

**FEDERAL TRADE COMMISSION**

**PERFORMANCE REPORT**

**FISCAL YEAR 2003**

**UNDER THE  
GOVERNMENT PERFORMANCE AND RESULTS  
ACT**

**MARCH 2004**

# Summary

---

---

The Federal Trade Commission (FTC) is a small, consumer-centered, results-oriented agency with a large mission. It affects the lives of consumers every day through, for example, the receipt of fewer telemarketing calls, lower prescription drug prices due to the availability of generic drugs, care labels in clothing, energy labels on appliances, health warnings on cigarette packages, or competitive prices for goods as a result of a blocked merger. The FTC is the only federal agency with broad jurisdiction to enhance consumer welfare in most sectors of the economy.

## Mission

At the start of the 21st century, global markets, high-technology innovation, and markets in transition to new ways of competing dominate the economic landscape. The FTC continues to adapt its mission strategies and workforce in response to these marketplace forces.

Consumer protection and antitrust law enforcement have played an important role in maintaining the competitiveness of U.S. markets. The FTC ensures that free markets work – that competition among producers and accurate information in the hands of consumers create the incentives to generate the best products at the lowest prices, spur efficiency and innovation, strengthen the economy, and produce benefits for consumers.

For competition to thrive, consumers must receive accurate information about products and services. Through its consumer

protection mandate, the FTC protects consumers from fraud, deception, and unfair practices in the marketplace. It works to foster the exchange of accurate, non-deceptive information, allowing consumers to make informed choices in their purchasing decisions and to participate with confidence in the traditional and electronic marketplaces. The FTC addresses current issues of importance to consumers, including identity theft, consumer privacy, telemarketing fraud, Internet fraud, health care, and consumer credit.

At the same time, for consumers to have a choice of products and services at competitive prices and quality, the marketplace must be free from unreasonable restrictions on competition. Through its maintaining competition mandate, the agency enforces the laws that prohibit anti-competitive mergers and business practices. It promotes free and open competitive markets, which bring consumers lower prices, innovation, and choice among products and services. A significant portion of the FTC's resources are devoted to market segments that matter most to consumers, including energy, health care, prescription drugs, grocery retailing, and high tech. It works to remove restrictions on competition so that markets can function at their best.

Five principles guide the development of the FTC's strategies for consumer protection and competition activities:

- Stop conduct that most threatens consumer welfare, such as anti-

competitive horizontal agreements between competitors and fraudulent and deceptive practices;

- Employ a systematic approach for identifying and addressing serious misconduct, with special attention to harmful behavior in key economic sectors;
- Apply all elements of the agency's distinctive portfolio of policy instruments to address consumer protection and competition issues – e.g., investigations, litigation, rule promulgation, research, studies, workshops, advocacy, and education;
- Improve the institutions and processes by which consumer protection and competition policies are formulated and applied; and
- Promote competition and the unfettered exchange of accurate, non-deceptive information through strong law enforcement and focused advocacy.

The two complementary parts of its mission make the FTC the only federal consumer protection agency with jurisdiction over a wide spectrum of consumer issues. In addition to enforcement authority, the FTC has unique jurisdiction to gather, analyze, and make public certain information concerning the nature of competition as it affects U.S. commerce. It also contributes to the policy deliberations of the Congress, the Executive Branch, other independent agencies, and state and local governments.

The FTC's legislative mandate to serve as a locus of professional expertise on competition and consumer protection issues

makes the FTC highly distinctive among antitrust and consumer protection agencies worldwide. To position itself to make intelligent contributions to consumer protection and competition policy through litigation or non-litigation instruments, the FTC must make substantial investments in what might be called "policy research and development." Its capacity to enforce the antitrust and consumer protection laws, and its credibility as a voice for sound public policy, requires a continuing commitment to conduct research that increases its understanding of how markets and firms operate, the conditions under which business conduct is likely to harm consumers, and the effects of its previous enforcement efforts.

## About the FTC

The FTC is an independent agency that reports to Congress on its actions. The agency is headed by five Commissioners, who are nominated by the President and confirmed by the Senate, and who serve staggered seven-year terms. The President chooses one Commissioner to act as Chairman. No more than three Commissioners can be of the same political party. At the end of Fiscal Year (FY) 2003, the Chairman was Timothy J. Muris, and the Commissioners were Mozelle W. Thompson, Orson Swindle, Thomas B. Leary, and Pamela Jones Harbour.

The FTC has two major law enforcement bureaus, Consumer Protection and Competition, supported by the Bureau of Economics and regional and mission support offices. It enforces laws that prohibit business practices that are anticompetitive, deceptive, or unfair to consumers. It also promotes informed consumer choice and

public understanding of the competitive process. The work of the FTC is critical in protecting and strengthening free and open markets in the United States and, increasingly, the world.

The Bureau of Consumer Protection's mandate is to protect consumers against unfair, deceptive, or fraudulent practices. The Bureau enforces a number of consumer protection laws enacted by Congress, as well as trade regulation rules issued by the Commission. Its actions include individual company investigations, law enforcement sweeps coordinated with other law enforcement agencies, administrative and federal court litigation, and consumer and business education. The Bureau also contributes to the FTC's ongoing efforts to inform Congress and other government entities of the impact that proposed legislation could have on consumers.

The Bureau of Competition is the FTC's antitrust arm. It acts to prevent business practices that restrain competition, such as illegal monopolization or anticompetitive mergers. It thereby ensures that the marketplace continues to provide a full range of product and service options for consumers, which in turn helps to ensure that consumers have the benefit of low prices and good product variety. The Bureau's actions include individual company investigations, administrative and federal court litigation, and consumer and business education. The Bureau also serves as a research and policy resource on competition issues. It prepares reports and testimony for Congress, and may present comments on specific competition issues pending before other agencies. The antitrust laws are enforced by both the FTC's Bureau of Competition and the

Antitrust Division of the Department of Justice. To prevent duplication of effort, the two agencies consult before opening any case.

The Bureau of Economics helps ensure that the FTC considers the economic impact of its actions. To achieve this, the Bureau provides economic analysis and support to antitrust and consumer protection casework and rulemaking. It also analyzes the impact of economic government regulation on competition and consumers and provides Congress, the Executive Branch, and the public with economic analyses of market processes as they relate to antitrust, consumer protection, and regulation.

The Regions comprise the Northeast, Southeast, East-Central, Midwest, Northwest, Southwest, and Western regions, served by offices in New York, Atlanta, Cleveland, Chicago, Seattle, Dallas, and Los Angeles and San Francisco, respectively (see <http://www.ftc.gov/ro/romap2.htm>). Their program activities are coordinated through the Bureau of Consumer Protection, and to a lesser extent, the Bureau of Competition. These offices conduct investigations and litigation, recommend new cases, provide advice to state and local officials on the competitive implications of proposed actions, provide local outreach services to consumers and business persons, and coordinate activities with local, state, and regional authorities. The regional offices frequently sponsor conferences for small businesses, local authorities, and consumer groups.

The FTC's Web site, <http://www.ftc.gov>, provides comprehensive information on its activities and access to public legal documents, press releases, educational materi-

als, a consumer complaint form, and the National Do Not Call Registry. The agency maintains two toll-free telephone numbers to report consumer complaints (1-877-FTC-HELP) and identity theft complaints (1-877-ID-THEFT).

## Strategic Goals and Objectives

The FTC's Strategic Plan sets forth the agency's Vision and Mission for its two goals. These goals, and their corresponding objectives, are the framework of the activities the agency pursues during the course of each fiscal year. Performance measures help the agency assess the impact of these annual activities.

FTC's Strategic Plan			
<b>Vision</b>	A U.S. economy characterized by vigorous competition among producers and consumer access to accurate information, yielding high-quality products at low prices and encouraging efficiency, innovation, and consumer choice.		
<b>MISSION</b>	To prevent business practices that are anticompetitive or deceptive or unfair to consumers; to enhance informed consumer choice and public understanding of the competitive process; and to accomplish these missions without unduly burdening legitimate business activity.		
<b>GOAL 1</b>	Prevent fraud, deception, and unfair business practices in the marketplace.	<b>GOAL 2</b>	Prevent anticompetitive mergers and other anticompetitive business practices in the marketplace.
<b>OBJECTIVE 1.1</b>	Identify fraud, deception, and unfair practices that cause the greatest consumer injury.	<b>OBJECTIVE 2.1</b>	Identify anticompetitive mergers and practices that cause the greatest consumer injury.
<b>OBJECTIVE 1.2</b>	Stop fraud, deception, and unfair practices through law enforcement.	<b>OBJECTIVE 2.2</b>	Stop anticompetitive mergers and practices through law enforcement.
<b>OBJECTIVE 1.3</b>	Prevent consumer injury through education.	<b>OBJECTIVE 2.3</b>	Prevent consumer injury through education.

## Highlights of FY 2003 Accomplishments

The FTC is a small agency but one that has a major impact on consumers and the marketplace. Its accomplishments demonstrate a significant return-on-investment for consumers and businesses alike. Noteworthy accomplishments of the past fiscal year include:

- **Do Not Call – Stopping Unwanted Telemarketing Calls.** At a Rose Garden ceremony in June 2003, the President announced the opening of the FTC's National Do Not Call Registry. Through this registry, subsequently adopted by the Federal Communications Commission, consumers can elect not to receive most telephone solicitations from telemarketers. Telemarketers are required to scrub their calling lists to remove any telephone numbers included in the registry. Registration is free to consumers; the registry will be paid for by fees collected from telemarketers that use the registry. Through December 2003, the registry logged more than 55 million telephone numbers. In the months and years ahead, the FTC will monitor compliance by telemarketers and bring any needed enforcement actions.
- **Redress Orders – Money Ordered to be Returned to Consumers.** The FTC continued to attack fraud and deception in FY 2003. The FTC filed 87 complaints in federal district court, obtained 98 federal court judgments ordering \$873 million in consumer redress, and obtained 19 orders assessing \$2.8 million in civil penalties. The total

redress ordered greatly exceeds the aggregate consumer redress ordered in FTC cases in FY 2002 (\$155 million) and FY 2001 (\$252 million) combined.

- **Pharmaceuticals – Protecting the Availability of Lower-Cost Prescription Drugs.** The FTC has engaged in a host of activities to ensure the prompt availability of lower-cost prescription drugs to consumers. For example, the FTC obtained settlements to prevent anticompetitive effects of three major pharmaceutical industry mergers, including the \$60 billion combination of Pfizer Inc., the largest pharmaceutical company in the world, and Pharmacia Corporation, in which the FTC's action protected competition in nine separate and wide-ranging product markets. The FTC also has brought law enforcement actions to prevent conduct by branded drug manufacturers to delay or obstruct the entry of lower-cost generic drugs on the market, notably including a landmark consent agreement with Bristol-Myers Squibb to resolve charges that the company abused regulatory procedures to interfere with entry of generic competition for two anti-cancer drugs and an anti-anxiety agent. The FTC has also used non-enforcement tools to address related issues, for example, by providing comments to Congress and the Food and Drug Administration on the potential for misusing Hatch-Waxman Act procedures governing the entry of generic drugs, based on the findings of an in-depth FTC study. In June 2003, the FDA adopted a new rule, incorporating certain FTC recommendations, that promotes the timely approval of low-cost generic drug alternatives. In December

2003, Congress passed the Medicare Prescription Drug Improvement and Modernization Act, which made changes in the FDA's final rule, consistent with the findings of the FTC study.

- **Home Mortgages – Stopping Deceptive or Abusive Lending Practices.** The FTC continued to attack deceptive or abusive lending practices targeted toward the most vulnerable groups in the population. In May 2003, a federal court finalized a settlement with The Associates, now owned by Citigroup, Inc., to resolve FTC charges of deceptive subprime mortgage lending practices. The settlement is expected to provide \$215 million in redress to approximately 850,000 homeowners. A related class action settlement is expected to yield an additional \$25 million.

The Associates is just one in a series of cases in which the FTC has pursued such pernicious practices. The FTC also challenged the lending practices of First Alliance Mortgage Company (FAMCO). In November 2002, the FTC received its first redress payment in FAMCO. Those monies were distributed to nearly 28,000 consumers within 45 days of receipt. Currently, the FTC is preparing a second distribution to borrowers. Ultimately, the FTC expects to distribute at least \$63 million of redress in FAMCO.

