaint received by the FTC. The agency leads the fight against identity theft by providing a toll-free hotline and website where consumers can file complaints and receive helpful information concerning their rights as victims of identity theft. More than 1,100 law enforcement agencies have access to

these complaints. The FTC also develops preliminary investigative reports for other federal law enforcement agencies and sponsors ID theft law enforcement training for state and local law enforcers. To date, the FTC, in cooperation with the DOJ, the U.S. Secret Service, the USPIS, and the International Association of the Chiefs of Police, has conducted 16 one-day Identity Theft Law Enforcement Training Seminars attended by more than 2,200 officers from more than 800 agencies.

**Cross-Border Fraud Website.** The FTC also uses information collected at “econsumer.gov” to identify fraud. Consumers from around the world can file complaints at the [econsumer.gov](http://econsumer.gov) website, which has received over 15,000 consumer complaints to date. These complaints are now accessible to consumer protection agencies in 20 countries. Participating agencies recently added a link to a directory of global online alternative dispute resolution providers, so that consumers from around the world have a potential avenue to resolve their consumer protection complaints without going to court.

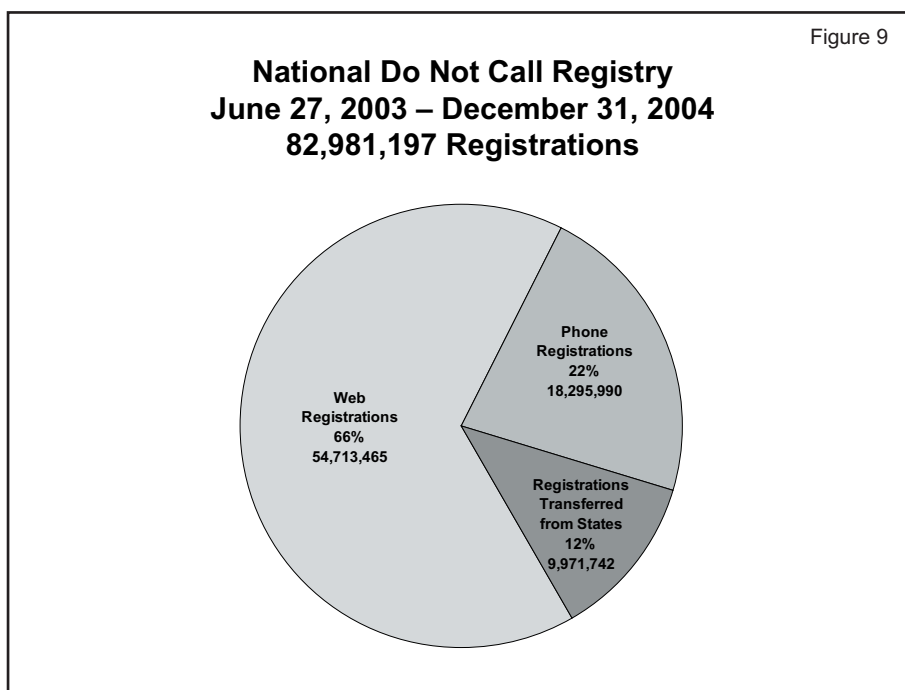
## B. Consumer Privacy

Protecting consumer privacy remains a top priority in the FTC’s consumer protection agenda. Through the vigorous enforcement of existing laws, rulemaking efforts, and ongoing consumer and business education, FTC initiatives address the serious consequences that result from the misuse of personal information.

### 1. Law Enforcement.

The FTC continued its aggressive enforcement of existing laws to protect consumer privacy during the past year. Law enforcement actions ranged from cases involving violations of the Do Not Call provisions of the Telemarketing Sales Rule, to cases attacking illegal spam or spyware that tracks consumers’ online behavior. Highlights include:

**National Do Not Call Registry.** As of March 2005, consumers had registered more than 85 million phone numbers with the FTC. The Registry protects consumer privacy by prohibiting commercial telemarketing calls to consumers who register their telephone numbers. The FTC has made enforcement of the Registry a top priority. Since October 2003, the Commission has filed five enforcement actions alleging that the defendants



had called consumers whose numbers were on the Registry, and has forwarded two additional cases to the DOJ for filing:

- **Flagship Resort and Braglia Marketing Group.** In February 2005, the Commission announced settlements in several Do Not Call enforcement actions. This was the first time the agency had sought civil penalties for violations of the Registry. Under the final orders, two timeshare sellers agreed to pay \$500,000 in civil penalties and abide by a federal court injunction – the telemarketers they retained were banned from owning or operating a telemarketing operation and agreed to a civil penalty of over \$526,000. According to the complaints, these defendants repeatedly violated the Registry provisions of the FTC’s Telemarketing Sales Rule; failed to pay the fees required to access the Registry; and unlawfully abandoned calls to consumers.

**Spam and Spyware.** Over the past year, the FTC’s spam program emphasized enforcement of the CAN-SPAM Act, which became effective on January 1, 2004. More recently, spyware is becoming one of the most serious consumer problems on the Internet. Spyware installs itself on an individual’s computer without that person’s consent and then monitors or controls computer use. It may be used to send pop-up ads, redirect the computer to websites, monitor Internet surfing, or record keystrokes, which, in turn, can lead to identity theft. To address the adverse effects of this digital menace, the FTC is investigating and aggressively prosecuting spyware distributors.

- **Phoenix Avatar.** In April 2004, the FTC filed its first CAN-SPAM cases against two sellers who hired spammers to promote their products. The defendants’ activities generated nearly one million consumer complaints. The FTC alleged that the defendants clogged the Internet with millions of deceptive messages. In August 2004, the court issued the first decision enforcing CAN-SPAM – granting the FTC’s motion for a preliminary injunction. The important message sent by that court’s decision: if you profit from illegal spam, you may be liable for violations of the CAN-SPAM Act, even if you did not push the “send” button.

Box 1

### Protecting Consumers Online

Commissioner Jon Leibowitz is particularly interested in competition and technology issues, including online commerce and privacy. On the technology side, he has spoken about the consumer harm caused by growing problems like spyware, phishing scams, and spam, and how the actions of some bad actors threaten to undermine the promise of the Internet. Most recently, Commissioner Leibowitz addressed the Congressional Internet Caucus State of the Net Conference, where he emphasized the ongoing role the Commission plays in protecting consumers online by the aggressive use of law enforcement tools like the CAN-SPAM Act and the Commission’s existing Section 5 authority.

- **Global Net Solutions.** In January 2005, the FTC filed suit against a network of individuals and corporations that used spam to sell access to online pornography. The Commission alleged that the defendants barraged consumers with sexually explicit email that violated virtually every provision of the CAN-SPAM Act, including the Adult Labeling Rule. The court immediately issued a temporary restraining order and has since entered a preliminary injunction.



- **Seismic Entertainment.** In October 2004, the Commission filed its first spyware case, alleging that the defendants unfairly downloaded adware and other software programs to consumers' computers without authorization and then advertised "anti-spyware" products to these same consumers. The court issued a temporary injunction stopping the defendants' unfair practices and the defendants are now subject to a preliminary injunction.
- **MaxTheater, Inc.** In March 2005, the Commission filed another case involving spyware. The FTC alleged that MaxTheater offered consumers free spyware scans that "detected" spyware on their computers even if there was none, to market anti-spyware software that does not work as represented.

