S. HRG. 107–1147

FTC REAUTHORIZATION

HEARING

BEFORE THE

SUBCOMMITTEE ON CONSUMER AFFAIRS, FOREIGN COMMERCE AND TOURISM

OF THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION UNITED STATES SENATE

ONE HUNDRED SEVENTH CONGRESS

SECOND SESSION

JULY 17, 2002

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ONE HUNDRED SEVENTH CONGRESS

SECOND SESSION

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C O N T E N T S

WITNESSES

FTC REAUTHORIZATION

WEDNESDAY, JULY 17, 2002

U.S. SENATE,
SUBCOMMITTEE ON CONSUMER AFFAIRS, FOREIGN COMMERCE, AND TOURISM,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
Washington, DC.

The Subcommittee met, pursuant to notice, at 9:30 a.m. in room SR–253, Russell Senate Office Building, Hon. Byron L. Dorgan, Chairman of the Subcommittee, presiding.

OPENING STATEMENT OF HON. BYRON L. DORGAN, U.S. SENATOR FROM NORTH DAKOTA

Senator DORGAN. The Subcommittee hearing will come to order. I would like to welcome the Federal Trade Commission, as well as the witnesses who have gathered to provide testimony to the Subcommittee today. Let me call on the Chairman of the Full Committee for any statement he may wish to make at the opening.

Senator Hollings.

STATEMENT OF HON. ERNEST F. HOLLINGS, U.S. SENATOR FROM SOUTH CAROLINA

The CHAIRMAN. Mr. Chairman, I want to thank you and the Subcommittee under your leadership for this particular hearing. It is very important. We have oversight responsibilities for one of the most important agencies, the Federal Trade Commission, and I wanted to pay my respects for the hard work they are doing and their willingness to undertake additional consumer protection responsibilities in the communications field.

We have got a terrible drive to remonopolize telecommunications, and they are being assisted materially by the Federal Communications Commission. We have got a distinguished Chairman over there whose first reaction to WorldCom was to see who could buy them. He was not interested in making the communications industry competitive and current. Instead, it is off to Wall Street, encouraging merger fever. That has been our problem, and the Federal Trade Commission is our last great hope to take on and watch these particular matters.

Chairman Morris just informed me that you have got some lease expenses you might have to assume with our budget freeze. The reason we had the budget freeze at the Commerce, State and Justice Appropriations Subcommittee is that we had to do a lot of eating. We had to provide for the Homeland Security. We had to provide for the world and embassy security under the Department of

State. We had to take care of the 4.1 percent pay increase, the prisons increase and, of course, the $300 million more that 98 Senators voted for the day before yesterday.

With that, that is all we could do to hold the lines in the budgets current as of this particular year, and so it was not an effort to cut the Federal Trade Commission. We appreciate what the Federal Trade Commission is doing, and you all keep up the good hard work. We are depending on you.

Thank you very much, Mr. Chairman.

Senator DORGAN. Senator Hollings, thank you very much.

Senator Wyden.

STATEMENT OF HON. RON WYDEN,
U.S. SENATOR FROM OREGON

Senator WYDEN. Thank you very much, Mr. Chairman. I appreciate the opportunity to make this brief opener. After a few minutes while I am in the Capitol, I will be back to participate in the hearing. I share Chairman Hollings' view that considerable good work is done at the Federal Trade Commission. I will tell the folks at the Commission and the Chairman here I really think that the Commission is AWOL on energy issues, and particularly with respect to gasoline pricing, and also electric issues.

With respect to gasoline pricing, the Commission found that anticompetitive practices known as red-lining were rampant in West Coast gasoline markets, and yet no action was taken. Perhaps what is particularly troubling and to me—just staggering—is the Federal Trade Commission in their inquiry, and I will quote here: "The investigation uncovered no evidence that any refiner had the ability profitably to raise prices market-wide or reduce output at the wholesale level."

Well, Chevron and Texaco, their president testified just to the opposite. He testified that the West Coast gasoline market is dominated by a limited number of refiner marketers whose individual actions can have significant market impact, and so what you have—and I want to be very clear with the Commission on this—is, you have oil company executives admitting to practices that the Federal Trade Commission says they cannot find evidence of. Think about that. Oil company executives come to the Congress and admit to engaging in anticompetitive practices that the Commission says it cannot find evidence of, so I have some questions to ask about that.

I am also very troubled about the Commission's position with respect to competitive effects of electric utility transactions with nonutility subsidiaries and affiliates. This is important for us on the West Coast because of Enron. The agency, of course, does have jurisdiction with respect to wholesale market impacts, and it seems that the agency gives a lot of speeches about the benefits of deregulation, and I do not see much about protecting consumers. I thank you, Mr. Chairman, and apologize for having to be gone for a few minutes, but look forward to the questioning later.

Senator DORGAN. Senator Wyden, thank you. Senator Wyden will be returning, and there is a Senate vote at 10:30, and we will go slightly into that vote before we take a very brief recess, and then I will be recognized on the floor of the Senate for the first amend-

ment, I believe immediately following the vote, so Senator Wyden will chair at that point.

Let me make a couple of comments. Senator Fitzgerald, I believe, the Ranking Member, will also be here in a few moments. But let me say that this hearing is a hearing to begin the task of reauthorizing the Federal Trade Commission. It is an independent Federal agency with broad consumer protection mandates from Congress. The Commission's authorization has expired. It is long past the time when Congress should do something about that, and it is my hope to introduce a piece of legislation at some point soon that would reauthorize the activities of the Federal Trade Commission. The two specific proposals that the Commission has that the Subcommittee will focus on this morning are interesting proposals.

The first is the proposed national Do-Not-Call registry that would amend the telemarketing sales rule and enable consumers to eliminate most telemarketing calls by making one call to the FTC. While consumers appear to overwhelmingly support this initiative, and the idea of uninterrupted dinner free from telephone solicitation appeals to many of us, we want to be certain that doing so will not have unintended consequences for groups such as charitable organizations that depend on some solicitation to raise funds. But I must say that if you go anywhere in the country and ask people what is annoying them these days, especially while they are eating, it is the incessant telephone calls that try to sell them a credit card to refinance their home, to solicit some other sort of contribution. The American people are upset by having their privacy invaded in this way, and the Commission has a proposal that is something we will talk about a bit today and will consider as we take a look at the reauthorization as well.

The Commission has also expressed an interest in rescinding the common carrier exemption for telecommunications issues. This exemption was put in the Federal Trade Commission Act back when there was only one federally-regulated telephone company. There is an argument that with a variety of companies now providing so many different types of telecommunications services, sometimes in combination with common carriage, sometimes as separate services, there needs to be an aggressive agency with expertise in fraud and marketing practices to police the industry.

There is some concern that this change will create redundancy, since the Federal Communications Commission already has jurisdiction, I personally think this subject needs to be examined at some length, and I look forward to beginning that discussion as well. I frankly do not think that there is as aggressive a set of actions as should be taken by current regulatory authorities, so for that reason I believe this is an interesting proposal.

Let me just make a comment on Senator Wyden's observation, especially with respect to energy and gasoline prices. In recent months, I guess over the last year or so, I have been concerned—in fact, I met with the Federal Trade Commission, some of them, some of the officials, including the Chairman. I have been concerned that consumers have not been well-served by a range of Federal agencies.

For example, when we saw what happened with respect to the Enron Corporation where investors lost their shirts, and the people

at the top of the corporation walked away with a pocket full of gold, I asked the question, "Well, who is looking out for the people that are the consumers of stocks at this point, and who were defrauded, in effect—bad information was put out to them, they were manipulated in many ways, they lost their shirts—who is investigating that?" And I was told the FTC really does not have jurisdiction. That is the Securities and Exchange Commission.

Energy pricing, we had hearings in this room with respect to the manipulation of wholesale energy prices, and therefore retail prices in the State of California. We will have a hearing tomorrow with Army Secretary White, who was involved in Enron Energy Services, on that very subject, and he asked the question, "Well, who is active and involved in seeing that the consumers were not defrauded out of billions of dollars in California?" The answer was, "Really, nobody." It was supposed to have been FERC, I guess, but FERC and the FCC and others have done their best pillars of stone imitations and essentially sat on their hands while consumers in a wide range of areas have, in my judgment, been defrauded, or manipulated, or in other ways disadvantaged.

I agree with Senator Wyden. I want watch dogs, and I want agencies that are aggressive, not paper tigers. I want real tigers going after those that are taking advantage of the American consumer. I want agencies that are aggressively pursuing fraud and price manipulation, and let me just say, part of my angst about this goes back to last fall with the hearings we had with respect to Enron and what happened to the investors, and there was not anybody seeming to be very excited about that in a regulatory area.

The American people were excited. Congress was excited. We could not find regulators that were very excited about it, and the same was true with respect to price manipulation. I happen to think Californians were bilked to the tune of billions of dollars, and it may well be to the tens of billions of dollars in phony energy pricing and manipulative and fraudulent pricing practices, and frankly, I see precious little evidence of anybody aggressively going after that. Shame on those who have the responsibility but do not assume it, and we will talk about some of that today as well.

The Federal Trade Commission has a specific area in which it works, and I mentioned earlier that we are going to talk about trying to expand that in certain area so that we might have the Federal Trade Commission involved in some of the areas that I just mentioned.

The Securities & Exchange Commission was literally created from the Federal Trade Commission. Congress took two commissioners, the General Counsel and 120 attorneys out of the FTC to create the new SEC many years ago. My own feeling is that we ought to take a look at that once again. I am not suggesting a wholesale merger these days of Federal agencies, but I am suggesting that I think that we have Federal watch dogs who have not been watching. I think the Federal Trade Commission does a lot of good work in trying to prevent consumer fraud, despite the fact that they are a small agency. Since 1995, the Federal Trade Commission has brought over 1,000 fraud and deception cases, won more than $825 million in consumer redress, and reviewed over 26,000 mergers worth nearly $10 trillion. They have been active in

a wide range of areas. I will not describe them all. We have been pleased to work with the Commission in many areas.

Mr. Muris will remember last fall when I was not pleased that we could not find a way for the Commission to believe it ought to go hip deep into the Enron issue. But you know, I understand that you have certain jurisdictional areas that you evaluate, and other agencies and other regulatory bodies have jurisdiction. So I hope maybe we can find a way to sort all this out, and decide if there are agencies that do not want to regulate, then let us get rid of them and give the responsibility to some agency that is staffed by people who do want to regulate.

This system of ours, this market system, needs effective regulation. This nonsense about let us just deregulate everyone and let the consumer beware, if we have not gotten a belly full of that in the last year, then somebody has been sleeping. You need, in this market system, effective oversight and regulation. There are people who are willing to defraud the consumers, and we need not just in the criminal justice system investigations, but we need regulatory agencies to prevent that from happening.

So with that as a precursor, let me call on Mr. Muris to begin providing us your comments this morning. Let me welcome the Chairman and all the members of the Federal Trade Commission, and let us include your entire statements as a part of our permanent record, and you may summarize as you choose.

Chairman Muris, why don't you proceed.

STATEMENT OF HON. TIMOTHY MURIS, CHAIRMAN, FEDERAL TRADE COMMISSION

Mr. MURIS. Thank you, Mr. Chairman, we are happy to be here, and we especially appreciate your support and kind words. In attendance with me today are the full Commission. In order of seniority, to my right is Commissioner Anthony, to my immediate left is Commissioner Thompson, to my far right, at least geographically and sometimes in other ways, is Commissioner Swindle, and to my far left is Commissioner Leary. We certainly appreciate the opportunity to appear before you today.

Since our last reauthorization in 2000, I believe the Commission has been very aggressive, and certainly I believe we have continued in my Chairmanship the aggressive nature of my predecessor, Bob Pitofsky.

On a personal note, I want to say that this is my sixth job in the Federal Government. I have voted with my feet in agreeing that we do need aggressive regulation. Four of those jobs have been at the FTC. I am extremely proud to be the FTC's Chairman. Our mission is vital, the issues are extraordinary, and the people are great.

Let me outline our mission briefly. In the time you have allotted, my colleagues will each discuss a specific issue. I will talk very generally.

In consumer protection, which is one of our two main missions, protection of consumer privacy is a key focus of our efforts. In this fiscal year, we have increased our resources 50 percent to address consumer harm that results from the misuse of consumer information. In addition to bringing 22 cases in this area in the last 14

months, as you mentioned, we have proposed amending the Telemarketing Sales Rule to create a national Do-Not-Call list. If we adopt that registry, it would allow consumers to make one call to remove their name from most lists.

We have also been active in another important privacy issue, which is the ubiquitous spam that people receive. We are probably one of the few places in the world that wants to receive spam. We have something called the "Refrigerator" in our computer lab that now has over 14 million spam. We have recently begun systematically looking at those spam, picking targets.

There are a great many deceptive solicitations made. For example, we recently bought a case against a very pernicious practice. Individuals would receive a spam that said, "Receive a free Sony Play Station," and in five clicks of their mouse they would be on a pornographic website with their phone bill being billed to a 900 number. We shut that down.

We certainly remain aggressive in fighting other frauds, including a variety of telemarketing fraud; franchise fraud; business opportunity and work-at-home schemes; advance fee loans; credit loss protection; and false and unsubstantiated claims for health and weight loss products.

I would like to give you a couple of recent examples. We obtained a federal court order against the promoters of Miss Cleo Psychic Services for misrepresenting the cost of the services. Surprisingly, she did not see it coming.

[Laughter.]

Senator DORGAN. Do you want to go slower, Chairman Muris?

Mr. MURIS. We also challenged the marketers of the devices you may have seen on television promising washboard abs. Those commercials and infomercials were ubiquitous at the end of last year and the beginning of this year. We have sued, and we have preliminarily stopped that activity.

Turning to antitrust, merger enforcement, of course, continues to be a staple of our efforts. Recently there have been fewer mergers, but there are still a great many cases that require enforcement activity, and we have been bringing such cases.

Health care is a major part of our effort. We have increased our resources in this area in this fiscal year by 50 percent as well. Most of those resources, probably about 70 percent-plus, involve pharmaceuticals, and I testified recently before you on that issue. Our focus has been on efforts by branded drug manufacturers to slow or stop competition from lower priced generics. We are particularly concerned about anticompetitive gaming of certain parts of the Hatch-Waxman Act, and the day I was here to testify on competition in the pharmaceutical industry, we announced a case. We brought another case recently, and we have many other investigations underway.

I am sure the other Commissioners will want to respond to Senator Wyden. I think he was quoting from Commissioners' statements that were issued shortly before I arrived. Energy is vital to our entire economy. We have spent a lot of effort on maintaining competitive energy markets, and we recently have increased our efforts. For the first time, on a real-time basis, we are now tracking the price of gasoline in 360 cities. We are looking for price anoma-

lies, whatever their cause; one: so that we can better understand what is going on in the marketplace; and two: so we can identify enforcement targets if appropriate ones exist.

As you mentioned, we have some legislative recommendations. The first, which will be discussed in more detail by Commissioner Anthony, involves the elimination of the exemption for common carriers. We also request some technical changes, as we describe in our written testimony.

Let me just conclude by saying, I firmly believe that we have a vital role. I want to thank you for your continued support of our mission, and I want to note that in accomplishing this mission there is a very high degree of unity among the five Commissioners. In fact, there is a near unanimous pattern in voting, particularly when it comes to law enforcement. That does not mean we agree on everything. We spend a lot of time working issues out among ourselves to achieve consensus, and we also work very closely with our staff. As you will see, the Commissioners are independent-minded, but I believe we work extraordinarily well together to serve the public interest.

[The prepared statement of Mr. Muris follows:]

PREPARED STATEMENT OF HON. TIMOTHY MURIS, CHAIRMAN, FEDERAL TRADE COMMISSION

I. Introduction

Mr. Chairman and Members of the Subcommittee, the Federal Trade Commission (FTC) is pleased to appear before you to support our reauthorization request for Fiscal Years 2003 to 2005. Since our last reauthorization hearing in February 2000, the FTC has continued to take innovative and aggressive actions to protect consumers and promote competition.

The FTC is the only federal agency with both consumer protection and competition jurisdiction over broad sectors of the economy.[1] We enforce laws that prohibit business practices that are anticompetitive, deceptive, or unfair to consumers. We also promote 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 FTC is a small agency, but one with a large mission. The FTC has shouldered an ever-increasing workload as the economy becomes more global and more high tech. The agency has met its broad responsibilities with only modest increases in resources. Highlights of recent accomplishments include:

- Enhancing consumer privacy and security. Since April 2001, the FTC has brought 22 cases involving privacy and security issues, ranging from "pretexting" (obtaining personal information under false pretenses) and children's privacy to "spam" (unsolicited commercial e-mail). The agency also has held three workshops to address privacy issues such as financial privacy notices and the security of consumer information.
- Recovering as much as $60 million for nearly 18,000 consumers who were victims of fraudulent lending under the terms of a proposed settlement that requires court approval. Working with the AARP, six states, and individual plaintiffs, in March 2002 the FTC settled charges against a mortgage company and its CEO for misleading consumers about fees they would be charged, which amounted to 10 to 15 percent of the loans.
- Attacking fraud. Since June 2001, the FTC has filed 98 federal court actions and obtained judgments for more than $160 million.
- Stopping branded drug manufacturers from eliminating competition from cheaper generic equivalents. Recent cases addressing conduct allegedly stifling generic competition have involved drugs for high blood pressure, anxiety, and angina and other cardiac problems.
- Preventing anticompetitive effects of mergers in the petroleum industry. Last year, the FTC reviewed three multi-billion dollar oil mergers and, where necessary, required divestitures in two of the proposed mergers to ensure continued

competition in refining, distribution, and retail sales of gasoline in markets across the United States.

- Ensuring competition among health care providers. The FTC is challenging as illegal agreements among providers to fix fees and boycott health plans that resist paying higher fees. The FTC's goal is helping to insure the existence of a competitive health care industry that consistently delivers high-quality care at competitive costs.

In accomplishing these goals, there is a high degree of unity among the five Commissioners. In fact, there is near unanimity in voting patterns, particularly with respect to votes concerning law enforcement matters. The near unanimity of voting patterns reflects both a broad consensus among the Commissioners about the types of cases the Commission should pursue, and the careful and deliberate process by which the Commissioners consider matters, consulting with the staff to address the issues and concerns of individual Commissioners. As Chairman Muris has stated,[2] through the efforts of a talented, dedicated, and professional staff, the current Commission is building on the extraordinary work of former Chairman Robert Pitofsky.

II. Mission Focus

In the next few years, the FTC will focus its resources in significant areas of the economy through law enforcement actions, consumer and business education campaigns, and continuing assessment of ongoing developments in the marketplace. As we explain in detail below, the FTC's activities fulfill its mission on behalf of American consumers by:

- Continuing emphasis on critical areas of law enforcement—stopping and preventing consumer fraud and deception as well as stopping anticompetitive mergers;
- Enhancing consumer privacy and security;
- Preventing deceptive and anticompetitive health care practices;
- Promoting and maintaining competitive energy markets;
- Keeping pace with technology and the changing marketplace;
- Targeting special initiatives to specific groups of consumers; and
- Advancing efficient law enforcement.

A. Continuing Emphasis on Critical Areas of Law Enforcement

Two areas in the FTC's jurisdiction have become staples of its law enforcement agenda—(1) fighting consumer fraud and deception, and (2) preventing anticompetitive mergers. Since 1995, the FTC has attacked fraud and deception by bringing 1,052 federal court and administrative actions, and obtaining orders for more than $825 million in consumer redress.[3] During the same time period, the FTC reviewed over 26,000 proposed mergers worth a total of nearly $10 trillion, opened about 1,600 formal investigations (issuing "Second Requests" in more than 300 matters), and took enforcement action in over 230 transactions. Over the next few years, the FTC plans to devote significant resources to build on its solid record of achievement in these areas.

1. Consumer Fraud and Deception

The FTC targets both traditional types of fraud and deception and those types that capitalize on new technologies. Simply stated, our mission is to identify the most egregious forms of fraud and deception; to bring cases, on our own and with our law enforcement partners across the country and around the globe; and to educate industry about complying with the law, consumers about how to protect themselves from fraud and deception, and ourselves about emerging issues.

The FTC has two toll-free telephone numbers and an online form available to consumers who have questions or complaints. Consumer complaints are entered into a number of FTC databases, which are accessible to increasing numbers of domestic and foreign law enforcement partners. To identify the most pervasive forms of fraud and deception, and to target wrongdoers for law enforcement actions, we analyze the information collected through the following data systems:

- **Consumer Response Center.** The FTC's Consumer Response Center (CRC) fields complaints and inquiries on a wide variety of consumer protection issues. Consumers can use a toll-free number (1–877–FTC–HELP), as well as an online form and the mail, to contact the CRC with complaints and inquiries. The CRC now responds to more than 55,000 inquiries and complaints a month.
- **Consumer Sentinel.** Established by the FTC in 1997, *Consumer Sentinel*[4] is a fraud database available online to law enforcement agencies across the U.S. and Canada. It receives complaints from the FTC's CRC and from a growing

number of other organizations in the U.S. and Canada. *Sentinel* now contains more than 680,000 complaints, and is the richest source of consumer fraud data available to law enforcement agencies. Since June 2001, the FTC has recruited 115 new *Sentinel* members, bringing the total number of *Sentinel* users to more than 460 law enforcement agencies. Law enforcement agencies can use this centralized database to identify trends and target companies that have received a large number of consumer complaints. Consumers also can access publicly available sections of this Web site for statistics about fraud, including the schemes that garner the most consumer complaints, the location of companies subject to complaints, and tips on how to avoid fraud.

- **Identity Theft.** Another FTC toll-free number, 1–877–ID–THEFT, is a central clearinghouse and a critical source of consumer complaint data on ID theft. Calls have increased from 2,200 calls per week one year ago to over 3,000 today. Building on its experience with *Consumer Sentinel,* the FTC began making the data available to its law enforcement partners through an online database. More than 350 law enforcement agencies—46 separate federal agencies and 306 state and local agencies—now can access the data. Among the agencies represented are more than half of the state Attorneys General, as well as law enforcement authorities from a number of major cities including Baltimore, Dallas, Los Angeles, Miami, San Francisco, and Philadelphia. To encourage even greater participation, we have conducted law enforcement training and outreach since April of this year to demonstrate the efficacy of the clearinghouse. As one example of positive results from these efforts, within three weeks after our most recent training seminar in Chicago, approximately a third of the participating agencies without prior access to the clearinghouse had signed up. We will continue to focus resources and to devise new methods to expand law enforcement access to the database. Finally, FTC investigators, working with the Secret Service, have started to prepare preliminary investigative reports based on clearinghouse data, which are referred to Financial Crimes Task Forces for possible prosecution.
- **Spam Database.** Since 1998, the FTC has maintained an electronic mailbox (uce@ftc.gov) to which Internet customers can forward unsolicited commercial e-mail, commonly known as "spam." This database currently receives, on average, 42,000 new pieces of spam every day. The total number of spam e-mails has grown from 700,000 in the first year to more than 10 million today. The FTC staff searches the database to identify trends and select law enforcement targets.
- **Surf Days.** The FTC ferrets out online fraud and deception through "Surf Days." First used in 1996 to look for online pyramid schemes, the law enforcement surf is now a staple of FTC online scheme identification, usually conducted with other law enforcement agencies. It provides both a window to learn about online practices and a way to alert new Web site providers—some of whom are new entrepreneurs unaware of relevant laws—that their sites appear to violate the law. Since May 2001, the FTC has conducted six surfs with more than 140 partners, focusing on claims about unsubscribing from spam, remedies or preventive products for anthrax and other serious diseases, bioterror protection devices, e-tailer holiday shipping, and ultrasonic pest-control devices.

Drawing on consumer complaint data and information gathered from Surf Days, the FTC targets fraudulent and deceptive practices. The FTC's cases reflect a broad range of illegal activity, including telemarketing fraud, franchise fraud, business opportunity and work-at-home schemes, advance fee loan and credit loss protection schemes, and false and unsubstantiated claims for health and weight loss products. The FTC also has continued to bring deceptive advertising cases, focusing in particular on cases that involve health or safety issues, or significant economic injury. Recent cases include:

- **Project Busted Opportunity.** In June 2002, the FTC, the Department of Justice, and 17 state law enforcement agencies announced law enforcement actions against 77 targets engaged in the sale of business opportunities or work at home schemes. The targets allegedly used deceptive earnings claims and paid "shills" to promote their schemes or otherwise violate consumer protection laws. [5]
- **Operation Dialing for Deception.** In April 2002, the FTC announced the filing of 11 federal district court complaints challenging "in-bound" telemarketing fraud—situations in which consumers call companies based on classified ads, Internet banners, or other promotions. Among those charged were the purveyors of advance-fee loans and credit cards, at-home medical billing programs, work-

at-home envelope stuffing schemes, and a "consumer protection" agency that was, in reality, no more than a shill for a vending machine business opportunity. [6]

- **Magazine Telemarketing.** A federal court ordered a group of magazine subscription telemarketers to pay $39 million in consumer redress for violating the terms of a 1996 FTC settlement. Among other provisions, the FTC's 1996 order barred the defendants from misrepresenting the cost of subscriptions, charging consumers' accounts without authorization, and threatening to harm consumers' credit ratings. To facilitate the redress process, the FTC established a special hotline for consumers who think that defendants may have billed them improperly. [7]
- **"Miss Cleo."** The FTC obtained a federal court order against the promoters of "Miss Cleo" psychic services after charging that defendants misrepresented the cost of services, billed for services never purchased, and engaged in deceptive collection practices. Among other provisions, the court's order enjoins the defendants from any future misrepresentations about the cost of psychic readings and from making harassing telemarketing calls. The FTC estimates that the defendants billed consumers $360 million in connection with this alleged illegal scheme. [8]
- **Ab Devices.** In "Project ABsurd," the FTC challenged widely advertised "ab" devices. In suits against three marketers of electronic abdominal exercise belts, the FTC charged that infomercials falsely advertised that users would get "six pack" or "washboard" abs without exercise. The 30-minute infomercials were heavily aired on national cable television stations, such as USA, TNN, Lifetime, E!, FX, and Comedy Central, and were among the ten most frequently aired infomercials in weekly U.S. rankings. The FTC's action seeks a permanent injunction to stop future false or deceptive claims and the payment of redress to consumers who bought the devices. [9]
- **Wonder Bread.** In March 2002, the FTC announced a settlement with the marketers of Wonder Bread concerning allegedly deceptive ads claiming that Wonder Bread could improve children's brain function and memory. [10]
- **Palm, Inc.** Palm, the leading manufacturer of Personal Digital Assistants (PDAs), agreed to a settlement concerning its claims that its PDAs come with built-in wireless access to the Internet and e-mail, as well as other common business functions—claims that the FTC alleged were not true for many models of the popular PDAs. Announced in March 2002, the settlement requires Palm to disclose, clearly and conspicuously, when consumers have to buy add-ons to perform advertised functions. [11]

2. Anticompetitive Mergers

Merger enforcement also continues to be a staple of the FTC's enforcement agenda. Stopping mergers that substantially lessen competition ensures that consumers pay lower prices and have greater choice in their selections of goods and services than they otherwise would. The level of merger activity in the marketplace, along with other factors, affects the FTC's merger workload. During the 1990s, record-setting levels of mergers, both in numbers and in size, required extraordinary efforts by the FTC staff to manage the necessary reviews within statutory time requirements. Recent economic conditions have reduced merger activity, and amendments to the Hart-Scott-Rodino Act [12] have cut the number of proposed mergers reported to the government. Even so, FTC merger enforcement remains a significant challenge for the following reasons:

- **The size, scope, and complexity of mergers have increased.** The number of mergers still remains relatively high by historic standards, and mergers also continue to grow in size, scope, and complexity. The dollar value of last year's reported mergers was about 82 percent higher, in nominal terms, than the 1995 total, even without any adjustment for the different filing thresholds. In fact, the $1 trillion total in 2001 exceeded the average annual total dollar value of reported transactions during the booming 1991–2000 decade. The size of mergers affects the FTC's workload because mergers among large diversified firms are likely to involve more products than mergers among smaller firms, and thus generally involve more markets requiring antitrust investigation. In addition, larger firms are more likely to be significant players in the markets in which they compete—increasing the need for antitrust review. Finally, as new technologies continue to grow and as the economy becomes more knowledge-based, the resulting complexity of many mergers requires more extensive inquiry.

- **Large numbers of mergers still require scrutiny.** The number of proposed mergers raising competitive concerns remains significant. Despite fewer reported transactions, the FTC's level of enforcement activity remains at a high level. Through the first eight months of this year, for example, we opened well over 100 merger investigations and issued 20 requests for additional information under the HSR Act (Second Requests), numbers only slightly below those during the peak merger wave years 1996 through 2000. Thus far in FY 2002, the FTC has taken enforcement action in 21 mergers. Thus, despite a drop in the number of merger filings, our merger enforcement workload remains high because the workload derives mostly from the number of transactions raising antitrust concerns, not from the overall number of filings.
- **Non-reportable mergers now require greater attention.** Although fewer proposed mergers remain subject to the reporting requirements of the HSR Act, the standard of legality under Section 7 of the Clayton Act remains unchanged.[13] Consequently, we need to identify through means such as the trade press and other news articles, consumer and competitor complaints, hearings, and economic studies, those unreported, usually consummated, mergers that could harm consumers. So far this fiscal year, the FTC has challenged two non-reportable mergers.[14]
- **Resource-intensive litigation is more frequently needed.** While the FTC resolves most merger challenges through settlement, it is sometimes necessary to litigate, particularly when the merger at issue already has been consummated. Merger litigation requires enormous resources. At the height of preparation, a single merger case requires the full-time attention of numerous staff members—not only lawyers, but also economists, paralegals, and support staff. To counter arguments and evidence presented by merging parties, these cases also require analysis and testimony by outside experts with specialized knowledge, which can be extremely costly. Since the fiscal year began, the FTC has filed two administrative actions,[15] and has authorized federal court challenges to five proposed mergers involving products including rum,[16] food service glassware,[17] pigskin and beef hide gelatin,[18] telescopes,[19] and cervical cancer screening products.[20]

B. Protecting Consumer Privacy and Security

A major focus of the FTC for the next several years will be the protection of consumer privacy and security. Consumers are deeply concerned about the privacy and security of their personal information, both online and offline. Although privacy concerns have been heightened by the rapid development of the Internet, concerns are by no means limited to the cyberworld. This fiscal year, we have substantially increased resources dedicated to privacy protection. The agency has undertaken several major privacy initiatives to reduce the serious consequences to consumers that can result from the misuse of personal information.

