

FEDERAL TRADE COMMISSION (FTC)**Statement of Regulatory Priorities****I. REGULATORY PRIORITIES***Background*

The Federal Trade Commission (FTC or Commission) is an independent agency charged with protecting American consumers from “unfair methods of competition” and “unfair or deceptive acts or practices” in the marketplace. The Commission strives to ensure that consumers benefit from a vigorously competitive marketplace. The Commission’s work is rooted in a belief that free markets work — that competition among producers and information in the hands of consumers bring the best products at the lowest prices for consumers, spur efficiency and innovation, and strengthen the economy.

The Commission pursues its goal of promoting competition in the marketplace through two different, but complementary, approaches. First, for competition to thrive, curbing deception and fraud is critical. Through its consumer protection activities, the Commission seeks to ensure that consumers receive accurate, truthful, and non-misleading information in the marketplace. 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 anticompetitive business practices. Thus, the second part of the Commission’s basic mission—antitrust enforcement—is to prohibit anticompetitive mergers or other anticompetitive business practices without unduly interfering with the legitimate activities of businesses. These two complementary missions make the Commission unique insofar as it is the Nation’s only Federal agency to be given this combination of statutory authority to protect consumers.

The Commission is, first and foremost, a law enforcement agency. It pursues its mandate primarily through case-by-case enforcement of the Federal Trade Commission Act and other statutes. The Commission, however, is also charged with the responsibility of issuing and enforcing regulations under a number of statutes. Pursuant to the FTC Act, for example, the Commission currently has in place thirteen trade regulation rules. The Commission also has adopted a number of voluntary industry guides. Most of the regulations and guides pertain to consumer protection matters and are generally intended to ensure that consumers

receive the information necessary to evaluate competing products and make informed purchasing decisions.

Industry Self-Regulation, Textile Leniency Policy, and Compliance Partnerships With Industry

The Commission continues to be committed to protecting consumers by means that burden businesses the least. To that end, it has encouraged industry self-regulation, developed a corporate leniency policy for certain rule violations, and established compliance partnerships where appropriate.

The Commission has issued reports that encourage industry self-regulation in several areas. In the entertainment industry, the Commission has encouraged industry groups to improve their self-regulatory programs to discourage the marketing of violent R-rated movies, Mature-rated electronic games and music labeling with a parental advisory to children. Recently, the Commission issued the latest of a series of reports on industry practices. The Commission recommended in its report that all three industries continue to improve compliance with existing ad placement guidelines and rating information practices and consider developing ‘best practices’ to avoid advertising in venues popular with teen audiences. See Federal Trade Commission, *Marketing Violent Entertainment to Children: A Fourth Follow-Up Review of Industry Practices in the Motion Picture, Music Recording & Electronic Game Industries* (July 2004), <http://www.ftc.gov/os/2004/07/040708kidsviolencecrpt.pdf>. During the fall of 2003, the Commission sponsored a one-day workshop bringing together industry and parent and consumer groups to discuss the state of industry self regulation. See <http://www.ftc.gov/bcp/workshops/violence/index/html>. The Commission also continues to encourage companies in the alcohol industry to engage in self-regulation to ensure that advertising for products containing alcohol is not directed at underage youths. This year, the Commission will work with industry to facilitate compliance with the improved self-regulatory standards announced in the FTC’s report, *Alcohol Marketing and Advertising* (Sept. 2003), <http://ftc.gov/os/2003/09/alcohol08report.pdf>.

In addition, in the weight-loss product advertising area, the Commission has proposed a strengthened self-regulatory response from the industry and more media responsibility to address the widespread

problem of blatantly false efficacy claims. Specifically, the Commission authorized the release of a media reference guide to assist media in identifying facially false weight-loss claims. Federal Trade Commission Staff, *Red Flag: A Reference Guide for Media on Bogus Weight Loss Claim Detection* (2003), available at: <http://www.ftc.gov/bcp/online/pubs/buspubs/redflag.pdf>. In addition, the FTC has supported a joint effort by the Electronic Retailing Association and the National Advertising Review Council to develop a self-regulatory, rapid review process to identify unsubstantiated claims in direct response to advertisements, such as infomercials.