Other cases include the FTC's ongoing litigation against Capital City Mortgage Corp. and a proposed agreement with Fairbanks Capital Holding Corp. The proposed Fairbanks agreement, announced in November 2003, settles

allegations of various unfair, deceptive, and illegal practices in the servicing of subprime mortgage loans.

- **Spam – Protecting E-mail through Research, Education, and Law Enforcement.** In April 2003, the FTC conducted a three-day public forum that examined the proliferation of, and potential solutions to, spam (unsolicited commercial e-mail) and released a report that found that 84.5 percent of examined spam contained elements of obvious deception or sold an illegitimate product or service. The FTC has targeted deceptive spam for aggressive law enforcement actions, including one in which an innocent-appearing spam message led consumers, including children, to sexually explicit material. To address spam more broadly, the FTC has created a Federal/State Spam Task Force with state and federal law enforcement partners. This Task Force provides a forum for members to address the interstate and international nature of spam and the latest spamming technology, spammer ploys, and investigational techniques. The FTC also educated consumers and businesses about steps they can take to reduce the amount of spam they receive.
- **Internet – Protecting E-Commerce.** The Internet holds great promise as an efficient marketplace for the sale of goods and services to consumers worldwide, but it also has presented some new competition and consumer protection issues. In response, the FTC has brought more than 300 cases to help keep e-commerce free from fraud, deception, and unfair practices. During FY 2003, the FTC brought 58 cases



involving fraudulent or deceptive marketing practices related to the Internet. The agency also has formed an Internet Task Force to explore these issues. So far, the Task Force has analyzed state regulations that may restrict the entry of new Internet competitors and has hosted public workshops on potential anti-competitive barriers to e-commerce.

- **Energy – Preventing Anticompetitive Gasoline Prices.** The energy market is a vital sector of the U.S. economy. In FY 2003, the FTC issued a complaint against the Union Oil Company of California that, according to the complaint, could save consumers hundreds of millions of dollars per year in gasoline purchases. In November 2003, an FTC Administrative Law Judge dismissed the complaint. This matter is currently on appeal before the Commission. The FTC also continued merger enforcement activity in energy markets, including a consent order designed to preserve competition in the market for the delivery of natural gas to the Kansas City area following the sale of a major Midwestern natural gas pipeline.
- **Intellectual Property (IP) – Keeping Pace with Market Innovations.** The FTC recognizes the importance of applying the most current knowledge about evolving markets to its enforcement policies. For example, the FTC and the Department of Justice concluded a series of hearings on “Competition and Intellectual Property Law and Policy in the Knowledge-Based Economy” responding to the growth of the knowledge-based economy, and to harmonize requirements under both IP and antitrust law to fulfill their common

goal of promoting innovation. These hearings, which took place over 24 days, and involved more than 300 panelists, formed the basis for an FTC report issued in October 2003, entitled “To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy.” This report offers recommendations for the patent system and describes the FTC’s plans and proposals to facilitate increased communication between antitrust agencies and patent institutions.

- **Health Care – Protecting Consumers from Anticompetitive Medical Fees.** During FY 2003, the FTC settled cases with eight groups of physicians for allegedly colluding to raise consumers’ costs and issued an administrative complaint against another group. These enforcement actions put a stop to, or seek to stop, allegedly collusive conduct that harms employers, individual patients, and health plans by depriving them of the benefits of competition in the purchase of physician services. In addition, the FTC challenged for the first time a provider organization engaged in collusive conduct in providing hospital services. Also in FY 2003, the FTC, working with the Department of Justice, completed nearly 30 days of hearings over seven months to explore developments in the dynamic health care market. The hearings focused on the specific challenges and complications involved in applying competition law and policy to health care, as well as a wide range of more specific health care and competition law and policy issues, such as hospital mergers, the significance of non-profit status, vertical integration, quality and efficiencies, the boundaries of the state action and *Noerr-Pennington*

doctrines, monopsony power, the adequacy of existing remedies for anti-competitive conduct, and the implications of the FTC's consumer protection mandate with regard to the performance of the health care financing and delivery markets.

- **Law Enforcement Sweeps.** The FTC leveraged its resources through coordinated actions with other law enforcement agencies against specific types of fraud and deception. In FY 2003, the FTC and more than 100 law enforcement partners targeted Internet scams, charitable fundraising scams, Internet auction fraud, and international drivers permit scams. These sweeps resulted in nearly 175 law enforcement actions, including 30 FTC cases.
- **Consumer Privacy and Security.** Consumer complaints and inquiries to the FTC regarding identity theft have risen from 36,000 in FY 2000 to 321,000 in FY 2003. Identity theft occurs when someone uses a consumer's personal information such as name, Social Security number, credit card number or other identifying information, without permission to commit fraud or other crimes. The identity theft reports and other information collected from these calls are made available through *Consumer Sentinel*, a secure Web site, to more than 940 of the FTC's law enforcement partners. To help consumers avoid or recover from identity theft, the FTC has distributed more than 1.3 million print copies of the FTC brochure "Identity Theft: When Bad Things Happen to Your Good Name" and recorded more than 1.4 million "inquiries" to the electronic version of the brochure on the

FTC's Web site. To assist consumers further, the FTC has developed a universal ID Theft Affidavit – a standard form accepted by all three major credit reporting agencies and other creditors from victims seeking to report fraudulent accounts opened in their names. The brochure and the affidavit also are available in Spanish. In May 2003, after encouragement from the FTC, the three major credit reporting agencies implemented a one-call system enabling consumers to secure copies of their credit reports and have fraud alerts placed on their files at each of the credit reporting agencies.

The FTC also brings law enforcement actions to protect consumer privacy. In FY 2003, the agency settled charges that Microsoft Corporation had misrepresented the measures it used to collect and maintain the security of personal information collected through its Passport Web services. Since October 2002, the FTC has announced settlements with three companies that allegedly collected extensive personal information from millions of high school students and then sold that information to commercial marketers, despite promising the information would be shared only with colleges, universities, and other education-related service providers.

- **Weight Loss Advertising and Products.** A FY 2002 FTC staff report, *Weight-Loss Advertising: An Analysis of Current Trends*, concluded that the use of false or misleading claims is rampant in weight-loss product advertising. To follow up, the FTC held a workshop in November 2002 in which participants – scientific and medical experts,

industry members, and representatives of media organizations and outlets – discussed the current science of weight loss, deceptive weight-loss advertising, and possible ways for the media to more effectively screen ads. Over the last decade, the FTC has brought more than 100 cases challenging misleading claims for all types of weight loss products, including over-the-counter supplements, commercial weight loss centers, weight loss devices, and exercise equipment.

## **FY 2003 Assessment – Measuring Performance Through Results**

### **Consumer Protection**

The goal of the Consumer Protection Mission is to prevent fraud, deception, and unfair business practices in the marketplace. The Mission works to accomplish this goal through three objectives: (1) identifying fraud, deception, and unfair practices that cause the greatest consumer injury; (2) stopping fraud, deception, and unfair practices through law enforcement; and (3) preventing consumer injury through education.

**Identifying Fraud, Deception, and Unfair Practices.** The FTC measures performance in this objective by determining the number of consumer complaints and inquiries that are added annually to its Consumer Information System database. The complaints in this database are used to identify problem areas as reported by the public. This enables the agency to detect and respond rapidly to fraud, deception, and other illegal practices, resulting in effective targeting of the agency's law enforcement resources. The continuous

input of new complaints into the database helps the FTC and its enforcement partners determine where and how the latest incidents of fraud may be occurring. The target for FY 2003 was to add at least 450,000 entries into the database. At the end of the fiscal year, 944,000 entries had been added, including 321,000 relating to identity theft, more than double the target of 155,000.

The FTC also shares complaints about fraud and deception relating to telemarketing, direct mail, and the Internet with its law enforcement partners through *Consumer Sentinel*, a secure, encrypted Web site that provides access to more than 1.5 million fraud and identity theft complaints. *Consumer Sentinel* is accessed by more than 940 law enforcers in the United States, Canada, and Australia to determine whether a particular fraudulent scheme is local, national, or cross-border in nature, and also to help spot larger trends for law enforcement action. The number of law enforcement partners grew by nearly 300 during FY 2003, and the FTC will continue to expand *Consumer Sentinel's* reach in the law enforcement community. In addition to gathering complaints relating to identity theft, in September 2003, the FTC released a survey showing that 27.3 million Americans have been victims of identity theft in the last five years.

**Stopping Fraud, Deception, and Unfair Practices.** The FTC measures the effectiveness of its law enforcement efforts to stop fraud and deception by estimating the amount of money it has saved consumers based on the annual fraudulent and deceptive sales of defendants. Saving consumers money is the ultimate goal of these efforts. Consumers save money each time

a fraudulent or deceptive operator is stopped by successful litigation or settlement with the agency. Savings to consumers are increased when the agency leads joint law enforcement initiatives with federal, state, and international partners. The target for FY 2003 was to save consumers \$400 million. The fiscal year ended with savings to consumers of approximately \$606.3 million, exceeding the target by 52 percent.

In FY 2003, the FTC established two new performance measures under this objective to report the number of data searches by FTC and other law enforcement personnel of the FTC's *Consumer Sentinel* complaints and the number of data searches by law enforcement personnel of the FTC's identity theft complaints. The actual number of *Consumer Sentinel* searches was 27,685 (exceeding the goal of 20,000 by 38 percent.) The actual number of identity theft searches by law enforcement personnel was 2,167 (exceeding the goal of 1,400 by 55 percent.) These new measures will be used, along with the identity theft survey results, to refine the agency's enforcement and education efforts relating to identity theft. The FTC, along with the Secret Service and Department of Justice, initiated a training program in March 2002 to provide local and state law enforcement officers with practical tools to enhance combined efforts to combat identity theft, including information about accessing *Consumer Sentinel* data. Through September 2003, the FTC and its partners held nine seminars and trained more than 1,000 persons from more than 165 agencies. Additional training is planned and likely will result in increased use of the *Consumer Sentinel* system.

**Preventing Consumer Injury.** Consumer

and business education represents the first line of defense against fraud, deception, and unfair practices. Most FTC law enforcement initiatives include a consumer and/or business education component aimed at preventing consumer injury and unlawful business practices. Public education programs benefit consumers by alerting them to their rights under various consumer protection laws and providing practical tips on how to recognize and avoid scams and rip-offs. To reach the broadest possible audience, the FTC makes maximum use of the national media and outreach to lead more consumers to the FTC's Web site (<http://www.ftc.gov>) and the one-stop government Web site for consumer information (<http://www.consumer.gov>). Messages also reach the public through the Consumer Response Center (at 1-877-FTC-HELP) and hundreds of partners who distribute FTC materials, link to the Web site, or post the FTC's messages on their Web sites. The goal in FY 2003 was to distribute at least 14 million FTC education publications. At year end, 28 million publications had been distributed, double the goal. The large number of consumers accessing Do Not Call Registry information on the FTC's Web site contributed to this dramatic increase in distribution. For the fourth consecutive fiscal year, more publications were distributed online (22.6 million) than in print (5.3 million). The number of publications distributed online has increased significantly, from 12.3 in 2002 and 9.6 million in 2001. Of the 28 million publications distributed in FY 2003, 458,000 were in Spanish. The goal for FY 2003 was to distribute 2.5 million identity theft publications, and 3 million publications were actually distributed.

To reach the expanding population of

Hispanic consumers in the United States, the FTC instituted an Hispanic Outreach Program in 2002. This effort includes the creation of a dedicated Spanish-language page on the FTC Web site to mirror the English-language page and translation of more than 60 consumer publications. The program also includes significant media outreach, with FTC staff speaking about important consumer protection issues on major Spanish-language networks news shows and the FTC disseminating public service announcements to the Spanish-language media.

## **Maintaining Competition**

The goal of the Maintaining Competition Mission is to prevent anticompetitive mergers and other anticompetitive business practices in the marketplace. The Mission works to accomplish its goal by: (1) identifying mergers and business practices that harm consumers by restricting competition; (2) stopping anticompetitive mergers and business practices by using its law enforcement powers; and (3) preventing consumer injury by working to increase knowledge and understanding of the antitrust laws and the benefits of competition among consumers, the business community, and other government officials. These three endeavors represent the FTC's objectives under the Maintaining Competition Mission.

During most of the last decade, unprecedented levels of merger activity in the marketplace dominated the FTC's Maintaining Competition agenda, with the number, size, and scope of proposed mergers increasing with each fiscal year. While the level of merger activity is down considerably from its peak in 2000, the

agency continues to review several large and complex mergers each fiscal year. The decline in merger activity has allowed the agency to re-emphasize the nonmerger portion of the Maintaining Competition mission.