1. Do Not Call Initiative

The FTC has proposed amending the Telemarketing Sales Rule (TSR)[21] to create a national do-not-call list that would be binding on telemarketers and allow consumers to make one call to remove their names from most telemarketing lists. The proposal also would restrict the use of "preacquired account information"—lists of names and credit card numbers of potential telemarketing customers—to ensure that these lists are not used to bill consumers for unwanted goods or services. To date, the FTC has received over 40,000 comments on the TSR proposal, reflecting a high degree of public interest.

2. Public Workshops

In December 2001, the FTC co-hosted, with seven other federal agencies, a public workshop titled *Get Noticed: Effective Privacy Notices under Gramm-Leach-Bliley* which assessed the impact of GLB privacy notices, identified successful privacy notices, discussed strategies for communicating complex information, and encouraged industry "best practices" and consumer and business education.[22] In May 2002, the FTC hosted a two-day public workshop to explore issues related to the security of consumers' computers and the personal information stored in them or in company databases.[23]

3. ID Theft

In 2001, identity theft was the number one consumer complaint made to the FTC. To help stamp out this growing consumer problem, the FTC has undertaken a number of initiatives:

- **Identity Theft Law Enforcement Training.** Last March, the FTC, the U.S. Secret Service, and the Department of Justice kicked off a series of nationwide training seminars to provide hundreds of local and state law enforcement officers with practical tools to enhance their efforts to combat identity theft.
- **ID Theft Affidavit.** In October 2001, the FTC joined with several companies and privacy organizations to create a universal identity theft affidavit for victims of identity theft to submit to creditors. Available online, the form helps victims recoup their losses and restore their legitimate credit records more quickly.
- **Identity Theft Education.** The FTC has coordinated with other government agencies and organizations to develop and disseminate comprehensive consumer education materials for victims of identity theft and those concerned with preventing this crime. Since its publication, the FTC has distributed more than 850,000 hard copies of its best-selling publication, "Identity Theft: When Bad Things Happen to Your Good Name," and has logged over 700,000 visits to its Web version. The FTC also launched an outreach effort to Spanish-speaking victims of identity theft, releasing Spanish versions of the identity theft booklet (Robo de Identidad: Algo malo puede pasarle a su buen nombre) and the ID Theft Affidavit. We have added Spanish-speaking phone counselors to our hotline staff and will soon launch a Spanish version of our online complaint form.

4. Privacy Enforcement Actions

The FTC brings law enforcement actions when it has reason to believe that laws protecting privacy have been violated. Recent FTC privacy enforcement actions include:

- **Children's Privacy.** Over the past year, the FTC brought six cases involving the rule implementing the Children's Online Privacy Protection Act (COPPA) for alleged violation of the requirement that commercial Web sites give notice of their information practices and obtain parental consent before collecting, using, or disclosing personal information about children under 13. As part of these settlements, the companies agreed to pay civil penalties totaling $175,000.[24]
- **Eli Lilly.** The FTC settled charges that Eli Lilly & Company unintentionally had disclosed the e-mail addresses of users of its Prozac.com and Lilly.com Web sites by failing to take reasonable steps to protect the confidentiality and security of that information. The settlement requires Lilly to establish a security program to protect consumers' personal information against any reasonably anticipated threats or hazards to its security, confidentiality, or integrity.[25]
- **Pretexting Cases.** The FTC has taken its first steps to enforce prohibitions against "pretexting"—the use of false pretenses to obtain customer financial information—which is prohibited under the Gramm-Leach-Bliley Act.[26] FTC staff found apparent violations after a surf of 1,000 Web sites and a review of 500 publications. The FTC sent warning notices to 200 firms and settled three actions in federal court involving the most egregious situations.[27]
- **Preacquired Account Information.**[28] A group of "buying clubs" has agreed to pay $9 million to settle charges by state Attorneys General and the FTC that they deceptively enticed consumers into accepting free trial memberships and deceptively obtained billing information from the consumers, which they used to bill consumers for membership in the "buying clubs" without the consumers' knowledge or authorization.[29]
- **Spam.** In February 2002, the FTC announced federal court settlements with seven individuals who allegedly were disseminating deceptive chain-letter e-mails involving pyramid schemes with "get rich quick" schemes.[30] In April 2002, the FTC announced a law enforcement action challenging "spam" e-mail messages that deceptively claimed that consumers had won a free Sony PlayStation 2 or other prize through a promotion purportedly sponsored by Yahoo, Inc. When consumers responded to the e-mail message, they were routed to an adult Internet site via a 900-number modem connection that charged them up to $3.99 a minute.[31]

C. Preventing Deceptive and Anticompetitive Health Care Practices

The cost of health care has become increasingly significant to both the economy and the American family. Health-related products and services account for over 13 percent of gross domestic product, up from 10.9 percent in 1988.[32] A major FTC objective is to root out deceptive practices that waste consumer dollars on ineffective or bogus remedies, and to stop collusion and other anticompetitive practices that drive up health care costs and decrease quality.

1. Internet Health Fraud and Deception

The Internet has become the newest venue for marketing snake oil. Promoters of fraudulent products and services continue to use the Internet to plague consumers searching for cures for various diseases and preventative treatments to manage their health. The FTC has in place several program to protect consumers from scam artists who prey upon consumers' fears and concerns about their health.

- **Bioterrorism Project.** Following the tragedies of September 11 and the anthrax attacks, the FTC targeted purveyors of phony products related to bioterrorism diseases. Last October, staff from the FTC, the Food and Drug Administration (FDA), and the offices of 30 state Attorneys General conducted a surf and followed it up with warning letters to 121 Web sites. These sites were exploiting bioterrorism fears by marketing ineffective products, ranging from oregano oil to gas masks. To date, over 70 of the 121 warned sites have eliminated their objectionable claims. In February, the FTC announced settlements with marketers of an ineffective anthrax home test kit [33] and an on-line seller of a colloidal silver product advertised to treat anthrax. [34]
- **"Teaser" Web Sites.** One of the principal challenges facing the FTC is reaching consumers *before* they fall victim to a fraudulent scheme. Knowing that many consumers use the Internet to shop for information, agency staff have developed 14 different "teaser" sites that mimic fraudulent sites and that are found easily by consumers who conduct research on the Internet with popular search engines. Within three clicks, the teaser sites link back to the FTC's site, where consumers can find practical, plain language information on recognizing fraudulent claims on a range of topics, including health care products. Feedback from the public on FTC teaser sites has been overwhelmingly positive. [35]
- **"Operation Cure.All."** In June 2001, the FTC, in cooperation with the FDA, Health Canada, and various state Attorneys General, announced "Operation Cure.All," the latest round of enforcement actions against online purveyors of health products that purported to cure serious diseases. The FTC challenged allegedly unfounded claims regarding a DHEA hormonal supplement, St. John's Wort, various multi-herbal supplements, colloidal silver, and a variety of electrical therapy devices.

Commissioner Sheila Anthony recently discussed Operation Cure.All before the Food and Drug Law Institute's 45th Annual Educational Conference in a speech titled "Combating Deception in Dietary Supplement Advertising" (April 16, 2002). [36] This speech discussed the FTC's recent law enforcement actions and proposed a strengthened self-regulatory response and more media responsibility to address the widespread problem of deceptive and unsubstantiated health claims for dietary supplement products.

2. Collusion and Other Anticompetitive Practices

During the past year, the FTC has placed renewed emphasis on stopping collusion and other anticompetitive practices that raise health care costs and decrease quality.

(a) **Antitrust Investigations Involving Pharmaceutical Companies.** The growing cost of prescription drugs is a significant concern for patients, employers, and government. Drug expenditures doubled between 1995 and 2000. [37] In response, the FTC dramatically has increased its attention to pharmaceutical-related matters in both merger and non-merger investigations. The agency now focuses one-quarter of all competition mission resources on this industry. We also have opened increasingly more pharmaceutical-related investigations. In 1996, less than 5 percent of new competition investigations involved pharmaceuticals, while in 2001, the percentage of new investigations involving pharmaceutical products was almost 25 percent.

- **Mergers Affecting the Pharmaceutical Industry.** Last year, the FTC took action to restore competition in the market for integrated drug information databases in a case involving violations of both Sections 7 and 7A of the Clayton Act. This case marked the first time the FTC sought disgorgement of profits as a remedy in a merger case. The case resulted from the 1998 acquisition by Hearst Corporation of the Medi-Span integratable drug information database business. Pharmacies, hospitals, doctors, and third-party payors rely on such databases for information about drug prices, drug effects, drug interactions, and the eligibility for drugs under various payment plans. At the time of the acquisition, Hearst already owned First DataBank, Medi-Span's only competitor. The FTC alleged that the acquisition created a monopoly in the sale of integratable

drug information databases, causing prices to increase substantially to all database customers.[38] We negotiated a settlement requiring Hearst to divest the Medi-Span database and to disgorge $19 million in illegal profits, which will be distributed to injured consumers.[39]

- **Pharmaceutical Firms' Efforts to Thwart Competition from Generic Drugs.** In its non-merger enforcement cases, the FTC focused on efforts by branded drug manufacturers to slow or stop competition from lower-cost generic drugs. While patent protection for newly developed drugs sometimes limits the role of competition in this industry, competition from generic equivalents of drugs with expired patents is highly significant. The Congressional Budget Office reports that consumers saved $8 to 10 billion in 1994 alone by buying generic versions of branded pharmaceuticals.[40] The first generic competitor typically enters the market at a significantly lower price than its branded counterpart, and gains substantial share from the branded product. Subsequent generic entrants typically bring prices down even further.[41] Anticompetitive "gaming" of certain provisions of the Hatch-Waxman Act[42] to forestall generic entry has been a major focus of FTC enforcement actions. FTC Hatch-Waxman abuse cases have fallen into three categories:

  (i) **Agreements Not to Compete.** The first category involves agreements between manufacturers of brand-name drugs and manufacturers of generics in which the generic firm allegedly is paid not to compete. The FTC has settled three such cases, including a recent settlement with American Home Products (AHP). That settlement resolved charges that AHP entered into an agreement with Schering-Plough Corporation to delay introduction of a generic potassium chloride supplement in exchange for millions of dollars. The FTC had alleged that an AHP generic would have competed with Schering's branded K-Dur 20, used to treat low potassium conditions, which can lead to cardiac problems.[43]

  (ii) **Fraudulent "Orange Book" Listings.** The second category deals with unilateral conduct by branded manufacturers to delay generic entry. Pursuant to the Hatch-Waxman Act, a branded drug manufacturer must list any patent claiming its branded drug in the FDA's "Orange Book." Companies seeking FDA approval to market a generic equivalent of that drug before patent expiration must provide notice to the branded manufacturer, which then has an opportunity to file a patent infringement action. The filing of such an action within the statutory time frame triggers an automatic 30-month stay of FDA approval of the generic drug. Certain branded manufacturers have attempted to "game" this regulatory structure by listing patents in the Orange Book improperly. Such a strategy permits the company to abuse the Hatch-Waxman's stay provision to block generic competition without advancing any of the Act's procompetitive objectives. The FTC recently filed an action against Biovail Corporation (Biovail), alleging that it had illegally acquired a license to a patent and engaged in such an anticompetitive patent listing strategy with respect to its high blood pressure drug, Tiazac. The matter was resolved through a consent order, which requires Biovail to: (1) transfer certain rights in the acquired patent back to their original owner; (2) terminate its infringement suit against the generic competitor, thereby terminating the 30-month stay; (3) refrain from any action that would trigger another 30-month stay; (4) refrain from future improper Orange Book listing practices; and (5) provide the FTC with prior notice of the acquisitions of any patents it intends to list in the Orange Book.[44]

  The FTC also recently filed an *amicus* brief in pivotal private litigation involving allegations of fraudulent Orange Book listing practices.[45] *In re Buspirone*—which is the subject of continuing litigation—involves allegations that Bristol-Myers Squibb Co. ("BMS") violated the antitrust laws by fraudulently listing a patent on its branded drug, BuSpar, in the FDA's Orange Book, thereby foreclosing generic competition. BMS argued that the conduct in question was covered by the *Noerr-Pennington* doctrine—a legal rule providing antitrust immunity for conduct that constitutes "petitioning" of a governmental authority. In its *amicus* brief opposing *Noerr* immunity, the FTC argued that submitting patent information for listing in the Orange Book did not constitute "petitioning" the FDA and that, even if it did, various exceptions to *Noerr* immunity applied. The district court subsequently issued an order denying *Noerr* immunity and adopting much of the Commission's reasoning.[46] The Court's ruling does not mean that all improper Orange Book filings will give rise to antitrust liability. An antitrust plaintiff must still

prove an underlying antitrust claim. The *Buspirone* decision merely establishes that Orange Book filings are not automatically immune from the antitrust laws or exempt from their scrutiny.

(iii) **Agreements Between Generic Manufacturers.** The third category of cases involves agreements among manufacturers of generic drugs. In our recent complaint against Biovail and Elan Corporation, plc (Elan), the FTC alleged that the companies violated the FTC Act by entering into an agreement that provided substantial incentives not to compete in the market for the 30 mg and 60 mg dosage forms of generic Adalat CC. Biovail and Elan are the only companies with FDA approval to manufacture and sell 30 mg and 60 mg generic Adalat products. In October 1999, Biovail and Elan entered into an agreement involving both companies' generic Adalat products. Under their agreement, in exchange for specified payments, Elan would appoint Biovail as the exclusive distributor of Elan's 30 mg and 60 mg generic Adalat products and allow Biovail to profit from the sale of both products. Our complaint alleged that the companies' agreement substantially reduces their incentives to introduce competing 30 mg and 60 mg generic Adalat products. The proposed order, which has a ten-year term, remedies the companies' alleged anticompetitive conduct by requiring them to terminate the agreement and barring them from engaging in similar conduct in the future. [47]

Commissioner Thomas B. Leary has written and spoken in depth about the issues that we must confront as we proceed with these cases at the intersection of intellectual property rights and antitrust enforcement. [48]

- **Generic Drug Study.** The FTC currently is conducting an industry-wide study focused on certain aspects of generic drug competition under the Hatch-Waxman Amendments. The study has examined whether the Commission's enforcement actions against alleged anticompetitive agreements, which relied on certain Hatch-Waxman provisions, were isolated examples or representative of conduct frequently undertaken by pharmaceutical companies. The study also has examined more broadly how the process that Hatch-Waxman established to permit generic entry prior to expiration of a brand-name drug product's patents has worked between 1992 and 2000. [49]

(b) **Antitrust Investigations Involving Health Care Providers.** So far this year, the agency has reached settlements with three groups of physicians for allegedly engaging in collusive practices that drove up consumers' costs. In May, the FTC announced a settlement with two Denver-area physician organizations to resolve charges that they entered into agreements to fix fees and to refuse to deal with health plans. According to the complaints, primary care doctors—who compete with each other as internists, pediatricians, family physicians, or general practitioners—formed groups to negotiate contracts for higher fees and other terms more advantageous than they could obtain by bargaining separately. The FTC's proposed orders put a stop to further anticompetitive collusive conduct. [50]

Earlier this year, the FTC settled charges that a group of Napa County, California, obstetricians and gynecologists agreed to fix fees and other terms of dealing with health plans and refused to deal with health plans except on collectively determined terms. The FTC's complaint further alleged that the physicians' actions harmed employers, individual patients, and health plans by depriving them of the benefits of competition in the purchase of physician services. To resolve the matter, the physicians agreed to refrain from engaging in similar conduct in the future, and to dissolve the organization through which they conducted their allegedly anticompetitive activity. [51]

(c) **Workshop on Health Care and Competition Law and Policy.** On September 9–10, 2002, the Commission will hold a public workshop focusing on the impact of competition law and policy on the cost, quality, and availability of health care, and the incentives for innovation in the field. Given the significance of health care spending in the United States, it is important that competition law and policy support and encourage efficient delivery of health care products and services. Competition law and policy should also encourage innovation in the form of new and improved drugs, treatments, and delivery options. Developing and implementing competition policy for health care raises complex and sensitive issues. The goal of this workshop is to promote dialogue, learning, and consensus building among all interested parties (including, but not limited to, the business, consumer, government, legal,

provider, insurer, and health policy/health services/health economics communities).

D. Promoting and Maintaining Competitive Energy Markets

Representing a significant portion of total U.S. economic output, energy is vital to the entire economy. The FTC focused considerable resources on energy issues, including conducting in-depth studies of evolving energy markets and investigating numerous oil company mergers.

1. Oil Merger Investigations

In recent years, the FTC has investigated numerous oil mergers. Last year, the agency reviewed three large oil mergers and analyzed the competitive effects in a host of individual product/geographic market combinations. When necessary, the agency has insisted on remedial divestitures to cure potential harm to competition. In Chevron/Texaco, the FTC accepted a consent agreement that allowed the proposed $45 billion merger to proceed but required substantial divestitures to cure the possible anticompetitive aspects of the transaction in 10 separate relevant product markets and 15 sections of the country comprised of dozens of smaller relevant geographic markets.[52] In Valero/Ultramar, the FTC obtained a settlement requiring Valero to divest a refinery, bulk gasoline supply contracts, and 70 retail service stations to preserve competition.[53] In Phillips/Tosco, applying the same standards, the Commission concluded that the transaction did not pose a threat to competition and voted unanimously to close the investigation.[54]

2. Study of Refined Petroleum Prices

Building on its enforcement experience in the petroleum industry, the FTC is studying the causes of the recent volatility in refined petroleum product prices. During an initial public conference held in August 2001, participants identified key factors, including increased dependency on foreign crude sources, changes in industry business practices, restructuring of the industry through mergers and joint ventures, and new governmental regulations. This information assisted the agency in structuring a second public conference in May 2002, focusing in greater depth on those factors identified as most important in the earlier conference. The information gathered through these public conferences will form the basis for a report to be issued later this year.

3. Gasoline Price Monitoring

The FTC also recently announced a project to monitor wholesale and retail prices of gasoline. FTC staff will inspect wholesale gasoline prices for 20 U.S. cities and retail gasoline prices for 360 cities. Anomalies in the data will prompt further inquiries and likely will alert the agency to the possibility of anticompetitive conduct in certain parts of the country. It will also increase our understanding of the factors affecting the price of gasoline.

4. Consumer Gas-Savings Tips

In addition to focusing resources on protecting competition to keep the family gasoline budget down, the FTC developed a series of consumer education publications to help families fuel up wisely: *Gas-Saving Products: Facts or Fuelishness?; The Low-Down on High Octane Gasoline; How To Be Penny Wise, Not Pump Fuelish;* and *Gas-Saving Products: Proceed with Caution.* Two of the publications were produced in cooperation with the American Automobile Association. To date, distribution totals for the four publications exceed 277,000.

E. Keeping Pace With Technology and the Changing Marketplace

As an agency with a history of studying marketplace developments,[55] the FTC is well-positioned to take a leading role in assessing the impact of high technology and globalization on domestic and world markets. In 1995, the agency held 23 days of hearings on these twin phenomena, which culminated in a comprehensive, two-volume Staff Report.[56] Building on this base, the FTC continues to study the impact of technology in general and specific innovations, such as the Internet, and to work increasingly with foreign government agencies and international bodies to promote competition and protect consumers both at home and around the globe. The FTC organizes numerous task forces, workshops, hearings, and conferences to gather information.

1. Technology

- **Internet Lab.** To keep pace with rapidly changing Internet technology, the FTC established an Internet Lab in 1999. Equipped with state-of-the-art personal computers, the lab is a resource for ongoing efforts to understand the me-

dium and to search for fraud, deception, and anticompetitive practices in a secure environment. It provides the necessary equipment and software to capture Web sites and preserve them as evidence. The lab also provides the latest tools for staff to track the manner in which technology is changing the way that commercial information is transmitted to consumers. Unlike advertising in traditional media, for example, advertising in electronic media may vary in content and appearance depending on the appliance and Web browser used by the consumer. FTC Internet enforcement cases reflect the broad range of illegal activity carried out online, from traditional scams like pyramid schemes, health fraud, and bogus investments to high-tech frauds that take advantage of the technology itself to scam consumers. Since June 2001, the FTC has brought over 51 cases involving fraudulent or deceptive Internet marketing practices, bringing the total number of Internet cases filed since 1994 to 236.

- **Internet Task Force.** In August 2001, an Internet Task Force began to evaluate potentially anticompetitive regulations and business practices that could impede e-commerce. The Task Force grew out of the already-formed State Action Task Force, which had been analyzing potentially anticompetitive state regulations generally, and out of the FTC's longstanding interest in the competition aspects of e-commerce. Over the past year, the Task Force has met with numerous industry participants and observers, including e-retailers, trade associations, and leading scholars, and reviewed relevant literature. The Task Force discovered that many states have enacted regulations, ostensibly for other purposes, that have the clear effect of protecting existing bricks-and-mortar businesses from new Internet competitors. The Task Force also is considering whether private companies may be curtailing e-commerce by employing potentially anticompetitive tactics, such as by collectively pressuring suppliers or dealers to limit sales over the Internet. To date, three advocacy filings have resulted in large part from the Task Force's efforts: (1) a joint FTC/DOJ comment before the North Carolina state bar expressing concerns about the impact on consumers of ethics opinions requiring that an attorney be physically present for all real estate closings and refinancings; (2) a joint FTC/DOJ comment before the Rhode Island legislature on similar requirements in a real estate bill; and (3) an FTC staff comment before the Connecticut Board of Opticians, which is considering additional restrictions on out-of-state and Internet contact lens sellers. [57]
- **Internet Competition Workshop.** In October, the Commission will hold a public workshop on possible efforts to restrict competition on the Internet. The workshop will include panel discussions to address certain specific industries that are important to consumers and that have experienced some growth in commerce via the Internet, but that may have been hampered by potentially anticompetitive state regulations or business practices. For example, the workshop will include panels on some or all of the following industries: retailing, automobiles, cyber-charter schools, real estate, health care, wine sales, auctions, contact lenses, and caskets. The Internet Task Force expects that the workshop will (1) enhance the Commission's understanding of these issues, (2) help educate policymakers about the effects of possibly protectionist state regulations, and (3) help educate private entities about the types of business practices that may or may not be viewed as problematic.
- **Standards Setting.** As technology advances, there will be increased efforts to establish industry standards for the development and manufacture of new products. While the adoption of standards is often procompetitive, the standards setting *process* which involves competitors' meeting to set product specifications, can be an area for antitrust concern. In a complaint filed last month, the FTC charged that Rambus, Inc., a participant in an electronics industry standards-setting organization, failed to disclose—in violation of the organization's rules—that it had a patent and several pending patent applications on technologies that eventually were adopted as part of the industry standard. [58] The standard at issue involved a common form of computer memory used in a wide variety of popular consumer electronic products, such as personal computers, fax machines, video games, and personal digital assistants. The FTC's complaint alleges that once the standard was adopted, Rambus was in a position to reap millions in royalty fees each year, and potentially more than a billion dollars over the life of the patents, all of which would be passed on to consumers through increased prices for the downstream products. [59] Because standard-setting abuses can harm robust and efficiency-enhancing competition in high tech markets, the FTC will continue to pursue investigations in this important area. [60]

- **Intellectual Property Hearings.** In February 2002, the FTC and the DOJ commenced a series of hearings on *"Competition and Intellectual Property Law and Policy in the Knowledge-Based Economy."*[61] The hearings respond to the growth of the knowledge-based economy, the increasing role in antitrust policy of dynamic, innovation-based considerations, and the importance of managing the intersection of intellectual property and competition law to realize their common goal of promoting innovation. During the hearings, business persons, consumer advocates, inventors, practitioners, and academics are focusing on:

  (a) what economic learning reveals, and does not reveal, regarding the relationships between intellectual property and innovation, and between competition and innovation;

  (b) "real-world" experiences with patents and competition;

  (c) procedures and substantive criteria involved in prosecuting and litigating patent claims;

  (d) issues raised by patent pools and cross-licensing and by certain standard-setting practices;

  (e) the implications of unilateral refusals to deal, patent settlements, and licensing practices;

  (f) international comparative law perspectives regarding the competition/intellectual property interface; and

  (g) jurisprudential issues, including the role of the Federal Circuit.

A public report that incorporates the results of the hearings, as well as other research, will be prepared after the hearings.

- **Wireless Workshop.** In March, FTC staff released a summary and update of the proceedings of its December 2000 workshop, "The Mobile Wireless Web, Data Services and Beyond: Emerging Technologies and Consumer Issues."[62] The workshop addressed five topics: (1) an overview of the relevant technologies; (2) privacy issues raised by these technologies; (3) security issues; (4) advertising and disclosures in the wireless area; and (5) self-regulatory programs. The FTC will continue to monitor the development of wireless technologies, along with the privacy, security, advertising, and other consumer protection issues they raise.

2. Globalization

- **International Antitrust.** Because competition increasingly takes place in a worldwide market, cooperation with competition agencies in the world's major economies is a key component of our enforcement program. Given differences in laws, cultures, and priorities, it is unlikely that there will be complete convergence of antitrust policy in the foreseeable future. Areas of agreement far exceed those of divergence, however, and instances in which our differences will result in conflicting results are likely to remain rare. The agency has increased its cooperation with agencies around the world, both on individual cases and on policy issues, and is committed to addressing and minimizing policy divergences.
- **ICN and ICPAC.** Last fall, the FTC, the DOJ, and twelve other antitrust agencies from around the world launched the International Competition Network (ICN). The ICN is an outgrowth of a recommendation of the International Competition Policy Advisory Committee (ICPAC) that competition officials from developed and developing countries convene a forum in which to work together on competition issues raised by economic globalization and the proliferation of antitrust regimes. ICN provides a venue for antitrust officials worldwide to work toward consensus on proposals for procedural and substantive convergence on best practices in antitrust enforcement and policy. Sixty-one jurisdictions already have joined the ICN, and we are working on initial projects on mergers and competition advocacy.
- **Free Trade Agreement of the Americas.** The FTC is working with the nations of our hemisphere to develop competition provisions for a Free Trade Agreement of the Americas.
- **OECD.** The FTC is participating in the continuing work of the OECD on, among other things, merger process convergence, implementation of the OECD recommendation on hard-core cartels (*e.g.,* price-fixing agreements), and regulatory reform.
- **Technical Assistance.** For the past ten years, the FTC has been able to participate in assisting developing nations that have made the commitment to mar-

ket and commercial law reforms. With funding principally from the U.S. Agency for International Development, and in partnership with the DOJ, about thirty nations have received technical assistance with development of their competition and consumer protection laws. Currently, the technical assistance program is active in South and Central America, South Africa, and Southeastern Europe. The program emphasizes the development of investigative skills, and relies on a combination of resident advisors, regional workshops, and targeted short term missions. These activities have enabled a large number of career staff to share their expertise, although great care is taken to avoid any intrusions on the time and planning for domestic enforcement projects. Future plans are focused on expanding this reimbursable program to the former Soviet Union and to Asia.

- **International Consumer Protection.** The number of consumer protection cases with an international component continues to rise. Consumers now increasingly participate in a global marketplace, often receiving telemarketing or e-mail solicitations from vendors outside the U.S. Increasingly, the FTC is called upon to lead or participate in international organizations. Last year, Commissioner Swindle became head of the U.S. delegation to the OECD Experts Group for Review of the 1992 OECD Guidelines for the Security of Information Systems. The revised guidelines will be released in early September and will promote a "culture of security" in which we all have a role to play. This spring, Commissioner Thompson was elected Chair of the OECD's Committee on Consumer Policy.
- **Cross-Border Fraud.** The FTC is increasing its efforts to counter fraud that transcends borders. In particular, our partnerships with Canadian officials allow the FTC to respond more effectively to telemarketing scams emanating from Canada. The FTC has forged two city-specific partnerships to coordinate our law enforcement efforts: the Ontario Strategic Partnership, in which the FTC's Midwest Regional Office has worked with Canadian law enforcers to focus on Toronto-based telemarketing; and Project Emptor, in which the Northwest Regional Office has partnered with British Columbia officials to target Vancouver boiler rooms. Drawing on these partnerships, in June 2002 the FTC and 17 Canadian and U.S. law enforcement and consumer protection agencies announced a coordinated criminal and civil law enforcement initiative to stop fraudulent cross border schemes and recover money for victims, many of whom are elderly. Fraudulent schemes targeted by the initiative included illegal international lottery scams, phony advance-fee credit card offers, and bogus credit card loss-protection schemes.[63] The FTC has brought seven actions and obtained nine final orders in cases involving cross-border fraud between the U.S. and Canada in 2002.
- **IMSN Findings on Cross-Border Remedies.** Last spring, the International Marketing Supervision Network—an organization of consumer protection agencies from 29 countries—under the leadership of the FTC, issued "Findings on Cross-Border Remedies," which outlines obstacles to cross-border enforcement of consumer protection laws and suggestions for overcoming these obstacles.
- **econsumer.gov.** In April 2001, 13 countries and the OECD launched *nsumer.gov* public Web site where consumers can file cross-border e-commerce complaints with law enforcement agencies around the world, access education materials about e-commerce, and contact consumer protection agencies. The site is available to consumers in English, French, Spanish, and German. Since its launch, three additional countries have joined the project. To date, we have received over 1,700 complaints from consumers in six continents about companies in more than 68 countries. Next steps for this project include adding additional members, increasing outreach and publicity, adding consumer education materials, and adding information about alternative dispute resolution for e-commerce complaints on the site.