Also, with respect to the Children’s Online Privacy Protection Act (COPPA), the Commission has approved the safe harbor programs of three organizations whose self-regulatory guidelines and programs protect children’s privacy to the same or greater extent as COPPA.

Recently, the Commission announced the Textile Corporate Leniency Policy Statement for minor and inadvertent violations of the Textile or Wool Rules that are self-reported by the company. 67 FR 71566 (Dec. 2, 2002). Generally, the purpose of the Textile Corporate Leniency Policy is to help increase overall compliance with the rules while also minimizing the burden on business of correcting (through relabeling) inadvertent labeling errors that are not likely to cause injury to consumers. Under this policy, the Commission announced the factors that staff will consider in allowing the mislabeled goods to be sold without relabeling. The policy follows the Commission’s Civil Penalty Leniency Program for small businesses, but is not limited to small businesses or situations involving civil penalties and excludes fraud cases. Since the Textile Corporate Leniency Program was announced, 25 companies have been granted “leniency” for self-reported minor violations of FTC textile regulations.

The Commission has also engaged industry in compliance partnerships in at least two areas involving the funeral and franchise industries. Specifically, the Commission’s Funeral Rule Offender Program, conducted in partnership with the National Funeral Directors Association, is designed to educate funeral home operators found in violation of the requirements of the Funeral Rule, 16 CFR part 453, so that they can meet the rule’s disclosure requirements. Approximately 215 funeral homes have participated in the program since its inception in 1996. In

addition, the Commission established the Franchise Rule Alternative Law Enforcement Program in partnership with the International Franchise Association (IFA), a nonprofit organization that represents both franchisors and franchisees. This program is designed to assist franchisors found to have a minor or technical violation of the Franchise Rule, 16 CFR part 436, in complying with the rule. Violations involving fraud or other section 5 violations are not candidates for referral to the program. The IFA teaches the franchisor how to comply with the rule and monitors its business for a period of years. Where appropriate, the program will offer franchisees the opportunity to mediate claims arising from the law violations. Since December 1998, fourteen companies have agreed to participate in the program.

New Rulemakings Required by Statute

Since the Commission's 2003 Regulatory Plan was published, the Congress enacted several laws requiring the Commission to undertake rulemakings and studies. These include at least 25 new rulemakings and eight studies required by the Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159 (FACTA or the FACT Act); the rulemaking and study required by the Fairness to Contact Lens Consumers Act of 2003, Pub. L. No. 108-64; the rulemakings and reports required by the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003, Pub. L. No. 108-187 (CAN-Spam Act); and the rulemaking pursuant to the Federal Deposit Insurance Corporation Improvements Act of 1991, Pub. L. 102-242. These rulemakings are proceeding according to schedule and are detailed more extensively in the *Unified Agenda*.

Ten-Year Review Program

In 1992, the Commission implemented a program to review its rules and guides regularly. The Commission's review program is patterned after provisions in the Regulatory Flexibility Act, 5 USC 601-612. Under the Commission's program, however, rules have been reviewed on a ten-year schedule as resources permit. For many rules this has resulted in more frequent reviews than is generally required by section 610 of the Regulatory Flexibility Act. This program is also broader than the review contemplated under the Regulatory Flexibility Act, in that it provides the Commission with an ongoing systematic approach for seeking information about the costs and benefits of its rules and guides and whether there are changes

that could minimize any adverse economic effects, not just a "significant economic impact upon a substantial number of small entities." 5 USC 610. The program's goal is to ensure that all of the Commission's rules and guides remain beneficial and in the public interest. It complies with the Small Business Regulatory Enforcement Act of 1996, Pub. L. 104-121. This program is consistent with the Administration's "smart" regulation agenda to streamline regulations and reporting requirements and Section 5(a) of Executive Order 12866, 58 FR 51735 (Sept. 30, 1993).