**Information Security and Enforcing Privacy Promises.** The Commission continued its efforts to protect privacy by ensuring that companies do not misrepresent their privacy policies. The agency gives special emphasis to representations concerning the security provided for customer information and the disclosure of information to third parties.

- **Petco.** In November 2004, the FTC announced its fifth case targeting companies that misrepresent the security provided to consumers' personal information. The FTC alleged that Petco Animal Supplies, Inc., although promising to keep its customers' information secure, did not take reasonable or appropriate measures to prevent commonly known attacks to its website by hackers. The FTC charged that the flaws allowed a hacker to access consumer records, including credit card numbers. Like the FTC's prior information security cases, the settlement requires that Petco implement a comprehensive information security program for its website.
- **GLB Safeguards Cases.** In November 2004, the Commission announced its first cases enforcing the Gramm-Leach-Bliley Safeguards Rule, which requires financial institutions to have reasonable procedures to ensure the security of customer information. As part of a nationwide compliance sweep, the FTC charged two mortgage companies with violating the Rule. The FTC alleged that the brokers failed to implement required safeguards to protect customer names, Social Security numbers,

Box 2

### Promoting Information Security

The Commission works to protect the privacy and security of consumer information. Commissioner Orson Swindle continues to play an active role in promoting the importance of information security. Commissioner Swindle has emphasized the continuing need for consumer education, noting that good information security practices must become just another part of our daily lives. Commissioner Swindle also has urged corporate leaders to make good information security practices an essential part of their business operations – literally, a part of their corporate culture. Addressing the Subcommittee on Technology, Information Policy, Intergovernmental Relations, and the Census, of the House Committee on Government Reform, Commissioner Swindle stated that "the FTC is working to ensure that all companies entrusted with personal information take reasonable steps to secure that information and minimize the risk that it may be misused. The agency has been and will continue to be vigilant in promoting a culture of security." Earlier this year, the Cyber Security Industry Alliance presented Commissioner Swindle with the RSA Conference Award for Public Policy for his work on information security.

bank account numbers, and other sensitive financial information. The settlements bar future violations of the Rule and require independent audits of the companies' security programs.

- **Gateway Learning.** In September 2004, FTC announced its first case challenging deceptive and unfair practices in connection with a company's material changes to its privacy policy. The FTC alleged that Gateway rented consumers' personal information to marketers, contrary to explicit promises made in its privacy policy at the time it collected the data. According to the complaint, after collecting consumers' information, Gateway changed its privacy policy to allow sharing the information with third parties, but failed to notify customers or obtain their consent.

## 2. Rulemaking.

Congress directed the FTC to issue rules to implement a number of statutes critical to protecting the privacy of consumers. Pursuant to this Congressional directive, over the last 12 months, the agency promulgated new rules addressing issues like telemarketing, spam, consumer credit, and identity theft.

**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. It requires the FTC to engage in 18 rulemakings. Within the past year, the FTC issued 10 of these rules and proposed two others. One of the completed rulemaking efforts is the "Free Annual File Disclosures" Rule, which requires the three national credit bureaus to establish a central website, phone number, and mail address for consumers to order a free copy of their credit report once every 12 months. The national rollout of this free credit report system began on the West Coast on December 1, 2004, and will be completed by September 1, 2005.

**CAN-SPAM Act.** As mentioned above, the FTC issued two rules pursuant to the CAN-SPAM Act in FY 2004. The first required spammers to identify sexually explicit content in the subject line of email. The rule implements the objective of the CAN-SPAM Act to protect email recipients from unwitting exposure to unwanted sexual images in spam. The second rule established criteria to determine whether the email's primary purpose is commercial, and therefore, covered by the Act.

**Telemarketing Sales Rule.** Congress instructed the FTC to amend the Do Not Call Rule to require telemarketers to purge newly-registered numbers from their call lists monthly instead of quarterly. The Rule became effective on January 1, 2005. The FTC also sought comment on a proposal to modify the call abandonment provision of the Rule to allow telemarketers to use prerecorded messages when they call consumers with whom they have an established business relationship. The FTC's request for comments emphasized that consumers will be able to assert an entity-specific Do Not Call request to stop prerecorded message telemarketing, just as they can with telemarketing that uses live sales representatives.

## Chapter 3 – Policy Tools to Complement Law Enforcement

### A. Competition Policy

As a complement to its enforcement mission, the FTC also promotes competition principles through a wide variety of activities, such as research and reports, workshops, advocacy filings, and amicus briefs. Through these activities, the FTC educates itself about emerging issues and shares information with other policymakers, business leaders, and consumers, providing intellectual leadership on competition issues.

#### 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 include topics of perennial interest, such as energy and healthcare, as well as emerging issues, such as concerns about the promise and impact of new technologies and certain kinds of distribution policies.

**Petroleum Merger Report.** In August 2004, the staff of the FTC’s Bureau of Economics released a report, *The Petroleum Industry: Mergers, Structural Change, and Antitrust Enforcement*, which presented a detailed review of structural changes and the FTC’s antitrust law enforcement efforts in the petroleum industry over the past 20 years. Consistent with the purpose of enhancing public understanding and policy making concerning competition in this industry, the report also elaborated on the analytical process the Commission uses when reviewing petroleum-related mergers. The report concluded that thorough FTC oversight of the industry, including both investigations and enforcement actions, has helped preserve industry competition and prevented gasoline price increases beyond those already dictated by market conditions.