F. Targeting Special Initiatives to Specific Consumer Groups

The FTC has initiated a variety of programs that seek to assist specific consumer groups. Among these groups are children, minorities and non-English speaking sections of the U.S. population, and homeowners who may be special prey for fraudulent lenders.

1. Children and Violent Media

In response to Congressional requests, the FTC continues to monitor violent media directed toward children. An FTC September 2000 report concluded that the entertainment industry targeted advertising of violent video games, movies, and music to children.[64] Subsequently, Congress directed that the FTC continue its ef-

forts through three related initiatives: consumer research and workshops, an underage shopper retail compliance survey, and marketing and data collection.[65] In response, the FTC released a follow-up report, in April 2001, outlining improvements in the movie and electronic game industries but finding no appreciable change in the music industry's target marketing practices.[66] The FTC's second follow-up report, in December 2001, found that the movie and electronic game industries had made continued improvements, and that although the music industry had made progress in disclosing parental advisory label information, it had not altered its marketing practices.[67] The FTC's third follow-up report, released in June 2002, found continued progress by the movie and electronic game industries and improvement by the music industry in including rating information in advertising that would help parents identify material that may be inappropriate for their children. This most recent report also showed compliance by the movie and electronic games industries with industry promises to limit ad placements, although the report found advertisements by all three industries continue to appear in some media popular with teens.[68] The report concludes that the music industry continues to advertise music with explicit content on television shows and in print magazines popular with teens.

2. Children and Gambling

The FTC also is assessing the marketing of online gambling sites to children. In June, the FTC announced the results of an informal survey of web sites to determine the access and exposure that teens have to online gambling.[69] The FTC visited over 100 popular gambling web sites and found that minors can, indeed, access these sites easily, and that minors often are exposed to ads for online gambling on non-gambling web sites. The FTC staff has met with representatives of the online gambling industry to seek voluntary corrective action, and with interested consumer advocates. The FTC, in conjunction with industry representatives, has launched a consumer and business education campaign warning about the dangers of underage online gambling. Online gambling industry representatives have advised FTC staff that they will devise a "Guide to Best Practices" regarding clear and conspicuous warnings about prohibited underage gambling, effective blocking methods, and restricted placement of industry advertisements.

3. Spanish-Speaking Consumers

To reach the expanding population of Spanish-speaking consumers in the United States, the FTC instituted an Hispanic Outreach Program in January 2002. This effort includes the creation of a dedicated page on the FTC Web site, *Proteccion para el Consumidor,* that will mirror the English page, and translation of 14 consumer publications, printed or posted to the Web. We also translated the FTC Consumer Complaint Form into Spanish. In addition, the FTC is conducting media outreach and providing interviews in Spanish.

4. Native Americans

The FTC has partnered with the Indian Arts and Crafts Board, the Alaska State Council on the Arts, and the Alaska Attorney General's office in developing and distributing more than 100,000 postcards and brochures to assure the authenticity of Alaskan Native art and help prevent fakes. The materials provide numerous tips—mostly centered on a "Silver Hand" certification program—on how to be confident that Alaskan Native art is truly Native.

5. Homeowners

The FTC also has focused its consumer protection efforts on homeowners, especially those in poorer urban areas, who sometimes are the victims of deceptive lending practices. Since 1998, the FTC has brought 15 cases involving a variety of deceptive lending practices. This past March, the FTC, six states, AARP, and class action and individual plaintiffs settled claims against First Alliance Mortgage Company and its chief executive officer. The complaint alleged that the defendants misled consumers about the existence and amount of origination fees for their loans (which typically constituted 10 to 25 percent of the loan) and the interest rate and monthly payments of their adjustable rate mortgage loans. Consequently, according to the complaint, consumers believed they were borrowing less money at lower interest rates than they actually were. The settlement, which requires court approval, creates a consumer redress fund that will include all of the remaining assets of First Alliance and its affiliates, now under liquidation in bankruptcy court, as well as a payment of $20 million from the company's principals. Nearly 18,000 borrowers could receive as much as $60 million in redress, making this one of the FTC's largest cases ever.

G. Advancing Efficient Law Enforcement

The FTC has undertaken a variety of efforts to streamline its practices, leverage its resources, and minimize the burden on the public. These ongoing "good government" initiatives share a common theme: they represent efforts to go beyond the regular, ongoing work of the agency and to find ways to make the FTC's work more effective, more efficient, and less costly for businesses and consumers. We seek to use our limited resources wisely, because each day or dollar saved can be applied to additional activities that benefit consumers.

1. Sweeps and Partnerships with Enforcement Agencies

The FTC leverages its resources through coordinated enforcement actions with other law enforcement agencies, both state and federal. In particular, the FTC conducts "sweeps" to investigate and bring actions against specific types of frauds and deceptions. In the past 12 months, the FTC and 12 partners have participated in sweeps covering Internet health fraud, cold-call telemarketing, Internet scams, and business opportunities, resulting in over 170 separate law enforcement actions.

2. Training Staff from Other Agencies

Another way that the FTC promotes efficient law enforcement is to train staff from other law enforcement agencies in new technologies or techniques pioneered by the FTC. One example is the FTC's ongoing Internet fraud training program. The FTC has created a series of regional "Netforces" made up of law enforcement agencies that have participated in our training. On April 2, 2002, the FTC began the first of these efforts by joining eight state agencies in the northwest United States and four Canadian agencies in an initiative targeting deceptive spam and Internet fraud. Together, these agencies have brought 63 law enforcement actions against Web-based scams ranging from alleged auction fraud to bogus cancer cure sites, and have sent more than 500 letters warning of the illegality of deceptive spam.

3. Streamlining Merger Review

A major focus of FTC efficiency efforts is the merger review process. The FTC is working on a number of reforms to speed the process and reduce the burden on merging parties without sacrificing the sufficiency of information required by the agency.

- **Electronic Premerger Filing.** As part of an overall movement to make government more accessible electronically, the FTC, working with the DOJ, will accelerate its efforts in FY 2003 to develop an electronic system for filing HSR premerger notifications. E-filing will reduce filing burdens for both businesses and government, and also will create a valuable database of information on merger transactions to inform future policy deliberations.
- **Burden Reduction in Investigations.** The agencies have taken steps to reduce the burden in document productions responsive to Second Requests. In response to legislation amending the HSR Act, the FTC amended its rules of practice to incorporate new procedures. The rule requires Bureau of Competition staff to schedule conferences to discuss the scope of a Second Request with the parties and also establishes a procedure for the General Counsel to review the request and rule promptly on any remaining unresolved issues. Measures adopted include a process for seeking modifications or clarifications of Second Requests, and expedited senior-level internal review of disagreements between merging parties and agency staff; streamlined internal procedures to eliminate unnecessary burdens and undue delays; and implementation of a systematic management status check on the progress of negotiations on Second Request modifications.
- **Merger Investigation Best Practices.** The FTC is conducting a series of national public workshops regarding modifications and improvements to the merger investigation process. The FTC will solicit input from a broad range of interest groups, including corporate personnel, outside and in-house attorneys, economists, and consumer groups, on topics such as using more voluntary information submissions before issuance of a Second Request, reducing the scope and content of the Second Request, negotiating modifications to the Second Request, and focusing on special issues concerning electronic records and accounting or financial data.[70]
- **Merger Remedies.** Other "best practices" workshops will solicit comments on merger remedies. Among the issues to be addressed are structuring asset packages for divestitures, timing of divestitures (*i.e.,* up front or after consummation), evaluating the competitive adequacy of proposed buyers, and assessing the preservation of competition after divestitures.

4. Consumer and Business Education

Yet another way the FTC seeks to make law enforcement more efficient is by disseminating information about deceptive practices in the marketplace. The less often consumers are victimized by deceptive practices, the fewer enforcement actions the FTC must bring. Further, the more that businesses, especially small businesses, understand their obligations, the more readily they can comply. Thus, consumer and business education is the first line of defense against fraud and deception.

With each major consumer protection enforcement initiative, the FTC launches a comprehensive and creative education campaign. Between May 2001 and May 2002, the FTC issued 108 consumer protection publications: 94 for consumers and 14 for businesses. Of those publications, 67 are new and 41 are revisions; 23 are translations into Spanish, and six are joint efforts between the public and private sectors. The FTC continues to exceed previous distribution records. In the last year, the FTC distributed more than 5.6 million printed publications to the public, and received more than 12.5 million "hits" on publications posted on the consumer protection portion of the FTC's Web site. Special FTC educational undertakings include:

- **National Consumer Protection Week.** For the fourth consecutive year, the FTC took the lead in organizing National Consumer Protection Week. This year, the event focused on privacy. Other participants 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 DOJ.
- **www.consumer.gov.** The FTC continues to manage *www.consumer.gov* and to recruit new members to participate in the site, which offers one-stop access to federal consumer information. In the past year, the number of members has grown from 135 to 178.
- **Response to 9/11.** In the wake of September 11th, the FTC worked with other groups to alert consumers to possible fund-raising fraud. The FTC released a Consumer Alert, *Helping Victims of the Terrorist Attacks: Your Guide to Giving Wisely* on September 21, at a press conference held by the FTC's Northeast Regional Office in conjunction with the New York Attorney General and the New York Better Business Bureau.

III. Legislative Recommendations

To improve the FTC's ability to implement its mission and to serve consumers, we make the following recommendations for legislative changes. We would be happy to work with the Committee to develop appropriate language.

A. Eliminate the FTC Act's Exemption for Communications Common Carriers

The FTC Act exempts common carriers subject to the Communications Act from its prohibitions on unfair and deceptive acts or practices and unfair methods of competition. This exemption dates from a period when telecommunications were provided by government-authorized, highly regulated monopolies. The exemption is now outdated. In the current world, firms are expected to compete in providing telecommunications services. Congress and the Federal Communications Commission (FCC) have dismantled much of the economic regulatory apparatus formerly applicable to the industry. Telecommunications firms also have expanded into numerous non-common carrier activities. Oversight by the FTC of telecommunications firms' activities thus has become increasingly important.

The FTC Act exemption has proven to be a barrier to effective consumer protection, both in common carriage and in other telecommunications businesses. The exemption also has prevented the FTC from applying its legal and economic expertise regarding competition to mergers and other possible anticompetitive practices, not only involving common carriage, but in other high-tech fields involving telecommunications. We believe that Congress should eliminate the special exemption to reflect the fact that competition and deregulation have replaced comprehensive economic regulation.

FTC efforts to halt fraudulent or deceptive practices by telecommunications firms have sometimes been stymied by the common carrier exemption. While common carriage has been outside the FTC's authority, we believe that the FTC Act applies to non-common carrier activities of telecommunications firms, even if the firms also provide common carrier services.[71] Continuing disputes over the breadth of the FTC Act's common carrier exemption hamper the FTC's oversight of the non-common carrier activities. These disputes have arisen even when the FCC does not have, or does not exercise, jurisdiction over the non-common carrier activity. These disputes may increase the costs of pursuing an enforcement action, or may cause the agency

to narrow an enforcement action—for example, by excluding some participants in a scheme—to avoid protracted jurisdictional battles and undue delay in providing consumer redress.

The FTC has the necessary expertise to address these issues. The FTC is the federal agency with broad consumer protection and competition experience covering nearly all fields of commerce. The FTC has extensive expertise with advertising, marketing, billing, and collection, areas in which significant problems have emerged in the telecommunications industry. In addition, the FTC has powerful procedural and remedial tools that could be used effectively to address developing problems in the telecommunications industry if the FTC were authorized to reach them.

The common carrier exemption also significantly restricts the FTC's ability to engage in effective antitrust enforcement in broad sectors of the economy. The mix of common carrier and non-common carrier activities within particular telecommunications companies frequently precludes FTC antitrust enforcement for much of the telecommunications industry. Further, because of the expansion of telecommunications firms into other high-tech industries and the growing convergence of telecommunications and other technologies, the common carrier exemption increasingly limits FTC involvement in a number of industries outside telecommunications.

B. Technical Changes

The FTC also requests two new limited grants of authority: (1) the ability to accept reimbursement for expenses incurred by the FTC in assisting foreign or domestic law enforcement authorities, and (2) the ability to accept volunteer services, in-kind benefits, or other gifts or donations. Both new authorities would be useful as the FTC tries to stretch its resources to meet its statutory responsibilities.

The authority to accept reimbursement for expenses incurred in assisting foreign or domestic law enforcement authorities would be especially useful, since the FTC has been working closely with domestic and foreign law enforcement authorities to address possible law violations. Partnering with these law enforcement authorities has resulted in enhanced law enforcement efforts and greater sharing of significant information. In some of these situations, our foreign or domestic partner is interested in reimbursing the FTC for the services it has provided or in sharing some of the costs of investigating or prosecuting the matter. Without specific statutory reimbursement authority, however, the FTC cannot accept and keep such reimbursements because of constraints under appropriations law. [72]

In addition, the FTC requests authority to accept donations and gifts, such as volunteer services and in-kind benefits. Congress has conferred this authority by statute on various agencies, including the Office of Government Ethics, the FCC, and the Consumer Product Safety Commission. [73] Without this authority, the FTC cannot accept services or keep items because of appropriations law constraints. This broad restriction on acceptance of gifts sometimes limits the FTC's ability to fulfill its mission in the most cost-effective manner. For example, the FTC cannot accept volunteer services from individuals wishing to provide such services to the agency. In addition, agency officials must sometimes refuse donated items that could otherwise be useful in carrying out the agency's mission, such as books and similar mission-related items.

IV. Concluding Remarks

Mr. Chairman and Members of the Subcommittee, we appreciate this opportunity to provide an overview of the Commission's efforts to maintain a competitive marketplace, free of deceptive and unfair practices, for American businesses and consumers. We believe that the Commission's antitrust and consumer protection enforcement has demonstrable benefits for consumers and the American economy—benefits that far outweigh the resources allocated to maintaining our mission. We would be pleased to respond to any questions you may have.

ENDNOTES

1. The FTC has broad law enforcement responsibilities under the Federal Trade Commission Act, 15 U.S.C. § 41 *et seq.* The statute provides the agency with jurisdiction over the most of the economy. Certain entities, such as depository institutions and common carriers, are wholly or partially exempt from FTC jurisdiction, as is the business of insurance. In addition to the FTC Act, the FTC has enforcement responsibilities under more than 40 statutes.

2. Timothy J. Muris, *Chairman Robert Pitofsky: Public Servant and Scholar* Remarks Before the American Antitrust Institute, Second Annual Conference (Washington, D.C., June 12, 2001), available at <http://www.ftc.gov/speeches/muris/muris010612.htm>.

3. Much of what the FTC challenges in its consumer protection mission is hardcore fraud, and given the transient nature of many of these illegitimate operations,

we frequently are unable to collect the full amount of the monetary judgment ordered. The judgment amount, however, gives some indication of the extent of fraud and deception stopped by the FTC.

4. This web site is available at <http://www.sentinel.gov>.

5. Press Release, *State, Federal Law Enforcers Launch Sting on Business Opportunity, Work-at-Home Scams* (June 20, 2002), available at <http://www.ftc.gov/opa/2002/06/bizopswe.htm>.

6. Press Release, *FTC Sweep Protects Consumers from "Dialing for Deception"* (Apr. 15, 2002), available at <http://www.ftc.gov/opa/2002/04/dialing.htm>.

7. *FTC v. H.G. Kuykendall, Jr.,* No. CIV–96–388-M (W.D. Okla. Mar. 4, 2002).

8. *FTC v. Access Resource Servs., Inc.,* No. 02–60226 (S.D. Fla. Feb. 20, 2002).

9. *FTC v. Electronic Products Distribution,* L.L.C., No. 02CV0888 H(AJB) (S.D. Cal. May 7, 2002); *v. United Fitness of America, LLC,.* CV-S–02–648-KJD-LRL (D. Nev. May 7, 2002); *FTC v. Hudson Berkley Corp.,* No. CV-S–0649-PMP-RJJ (D. Nev. May 7, 2002).

10. *Interstate Bakeries Corp.,* Docket No. C–3402 (Apr. 16, 2002) (consent order).

11. Palm, Inc. Docket No. C–4044 (April 18, 2002) (consent order)

12. 15 U.S.C § 18a, *as amended,* Pub. L. No 106–553, 114 Stat. 2762 (2000).

13. *See* 15 U.S.C. § 18a, *as amended,* Pub. L. No. 106–553, 114 Stat. 2762 (2000).

14. *MSC Software Corp.,* Docket No. 9299 (Oct. 10, 2001) (complaint issued) (alleging that two MSC acquisitions violated Clayton Act).

15. *MSC Software Corp.,* Docket No. 9299 (Oct. 10, 2001) (complaint issued) (involving engineering software); *Chicago Bridge Iron Co., Inc.,* Docket No. 9300 (Oct. 25, 2001) (complaint issued) (pertaining to field-erected specialty industrial storage tanks).

16. Press Release, *FTC Authorizes Suit to Block Joint Acquisition of Seagram Spirits and Wine by Diageo PLC and Pernod Ricard S.A.* (Oct. 23, 2001), available at <http://www.ftc.gov/opa/2001/10/diageo.htm>.

17. *FTC v. Libbey, Inc.,* Civ. Act. No. 02–0060 (RBW) (Memorandum Opinion) (D.D.C. Apr. 22, 2002) (granting FTC's request for a preliminary injunction).

18. Press Release, *FTC to Challenge DGF Stoess's Proposed Acquisition of Leiner Davis* (Jan. 15, 2002), available at <http://www.ftc.gov/opa/2002/01/gelatin.htm>.

19. Press Release, *FTC Authorizes Injunction to Pre-empt Meade Instruments' Purchase of All, or Certain Assets, of Tasco Holdings, Inc.'s Celestron International* (May 29, 2002), available at <http://www.ftc.gov/opa/2002/05/meadecelestron.htm>.

20. Press Release, *FTC Seeks to Block Cytyc Corp.'s Acquisition of Digene Corp.* (June 24, 2002), available at <http://www.ftc.gov/opa/2002/06/cytyc—digene.htm>.

21. Telemarketing Sales Rule, 67 Fed. Reg. 4492 (Jan. 30, 2002) (proposed Rule amendments).

22. Press Release, *Workshop Planned To Discuss Strategies for Providing Effective Financial Privacy Notices* (Sept. 24, 2001), available at <http://www.ftc.gov/opa/2001/09/glbwkshop.htm>.

23. Press Release, *FTC to Host Public Workshop on Consumer Information Security* (Mar. 12, 2002), available at <http://www.ftc.gov/opa/2002/03/security.htm>.

24. *United States v. The Ohio Art Co.,* No. 3:02CV7203 (N.D. Ohio filed Apr. 19, 2002); *United States v. American Pop Corn Co.,* No. C02–4008DEO (N.D. Iowa Feb. 28, 2002) (consent decree); *United States v. Lisa Frank, Inc.,* No. 01–1516-A (E.D. Va. Oct. 3, 2001) (consent decree); *United States v. Looksmart, Ltd.,* No. 01–606-A (E.D. Va. Apr. 23, 2001) (consent decree); *United States v. Bigmailbox.com, Inc.,* No. 01–605-A (E.D. Va Apr. 23, 2001) (consent decree); *United States v. Monarch Servs., Inc.,* No. AMD 01 CV 1165 (D. Md. Apr. 20, 2001) (consent decree).

25. *Eli Lilly & Company,* Docket No. C–4047, (May 10, 2002) (final order).

26. 15 U.S.C. § 6801.

27. *FTC v. Information Search, Inc.,* No. AMD–01–1121 (D. Md. Mar. 15, 2002); *FTC v. Guzzetta,* No. CV–01–2335 (E.D.N.Y. Feb. 25, 2002); *FTC v. Garrett,* No. H 01–1225 (S.D. Tex. Mar. 26, 2002).

28. The cases challenging the misuse of preacquired account information and deceptive spam also involved issues of fraud.

29. *TechnoBrands, Inc., and Charles J. Anton,* Docket No. C–4041 (Apr. 15, 2002) (decision and order), available at <http://www.ftc.gov/os/2002/04/technobranddo.pdf>; *FTC v. Technobrands, Inc.,* No. 3:02-CV–86 (E.D. Va. filed Feb.15, 2002); *FTC v. Ira Smolev,* No. 01–8922 CIV ZLOCH (S.D. Fla. filed Oct. 23, 2001).

30. *FTC v. Boivin,* No. 8:02-CV–77-T–26 MSS (M.D. Fla. Jan. 15, 2002) (consent decree); *FTC v. Estenson,* No. A3–02–10 (DND Feb. 5, 2002) (consent decree); *FTC v. Larsen,* No. 8:02-CV–76-T–26MAP (M.D. Fla. Jan. 16, 2002) (consent decree); *FTC v. Lutheran,* No. 02 CV 0095 K (RAB) (S.D. Cal. Jan. 18, 2002) (consent decree); *FTC v. Va,* No. 02–60062-Civ-Zloch (S.D. Fla. Jan. 18, 2002) (consent decree); *FTC v. Pacheco,* No. 02-CV–31L (D.R.I. Jan. 22, 2002) (consent decree).

31. *FTC v. BTV Industries,* No. CV-S–02–0437-LRH (PAL) (D. Nev. filed Mar. 7, 2002).
32. Katharine Levit *et al., Inflation Spurs Health Spending in 2000,* 21 Health Affairs 172 (Jan.—Feb. 2002).
33. *FTC v. Vital Living Products, Inc.,* No. 3:02CV74-MU (W.D. N.C. Mar. 13, 2002).
34. *FTC v. Pletschke,* Docket No. C–4040 (Feb. 22, 2002) (decision and order).
35. The titles of the teaser sites are: Looking for Financial Freedom?; The Ultimate Prosperity Page; Nordicalite Weight Loss Product; A+ Fast Ca$$h for College; EZTravel: Be an Independent agent; EZTravel: Certificate of Notification; EZToyz Investment Opportunity; HUD Tracer Association; CreditMenders Credit Repair; NetOpportunities: Internet is a Gold Mine; National Business Trainers Seminars; VirilityPlus: Natural Alternative to Viagra; ArthritiCure: Be Pain-Free Forever.
36. Commissioner Sheila F. Anthony, Remarks Before the Food & Drug Law Institute, 45th Annual Educational Conference, *Combating Deception in Dietary Supplement Advertising* (Apr. 16, 2002), available at <http://www.ftc.gov/speeches/anthony/dssp2.htm>.
37. *See* National Health Expenditures, by Source of Funds and Type of Expenditures, Health Care Financing Administration, available at <http://www.hcfa.gov/stats/nhe-oact/tables/t3.htm>
38. *FTC v. The Hearst Trust, The Hearst Corp., and First DataBank, Inc.,* Civ Act. No.1:01CV00734 (D.D.C. Apr. 5, 2001) (complaint) (Commissioner Leary and Commissioner Swindle dissenting).
39. *FTC v. Hearst,* Civ. Act. No. 1:01CV00734 (D.D.C. Nov. 9, 2001) (Stipulation for Entry of Final Order and Stipulated Permanent Injunction).
40. *Congressional Budget Office, How Increased Competition from Generic Drugs Has Affected Prices and Returns in the Pharmaceutical Industry* (July 1998), available at <http://www.cbo.gov>.
41. *Id.*
42. *See* Federal Food, Drug, and Cosmetics Act, 21 U.S.C. § 301 *et seq.* The Hatch-Waxman amendments were contained in the Drug Price Competition and Patent Restoration Act of 1984, Pub. L. No. 98–417, 98 Stat. 1585 (codified at 15 U.S.C. §§ 68b, 68c, 70b; 21 U.S.C. §§ 301 note, 355, 360cc; 28 U.S.C. § 2201; 35 U.S.C. §§ 156, 271, 282 (1984)).
43. *Schering-Plough Corp.,* Dkt. 9297 (Apr. 2, 2002) (consent order as to American Home Products). In an initial decision filed on June 27, 2002, an FTC Administrative Law Judge (ALJ) dismissed all allegations of anticompetitive conduct in a March 2001 Federal Trade Commission complaint against pharmaceutical manufacturers Schering-Plough Corporation (Schering) and Upsher-Smith Laboratories (Upsher-Smith). *Schering-Plough Corp.,* Dkt. 9297 (June 27, 2002) (initial decision) (available at <http://www.ftc.gov/os/2002/07/scheringinitialdecisionp1.pdf, and http://www.ftc.gov/os/2002/07/scheringinitialdecisionp2.pdf . An appeal is pending with the Commission.
44. *Biovail Corp.,* File No. 011–0094 (Apr. 23, 2002) (proposed consent order accepted for placement on public record for comment).
45. *In re Buspirone Patent Litigation/In re Buspirone Antitrust Litigation,* Memorandum of Law of *Amicus Curiae* The Federal Trade Commission in Opposition to Defendant's Motion to Dismiss *available at* <http://www.ftc.gov/os/2002/01/busparbrief.pdf
46. *In re Buspirone,* 185 F. Supp. 2d 363 (S.D.N.Y. 2002).
47. *Biovail Corp.,* File No. 011–0132 (June 27, 2002) (proposed consent order accepted for placement on public record for comment).
48. See Thomas B. Leary, Commissioner, *Antitrust Issues in Settlement of Pharmaceutical Patent Disputes, Part II,* Remarks Before the American Bar Association's Antitrust Healthcare Program, Washington, D.C., (May 17, 2001) <http://www.ftc.gov/speeches/leary/learypharmaceuticalsettlement.htm>; Thomas B. Leary, Commissioner, *Antitrust Issues in Settlement of Pharmaceutical Patent Disputes,* Address Before the Sixth Annual Antitrust Healthcare Forum, Northwestern University School of Law, Chicago, Illinois (Nov. 3, 2000), available at *<p://www.ftc.gov/speeches/leary/learypharma.htm* The Commission also submitted testimony this Spring on competition in the pharmaceutical industry before the Committee on Commerce, Science, and Transportation, U.S. Senate. The testimony is available at *<p://www.ftc.gov/os/2002/04/pharmtestimony.htm*
49. *See* Fed. Reg. 61334 (Oct. 17, 2000); 66 Fed. Reg. 12512 (Feb. 27, 2001).
50. *Physician Integrated Servs. of Denver, Inc., Michael J. Guese, M.D., and Marcia L. Brauchler,* File No. 011–0173 (May 13, 2002) (proposed consent order accepted for placement on public record for comment); *Aurora Associated Primary Care Physicians, L.L.C., Richard A. Patt, M.D., Gary L. Gaede, M.D., and Marcia*

L. Brauchler, File No. 011–0174 (May 13, 2002) (proposed consent order accepted for placement on public record for comment).

51. *Obstetrics and Gynecology Med. Corp. of Napa Valley,* File No. 011–0153 (May 14, 2002) (final order).

52. *Chevron Corp./Texaco Inc.,* Docket No. C–4023 (Jan. 2, 2002) (consent order).

53. *Valero Energy Corp./Ultramar Diamond Shamrock Corp.,* Docket No. C–4031 (Feb. 19, 2002) (consent order).

54. *Phillips Petroleum Corp./Tosco Corp.,* File No. 011–0095 (Sept. 17, 2001) (Statement of the Commission).

55. For example, an FTC study of the broadcasting industry influenced passage of the Radio Act of 1927 (a predecessor to the Federal Communications Act of 1934), and the FTC's disclosure of securities abuses played a role in heightening Congressional recognition of the need for securities regulation and led to the Securities Act of 1933.

56. Staff of the Federal Trade Commission, Anticipating the 21st Century: Competition Policy in the New High-Tech, Global Marketplace (May 1996).

57. Letter from Timothy J. Muris, Chairman, Federal Trade Commission and Charles A. James, Assistant Attorney General (Antitrust), Department of Justice, to The Honorable John B. Harwood, Speaker of the Rhode Island House of Representatives (regarding proposed bill H. 7462, Restricting Competition From Non-Attorneys In Real Estate Closing Activities) (Mar. 29, 2002); Letter from Timothy J. Muris, Chairman, Federal Trade Commission and Charles A. James, Assistant Attorney General (Antitrust), Department of Justice, to Ethics Committee, North Carolina State Bar (regarding North Carolina State Bar Opinions Restricting Involvement of Non-Attorneys in Real Estate Closings and Refinancing Transactions) (Dec. 14, 2001); and Comments of The Staff of the Federal Trade Commission, Intervenor, *In Re: Declaratory Ruling Proceeding On the Interpretation and Applicability of Various Statutes and Regulations Concerning the Sale of Contact Lenses* Ct. Bd. Of Examiners for Opticians, Mar. 27, 2002).

58. *Rambus Inc.,* Docket No. 9302 (June 18, 2002) (complaint), available at <http://www.ftc.gov/os/2002/06/rambuscmp.htm>.

59. *Id.*

60. In 1996, the FTC brought a similar case against Dell Computer, alleging that Dell had failed to disclose that it had an existing patent on a personal computer component that was adopted as the standard by a video electronics group. *Dell Computer Co.* Docket No. C–3658 (May 20, 1996) (consent order) (Commissioner Azcuenaga dissenting).

61. *See* 66 Fed. Reg. 58146 (Nov. 20, 2001).

62. Federal Trade Commission, Public Workshop: The Mobile Wireless Web, Data Services and Beyond: Emerging Technologies and Consumer Issues (Feb. 2002), available at <http://www.ftc.gov/bcp/reports/wirelesssummary/pdf>.

63. Press Release, *U.S., Canadian Law Enforcers Target Cross-Border Telemarketing* (June 10, 2002), available at <http://www.ftc.gov/opa/2002/06/crossborder.htm>.

64. Federal Trade Commission, Marketing Violent Entertainment to Children: A Review of Self-Regulation and Industry Practices in the Motion Picture, Music Recording & Electronic Game Industries (Sept. 2000), available at <http://www.ftc.gov/reports/violence/vioreport.pdf>.

65. *See* Conf. Rep. No. 107–278, at 162 (Nov. 9, 2001).