**Identifying Mergers and Business Practices That Harm Consumers.** The FTC uses premerger notification reports required under the Hart-Scott-Rodino (HSR) Act as its primary means for identifying potentially anticompetitive mergers. Over the past two fiscal years, a less active economy and revised HSR filing thresholds have kept the number of transactions reported to the antitrust agencies at moderate levels. The modified reporting thresholds did not alter the standard of legality for mergers under Section 7 of the Clayton Act, however, so the FTC has increased efforts to identify mergers not reported under HSR that might harm competition. These efforts have included monitoring trade press and Internet resources, as well as following up on information from congressional offices, other Executive Branch agencies, state and local governments, consumers, businesses, and the antitrust bar about possibly anticompetitive mergers. The FTC uses similar means to identify business practices that may harm consumers.

The FTC determined success in identifying anticompetitive mergers and business practices by measuring: (1) the percentage of significant merger investigations (defined by the issuance of a formal request for additional information (a "second request") from the parties under the HSR Act) that result in enforcement action; and (2) the number of new nonmerger investigations opened.

The agency seeks to balance its available resources and the need for careful review of all potentially anticompetitive merger transactions, so that between 60 percent and 80 percent of HSR requests for additional information result in enforcement action. A percentage below 60 percent may suggest that the FTC is targeting enforcement resources ineffectively and unduly burdening businesses by investigating too many competitively benign transactions, while a percentage higher than 80 percent could suggest that the agency may be allowing anticompetitive mergers to go forward by focusing its review too narrowly. In FY 2003, the percentage of completed second request investigations resulting in enforcement action was 70 percent, exactly at the midpoint of the targeted range.

The Mission determined success in identifying anticompetitive business practices by counting the number of nonmerger investigations opened during the fiscal year, with a goal of 45 to 70 new investigations. This figure fluctuates based on the demands of the agency's merger caseload, which is subject to statutory time constraints, and the status of investigations and litigation already underway at the beginning of the fiscal year. In FY 2003, the Maintaining Competition Mission opened 50 new nonmerger investigations. These investigations, following 59 nonmerger investigations opened in 2002, reflect the greater proportion of resources devoted to litigating significant nonmerger matters identified and developed during the past two fiscal years.

**Stopping Anticompetitive Mergers and Business Practices.** The FTC employs its law enforcement authority to stop anticompetitive mergers and practices both directly and indirectly. Through federal

court or administrative litigation or by negotiated settlement, the agency saves consumers hundreds of millions of dollars annually by preventing harmful mergers from taking place, by requiring the restructuring of transactions to eliminate anticompetitive effects, or by stopping unlawful business practices. In addition to these direct actions, an effective FTC enforcement presence indirectly serves its objective by demonstrating to the business and legal communities that the agency can and will take successful legal action to stop anticompetitive transactions and practices.

In FY 2003, the FTC undertook 44 antitrust enforcement actions, almost equally divided between merger and nonmerger matters. This total represents an increase of 33 percent over the 33 enforcement actions in 2002, and an increase of 63 percent over the 27 enforcement actions in 2001. In the merger area, the FTC authorized the staff to seek preliminary injunctions in three matters, issued one administrative complaint, and accepted seven consent agreements for comment. In addition, merger parties abandoned ten merger transactions in the face of likely FTC action. The FTC issued seven nonmerger administrative complaints and accepted 16 nonmerger consent agreements for comment.

The FTC determined success in stopping anticompetitive mergers and practices in FY 2003 by measuring: (1) the percentage of positive outcomes obtained in antitrust administrative and federal court enforcement actions; (2) the estimated savings to consumers resulting from FTC merger enforcement actions; and (3) the estimated savings to consumers resulting from FTC nonmerger enforcement actions.

A positive outcome for an administrative and federal court enforcement action includes abandonment of an anti-competitive transaction following an FTC challenge, a consent agreement to resolve antitrust concerns, or a successful result in court after all proceedings, including appeals, have concluded. A negative outcome occurs when parties refuse to settle antitrust concerns raised by the agency, and the agency is unsuccessful in obtaining relief through the courts. The FTC significantly exceeded its goal of positive outcomes in 80 percent of its enforcement actions, achieving a positive result in all 37 of the administrative and federal court enforcement actions concluded during the fiscal year.

As part of its FY 2000-2005 Strategic Plan, the FTC set a goal of \$4 billion in consumer savings from merger enforcement over the five-year period. The reason for using an aggregate figure for the period rather than yearly goals was that external factors cause significant fluctuations in merger activity. Because this measure is being discontinued before the end of the five-year period covered under the previous Strategic Plan, the FTC has revised the goal proportionately to \$2.4 billion over the three-year period FY 2001-2003. During those years, the estimated consumer savings from FTC merger enforcement was about \$3.5 billion, exceeding the target by over 45 percent.

The FTC also set a goal of \$1 billion in consumer savings from nonmerger antitrust enforcement over the same five-year strategic plan period, and similarly revised the goal proportionately to \$600 million over three years. Over the three-year period, the agency's nonmerger enforcement resulted in approximately \$606 million

in estimated savings, exceeding the target. Moreover, the combined three-year merger and nonmerger consumer savings exceeded \$4.1 billion, a figure 37 percent higher than the combined goal of \$3 billion for the period.

**Preventing Consumer Injury.** The FTC increases awareness of antitrust law and policy and promotes compliance with the antitrust laws by educating the public about its activities and communicating its enforcement intentions. The agency's methods of informing the public include development and publication of antitrust guidelines and policy statements; press releases and public dissemination of documents describing its formal actions; and well-publicized testimony, speeches, and publications.

The FTC determined success in educating the public about antitrust law and policy by measuring: (1) the number of initiatives (including speeches, testimony, reports, policy statements, etc.) undertaken to educate the public during the fiscal year; and (2) the extent to which members of the public visited antitrust related content on the FTC's Web site.

In FY 2003, agency representatives undertook 306 antitrust outreach efforts, including speeches, testimony, written comments on regulatory proposals, policy statements, etc. This figure represents more than twice the number reported for FY 2001 and about 7 percent more than the number reported for FY 2002. Although improvements in counting methodology likely accounted for some of the gain, the result still shows a significant expansion in the FTC's public outreach efforts during FY 2003.

The FTC's Web site recorded more than 10 million hits on antitrust-related content

in FY 2003, a significant increase from 4.3 million hits in FY 2002 and 2.6 million hits in FY 2001. This measure is significant in that it represents initiative taken by the public to seek out FTC information, rather than merely reflecting agency activities.

## Ongoing Challenges

### Consumer Protection

The FTC currently enforces a number of statutes and regulations that address consumer privacy. Consumers increasingly are concerned about the ways in which their personal information is used; consequently, companies that make specific privacy promises need to live up to them. Doing so will enhance the confidence that consumers have in the marketplace. The FTC is concerned with the misuse of personal information and is committed to both law enforcement and education of consumers and businesses on this subject. Areas of current focus include telemarketing, spam, identity theft, and pretexting (obtaining consumers' personal financial information under false pretenses), as well as enforcement of the Children's Online Privacy Protection Act (COPPA), the Gramm-Leach-Bliley Act, the Telemarketing Sales Rule (TSR), as amended in December 2002, and Section 5 of the Federal Trade Commission Act.

Recent amendments to the TSR include initiatives designed to afford consumers greater privacy protections. Most significantly, the amended TSR created a National Do Not Call Registry, enabling consumers to protect themselves from unwanted and often intrusive telemarketing calls. A national survey shows that registered consumers are receiving significantly

fewer telemarketing calls. Those registered can file a complaint when a covered telemarketer calls. Further, the amendments to the TSR address pretexting, the use of "pre-acquired account information" – a situation in which, unbeknownst to consumers, a telemarketer has their billing information in hand before initiating a sales call. Account information that has been "pre-acquired" can be misused, resulting in unauthorized charges on consumers' accounts. The TSR amendments also impose new restrictions on the practice of "call abandonment" – where a consumer answers the telephone only to find "dead air" – and require telemarketers to transmit caller-ID identifying information.

The FTC also continues to focus on spam. In April 2003, the Bureau of Consumer Protection released a study – the first extensive review of the likely truth or falsity of claims appearing in spam. Reviewing a random sample of 1,000 pieces of spam, the study found that 84.5 percent contained at least one form of deception or sold an illegitimate product or service. During FY 2003, the FTC also hosted a public forum to explore issues relating to the proliferation of and potential solutions to spam. The forum also examined how the unique qualities of spam both contribute to and hinder fraud and its prosecution. The FTC will continue to bring law enforcement actions targeting deceptive spam and will continue to focus on the policy challenges relating to the increasing amount of spam.

Another major challenge is the problem of identity theft. In September 2003, the FTC released the results of a survey showing that 27.3 million Americans have been victims of identity theft in the last five years, and that identity theft losses to businesses, financial institutions, and consumer victims



are in the billions of dollars. The FTC will continue to focus efforts on combating identity theft.

## **Maintaining Competition**

The ongoing globalization of the economy and new information technologies have a significant impact on Maintaining Competition activities. The continuing growth of commerce beyond national boundaries has resulted in myriad antitrust enforcement regimes in various jurisdictions, and variations in these regimes can interfere with the common goal of promoting a competitive economy. In addition, the increasingly technology-driven and knowledge-based economy has both policy and practical implications.

Antitrust enforcement no longer stops at U.S. shorelines. Antitrust matters involving activity in many different jurisdictions, with varying sets of competition statutes, can be costly and inefficient. For example, the number of jurisdictions with merger enforcement regimes has grown from just a handful in 1990 to over 65 today. The resulting costs include the cost of complying with different regulatory mechanisms, as well as the risk of differing outcomes. Seeking to increase both procedural and substantive convergence among numerous merger oversight regimes throughout the world will continue to be a high priority for the foreseeable future.

The continuing development of high-tech industries and the significance of intellectual property rights influence the FTC's merger and nonmerger activities. While the fundamental principles of antitrust do not differ when applied to high-tech industries, or other industries in which patents

or other intellectual property are highly significant, the issues are often more complex, take more time to resolve, and require different kinds of expertise. The FTC now requires expertise in patent law, as well as antitrust law, and sometimes must hire technical consultants in areas such as electrical engineering or pharmacology. In addition, the increased significance of intellectual property concerns in merger and nonmerger cases raises issues about the appropriate interaction of antitrust and intellectual property laws.

Changing economic conditions present a continuing challenge as the agency seeks to maintain an appropriate balance of merger and nonmerger enforcement. Extensive merger activity throughout the 1990s limited the agency's use of available resources to pursue a robust nonmerger enforcement program. Merger activity over the past two to three fiscal years has slowed to a more moderate pace, permitting the agency to pursue a broader agenda of initiatives to aid consumers in the nonmerger area. A significant future upswing in merger activity may jeopardize the agency's ability to sustain its recent achievements in this area.

# THE RESULTS

---

---

## **Goal 1: Prevent Fraud, Deception, and Unfair Business Practices in the Marketplace**

Congress has charged the FTC with the broadest legislative mandate of any federal consumer protection agency. While most federal consumer protection agencies have jurisdiction over a specific market sector, the FTC possesses broad law enforcement authority that encompasses most segments of the economy, including business and consumer transactions on the Internet. As the nation's leading consumer protection agency, its goal is to protect consumers by preventing fraud, deception, and unfair business practices in the marketplace. It applies three related objectives to achieve this broad-reaching goal.

- Identifying fraud, deception, and unfair practices that cause the greatest consumer injury.
- Stopping fraud, deception, and unfair practices through law enforcement.
- Preventing consumer injury through education.

First, the FTC identifies practices that cause consumer injury by analyzing the consumer complaint data collected in its Consumer Information System database, holding public discussions, and monitoring the marketplace, including the Internet. Next, the FTC uses this information to target law enforcement efforts. Its law enforcement program aims to stop and deter fraud and deception, protect consumers' privacy, and increase compliance with

its consumer protection statutes to ensure that consumers have accurate information for purchasing decisions. Finally, the FTC targets its education efforts to give consumers the information they need to protect themselves from injury, and explains to businesses how to comply with applicable laws.