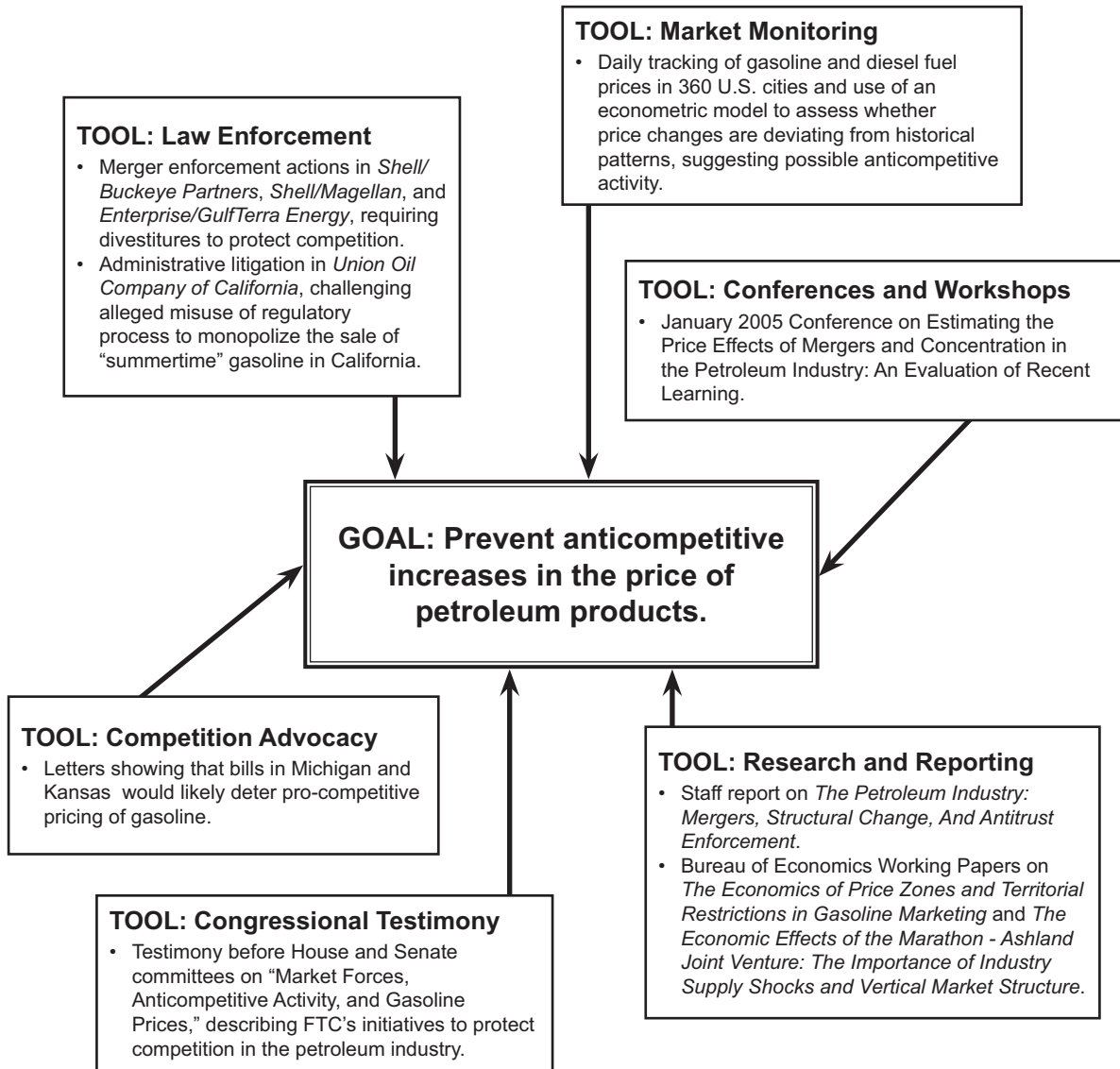
**Health Care Report.** In July 2004, the FTC and the DOJ released a joint report, *Improving Health Care: A Dose of Competition*, which distilled a wealth of information gained from 27 days of public hearings and other data collected over a two-year period. To promote policies that ensure access to quality health care and enhance informed consumer choice, the report provided significant observations and recommendations about the availability of information regarding the price and quality of health-care services; physician collective bargaining; insurance mandates; hospital merger analysis; managed care organizations’ bargaining power; and hospital group purchasing organizations.

**Contact Lens Competition.** The agency has been active in ensuring competition in the contact lens industry. Under the Fairness to Contact Lens Consumers Act, in July 2004, the FTC issued the Contact Lens Rule which requires, *inter alia*, that prescribers provide patients with a copy of their prescriptions after a fitting and verify those prescriptions to any third party designated by a patient. In February 2005, the FTC issued a report on competition in the contact lens industry that focused on the effects of manufacturer marketing strategies, such as private labeling and limited distribution, and found neither likely to raise competitive or consumer protection concerns. The report also studied the pricing of contact lenses through various non-traditional contact lens sellers, and found that wholesale clubs and online retailers typically offered the lowest prices for the lenses sampled. The report found that requirements that

Figure 10

## The FTC's Integrated Approach to Competition Policy

The FTC uses a variety of competition policy tools in a coordinated fashion to achieve its policy goals, such as removing impediments to competition in the petroleum industry.\*



\* The examples provided are from the period April 1, 2004 though March 31, 2005.

unnecessarily burden e-commerce, such as licensing requirements to dispense contact lenses and advertising restrictions, have the potential to cause consumers to pay higher prices for contact lenses without offsetting consumer protection benefits.

## 2. Hearings and Workshops.

Hearings and workshops represent one of the FTC's most powerful policy "research and development" tools. They allow the agency to bring together experts from the business,



government, legal, and academic communities to engage in an in-depth analysis of important, and often contentious, issues. Often, FTC hearings and workshops lead to significant advances in cutting edge knowledge of competition policy issues. In the past 12 months, the following hearings and workshops have been of particular interest.

**Price Effects of Mergers and Concentration in the Petroleum Industry.** To ensure that its work is most effective in maintaining competition and protecting consumers, the FTC periodically assesses its performance in fulfilling its significant responsibilities and welcomes constructive critiques. In this context, the Commission assembled a panel of five outside expert econometricians in January 2005 for a conference on the effects of mergers in the petroleum industry from an econometric perspective. The panelists addressed the question broadly as well as with specific reference to two recent reports – a March 2004 FTC Bureau of Economics case study of the effects of the Marathon-Ashland joint venture and a report released in May 2004 by the Government Accountability Office.

**Patent Reform.** In April 2004, the FTC co-sponsored a conference, “Ideas into Action: Implementing Reform of the Patent System,” with the National Academy of Sciences (NAS) and the Berkeley Center for Law and Technology to address patent reform and possible implementation. The event provided a forum for government officials, business representatives, scholars, lawyers, and others to evaluate and discuss recommendations from recent reports on patent reform released by the FTC and the NAS. In addition, the FTC recently co-sponsored, with the National Academies’ Board on Science, Technology and Policy, and the American Intellectual Property Law Association, several patent reform workshops, structured in a town meeting format. That format facilitated commentary from a wide range of participants, including small inventors, representatives of small and large businesses, and lawyers involved in patent prosecution and litigation. Among other issues, the workshops have highlighted the FTC patent reform recommendations for a post-grant opposition system and modification of the doctrine of willful infringement. The final workshop will take place in Washington, D.C., on June 9, 2005 and will address draft patent reform legislation.

### 3. *Advocacy.*

An important complement to the FTC’s efforts to forestall or eliminate private restrictions on competition are efforts to eliminate *public* impediments to competition that may reduce consumer welfare. 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 law enforcement: health care, energy, and others with a major impact on consumers’ wallets.

**Pharmacy Benefit Manager Comments.** Concerned with likely price increases in pharmaceutical markets, the FTC staff submitted comments on proposed California legislation that would have required pharmacy benefit managers (PBMs) to disclose certain information to health plans and consumers regarding their arrangements with pharmaceutical companies. The FTC pointed out that these provisions likely would reduce competition between pharmaceutical companies and thus decrease the incidence of cost-reducing drug substitutions. Governor Schwarzenegger vetoed the legislation and cited the FTC letter in his veto message as a basis for his decision.