66. Federal Trade Commission, Marketing Violent Entertainment to Children: A Six-Month Follow-Up Review of Industry Practices in the Motion Picture, Music Recording & Electronic Game Industries (Apr. 2001), available at <http://www.ftc.gov/reports/violence/violence010423.pdf>.

67. Federal Trade Commission, Marketing Violent Entertainment to Children: A One-Year Follow-Up Review of Industry Practices in the Motion Picture, Music Recording & Electronic Game Industries (Dec. 2001), available at <http://www.ftc.gov/os/2001/12/violencereport1.pdf>.

68. Federal Trade Commission, Marketing Violent Entertainment to Children: A Twenty-One Month Follow-Up Review of Industry Practices in the Motion Picture, Music Recording & Electronic Game Industries (June 2002), available at <http://www.ftc.gov/reports/violence/mvecrpt0206.pdf>.

69. Press Release, *FTC Warns Consumers about Online Gambling and Children* (June 26, 2002), available at <http://www.ftc.gov/opa/2002/06/onlinegambling.htm>.

70. *See* Press Release, *FTC Initiates "Best Practices Analysis" for Merger Review Process* (Mar. 15, 2002), available at <http://www.ftc.gov/opa/2002/03/bcfaq.htm>.

71. *See, e.g., FTC v. Verity Int'l, Ltd.,* 194 F. Supp. 2d 270 (S.D.N.Y. 2002).

72. The Securities and Exchange Commission (SEC) currently has authority to accept payment and reimbursement for investigative or other assistance that it pro-

vides to a foreign securities authority. *See* 15 U.S.C. § 78d(f). *Congress were to grant the FTC similar authority, that would permit the agency to accept reimbursement from foreign or domestic law enforcement authorities for services provided or for cooperative investigative or law enforcement activities.*

73. *See* 5 U.S.C. App. 4, § 403(b); 47 U.S.C. § 154(g)(3); and 15 U.S.C. § 2076(b)(6).

Senator DORGAN. Chairman Muris, thank you very much.

I think we will go in order if you would like. Commissioner Anthony is next.

STATEMENT OF HON. SHEILA F. ANTHONY, FEDERAL TRADE COMMISSION

Ms. ANTHONY. Mr. Chairman, Members of the Subcommittee, I would like to take a moment to address our legislative recommendation to repeal the FTC Act's exemption for communications common carriers, but first I would like to thank you, Chairman Dorgan, for tackling this important issue. There has been a general feeling at the Commission for sometime that this exemption should be eliminated, and this hearing today is really the first time Congress has asked us to address this topic, and this impediment actually to our ability to protect consumers, and so I appreciate your leadership in this regard.

Section 5 of the FTC Act grants the Commission broad authority to protect consumers. We deal with classic consumer protection issues such as fraud and deceptive advertising, as well as antitrust issues such as mergers and anticompetitive conduct. One of the few activities expressly exempted from the Commission's authority is common carriage subject to the Communications Act. At the time this Act was adopted, early in the 20th Century, the exemption made sense. As you noted, telecommunications services were being provided in the United States substantially by single service monopoly firms highly regulated by the Interstate Commerce Commission first, and then by the FCC. With pervasive regulation and a noncompetitive marketplace, there really was little need for the FTC's additional oversight.

I call your attention to a picture over here on the wall of the committee room showing some old telephone systems, and just draw the distinction that that was what we were operating under a good while ago, but we are now at the dawn on of the 21st Century, and the state of affairs in the telecommunications industry is vastly different. Ma Bell's tightly regulated monopoly has given way to competition and a largely deregulated market.

In addition, the business activities of telecommunications firms have now expanded far beyond common carriage and into fields including Internet services and cable television. AT&T is a good example. Opening the door to competition in telecommunications also opens the door to a raft of consumer protection issues that are the FTC's bread and butter. Unfortunately, the exemption stands in the way of the FTC protecting consumers in this new telecommunications marketplace. The bottom line is that the exemption has outlived its purpose, and consumers are being harmed.

Let me give you some concrete examples of what I am talking about in the consumer protection arena. We have seen telecommunications firms increasingly engage in aggressive business activities, including fraud and deception to gain or retain customer

and market share both in their common carrier businesses and in their other business. We have seen cramming, which are unauthorized charges for goods and services on consumer's telephone bills, and we have seen a torrent of misleading long distance advertising.

The FTC has extensive experience with these types of billing, marketing, collection and advertising issues. Furthermore, even when telecom firms engage in fraudulent or deceptive business practices that do not fall within the exemption, the exemption can still pose an obstacle. Defendants often argue that the exemption protects every action of a company that enjoys common carrier status. The Commission firmly believes that only the common carrier activities of such companies are exempted, but litigating this issue, as the Commission has been repeatedly forced to do, raises the cost of pursuing enforcement actions. It forces the agency to make pragmatic decisions about who to include in a complaint, and about unnecessary delays in obtaining consumer redress and other remedies.

In the competition arena, the exemption creates serious antitrust enforcement obstacles. The exemption potentially precludes the FTC from reaching a variety of conduct that may warrant antitrust scrutiny. For example, a regulated common carrier may seek to deter competition from providers of Internet telephony by degrading connections, or through connection fees. A telco might also refuse to deal with a DSL-based broadband ISP except on conditions that disfavor Internet telephony. The scenarios are virtually limitless.

The point is that the exemption effectively removes a large part of the Government's resources, antitrust resources from being available to address competition problems in markets that are highly important to consumers and to our economy. Removal of the exemption is in the public interest. The FTC is well-equipped to address competition issues in markets undergoing deregulation and technological change, as it has already in natural gas, electricity, and cable.

The FTC was specifically created as an expert administrative body with economic expertise to address complex competition issues. In sum, American consumers will benefit if the Congress repeals the communications common carrier exemption from the FTC Act, and I urge this Subcommittee to take the leadership in doing so.

Thank you.

Senator DORGAN. Thank you.

Commissioner Thompson.

STATEMENT OF HON. MOZELLE W. THOMPSON, FEDERAL TRADE COMMISSION

Mr. THOMPSON. Good morning, and thank you, Chairman Dorgan and Members of the Subcommittee, for the opportunity to appear before you today and offer testimony in support of the FTC's reauthorization.

Today, I would like to talk to you about a vital and increasingly important area of the agency's work, the area of international consumer protection. It is a unique time in our history where improvements in communications and technology have created a global

marketplace where American consumers and businesses play an active role. It is also a special time in our economic history, where people in the United States and throughout the world recognize that consumer confidence is a necessary element for the global marketplace to survive. Finally, it is an important time because people around the world are looking to America for leadership on these issues.

The FTC has a long history of protecting consumers in the American marketplace, which is the most vibrant, transparent, and diverse in the world. Therefore, it is not surprising that the FTC would now be called upon to play an important role internationally in the area of consumer protection, enforcement, and policy development. This leadership role is evidenced by work in international organizations like the OECD Committee on Consumer Policy, where I was recently honored to be elected chair, and since it is the only international policymaking forum that focuses solely on consumer policy issues and the IMSN, or International Marketing Supervision Network, an organization of international law enforcement Agencies that share information about how to protect consumers against fraud.

In addition, we work with important regional organizations, whether it is APEC, Asia Pacific Economic Cooperation forum, or the Free Trade Association of the Americas, as well as stakeholder organizations like the Transatlantic Consumer Dialogue and the Global Business Dialogue for Electronic Commerce.

These last two organizations in particular provide us with an opportunity to hear from businesses, consumers, and Governments about international consumer issues.

Of course, all of these efforts benefit from the support of Chairman Muris and his recognition that the FTC's role in international consumer protection is of great benefit to both American consumers and businesses.

Now, I would like to talk a little bit about the specific areas that we are working on in international consumer protection, since they help to illustrate our commitment and the commitment of our international colleagues to the important issue of consumer confidence. At both the OECD and the IMSN, we are working with our international counterparts to develop a common understanding of what constitutes core consumer protection. We are beginning with work on a statement about cross-border fraud. By working on such issues, we hope to develop more effective means of going after those who commit harm across national boundaries.

We are also continuing to develop bilateral relationships that enable us to share information and take coordinated enforcement action to protect consumers. Among the countries we have entered into agreements with are Canada, Australia, and the United Kingdom. These relationships have resulted in an increase this year in cross-border prosecutions of cases that have been developed, for example, between the FTC's regional offices and our Canadian colleagues, but these international efforts are not limited to simply consumer protection enforcement.

We have also worked with our colleagues in a number of other consumer protection areas, beginning, for example, with our work with the OECD's groundbreaking guidelines for consumer protec-

tion in the electronic marketplace, which was released in 2000, and at latest count has been translated into 17 languages. There, the Committee on Consumer Policy has also examined questions of online ADR, or alternative dispute resolution, that might provide cross-border consumers with inexpensive alternatives to courts.

They have also worked on summaries and surveys of various countries' protections for credit and debit card holders because of the frequency with which such cards are used in cross-border transactions.

To conclude, I expect the Commission will continue its work in these areas, and will seek to actively participate in international fora that reach out to countries such as those in Asia, Latin America, and Eastern Europe. These international relationships will continue to be important, because mutual understanding about consumer protection is a key element in ensuring that there will be consumer confidence in an American, as well as a world marketplace.

I continue to have confidence that our economic system produces the strongest, most transparent, and safest markets in the world. However, our economic well-being in part comes from active involvement of agencies like ours taking appropriate law enforcement action and by providing leadership in a global setting about appropriate as well as inappropriate business conduct. In that way, I believe the FTC has a very important place in making markets accountable to consumers in both our antitrust and consumer protection missions, and I believe we are demonstrating why we are among the most effective in the world in doing so.

Thank you for your consideration, and I will be happy to answer any questions you may have.

Senator DORGAN. Mr. Thompson, thank you very much.

Commissioner Swindle.

STATEMENT OF HON. ORSON SWINDLE,
FEDERAL TRADE COMMISSION

Mr. SWINDLE. Thank you, Mr. Chairman. I would like to comment briefly about the Commission's activities in both the security and privacy agenda.

Security and privacy of confidential personal information have been concerns at the Federal Trade Commission for many years, especially in the context of online technologies and electronic commerce. In the wake of the September 11 tragedies, all levels of Government and industry have directed an enormous amount of attention to the critical nature of information systems and network security. Adequately enhancing this security is a complex challenge requiring a new way of thinking for everyone involved.

The FTC's consumer security agenda complements the FTC's privacy agenda, as set forth by Chairman Muris in October of 2001, which encompasses all aspects of consumer privacy both online and offline. By protecting consumer privacy and security, we hope to increase consumer trust in e-commerce, and reap the benefits of this extraordinary tool for education, entertainment, consumer interest, and commerce.

In May, the Commission held a 2-day workshop on consumer security. We sought to identify critical topics that were demanding

attention in order to enhance consumer security and minimize the vulnerabilities of the Nation's critical infrastructure. Workshop participants, including experts from academia, Government, and the private sector examined the most relevant security threats that consumers may face on the Internet. We explored best practices and how consumers' activities in today's interconnected world might make them unwitting participants in various security incidents. The workshop will serve as a building block for future Commission education and outreach efforts.

The Commission's Offices of Public Affairs and Consumer and Business Education, in consultation with security and technology experts inside and outside of Government are developing a comprehensive, long-term education campaign aimed at promoting a culture of security among consumers, businesses, and organizations in the United States and beyond. The education campaign will offer practical tips and best practices such as encouraging home broadband users to install firewalls to protect their computers from unwanted infiltration.

With the assistance of industry and consumer advocates, we are currently determining what kinds of messages can and should be delivered to ensure the largest possible number of groups and individuals become aware of the challenges that we face today. We hope that information about good security practices will be available to consumers in virtually every aspect of daily life: the workplace, schools, libraries, homes, and, of course, on the Internet.

Our goal is to achieve a level of awareness where good security practices become second nature to consumers. Ideally, all of us will one day engage in sensible security practices in the same way that we put on our seatbelts in the car before starting it, or look both ways before crossing a street.

On the international front, the Commission is playing an active role in the policy debate over information systems and network security, especially as these topics relate to consumers. Between December 2001 and June 2002, I served as the head of the U.S. delegation to the Organization of Economic Cooperation and Development experts' group charged with revising the 1992 guidelines for security of information systems. Originally written over 10 years ago, the OECD's guidelines lacked relevance in today's interconnected world of information systems and networks.

In light of contemporary threats, new technologies, and the essential nature of these systems and networks to our critical infrastructure, the OECD recognized that the guidelines should be updated. The revised guidelines, which I expect to receive formal approval later this month, apply to anyone involved with computers, the Internet, and information systems and networks. The guidelines will be available to both member and non-member countries developing best practices for security in our global economy.

The revised guidelines will be user-friendly and relevant to the current times and the roles of all participants in the information economy. The spirit of that document provides many important messages that will be incorporated into the Commission's outreach and education campaign to create a new way of thinking, or a culture of security, among all members of society when participating in information systems and networks.

Security is on our minds at the FTC, and we hope that greater public awareness will soon follow.

Thank you, Mr. Chairman.

Senator DORGAN. Commissioner Swindle, thank you very much. Commissioner Leary.

STATEMENT OF HON. THOMAS B. LEARY, FEDERAL TRADE COMMISSION

Mr. LEARY. Mr. Chairman, Members of the Subcommittee, I would like to amplify on some earlier comments and emphasize an aspect of our work that is sometimes overlooked. The Federal Trade Commission does, indeed, have important law enforcement responsibilities, but it is also supposed to investigate and to educate.

People will be surprised if they study the legislative history of this agency. When the Commission was created in 1914, President Wilson and Congress then recognized that the commercial world was becoming increasingly complex, and that people needed some guidance on what practices were reasonable or unreasonable, fair or unfair. At the same time, we know that the Commission members who provide that guidance cannot just rely on their own preferences. They need to be educated, too, because no single person can be expert on the myriad facets of a complex economy. So, the ideal educational process should be a two-way communication between the agency and people with experience and expertise of their own.

For a variety of reasons, that historic mission of the FTC has sometimes been neglected. However, it was revived in 1995, when Bob Pitofsky, our former Chairman, scheduled extensive hearings on global and innovation-based competition. Since that landmark event, similar hearings or workshops have continued at an accelerated pace. You have heard about some of them today. Let me mention some more.

We have, for example, had hearings on so-called slotting allowances and on issues in the B2B marketplace. We have had public hearings on the complex factors affecting gasoline prices—and I might just say in passing, if in any of our inquiries we uncover any evidence of unlawful activity, we will act, I promise you.

Most recently, we have had a series of hearings on the interface between competition law and intellectual property law. If these legal regimes have a common objective to promote innovation and consumer welfare, they approach the objective from opposite directions, and this can create tensions in particular cases. These issues are complex. Opinions differ, and some court decisions are hard to reconcile.

Commission hearings on this subject and others can be helpful in a variety of ways. They provide a reality check on our own enforcement agenda. They help to inform statements we might make to legislative or administrative bodies at the Federal or State level. They inform lawyers in the private sector who advise clients day to day on compliance issues. They also help to build some policy agreement among the diverse interests that participate. We do not resolve all differences by talking, of course. You people know that much better than we do. But, it is encouraging to see how the de-

bate becomes narrowed and focused when people sit down together to address these difficult issues in a forum that we provide.

Finally, you should be aware of the Commission's massive educational efforts aimed at consumers as a whole. We actively monitor the marketplace, particularly the Internet, in search of consumer frauds, and we prosecute these frauds whenever we find them. An equally important weapon in the battle against fraud, however is consumer education. Consumers who are better informed about the most common scams are less likely to be victims. We have provided you today with a representative package of these educational materials, and you can see that they are prepared in a consumer-friendly format.

Last year, the FTC distributed over 5 million print publications of this kind, and there were over 10 million hits on our website. This is a very important part of what we do.

Thank you.

Senator DORGAN. Commissioner Leary, thank you very much. Let me say to the Commissioners, we appreciate your testimony and appreciate the work of your agency. I want to ask you a series of questions, and did you arrange that ambient noise just when we began to ask questions?

Mr. MURIS. We are not that good.

Mr. SWINDLE. It is a new form of unrequested spam.

Senator DORGAN. I am going to ask you a series of questions about what you are not doing and what you think you can not do, and I would like to understand a little more why that is the case.

Example: We had testimony at this table within recent weeks by the Attorney General of New York. His investigation showed that there were some firms on Wall Street that were saying to the consumers "Buy this stock, it is a great stock, we recommend it." Internally in memorandums in their companies they were saying, "This stock is a dog, this is awful." So they were cheating, defrauding the consumer, and using deceptive advertising. Why can you not get a suit of armor on and go get that? What prevents the FTC from involving themselves in that situation?

Mr. MURIS. If I could respond first, and then some of my colleagues might want to chime in.

With advertising of any sort, we have a good argument that we could act. I will say that in the specific case that you are talking about, there are potential legal difficulties. As I understand the situation, the individuals who are making these claims have licenses and are regulated through the NASD and the SEC. They have a whole series of regulations dealing with advertising. Our normal practice as a matter of comity between agencies would—we sit on a committee, at the Justice Department that talks about who will do what with various sorts of stock fraud.

Because the SEC has 1,000 people, as many people as we have in our whole agency, that deal with stock fraud, we would tend to defer to them.

But on a second point, we could run into legal difficulties. We would have to look at the specific fact situations, because of specific regulations that may be implicated. There have been cases, in both the antitrust and consumer protection contexts, where if someone was doing something pursuant to and in compliance with the regu-

lations of another agency, then it would be very difficult for us legally to act.

Senator DORGAN. Well, let us have you give me some information about that, then. I would like to understand—if you think there are some legal difficulties, let us think about what they are.

Second, you are saying maybe the SEC has the jurisdiction here. Do you think the SEC is doing anything about this?

Mr. MURIS. Particularly since we had our initial conversations, I think it was in January, I have met and had continued conversations with people at the SEC and with people at the Justice Department in many of these areas. I understand they have a criminal task force. I do not personally know everything they are doing.

They have told me that there are many individuals working on these issues. I believe that they have briefed your staff, although I do not know that for a fact, and I am sure they would, if asked. The addition of criminal investigations causes another complication for us, because law enforcers, including the FTC, are quite reluctant to proceed civilly when there is a criminal investigation.

Senator DORGAN. But in order to get to the evaluation of whether there is a criminal act, someone has to investigate it. When you have a company out there saying, "Buy this stock, this is a good deal, it is very important that you buy this stock," and internally, they are saying "this is a dog." It seems to me that is deceptive advertising. Frankly, I think the cracks are bigger than the platform when you talk about things falling through the crack at the SEC, but that is a different issue.

Let me ask—now, I understand a bit, and you will send me some information about this issue. I understand why you are not too involved in that.

Railroad pricing: Our public service commission in North Dakota estimates that we are overcharged $100 million in North Dakota for rail service by a monopoly rail service. Are you able to be involved in price investigations with respect to the railroads?

Mr. MURIS. Commissioner Anthony, go ahead.

Ms. ANTHONY. I think that would be considered a common carrier, and we again fall under that.

Senator DORGAN. So who would be working on that? Who in the Federal Government would be working on that issue in a regulatory way?

Mr. MURIS. Well, the Department of Transportation and the Surface Transportation Board have authority. The Justice Department has tended to do antitrust in that area, and I know they have had input into decisions of the Surface Transportation Board involving mergers.

Senator DORGAN. Let me say, the Surface Transportation Board is sort of driven into the same corral as the SEC on most of these issues with respect to enforcement.

If you, God forbid, would have breast cancer and are taking Tamoxifin for breast cancer, you are paying 10 times the price for Tamoxifin that is paid in Winnipeg, Manitoba. Who would look at that and see whether that might be a pricing problem? They are charging not double, triple, or quadruple the price, but 10 times the price that is charged 5 miles north of North Dakota in a one-room

drugstore in Emerson, Canada. Would that be a pricing issue the FTC would have any jurisdiction in looking at?

Mr. MURIS. We have been quite active in the pharmaceutical area for monopolization activities, but under the law there has to be an act other than the charging of a high price. We have been extremely active, and we have drastically increased our resources in the pharmaceutical area, and I think we are helping in many cases to lower the price of drugs.

Senator DORGAN. The same issue with respect to farm chemicals that they tweak with respect to a formula sold in Canada. They sell it here for double or triple the price, the price-gouging, but let me go to the things we talked about just very briefly, and I will not extend it.

The common carrier issue, is it the FTC's feeling that the FCC is not doing its job in this area?

Commissioner Anthony.

Ms. ANTHONY. I would not like to characterize it that way, Mr. Chairman. However, I do believe that the Commission, the Federal Trade Commission is competent to tackle this problem with a great deal of expertise. That is what we do day in and day out.

Senator DORGAN. Could I ask it a different way, Commissioner Anthony? If you felt that the Federal Communications Commission was doing a bang-up job on consumer issues, just one of these things you look at and say, that is a sterling job, would you be asking us to deal with this rule in this way?

Ms. ANTHONY. I know the Chairman will realize that I am reluctant to criticize our sister agencies, and we try to work with them in a harmonious fashion, so what I would just say is that we do work with FCC frequently, and they have cooperated with us often on our cramming cases and in our AOL-Time Warner antitrust investigations in this area. Our job is to protect consumers, and that is what we do day in and day out. We bring value to the table, I think.

Senator DORGAN. Well, will rescinding the common carrier exemption provide some benefits for the American people? In other words, would you do something better than you are doing now? Will rescinding the common carrier exemption improve things, and if that is the case, I think I have my answer.

Ms. ANTHONY. We would like to think that we could certainly add to the improvement of protecting consumers in this country, yes.

Senator DORGAN. You should be in the State Department.

[Laughter.]

Senator DORGAN. So diplomatic, the FCC will appreciate that.

Let me ask just one additional question on the Do-Not-Call registry. We will have testimony in the second panel saying that the way it has developed will be devastating to certain charitable groups and others. Who can respond to that?

Mr. MURIS. Under the Patriot Act, telemarketing for charities by for-profit entities is now covered. I do believe that the proposed rule as we stated, and we are still evaluating it, has problems vis-a-vis charities. I believe that for both constitutional and policy reasons. However, our law applies to for-profit telemarketers on behalf of charities. We should do it carefully, and I am still working my

way through this. We have not received materials from the staff to the Commission yet, but I do believe there are bases to treat charities differently.

Senator DORGAN. And with respect to financial institutions and common carriers, your Do-Not-Call list would not apply, would it, to those financial institutions or common carriers?

Mr. MURIS. That is correct, but we are optimistic that the Federal Communications Commission, if we adopt a rule, would adopt a similar rule, and that that would apply.

Senator DORGAN. Are they talking about that?

Mr. MURIS. I believe they are internally, yes.

Senator DORGAN. Commissioner Anthony, I was, of course, being complimentary when I was talking about the diplomacy with which you discussed your relationship with other agencies.

Well, I have some other questions that I am going to submit in writing. I was asking a series of questions at the front end describing areas where you are not involved. In some areas I hope you would be, and lacking the authority, I would like to explore with you the opportunity to have some additional authority.

Let me thank you for your testimony once again. I would call on Senator Smith.

STATEMENT OF HON. GORDON SMITH,
U.S. SENATOR FROM OREGON

Senator SMITH. Thank you, Mr. Chairman. I would like to follow up on your last question, which is the national Do-Not-Call list. Senator Wyden and I have the privilege of representing many telemarketers. There are 70,000 in the State of Oregon. Our State leads the Nation in unemployment right now, so we are concerned about those jobs. We certainly understand the motive behind the establishment of this list. none of us likes to be bothered by telemarketers, but on the other hand, I am wondering that in the formulation of this rule, have you done any studies on the economic impact to the country, to the industry, to employment in this country?

Mr. MURIS. Our record is voluminous. There are materials on this issue. We held a 3-day workshop in June where we discussed a variety of issues. My impression, Senator, from talking to telemarketers is, they do not want to call people who do not want to be called, and they could do their telemarketing more efficiently on that basis.

We certainly have not reached final decisions. The staff is in the process of assembling the comments and digesting them. They will make recommendations to the Commission, and the Commission will decide based upon the full rulemaking record. Of course, what is said here will become a part of our record.

Senator SMITH. Might you make an exception for businesses to contact those consumers with whom they have an established business relationship? Is that part of your rulemaking contemplation?

Mr. MURIS. Some very persuasive points were made at our 3-day workshop. Again, I have not discussed this issue with my colleagues, but I think that in certain limited circumstances such an exemption, if narrowly tailored, might make sense. We are evalu-

ating it. Many states who have Do-Not-Call lists have such a provision.

Senator SMITH. I for one would encourage that exemption, or exception, and I wonder if you have plans to harmonize with the 20 states that already have these Do-Not-Call lists? Have you got coordination with the states on that?

Mr. MURIS. Well, I think that is very important. I think we all have the same goals and desires. At the staff level we have been talking extensively with the state officials who are involved with this issue, the State Attorneys General. That is certainly desirable, and I personally do not see any reason why we cannot accomplish harmonization.

Senator SMITH. I think that is critical.

And finally, I wonder, can you share with us how you propose to keep your list, the national list, current and accurate, as that seems a fairly daunting task. Do you have a system for keeping it current?

Mr. MURIS. Thanks to modern technology, it is not nearly as daunting a task as it would have been several years ago. We have learned a lot from the various states. Some of the states, for example, were keeping a list with index cards, and I think that would not be practical on a national basis.

Senator SMITH. I would not suggest that, either.

Mr. MURIS. We have solicited request proposals from various contractors on how we would implement a list. We have spent a lot of time on that issue, and I do believe it is feasible if it is done using modern technology.

Senator SMITH. Thank you, Mr. Chairman. That is all my questions.

Senator DORGAN. Senator Wyden.

Senator WYDEN. Thank you, and I want to begin on this West Coast gasoline pricing issue. You have got three West Coast Senators here. We consistently pay higher gasoline prices than the rest of the country, and I think the discussion begins with last year's report where the Commission found that red-lining anticompetitive practices were rampant in those West Coast markets and did not take any action. I want to read you exactly what the Commission said, Mr. Muris, and what the oil companies are admitting to contradicts it, and let me just read you from your report on it.

Your report said, the investigation uncovered no evidence that any refiner had the ability profitably to raise prices market-wide or reduce output at the wholesale level. That was the finding at page 4 of the Commission's report, yet Chevron, their president, Chevron-Texaco, told the Senate that his company had sufficient market power to influence prices on its own. He testified—and I will quote here—"the West Coast gasoline market is dominated by a limited number of refiner marketers whose individual actions can have significant market impact, so what you have is an oil company executive telling the U.S. Senate that he can do what the Federal Trade Commission says it cannot find evidence of."

So my question to you, Mr. Muris—and this has great impact on all of us who represent the West Coast gasoline markets—given the fact that a major oil company executive is contradicting what your Commission found, does that indicate that the study was flawed,

or does it indicate that you all just do not have the authority to go out and get the facts?

Mr. MURIS. In fairness to my colleagues, all four of them participated in that study, but I did not. If I could allow them to respond, and then I could address your comments.

Senator WYDEN. That would be fine. I would just like to know how you reconcile something which has enormous impact for consumers with two statements that are just directly contradictory.

Mr. LEARY. Well, Senator, I am willing to step into the breach on that. I was here at the time. I would really like to amplify on what I am about to say in writing to put this all in the full context. However, just facially, there is a tremendous difference between one company saying another company has big influence on pricing in a marketplace, and that company admitting that people have engaged in anticompetitive activities, or that they can profitably restrict output in order to raise prices.

You can have tremendous influence on a marketplace in a downward direction as well, so the two statements that you are talking about are, first, not necessarily internally contradictory. Second, that report was about 100 pages long and canvassed a vast amount of information. The Commission at that time, on the information before it, unanimously concluded that we could not find evidence of law violation.

Senator WYDEN. You have an oil company executive admitting to Congress that individual companies have sufficient market power to be able to affect the West Coast gasoline market. You said in your report that that could not be done.

Mr. LEARY. No.

Senator WYDEN. I read it to you. It says, "The investigation uncovered no evidence that any refiner had the ability profitably to raise prices."

Mr. LEARY. That is not the same thing.

Mr. SWINDLE. Senator Wyden.

Senator WYDEN. I do not know, a clear meaning to me is that you all found that one company could not drive the market, and yet you have Chevron and Texaco saying one can. I mean, certainly the other point is right, you could drive it downward, too. Nobody disputes that. I just do not see anybody pushing real hard to drive things downward, and I see a lot of people pushing to drive them upward.

Mr. LEARY. I do not hear the executive you are quoting, Senator, to be saying another company has the ability to restrict output and raise prices.

Senator WYDEN. He is saying one company, their individual actions can drive the market, and you are saying you found otherwise.

Mr. SWINDLE. Senator Wyden, if I may comment, the key word here is profitably, and I think most companies are in the business to make profit. We see examples every year of a single refinery having an effect on the market oftentimes because it had a fire, it had to shut down. No one is contesting the capacity to affect the market, but the intentional conduct to affect the market, I would think, in most companies, would have to be accompanied by the ultimate goal of making profits.

I think it is a pretty dangerous game, even though there are, as we all realize, limited numbers of competitors on the West Coast. For them to jump in and try to do something dastardly to the market by their own conduct and then suffer the consequences themselves, it does not make sense. I think there is a distinction between those two statements.

Senator WYDEN. They do not suffer any dastardly consequences. Basically, in much of the West Coast area three companies control 75, 80 percent of the market, and you can stick it to consumers when you couple it with red-lining, and I guess if it is the position of the Federal Trade Commission that when they said that they found nobody had the ability to drive the market, and Chevron-Texaco says one company can drive the market on the West Coast, I mean, if you all do not read this the way I do, then we can just move on, but it sure looks pretty clear to me.

Now, Commissioner Thompson, in your concurring opinion you raised additional concerns about red-lining, but you also said that there really was not much that could be done, or I guess that you wanted to see done. Was that because you did not have sufficient evidence, or what was the motivating factor with respect to your joining the majority there?