One of the greatest challenges the FTC faces is safeguarding consumer information in the electronic marketplace so consumers will enjoy the same confidence in these commercial transactions that they enjoy in the traditional marketplace. Online commerce has the potential to deliver goods and services, often more conveniently, faster, and at lower prices than traditional brick-and-mortar operations. Online commerce promises significant benefits to consumers and the economy. Moreover, the Internet is stimulating the development of innovative products and services that were barely conceivable just a few years ago, and is enabling consumers to tap into rich sources of information that they can use to make better informed purchasing decisions.

There is real risk, however, that these benefits may not be realized if consumers associate the Internet with fraudulent operators. The boom in e-commerce has opened up fertile ground for fraud. In the FTC's experience, fraudulent operators are always among the first to appreciate the potential of a new technology and then use

that potential to exploit and deceive consumers. Of particular concern is that Internet health fraud continues to plague consumers looking for solutions to serious illnesses. Traditional scams, such as pyramid schemes, also have found new life on the Internet. The FTC is using all the tools at its disposal – such as its consumer complaint database – to help target areas of consumer problems, and is fashioning law enforcement and educational efforts to respond quickly and vigorously to these concerns.

Privacy of personal information is important, and companies that make specific promises to consumers about privacy must honor those promises. Companies that honor their promises add to consumer confidence in the marketplace. The FTC is concerned with the misuse of personal information and is fully committed to both enforcement and education in this area. For example, the FTC is charged with enforcing the Children’s Online Privacy Protection Act (COPPA) and its implementing Rule, which became effective in April 2000. In FY 2003, the FTC brought two enforcement actions challenging alleged COPPA rule violations. This brings the total number of COPPA enforcement actions to eight. It also continued an extensive education campaign on children’s privacy directed to businesses, parents, and educators.

The FTC’s comprehensive, multi-year review of the Telemarketing Sales Rule (TSR) revealed widespread consumer frustration over unwanted telephone solicitations, which some see as a violation of privacy in their home. To address this concern, in December 2002, the FTC amended the Rule to establish a National Do Not Call Registry. The Registry is up

and running and being enforced. Covered telemarketers are prohibited from calling consumers who place their telephone numbers in the Registry. By the end of December 2003, the Registry contained more than 55 million telephone numbers. Further, the amendments to the TSR address the use of “pre-acquired account information” – a situation in which, unbeknownst to consumers, a telemarketer has their billing information in hand before initiating a sales call. Account information that has been “pre-acquired” can be misused, resulting in unauthorized charges on consumers’ accounts. The TSR amendments also impose new restrictions on the practice of “call abandonment” – where a consumer answers the telephone only to find “dead air” – and require telemarketers to transmit caller-ID identifying information.

The FTC also works on policy and enforcement efforts related to spam (unsolicited commercial e-mail). In April 2003, the Bureau of Consumer Protection released the first extensive review of the likely truth or falsity of claims appearing in spam. The study included a random sample of 1,000 pieces of spam from three FTC data sets and found that 84.5 percent contained false “From” lines, “Subject” lines, or message text or sold an illegitimate product or service. During FY 2003, the FTC also hosted a public forum to explore issues relating to the proliferation of and potential solutions to spam. The forum also examined how the unique qualities of spam both contribute to and hinder fraud and its prosecution. The FTC brought 19 enforcement actions targeting deceptive spam during FY 2003.

Identity theft is another area where the FTC continued to protect consumers during FY 2003. In September 2003, the FTC re-

leased the results of a survey that found that 27.3 million Americans have been victims of identity theft in the last five years, including 9.9 million in the last year alone. Last year's identity theft losses to businesses and financial institutions totaled nearly \$48 billion, and consumer victims reported \$5 billion in out-of-pocket expenses.

### **Objective 1.1: Identify Practices That Cause Consumer Injury**

The first step in preventing fraud, deception, and unfair business practices in the marketplace is to identify the practices that cause the greatest consumer injury.

#### **Strategies**

To identify consumer protection problems, the FTC collects and analyzes data from many sources. Its Consumer Response Center receives consumer complaints and inquiries via a toll-free number (1-877-FTC-HELP), mail, and the Internet. Partners such as the National Fraud Information Center of the National Consumers League, the Internet Fraud Complaint Center (a partnership between the FBI and the National White Collar Crime Center), Better Business Bureaus, and PhoneBusters (the Canadian fraud database), also share the consumer complaint data they collect with the FTC.

All of this information is entered into the Consumer Information System database and then analyzed by FTC staff to identify trends and target fraudulent, deceptive, and unfair business practices. The agency shares the fraud complaints that it collects with more than 940 other law enforcement agencies across the United States, Can-

ada, and Australia via an encrypted Web site called *Consumer Sentinel*. Although the FTC is not empowered to act on behalf of individual consumers, consumer complaint data obtained through *Consumer Sentinel* enables the FTC and its other law enforcement partners to coordinate their enforcement efforts, and to spot trends and target the most serious consumer problems. Summary and trend data are shared on the public *Consumer Sentinel* site (<http://www.consumer.gov/sentinel>). The constant input and analysis of fresh complaint data have allowed the FTC to move quickly to stop illegal practices before they cause more harm to consumers.

Consumers can call the FTC's second toll-free number, 1-877-ID-THEFT, or view its Web site to obtain information about and report identity theft. When they call the FTC or visit its Web site, consumers also can receive guidance on the steps they can take to resolve credit and other problems that may have resulted from identity theft. In FY 2003, the agency received 321,000 identity theft complaints and inquiries, 70 percent more than the 185,000 it received in FY 2002. The FTC uses this data to spot patterns that can help criminal law enforcement agencies prosecute identity theft and help businesses avoid the financial consequences of this crime. Although most ID theft cases are criminal, the FTC staff systematically examine complaint data for civil cases within its jurisdiction and will bring those cases where appropriate. Criminal cases are identified by the joint FTC and U.S. Secret Service Case Referral Program and strong leads are referred to regional task forces, many led by the Secret Service Financial Crimes Division.

In addition to receiving and analyzing consumer complaints, the FTC monitors the

growing online marketplace through Web surfs, where it and partner organizations systematically surf the Internet to identify Web sites engaged in questionable practices. In FY 2003, the FTC led or coordinated seven surfs, focusing on spam, HIV home test kits, e-tailer holiday shopping, bioterrorism, online gambling, SARS protection products, and other health-related products. When suspect sites are identified during a surf, e-mail warnings are sent to the operators explaining the law and providing a link to the FTC Web site for further information. If a Web operator ignores the warning, the FTC or one of its partners may file suit.

### **Performance Measure and Results**

To assess its effectiveness in identifying fraudulent and deceptive practices, the agency measured the number of consumer complaints and inquiries added to the Consumer Information System database. Additional consumer data enables the agency to more effectively spot trends, identify emerging scams, and coordinate activities with other law enforcers. In FY 2003, the FTC added 944,000 entries, exceeding its target of 450,000 by 110 percent. Under a new performance measure for FY 2003, the FTC added 321,000 consumer complaints and inquiries related to identity theft into its database, exceeding its target of 155,000 by 107 percent. These results reflect the increasing interest of organizations in contributing complaint data and consumers' growing awareness of the FTC's online complaint form and toll-free telephone numbers, and gives the FTC a broader view of what reporting consumers are experiencing. The database allows the FTC and its law enforcement partners to identify and develop cases against fraudulent operators that cause the great-

est consumer injury. By analyzing consumer complaints, the FTC can identify and ultimately refine its enforcement and education efforts to target the most serious consumer problems, which currently include identity theft, online auction fraud, Internet service provider scams, unauthorized billing scams, pyramid and other investment schemes, travel and vacation fraud, pay-per-call solicitation frauds, high-tech Internet-based fraud, and health care fraud.

### **Performance Assessment and Future Trends**

Not only does the FTC's database help identify the most serious consumer protection problems, it quickly informs the agency of emerging scams so that the agency can move rapidly to stop consumer injury. In addition, by collecting data from consumers and other sources and sharing it with other law enforcers, the FTC is able to coordinate and, thus, augment the effectiveness of law enforcement agencies across the country and in Canada and Australia. To make the database even more valuable, the FTC continues to pursue new international partnerships to increase its collection of information from consumer agencies in other countries. For example, through the [econsumer.gov](http://econsumer.gov) Web site, the agency partners with other members of the International Consumer Protection Enforcement Network, an international group that identifies and shares information about worldwide consumer protection issues. Through [econsumer.gov](http://econsumer.gov), consumers in the 17 participating countries can file complaints using an online form and obtain consumer education materials. Law enforcement members can access a nonpublic site to obtain specific information about the

complaints that consumers have filed.

The FTC will continue to expand the complaint database and increase its use by recruiting and training additional law enforcement partners. It also will make better use of its rich store of data by identifying repeat offenders and sharing this information with other law enforcers. In addition, the FTC will increase its capacity to analyze data quickly in order to identify and respond to frauds and identity theft in their early stages and prevent consumer injury. The data will be used to provide more information to the public – by giving consumers information to protect themselves from scams and identity theft, and informing public policy discussions about consumer protection issues in the marketplace. The FTC also will continue to collect data on consumers' experiences and general inquiries and upgrade its system to track and analyze privacy-related complaints more effectively.

The new performance measure regarding identity theft complaints and inquiries is proving very timely in light of the identity theft survey results that the FTC released in September 2003. The number of victims and the dollars lost to identity theft are dramatic – 27.3 million American victims in the last five years and billions of dollars in losses to businesses, financial institutions, and consumer victims. The FTC will continue to devote resources to combat identity theft by fine-tuning its efforts in consumer education and outreach and working with law enforcement authorities.

FTC staff also continue to work to analyze the results of a consumer fraud survey. Through this survey, the FTC seeks to learn whether complaints in the database are representative of consumers' actual ex-

periences. The agency also expects that the survey results will help determine whether certain classes of consumers are not represented in the database, so that it can target those populations with information about the fraudulent scams they may encounter and information on how to submit complaints to the FTC either through its toll-free numbers or *Consumer Sentinel*. After reviewing the survey results, the FTC will analyze its enforcement efforts to ensure that it is addressing the most costly and prevalent forms of fraud through legal action. Based on the information received through the survey, the FTC also intends to review and, if appropriate, revise its performance measures. To assist in reaching these goals, the agency expects to conduct this survey periodically.

### **Objective 1.2: Stop Practices That Cause Consumer Injury**

Once fraud, deception, and unfair business practices are identified in the marketplace, the FTC focuses its law enforcement efforts on areas where it can have the greatest impact for consumers.

### **Strategies**

The FTC plays a vital role in protecting consumers' privacy, emphasizing both enforcement and education. It focuses on telemarketing, spam, identity theft, and pretexting (the use of pre-acquired account information), as well as enforcement of the Gramm-Leach-Bliley Act, the TSR as amended in December 2002, and Section 5 of the FTC Act.

Telemarketing fraud continues to be a significant law enforcement priority. The

FTC will continue to pursue telemarketing cases and enforce the National Do Not Call Registry. Other priorities include protecting consumers from more traditional scams that have moved to the Internet.

One of the most effective tools in the battle against fraud has been the law enforcement sweep – simultaneous law enforcement actions by federal, state, and/or local partners against numerous defendants nationwide that focus on a particular, widespread type of fraud. Each sweep is supported by consumer education aimed at preventing future losses to the public. Since its first sweep in 1995, the FTC and its partners have brought more than 2,200 law enforcement actions in 78 sweeps against fraudulent operators. This total includes 522 actions brought by the FTC alone. Thus, for every action that the FTC brings, its partners bring an average of three. In FY 2003, the FTC led 5 sweeps resulting in a total of 175 actions, including 30 FTC actions. In addition to leveraging agency resources, sweeps generate substantial local, regional, and international interest, thus further raising consumer awareness.

The number of consumer protection cases with an international component continues to rise. In October 2002, the Chairman unveiled a five-point plan to fight cross-border fraud. Work has been completed on two points – a workshop on public/private partnerships to fight cross-border fraud (held in February 2003) and an OECD Recommendation on Cross-Border Fraudulent and Deceptive Commercial Practices. Two more prongs of the plan – pursuing bilateral and multilateral cooperation arrangements and providing technical assistance to developing countries on consumer protection issues – are ongoing.

Work also continues on the fifth project – issuing a report to Congress with recommendations for legislative changes strengthening our ability to combat cross-border fraud.

In the nonfraud area, the FTC works to ensure compliance with the consumer protection statutes that it enforce. Given its broad jurisdiction and limited resources, it focuses on the most serious identified problems, using varied enforcement tools and encouraging self-regulation in appropriate situations. Information obtained from its Consumer Information System database and from monitoring national advertising enables the agency to focus its law enforcement actions on areas that pose the greatest risks to consumer health, safety, and economic well-being. The FTC also works with industry and interested groups to support private initiatives where appropriate.