**“Any Willing Provider” and “Freedom of Choice” Bills.** Also concerned about rising pharmaceutical costs and other harms to consumers, FTC staff responded to requests for comments on seven proposed bills in Rhode Island that contain so-called “freedom of choice” and “any willing provider” provisions for pharmaceutical sales. All seven bills require health plans to ensure “freedom of choice” for consumers to choose among all sources of pharmaceutical services and to include in their networks any pharmacy willing to accept the contractual terms offered to other pharmacies. Although the bills are designed to increase competition by letting consumers choose their pharmacy provider, staff concluded that the bills likely would increase the cost of pharmaceutical services as well as limit competition and undermine consumer choice.

**Below Cost Gasoline Sales Bills.** In 2004, FTC staff responded to requests from Michigan and Kansas legislators for comments on bills to ban below-cost gasoline sales. FTC staff concluded that, if enacted, the bills likely would restrict competition, deter pro-competitive price cutting, and lead to higher prices for the states’ consumers. Moreover, staff concluded that such bills are unnecessary because federal antitrust laws already cover below-cost pricing that has the potential to harm competition.

**Electricity.** The FTC filed two comments with the Federal Energy Regulatory Commission (FERC) in July 2004 about how to assess and safeguard against the exercise of market power and accompanying price hikes. The first comment recommended that FERC’s assessments of when to permit electric utilities to sell wholesale power at market rates be based on the principles and framework outlined in the DOJ/FTC Horizontal Merger Guidelines. FERC has not yet ruled on these issues. The second comment concerned FERC’s policies governing electric utility procurement. FERC cited this comment to support new policies to prevent rate regulation evasion and anticompetitive cross-subsidization that have the effect of raising consumer prices.

**Corporate Ownership of Funeral Homes.** In April 2004, FTC staff commented on a bill to permit corporate ownership of funeral homes in Maryland in response to a legislator’s request. Staff concluded that the bill would permit easier entry into the funeral home business, thereby increasing competition and potentially offering consumers lower prices and better quality for funeral home services.

**Professional Services.** The FTC has been active in advocating for maintaining and increasing competition between attorneys and lay providers for a variety of services in an effort to give consumers choices. The FTC and the DOJ submitted a comment urging the Massachusetts Bar Association not to adopt an overly broad definition of the practice of law, which staff argued was likely to eliminate many forms of lawyer-nonlawyer competition and lead to higher costs for consumers. The FTC and the DOJ also commented in support of a Massachusetts bill that would allow nonattorneys to provide many real estate settlement activities, which will likely reduce real estate settlement costs for 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 12 months, the FTC filed amicus briefs on issues concerning competition in the pharmaceutical industry, the proper application of antitrust

defenses, and maintaining and increasing competition between attorneys and lay providers to enhance consumer choice.

- ***Teva Pharmaceuticals USA v. Pfizer.*** The FTC’s brief in the Federal Circuit supported allowing generic drug firms to seek a declaratory judgment that a generic drug does not violate an existing patent. The FTC argued that disallowing such an action would enable brand-name drug manufacturers to use provisions of the Hatch Waxman Act to delay any generic applicant from entering the market, thus harming consumers by depriving them of access to lower priced generic alternatives.
- ***Andrx Pharmaceuticals, Inc. v. Kroger Company.*** With the DOJ, the FTC filed an amicus brief responding to a petition for a writ of certiorari in a matter in which an alleged pharmaceutical patent infringer agreed not to market its product while patent infringement litigation was pending. Although the Sixth Circuit’s finding of a *per se* antitrust violation arguably conflicts with an Eleventh Circuit precedent, the agencies concluded that the issue is insufficiently developed to warrant the Supreme Court’s attention at this time.
- ***Jackson Tennessee Hospital Co.*** The agency’s brief challenged the district court’s holding that certain conduct by a public hospital district was shielded from antitrust enforcement by the State Action Doctrine, arguing that the court erred in holding that a series of anticompetitive agreements were the foreseeable result of the hospital district’s broad statutory authority, comparable to that of private firms, to operate and manage health care facilities. As the brief explained, the State Action Doctrine only shields the conduct of subordinate state entities when they act pursuant to a state policy to displace competition with an alternative means of advancing the public interest.
- ***Cleveland Bar Association vs. Compmanagement, Inc.*** The FTC’s brief argued that the court should be guided by the public interest when considering whether lay practice in workers’ compensation matters before the Ohio Industrial Commission constitutes the unauthorized practice of law. The brief argued that prohibiting lay practice is likely to cause consumers of these services to have less choice and pay higher prices, without providing any additional protections. It also noted that lay representation had been permitted for 30 years and with no evidence that it harmed consumers. The court ultimately ruled that such lay representation was not the practice of law.
- ***McMahon v. Advance Title.*** The FTC and the DOJ filed an amicus brief in the West Virginia Supreme Court of Appeals, urging the court to reject a bar opinion that lay real estate settlement services are the unauthorized practice of law. The brief argued that there is no evidence of consumer harm from lay settlements and that such a ban would likely increase the price of both lay and attorney settlements for West Virginia consumers. The West Virginia court reversed the lower court’s decision to uphold the bar opinion on the ground that there was an insufficient factual record to determine that these services are the practice of law. The court stated that such a determination requires weighing considerations such as accountability, due care, and public safety.

## B. Consumer Protection Policy

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

### 1. Reports and Research.

In addition to using electronic databases and websites to track consumer fraud, the FTC conducts numerous studies of marketplace issues affecting consumers and publishes its findings in reports.

**National Do Not Email Registry Report to Congress.** The CAN-SPAM Act called for the FTC to report to Congress on a plan and timetable for establishing a National Do Not Email Registry, modeled on the Do Not Call Registry. The FTC issued the *Do Not Email Registry Report* on June 14, 2004, explaining that after significant fact finding such a program likely would fail to reduce spam and might instead have the opposite effect. Rather than a National Do Not Email Registry, the report advocated for the private development of a robust email authentication system to prevent spammers from hiding their tracks and thereby evading Internet service providers' anti-spam filters and law enforcement. To explore the issues surrounding email authentication and to facilitate the development of such a rule, the FTC held an Email Authentication Summit last fall.

**A CAN-SPAM Informant Reward System Report to Congress.** The CAN-SPAM Act also required the FTC to issue a report assessing whether, and how, a system to reward members of the public for tracking down spammers could help improve enforcement of the CAN-SPAM Act. Relying on the FTC's law enforcement experience, the September 2004 report identified three anti-spam enforcement hurdles: (1) identifying and locating the spammer; (2) developing sufficient evidence to prove the spammer is legally responsible for sending the spam; and (3) obtaining a monetary award. The report examined how to overcome these hurdles and analyzed the issues the FTC believed Congress should consider in determining whether to go forward with a reward system, and if so, the features such a system might include.