As part of its continuing ten-year plan, the Commission examines the effect of rules and guides on small businesses and on the marketplace in general. These reviews often lead to the revision or rescission of rules and guides to ensure that the Commission's consumer protection and competition goals are achieved efficiently and at the least cost to business. In a number of instances, the Commission has determined that existing rules and guides were no longer necessary nor in the public interest. As a result of the review program, the Commission has repealed 48 percent of its trade regulation rules and 57 percent of its guides since 1992.

Calendar Year 2004-05 Reviews

All of the matters currently under review pertain to consumer protection and are intended to ensure that consumers receive the information necessary to evaluate competing products and make informed purchasing decisions. During early 2004, the Commission published a revised timetable for its regulatory review program deferring all review for one year because of ongoing review proceedings as well as the addition of at least 27 rulemakings required by new legislation. 69 FR 3867 (Jan. 27, 2004). In January 2005, the Commission plans to publish a notice announcing the new rules and guides, if any, that will be reviewed during 2005.

Ongoing Reviews

As part of the Commission's ten-year review program, in 2003 the Commission continued reviews of eight rules, two guides, and one interpretation. It is expected that during the spring of 2005, the Commission will issue separate notices requesting comments both on the Statement of General Policy or Interpretations under the Fair Credit Reporting Act (also known as FCRA Commentary) and for the Guides Concerning the Use of Endorsements and Testimonials in

Advertising. Other reviews are proceeding.

First, with respect to the Premerger Notification and Report Form, the Commission issued a Notice of Proposed Rulemaking (NPRM) to reconcile, as far as practical, the current disparate treatment of corporations, partnerships, limited liability companies, and other types of non-corporate entities under the rules. See 69 FR 18686 (Apr. 8, 2004). The staff expects to forward its recommendation about this issue to the Commission by the end of 2004 or early 2005. In the same time frame, the Commission anticipates amending the Hart-Scott-Rodino Rules to allow parties to file the premerger notification and report form electronically via the Internet.

Second, in the review of the Franchise Rule, 16 CFR part 436, the Commission announced on August 25, 2004, the issuance of a staff report, "*Disclosure Requirements and Prohibitions Concerning Franchising*," which summarizes the rulemaking record to date, analyzes the various alternatives, and sets forth the staff's recommendations to the Commission on the various proposed amendments to the Franchise Rule, 69 FR 53661 (Sept. 2, 2004). Among other things, staff proposes that the Commission retain the Franchise Rule while updating it to account for new technologies and to provide prospective franchisees with more disclosure about the nature of the franchise relationship, while minimizing the discrepancies between Federal and State law. Public comments are being accepted until November 12, 2004. Staff will review the comments and anticipates sending its recommendation to the Commission in late 2005. The Commission did not review or approve the staff report.

Third, in the review of the R-Value Rule for home insulation, 16 CFR part 460, the Commission reviewed the comments received on the Advance Notice of Proposed Rulemaking (ANPRM) and issued an NPRM, which announced a number of proposed amendments to the rule. 68 FR 41872 (July 15, 2003). After assessing the public comments, staff expects to forward its recommendation to the Commission regarding substantive amendments to the rule by late 2004.

Fourth, for the rulemaking on Privacy of Consumer Financial Information, 16 CFR part 313, the Commission and banking agencies published an ANPRM and requested public comments on a variety of subjects including the goals, language, and mandatory or permissible

aspects of privacy notices. 68 FR 75164 (Dec. 30, 2003). Since the issuance of rules in 2000 in accordance with Gramm-Leach-Bliley Act, 15 USC 6801 *et seq.*, requirements that financial institutions provide notice of their privacy policies to their customers, the agencies have been trying to develop more useful privacy notices to consumers. The comment period for the ANPRM ended on March 26, 2004. Staff for the agencies are reviewing comments and continuing to work together to determine the next steps.

Fifth, the Commission's review of the Pay-Per-Call Rule, 16 CFR part 308, is ongoing. The Commission has held workshops to discuss proposed amendments to this rule, including provisions to combat telephone bill "cramming"—inserting unauthorized charges on consumers' phone bills—and other abuses in the sale of products and services that are billed to the telephone including voicemail, 900-number services, and other telephone based information and entertainment services. The most recent workshop focused on discussions of the use of 800 and other toll-free numbers to offer pay-per-call services, the scope of the rule, the dispute resolution process, the requirements for a presubscription agreement, and the need for obtaining express authorization from consumers before placing charges on their telephone bills. Staff anticipates forwarding its recommendation to the Commission during the spring of 2005.