### **Performance Measures and Results**

The FY 2003 goal was to save consumers more than \$400 million by stopping fraudulent and deceptive practices in the marketplace. The FTC surpassed this target, saving consumers an estimated \$606.3 million. Consumer savings are measured by estimating the annual fraudulent and deceptive sales made by defendants in the 12 months prior to filing a complaint. The savings calculation actually may underestimate the FTC's impact because it assumes that the fraud and deception would have continued for only one additional year; however, it provides a uniform method for calculating savings and minimizes speculation about the likely duration of the fraud and deception. The law enforcement actions included in this measure were taken against individuals or small compa-

nies, as well as scam artists operating large schemes on the Internet. The FTC's experience in most cases is that once it files a complaint in federal district court and obtains a court order, the defendants stop their fraudulent practices; if they fail to comply, they are subject to contempt proceedings. Thus, in stopping these frauds, the agency stops further consumer losses to these defendants. By publicizing these law enforcement actions and distributing consumer education materials, it seeks to alert consumers to fraudulent and deceptive practices, educate them to avoid such practices in the future, and ultimately increase consumer confidence in the marketplace, while deterring similar behavior by would-be violators.

The FTC established two new performance measures under this objective in FY 2003 to report the number of data searches by FTC and other law enforcement personnel of its *Consumer Sentinel* complaints and the number of data searches by law enforcement personnel of its identity theft complaints. With 27,685 data searches of the *Consumer Sentinel* database, the agency surpassed its target of 20,000. Also, with 2,167 data searches by law enforcement personnel of the identity theft database, it surpassed its target of 1,400.

### **Performance Assessment and Future Trends**

Based on *Consumer Sentinel* data, Internet fraud is significant and growing. The FTC is targeting the most pervasive online fraud and moving quickly to stop large, fast-growing Internet scams. In FY 2003, the FTC brought 58 cases involving fraudulent or deceptive marketing practices related to the Internet, bringing the total number

of Internet cases filed by the FTC since 1994 to more than 300. The FTC expects fraud to continue to grow as the use of the Internet rises and, in response, it will increase its efforts to slow online fraud and prevent consumer injury. In particular, online fraud has the potential to reach consumers worldwide and cause great economic injury. As its technological expertise continues to develop, the agency will be better able to detect and deter online fraud before these schemes take hold. This effort, combined with strategies such as law enforcement sweeps, demonstrates its effectiveness in preventing consumer injury.

With an estimated \$350 billion to spend, the Hispanic population in the United States is attracting many advertisers. Given the size and influence of this growing market, the FTC will be targeting deceptive and fraudulent advertising and other practices aimed at Hispanic consumers. The FTC will target frauds on the basis of Consumer Sentinel and other data identifying the top problems for Hispanic consumers, products and services that are extensively advertised, particularly in major media, and practices causing significant economic or other harm.

The FTC also will enhance coordination with criminal law enforcers. By developing contacts with criminal prosecutors in a more systematic manner, the agency hopes to increase the number of criminal prosecutions of consumer fraud, including conduct that FTC staff have discovered, investigated, or prosecuted civilly.

In addition to fighting fraud, the FTC also focuses on compliance through traditional advertising laws and FTC Rules and Guides. It works cooperatively with its law



enforcement partners, industry, and consumer groups to extend the reach of its efforts to increase compliance. The scope of the agency's current and upcoming priorities spans its broad jurisdiction, and this broad jurisdiction makes it difficult to measure the overall impact of its nonfraud activities. The FTC is exploring using new performance measures that focus its impact in more narrowly defined areas. Nonetheless, it will continue to use business and consumer education, as well as selective enforcement, to ensure broad compliance with the rules and regulations it enforces.

With respect to identity theft, although Congress established the FTC as the central clearinghouse for identity theft complaints, the FTC – a civil law enforcement agency – has no enforcement authority to prosecute identity theft crimes. The information contained in its database, however, directly supports such criminal prosecutions. The agency has learned from experience that hands-on information and training provided to its customer law enforcement agencies greatly enhances their abilities to mine the information in the complaint database and ultimately prosecute identity theft crimes more successfully. Consequently, the FTC initiated identity theft training for local, state, and federal criminal enforcement groups and, through September 2003, trained more than 1,000 law enforcers from more than 385 agencies. Through the new performance measures, the FTC will monitor the success of these training programs to determine how such training should be modified to better meet the needs of its partner agencies.

### **Objective 1.3: Prevent Consumer Injury Through Education**

Consumer and business education is a first line of defense against fraud and deception.

#### **Strategies**

The FTC is committed to using education and outreach as cost-effective methods of preventing consumer injury, increasing business compliance, and adding an extra dimension to its law enforcement program. Virtually every consumer protection effort contains an educational component, from compliance surfs and law enforcement sweeps to the announcement of new rules and regulations. Through reports, publications, Web sites, media events, speeches, advocacies (e.g., the FTC's comment to the Department of Housing and Urban Development on the Real Estate Settlement Procedures Act and its comment to the Food and Drug Administration on trans-fatty acid labeling and claims), and collaborative activities with other organizations, the FTC reaches tens of millions of consumers and businesses every year. In FY 2003, the agency issued 105 new or revised publications – 92 for consumers and 13 for businesses – covering traditional subjects such as charitable donations and credit issues; high-tech subjects such as electronic banking, Internet auctions, and spam; and timely subjects such as identity theft, telemarketing, and privacy.

The Consumer Information System database helps the FTC tailor its education efforts to topical areas where fraud, deception, unfair practices, and information gaps are causing the greatest injury. Consumers

are given the tools they need to spot potentially fraudulent and other illegal promotions, and businesses are advised how they can comply with the law. As with the agency's law enforcement, more of its educational efforts now involve the Internet. The FTC not only addresses consumer issues involving the Internet, such as shopping online, but it also uses the Internet as a tool to reach consumers, for example, through its Web sites, online banner public service announcements, and online distribution of informational pieces called "news consumers can use."

The FTC coordinates with hundreds of private and public partners to provide information about specific promotions, products, and services. It continues to manage the consumer.gov Web site, which is linked with the interagency firstgov.gov Web site, which offers one-stop access to federal consumer information. The FTC continues to increase the federal agency partnership base for consumer.gov, with more than 180 agencies participating. In FY 2003, the FTC took the lead for the fifth consecutive year in organizing National Consumer Protection Week. This year's theme campaign was information security. Its partner organizers were the National Association of Consumer Agency Administrators, AARP, the National Consumers League, the Council of Better Business Bureaus, the Consumer Federation of America, the U.S. Postal Service, the U.S. Postal Inspection Service, the National Association of Attorneys General, and the Department of Justice.

To reach the expanding population of Hispanic consumers in the United States, the FTC instituted an Hispanic Outreach Program. This outreach effort included a dedicated Spanish-language page on the

FTC Web site and translations of more than 60 consumer publications, including 32 publications during FY 2003.

### **Performance Measure and Results**

The FTC gauges the impact of its education efforts by tracking the number of consumer and business education publications it distributes to the public in response to consumer requests. Ideally, the agency would like to measure the extent to which its educational materials improve consumer understanding and help them get better value for their money. This effect would be extremely difficult to measure, but tracking the distribution of publications provides a rough idea of how many consumers believe its information will prove useful. In FY 2003, the FTC exceeded its goal of 14 million publications by distributing 28 million publications.

In FY 2003, the FTC established two new performance measures to report the annual number of education publications distributed to or accessed electronically by consumers relating to identity theft, and the annual number of Spanish-language publications distributed to or accessed electronically by consumers. The FTC distributed 3.0 million publications related to identity theft, exceeding its goal of 2.5 million. The FTC also distributed 458,000 Spanish-language publications. Since the Hispanic Outreach program is relatively new and publications have been translated into Spanish only recently, no target was established for FY 2003. The FY 2003 actual number will be used to establish the target in future fiscal years.

## Performance Assessment and Future Trends

The FTC seeks to alert as many consumers as possible to the telltale signs of fraud, deception, and unfair business practices, and other critical consumer protection issues. Use of the Internet to disseminate information about fraud and technology-related matters plays an integral role in the FTC's education, deterrence, and enforcement efforts, permitting the agency to reach vast numbers of consumers and businesses quickly, simply, and at low cost.

The measure of the number of publications distributed by the FTC indicates its impact in educating consumers, although it does not fully capture the millions of FTC publications that are distributed to consumers by others. While the number of print publications the FTC distributed remained relatively static, the number of publications accessed through the Internet soared as more consumers and businesses go online. In 1996, the agency distributed only 140,000 publications online. In FY 2003, it distributed 22.6 million through its Internet Web site alone. These numbers illustrate the Internet's coming of age as a mainstream medium and highlight its usefulness in any large-scale educational campaign. Consequently, the FTC will increase its use of the Web site, <http://www.ftc.gov>, and the multi-agency Web site, <http://www.consumer.gov>, to reach consumers, businesses, law enforcement officials, and the media more efficiently and effectively.

In FY 2004, the FTC will continue to focus consumer and business education efforts on subjects identified by its consumer complaint databases where information gaps cause the greatest injury, such as

globalization, Internet scams, fraudulent schemes, and identity theft. In the privacy area, it will use an approach that has proven successful in the past by establishing an outreach program to increase consumer awareness of and business compliance with the privacy information required by the Gramm-Leach-Bliley Act. The FTC will continue to creatively use technology, including new interactive media, to extend the reach of consumer and business education. Also, as highlighted by its new performance measures, the agency will continue to focus outreach in the identity theft arena and its efforts to reach the nation's growing Hispanic population. The FTC will continue to work to identify and educate underserved consumer groups to help protect them from becoming victims of fraud.

## Goal 2: Prevent Anticompetitive Mergers and Other Anticompetitive Business Practices in the Marketplace

Competition among sellers in an open marketplace gives consumers the benefit of lower prices, higher quality products and services, maximum choice, and innovation leading to beneficial new products and services. Anticompetitive mergers and business conduct that diminishes competition deny consumers these benefits, and are illegal under the antitrust laws. Thus, the FTC's goal is to promote vigorous competition by applying the antitrust laws to: (1) prevent anticompetitive mergers; and (2) stop business practices that diminish competition, such as agreements among competitors about prices or other aspects of competition (referred to as nonmerger enforcement). The agency applies three related objectives to achieve this broad-reaching goal.

- Identifying anticompetitive mergers and practices that cause the greatest consumer injury.
- Stopping anticompetitive mergers and practices through law enforcement.
- Preventing consumer injury through education.

First, the FTC staff identify mergers and business practices that have resulted in or are likely to result in anticompetitive effects by conducting thorough factual investigations and applying economic analysis to distinguish between actions that threaten the operation of free markets and those that are benign or procompetitive. This step is critical because a merger or business practice may be either neutral, beneficial (by enabling sellers to be more efficient

and pass those savings along to consumers), or harmful (by enabling sellers to reduce the output of their product and raise the price to consumers). Thus, indiscriminate or ill-considered intervention in the marketplace may do more harm than good.

Second, once the FTC identifies a harmful or potentially harmful merger or business practice, it takes enforcement action under the antitrust laws to stop it, either through an administrative challenge or in federal court. In many instances, the agency is able to reach a consent agreement that remedies its competitive concerns and avoids litigation.

Third, the FTC seeks to prevent anticompetitive activity by educating businesses and consumers about the antitrust laws and its efforts to ensure competitive markets. Increased knowledge and understanding facilitate businesses' efforts to comply with the law, and enable consumers to identify anticompetitive activity more readily and bring it to the FTC's attention for possible enforcement action.

### Objective 2.1: Identify Anticompetitive Mergers and Practices That Cause Consumer Injury

The first step in preventing anticompetitive mergers and anticompetitive business conduct is determining which mergers and business practices are anticompetitive.

## Strategies

The FTC seeks to identify anticompetitive mergers and practices with as much accuracy as possible, because both under- and over-enforcement can harm consumers' interests. Thus, the agency seeks to undertake enforcement action against transactions or conduct that harms consumers, but at the same time, avoids taking enforcement action that prevents businesses from completing transactions or engaging in practices that fundamentally benefit consumers. The agency also tries to accomplish this task as efficiently as possible so that it can devote the bulk of its resources to further investigation of and possible challenge to the most problematic mergers and practices. A collateral, but important, consideration is to conduct the inquiry in a way that minimizes the cost or inconvenience to businesses.