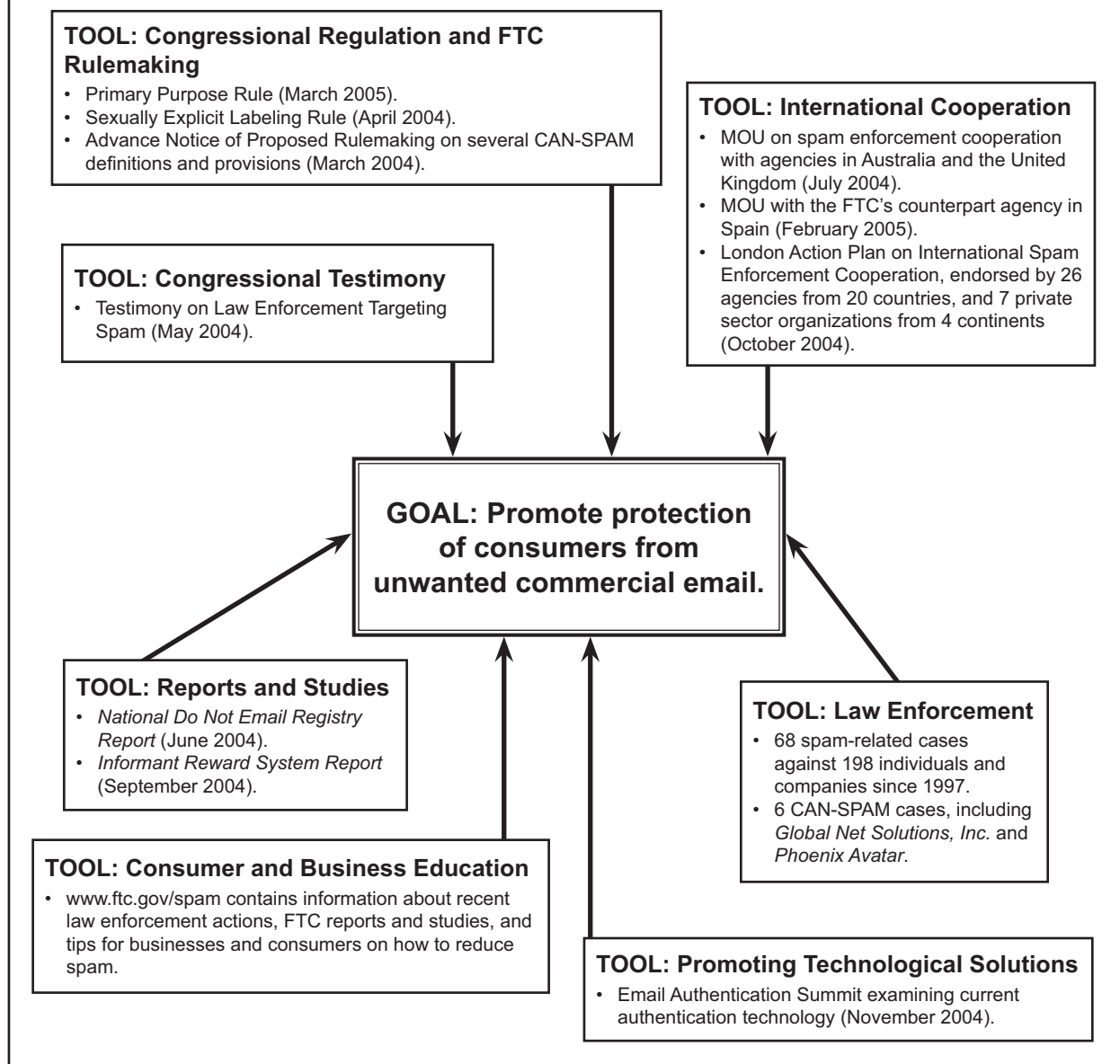
**FACT Act Studies.** The FACT Act requires the FTC to conduct eight studies. The agency completed five of these studies in 2004 and reported on, respectively, (1) the accuracy of information contained in credit reports; (2) data matching tools used by credit bureaus to insert information into consumers' credit files and provide credit reports to businesses; (3) the costs and benefits of notifying consumers when negative information is added to their credit files; (4) the effects of providing consumers with the same credit report used by a creditor following an adverse credit decision; and (5) common financial transactions that are not included in consumers' credit files but that might bear on creditworthiness. The completed studies examined the various methods used by the national credit bureaus to build and maintain their complex databases of consumer information, and the costs and benefits of a variety of proposals to improve the quality of the data in those databases. The studies ultimately concluded that legislative or administrative changes to the credit reporting laws would be premature, given that



Figure 11

## The FTC's Integrated Approach to Consumer Protection Policy

The FTC uses a variety of tools to achieve its policy goals, such as promoting protection for consumers from unwanted commercial email.



we are just beginning to develop experience with the provisions of the FACT Act that address these issues.

## 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.

**Evaluating the Impact of New Technology on Consumers.** The FTC continues to invest significant resources to explore the impact of new technology on consumers, hosting workshops on spyware (April 2004), radio frequency identification technology (June 2004), email authentication (November 2004), and peer-to-peer file sharing software (December 2004). Each of these workshops addressed current applications as well as emerging technologies. The workshops provided the opportunities to discuss the benefits and risks posed by new technologies and to examine various self-regulatory and technological efforts to address consumer concerns.

**Class Action Workshop.** In September 2004, the FTC and the Georgetown Journal of Legal Ethics cosponsored a workshop on “Protecting Consumer Interests in Class Actions.” The seven panels debated policy issues related to consumer class actions – all with an eye to determining how class actions can be improved to protect the interests of consumers and ensure value to class members. The workshop addressed a wide variety of issues, including the use of coupon compensation and other non-pecuniary forms of redress, the role of third-party objectors and amicus filers, drafting plain language notices and ensuring they reach class members, compensating class counsel, special ethics concerns in class action litigation, the current state of empirical analysis of key class action issues and proposals for future research, and the use of class actions as an alternative to regulation.

### 3. Advocacy.

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.

**Nutrient Health Claims.** In July 2004, the FTC filed a comment on the FDA’s proposed rules concerning certain nutrient content and health claims in food labeling. It encouraged the FDA to consider alternatives to potentially overly restrictive requirements for making health claims on food labels. It also supported revising the FDA’s regulations to allow food marketers to provide a broader universe of accurate health-related information to assist consumers in

Box 3

#### Privacy and P2P Technology

In December 2004, Commissioner Pamela Jones Harbour presented opening remarks on the second day of the FTC’s workshop on peer-to-peer file-sharing technology. P2P technology enables individuals to share files stored on their local hard drives (including music, video, or software), which allows for faster file transfer and conservation of bandwidth, but may raise security, privacy, and copyright concerns. In her remarks, Commissioner Harbour stated, “As part of our consumer protection mission, the FTC must remain vigilant in protecting consumers against unfair trade practices, deception, and anticompetitive conduct. But in order to remain true to our competition mission, we also must take care not to pursue, create, or condone policies that inadvertently impede the evolution and adoption of useful new technologies, to the long-run detriment of consumers and businesses. Our goal in sponsoring this workshop is to bring together the individuals and groups who develop and use P2P technology – as well as those whose existing business models are affected by it – to ensure that policy-makers and the public are as well-informed as possible.”

selecting more healthful food and to promote competition among manufacturers to develop and market healthier food products.

**Disclosure of Trans Fat.** In April 2004, staff filed a comment supporting the FDA's proposal to provide on food labels information about trans fats, which recent studies showed increase cholesterol levels much like saturated fats. The comment favored the development of a Daily Value for trans fat to help consumers understand the significance of these fats in their diets and to permit the FDA eventually to allow trans fat nutrient content claims and health claims.