Sixth, the Commission's review of the Regulations Under the Comprehensive Smokeless Tobacco Health Education Act of 1986 (Smokeless Regulations), 16 CFR part 307, is ongoing. The Smokeless Regulations govern the format and display of statutorily mandated health warnings on all packages and advertisements for smokeless tobacco. In fiscal year 2000, the Commission undertook its periodic review of the Smokeless Regulations to determine whether the Regulations continue to effectively meet the goals of the Act and to seek information concerning the regulations' economic impact in order to decide whether they should be amended. Staff is currently assessing the public comments and anticipates forwarding its recommendations to the Commission by April 2005.

Finally, the Commission began its regulatory review of certain aspects of the Funeral Industry Practices Rule (Funeral Rule), 16 CFR part 453, in 1999. The Funeral Rule, which became effective in 1984, and was amended in

1994, requires providers of funeral goods and services to give consumers itemized lists of funeral goods and services that state prices and descriptions and also contain specific disclosures. The rule enables consumers to select and purchase only the goods and services they want, except for those that may be required by law and a basic services fee. Also, funeral providers must seek authorization before performing some services, such as embalming. In addition to an assessment of the rule's overall costs and benefits and continuing need for the rule, the review will examine whether changes in the funeral industry warrant broadening the scope of the rule to include non-traditional providers of funeral goods or services and revising or clarifying certain prohibitions in the rule. *See* 64 FR 24250 (May 5, 1999). In response to requests of industry members, the Commission determined to extend the comment period. A public workshop conference was subsequently held to explore issues raised in the comments submitted. Staff expects to forward its recommendation to the Commission by July 2005.

Final and Other Actions

Since publication of the 2003 Regulatory Plan, the Commission has taken final actions on several rulemakings. After amending the Telemarketing Sales Rule (TSR), 16 CFR part 310 (68 FR 4580, Jan. 29, 2003), to establish a national "do not call" registry, the Commission opened the registry on June 26, 2003. Consumers can register for free in two ways: online at DONOTCALL.GOV or by telephone at 1(888) 382-1222. As of October 1, 2003, it became illegal for most telemarketers to call a number listed on the registry. Also, the Commission issued additional amendments to the TSR on July 31, 2003, that imposed fees on entities accessing the "do not call" registry. *See* 68 FR 45134.

The Consolidated Appropriations Act of 2004, Pub. L. No. 108-199, required that the Commission amend the TSR to require telemarketers subject to the TSR to access the "do-not-call" lists once a month rather than every three months. The Commission has implemented these provisions by promulgating regulations, effective January 1, 2005, requiring the telemarketers to scrub their lists at least every 31 days. 69 FR 16368 (Mar. 29, 2004).

Also pursuant to the Consolidated Appropriations Act of 2004, the Do-Not-Call Implementation Act, Pub. L. No. 108-10 (2003), and the Telemarketing Fraud and Abuse Prevention Act, 15

USC 6101-08, the Commission published an NPRM that would amend the TSR to revise fees charged for industry access to the national "do-not-call" registry. 69 FR 23701 (Apr. 30, 2004). In addition, the Commission has promulgated a new fee structure for accessing the "do-not-call" lists that became effective September 1, 2004. *See* 69 FR 45580 (July 30, 2004). Under the new fee structure, the annual fee for each area code of data accessed will be \$40, and the maximum amount that any entity would be charged — for access to 280 area codes of data or more would be \$11,000. The final rule continues to allow all entities accessing the Registry to obtain the first five area codes of data for free and allows those entities exempt from the Registry's requirements to obtain access at no charge.