The premerger notification requirements of the Hart-Scott-Rodino (HSR) Act are the agency's primary means for identifying potentially anticompetitive mergers, acquisitions, and joint ventures (collectively referred to as mergers). The HSR Act requires companies to report certain proposed mergers to the FTC and Department of Justice (which jointly enforce the HSR Act), and wait for a specified period (usually 30 days) to allow antitrust review.

The FTC's staff carefully examine each transaction reported under HSR to determine whether it poses a threat to competition. The agency seeks to identify as many of the competitively harmless transactions as possible within the initial waiting period, both to conserve resources and to minimize the delay imposed on businesses by the HSR requirements. In most cases, the staff can make a reasonable judgment

about whether a merger has the potential to be anticompetitive or not after an initial screening based on materials filed with the HSR notification. The agency may authorize a more extensive investigation of transactions that raise more difficult questions. Under the HSR Act, the agency may issue a formal request for additional information from the parties (a "second request"), which extends the initial waiting period. Because of the typical scope and complexity of the issues, and the fact that the HSR statute permits only one request for additional information relating to a transaction, an investigation extended by the issuance of a second request almost always requires a significant investment of resources by both the agency and the parties.

Most HSR transactions raise no antitrust issues, and the antitrust agencies permit these to proceed. Together, the FTC and the Department of Justice Antitrust Division issued second requests in less than 5 percent of reported mergers in FY 2003. Moreover, the enforcement agencies frequently complete the initial screening in less time than is allowed under the HSR Act. In these instances, the government grants "early termination" of the HSR waiting periods, allowing transactions to go forward more quickly. Approximately 63 percent of filed transactions received early termination in FY 2003.

Amendments to the HSR Act, effective in 2001, modified the criteria governing when the reporting requirement applies. Thus, the antitrust agencies now receive fewer formal notifications of proposed mergers under the HSR Act. This change in HSR filing thresholds did not change the standard of legality under the antitrust laws, however. While the vast majority of poten-

tially problematic mergers continue to be subject to the revised HSR filing requirements, smaller merger transactions may still be anticompetitive. Consequently, the agency now devotes more effort to identifying non-reportable mergers that may harm (or may have harmed) competition. This effort involves monitoring the trade press, industry sources, and the Internet to stay informed of industry developments; following up on case leads from congressional offices, other Executive Branch agencies, and state and local governments; and encouraging consumers, businesses, and the bar to notify the FTC of possibly anticompetitive mergers. Consistent with this increased focus, more than a quarter of the agency's merger enforcement actions in FY 2003 involved transactions not subject to HSR reporting requirements.

In FY 2003, even though the FTC had fewer mergers to review compared to recent fiscal years, the volume of merger activity remained significant by historical standards and the agency examined a number of very large and complex transactions. Antitrust review of large transactions, such as the \$60 billion merger of Pfizer, Inc. and Pharmacia Corporation reviewed by the FTC this fiscal year, is invariably much more complex and time consuming than is the case for smaller transactions. Large, multifaceted transactions are more likely to raise antitrust issues, and those issues may involve a number of separate product and geographic markets, each requiring separate analysis. For example, from FY 1999 to FY 2003, the FTC's review of 17 grocery retailing and petroleum industry mergers required examination of the mergers' competitive effects in 305 separate markets, an average of nearly 18 markets per transaction. The agency opened more merger investigations in FY

2003 than in FY 2001 or FY 2002, perhaps foreshadowing an upswing in merger activity in the coming fiscal years.

In the nonmerger area, agency staff review complaints received from consumers, businesses, congressional offices, and elsewhere to identify potentially anticompetitive nonmerger business practices. In addition to responding to complaints from the public, the FTC pursues a "positive agenda" of planned initiatives; that is, it takes a systematic and proactive approach to identifying specific conduct that is likely to pose the greatest threat to consumer welfare. Fundamentally, the focus is on the types of practices, such as agreements among competitors, that are most likely to harm consumers. Other relevant considerations include:

- Whether the relevant sector of the economy is one, such as health care or energy, that has a significant impact on consumers' daily lives;
- The deterrent effects of antitrust enforcement on businesses;
- Whether the FTC has enforcement experience in an area that will enable the agency to make an impact quickly and more efficiently; and
- Whether the matter presents an opportunity to contribute positively to the development of antitrust law.

Thus, in FY 2003, for example, the FTC brought several important nonmerger cases resulting from the work of two task forces focusing on substantive areas of law (the *Noerr-Pennington* and State Action doctrines). In addition, the agency has increased its focus on the health care sector

of the economy, which is of crucial importance to consumers. In addition to continuation of a lengthy series of hearings on antitrust in the health care sector, the agency obtained ten consent agreements and issued three administrative complaints in the health care area during FY 2003.

### **Performance Measures and Results**

The FTC used two performance measures to gauge how well it identified anticompetitive mergers and practices in FY 2003.

The first measure was the percentage of HSR second request investigations concluded during the fiscal year that ultimately resulted in enforcement action (i.e., consent agreements, administrative complaints, Commission authorizations to seek a preliminary injunction, and merger transactions abandoned after the FTC initiated an antitrust investigation). The goal for this measure was for at least 60 percent, but no more than 80 percent of second request investigations, to result in an enforcement action. The universe for this measure consists of investigations completed during the fiscal year, regardless of when the second request was issued, because second request investigations often extend beyond fiscal year boundaries. Matters ultimately resulting in enforcement action typically entail more investigation than those that do not, so limiting the universe to those transactions in which a second request was issued and the matter was concluded within the same fiscal year could skew the results by disproportionately excluding enforcement outcomes.

Meeting the minimum percentage set by the goal (60 percent) signifies that the agency effectively identified likely candidates for enforcement action during the

initial HSR waiting period. The upper bound of the target range on this measure is also important, though the rationale may be less clear. Because the need for enforcement is apparent from the beginning in many transactions, the agency could raise its percentage under this measure by setting overly rigorous standards – perhaps approaching certainty of a violation – for the issuance of second requests. However, such an approach would likely screen out some matters for which a fuller investigation would demonstrate the need for enforcement. Thus, a result approaching 90 or 100 percent on this measure would suggest that the agency potentially had failed to pursue some illegal mergers.

In FY 2003, the FTC took enforcement action in 70 percent (14 of 20) of the second request merger investigations concluded during the fiscal year, a slight increase over the 68 percent reported for both FY 2001 and FY 2002, and precisely at the midpoint of the desired range for this measure.

The FTC measured success in identifying possibly illegal conduct by counting the number of nonmerger investigations opened. While the mere opening of a formal investigation does not signal the presence of anticompetitive conduct, evidence and a viable legal/economic theory of consumer harm are prerequisites for opening investigations. The FTC's staff screen hundreds of allegations of illegal conduct each fiscal year, but few present sufficient grounds for formal investigation. Therefore, the number of investigations opened reflects the FTC's success in identifying conduct that may be anticompetitive, along with the level of resources available to devote to this area.

FY 2003 was successful in terms of identi-

fying anticompetitive conduct in the marketplace. Based on historical data, the FTC established a goal of opening 45 to 70 nonmerger investigations over the course of each fiscal year. The agency met this goal in FY 2003, opening 50 nonmerger investigations. These investigations, following 59 nonmerger investigations opened in FY 2002, reflect the greater proportion of resources devoted to litigating significant nonmerger matters identified and developed during the past two fiscal years.

### **Performance Assessment and Future Trends**

The issuance of a second request is a significant step in a merger investigation. Because the law permits only one second request, the FTC typically issues a very comprehensive request that calls for all relevant information on all possible issues in the investigation. Given the size of the parties involved and the necessarily broad scope of the inquiry, a response may consist of hundreds (or even thousands) of boxes of documents. Gathering and examining this material involves a major resource commitment by the parties and by FTC attorneys and economists. Moreover, the law prevents the parties from proceeding with the merger while this process is taking place. Consequently, a second request can sometimes result in significant delays in closing a transaction.

For all of these reasons, the FTC does not lightly issue a second request. In fact, it does as much as possible within the initial waiting period to determine which transactions pose no competitive threat, so that the truly benign mergers may proceed without the delay and expense of a second request. In FY 2003, for example, the FTC

issued second requests in less than 2 percent of the mergers reported under HSR. At the same time, it is far easier to remedy an anticompetitive merger *before* it is consummated, so the agency makes every effort to identify and give careful scrutiny to potentially harmful mergers during the HSR waiting period.

The first measure, the percentage of HSR second request investigations concluded during the fiscal year that ultimately resulted in enforcement action, reflects the balance between these two considerations. If the staff uses the initial HSR waiting period effectively, the agency should be able to “clear” the great majority of reported transactions, permitting them to go forward without further delay or burden. The FTC should also be able to isolate for more intensive investigation those transactions that could be harmful. While the initial screening process should permit as many benign transactions as possible to pass through, the focus should not be so narrow that only those transactions in which an antitrust problem is relatively obvious are subject to further investigation, while other transactions that may be similarly harmful, but in more subtle ways, can proceed unchallenged.

The result for FY 2003 (70 percent) indicates that the FTC issued second requests only when a violation was more likely than not. In fact, in each of the past three fiscal years, it was more than twice as likely as not that a second request would result in enforcement action. While the imposition of some burden on parties to benign transactions is inescapable, the agency has kept it to a minimal level. In FY 2003, parties to only six transactions (about 0.6 percent of all reported transactions) had to undergo the time and expense of a



second request production that ultimately demonstrated no violation.

The number of merger enforcement actions in FY 2003 is consistent with the numbers from earlier fiscal years, so there is no cause to question whether the presence of this measure affected agency decision-making. In FY 2003, the FTC took 21 merger enforcement actions, similar to the results for FY 2001 and FY 2002 (23 and 24 enforcement actions, respectively).

The number of new nonmerger investigations in FY 2003 reflects a continued shift in the makeup of the agency's caseload rather than a change in performance and the number of investigations, and is consistent with the renewed emphasis on nonmerger enforcement since 2001. During FY 2001 and FY 2002, following the decade-long merger wave of the 1990s, the FTC was able to devote increased attention to the nonmerger portion of its Maintaining Competition Mission. In particular, the FTC emphasized new case generation, since the demands imposed by merger activity in previous fiscal years had left few staff resources available to pursue nonmerger matters.

As a result of the renewed emphasis, the FTC opened 56 and 59 new nonmerger investigations, respectively, in FY 2001 and FY 2002. The agency's success in generating nonmerger investigations during the previous two fiscal years allowed it to focus instead on bringing many of those matters to completion in FY 2003, as discussed more fully below. Thus, the significant nonmerger enforcement accomplishments over the course of FY 2003 reflect the emphasis on nonmerger case generation during FY 2001 and FY 2002.

This performance measure provides useful, but limited, information about the agency's performance in identifying anticompetitive conduct. To assess its performance more comprehensively, the FTC will use a new performance measure, beginning in FY 2004, in lieu of the number of new nonmerger investigations. The new measure involves a ratio similar to that used to measure success in identifying anticompetitive mergers; that is, the FTC will compute the percentage of significant nonmerger investigations (those in which the Commission has authorized the use of its compulsory process authority) that ultimately result in enforcement action. Based on an assessment of past experience and the agency's best judgment, the initial goal will be a result of at least 60 percent but not more than 80 percent. As with mergers, a percentage below 60 percent may suggest that the FTC is targeting enforcement resources ineffectively by investigating too many competitively benign practices (and unduly burdening businesses as a result). A percentage higher than 80 percent may suggest that the agency is focusing too narrowly and thus potentially allowing problematic business practices to go forward without sufficient review.

**Objective 2.2: Stop  
Anticompetitive  
Mergers and Practices  
Through Law  
Enforcement**

Law enforcement represents the most direct method by which the FTC pursues its goal of stopping mergers and business practices that significantly threaten competition and harm consumers. In both merger and nonmerger enforcement, the FTC focuses primarily on transactions or prac-

tices most likely to harm consumers, that is, mergers of firms competing in the same market or markets, and agreements among direct competitors. Other activities, such as unilateral action by a single firm, or a merger or agreement involving a supplier and customers or between a firm and a potential competitor, also may threaten competition and are therefore subject to FTC scrutiny.

The FTC directs much of its attention and resources to segments of the economy that are particularly important to consumers and in which it has particular expertise. These include energy and natural resources, food, health care, consumer goods and services, pharmaceuticals, and technology.