**Direct to Consumers Drug and Devices Advertisements.** In May 2004, FTC staff provided comments to the FDA on proposed new options for prescription drug and device advertising. The comments observed that the FDA's proposals represent substantial progress toward the goal of finding the appropriate means to convey relevant risk information to consumers in a manner that they can understand.

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

The FTC also seeks to advance consumer interests by filing amicus briefs in private litigation. The FTC champions the interests of consumers by providing the courts with the benefit of its experience in implementing consumer protection statutes and in affording redress to injured consumers. For example, the Commission filed briefs in *Spano v. Safeco Insurance Co.* and *Ashby v. Farmers Group, Inc.*, two cases posing the question of whether the offering of insurance at less favorable rates on the basis of information obtained in a consumer report constitutes "adverse action" triggering consumer rights under the Fair Credit Reporting Act (FCRA).

The Commission addressed another FCRA issue in *Cole v. U.S. Capital, Inc.*, involving the circumstances under which consumer report information can be provided for marketing purposes. Also, in conjunction with several other federal agencies, the Commission filed an amicus brief in *American Bankers Ass'n v. Lockyer*, addressing the preemptive effect of the FCRA on state laws.

Drawing on its own experience with the fashioning of effective consumer redress programs, the Commission also intervened in a class action case to ensure that any settlement would afford fair and effective remedies to consumers harmed by unlawful practices. In *Cass v. AmeriDebt, Inc.*, a case involving defendants in an FTC action challenging the allegedly deceptive marketing of financial and debt management services, the FTC intervened to ask the Court to reconsider its preliminary approval of a class action settlement and to stay the sending of notices to the class regarding the settlement. The brief argued that the settlement was inadequate for a number of reasons, including the size of the recovery and the failure of the notice to disclose adequately the material terms of the settlement.

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

Information empowers consumers to recognize, avoid, and report fraudulent or deceptive practices in the marketplace. As a result, the FTC mounts education campaigns in conjunction with its consumer protection law enforcement and policy initiatives. Since April 2004, the FTC has produced more than 49 new publications, 33 revised publications, designed 10 micro-sites on [ftc.gov](http://ftc.gov), distributed more than 5 million publications, and logged almost 20 million accesses to its websites.

**Hispanic Outreach.** One of the hallmarks of last year's information efforts was the FTC's Spanish-language fraud awareness campaign, *¡Ojo! Mantente alerta contra el fraude: Infórmate con la FTC*. The campaign includes radio public service announcements (sent to nearly 220 radio stations), a website ([www.ftc.gov/ojo](http://www.ftc.gov/ojo)), and outreach to more than 200 community-based organizations in cities with large or growing Hispanic populations. The FTC continued to increase outreach to Spanish-language media on dozens of consumer protection topics, including identity theft, telemarketing fraud, bogus weight-loss and health care claims, and work-at-home scams. Since April 2004, the FTC has distributed nearly 200,000 publications in Spanish; and the agency's website has logged almost 500,000 accesses to its Spanish language publications.

**Consumer Education Publications.** As new scams arise or take different twists, and as newly enacted laws offer consumers additional protections, the FTC produces and disseminates "news consumers can use" in a variety of formats, including brochures, columns, postcards, radio public service announcements, and posters. Since April 2004, the FTC has produced new publications on subjects as varied as phishing, telemarketing, mortgage servicing, gas-saving gadgets, marketing violent entertainment to children, the National Do Not Call Registry, shopping online, advance-fee loans, and spyware. The agency posts education pieces to its website, distributes them through the media, and also disseminates them through intermediaries, conferences, and conventions.

**Outreach to Business.** Along with empowering consumers with information about their rights under the various consumer protection statutes, the FTC works with industry associations and professional organizations to boost compliance with – and raise awareness of – trade rules and regulations. Where appropriate, the agency encourages self-regulation. To persuade the media to be more vigilant in scrutinizing the advertisements for weight-loss products, the FTC disseminated *Red Flags: A Guide to Bogus Weight-Loss Claims*. The booklet and website illustrate seven claims for weight-loss products that are facially false, and should never be accepted for airing or publication. In addition, the FTC continued its focus on business education by sponsoring the seventh *Green Lights and Red Flags: FTC Rules of the Road for Advertisers*, a seminar for attorneys and advertisers. This one-day workshop offered a practical overview on complying with federal consumer protection laws, attracted 135 attendees, and covered advertising substantiation, special issues for online marketers, consumer privacy and information security, and telemarketing. These and other business education materials are also available to businesses on the FTC's website and accessible through the Small Business Administration.

**Teaser Websites.** With a nod to the ubiquity of the Web, the FTC continued its use of "teaser" websites to spread consumer protection messages in efficient and creative ways. For example, the "FatFoe" teaser site ([www.wemarket4u.net/fatfoe](http://www.wemarket4u.net/fatfoe)) hawks the "benefits" of eggplant extract for weight-loss, mimicking sites that make facially false claims for weight-loss products. Consumers who clicked for more information about the "miracle pill" are redirected to an FTC page with tips on how to spot bogus claims for diet products. This fake product site was widely promoted through the media, and generated consumer interest through web logs (blogs). As part of the Project Biz Opp Flop sweep, in February 2005, the FTC launched another teaser website that looks like a pitch for a "can't miss" business opportunity for "Sundae Station," an ice-cream sundae vending machine. Once consumers click on any of the links, they learn the ad is



really an education piece about business opportunity scams.

**Financial Literacy.**

The passage of the FACT Act spurred an extensive revision of FTC publications related to credit, free credit reports, and identity theft. As a

member of the inter-agency Financial Literacy and Education Commission created under the FACT Act, the FTC also promotes federal resources on financial literacy for all segments of the population through a new website ([www.mymoney.gov](http://www.mymoney.gov)) and a toll-free telephone number.

**National Consumer Protection Week.** The FTC coordinated the seventh annual National Consumer Protection Week (NCPW) campaign, partnering with local, state, and federal agencies, as well as national consumer advocacy groups, to highlight consumer protection and education efforts around the country. This year, NCPW focused on identity theft and the steps consumers should take to minimize the risk of identity theft. As part of these efforts, the FTC built a website, [www.consumer.gov/ncpw](http://www.consumer.gov/ncpw), created campaign materials, and organized an exhibit at Union Station in Washington, D.C.



## 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 U.S. The FTC also actively assists new democracies in their transition to market-based economies in developing competition and consumer protection agencies.