Second, on February 4, 2004, the Commission published a Federal Register notice announcing that it would retain the Trade Regulation Rule on Ophthalmic Practice Rules (Eyeglass Rule) in its present form. 69 FR 5451. In that notice, the Commission also discussed the comments received in response to the Commission's request for comments on the rule and analyzed the effect of the Fairness to Contact Lens Consumers Act, 15 USC 7601-7610, on the Eyeglass Rule. A separate Federal Register Notice, also published on February 4, 2004, containing an NPRM under the Fairness to Contact Lens Consumers Act, makes two clerical amendments to the Eyeglass Rule, which clarify the distinction between that rule and the proposed Contact Lens Rule. 69 FR 5440, 5450. On July 2, 2004, the Commission issued its final Contact Lens Rule as required by the Fairness to Contact Lens Consumers Act. 69 FR 40482.

Third, as required by the CAN-SPAM Act of 2003, the Commission issued a rule prescribing that a mark be included in commercial e-mail that contains sexually oriented materials. 69 FR 21024 (Apr. 19, 2004). This rule went into effect on May 19, 2004. The Commission is also required to issue a rule defining the relevant criteria to facilitate the determination of the "primary purpose" of an electronic message by December 6, 2004. *See* 69 FR 11776 (Mar. 11, 2004) (ANPRM); 69 FR 50091 (Aug. 13, 2004) (NPRM). Besides other CAN-SPAM related discretionary rulemakings that are ongoing, the Commission is also required to issue four separate reports to the Congress within the next two years.

Fourth, the Commission has actively been issuing, sometimes in conjunction

with other federal agencies, rules according to the statutory mandate of the FACT Act. First, on December 24, 2003, the Commission and the Board of Governors of the Federal Reserve System (the Federal Reserve Board) jointly adopted Interim Final Rules that established December 31, 2003, as the effective date for provisions of the Act that determine the relationship between the Fair Credit Reporting Act (FCRA) and state laws and provisions that authorize rulemakings or other implementing actions by agencies. 68 FR 74467. On February 11, 2004, these Interim Final Rules were made final. Also, on that date, the Commission and the Federal Reserve Board published joint final rules that established a schedule of effective dates for many of the provisions of the FACT Act for which the Act itself did not specifically provide an effective date. 69 FR 6526. On February 24, 2004, the Commission published an Interim Final Rule effective on March 3, 2004, that prohibited consumer reporting agencies from avoiding treatment as nationwide consumer reporting agencies. 69 FR 8532. The Commission requested comments on that Interim Final Rule, and the comment period closed on April 23, 2004.

On May 20, 2004, the Commission issued a final rule effective on June 21, 2004, making technical changes to earlier rules, establishing a general organizational scheme for subchapter F of chapter I of title 16 of the Code of Federal Regulations, and setting forth general provisions applicable to all FTC rules under the FCRA. 69 FR 29061. On June 24, 2004, the FTC issued a final rule effective on December 1, 2004, for the provision of free consumer reports to consumers, including (1) a central source whereby consumers can make one request and receive their consumer report from each of the three major nationwide consumer reporting agencies and (2) rules with respect to the provision of free consumer reports by "nationwide specialty consumer reporting agencies," as defined in the new FCRA section 603(w). 69 FR 35468 (June 24, 2004).

By December 2004, the FTC must promulgate, in coordination with the Federal Reserve Board, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, the National Credit Union Administration, and the Securities and Exchange Commission, rules (1) providing for the proper disposal of consumer report information, 69 FR 21388 (Apr. 20,

2004) (NPRM); (2) governing consumers' new right to opt out of marketing by affiliates, 69 FR 33324 (June 15, 2004) (NPRM); 69 FR 43546 (July 21, 2004) (Extension of Comment Period); and (3) improving the required notice to consumers regarding their right to opt out of prescreened solicitations. 69 FR 58861 (Oct. 1, 2004) (NRPM). Although there is no statutory deadline, the FTC must also issue a rule (1) setting the required duration of the new active duty fraud alert; and (2) defining certain terms that are relevant to new identity theft victims' rights. 69 FR 23370 (Apr. 28, 2004) (NPRM). The Commission issued the final rule on October 29, 2004, 69 FR 63922. The FTC is also required to promulgate a summary of consumers' identity theft rights, 69 FR 42616 (July 16, 2004) (Proposed Summaries and Notices), and to amend the existing general summary of consumer rights to include consumers' rights to a credit score and free annual credit report. The Commission expects to do so by December 2004.