Mr. THOMPSON. At the time, I believe that we did not have sufficient evidence. Now, what I would say to you, my view today is, if we have evidence, or have information that tells me that we are likely to find evidence someplace, I would support us going after it, but at the time of that report we conducted a fairly thorough investigation and we could not find that evidence, but my view is that we at the Commission are always looking for opportunities to ferret out anticompetitive behavior, and if you or anyone else can bring us information that tells us that there is evidence, then I am sure that my colleagues and I would be willing to go for it.

Senator WYDEN. Well, with all due respect—my time is up. I am going to return to this subject—I brought you that evidence. I brought you case after case from the West Coast of companies that were shellacked by anticompetitive practices, and I will return to this on another round.

Senator DORGAN. There are 9 minutes remaining on the vote that is occurring on the Senate floor. Let us try to get in as much as we can before we break for the vote.

Senator McCain.

STATEMENT OF HON. JOHN MCCAIN,
U.S. SENATOR FROM ARIZONA

Senator MCCAIN. I want to thank the witnesses for being here, and I think you are doing a fine job. I appreciate the many contributions you are making.

Mr. Muris, in a recent "Seinfeld" episode, Mr. Seinfeld's phone rang. He picked up the phone and it was a telemarketer and he said, "You know, I am busy right now. Can I have your home phone number and call you back?" And the telemarketer said "No, I cannot be called at home." And he said "Well, neither should I," and hung up the phone. Could we allow something like that to happen? Should the telemarketer's home phone number be able to be revealed to the caller so that the caller can call the telemarketer

back at his or her convenience? Do you think Seinfeld was onto something there?

Mr. MURIS. I think he was certainly onto something about the frustration people feel about this practice. We received over 40,000 comments. It was the most we have ever received, other than in one case where someone had gone to stock car race tracks and passed out free comment cards. These comments are all different. Everyplace we go, many people comment, and comment favorably.

As I said, we need to do this rule right, we need to do it sensibly, and we are moving in that direction. We also need authority from Congress. The law allows us to raise the money through fees, but we need authority from Congress to spend the money, so under the proposal we have we will need legislation before we can implement the rule.

Senator MCCAIN. I think we can go to work on that. It seems to me that that would be appropriate. I have a media report here that says even with a list in place consumers could still get phone pitches from industries and groups, including some heavyweight telemarketers regulated by agencies other than the FTC. Among them are phone companies, airlines, banks, brokers, charities, and political campaigns. Is that true?

Mr. MURIS. There are people we cannot reach. We are optimistic that the Federal Communications Commission, if we adopt a rule, will adopt a similar rule. We believe in the aggregate that approximately 80 percent of the telemarketing calls would be reached. The calls from politicians, however, neither the FCC nor the Federal Trade Commission has authority to regulate those calls.

Senator MCCAIN. We would never want anything like that to happen, would we?

[Laughter.]

Senator MCCAIN. Because we have a vote now, I would like to ask one more question and switch gears. You recently issued another report on the marketing of violence to children by the television, music, and movie industry. Again, I want to point out: The whole point here was not that anyone was trying to impose any kind of censorship. The problem we had was these entertainment organizations marketing to children content that they themselves had judged was not suitable for children.

I mean, I have to keep repeating that over and over again, because I keep being accused of trying to impose some kind of censorship. We think it is fair that when the movie industry judges a certain movie not suitable for children below a certain age, that they not market that product to children below that certain age. That is what this is really all about. I hate to be so redundant, but I keep hearing the charge that we are trying to impose acts of censorship on the industry.

How is the industry doing, and how would you rate their performance so far?

Mr. MURIS. Well, let me respond briefly. I know Commissioner Swindle has paid a lot of attention to this, and maybe Orson wants to respond as well.

We just issued our fourth report. We have found more progress, quite frankly, in the movie industry and in the video game industry

than in the music industry. If Commissioner Swindle wants to elaborate.

Mr. SWINDLE. I think the Senator is right, the advertising to children below the acceptable level of content——

Senator MCCAIN. That they determine themselves.

Mr. SWINDLE. They are still doing it. It is rather complex, in that we have markets that are obviously for children, we have markets that our children watch, and then we have markets, obviously, for adults, and it is that middle ground that I think we see most of the violations today.

There have been great improvements, or there have been good improvements, I should not say great. I think that could be spun be the wrong way.

The movie industry has made progress. The video game industry has made progress. The music industry for all practical purposes is literally just putting a stick in our eye. They do not choose to pursue this. They will plead First Amendment over and over and over, which is absolutely not the case. I do not think any of us really care what they publish, but we do care about the marketing of it to children, obviously, below the age level that should be listening to this kind of stuff, and by their own standards they somewhat suggest that there is a delineation here, but they simply are not conforming.

Senator MCCAIN. You know the sad thing about it, Commissioner Swindle, is that they sat here, where you are sitting, and said that they would make changes to stop marketing this. So, it is remarkable that they would testify before Congress that they would take certain actions, particularly the record industry, and in your view, which is far more informed than mine, then make little or no progress in the direction that they committed to. It is really reprehensible.

Mr. SWINDLE. I was at the hearing and heard that statement. I would point out something here that I think is critical. We all—I mean, the First Amendment is the cornerstone of our society and our way of Government. We do not want to infringe on that. If consumers do not like what is coming at them, they have a manner in which they can correct that. Unfortunately, as long as sufficient consumers buy the stuff, in particular, what the music industry is putting out, they will continue to do it. It is economics.

Senator MCCAIN. But, to entice children to purchase a product that they have deemed unsuitable for that child's consumption seems to me to have nothing to do with the First Amendment, but a whole lot to do with unsavory practices.

I thank you, Mr. Chairman. I thank the Commission.

Senator DORGAN. Senator Nelson.

STATEMENT OF HON. BILL NELSON,
U.S. SENATOR FROM FLORIDA

Senator NELSON. Including, Senator—including Alcopops, which is marketing alcohol to minors, and you all have a lawsuit on that right now.

We have got to go vote, and I am going to have my questions asked by the Chairman, but just let me say hello to my good friends Orson Swindle and Sheila Anthony. It is good to see you all,

and as Sheila said, your role is to protect the consumer, and please be very vigorous in what you are doing on protection of the consumer. I will have the Chairman ask my questions.

Senator DORGAN. Thank you. Senator Wyden left to vote, and he will be back early, so I expect within 5 minutes Senator Wyden will pick up the gavel. We will recess for 5 minutes until Senator Wyden is back. The hearing stands in recess.

[Recess.]

Senator WYDEN. Let us resume the hearing, if we could have all of our guests take their seats, please.

Senator Fitzgerald has joined us, and I think with the Senator's leave, I will finish some additional questions, and then we will recognize the Senator.

To continue on this West Coast gasoline pricing issue, Chairman Muris, let me review what you have done since you have been named Chairman. You were appointed Chairman and the agency initiated daily monitoring of prices in 300 gasoline markets around the country. You directed the FTC staff to review the oil company mergers that the FTC allowed to go through in the past several years to determine if the agency did not do enough to remedy the anticompetitive impact of the mergers, and you held a number of very widely publicized conferences on gasoline pricing.

If you do not believe that there are anticompetitive problems in the gasoline market, what is the purpose of spending all this taxpayer money?

Mr. MURIS. That is a very good question. Let me address what we have done and why we have done it.

First of all, there are a variety of issues besides the ones that you raise. There are concerns about the volatility of prices. There are also, as Senator Levin's committee and their report noted, concerns about increases in concentration. We have taken four steps, because these are serious issues that need to be addressed, and because I think it is important that we continually reevaluate our work, particularly in the merger area, where the standards are so factual, specific, and in some ways ad hoc.

We are producing, based on the conferences you mentioned, a study about gas price volatility that is underway right now. We are updating an oil merger study that was done twice in the 1980s, which I think will address some of the issues that Senator Levin addressed. We are looking at the impact of past mergers, particularly a few mergers that the Commission did not challenge. There has been a recent working paper that raises some questions about the aftermath of one of the mergers. Finally, we are, for the first time, tracking prices in real time.

We are doing these things for several reasons, including the educational function that Commissioner Leary mentioned, of understanding what goes on in the marketplace; the function that Commissioner Thompson and others have mentioned, of looking for possible anticompetitive problems; and the function of, quite frankly, I think Government agencies should continually reevaluate the standards that they apply.

In terms of the gas price tracking, although we just started it, we have found some anomalies. One of the anomalies, for example, in California was attributable to an unreported problem in a refin-

ery. We are at an early stage in this project. We have a few leads that may be anticompetitive problems, and I believe it is appropriate for us to engage in these activities because energy is a very important part of our domain. I think what you heard, and this investigation concluded before I arrived, was that people felt there was not sufficient evidence to proceed; I think it is important that we continue to look for evidence both to explain to the public why there are problems, and to see if there are anticompetitive violations.

Senator WYDEN. In effect, what the Federal Trade Commission is doing with the merger reviews and reconsidering the merger reviews is, it is reconsidering merger reviews that it did before the deals were allowed to go through, and what I am wondering about is why we are not protecting consumers, doing something to protect their interest at the outset instead of essentially doing merger reviews twice, and as you know, I would like to see the Commission particularly try to help consumers in these highly concentrated industries at the front end before the merger goes through.

I mean, you are going to go back and look at the whole slew of mergers, BP and Amoco, Exxon and Mobil, BP-Amoco and Arco, Chevron and Texaco, Phillips and Tosco. Would it not be better to have a policy to try to protect the consumer at the front end?

Mr. MURIS. I am sorry if I left the wrong impression. That is not what I am suggesting, and I will ask my colleagues if they want to comment in a moment here. The Commission has been quite aggressive in merger enforcement. Most of those mergers occurred before I arrived, some have occurred since, the Commission has taken remedial action in a large number of oil industry mergers, requiring divestitures in the tens of billions of dollars.

Some of what we are looking at in these retrospectives are mergers that the Commission did not challenge. One of the things we are particularly looking at, not just in oil but in other areas, is the impact of those mergers we did not challenge. Again, I will ask my colleagues if they want to comment on our oil industry policy, merger policy.

Mr. LEARY. Well, Senator, I was present for some of those oil industry mergers, and I can assure you that they were looked at very carefully, and there were gigantic divestitures required at the level where it has the particular impact on consumers. Divestitures were required at lower levels of concentration than we have done for any other industry of which I am aware.

However, foresight is never perfect. There is nothing inconsistent at all, in my view, with having an extensive review up front but, in an area that is of such significant concern to people like yourself and others, going back to take another look at it and see whether or not we got it right.

Senator WYDEN. I do not quarrel with that. What has happened in the West Coast, though, is nobody really does anything until the damage is done. I mean, we have had the competitive juices sucked out of the West Coast gasoline markets. We have lost hundreds of stations. We have got in most towns in my State a couple of companies driving the market, documented red-lining. Commissioner Thompson asked, could we have it. I have given you all of the

cases. You found it, and yet everybody says, "Well, gosh, we do not have any evidence of collusion."

Well, of course you are not going to have a couple of big oil company executives go somewhere and say, "this is a great day, let's set the market," but I will tell you, I find what you have done with respect to the West Coast gasoline market, I think it is a textbook case of how you do not do consumer protection. I see absolutely no evidence of anybody trying to stand up for West Coast gasoline consumers. I think all of the studies and conferences and seances that you all seem to be having really are not going to lead to much of anything.

I hope the merger issue produces something. I guess if it generates a bunch of new reports that are going to collect dust and not lead to any real enforcement action, I may do something I have not done in all my years in the Congress, in 21 years in the House and Senate, and I will move to cut off the money for exercises that are just a joke with respect to consumer protection.

I want to recognize my colleague, Senator Fitzgerald, and then I will come back for some additional questions on other subjects. Senator Fitzgerald.

STATEMENT OF HON. PETER G. FITZGERALD,
U.S. SENATOR FROM ILLINOIS

Senator FITZGERALD. Well, thank you, Chairman Wyden. I would also like to thank the Subcommittee Chairman Dorgan for putting this hearing together. I know that the FTC has not been reauthorized since 1996. I think it would be appropriate at some point to reauthorize the FTC. You probably feel like Rodney Dangerfield, you can't get no respect if you cannot get reauthorized, but we are glad you are still operating. We appreciate all of you being here today.

In my 3½ years in the Senate, I have already seen a couple of situations in which oil prices spiked, and there were demands for FTC investigations. I think oil prices spiked in 1999. My colleague from Illinois, Senator Durbin, asked the FTC for an investigation. Chairman Pitofsky at that time undertook an investigation to see whether there was any collusion or price-fixing in the industry, and the FTC could not find evidence of that. I think instead, the FTC found evidence that supplies of petroleum were tight. There had been fires at a pipeline, only one refinery in Illinois, and a declining supply of oil that caused the price spikes.

Then last year, we had another price spike in oil. My colleague from Illinois asked for another investigation, and I believe that similar conclusions were reached. So I think there is always a potential that people can figure that there is some kind of conspiracy going on when oil prices go up, but I think it primarily concerns the supply and demand.

Let me ask you a question along those lines, starting with Chairman Muris. If you were to find evidence of illegal collusion amongst oil companies, I take it that you would take action to go after whoever was involved in such collusion? Is that not correct?

Mr. MURIS. Yes, Senator, absolutely. One of the reasons that we are tracking prices on a real-time basis is to better understand the reasons for price volatility. I have recently sent a letter to all of the

State Attorneys General, asking for their help. If we do find localized problems we hope to be able to work together to understand them, and if there are law enforcement violations, to move on them.

An additional point I forgot to mention to Senator Wyden is, I think one useful thing that has come out of the Commission's work is the role of the EPA rules in terms of so-called boutique fuels in contributing to the price spikes. Our staff has submitted comments to the EPA and offered to work with them to try to get competitive concerns considered as a part of the calculus in what they are doing with these rules, because when you divide up the country by requiring so many different fuel blends, you are exacerbating problems that are caused by refinery fires and other incidents.

Senator FITZGERALD. I think in Illinois, at one point, we had four different types of fuel used in different parts of the State, so clearly that presents a problem if the refineries have to gear up for narrowly targeted markets. That is happening all across the country.

Let me ask this. What does the FTC do if they find evidence of collusion or price-fixing in an industry? Do they refer it to the Justice Department for prosecution? What happens? What are the mechanics when this is found?

Mr. MURIS. It depends upon the nature of the collusion, and what is going on. The Justice Department has criminal authority and we do not, so they do criminal investigations. We have brought price-fixing cases, and cases that look much like price-fixing. Recently, for example, we brought three price-fixing cases involving physicians, one in the Napa area in California, and two in the Denver area.

Senator FITZGERALD. Did you do the investigation?

Mr. MURIS. Yes, we did.

Senator FITZGERALD. And do you have authority to do criminal investigations?

Mr. MURIS. No. We brought these cases civilly, and the Justice Department sometimes proceeds civilly as well. They often proceed criminally. Quite frankly, it is very difficult to convict professionals of criminal price-fixing.

Senator FITZGERALD. What did you find they had been doing, and what did you allege?

Mr. MURIS. We accepted consent agreements. What the consent agreements alleged was that groups of physicians got together and essentially hired an agent to negotiate. The only integration that the doctors had was that an agent who they hired negotiated with the managed care plans to raise the reimbursement rates substantially, and we have obtained consent agreements stopping those practices. The Justice Department sometimes proceeds civilly and sometimes criminally. If we really found evidence of a criminal violation, by virtue of our relationship with the Justice Department, we would refer it to them for criminal prosecution.

Senator FITZGERALD. On that issue, physicians have begun to talk about asking for the right to collectively bargain, because they feel they are excessively hampered. There are hundreds of thousands of physicians in this country, and they have to negotiate with a handful of HMOs in their areas. They feel that the deck is stacked against them, and that every year their reimbursements

are cut, their cost goes up, and there is nothing that they can do about it.

You may not want to get into this issue and recommend anything for Congress, but it is possible that Congress is going to be confronted with voting on legislation. I think legislation that would give physicians the right to collectively bargain has been introduced in the House and has passed at least a committee in the House. Do you think it is right that physicians, if they band together even in a small group to negotiate with an HMO, should be subject to the Federal Government coming after them?

Mr. MURIS. First of all, there was a bill that passed the House. The Commission opposed it. I believe all of my colleagues—I was not on the Commission at the time—were opposed.

Senator FITZGERALD. The Commission opposed the bill?

Mr. MURIS. Yes.

Senator FITZGERALD. Why was that?

Mr. MURIS. Because the bill would raise prices to consumers. The Commission and the Justice Department have a long history of bringing these cases, and these few cases that we recently brought indicate what such a bill would do. It would give people a license to raise prices, and that would be anticompetitive.

I do think there are steps that physicians can take to get together to improve their practices, to improve quality. Our staff recently issued an advisory opinion for the first time recognizing so-called clinical integration, which is where doctors get together to try to share with each other information on how to treat patients more effectively. That does not violate the antitrust laws. In fact, we should encourage that activity, but if the doctors are simply getting together to fix prices, as they did in the cases that I mentioned, then it does not make any sense, I believe, to create a special class of people who can fix prices outside the antitrust laws.

Senator FITZGERALD. And the reason would be that the doctors are all self-employed businessmen. Typically, if they are not employees of a company, their getting together to negotiate with an HMO becomes businesses conspiring with each other to fix prices. I am hearing a lot from doctors in Illinois about how they feel that they have absolutely no leverage when they are negotiating individually with an HMO.

The HMO tells the doctors that "If you want to get patient referrals, you must accept our price schedule," which is typically low. The doctor, being one doctor when there are tens of thousands in the area, feels overwhelmed, and that he or she has no bargaining power. They feel that they are just getting crushed to the point that medical school applications are declining rapidly in this country because the practice of medicine has become much less attractive.

Mr. MURIS. There are serious issues about the relationship between managed care and physicians, particularly on quality issues. The antitrust laws should not be a bar to doctor's dealing with those issues. Doctors do join together in many areas now where they are not just individual practitioners, but if what the doctors simply want to do is get together to fix prices, I have no understanding in the world why public policy should allow that to hap-

pen. That is anticonsumer, and it is not helpful to the problems we have in the medical area.

Inflation is growing rapidly again in health care. We have an active program, not just with doctors. By far most of our resources go to pharmaceuticals. We are also looking at hospital mergers in which concentration has increased. Competition has a role in health care, but I do believe, and I will say it again, that physicians—in terms of paperwork, in terms of quality control, in terms of a lot of issues that do not directly affect prices—can legally get together under the antitrust laws.

Senator FITZGERALD. You think right now they have the power to do that, to negotiate amongst themselves to set a unified front in other areas besides the actual prices?

Mr. MURIS. Absolutely, and this advisory opinion, which we will be glad to send to you, will allow them to integrate for the purposes of improving quality. In fact, we have non-public investigations, and in some of them we are seeing doctors who are engaged in such clinical integration. If they are doing that, then I think that is commendable.

Senator FITZGERALD. When did you issue that advisory opinion? Was it recent?

Mr. MURIS. Yes. I believe it was in March.

Senator FITZGERALD. I would like to get a copy of that, if I could, and with that, Mr. Chairman, I thank the panel for being here.

Senator WYDEN. I thank my colleague.

I want to go now with the Commission to another area of the energy business, where troubling anticompetitive practices have been uncovered as well. The Enron memos reveal significant evidence that Enron was engaged in a deliberate scheme to manipulate the West Coast electric market. Transcripts provided to the Federal Energy Regulatory Commission by Portland General Electric raise questions about the role of transactions between utilities and their affiliates engaged in energy trading activities that may have been used as part of the Enron scheme.

For example, one trader was quoted as saying, "Enron wants to do something kind of squirrely." Another transmission employee is quoted as saying, "They are doing that, selling power to Enron, across the Bonneville Power Agency going down to California again. They did that before, remembering there are all those extra accounts, and then you guys have to make sure you do whatever extra input you have to do."

Now, these statements—and this is a question for you, Mr. Muris—clearly suggests that these employees had concerns about these transactions that their parent companies wanted to engage in. My question is, to begin this area, Mr. Muris, doesn't the Federal Trade Commission have jurisdiction over utilities engaging in transactions with their subsidiaries and affiliates that have anticompetitive impact on a wholesale market?

Mr. MURIS. Yes, I believe we do, although there is regulation by FERC, which applies directly to many of these provisions. It is possible, because there may be an implied exemption doctrine under the antitrust laws, depending on what the FERC regulation is, that the antitrust laws do not apply.

Senator WYDEN. Well, our reading again is that the FTC does have authority here, and I would like to know whether the Federal Trade Commission has ever used its authority to investigate the use of affiliate transactions by Enron or others in the electric utility business as part of a scheme to manipulate a wholesale market.

Mr. MURIS. I believe there are potential anticompetitive problems here. This happens to raise an issue with which we had some friction with Chairman Hollings. The Justice Department and the FTC have, for over 5 decades, agreed with each other that they would not investigate the same matters. Indeed, in mergers, that is a legal requirement.

Historically, the Federal Trade Commission has done all of energy except for electricity. We had agreed with DOJ that we would change that, and that the FTC would do all of energy. Pursuant to some problems Senator Hollings had that were not related to that issue, the agreement was abrogated, and now electricity remains with the Justice Department in terms of antitrust issues. In terms of which agency has the expertise, it has historically been the Antitrust Division, and under the 1993 Clearance Agreement which is now in place, since the 2002 Clearance Agreement was abrogated, it is the Justice Department that has primarily been looking at electricity.

Senator WYDEN. I again have to just walk away with all of these problems, and the FTC certainly before anything you have described had authority over wholesale market impacts in the energy field. I cannot understand why, when there is an egregious case of an electric utility engaging in an abusive transaction with a subsidiary that has significant price impact on the wholesale market, which is what happened on the West Coast, I cannot see why the Federal Trade Commission is unwilling to get involved.

Mr. MURIS. Well, I completely agree with your premise. Before we abrogated the agreement, in fact, the newspaper stories which came out within a week of the agreement being abrogated raised suspicions of anticompetitive conduct. Let me be clear, I have no idea whether there are, in fact, violations of the antitrust laws, but certainly the material I read in the paper raises suspicions. Under our scheme, however, for decades the two agencies have agreed that only one will investigate a particular area and particular kinds of conduct. After we abrogated the agreement, electricity returned to the Justice Department.

Senator WYDEN. Do you think that ought to be changed?

Mr. MURIS. Well, I signed an agreement that was abrogated that gave all of energy to the FTC. I thought that was appropriate. For reasons unrelated to energy, Senator Hollings wanted the agreement abrogated. The Justice Department abrogated the agreement, and we returned to our prior state of affairs.

Senator WYDEN. It just looks to me like when you deal with energy at the Federal Trade Commission, if you want to have a conference you have gone to the right place. The Federal Trade Commission will do it for you. If you want to do anything that is going to protect the consumer to get a real enforcement action, you have got to go elsewhere.

Mr. MURIS. If I could just respond, most of this happened before I was there, but I think the Commission was extremely aggressive on the merger front, Senator

Senator Wyden. Well, what do you want to have changed? I mean, you have said this happened before you, but I do not see anything going to change. What I see is what I have described in Oregon with respect to the West Coast gasoline market. We have handed you the evidence of red-lining, of a whole host of anti-competitive practices. That did not seem to be sufficient. Here I am talking about areas where the Federal Trade Commission has had authority, and you said you had given it up, and I said, "well, it is your watch now, you have got a chance to lead, do you want to lead?", and you have said, "well, I guess not."

Mr. MURIS. No. What I have said is, I preferred to lead. Not by my choice was the agreement abrogated. We have returned to the state of affairs that existed before we signed the agreement, and under that state of affairs, it is the Justice Department that has handled electricity. We were in the process of hiring people to look at electricity mergers. I met with the Chairman of FERC. We were trying to work out a process where we could more actively participate in electricity issues and electricity mergers, but if we did that now, I am sure I would be accused of—in fact, I know I would be accused of—violating something that we promised not to do, which was to implement that agreement, so whatever else you think, or whatever other charges you may want to lay, we are not guilty on that one.

Senator WYDEN. Out of curiosity, Mr. Muris, on your watch have Federal Trade Commission employees gone out at the state level and testified on State deregulation issues with respect to energy?

Mr. MURIS. In gas prices, yes, sir.

Senator WYDEN. But not on electric issues?

Mr. MURIS. On electric issues, let me distinguish law enforcement from advocacy and studies. The House Energy and Commerce Committee asked the Commission a few years ago to produce some studies on electricity deregulation. The Commission has produced two studies, one a few years ago, one last year just as I arrived, and we have used those studies to talk to people at the State level, and we have also talked to FERC about the state of competition in electricity.

On gasoline, we recently filed comments criticizing a proposal that would have made it more difficult in the Commonwealth of Virginia—this is at the staff level we have done this—that would have made it more difficult to lower prices.

The Commission has filed several comments like that in the late 1980s and 1990s, and we filed this one last year. These were laws aimed at some of these new hypermarket firms that were coming into markets and selling gasoline at lower prices. They were going to make it harder for those firms to lower prices. We filed a comment with a Virginia legislative committee. The committee, in fact, voted the bill down.

Senator WYDEN. Well, that certainly sounds useful, I guess. What I was driving at is that if you have told us you do not have any authority in these energy matters any more really, and that has essentially been your testimony, I am curious about what is

going on at the State level that sounds like what you did at the Virginia initiative sounded useful.

Mr. MURIS. Well, let me make clear, we have authority—first of all, we have jurisdiction. We cannot divest ourselves of our jurisdiction. Only Congress can do that, but for over 5 decades, since 1948, the two agencies have agreed that they will not duplicate each other in terms of investigations. When it comes to electricity mergers and electricity cases, those have been done historically by, and the expertise resides in, the Department of Justice. After we abrogated the agreement in the middle of May, that expertise remains with the Department of Justice. We are applying the rules we had in place pursuant to the 1993 Clearance Agreement.

Senator WYDEN. One last question on the energy question. Commissioner Thompson, were you concerned at all with respect to whether the rules are ones that will make it virtually impossible to prove collusion, or anticompetitive practices. When you wrote your opinion in the gas pricing question you raised some issues, at least in my mind, with respect to what you thought the rules should be on evidence. You heard me say that I just do not think oil companies in 2002 show up somewhere and say, "Let us go fix prices." I am curious what you meant with respect to the rules on proving collusion and anticompetitive practices.

Mr. THOMPSON. I was concerned about whether we had significant groundwork, enough to bring an action based on a claim of site-specific pricing. Now, I think one of the things the Chairman outlined is that the work that we are doing now in examining what we looked at and whether they were effective in remedying some of the conditions we are seeing now will help to inform us as to whether we should be changing how we look at those questions, and what kind of remedial action we should be taking, but I raise the concern because I thought it was an important one to consider and examine, and that is why I think one of the things we are doing now is to actually look carefully at whether some of the assumptions and some of the conduct that we were concerned about and some of the remedies that we in fact put into place actually get at——

Senator WYDEN. What remedies were put in place? I cannot find a single remedy, I cannot find a single thing that was done for the West Coast consumer on this. Please enlighten me with respect to the remedies you put in place.

Mr. THOMPSON. I am talking in a more general fashion about things like divestitures, what we did in Exxon-Mobil, what we did in a number of different cases. Now, I have not been around for all of the mergers, but I think we have taken a very aggressive position with regard to challenging the most recent oil company mergers, but I think that we need to go back and take a look and find out whether that aggressive position actually resulted in the kinds of positive benefits that we had hoped.

Senator WYDEN. I will hold the record open for anybody on the Commission, either the Chairman or any individual Member who can give me some information with respect to anything concrete, specific, that was done to help the West Coast consumer, because I cannot find a single thing out there, and in the interest of fair-

ness the record will be open and we will await the Commission or any individual commissioner's opinion on it.

Unless you all have anything further, we will excuse you at this time. Does anybody want to add anything further?

[No response.]

Senator WYDEN. You are excused.

Our next panel, Mr. Charlie Mendoza, member, Board of Directors, AARP; Mr. Lawrence Sarjeant, U.S. Telecom Association; Mr. Robert Wientzen, Direct Marketing Association; Mr. Harry Schwartz, Center for Democracy and Technology; Dennis Alldridge, President, Special Olympics-Wisconsin; and Mr. Lou Cannon, President of the DC Lodge of the Fraternal Order of Police. If you all would come forward.

All right, gentlemen, we welcome you, and it is gentlemen on this panel. Mr. Mendoza, we note that you have got kind of a time crunch, so why don't we begin with you. We are going to make your prepared statements a part of the record in their entirety. I note that there is almost a kind of physical compulsion to read a statement when you come, but we will put it in the record in its entirety, and if you can just talk a few minutes, that will give us a chance to get into your issues.

Mr. Mendoza, welcome.

STATEMENT OF CHARLES MENDOZA, MEMBER, AARP BOARD OF DIRECTORS

Mr. MENDOZA. Thank you very much, Mr. Chairman. I really appreciate—and I apologize, I have to be sneaking out of here, but I am Charlie Mendoza, and I am a member of the AARP Board of Directors, and on behalf of our membership, I really want to thank you for allowing us to be here this morning to discuss the performance of the Federal Trade Commission in fulfilling its mission, and I think that our constituency, which is now over 35 million consumers over the age of 50, we recognize the importance of the role that the Federal Trade Commission plays in protecting the wide interests of consumers on many, many issues, and we do support the FTC in its efforts to serve the Nation as its consumer protection agency, and we really do commend it for adapting to address these evolving deceptive practices despite, I guess, many limited resources.

But my testimony here today will focus on the Commission's proposal to amend the telemarketing sales rule, and AARP strongly supports the FTC's goal of implementing a national Do-Not-Call category, or registry, preventing interference with the caller's identification services and eliminating the improper use by telemarketers of preacquired account information.

Additionally, you will see in our submission that it touches on other issues under the jurisdiction of the Commission such as the FTC's work on the funeral rule identity theft and misleading or deceptive product advertisements. AARP's interest, though, in the telemarketing sale rules and the concerns about telemarketing are longstanding.