### A. Competition

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

The FTC continues to strengthen relationships with competition agencies around the world. These relationships have become a key component of an effective enforcement program, and facilitate the agency's efforts to promote convergence toward sound consumer welfare-based competition enforcement and policy. The FTC continues to work closely with the European Union, Canada, and many other jurisdictions on cases of mutual interest, including the following matters during the past year:

- **Sanofi/Aventis:** Sanofi-Synthélabo's 2004 acquisition of Aventis, S.A. raised competitive issues in several pharmaceutical markets including the markets for cytotoxic drugs for the treatment of colorectal cancer. Close consultation and cooperation between the FTC and the European Commission (EC) staff were necessary to achieve non-conflicting remedies in the separate European and U.S. markets. Because this was a tender offer subject to France's takeover code, the FTC also consulted with France's financial regulator, the *Autorité des Marchés Financiers*.
- **GE/InVision:** The FTC worked closely with Germany's *Bundeskartellamt* and the parties in developing an effective divestiture remedy to preserve competition in the

Box 4

#### Rendering International Assistance

The Federal Trade Commission continues to work with foreign nations that seek to benefit from the FTC's years of experience with the sound application of competition law to enhance consumer welfare. This is a particular challenge for those nations making the transition from pervasive government control to a free market economy. During the past year, Commissioner Thomas B. Leary traveled to both China and to Russia to meet with government officials responsible for the development of competition policy in these important nations. He has stressed that these countries have the opportunity to learn from both the successes and the mistakes that the United States has made during the relatively long evolution of its own competition law, and that the objective should be to seek consensus on the basic principles that competition law seeks to protect before focusing on the subtleties of specific legislative language that will implement the principles.

specialized market for X-ray nondestructive testing in conformance with the laws of Germany, where most of the remedial obligations were to be implemented.

- **Sony/BMG:** The FTC worked with the EC in their investigations of several issues raised by this proposed merger of the parties’ music businesses. Both agencies ultimately closed their investigations without taking enforcement actions, acknowledging in their press releases their close communication during the investigations.

The FTC’s bilateral relationships are important vehicles to minimize divergences in competition policy and enforcement. Foreign agencies often seek the input of the U.S. agencies in the development of new policy initiatives. During the past year, the FTC consulted with the EC regarding several aspects of merger policy, including its review of remedies, with the United Kingdom regarding the Competition Commission’s divestiture guidance, with the Canadian Competition Bureau on the treatment of merger efficiencies, and with the Japan Fair Trade Commission on the revision of its merger guidelines. The U.S. agencies also have benefitted from the input from our foreign counterparts on policy reviews in the U.S.

**2. Multilateral Competition Cooperation.**

Multilateral competition fora provide important opportunities for agencies to enhance mutual understanding and promote cooperation and convergence. The FTC participates actively in, among others, the ICN, the OECD, APEC, and UNCTAD.

**ICN.** The ICN, which now includes 86 member competition agencies from 77 jurisdictions, provides an important venue for antitrust officials worldwide to achieve procedural and substantive convergence on best practices in antitrust enforcement and policy. In April 2004, the ICN hosted its third annual conference. Based on recommendations of the subgroup the FTC chairs, the ICN adopted four new Recommended Practices on Merger Notification Procedures, which complement the seven Recommended Practices and eight Guiding Principles for Merger Notification and Review adopted the previous year. The ICN will consider new practices dealing with merger remedies and agency enforcement powers at this year’s annual conference. In addition, the Merger Working Group held a successful conference on merger investigation techniques, and is engaged in projects on merger remedies and merger guidelines. The FTC also



Figure 12

participates actively in the ICN's other working groups, including those on Competition Policy Implementation, which works to help new agencies strengthen their institutional capacity and performance, Antitrust Enforcement in Regulated Sectors, which deals with the practical and procedural aspects of the relationship between antitrust enforcers and regulators, and Cartels, which addresses the challenges of anti-cartel enforcement.

**OECD.** The OECD Competition Committee is an important forum for competition officials from developed countries to share experiences and promote best practices. During the past year, the FTC has participated actively in the OECD's continuing work on, *inter alia*, merger process convergence, regulatory reform, and the interface between trade and competition policy. The FTC has helped lead OECD initiatives exploring synergies between competition and consumer protection policy through joint roundtables, and the FTC participates in the Global Forum on Competition in which competition issues are discussed with approximately forty OECD non-members from developing countries.

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

Trade agreements increasingly involve competition issues. The FTC participates in U.S. delegations that negotiate competition chapters of Free Trade Agreements, including the agreement with Australia and the ongoing negotiations with the Andean Community and Thailand. The agency has been working with other U.S. agencies and the other nations of the hemisphere, to develop competition provisions for a Free Trade Agreement of the Americas. The FTC has co-chaired the U.S. delegation to the World Trade Organization (WTO) Working Group on the Interaction Between Trade and Competition Policy, and is involved in WTO initiatives involving competition issues.

## **B. Consumer Protection**

Globalization is one of the central consumer protection developments of the 21<sup>st</sup> century, commanding the attention of businesses, consumers, law enforcers, and policymakers around the world. The FTC is leading the development of an international market-based consumer protection model that focuses on protecting consumers from significant harm, and maximizing economic benefit and consumer choice. The FTC is working toward these goals by building an international network of cooperation to combat cross-border fraud and promoting market-oriented consumer protection and privacy policies.

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

With advances in technology, scammers can victimize thousands of consumers across the globe in a short time and disappear nearly without a trace – along with their ill-gotten gains. The FTC continues to receive more complaints involving international transactions and undertakes more law enforcement investigations with international components. In the past few years, the Commission launched a comprehensive program to combat cross-border fraud.

**Legislative Proposals.** The FTC testified in support of passage of the International Consumer Protection Act to improve its ability to combat cross-border fraud. This legislation would allow the FTC to share key information with foreign partners enabling them to pursue fraudulent enterprises in their countries that target U.S. consumers. The proposed legislation

would help the FTC fight deceptive spam and spyware by allowing the agency to investigate more fully email and other communications originating from outside the United States.

**Cross-Border Fraud Cooperation.** In January 2005, the FTC entered into a new consumer protection enforcement memorandum of understanding (MOU) with its counterpart agency in Mexico – the first consumer protection MOU with a non-English speaking country. The FTC also continues to work closely with Canadian agencies on cross-border telemarketing issues. Through its partnerships with Canadian agencies, the FTC filed several law enforcement actions against Canadian telemarketers targeting U.S. consumers.

**International Cooperation on Spam.** The FTC co-hosted a meeting in London of international agencies responsible for spam enforcement. The “London Action Plan on International Spam Enforcement Cooperation,” announced at the meeting, was endorsed by 26 agencies from 20 countries and seven private sector organizations from four continents. Pursuant to the Action Plan, participants will share information, investigative techniques, and enforcement strategies. The FTC also announced a trilateral MOU on spam enforcement cooperation in July 2004 with agencies in Australia and the United Kingdom, and an MOU with the Spanish data protection agency in February 2005.



## 2. Promoting Market-Oriented Policies.

Given the growth of the global marketplace, greater consistency among consumer protection rules will reduce compliance burdens for businesses selling internationally and, in turn, promote consumer choice. Because clearer, more consistent rules will increase competition, consumers should benefit from lower prices. The development of international market-driven consumer protection policies is, therefore, a priority for the FTC.

**Asia-Pacific Economic Cooperation (APEC) Privacy Framework.** FTC staff participated in the development of a privacy framework endorsed by Ministers attending a summit of the APEC forum. The APEC Privacy Framework promotes a consistent approach to information privacy protection across APEC member economies, while avoiding the creation of unnecessary barriers to information flows.