## Strategies

To stop potentially anticompetitive mergers and practices through law enforcement, the FTC seeks legal remedies under the antitrust laws, through federal court action, administrative proceedings, or negotiated settlements. For mergers, the preferred – that is, the most effective and cost-efficient – strategy is to prevent anticompetitive mergers before they occur. The agency implements this strategy primarily through its authority to seek a federal court injunction preventing the transaction. In many cases, the merger parties elect not to defend a court challenge, and instead agree to resolve competitive concerns through a consent agreement. This approach is suitable when the competitive problem relates to only a portion of the transaction, so a divestiture of assets sufficient to preserve or restore competition will allow other, competitively neutral or beneficial aspects of the merger to go forward.

In other instances, the parties may abandon a transaction after assessing the likely outcome of an FTC court challenge. When a merger already has been consummated, the FTC generally relies on its internal administrative remedial powers to restore competition lost as a result of the merger. Administrative litigation seeking to restore competition following an alleged illegal merger likely will be more frequent in light of the revisions to HSR premerger filing thresholds.

In nonmerger matters, the FTC seeks to stop ongoing activity that harms competition. The Commission may initiate administrative proceedings before an Administrative Law Judge to adjudicate the issues and establish a basis for an order that the respondents (the parties to the proceeding) “cease and desist” the conduct. The FTC also has authority to seek relief in federal courts, though it uses this option sparingly in nonmerger matters. Again, the agency is often able to negotiate a consent agreement with the parties that remedies the problem without need for litigation.

In both merger and nonmerger matters, thorough investigation, as well as sophisticated legal and economic analysis, is of critical importance to ensuring accurate assessment of the potential for competitive harm resulting from the transaction or conduct in question and, if necessary, to demonstrating the likelihood of harm before an adjudicative body. When the FTC concludes that the likelihood of such harm indicates a law violation, and no settlement is possible, the Commission authorizes its staff to litigate the matter. The agency’s staff prepare thoroughly for litigation, whether before an Administrative Law Judge or in federal court. The high percentage of settlements in FTC antitrust cases

(or, in the case of mergers, the parties' abandonment of the anticompetitive transaction) results, in large measure, from the FTC's readiness to obtain the needed relief through litigation, if necessary.

The FTC has placed increasing emphasis on crafting remedies that will successfully eliminate the anticompetitive effects of the activity in question and do so in a timely fashion. As part of this strategy, the agency studies and evaluates the remedies used in past antitrust cases, particularly divestiture orders used to resolve merger cases. This ongoing process focuses on what makes divestiture orders most effective in preserving or restoring competition, and on how to expedite the completion of curative divestitures.

The FTC also studies current or emerging topics involving possible antitrust enforcement to develop policy positions. For example, in early FY 2003, the FTC's Bureau of Economics invited prominent experts to participate in a roundtable discussion entitled "Understanding Mergers: Strategy and Planning, Implementation and Outcomes." The roundtable helped the agency's staff to gain a better understanding of the mergers and acquisitions process from a corporate strategic perspective, as well as the factors that determine whether mergers succeed or fail. In addition, the FTC is conducting retrospective studies on cases involving hospitals, the oil industry, and branded consumer products. The learning derived from this and other research and development initiatives, besides facilitating selection of better cases with higher positive impact, provides important economic support that helps the agency succeed in the enforcement matters it pursues.

## Performance Measures and Results

The FTC has used three measures to document success in stopping potentially anticompetitive mergers and practices through law enforcement. These measures include: (1) the percentage of positive outcomes when the FTC challenges anticompetitive mergers and practices; (2) the estimated savings to consumers resulting from FTC merger enforcement efforts; and (3) the estimated savings to consumers resulting from FTC nonmerger enforcement efforts.

Economic theory and evidence demonstrate that competition results in lower prices, better quality, and more innovation in markets. Because successful enforcement of the antitrust laws protects competition and therefore promotes these consumer benefits, it is important that the FTC usually succeed when it challenges anticompetitive mergers and practices. Even if the agency successfully identifies an anticompetitive merger or practice, consumers derive no benefit unless it obtains a positive outcome – that is, appropriate relief, either through settlement or by persuading an adjudicator to order such relief.

Thus, the frequency with which the agency obtains positive outcomes is an important indicator of its success in producing tangible benefits for consumers. The FTC's goal is to obtain a positive result in at least 80 percent of the matters in which it determines that a merger or a course of conduct is anticompetitive. Positive results include the parties' abandonment of an anticompetitive transaction after antitrust concerns are identified, an administrative consent agreement to resolve antitrust concerns, or a successful challenge in court. A

negative result occurs when parties refuse to settle antitrust concerns raised by the agency and court action fails to achieve the agency's objectives.

This is not to say that the FTC, or any law enforcement agency, should win every case. Some cases involve very close questions, on which reasonable minds can and do differ. Other cases may be very difficult from a litigation standpoint, but still worth pursuing, and all of the FTC's antitrust challenges are defended by highly competent and well-financed counsel.

In addition, the FTC's responsibilities include taking action to help shape the development of the antitrust laws. Fulfillment of this duty requires occasionally litigating cases involving more than the usual degree of risk, such as where there is no clear precedent and the FTC is seeking to establish a new legal principle. In other instances, the FTC brings cases seeking to benefit consumers by clarifying, or perhaps improving upon, existing precedent. For example, the FTC now has several cases pending in administrative litigation that may provide an opportunity for clarification of the scope of the *Noerr-Pennington* and *State Action* doctrines, two exemptions to the antitrust laws that have increasing impact following court decisions that seemingly have broadened their reach. The FTC's mission includes bringing cases that highlight difficult issues such as these and seeking to persuade the courts of the merit of its views on what the law should be. Bringing cases that test the boundaries of the law is an important part of the FTC's responsibilities, even though the results are far from certain. Thus, the goal on this measure reflects the reality that, even when the agency brings a meritorious case and litigates it well, success is not assured.

Moreover, setting the standard too high could be detrimental if the effect were to deter the agency from bringing important, but risky, cases.

The agency exceeded its goal for this measure in FY 2003, achieving relief through litigation, reaching a successful settlement agreement, or persuading parties not to proceed with an anti-competitive acquisition in all 37 enforcement matters brought to conclusion during the fiscal year.

Antitrust enforcement saves consumers money by preventing price increases that likely would have occurred due to the loss of competition if an anticompetitive merger had gone forward unchallenged, or by stopping anticompetitive conduct that raises prices. In past years, the FTC estimated the dollar savings to consumers resulting from its enforcement actions by applying an arbitrary percentage to the volume of commerce in the affected markets (1 percent of the market, for two years in merger cases and for one year in non-merger cases) as a very rough proxy for the actual consumer benefit. As some stakeholders have noted, however, this methodology is flawed in certain respects. Accordingly, the agency will replace the two "consumer savings" measures beginning in FY 2004, as discussed below.

As noted in the FTC's FY 2000-2005 Strategic Plan, external factors, such as level of merger activity, may cause the results on the consumer savings measures to fluctuate significantly from fiscal year to fiscal year. In consideration, the goals for these measures were expressed in terms of aggregate targets for the five-year strategic plan period, rather than as yearly targets. Because these measures are

being replaced before the end of the original five-year period, the agency has adjusted the targets on a pro rata basis, based on three instead of five fiscal years. For merger enforcement, the adjusted target is \$2.4 billion in consumer savings over three fiscal years (based on the original target of \$4 billion over five fiscal years). The combined estimated consumer savings from FTC merger enforcement from FY 2001 through FY 2003 is over \$3.5 billion, which exceeds the target by 46 percent.

Nonmerger enforcement also benefits consumers by stopping anticompetitive activity that raises prices or restricts non-price competition. As with mergers, the FTC set a goal based on an aggregate target for the FY 2000-2005 period under the previous Strategic Plan. The adjusted target for this measure is \$600 million over three fiscal years (based on the original target of \$1 billion over five years). The combined estimated consumer savings from FTC nonmerger enforcement from FY 2001 through FY 2003 is \$454 million, somewhat lower than the adjusted target. Based on the upward trend on this measure, and the number of nonmerger investigations and cases currently pending, the FTC expects that it would exceed the original five-year performance target on this measure if it remained in use.

### **Performance Assessment and Future Trends**

In FY 2003, the FTC achieved a positive outcome in 100 percent of the challenges initiated by the agency (e.g., court orders in litigated cases and negotiated settlements), exceeding by a significant margin its goal of an 80 percent success rate. This level of success was due, in part, to the

high percentage of cases that were resolved through consent agreements, as well as a number of merger transactions abandoned by the parties who chose not to contest an FTC challenge. This does not diminish the accomplishment, however, because the FTC is more likely to obtain settlements when the parties anticipate that they are not likely to prevail in court. The FTC realistically does not expect to succeed in every litigated case every fiscal year, however. A law enforcement agency that prevails in every litigated matter may do so because it pursues only the cases that are easiest to win. Particularly given the FTC's responsibility to aid in antitrust policy development, it will sometimes undertake difficult cases with no clear precedent. Several matters involving difficult issues currently are pending in administrative litigation, and the outcome is uncertain in each instance. The FTC will continue to bring law enforcement actions where it has reason to believe that the merger or practice in question is unlawful and harms consumers, even where litigation risks may exist. Thus, in fiscal years in which litigated cases make up a larger proportion of the total number of resolved cases, the FTC's success rate may be closer to the target of 80 percent.

The pattern of consumer savings in FTC merger and nonmerger cases reinforces the point made in the FY 2000-2005 Strategic Plan about significant fluctuations in results based on external factors. Notably, about 70 percent of the estimated merger consumer savings over three fiscal years is attributable to only one fiscal year, FY 2001. That fiscal year came at the end of a period of unprecedented merger activity. One consequence, in addition to the very high estimated consumer savings resulting from FTC merger enforcement,

was a very modest level of nonmerger enforcement resulting from the necessary shift in resources from nonmerger to merger work. Thus, the estimated consumer savings for nonmerger cases was \$157 million in FY 2001 and \$86 million in FY 2002 (because very few nonmerger investigations had been initiated in prior fiscal years, when merger review dominated the agency's antitrust workload). In FY 2003, by contrast, following two fiscal years in which the agency's investment in developing nonmerger matters rose sharply, the estimated nonmerger consumer savings was \$211 million.

What these results indicate, besides the fluctuation in results between fiscal years even with comparable levels of effort and success, is the tradeoff between merger and nonmerger enforcement. For this reason, it perhaps is more useful to look at the combined results of merger and nonmerger enforcement as a gauge of the agency's overall antitrust activity. During the period FY 2001 through FY 2003, the total consumer savings attributable to FTC merger and nonmerger enforcement was \$3.95 billion, nearly 32 percent higher than the adjusted combined target of \$3 billion.

As noted above, the FTC concluded, after careful study, that the disadvantages of the consumer savings measures outweigh their advantages. Among the difficulties was the implied precision in the estimates, suggesting a greater degree of accuracy in measuring consumer benefit than realistically is possible. A related difficulty involves the assumptions implicit in these measures. For example, the measures reflect an implicit assumption that every agency enforcement decision is correct, for purposes of the consumer savings measures. This assumption is problematic, however,

because merger enforcement involves making predictions about the future performance of markets under complex alternative scenarios. While the FTC's predictions are informed by broad knowledge about economic theory, as well as intensive investigation into the transactions and relevant market(s) in question, the process nevertheless requires the agency to make predictions and, thus, is subject to error. In short, the consumer savings estimate always has been a prediction of the effects that the agency hoped its actions would have, rather than an evaluation of the actual effects of those actions.

Beginning in FY 2004, the FTC will replace the consumer savings measures with new indicators that also seek to reflect the scope of antitrust enforcement activities, but without attempting to quantify the specific benefit to consumers. For both merger and nonmerger enforcement, the FTC will measure the volume of commerce in markets in which it takes enforcement action. Because external factors may cause the results to fluctuate significantly from fiscal year to fiscal year, the targets are expressed in terms of an aggregate target for the five-year strategic plan period, rather than as yearly figures. These measures should provide a very similar indicator of the scope of FTC antitrust enforcement activity, but will not include the troublesome aspects of the previous consumer savings measures.

### **Objective 2.3: Prevent Consumer Injury Through Education**

In addition to its law enforcement activity, the FTC provides substantial information to the business community and consumers about the role of antitrust laws, and busi-

nesses' obligations under those laws.