We have been doing this for a long, long time, the educative effort, and since the adoption of the rule in 1995 we at AARP have really dedicated significant resources in educating the consumers

about telemarketing fraud, and I have been personally all across the Nation talking on this issue with Federal, State, and local law enforcement agencies.

We have also worked with State legislators to enact telemarketing legislation. In fact, my own State of Georgia was one of the first to enact a telemarketing law. AARP is a strong supporter of the existing rule, and we believe that the Commission's recommended additions to the rule will make it even better.

The rule has empowered law enforcement agencies to prosecute unlawful telemarketers, and I think it has held legitimate telemarketers to established standards of conduct. It also has provided the States with a floor of consumer protection, and many States have been successful in raising that floor. Close to 30 States have expanded upon the rule's protections and prohibitions in developing State-specific laws and regulations that better protect the consumers within their States.

The Commission's proposal to implement a national Do-Not-Call registry, I think, is a well-reasoned approach to address the concern that our members have expressed regarding their inability to stem the volume of telemarketing calls, particularly in States that lack Do-Not-Call laws.

Provided it is properly implemented to benefit the consumers, the establishment of the registry should be substantial. A national Do-Not-Call listing would supply consumers with a sense of comfort along with a return of control over their telephone.

We are pleased that the prohibition applies to all calls within the jurisdiction of the Commission, including calls soliciting charitable contributions initiated by a for-profit entity. We think that the expanded jurisdiction which has been afforded the FTC through the enactment of the USA Patriot Act and its amendments is welcome. It now prevents questionable organizations soliciting on behalf of sound-alike charities from calling consumers, while allowing the local church, fire department, and fraternal organization to continue their legitimate funding appeals.

Doing so allows credibility to the caller, and allows the call recipient to make contribution decisions based on the merits, with less concern about whether the caller is representing a legitimate group.

AARP is also pleased that the FTC is considering expanding the scope of the rule's coverage by eliminating the exemption for common carriers. Taking such action is consistent with the purpose of implementing a Do-Not-Call registry, which is reducing the number of unwanted telemarketing calls to the consumer. We believe that a joint effort between the Federal Communications Commission and the Federal Trade Commission to include common carriers under the Do-Not-Call provision of the telemarketing sales rules would reduce confusion and lead to a more comprehensive registry. The national Do-Not-Call registry would complement the existing State Do-Not-Call lists.

The continued ability of the States to protect their residents and to enforce their rules is a strong reason not to preempt them with the establishment of the registry. While the registry will provide much needed relief to consumers across the country, some States will offer consumers even more.

AARP fully supports the Commission's efforts to prohibit the blocking of caller identification, Caller ID. The proposed changes to the rules that will require the disclosure of the caller or the organization's actual name and telephone number are to be applauded. We believe that consumers who spend money on Caller ID services should be able to use the product for its intended purpose. Adoption of the call blocking provision of the rule will return control of the telephone where it belongs, in the hands of the consumer.

I see the amber light is coming on, and they wrote more than I really need to say, but the bottom line here is that we believe this registry will support, will strengthen particularly our consumers, people like me who have a heck of a time hanging up. We listen to these calls. We have had the training, we have had the education, but it is still difficult, and so on behalf of our members, we would like you to consider that, Mr. Chairman.

[The prepared statement of Mr. Mendoza follows:]

PREPARED STATEMENT OF CHARLES MENDOZA, MEMBER, AARP BOARD OF DIRECTORS

Chairman Dorgan and Members of the Committee:

My name is Charlie Mendoza and I am a member of AARP's Board of Directors. On behalf of AARP and its 35 million members, thank you for inviting us here this morning to discuss the performance of the Federal Trade Commission (FTC) in fulfilling its mission. AARP recognizes the important role that the Federal Trade Commission plays in protecting the interests of consumers on a wide range of issues. We support the FTC in its efforts to serve as the Nation's consumer protection agency and commend it for adapting to address evolving and troublesome deceptive practices despite limited resources.

Our testimony today will focus on the Commission's proposal to amend the Telemarketing Sales Rule. AARP strongly supports the FTC's goals to implement a national Do Not Call registry, prevent interference with Caller Identification services and eliminate the improper use by telemarketers of preacquired account information. Additionally, our testimony will touch on other issues under the jurisdiction of the Commission such as death care, identity theft and advertising restrictions.

Telemarketing Sales Rule

AARP's interest in the Telemarketing Sales Rule and concerns about telemarketing abuses are long-standing. Seven years ago we were active participants in the original rulemaking proceeding. Since the adoption of the Rule in 1995, AARP has dedicated significant resources to educating consumers about telemarketing fraud and to working with federal, state and local law enforcement agencies to combat it. We have also worked with state legislatures to enact state telemarketing legislation. The existing Rule has supported these efforts and we believe that the Commission's recommended additions will strengthen the Rule.

AARP's strong support of the Telemarketing Sales Rule is well documented both at the Commission and here in the Congress through our filed comments, testimony and participation in FTC-led workshops. The Rule has served as a foundation from which AARP has been able to mount education and awareness campaigns. Our advocacy efforts have built upon the Rule's provisions regarding disclosures, prohibitions, and enforcement mechanisms. We have also conducted research related to the Rule, some of which will be described later in these comments.

The Rule has also empowered law enforcement agencies to prosecute unlawful telemarketers and helped legitimate telemarketers to establish standards of conduct. The existence of the Telemarketing Sales Rule has improved the ability of federal, state, and local law enforcement officials to take action against telemarketing firms, and specific violations of the Rule have led to prosecutions and, in some cases, remuneration for victims.

Finally, the Rule has provided the states with a floor of consumer protection—and many have been successful in raising that floor. Close to thirty states have expanded upon the Rule's protections and prohibitions in developing state-specific laws and regulations that better protect consumers. At least eleven of the states have enacted laws using provisions from an AARP model law building upon the Rule, and additional states are in the process of considering comprehensive telemarketing legislation. In fact, recent AARP surveys conducted in New Jersey, Min-

nesota and Michigan found that an overwhelming percentage of survey participants favor additional state laws to prevent unfair, misleading, or deceptive telemarketing practices. [1]

National Do-Not-Call Registry

AARP supports the Commission's decision to introduce a national Do-Not-Call registry, asking only that it not preempt states' efforts to establish stronger protections for consumers. As proposed, the national Do-Not-Call registry would enable a consumer to call a toll-free number to place his or her phone number on a national list. Telemarketers would then be required to access the FTC's list, removing the numbers of all consumers whose numbers appeared on the registry.

The Commission's proposal is a well-reasoned approach to address concerns AARP's members have expressed regarding their inability to stem the volume of telemarketing calls, particularly in states that currently lack Do-Not-Call laws. Provided it is properly implemented and strictly enforced, the benefit to consumers of the establishment of the registry should be substantial. A national Do-Not-Call listing would supply consumers with a sense of comfort along with a return of control over their telephone.

We are pleased that the prohibition applies to all calls within the jurisdiction of the Commission, including calls soliciting charitable contributions initiated by for-profit entities. The expanded jurisdiction accorded the FTC through enactment of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) amendments is welcome. It now prevents questionable organizations soliciting on behalf of sound-alike charities from calling consumers, while allowing the local church, fire department, and fraternal organizations to continue their legitimate fundraising appeals. Doing so adds credibility to the caller and allows the call recipient to make a contribution decision on the merits, with less concern about whether the caller is representing a legitimate group.

AARP is also pleased that the FTC is considering expanding the scope of the Rule's coverage by eliminating the exemption for common carriers. Taking such action is consistent with the purpose of implementing a Do Not Call registry, which is to reduce the number of unwanted telemarketing calls to the consumer. We believe that a joint effort between the Federal Communications Commission and the FTC to include common carriers under the Do Not Call provisions of the Telemarketing Sales Rule would reduce confusion, leading to a more comprehensive registry.

The national Do-Not-Call registry would complement existing state Do-Not-Call lists. AARP has been an active participant across the country on behalf of state Do-Not-Call lists. The continued ability of the states to protect their residents and to enforce their rules is a strong reason not to preempt them with the establishment of the registry. Statements by the Commission that "state requirements should be preempted only to the extent that the national Do-Not-Call registry would provide more protection to consumers" support our position and are consistent with AARP principles that federal consumer protections should serve as a floor, not a ceiling. While the registry will provide much needed relief to consumers across the country, some states will offer consumers even more.

Call Blocking

AARP fully supports the Commission's efforts to prohibit the blocking of caller identification (Caller ID) information. The proposed changes to the Rule that will require the disclosure of a caller or organization's actual name and telephone number is to be applauded. AARP has strongly advocated for this change in business practices. In previous comments at the Commission and in support for legislation in both the House and the Senate, we have urged implementation of this type of requirement. We believe that consumers who spend money on Caller ID services should be able to use the product for its intended purpose. Increasingly, consumers are asked to "take responsibility" and "make the best choice," and become "empowered." Inasmuch as consumers' purchase Caller ID services to become empowered and screen telemarketers, they should be able to use these services for this purpose. Why would legitimate telemarketers want their name and/or phone number concealed, effectively rejecting a free advertisement? The existing environment that allows telemarketers to block their identifiers places consumers at a disadvantage. Not only are consumers unable to identify who is calling as the call arrives, but also

[1] AARP NJ Telemarketing and "Do Not Call" List Survey (January 2002); AARP Michigan Telemarketing and "Do Not Call" List Survey (April 2002); AARP Minnesota Telemarketing and "Do Not Call" List: An AARP Survey (December 2001).

they cannot return a call because the number is unavailable. Adoption of the call blocking provision of the Rule will return control of the telephone where it belongs, in the hands of the consumer.

Additionally, AARP has recommended that the name of the charitable organization with a verifiable phone number of the organization appear on the display. This would provide consumers with the information necessary to decide if they want to pick up the call. It also supplies the consumer with a phone number to call to verify that the telemarketer is indeed calling on behalf of the organization and gives the consumer a direct link to the charity if questions arise. Further, this approach enables consumers to contact government agencies such as the Better Business Bureau or state Attorney General to verify the legitimacy of the organization, and helps prevent consumers from becoming victims. Such a requirement would likely benefit legitimate telemarketers as well, since a consumer is more likely to accept a call from the American Cancer Society than from a telemarketing firm.

Preacquired Account Information

AARP strongly supports the proposed revision to the Telemarketing Sales Rule that prohibits the practice of receiving any consumer's billing information from any third party for use in telemarketing, or disclosing any consumer's billing information to any third party for use in telemarketing.

A telemarketer's ability to use preacquired account information without the obtaining this information directly from the consumer is a major concern. Historically, preacquired account information has been used in conjunction with free trial offers that end up being paid subscriptions, and complimentary memberships in travel clubs that show up at the consumer's doorstep as negative option solicitations, with dues or membership fees assessed for inaction. In these cases, not only did consumers honestly believe that they were agreeing to a free-of-charge service, they clearly were unaware of the fact that the telemarketer was already in possession of billing information. Over and over we hear from consumers that they had no idea that money could be taken from their account without their providing an account number. This is a deceptive, unfair, and abusive practice that should be prohibited.

As with any rule or regulation, enforcement of the Telemarketing Sales Rule is critical. Equally important is the disclosure of information regarding enforcement actions. AARP is very concerned with the lack of national data regarding enforcement actions, the effectiveness of the Rule or even the amount of money that currently being spent on telemarketing. Absent this type of information, it is extremely difficult to measure the success of various education efforts and enforcement partnerships, including those in which AARP is engaged. Collecting national telemarketing data that is accessible to the general public would prove beneficial to all interested parties.

In sum, AARP supports the FTC's efforts to amend the Telemarketing Sales Rule to include a national Do Not Call registry with as few exemptions as possible. Implementation of such a rule is clearly in the public's best interest and should not be delayed or weakened.

Death Care

Another industry sales rule within the jurisdiction of the FTC that is of importance to AARP and its members is the Funeral Rule. Over the past decade significant change has taken place in the funeral and burial industries. Changes include: consolidation of funeral homes and cemeteries; cemeterians providing funeral goods and services and funeral directors providing burial goods and services; an increase in third-party providers; Internet shopping; and the proliferation of preneed contracts.

These changes provide consumers with a mixed bag of results—some good, some not so good. The Funeral Rule, implemented by the Federal Trade Commission in 1984, was designed to ensure that "consumers have access to sufficient information . . . " and prohibited misrepresentations "used to influence consumers' decisions on which goods and services to purchase." The original Rule, however, could not have anticipated the changes the industry has undergone. In the interest of both consumers and industry, AARP has recommended that the Rule be expanded to include all providers of funeral and burial goods and services.

Expansion of the Funeral Rule by the FTC would better protect consumers and provide a "level playing field" to all participants in the funeral and burial goods and services marketplace. Even this type of expansion, however, would not alleviate some of the problems associated with the sale of preneed contracts. We have therefore also recommended that the Commission include minimum contract standards in the revised Rule. We believe that the FTC's current review of the Funeral Rule should lead to action that will address our concerns.

Regarding the current review, while AARP recognizes the difficulty the Commission has with the many demands on their limited resources, we believe the FTC should respond to the Funeral Rule review process in the very near future. It will be three years next month since comments were due to the Commission. During that same interval, the industry has continued to evolve and consumers have continued to fall victim to misleading, deceptive and sometimes criminal behavior on the part of death care providers. A Commission decision might not right all the wrongs, but it could provide some clarity for consumers and providers alike.

Other Issues

An alarming problem confronting consumers is that of identity theft. The act happens quickly and quietly, yet the effects can be devastating and can take literally years to clean up. However, the FTC is to be commended for working on behalf of consumers to make the rehabilitation of one's identity a little bit easier. Thanks to the Commission's adoption of the ID Theft Affidavit, a consumer can now fill out one form that will alert all of the credit agencies at one time to the plight. Previously, victims were required to report the theft to a number of different credit agencies.

Another area for which the Commission has responsibility are laws that prohibit misleading or deceptive advertising. This oversight authority can be particularly important in areas such as labels of foods and nutritional supplements where false and misleading claims in advertising may cause persons with serious illness and disease to forego proven medical treatments in favor of products glamorized by unsubstantiated claims and potentially risk even greater harm to their health. Inadequate resources unfortunately limit the FTC's reach in this area.

That leads to our final point: concern over limited funds. When provided with the resources necessary to carry out its mission, the FTC does an excellent job of enforcing the law. Inadequate funding clearly hampers the agency's effectiveness.

Despite uneven enforcement, we support the Commission's efforts to crack down on false and misleading advertising, deter fraudulent telemarketers and uncover Funeral Rule infractions. We ask the Congress to recognize the importance of the FTC to consumers when making appropriations decisions, granting them the resources to effectively enforce the rules they have promulgated.

Conclusion

Mr. Chairman, AARP appreciates having the opportunity to testify today in support of the Federal Trade Commission's efforts to protect consumers. In particular, we strongly support the proposed revisions to the Telemarketing Sales Rule, including the national Do Not Call registry, which will benefit consumers and should be adopted as proposed with as few exemptions as possible.

In addition, we hope that the Congress will adequately fund the Commission so that it can accomplish the mission it has been given: to enforce consumer protection laws. Thank you for providing us with the opportunity to voice our views.

Senator WYDEN. Thank you. Very good.
Mr. Sarjeant.

STATEMENT OF LAWRENCE E. SARJEANT, VICE PRESIDENT, LAW AND GENERAL COUNSEL, U.S. TELECOM ASSOCIATION

Mr. SARJEANT. Good morning, Mr. Chairman. Thank you and Members of the Subcommittee for giving the United States Telecom Association the opportunity to testify and present its views on the issue of whether the Federal Trade Commission should be authorized by Congress to have concurrent jurisdiction with the Federal Communications Commission over common carrier marketing and advertising practices.

USTA is the Nation's oldest trade organization representing local telephone companies. USTA's carrier members provide a full array of voice and data and video service over wire line and wireless networks. USTA is opposed to giving the FTC concurrent jurisdiction with the Federal Communications Commission. USTA is opposed to conferring regulatory authority over telecommunications common carriers upon another Federal agency, resulting in potentially du-

plicative, conflicting, and costly new regulatory requirements, especially where there is not a clearly demonstrated public interest benefit in doing so.

The FTC, since its creation in 1914, has not had regulatory authority with respect to common carriers. The reason for this exemption is, there is no absence of regulations. There is no void to fill. Those who would suggest that the Congress and the FCC have dismantled the regulatory apparatus applicable to the common carrier industry are simply wrong. Incumbent local exchange carriers are still pervasively regulated by the FCC and the States.

Yesterday, the FCC adopted revised rules implementing Section 222 of the Telecommunications Act of 1996 concerning carriers' use of customer proprietary network information, CPNI, in marketing products and services. If one looks at 47 Code of Federal Regulations Section 64-2400, one would see that the FCC has detailed requirements for common carriers in rendering customer bills.

The stated purpose and scope of these truth-in-billing rules is to, among other things, aid customers in understanding their telecommunications bills, and to provide them with the tools they need to make informed choices in the market for telecommunications services. The FCC also has rules implementing Section 227 of the Act known as the Telecommunications Consumer Protection Act, which limits unsolicited advertisements that use automatic telephone dialing systems, artificial or prerecorded voice messages, and fax machines.

It was during the William Kennard administration that the FCC established an enforcement bureau, and the then-Consumer Information Bureau, which is now the Consumer and Governmental Affairs Bureau. Both have made it a priority to ensure that consumers have access to both information about telecommunications services and assistance in resolving disputes with common carriers providing interstate telecommunications services.

One of the many responsibilities of the Consumer and Governmental Affairs Bureau is to provide staff assistance to the Consumer and Disabilities Telecommunications Advisory Committee, a Federal advisory committee that provides feedback to the FCC on a regular basis on issues of interest and concern to consumers generally and the disabilities community.

The FCC has determined that Section 201(b) of the Communications Act of 1934, as amended, requires that common carriers practices for and in connection with communications services shall be just and reasonable, and any such practice that is unjust or unreasonable is unlawful. The FCC has used this Section 201(b) authority to determine that unfair and deceptive marketing practices by common carriers constitute unjust and unreasonable practices. The FCC has indicated that its authority and actions pursuant to 201(b) of the Communications Act, as amended, would be guided by the principles of truth in advertising, developed by the FTC under Section 5 of the FTC Act.

There is no existing lack of authority. The FCC has already fully occupied the field when it comes to interstate communications carriers. Nonetheless, the FCC has worked jointly with the FTC to make sure that there are no gaps left between the respective jurisdictions of the two agencies, and I would direct the Subcommittee

to the joint policy statement of the FCC and FTC on March 1 of 2000. The FCC has been very active from an enforcement perspective in a variety of areas that impact consumers, such as telephone solicitation, marketing, slamming, and unsolicited facsimiles. This enforcement is accomplished through the Telecommunications Consumer Division of the FCC Enforcement Bureau. I will not identify all of the enforcement actions, but there is a website that the FCC has, and this division has listed all the different enforcement actions and the fines that have been assessed.

As Chairman Powell has indicated in testimony before both the House and the Senate, the FCC is dedicated to putting more resources into enforcement, including litigation resources. Chairman Powell also called upon the Congress to substantially raise the forfeiture amounts for violations of the Communications Act, and Congress has responded. Extending concurrent jurisdiction to the FTC over telecommunications common carriers would be counterproductive, as it would lead to confusion. Common carriers would not know which agency to rely on for advice, or which agency's compliance standards to follow.

The FTC request for concurrent jurisdiction appears to be a solution in search of a problem. There is no barrier to effective consumer protection with respect to common carriers. There being no compelling demonstration of a problem in need of fixing, USTA ask that you not authorize the FTC to assert concurrent jurisdiction with the FCC over telecommunications common carriers.

Thank you.

[The prepared statement of Mr. Sarjeant follows:]

PREPARED STATEMENT OF LAWRENCE E. SARJEANT, VICE PRESIDENT, LAW AND GENERAL COUNSEL, U.S. TELECOM ASSOCIATION

Thank you Mr. Chairman and Members of the Committee for giving the United States Telecom Association (USTA) the opportunity to testify and present its views on the issue of whether the Federal Trade Commission (FTC) should be authorized by Congress to have concurrent jurisdiction with the Federal Communications Commission (FCC) over common carrier marketing and advertising practices. I am Lawrence E. Sarjeant and I serve as Vice President Law and General Counsel of USTA. I appear at the hearing today on behalf of the entire association. USTA is the nation's oldest trade organization for the local telephone industry. USTA's carrier members provide a full array of voice, data and video services over wireline and wireless networks.

A. Telecommunications Common Carriers Are Already Subject to Regulation of Their Market and Advertising Practices by the FCC and the States

USTA would be strongly opposed to giving the FTC concurrent jurisdiction. USTA is not opposed to regulatory authorities both state and federal having the jurisdiction to police, enforce, remedy and regulate these practices. What USTA is opposed to is adding one more federal regulatory body resulting in potentially duplicative, conflicting and costly new regulatory requirements.

The FTC since its creation in 1914 has not had regulatory authority with respect to common carriers. This exemption for common carriers has been recognized by the federal judiciary (*See*, e.g., *FTC v. Miller*, 549 F.2d. 452, 7th Cir, 1977), and it has been reaffirmed by Congress. The reason for this exemption is that there is no absence of regulation—there is no void to fill. Common carriers were regulated in 1914 by the Interstate Commerce Commission, and when the FCC was created by Congress in 1934, the regulatory authority over telephone common carriers was transferred to it. The exemption from FTC authority was continued. Incumbent local exchange carriers are still pervasively regulated by the FCC and the States.

B. The FCC Has Determined That Telecommunications Carrier Marketing Practices Is Subject to Section 201(b)

The FCC has determined that Section 201(b) of the Communications Act of 1934, as amended "requires that common carriers' **practices** . . . for and in connection with . . . communication service, shall be just and reasonable and any such . . . **practice** . . . that is unjust or unreasonable is hereby declared to be unlawful . . . " (FCC–FTC Joint Policy Statement, FCC 00–72, 2/29/2000, para. 4). The FCC has used this Section 201(b) authority to determine that unfair and deceptive marketing practices by common carriers constitute unjust and unreasonable practices. In February 2000, when the FCC and the FTC issued a Joint Policy Statement for Advertising of Dial-Around and other long distance services to consumers, the FCC indicated that its authority and actions pursuant to Section 201(b) of the Communications Act, as amended, would be guided by the "principles of truth in advertising developed by the FTC under Section 5 of the FTC Act." Consequently, there is no existing lack of legal authority. The FCC has already fully occupied the field when it comes to interstate communications carriers. With respect to intrastate communications, the states continue to have full authority, pursuant to existing state laws.

C. The FCC Has Taken Enforcement Actions Against Telecommunications Carriers' Marketing Practices

The FCC has not only recognized that it has statutory authority to take action against unfair and deceptive practices by common carriers, it has taken affirmative enforcement actions pursuant to that authority. The FCC has been very active from an enforcement perspective in a variety of areas that impact consumers such as telephone solicitation marketing, slamming, and unsolicited facsimiles. This enforcement is accomplished through the Telecommunications Consumers Division of the FCC Enforcement bureau. The following are marketing enforcement actions taken by the FCC as identified on its' website—

MARKETING ENFORCEMENT ACTIONS

04–01–2000 $1,000,000 in total fines proposed in Notice of Apparent Liability against NOS Communications, Inc. (NOS) and Affinity Network Incorporated (ANI) for apparent unfair and deceptive marketing practices

12–07–2000 Order on Reconsideration of 7/17/00 Order imposing a forfeiture against Business Discount Plan, Inc. (denied in part, granted in part). Forfeiture adjusted to $1,800,000.

03–01–2000 $100,000 Consent Decree with MCI WORLDCOM for marketing and advertising practices

As Chairman Powell has indicated in testimony before both the House and Senate, the FCC is dedicated to putting more resources into enforcement, including litigation resources. Chairman Powell has also called upon the Congress to substantially raise the forfeiture amounts for violations of the Communications Act. The House in H.R.1542, has responded to this request by means of the Upton Amendment added H.R. 1542 on the House floor. H.R.1542 as passed by the House, provides the FCC with cease and desist authority in common carrier matters, while also increasing the future amount to up to $10,000,000. Violations of cease and desist orders will result in forfeitures of up to $20,000,000.

USTA, therefore, believes that the FCC has taken steps to enhance enforcement efforts, and it has taken enforcement actions with respect to the marketing and advertising issues in question. There is, in USTA's judgment, no need to complicate the issue by adding still another independent regulatory commission to the mix. It would be one thing if the FCC did not have the requisite authority, or if it did have the authority, but failed to exercise it or exercise it properly. This is not the case. There is no regulatory failure that USTA has observed. Certainly, USTA members do not think so.

D. Adding Concurrent FTC Jurisdiction Over Marketing Practices of Telecommunications Carriers Would Be In Conflict with Congressionally Developed Regulatory Scheme

The FCC comprehensively regulates marketing, including telemarketing, by common carriers and their agents. To add concurrent FTC jurisdiction would be in conflict with the comprehensive regulatory scheme developed by Congress and enforced by the FCC.

Relevant cases in point are: first, under Section 227 of the Communications Act of 1934, as amended (Telephone Consumer Protection Act, TPCA), the FCC exercises general jurisdiction over telemarketing by common carriers as well as by their

non-carrier affiliates. Significantly, the TPCA and the FCC's implementing regulations apply to both interstate and intrastate telemarketing by all carriers, non-carriers and their agents; second, Section 222 of the Communications Act, as amended and the FCC's implementing regulations address how telecommunications carriers may use Customer Proprietary Network Information (CPNI) they obtain from their customers in marketing products and services, including in the course of inbound telemarketing; and third, Sections 272 through 276 of the Communications Act of 1934, as amended and the FCC's implementing regulations create an additional set of rules governing marketing activities by Bell Operating Companies and their non-carrier affiliates.

Extending concurrent jurisdiction to the FTC over telecommunications common carriers would be counterproductive, as it would lead to confusion. Common carriers would not know which agency to rely on for advice or which agency's compliance standards to follow. There being no compelling demonstration of a problem in need of a solution, USTA asks that you not authorize the FTC to assert concurrent jurisdiction with the FCC over telecommunications common carriers.

Thank you.

Senator WYDEN. Very good.

Mr. Wientzen.

STATEMENT OF H. ROBERT WIENTZEN, PRESIDENT AND CEO, DIRECT MARKETING ASSOCIATION, INC.

Mr. WIENTZEN. Thank you, Mr. Chairman. I am Bob Wientzen. I am President and CEO of the Direct Marketing Association. We are the largest trade association for businesses interested in interactive and database marketing. We have about 5,000 member organizations here in the United States and 50 other countries. We represent all aspects of the teleservices industry both on the profit and non-profit side. They are members of our association, and any change in the legal requirement for this segment is necessarily going to have a significant impact on our members and on that segment of the industry.

Telemarketing makes an important contribution to the U.S. economy. Outbound consumer telemarketing generated about $274 billion in sales in 2001, and it is estimated to employ a little over 4 million workers. The telemarketing industry employs a high number of minorities and individuals in welfare to work programs, and telemarketing companies often are located in small towns, where they are the primary employer. It is an inseparable part of an even larger $661 billion industry that contributes close to 6 percent of the U.S. GDP, and more than 6 million jobs to the U.S. economy.

In addition, telemarketing is a mainstay for obtaining charitable contributions in the United States.

I want to acknowledge the Commission for its efforts in stopping fraud and deception through increased enforcement of existing laws, rather than pushing for new laws. The Commission already has broad authority to enforce against bad actors in the marketplace. We have heard a good bit about that this morning, and we at the DMA continue to work closely with the Commission on stopping fraud through referrals of cases on a regular basis.

I want to focus our testimony this morning on the Commission's Do-Not-Call registry proposal and related issues. The DMA believes the Commission has laudable goals in proposing an amendment to the telemarketing sales rule and has filed comments in the proceedings, as well as participated in its workshops. I believe that a focus on enforcement rather than additional regulation is the appropriate course to take in respect to combatting what is admit-

tedly cases of abusive telemarketing. For this reason, the DMA opposes the creation of a Government-administered Do-Not-Call list as currently proposed by the Commission.

We believe the Commission's proposal extends way beyond the Telemarketing Consumer Fraud and Abuse Prevention Act's purpose of reducing abusive and deceptive practices, and that it will interfere with legitimate telemarketing activities that comprises a significant portion of our economy.

Likewise, we believe the proposal restricts legitimate commercial speech that is protected by the First Amendment. This is particularly the case with respect to the limitation on businesses being able to communicate with their existing customers who are on a national Do-Not-Call list.

Now, we believe the Commission's authority under the TSR does not extend to the creation of a national Do-Not-Call list. At the time of the enactment, the Congress specifically stated, and I quote, "The Committee does not intend to limit legitimate telemarketing practices." There is no reference to a Do-Not-Call list in either the statutory texts or the legislative history of the Act. However, the Telephone Consumer Protection Act, referred to as the TCPA, demonstrates that where Congress wanted the agency to consider such a mechanism, it did so in a statute.

Specifically, the TCPA authorized the Federal Communications Commission to conduct a rulemaking proceeding in which it was to consider a number of measures to protect residential telephone subscribers' rights in an efficient, effective, and economic manner, and without the imposition of any additional charge to telephone subscribers.

Now, the Commission's current proposal would directly contradict the FCC's consideration and rejection of a national Do-Not-Call registry in its rulemaking in 1992. In its rulemaking, the FCC found that a national Do-Not-Call list would be costly, and I will quote here again: "Costly and difficult to establish and maintain in a reasonably accurate form." Attached to this testimony and submitted for the record are the comments we have submitted in this proceeding in conjunction with the U.S. Chamber of Commerce, which set forth in detail the legal and policy reasons against the Commission's creating a Do-Not-Call list.