**Integration of Competition and Consumer Protection Policies.** FTC staff led several international initiatives promoting the integration of competition and consumer protection policies. One of the goals of these initiatives was to encourage consumer protection agencies worldwide to avoid overly-regulatory approaches that could deter competition and increase costs for consumers. In October 2004, FTC Chairman Majoras led an academic roundtable to discuss these linkages that was attended by the heads of both competition and consumer protection agencies. FTC staff also participated in a joint meeting of the OECD Competition and Consumer Policy Committees, and is now participating in an OECD Consumer Policy Committee working group on this subject.



## **C. International Technical Assistance**

The FTC provides technical assistance to countries in the developing world, both in competition and consumer protection, using funds provided by the U. S. Agency for International Development and the U. S. Trade and Development Agency. In 2004, the FTC conducted 25 missions to 16 countries, employing 33 different FTC employees. The program promotes U.S. interests by encouraging economic growth and development through trade capacity building and commercial law reform. The FTC program is currently active in the Andean Community, Central America, Mexico, South Africa, India, and the Association of South East Asian Nations (ASEAN). Last year, the FTC concluded successful programs in Southeast Europe and Indonesia.

In alliance with the DOJ Antitrust Division, experienced antitrust lawyers and economists engage primarily in short-term training missions to develop investigational skills. Resident advisors are also stationed in Pretoria, South Africa and with the Secretary General of the ASEAN in Jakarta, Indonesia. Experienced FTC consumer protection lawyers and economists are a growing presence internationally, through short term missions with a special focus on e-commerce. These missions stress that consumer welfare and freedom of choice is advanced by competitive marketing that conveys accurate rather than fraudulent or deceptive information.

## Conclusion

### Continuity in a Time of Transition: Looking Ahead to the Future

The past twelve months at the FTC have been marked by a unique opportunity to reflect on and celebrate the agency's achievements throughout the past 90 years. In 1914, the year the agency was created, the United States manufactured almost twice as many horse-drawn vehicles as cars; less than a quarter of all U.S. households had electricity; and only 1 in 10 Americans had a telephone. The first transcontinental phone call was still a year away and, when it was made, it cost \$20.70 for three minutes, nearly \$371 in today's currency. The issues the Commission faces today would have been the stuff of science fiction when the FTC was created, if they could have been imagined at all.

Throughout the many changes in our economy, the FTC's greatest achievements have emerged far less from efforts marked by sharp, recurring discontinuities in philosophy than by the cumulative, progressive search for better policies and practices. Continuity in philosophy about the proper role of the FTC in protecting markets and consumers, even through times of transition, has been a hallmark of recent agency history. The agency has experienced significant personnel transition in the previous year, with the departures of former Chairman Timothy J. Muris and Commissioner Mozelle Thompson, as well as some senior agency staff members, and the arrival of Chairman Deborah Platt Majoras and Commissioner Jon Leibowitz and some new key staff members. This natural transition enhances the FTC's process of deliberate institutional self-assessment, renewal, and development to permit it to meet the challenges that it is sure to face.

The next twelve months will find an agency continuing its investment in activities that strengthen the institution over the long term, which will, in turn, enhance the FTC's special charter – to stand up for both consumers and competition.

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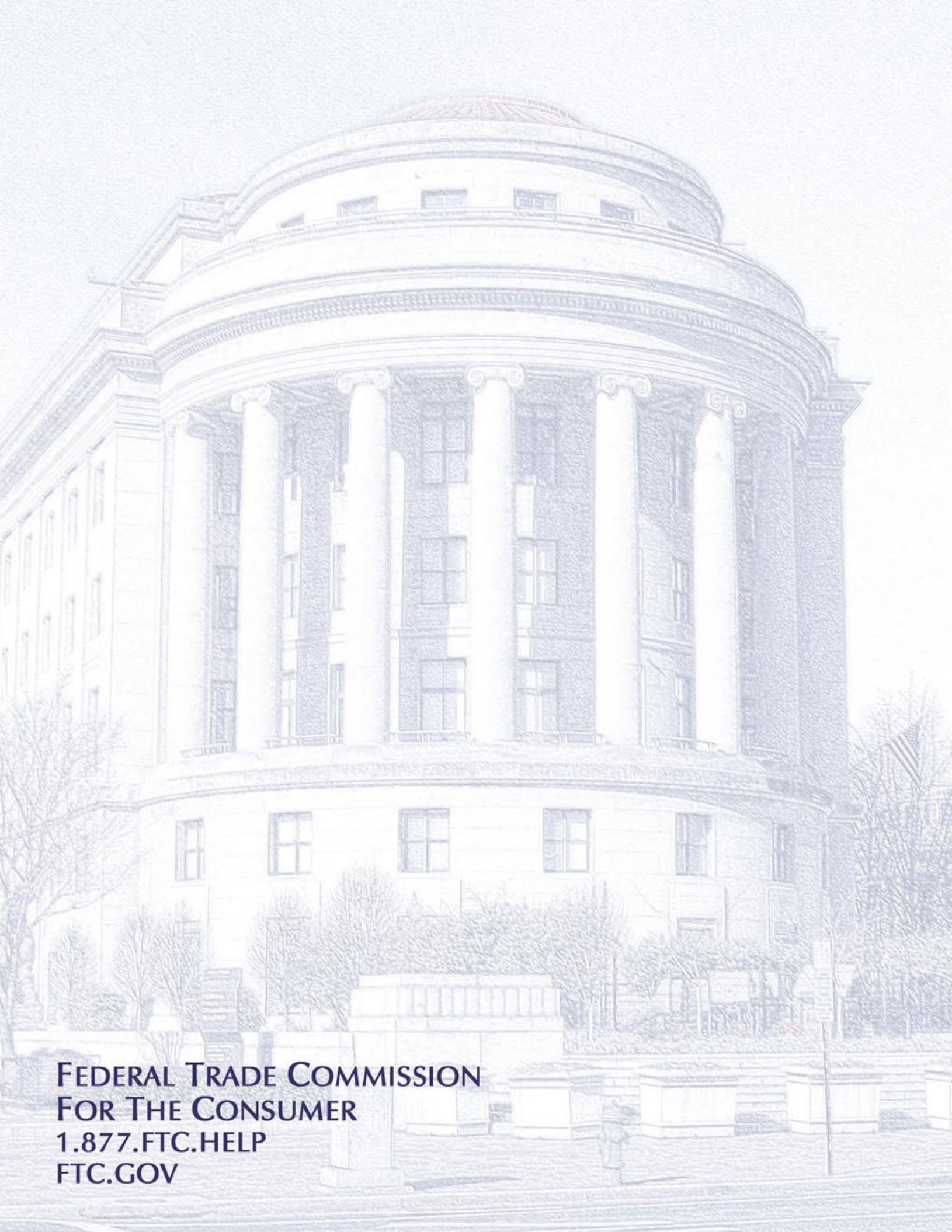
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October 2004

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Louis D. Brandeis Award	Heather Hipsley
Janet D. Steiger Outstanding Team Award	Three Tenors Team Health Care, Hearing & Report Team Rulemaking Team
Leon Higginbotham, Jr. Award	BCP Diversity Council
Otis B. Johnson Award	Hiram Andrews Carole Danielson Arlene Palmer Ann Stahl
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