Fifth, as part of the Commission's regulatory review program, on March 3, 2003, staff requested public comments on the economic impact and benefits of the Rules and Rules and Regulations under the Hobby Protection Act and whether changes in the relevant technologies — such as e-mail and the Internet — affect the rule since it was issued. 68 FR 9856. On March 3, 2004, the Commission retained the Hobby Protection Act Regulations without amendment. 69 FR 9943.

Sixth, in the review of the Labeling Requirements for Alternative Fuels and Alternative-Fueled Vehicles, 16 CFR part 309, the Commission requested comments about the need to retain the rule and specific options for modifying the alternative-fueled-not-including hybrids-vehicle label in light of new Environmental Protection Agency (EPA) tailpipe standards. See 69 FR 55332 (Sept. 14, 2004). After assessing the public comments, the Commission amended the rule to delete vehicle-specific information from the labels and added a reference to the EPA's green vehicle guide website, <http://www.epa.gov/greenvehicle>, which provides detailed comparative information about vehicle emissions generally and by vehicle model. 69 FR 55332 (Sept. 14, 2004). The amendment will become effective on March 31, 2005.

Lastly, for the review of the Tire Advertising and Labeling Guides (Tire Guides), the Commission issued a notice seeking public comment about, among

other things, whether there is a continuing need for the Tire Guides and what changes, if any, should be made to them to increase the benefits of the Guides to purchasers. 68 FR 50984 (Aug. 25, 2003). On September 17, 2004, the Commission announced the repeal of the Tire Guides. 69 FR 56932 (Sept. 23, 2004).

Summary

In both content and process, the FTC's ongoing and proposed regulatory actions are consistent with the President's priorities. The actions under consideration inform and protect consumers and reduce the regulatory burdens on businesses. The Commission will continue working toward these goals. The Commission's ten-year review program is patterned after provisions in the Regulatory Flexibility Act and complies with the Small Business Regulatory Enforcement Fairness Act of 1996. The Commission's ten-year program also is consistent with section 5(a) of Executive Order 12866, 58 FR 51735 (Sept. 30, 1993), which directs executive branch agencies to develop a plan to reevaluate periodically all of their significant existing regulations. In addition, the Telemarketing Sales Rule, 16 CFR part 310 (2003), is consistent with the President's Statement of Regulatory Philosophy and Principles, Executive Order 12866, section 1(a), which directs agencies to promulgate only such regulations as are, *inter alia*, required by law or are made necessary by compelling public need, such as material failures of private markets to protect or improve the health and safety of the public.

As set forth in Executive Order 12866, the Commission continues to identify and weigh the costs and benefits of proposed actions and possible alternative actions, and to receive the broadest practicable array of comment from affected consumers, businesses, and the public at large. As stated above, since 1992 the Commission has repealed 48 percent of its trade regulation rules and 57 percent of its industry guides that existed in 1992 because they had ceased to serve a useful purpose. In sum, the Commission's regulatory actions are aimed at efficiently and fairly promoting the ability of "private markets to protect or improve the health and safety of the public, the environment, or the well-being of the American people." Executive Order 12866, section 1.

Rulemakings that Respond to Public Regulatory Reform Nominations

During March 2002, OMB requested public nominations for regulatory reforms. The Office of Information and Regulatory Affairs (OIRA) conducted a preliminary review of the public comments received and found five FTC activities that one or more commenters had nominated for reform. In a March 7, 2003 letter, the FTC responded that the

agency systematically reviews all regulations and guides on a ten-year basis and explained how the agency had already reviewed or was about to review the activity at issue or why some of the other activities were not good candidates for reform as contemplated by the Smarter Regulations Report.

II. REGULATORY ACTIONS

The Commission does not plan to propose any rules that would be a "significant regulatory action" under the definition in Executive Order 12866.

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