Now, we are not opposed to the concept of a national Do-Not-Call list. The DMA has, in fact, had its telephone preference service in place since 1985. There are currently about 4.7 million consumers on our Do-Not-Call list. The TPS file covers consumer telemarketers with no exceptions or exemptions. Any consumer who wants to reduce the number of unwanted telemarketing calls they receive can have the name placed on the list for free, and I note with emphasis that the proposed commission's list, unlike the DMA list, would not cover common carriers, as you have already heard, or the airlines, or banking, or insurance industries, among others, whereas our list does apply to those.

With this background, I want to address specific concerns that the DMA has regarding the Commission going ahead with such a list. These areas are set forth in more detail in a letter we have submitted and filed with the Commission on behalf of not only the association, the Direct Marketing Association, but five other asso-

ciations.* These issues include the need for an exemption to the list that would allow businesses to contact customers with whom they already have an existing relationship, harmonization of the national list with more than the 20-state list that already exists, measures to ensure the accuracy of the list, and we have significant concerns in that area, and further evaluations of the actual cost of the list so as not to impose a prohibitive cost on telemarketers.

We think there are key reasons for these issues to be considered, and again would stress the fact that we believe that the existing private list conducted for a number of years more than adequately deals with the concerns of consumers as evidenced, Senator, by the fact that in those States that have do-not-call lists, the vast majority of the people who have already been on the DMA's list do not sign up for these lists. They in fact find that they work just fine, and so we would submit to you that the current FTC proposal is inappropriate, and duplicative of the private sector and the States' existing lists.

[The prepared statement of Mr. Wientzen follows:]

PREPARED STATEMENT OF H. ROBERT WIENTZEN, PRESIDENT AND CEO, DIRECT MARKETING ASSOCIATION, INC.

I. Introduction

Good morning, Senator Dorgan, and Members of the Subcommittee, and thank you for the opportunity to appear before you as the Subcommittee discusses reauthorization of the Federal Trade Commission. I am Robert Wientzen, President and CEO of the Direct Marketing Association, Inc. ("The DMA").

The Direct Marketing Association is the largest trade association for businesses interested and involved in interactive and database marketing, with approximately 5,000 member organizations from the United States and more than 50 other nations. Founded in 1917, its members include direct marketers from every business segment, as well as the non-profit and electronic marketing sectors. All aspects of the teleservices industry, both profit and non-profit, are represented in The DMA's membership. Any change in the legal requirements for this segment necessarily would have an impact on The DMA and its members.

Telemarketing makes an important contribution to the United States economy. Outbound consumer telephone marketing generated $274.2 billion in sales in 2001 and is estimated to employ 4.1 million workers.[1] The telemarketing industry employs a high number of minorities and individuals in welfare-to-work programs, and telemarketing companies often are located in small towns where they are a primary employer.[2] It is an unseparable part of an even larger $661 billion industry that contributes almost 6 percent of U.S. GDP and more than 6 million jobs to the U.S. economy. In addition, telemarketing is a mainstay for obtaining charitable contributions in the United States.

I want to acknowledge the Commission for its approach in stopping fraud and deception through increased enforcement of existing laws rather than through pushing for new laws or adopting new rules. The Commission already has broad authority to enforce against bad actors in the marketplace. We at The DMA continue to work closely with the Commission on stopping fraud through referral of cases to the Commission on a regular basis and industry and consumer education on fraud prevention. I would like to focus our testimony today on the Commission's do-not-call registry proposal and related issues. The DMA believes that the Commission has laudable goals in its proposed amendments to the Telemarketing Sales Rule ("TSR"), and has filed comments in the proceeding as well as participated in its workshop.

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*The information referred to has been retained in Committee files.

[1] These numbers are from a forthcoming WEFA Group study, *Economic Impact, U.S. Direct and Interactive Marketing Today, 2002 Forecast*

[2] *The Faces and Places of Outbound Teleservices in the United States: The People and Places that Would Be Harmed by a Decline in Telemarketing,* The Direct Marketing Association, Inc., June 2002.

I believe that the focus on enforcement rather than additional regulation also is the appropriate course to take with respect to combating abusive telemarketing.

For this reason, The DMA opposes the creation of a government-administered national do-not-call list as currently proposed by the Commission. We believe that the Commission's proposal extends beyond the Telemarketing and Consumer Fraud and Abuse Prevention Act's purpose of reducing abusive and deceptive practices and will interfere with the legitimate telemarketing activities that compose this significant portion of the economy. Likewise, we believe that the proposal restricts legitimate commercial speech that is protected by the First Amendment. This is particularly the case with respect to the limitation on businesses being able to communicate with their existing customers who are on a national do-not-call list.

We believe that the Commission's authority under the TSR, prescribed by the Congress, does not extend to the creation of a national do-not-call list. At the time of enactment, the Congress specifically stated that " . . . the Committee does not intend to limit legitimate telemarketing practices."[3] There is no reference to a do-not-call list in either the statutory text or the legislative history of the Act. However, the Telephone Consumer Protection Act, referred to as the "TCPA," demonstrates that where Congress wanted an agency to consider such a mechanism, it did so in a statute. Specifically, the TCPA authorized the Federal Communications Commission to conduct a rulemaking proceeding in which it was to consider a number of measures to protect residential telephone subscriber rights in an "efficient, effective, and economic manner and without the imposition of any additional charge to telephone subscribers."[4]

The Commission's proposal would directly contradict the FCC's consideration—and rejection of—a national call registry in its rulemaking implementing the TCPA in 1992. In its rulemaking, the FCC found that a national do-not-call list would be "costly and difficult to establish and maintain in a reasonably accurate form."[5] Attached to this testimony and submitted for the record are the comments that The DMA submitted in this proceeding in conjunction with the United States Chamber of Commerce, which set forth in detail the legal and policy reasons against the Commission creating a do-not-call list.*

The DMA, of course, is not opposed to the concept of a national do-not-call list. The DMA has had its Telephone Preference Service ("TPS") in place since 1985. There are currently 4.7 million consumers on the TPS do-not-call list. The TPS covers consumer telemarketers with no exceptions or exemptions. Any consumers who want to reduce the number of unwanted national telemarketing calls they receive can have their names placed on the TPS list for that purpose free of charge. I note that the proposed Commission list, unlike the DMA list, would not cover common carriers, or the airline, banking, or insurance industries, among others.

With this background, I want to address specific concerns with the Commission's proposal that The DMA believes should be addressed if the Commission proceeds with a do-not-call list. These areas are set forth in more detail in a letter also submitted for the record with my testimony that was filed with the Commission on behalf of The Direct Marketing Association, the American Teleservices Association, the Electronic Retail Association, the Magazine Publishers of America, the National Retail Federation, and the Promotion Marketing Association collectively.*

These include:

- The need for an exemption to the list that would allow businesses to contact customers with whom they have an established business relationship.
- Harmonization of any national list with the more than 20 states that have do-not-call lists, so that businesses and consumers can deal with one list.
- Measures to ensure the accuracy of the list.
- Further evaluation of the actual costs of such a list so as not to impose prohibitive costs on businesses to comply.

II. An Exemption to the Proposed National Do-Not-Call List Should be Created to Allow Businesses to Contact Individuals with Whom They Have an Established Business Relationship.

Of these issues, the most critical to The DMA is the creation of an exemption that will preserve the ability of businesses to contact those individuals with whom they

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[3] H.R. Rep. No. 103–20, at 9 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1626.

[4] 47 U.S.C. § 227(c)(2).

[5] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* 7 FCC Rcd 8752, ¶ 14 (1992) (the "TCPA Order").

* The information referred to has been retained in Committee files.

have an established business relationship who register for the do-not-call list. In other areas of the law governing marketing, exemptions exist for contacting individuals when such a relationship exists. For example, the FCC in its rules implementing the TCPA provides for marketing to established customers using both fax and telemarketing. The FCC concluded in this rulemaking that "a solicitation to someone with whom a prior business relationship exists does not adversely affect subscriber privacy interests. Moreover, such a solicitation can be deemed to be invited or permitted by a subscriber in light of the business relationship."[6] This reasoning is equally applicable under the TSR.

It is unrealistic to expect consumers who sign on to a national do-not-call list to understand that, by doing so, businesses with which they have relationships will no longer be permitted to contact them to offer goods and services. It is for this very reason that almost all of the states that have implemented do-not call lists have created exemptions for customers with a pre-established business relationship. The Commission proposes that, after signing onto the do-not-call list, consumers with existing business relationships can exercise their choice to receive calls from specific companies through the companies' obtaining "express verifiable written authorization." In these tough economic times, where businesses are struggling to attract new customers, it hardly seems appropriate to require written permission to call an existing customer.

III. Any National Do-Not-Call List Should Be Harmonized with State Do-Not-Call Lists.

The next issue that I would like to discuss is that of harmonization of any national list with state lists. Any government-mandated national do-not-call list that is established must be harmonized with state lists so that companies could comply with one list. In the past several years, many states have enacted do-not-call lists. The current framework, in which telemarketers are required to comply with more than 20 state laws, creates significant burdens on businesses. A preferable approach would limit such burdens by creating one list to which marketers could subscribe that would encompass state lists and a national list.

This harmonization must extend beyond compilation and administration of the list to include exemptions and enforcement standards as well for interstate calls. However, such is not the case as envisioned by the FTC in its TSR proposed revisions.

IV. Steps Should Be Taken to Help Ensure the Accuracy of a Do-Not-Call List.

The national do-not-call list as proposed by the Commission will not accurately reflect individuals who place their names on the list because society is highly mobile, with telephone numbers changing regularly. The Commission proposes that its list be based upon a person's placement of his or her "name and/or telephone number" on the Commission-maintained registry and the capture of Automatic Number Identification ("ANT") information. It is estimated that phone numbers change for 16 percent of the U.S. population on an annual basis. Phone numbers are usually reassigned approximately 90 days after an individual has moved and is no longer using the number.

A list with solely name or phone number would be outdated annually, if not sooner. Such a scenario would not honor consumers' preferences. In fact, it could result in individuals who did not place their names/numbers on the list not receiving calls that they may want. The DMA's TPS, by obtaining name, address, and telephone number, can regularly be checked against the U.S. Postal Service's National Change of Address List. The Commission's proposal would not employ similar measures to ensure an accurate list. An approach that solely captures name and phone number would require at a minimum an annual renewal to afford meaningful choice.

V. The Costs Estimated by the Commission Do Not Accurately Reflect the Costs of Running a National List.

The Commission's forecasted annual $5 million cost of administering a national do-not-call list far underestimates the true costs of administering such a list. Under the current proposal based on this estimate, the Commission will charge national telemarketers $3,000 per year to purchase the do-not-call list. The Commission does not specify who will bear the burden of the additional costs in the probable event that this estimated cost for administration of the do-not-call list proves inadequate.

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[6] TCPA Order at ¶ 34. The sponsors of federal legislation to regulate unsolicited commercial electronic mail have incorporated a similar established business relationship exemption in their bills, including H.R. 3113, which passed the U.S. House of Representatives by a vote of 427 to 1 in 2000.

The DMA and its members are concerned that, if in fact it costs significantly more to administer the do-not-call list, such costs not be passed on to marketers.

As described above, the Commission's current proposal will not create an accurate list. It will be far more expensive to compile a list that is capable of being accurate and authenticated because obtaining additional information beyond name and/or number cannot be automated. For example, Experian, Inc., a company that offers marketing lists to businesses, offers a consumer opt-out from being placed on marketing lists that result from "prescreening." In order to ensure accuracy and verification to honor the opt-out, Experian uses automated technology that confirms an individual's telephone number, address, and Social Security Number. Experian estimates the cost per person solely to collect and input a consumer's information to be $1.28. This does not include the costs of administering the list. If, as some project, the Commission's proposed list will result in 64 million names, using the $1.28 figure, such a list would cost more than $80 million in the first year alone. Similarly, the FCC found the high costs of such a database, ranging from $20 million to $80 million in the first year and $20 million per year thereafter, to be prohibitive.

Additionally, we note our belief that the Commission's proposal to assess such fees violates both OMB Circular A–25 and the Independent Offices Appropriations Act, both of which we believe would require a specific delegation from Congress to assess such charges. For the record, we have attached our filing to the Commission regarding the issue of do-not-call list user fees, which sets forth our legal analysis of this issue.*

VI. Agents of Charities Should Not Be Subject to the Do-Not-Call List.

The DMA, through its Nonprofit Federation, has members who are very concerned about an imposition of a do-not-call list on charities. The Commission proposes that agents who perform telemarketing for non-profit charitable organizations would be subject to the list. Charitable organizations themselves would not be subject to the list. The Commission should not extend the do-not-call list to non-profit organizations' agents. Such an extension would have devastating economic effects on charities' ability to raise funds as the number of individuals whom they could contact would be severely limited. Likewise, this type of extension to agents of charities would create an uneven playing field between those non-profits that have to hire a telemarketing firm for cost efficiency reasons, and those that can use internal staff to telemarket.

VII. Transfer of Preacquired Account Information Should Be Permitted for Legitimate Business Practices.

Finally, we would like to take this opportunity to discuss one additional proposed amendment to the TSR other than the do-not-call list. The Commission proposes a flat ban on the transfer of a consumer's account information. The Commission bases its proposed prohibition on the transfer of preacquired billing information on the belief that "the sharing of consumers' pre-acquired billing information is likely to cause unauthorized charges to consumers." While again the Commission has laudable goals, its proposal goes beyond deceptive and abusive practices and will limit useful and legitimate practices. There are numerous transfers of account information that provide practical efficiencies and benefits to both consumers and businesses. We believe that the Commission's concerns can best be addressed through appropriate informed consent from consumers.

For example, if a consumer calls and orders outdoor clothing from a merchant and is offered by the same sales agent another merchant's fly-fishing magazine, transfer of information should not be prohibited if the customer agrees to the transfer. Likewise, it is a significant benefit to consumers when the customer calls the merchant and is then transferred for the second seller to be able to obtain and use information such as address and credit card information generated from the first sale. This eliminates the need for a consumer to restate to the second sales representative information that was just provided to the first sales representative. Transfer and/or use of account information in such scenarios with disclosure to and consent by the consumer is inherently more efficient for both the merchant and consumer.

Similarly, legitimate marketers may elect to conduct joint marketing programs pursuant to which one marketer, e.g. an airline, may provide its customers' names and telephone numbers to a hotel chain so that the hotel can solicit that customer to book hotel space for the customer's business or vacation travel. Allowing the marketers to share consumer billing information with the consumer's informed and ex-

*The information referred to has been retained in Committee files.

press verifiable consent again makes the transaction easy, convenient, and efficient for marketers and consumers alike.

VIII. Conclusion

I thank the Chairman and the Members of Subcommittee for the opportunity to express the views of The DMA. We know that Congress and this Subcommittee will continue to monitor these issues closely and we look forward to working with you.

Senator WYDEN. Very good.

Mr. Schwartz.

STATEMENT OF ARI SCHWARTZ, ASSOCIATE DIRECTOR, CENTER FOR DEMOCRACY AND TECHNOLOGY

Mr. SCHWARTZ. Senator Wyden, I would like to thank you, Senator Dorgan and the rest of the Subcommittee for having the Center for Democracy and Technology here to testify today. As you know, the Center has been following the Federal Trade Commission's work in the area of privacy closely during the last 7 years. During that time, we have been impressed with the Commission's commitment of resources and intellectual capital on this increasingly important issue.

In my written testimony, I have documented 10 areas where the Commission has focused its privacy efforts over the past 2 years. Most of the Commission's privacy work has been tied directly to its mission of preventing deceptive and fraudulent business practices. For example, in an area where you have concerns, unsolicited commercial e-mail, commonly known as spam, the Commission has focused action on the area of fraudulent scams. I think that the Chairman went into the details of some of these scams they have gone after.

In their web privacy sweeps, the Commission has conducted detailed reviews of privacy notices. This has allowed them to convince companies to post online privacy notices while helping to prevent vague and even fraudulent policies. While this work has been largely successful, the actions of the Commission in privacy areas enabled by specific statutes demonstrates that the FTC already has sufficient expertise to take on general privacy protection responsibilities.

The Commission has demonstrated the thoughtful and patient, yet innovative and ultimately very workable, approach to addressing privacy issues that has transcended through the administrations. An example of this is the Commission's work to enforce the Children's Online Privacy Protection Act, also slow but steady improvement in the complex area of financial privacy education and enforcement.

In each of these cases the Commission has brought a wide range of players to the table to work out difficult issues through an iterative and inclusive process. The Commission's work on the do-not-call telemarketing registry also shows this comprehensive approach to developing sound privacy protections. The Commission has made it clear that it has no intention to ban telemarketing outright, but instead to give consumers more control over how and why calls come to their home during dinner time.

CDT and the broad coalition of consumer and citizen groups are generally pleased with the current rule as proposed. However, we would support any effort to give consumers more choices and more

controls at the time of signing up for the registry and after as the Commission continues to investigate a balanced approach.

To give the Commission general authority and other consumer privacy related areas, Congress must now pass privacy legislation. The Full Commerce Committee has already taken up this step by voting in favor of the Online Privacy Protection Act earlier this year. We hope that the rest of Congress will follow your leadership on this critical issue of corporate trust and accountability.

Thank you.

[The prepared statement of Mr. Schwartz follows:]

PREPARED STATEMENT OF ARI SCHWARTZ, ASSOCIATE DIRECTOR, CENTER FOR DEMOCRACY AND TECHNOLOGY

I. Summary

Chairman Dorgan and Members of the Committee, the Center for Democracy and Technology (CDT) is pleased to have this opportunity to testify about the Federal Trade Commission (FTC) and its role in consumer and privacy protection.

Over the past seven years the FTC's activities in the area of information privacy have expanded. The Commission has convened multiple workshops to explore privacy, issued several reports, conducted surveys, and brought several important enforcement actions in the area of privacy. The Commission's work has played an important role in bringing greater attention to privacy issues and pushing for the adoption of better practices in the market place.

Two years ago, CDT testified that "(t)he work of the Federal Trade Commission—through its public workshops, hearings . . . provides a model of how to vet issues and move toward consensus."

Chairman Muris has successfully continued the consultation and education process, working with public interest groups and industry on key issues and taking enforcement actions or instituting rulemakings on several important new fronts.

CDT and other public interest and consumer groups have been pleased with the Commission's thoughtful approach to creating a National "Do Not Call Registry." The registry will provide consumers with an easy way to cut down on unwanted telephone calls and will offer industry a streamlined means of complying with the growing number of state and self-regulatory "Do Not Call" lists.

CDT has also been pleased with the Commission's extensive new educational effort with the public and industry on privacy notices, ID theft, wireless privacy, spam, and other issues. It should be noted that each of these areas is clearly within the FTC's jurisdiction to prevent deceptive trade practices.

However, CDT would like to see the Commission use its new resources to stop unfair information practices as well as deceptive ones. These unfair practices include: lack of meaningful notice and choice; the ability to correct and amend personal information; and inadequate security safeguards.

It has long been CDT's belief that unfair information practices are already covered by the Commission's current authority. Yet, the long-standing hesitancy of the Commission to proceed has made it necessary for Congress to confirm this authority in law. Although Chairman Muris has suggested that general federal privacy legislation is unnecessary, CDT sees an *urgent* need for legislation similar to S. 2201, the Online Privacy Protection Act, as passed by the full Senate Commerce Committee earlier this year. Privacy protections in law—enforced by the FTC—are an essential ingredient of building and maintaining consumer confidence in the networked economy. We thank you, Chairman Dorgan, as well as Chairman Hollings and the other Senators who worked so hard to move this issue forward in the Committee. CDT looks forward to continuing to work with you to see such a measure signed into law.

II. About CDT

CDT is a non-profit, public interest organization dedicated to developing and implementing public policies to protect and advance civil liberties and democratic values on the Internet. One of our core goals is to enhance privacy protections for individuals in the development and use of new communications technologies. We thank the Chairman for the opportunity to participate in this hearing and look forward to working with the Committee to develop policies supporting civil liberties and a vibrant communications infrastructure.

III. The Role of the FTC as the Federal Government's Leader on Consumer Privacy Issues

The FTC has used its current jurisdiction to take basic steps to protect the privacy of Americans in several innovative and balanced ways. The Commission is the government's leader in consumer privacy policy and should be commended for its current work in the area given its limited view of its own jurisdiction.

Last fall, Chairman Muris said that the Commission would increase privacy enforcement by 50 percent. According to internal figures, the Commission believes it is on track to reach this goal. This dramatic increase was on top of the new attention given to privacy issues that had begun five years earlier.

In particular, over the past two years, the Commission has worked in ten areas of interest to CDT:

1. Telemarketing Sales Rule—"Do Not Call" Registry

Under the 1994 Telemarketing and Consumer Fraud and Abuse Prevention Act, [1] the Commission was given the authority to regulate telemarketing sales. The Commission's regulations, named the Telecommunications Sales Rules (TSR), were put into effect in 1995. [2] The TSR placed some basic time, place and manner restrictions on calls and left the door open to revisiting the rule if it was not adequately protecting consumers.

Some have said that telemarketing is merely an annoyance and not a privacy concern and therefore stronger rules are not necessary. CDT disagrees. We define privacy as individual control over one's personal information. Control over one's telephone number and other personal information is central to the privacy issue in the modern world.

The American public seems to agree with us. An AARP study of New Jersey residents showed that 77 percent viewed telemarketing first and foremost as an invasion of privacy; 10 percent a consumer rip-off, and only 2 percent a consumer opportunity. [3]

The Commission has responded to the public concern about telemarketing by issuing a notice of proposed rulemaking, reopening the TSR and seeking public comment about how the rule could be rewritten to put consumers back in control of their telephones. [4] As a part of this process, the Commission has proposed the creation of a "do not call" registry, similar to those already in existence in 15 states. On this proposal, over 42,000 public comments have been submitted to the Commission. Over 90 percent of them support the proposed "Do Not Call" registry.

CDT believes that consumer choice should play an essential role in telemarketing: Telemarketing should not be banned, but consumers should be able to decide what kind of marketing calls they want and when they want to receive them. Currently, consumers must take one of several different approaches to remove their names from telemarketing lists. They must (1) sign up for the Direct Marketing Association's do-not-call list; (2) enlist the help of some or all of twenty different state laws that include do-not-call provisions; and/or (3) contact individual companies to direct them to place them on a company-based do-not-call list. Currently, consumers must find their way through this complex maze of options.

CDT, in coalition with other consumer groups, filed extensive comments with the Commission supporting the proposed new Do-Not-Call list. [5] (The coalition were also the creators of ConsumerPrivacyGuide.org—a Web site designed to educate consumers on what they can do to protect their own privacy.) Our joint comments state that institution of a national "Do-Not-Call" list by the FTC would provide consumers with a straightforward, easy-to-exercise mechanism to remove their names from telemarketing lists. The FTC initiative would lift the burden from consumers who must either use the DMA service or a state do-not-call request on a company-by-company basis.

We stressed in our comments that the FTC's "Do-Not-Call" initiative should not dilute or undercut the protections afforded consumers by the states against invasive telemarketing. Further, as we pointed out, it is critical that consumers are not charged a fee to be placed on the "Do-Not-Call" list—consumers' ability to protect the privacy of their personal information should not be contingent upon their ability to pay a fee.

CDT has been pleased with how the public process on this important issue has progressed. To date it has been a model example of how a complex but important

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[1] 15 U.S.C. 6101–6108
[2] 16 CFR Part 310
[3] http://research.aarp.org/consume/nj__telemarketing.pdf
[4] http://www.ftc.gov/bcp/conline/edcams/donotcall/pubs/NDNCR—therule.pdf
[5] http://www.ftc.gov/os/comments/dncpapercomments/04/consumerprivacyguide.pdf

issue can be addressed through an open, public process. We hope that the Commission will follow an equally inclusive process when it issues its final draft of the rule.

2. Privacy Education

The FTC has generally served a valuable role working with and educating the business community about privacy best practices and implementation of fair information practices. An important example is the work the FTC has undertaken in the area of privacy notices. The millions of confusing privacy notices mailed to consumers under the Graham-Leach-Bliley Act highlighted the difficulties encountered in providing consumers with clear, comprehensive and easily understood notice.

While significant work had been undertaken by the business community and advocates to explore and develop better ways to effect good notice, the FTC workshop held in late 2001 was an important opportunity to raise issues to be resolved and share findings in a public discussion. Participants were able to voice concerns, note accomplishments and chart out areas for future research.

Forums such as these are important tool in highlighting and encouraging efforts to address specific privacy issues.

3. Unsolicited Commercial Email (Spam)

The Commission taken several useful steps regarding the issue of unsolicited commercial email, or "spam:"

- The Commission has created an educational Web site for consumers and businesses. The site provide consumers with helpful information on how spam works, why they get spam, and how to decrease the amount of spam they receive. The site advises businesses on how to comply with a user's unsubscribe request.
- The FTC also conducted a study to test whether "unsubscribe" or "remove me" requests were being honored. The study reported that the majority of consumer requests were not getting through. The Commission thereupon sent out warning letters to spammers.
- In April of 2002, the FTC filed a complaint against Internet spammers who allegedly sent out deceptive, unsolicited commercial emails and participated in Web fraud. The FTC joined several state law enforcement officials in the United States as well as four Canadian law enforcement agencies in bringing 63 different actions against various Web schemes and scams that targeted victims through spam.

While the Commission, given its limited view of its jurisdiction, has taken these exemplary first steps in research, education and enforcement regarding unsolicited commercial email, CDT would like to see it given more power to tackle fraudulent spam Further appropriate steps could be taken under provisions in the CAN SPAM Act (S. 630),sponsored by Senators Burns and Wyden and recently passed by the full Commerce Committee. CDT is hopeful that we can begin to turn the tide on spam while still protecting the First Amendment right of anonymous non-commercial/political speech online.[6]

4. Gramm-Leach-Bliley Compliance

Under the new financial services law, the Commission has jurisdiction over important financial institutions such as insurance and mortgage companies. In an August 2001 survey, CDT found that these companies were among the worst in posting privacy notices on Web sites. That month, we filed a complaint with the FTC about several mortgage companies that were not posting notices as required by the FTC's GLB regulations. While the Commission has not officially closed the case, the five remaining Web sites have now posted privacy policies.

CDT believes that there is probably still more basic, but important enforcement work that the Commission could to do in the area of privacy notice for insurance and mortgage companies.

5. Identity Theft and Identity Fraud

The FTC has been a leading agency in the prevention and prosecution of identity theft through its identity theft program. The program contains three key elements: the Identity Theft Data Clearinghouse;[7] consumer education and assistance re-

[6] For more information on CDT's views on the CAN SPAM act, please see our recent Policy Post http://www.cdt.org/publications/pp__8.12.shtml

[7] http://www.consumer.gov/idtheft/

sources; collaborative enforcement efforts involving criminal law officers and private industry.

The Identity Theft Clearinghouse currently holds more than 170,000 victim complaints and serves as an important tool for 46 federal and 306 state and local law enforcement agencies, including the US Secret Service, the Department of Justice, the US Postal Inspection Service, and the International Association of Chiefs of Police. The FTC has also been increasing outreach programs to educate law enforcement officials on how the Clearinghouse database can be used to enhance investigations and prosecutions.

In regards to consumer education and assistance resources, the FTC has held training seminars for law enforcement officials at all levels in an attempt to give law enforcement the necessary tools they will need to combat identity theft. The FTC has also implemented a nationwide, toll-free hotline that consumers can call if they have become a victim and a Web site that consumers can access to file a complaint and gain helpful prevention tips.

The Commission's work in this area shows that it can be a leader with other law enforcement agencies, serving as the main contact to the public. Hopefully the Commission's work, along with the passage of new legislation in this area, can help to cut down on what many believe to be the fastest growing crime in the country.

6. Wireless Privacy

In December 2000, the Commission held a workshop entitled "The Mobile Wireless Web, Data Services and Beyond: Emerging Technologies and Consumer Issues."[8] As this subcommittee knows well, the wireless privacy issues have been a growing concern for consumers due to the emerging use of location tracking technologies to provide consumers with enhanced services. It was clear from the workshop that the staff and Commissioners have the understanding and skills necessary to undertake a serious privacy or security investigation in this area if it is warranted. However, the Commission has taken little action in this area since the workshop. CDT urges the Commission to follow-up with another workshop in this area as wireless technologies and location applications progress.

7. Online Profiling and Data Mining

Online profiling is the practice of aggregating information about consumers' preferences and interests, gathered primarily by tracking their movements online. It remains one of the most complex and opaque issues in privacy. Consumers are concerned because they know someone is watching, but they don't know who, how or to what end.

In November 1999, FTC examined online profiling, focusing on the use of the resulting profiles to create targeted advertising on Web sites.[9] In June and July of 2000, the FTC issued a two-part report on online profiling and industry self-regulation.[10] The Commissioners unanimously commended the Network Advertising Initiative (NAI) for its self-regulatory proposal that seeks to implement Fair Information Practices for the major Internet advertisers' collection of online consumer data. The July report also asked Congress to enact baseline legislation to protect consumer privacy. In addition to its several reports, the FTC has also held a series of public workshops on data mining in an effort to educate consumers as well as it itself.[11]

The reports and workshops that the FTC has undertaken in this area have represented the best work done in this area internationally. Unfortunately, since Chairman Muris has taken office, little public work has been continued in this area. We hope that the Commission will return to this area, one that causes concern to so many consumers.

8. Computer Security Education

The FTC has taken several steps to educate consumers on computer security. In addition to holding workshops, the FTC is drafting a guide for consumers on how to stay safe online using a high-speed Internet connection. The guide details how users can protect their computers from viruses and hackers by explaining security features such as firewalls and updating virus protection software. The FTC has worked diligently to make the report both understandable and appealing to the average consumer through careful analysis and easy to read text. The Commission has

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[8] A staff summary of the event was released in February 2002 http://www.ftc.gov/bcp/workshops/wireless/.