## Strategies

The FTC uses education and outreach to help prevent consumer injury, increase business compliance, and augment its law enforcement efforts. The agency pursues this strategy through guidance to the business community; outreach efforts to federal, state, and local agencies, business groups, and consumers; development and publication of antitrust guidelines, policy statements, and reports; and speeches and testimony. By using these mechanisms to signal its enforcement policies and priorities, the FTC deters would-be violators of the antitrust laws.

FTC law enforcement efforts also are made more effective by public awareness of what types of conduct are likely to be challenged as law violations. Through press releases about FTC actions and publication of related materials on the agency Web site, the public facts underlying FTC actions provide bases for companies to evaluate the likelihood that other transactions likely would face challenge.

In addition, the FTC educates the public through guidelines; congressional testimony (such as testimony on gasoline pricing and competition in the pharmaceutical industry); conferences, hearings, and workshops (such as the series of hearings on the interrelationship between antitrust and intellectual property law, a second conference on factors contributing to the price of refined petroleum products, and hearings on health care and competition law and policy); advisory opinions (addressing issues such as the scope of the Nonprofit Institutions Act); and reports (such as the FTC staff's study on sale of

wine via the Internet).

As a complement to FTC enforcement activity, the agency also advises other federal and state government officials about the possible effect that various regulatory proposals may have on competition. By providing economic analysis and other informed guidance, the FTC can help policymakers better understand the impact of their decisions in creating, maintaining, or forestalling competitive markets. The FTC has a long and distinguished history in this area. Currently, the FTC advocates market-based solutions through the publication of studies and reports, as well as participation in state and federal legislative and regulatory forums. The agency also participates as an *amicus curiae* (friend-of-the-court) in judicial proceedings when the FTC's involvement can help remove protectionist regulations, when substantial questions of antitrust law are involved, or when the FTC can add a different perspective to the deliberations because of special knowledge or experience.

Finally, the FTC seeks to make its law enforcement presence visible and its enforcement policies transparent in order to serve its objectives through deterrence. Each successful enforcement action not only promotes competition in specific market(s), but also serves to communicate to the business and legal communities that the FTC can and will move successfully to challenge the type of merger transaction or conduct at issue. The agency explains the relevant facts and issues of cases in which it obtains a consent agreement in press releases and in published "Analyses To Aid Public Comment" so the nature of the problem is clear. In addition, the FTC has sought to provide greater transparency concerning its decision-making by issuing

statements explaining why it declined to take action in merger investigations of significant public interest. More generally, the Bureau of Competition and Economics each have released materials describing investigational procedures and methods of analysis.

Opinions issued by the Commission in adjudicative matters not only serve as legal precedent, but also help to explain in depth the FTC's policies and their underlying rationale. For example, in an adjudicative decision issued during FY 2003, the Commission described the analytical framework it will employ for defining the bounds of acceptable collaboration between direct rivals – including joint ventures and price fixing agreements.<sup>1</sup> The Commission's opinion "synthesized" the applicable case law and sought to eliminate confusion resulting from differing interpretations of common antitrust labels by establishing a sliding scale approach.

As of the end of 2003, ten antitrust matters were in administrative proceedings, far more than at any time in the past two decades. Each will provide an opportunity for the FTC to set out in detail its analysis of important legal issues. Understanding fully what kinds of transactions or conduct the FTC is likely to challenge, and why, greatly facilitates antitrust lawyers' counseling of their clients, and prevents many anti-competitive mergers from being proposed or anti-competitive practices from being implemented.

---

<sup>1</sup> Polygram Holding, Inc., et al., Docket 9298 (July 28, 2003).

## Performance Measures and Results

In FY 2003, the FTC advised the public on its enforcement decisions by:

- Issuing press releases and related documents describing enforcement actions and other significant non-enforcement activities;
- Issuing public explanations of its reasons not to take enforcement action in appropriate instances to increase transparency in decision-making;
- Studying and reporting, consistent with its historic role, on significant policy issues and competitive conditions in particular markets;
- Responding to requests from other government entities for advice on the implications for competition and consumers of proposed regulatory actions;
- Appearing before business, bar, and consumer groups, as well as before congressional committees, to address competition-related subjects; and
- Maintaining effective coordination and liaison with foreign competition authorities.

The FTC uses two performance measures to assess its public education efforts: (1) the number of initiatives, including speeches, testimony, reports, policy statements, etc., taken to educate the public during the fiscal year; and (2) the number of times that members of the public visit antitrust-related content on the FTC's Web site. Since the FTC publishes virtually all significant public documents on its Web site, the number of "hits" on antitrust



content is a good indicator of the quantity of information provided to the public, as well as its quality (because visitors will stay longer and return more often if the information is helpful).

In FY 2003, agency representatives undertook 306 antitrust outreach efforts, including speeches, testimony, written comments on regulatory proposals, policy statements, etc., an increase of 7 percent over FY 2002. Notably, FTC representatives presented congressional testimony or major speeches on topics such as competition in the pharmaceutical industry, legal restrictions on the development of e-commerce, new economic arguments and evidence in antitrust investigations, and health care and competition law and policy in the 21<sup>st</sup> century. The agency also issued a lengthy report analyzing and making recommendations on the State Action doctrine and a study on the impact of state laws restricting Internet sales of wine. Competition advocacy filings submitted by the agency in FY 2003 addressed competition in markets for legal services, gasoline, electricity, and natural gas, and the agency also released a number of advisory opinions providing guidance on the legality of proposed actions by health care providers.

The FTC makes all of its reports, speeches, competition advocacy filings, advisory opinions, and other similar materials readily available to the public via its Web site. The agency also regularly publishes press releases announcing its antitrust law enforcement actions, with links to significant underlying documents providing ample detail. This collection of material serves as an invaluable resource for businesses, antitrust lawyers, academic scholars, and consumers seeking to learn more about the FTC's maintaining competi-

tion efforts. The Web site recorded over 10 million hits on antitrust-related content in FY 2003, more than double the number reported in FY 2002, and nearly 40,000 hits each business day. Although some of the increase may result from increased overall use of the Internet as an information resource, this level of information dissemination reflects significant public interest in the FTC and its Maintaining Competition Mission. Moreover, the broad distribution of FTC educational and policy materials represents a significant leveraging of the resources devoted to the FTC's antitrust enforcement work.

### **Performance Assessment and Future Trends**

As described above, the FTC's public education efforts take many different forms, and thus are not fully revealed by the summary statistics. The FTC is strongly committed to the importance of education and outreach and will continue to place emphasis on and expand its activities in this area in future fiscal years.

The FTC fills two educational roles in the Maintaining Competition Mission. First, education serves to leverage the FTC's enforcement resources by explaining the scope of the antitrust laws, demonstrating that the FTC is active in bringing enforcement actions against certain types of mergers and practices, and signaling future enforcement intentions – all of which serve to deter harmful marketplace activity. Just as citizens benefit from the effect of the local “cop on the beat” in deterring crime, consumers ultimately benefit when the FTC makes its presence visible. As noted by the American Bar Association Section of Antitrust Law, “private compliance efforts are a critical prophylactic against anti-

competitive behavior, and the effectiveness of private compliance efforts is directly affected by the nature and clarity of the communication of enforcement priorities.”<sup>2</sup>

Second, the FTC has a unique set of tools and capabilities for analyzing important policy issues and conveying information about competition policy to a larger community, including, on occasion, issues over which the FTC has no direct authority. As one example of the value of FTC analysis and information dissemination efforts, the Food and Drug Administration relied significantly on an FTC report entitled “Generic Drug Entry Prior to Patent Expiration” to support new rules, issued in June 2003, designed to foster competition in the pharmaceutical industry.

Although the number of public outreach efforts in written or oral form does not directly relate to outcomes in the marketplace, evidence nevertheless indicates that success in communicating enforcement priorities has a strong impact on the level of anticompetitive activity taking place. The agency has determined after careful examination, however, that the current performance measure does not effectively measure its performance in this area. The various items counted are not of equal weight. For example, a successful amicus brief persuading a court to adopt a pro-consumer position likely will have far more impact than a speech simply recounting past actions before a small group, yet no effective way of distinguishing among different efforts has been identified. Sec-

ond, measurements of activities, such as the number of speeches given, may indicate the level of effort put toward an objective, but not the agency’s effectiveness in accomplishing it.

With the importance of the Internet as a vital source of information in today’s society, the number of “hits” on antitrust education and outreach material on the FTC’s Web site is a more meaningful indicator of FTC success in educating those who influence policy, as well as the general public, and in stimulating public interest in the agency’s work. Use of the Internet to disseminate information about antitrust and other competition-related matters plays an integral role in the FTC’s education and deterrence efforts, permitting the agency to convey a wealth of information quickly, simply, and inexpensively to the business, legal, and regulatory communities, and to consumers. This measure more directly reflects the FTC’s effectiveness because it measures outcomes based on the agency’s constituencies’ assessment of the utility of the agency’s published materials. That is, the level of activity on the FTC Web site depends to a large degree on the scope, utility, and reliability of the information made available there. People will revisit the site to the extent that what they find there is of value. Matters that are of great importance to the public – as determined by the public – will draw a large number of visitors. But if the material presented is irrelevant, difficult to understand, or misleading, then interest in the site inevitably will diminish.

Because the FTC’s prevention objective has two different components – (1) educating the legal and business communities about applicable legal standards and enforcement policies to facilitate compli-

---

<sup>2</sup> American Bar Association Section of Antitrust Law, *The State of Federal Antitrust Enforcement - 2001*, 11 (Jan. 2001).

ance with the law; and (2) educating the public in general, as well as policymakers, about the benefits of competition – the FTC will use two new measures, beginning in FY 2004. The new measures will be based on the level of traffic on pages on the FTC’s Web site relevant to each of the two components.

**Fiscal Year 2003 Performance Measures**  
as of September 30, 2003

**Consumer Protection Mission**

<b>Goal 1: Prevent fraud, deception, and unfair business practices in the marketplace.</b>			
	<b>FY 2003 Target</b>	<b>FY 2003 Actual</b>	<b>Percent Accomplished</b>
Objective 1.1: Identify fraud, deception, and unfair practices that cause the greatest consumer injury.			
Measure 1.1.1: Annual number of consumer complaints and inquiries entered into database.	450,000	944,000	210%
Measure 1.1.2: Annual number of consumer complaints and inquiries related to identity theft entered into database.	155,000	321,000	207%
Objective 1.2 -- Stop fraud, deception and unfair practices through law enforcement:			
Measure 1.2.1: Dollar savings for consumers from FTC actions which stop fraud and deception.	\$400 million	\$606.3 million	152%
Measure 1.2.2: Number of data searches conducted by FTC and law enforcement personnel of the FTC's Consumer Sentinel database.	20,000	27,685	138%
Measure 1.2.3: Number of data searches by law enforcement personnel of the FTC's identity theft database.	1,400	2,167	155%
Objective 1.3 -- Prevent consumer injury through education:			
Measure 1.3.1: Total number of education publications distributed to or accessed electronically by consumers.	14 million	28 million	200%
Measure 1.3.2: Number of education publications related to identity theft distributed to or accessed electronically by consumers.	2.5 million	3.0 million	120%
Measure 1.3.3: Number of Spanish-language education publications distributed to or accessed electronically by consumers.	establish baseline	458,000	n/a

## Maintaining Competition Mission

<b>Goal 2: Prevent anticompetitive mergers and other anticompetitive business practices in the marketplace</b>			
	<b>FY 2003 Target</b>	<b>FY 2003 Actual</b>	<b>Percent Accomplished</b>
Objective 2.1 -- Identify anticompetitive mergers and practices that cause the greatest consumer injury.			
Measure 2.1.1: Percent of HSR second requests resulting in enforcement action.	60-80%	70%	n/a
Measure 2.1.2: Number of nonmerger investigations opened per fiscal year.	45-70	50	n/a
Objective 2.2 -- Stop anticompetitive mergers and practices through law enforcement :			
Measure 2.2.1: Positive outcome of cases brought by FTC due to alleged violations.	80%	100%	n/a
Measure 2.2.2: Dollar savings for consumers resulting from FTC actions.	\$800 million	\$292 million	37%
Measure 2.2.3: Dollar savings for consumers resulting from FTC actions stopping anticompetitive nonmerger activity.	\$200 million	211 million	101%
Objective 2.3 -- Prevent consumer injury through education			
Measure 2.3.1: Quantify number of education and outreach efforts.	establish baseline	306	n/a
Measure 2.3.2: Quantify number of hits on antitrust information of FTC Web.	establish baseline	over 10 million	n/a