[9] Public Workshop on "On-Line Profiling"—http://www.ftc.gov/bcp/profiling/index.htm

[10] http://www.ftc.gov/os/2000/06/onlineprofilingreportjune2000.pdf and http://www.ftc.gov/os/2000/07/index.htm#27

[11] http://www.ftc.gov/bcp/workshops/infomktplace/index.html

continued to work with consumer groups to ensure that the guide is easy to use and contains the necessary information. In addition, FTC held a public workshop in May to examine issues surrounding the security of consumers' computers. [12]

9. Internet Privacy Sweeps

Earlier this year, the Commission continued its ongoing assessment of the state of Internet privacy which began five years ago and has been repeated twice since. This year, the Commission embraced a report [13] organized by the Progress and Freedom Foundation and conducted by the Ernst and Young accounting firm. The results show significant improvement in the number of privacy policies posted and the growth of the new privacy protocol, the Platform for Privacy Preferences (P3P). [14] This positive growth is due, in part, to the educational work of the Commission.

On the other hand, the study found that self-regulatory seal programs have actually been shrinking. This is mainly due to the bankruptcy of many dot com players, but it also indicates that we are entering a time of a major privacy gap. Some companies are actively involved in the privacy issue and are doing their best to build trust. Meanwhile, a small number of free-rider companies are doing no work on privacy. The marketplace has remained confusing to the average consumer and many prefer to sit on the sidelines until baseline privacy is assured. [15]

CDT hopes that Congress will continue to support and monitor the FTC's privacy sweeps—and we urge the Commission to work with a wide range of organizations and academics, including consumer groups, when preparing the parameters and methodology for future sweeps.

10. COPPA Compliance

In 1998, Congress passed the Children's Online Privacy Protection Act (COPPA) [16] in order to protect children's personal information in interactions with commercial sites. The FTC was required to enact a rule to implement COPPA and in doing so it clarified issues concerning coverage and liability, modified several definitions that would have interfered with children's ability to participate, speak and request information online, and made every effort to create a predictable and understandable environment for the protection of children's privacy online.

Since issuing its final Rule implementing COPPA, the FTC has taken several effective and necessary steps to enforce and enhance compliance with COPPA. This past spring, the FTC released a package of initiatives that included:

- The announcement of a settlement in its sixth COPPA enforcement case, against the operators of the "Etch-A-Sketch" Web site, resulting in a $35,000 civil penalty.
- The release of an FTC COPPA compliance survey and a business education initiative, including the publication of "You, Your Privacy Policy and COPPA" to help children's Web site operators draft COPPA-compliant privacy policies.
- The announcement of warning letters to more than 50 children's sites alerting them to the notice provisions of COPPA and the requirement that they comply with the provisions.
- In response to public input, the decision to extend COPPA's sliding scale mechanism for obtaining verifiable parental consent until 2005.

While there is still work to be done, the COPPA experience demonstrates that the FTC can develop workable privacy rules in complex and sensitive areas that go well beyond its traditional arenas.

IV. The Future Role of the FTC in Privacy Issues

While the Commission's privacy work has been successful, it has also been limited mainly to areas of deceptive or fraudulent practices. CDT believes that this limited focus is preventing the Commission from taking on urgently needed actions in the privacy area.

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[12] http://www.ftc.gov/bcp/workshops/security/index.html

[13] http://www.pff.org/pr/pr032702privacyonline.htm

[14] CDT was the originator of the P3P concept and has continued to work on the specification and its adoption. More information about P3P can be found at http://www.w3.org/p3p and http://www.p3ptoolbox.org

[15] Business Week has conducted a number of surveys showing that privacy is the number one concern of both those who are not online and those who are online, but do not shop online. The most recent is available at http://businessweek.com/2000/00__12/b3673006.htm. Jupiter Communications has estimated that $18 billion in consumer transactions did not take place online because of privacy concerns (McCarthy, John, "The Internet's Privacy Migraine," presentation, SafeNet2000, December 18, 2000).

[16] 15 U.S.C. 6501

• Proposed Privacy Legislation

CDT believes that a comprehensive, effective solution to the privacy challenges posed by the information revolution must be built on three components: industry best practices propagated through self-regulatory mechanisms; privacy as a design feature in products and services; and some form of federal legislation that incorporates Fair Information Practices—long-accepted principles specifying that individuals should be able to "determine for themselves when, how, and to what extent information about them is shared."[17] Legislation need not impose a one-size-fits-all solution. However, as a starting point, strong privacy legislation is urgently needed to cover sensitive personal information such as privacy of medical and financial records. For broader consumer privacy, there need to be baseline standards and fair information practices to augment the self-regulatory efforts of leading Internet companies, and to address the problems of bad actors and uninformed companies. Finally, there is no way other than legislation to raise the standards for government access to citizens' personal information increasingly stored across the Internet, ensuring that the 4th Amendment continues to protect Americans in the digital age.

On May 17, 2002 the Senate Commerce Committee passed S. 2201, the Online Privacy Protection Act. S.2201 would set a true baseline of privacy protection and would give the FTC the clear authority to go after companies engaging in unfair information practices.

During the Committee process, Senator McCain asked the FTC Commissioners to give their views on S.2201. In response, Chairman Muris gave five reasons that such a bill was not necessary at that time.[18] CDT disagrees strongly with the Chairman. While CDT continues to work with the FTC to help advance self-regulatory efforts, privacy enhancing technologies and public education, we believe that these efforts alone are not and cannot be enough to protect privacy or instill consumer confidence on their own.

CDT commends the Senate Commerce Committee for its excellent work in improving S.2201 during the Committee process. We hope that the Committee continues to push for the FTC's expanded jurisdiction in this area.

• Proposed Rescinding of Common Carrier Exemption

The Committee also asked CDT to address the issue of rescinding the exemption that prevents the Commission from exercising general jurisdiction over telecommunications "common carriers."

The idea of creating a level playing field is appealing, particularly when some communications services fall within the jurisdiction of the FTC. In particular, lifting the restriction in certain areas—such as billing, advertising and telemarketing—could ensure that the agency with the most expertise in these areas is taking a leading role.

However, rescinding the exemption completely could lead to duplication of government regulation and/or confusion for consumers in certain areas. For example, telecommunications companies are already subject to the Customer Proprietary Network Information (CPNI) rules administered by the Federal Communications Commission, which limit reuse and disclosure of information about individuals' use of the phone system including whom they call, when they call, and other features of their phone service. At this point, we are not sure it would be wise to take this issue away from the FCC. Similar questions may arise with other issues: Which agency would take the lead? By which rules would a complaint about deceptive notice be addressed? How will these decisions be made?

The Commission has been thoughtful in these areas in the past, so it is likely that any concerns could be addressed. Yet, if this proposal moves forward, the Commission would need to be able to have a detailed examination and plan for dealing with similar areas of overlap.

Conclusion

The FTC is to be commended for taking some very laudatory steps to address the serious and widely shared concerns of the American public about privacy. Indeed, as the foregoing review of issues demonstrates. The FTC already has sufficient expertise to take on general privacy protection responsibilities. However, the Commission has, in our view, taken an unduly narrow view of its jurisdiction, such that Congressional action is needed to establish a baseline of fair information practices in law. We will continue to work with this Committee and the Commission to find

[17] Alan Westin. *Privacy and Freedom* (New York: Atheneum, 1967) 7.
[18] http://www.ftc.gov/os/2002/04/sb2201muris.htm

innovative, effective and balanced solutions to the privacy problems posed by the digital age.

Senator WYDEN. Thank you.
Mr. Alldridge.

STATEMENT OF DENNIS H. ALLDRIDGE, PRESIDENT, SPECIAL OLYMPICS–WISCONSIN, NON–PROFIT AND CHARITABLE COALITION REPRESENTATIVE

Mr. ALLDRIDGE. I thank the Subcommittee and its fine staff for allowing me to appear this morning regarding the Federal Trade Commission's proposed national Do-Not-Call registry. My perspective is that of President of Special Olympics-Wisconsin. I speak on behalf of the Not-for-Profit and Charitable Coalition. The Not-for-Profit Coalition has 277 member organizations.

All are non-profit or charitable organizations. About 2 dozen are national groups such as Mothers Against Drunk Driving, the Leukemia and Lymphoma Society, the National U.S. Junior Chamber of Commerce, and Amvets, American Veterans. About 250 are State and local groups and include scores of charities, veterans groups, law enforcement, fire fighter, paramedic and other public safety organizations.

Special Olympics-Wisconsin is a non-profit member of the coalition. Our mission is to provide year-round sports training and athletic competition in a variety of Olympic-like sports for children and adults with cognitive disabilities, 9000 athletes who are currently being served by our program each year. These athletes are helped along the way by 3,500 coaches and more than 17,000 volunteers. We have 220 registered local agencies, each under the direction of a volunteer agency manager.

Our volunteers put in more than 350,000 hours of service annually, which allow our athletes to log over 500,000 hours of training and competition. Last year, we conducted 72 state-wide competitions and Special Olympics-Wisconsin was proud to award more than 27,000 medals and ribbons to deserving young men and women who overcame disabilities that few of us can even comprehend. Inspiring greatness in our athletes each and everyday is our goal.

I speak only for the coalition, but I am confident that thousands of non-profits and charities totally agree with our views with respect to the Commission's proposed rulemaking. The common thread is that we all use and rely upon public appeals by professional representatives. These representatives perform at least two critical functions. First, they account for the lion's share of our revenue. For example, public appeals made by professional representatives account for more than 37 percent of Special Olympics-Wisconsin's annual revenue.

Second, and I emphasize this as an often overlooked point, they carry our program and mission to the general public, they put out the call for volunteers, and they build attendance at our games and competitions. That is very critical for a volunteer-driven organization like Special Olympics.

Also, Mothers Against Drunk Driving often launches, advocates, and supports national, State, and local legislative and administrative campaigns. Their professional representative's telephone calls

serve as a public alert and general call to arms with respect to those campaigns. Often, appeals for financial support are not made until the end of the conversation.

Fully two-thirds of all legitimate non-profits and charities rely upon professional representatives to make these public appeals. The Commission's proposed Do-Not-Call registry would irreparably harm every single one of these organizations, and it would deal a death blow to thousands of them. While the Commission predicts that its national registry would cut the potential donor call pool by 40 percent, knowledgeable observers suggest that the FTC's guesstimate is extremely low, and as if that were not enough, please allow me to explain how the Do-Not-Call registry further terrorizes non-profits and charities.

Special Olympics-Wisconsin has individuals who have donated money to support our program in each of the last 5 years. Motivated by their understandable desire to avoid commercial telemarketing calls, one of these individuals may place their name on the FTC's Do-Not-Call registry. The professional representative for Special Olympics-Wisconsin would be prohibited from calling that proven donor supporter unless that individual had given his prior explicit consent to receiving a telephone call from our representative.

Thus, by placing his name on the FTC's Do-Not-Call registry, that long-time donor supporter has unwittingly shut out contacts by Special Olympics-Wisconsin made by our representative. Ironically, because the FTC's Do-Not-Call registry totally exempts telemarketing calls for credit cards, banks, insurance, airlines, long distance services, and political candidates, they have left themselves open to many of the types of commercial calls they were hoping to avoid in the first place.

While the not-for-profit and charitable community is bewildered and alarmed, we do not ascribe bad faith to the Commission for including our professional representatives and thus ourselves in this proposal. In Wisconsin, we had hearings on the Do-Not-Call laws. They passed a law which specifically exempts calls made on behalf of the not-for-profits. Also, as you all know, charitable calling in Wisconsin and every other State is highly regulated, so we respectfully ask that they reconsider their position and completely exempt these public appeals by our professional representatives and us.

Finally, we seek the Subcommittee's active support of our efforts. Thank you.

[The prepared statement of Mr. Alldridge follows:]

PREPARED STATEMENT OF DENNIS H. ALLDRIDGE, PRESIDENT, SPECIAL OLYMPICS-WISCONSIN, NON-PROFIT AND CHARITABLE COALITION REPRESENTATIVE

I. Introduction

Mr. Chairman and Members of the Subcommittee, my name is Dennis H. Alldridge. I am the President of the Special Olympics Wisconsin ("SOWI"). I appear today before the Subcommittee on behalf of the Not-For-Profit and Charitable Coalition ("Coalition") to offer testimony on the irreparable harm on nonprofit and charitable organizations that will result from the Federal Trade Commission's ("Commission") implementation of a national "Do-Not-Call" registry pursuant to proposed amendments to the Telemarketing Sales Rule, 16 C.F.R. §310 *et seq.* ("TSR"). At the outset, I want to clarify that my testimony is limited to the negative impact of the "Do-Not-Call" registry as applied to nonprofit and charitable organizations and their professional fundraisers, that is, *noncommercial* conduct that is not intended

to induce purchases of goods or services under the TSR and the Telemarketing Consumer Fraud and Abuse Prevention Act, 15 U.S.C. §6101 *et seq.* ("Telemarketing Act").

As discussed in written comments filed with the Commission [1] in response to the Commission's Notice of Proposed Rulemaking, *see* Notice of Proposed Rulemaking, 67 FED. REG. 4492 (Jan. 30, 2002) ("Notice"), SOWI and the Coalition strongly oppose the proposed TSR amendments and the national "Do-Not-Call" registry as applied to nonprofit and charitable organizations. [2] The "Do-Not-Call" registry will decimate an already cash poor nonprofit and charitable industry. By the Commission's own estimates, up to 40 percent of all households will sign up with the "Do-Not-Call" registry. *See* Federal Trade Commission, *Fiscal Year 2003 Congressional Justification Budget Summary*, at 6. This probably is a conservative estimate based on information cited by the Commission. But even assuming the accuracy of the estimate, there is no doubt that most nonprofit and charitable organizations will not survive with a 40 percent reduction in communications with current and prospective donors and commensurate erosion of their charitable message and donations.

The Coalition has three major concerns. First, the "Do-Not-Call" registry as applied to professional fundraisers soliciting contributions on behalf of nonprofit and charitable organizations will devastate these organizations. It will reduce funding, impede the fulfillment of mission objectives, and silence the constitutionally protected dissemination of the nonprofit and charitable message. Second, the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. 107–56 (Oct. 25, 2001) ("USA PATRIOT Act") did not give the Commission jurisdiction to regulate nonprofit and charitable institutions and their professional fundraisers. Nor did it give the Commission authority to restrain nondeceptive, nonabusive, and legitimate charitable solicitations by professional fundraisers acting on behalf of legitimate nonprofit and charitable organizations. The Commission's contrary interpretation departs from its 1995 Advisory Opinion that the TSR generally imposes no restrictions on the legitimate fundraising activities of nonprofits and their professional fundraisers because a donation is not "telemarketing" under the Telemarketing Act and the TSR. Finally, the Coalition believes that the "Do-Not-Call" registry is unconstitutional as applied to professional fundraisers who solicit charitable donations on behalf of nonprofit and charitable organizations. Such conduct by professional fundraisers is fully protected noncommercial speech under the First Amendment.

We appreciate the willingness of the Subcommittee and staff to listen to the concerns of the nonprofit and charitable community, and we look forward to continuing our work with the Subcommittee in order to achieve a resolution. We respectfully submit that the only viable resolution is to permit nonprofit and charitable organizations to continue to fulfill their vital public functions by excluding from the Telemarketing Act and the proposed TSR amendments (including the proposed national "Do-Not-Call" registry) charitable solicitations by professional fundraisers on behalf of nonprofit and charitable organizations.

II. Overview of Special Olympics Wisconsin and the Coalition

My testimony today is based on more than twenty years experience in the nonprofit sector with the Special Olympics. I have been President of SOWI since 1989. Prior to my position with SOWI, I was the Executive Director of Illinois Special Olympics, Inc. between 1980–1989. As the Chief Executive Officer of SOWI, I have responsibility for the organization's planning, budgeting, public relations, and fundraising. These responsibilities are conducted in accordance with the standards, policies and procedures of the Special Olympics International and SOWI including, for example, SOWI's fundraising guidelines and "Do-Not-Solicit" list.

SOWI is an accredited program of Special Olympics, Inc. ("SOI"). SOI is an international nonprofit organization founded by Eunice Kennedy Shriver in 1968 to provide sports training and competition to persons with cognitive disabilities. [3] SOI pro-

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[1] SOWI's comment is available on the Commission's website at http:///www.ftc.gov/os/ comments/dncpapercomments/04/sowisconsin.pdf. The Coalition's comments are available at (1) http://www.ftc.gov/os/comments/dncpapercomments/04/notfor profit.pdf, and (2) http:// www.ftc.gov/os/comments/dncpapercomments/supplement/npcc.pdf. These written comments are incorporated by reference into this Prepared Statement.

[2] The Coalition participated in the public forum on the proposed TSR amendments held by the Commission on June 5–7, 2002. A transcript of the proceeding has not been released by the Commission.

[3] Special Olympics' mission is to provide year-round sports training and athletic competition in a variety of Olympic-type sports for persons eight years of age and older with cognitive disabilities, giving them continuing opportunities to develop physical fitness, demonstrate courage,

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grams are patterned after the Olympic Games. In fact, SOI is the only organization authorized by the International Olympic Committee to use the word "Olympics" in its corporate name. Similar to the Olympics, SOI has a global presence, with programs in every state and in 150 countries. It serves nearly 1,000,000 athletes and 500,000 volunteers who take part in more than 15,000 Special Olympics games around the world, involving 24 summer and winter sports.

SOWI alone serves 9,000 athletes in 220 Wisconsin communities participating in 72 statewide competitions. Participation in sports brings significant benefits to people with cognitive disabilities of all ages and abilities. Through the work of SOWI, persons with disabilities are given physical benefits (fitness, increased coordination, cardiovascular fitness and endurance), mental benefits (knowledge of rules and strategy, along with increased selfesteem, self-confidence, and pride), and social benefits (teamwork, interaction with peers and people without cognitive disabilities, opportunity to travel and learn about other places and interests, family pride, and increased community awareness and acceptance). These benefits empower SOWI athletes to lead richer, more rewarding lives by applying new skills and confidence to school, work, home and social life.

SOWI's nonprofit mission is reflective of other members of the Coalition. The Coalition is composed of 277 national, state, and local nonprofit and charitable organizations with tax-exempt status under the United States Internal Revenue Code, 26 U.S.C. § 501(c), that oppose the Commission's proposed rule. The Coalition includes a broad spectrum of organizations in the nonprofit and charitable sectors that provide highly diversified program benefits to the public and their members. It includes national nonprofits devoted to fighting disease and improving the quality of life for Americans such as Mothers Against Drunk Driving, The National Federation for the Blind, the Cancer Federation, and the Leukemia and Lymphoma Society. Many Coalition members target the special needs of sick or missing children such as The Kids Wish Network, Miracle Flights for Children, National Children's Cancer Society, and the Committee for Missing Children. In addition to these national charities, the Coalition consists of more than 180 statewide membership organizations representing hundreds of thousands of active and retired law enforcement officers, professional and volunteer fire fighters, Jaycees, and veterans.

The public benefits created by the Coalition members are substantial and unparalleled. The various public safety organizations represent police chiefs, sheriffs, highway patrol, state and municipal police, narcotic officers, fire chiefs, professional fire fighters, paramedics and state investigatory personnel. As full time public safety personnel, the organizations are a unique and unrivaled source of knowledge and expertise on law enforcement, the fire service, and emergency medical services. They offer advice and counsel on criminal apprehension, detention, enforcement, fire safety, delivery of fire fighting services, and anti-terrorism expertise. They provide training and education on topics such as enhancements in law enforcement and fire fighting technology which improve the quality of services realized by the public. And many of the organizations sponsor comprehensive public service and educational programs on issues such as seat belt usage, home fire prevention, alcohol abuse, safe driving, illegal drugs, missing children, and community policing.

Thousands of charitable causes and state and local community programs are sponsored, supported or funded by these public safety organizations. A few examples illustrate the connection between the Coalition members and community programs. Professional fire fighters represented in the Coalition provide extensive volunteer and financial support for The Muscular Dystrophy Association, and similar national support is provided by law enforcement organizations to the Special Olympics. Other examples include death benefit and benevolent programs for public safety officers killed or injured in the line of duty, scholarship programs for high school students, summer camps for underprivileged youths, hospital visits to children with terminal illnesses, and support of burn camps and burn victims.

The Coalition also includes a significant number of state military veterans organizations affiliated with the American Legion, Military Order of the Purple Heart, Veterans of Foreign Wars, AMVETS, and the Vietnam Veterans of America. Together, these organizations facilitate, support, and fund countless public initiatives such as emergency financial aid; relocation, medical, employment and educational services for veterans; support for orphans and widows of veterans killed in the line of duty; assistance to disabled veterans in securing Veteran's Administration benefits and obtaining medical treatment, coordinating volunteer efforts that provide hundreds of thousands of hours of uncompensated services to hospitals; assisting

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experience joy and participate in a sharing of gifts, skills and friendships with their families, other Special Olympics athletes and the community.

veterans in obtaining employment; and providing transitional housing for homeless veterans.

III. Summary of the Proposed TSR Amendments

The TSR regulates specific deceptive and abusive telemarketing practices as defined by the Telemarketing Consumer Fraud and Abuse Prevention Act, 15 U.S.C. § 6101 *et seq*. ("Telemarketing Act"). Enacted in 1994, the Telemarketing Act represents an effort by Congress to address fraudulent commercial telemarketing conduct harmful to consumers. That mandate, however, does not support a regulatory interpretation that creates a government-imposed prohibition against communicating with certain consumers—upon risk of federal, state or civil liability. Nor does it support a regulatory scheme creating a mandatory fee-based telephone registry that will eliminate or significantly reduce *all* nonprofit and charitable telephone calls regardless of whether they are fraudulent, abusive or deceptive.

Under the Telemarketing Act, the Commission's regulatory authority has been limited to deceptive and abusive telemarketing acts and practices intended to induce the purchase of goods or services, that is, *commercial conduct*. The Commission now proposes a fundamental departure from this approach that will compromise substantially the ability of nonprofit and charitable organizations to generate funding necessary to fulfill their vital missions and silence their nonprofit message. First, the Commission seeks to expand its jurisdiction by regulating nondeceptive, nonabusive, noncommercial and admittedly legitimate charitable solicitations by professional fundraisers acting on behalf, and as an extension, of nonprofit and charitable organizations.[4] And second, the Commission seeks to implement a national "Do-Not-Call" registry applicable equally to commercial telemarketers and noncommercial charitable solicitations by professional fundraisers on behalf of nonprofit and charitable organizations. Combined, the proposed amendments will give the Commission the authority to do indirectly what it acknowledges cannot be done directly under the Telemarketing Act, that is, regulate nonprofit and charitable organizations by asserting jurisdiction over their inextricably linked agents and service providers that perform charitable solicitations on their behalf and function as an extension of these organizations.

The Commission purportedly justifies the amendments on the grounds that consumers have a heightened interest in residential privacy and need protection against unscrupulous telemarketers that may perpetrate fraudulent charitable solicitations, *see, e.g.,* Notice, 67 FED. REG. at 4497 n.51. These are laudable goals, but there can be no serious question by the Commission that SOWI and members of the Coalition are not fraudulent. In fact, in the past, the Commission has found comparatively little evidence of charitable solicitation fraud.[5] The vast majority of TSR comments filed with the Commission did not identify fraud as an issue, much less alleged nonprofit and charitable solicitation fraud. Notice, 67 FED. REG. at 4495 ("A majority of the comments received during the Rule review focused on issues relating to consumer privacy and consumer sovereignty, rather than on fraudulent telemarketing practices"). Indeed, the Better Business Bureau and other organizations consistently rank charitable solicitation fraud extremely low on complaint lists.[6] To the extent that residential privacy is at stake, the Commission's broad and

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[4] In fact, the Commission cites implicit Congressional support for the "Do-Not-Call" registry to regulate nondeceptive and entirely legitimate nonprofit and charitable communications. The Commission states that "Congress recognized that telemarketers' right to free speech is in tension with and encroaches upon consumers' right to privacy within the sanctity of their homes . . . Congress provided authority for the Commission to curtail these practices that impinge on consumers' right to privacy but are not likely deceptive under FTC jurisprudence. This recognition by Congress that even non-deceptive telemarketing business practices can seriously impair consumers' right to be free from harassment and abuse and its directive to the Commission to reign in these tactics, lie at the heart of § 310.4 of the TSR." *See* Notice, 67 FED. REG. at 4543. 16 C.F.R. § 310.4, as proposed, will make it an abusive telemarketing act or practice in violation of the TSR if a professional fundraiser—acting on behalf of a nonprofit and charitable organization—places an outbound telephone call to any donor who subscribes to the "Do-Not-Call" registry.

[5] Prepared Statement of the Federal Trade Commission on Charitable Solicitation Fraud before the Subcommittee on Oversight and Investigations of the Committee on Energy and Commerce, United States House of Representatives (Nov. 6, 2001) ("To date, the findings of fraud are few and far between, and the Commission continues to monitor this situation as aggressively as any the Commission has ever pursued").

[6] *See, e.g.*, Better Business Bureau Annual Complaint Summary—1999 (ranking complaints against national charities as 524th on its list of complaints by type of business, with complaints against local charities ranking 271st); National Fraud Information Center, Telemarketing Fraud Statistics (charitable solicitation fraud not listed in the "Top 10 Frauds" in 2000 and 2001).

indiscriminate approach to regulate *all* telephone calls is neither constitutional nor reasonable based on the clear damage to nonprofit and charitable organizations.

IV. The Proposed TSR Amendments Will Have a Devastating Impact on Nonprofit and Charitable Organizations by Interfering with Their Nonprofit and Charitable Missions

The proposed TSR amendments will have an irreparable negative impact that will limit dramatically the ability of nonprofit and charitable organizations to use the services of professional fundraisers. The consequences will be devastating for members of the Coalition and include, but are not limited to, massive reductions in donations, diminished ability to satisfy important public safety and community functions based on limited resources, and substantial harm to consumers who benefit from, and rely upon, these functions. Perhaps the most significant harm will be silencing the communication and fulfillment of the mission objectives of nonprofit and charitable organizations. As noted by the United States Supreme Court, nonprofit and charitable organizations use professional fundraisers "who 'necessarily combine' the solicitation of financial support with the 'functions of information dissemination, discussion, and advocacy of public issues.'" *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980) (citation omitted). *See Riley v. Nat'l Fed. of the Blind*, 487 U.S. 781, 798 (1988) ("where the solicitation is combined with the advocacy and dissemination of information, the charity reaps a substantial benefit from the act of solicitation itself") (citations omitted). Interfering with the solicitation of support likely would end the advocacy of ideas. *Schaumburg*, 444 U.S. at 632.

Professional fundraisers are essential to the fulfillment of the nonprofit and charitable mission and necessarily involve the fundraisers' communication of the nonprofit message. For example, SOWI receives no federal funding. To provide expensive year-round program benefits, SOWI relies on nonprofit contributions from organizations, individuals, corporations, foundations, and fundraising by professional fundraisers. Indeed, professional fundraisers provide approximately 68 percent of SOWI's annual income. 85 percent of these donations are from individual donors with long and reciprocally valued relationships involving financial support and volunteering with SOWI. These relationships are jeopardized by the proposed TSR amendments. Ultimately, the donations are used to fund competitions, training, and programs that not only help our athletes improve their skills, but also build self-esteem and confidence. In summary, SOWI fulfills its mission only through small donations from a large number of donors. Fundraising by professional fundraisers is essential to the survival of SOWI.

12 SOWI's reliance on professional fundraising is not unique. By necessity or choice, many nonprofit and charitable organizations rely on professional fundraisers to solicit charitable donations on their behalf. An estimated 60 percent to 70 percent of nonprofit and charitable organizations use professional fundraisers to deliver their messages to consumers and solicit donations. Jeff Jones, *Do Not Call: Proposed FTC Rules Could Hurt*, THE NONPROFIT TIMES (Mar. 2002) (citing Paulette Maehara, CEO of the Association of Fundraising Professionals). Similar to SOWI, many of these organizations have small staffs in relation to the program benefits delivered. They simply do not have the infrastructure, personnel, operational efficiencies, and expertise to impart the fundraising message currently imparted by professional fundraisers.

Many nonprofit and charitable organizations have built constituencies through grass roots support. Telephones are the most practical and cost effective interactive medium for these organizations in recognition of the fact that direct (e.g., face-to-face) solicitation is logistically impossible and direct mail is cost prohibitive. Telephone calls by professional fundraisers confer obvious benefits. Trained professional fundraisers deliver prepared scripts, often created or approved by the nonprofit and charitable clients, to communicate the clients' messages. The fundraisers understand the unique state law requirements governing the communications. Most states require registration, bonds, and point-of-solicitation disclosures.[7] Ultimately non-

[7] Donations to nonprofit and charitable organizations are regulated extensively under state laws. The overwhelming majority of states that have passed "Do-Not-Call" statutes of one form or another expressly exempt or exclude coverage of nonprofit and charitable solicitations including solicitations by professional fundraisers on behalf of these entities—a approach rejected by the Commission here. And virtually every state imposes statutory and regulatory requirements on professional fundraisers soliciting donations on behalf of nonprofit and charitable organizations such as registration and licensing, posting of bonds, point-of solicitation disclosures, fraud protection provisions, record keeping provisions, and annual reporting of financial information. These requirements serve numerous functions. They offer public information on the activities of charities, and they also allow state enforcement authorities to identify violations and prosecute where necessary.

profit and charitable organizations reap benefits from this process including (1) donations from consumers to support the needs of the organization, and (2) delivery of the central message of the nonprofit and charitable organization. In the case of SOWI, telephone calls to current and prospective donors by professional fundraisers allow us to (1) recruit volunteers to participate in SOWI athletic competitions,[8] (2) spread the special message of SOWI to elicit public support for our programs, and (3) request donations.

Nonprofit and charitable organizations rely on the expertise and operational efficiencies of professional fundraisers to conduct their fundraising campaigns and disseminate their message. SOWI employs several professional fundraising firms to provide these services with an extremely low incidence of complaints. There are advantages to this approach. Successful and cost-effective fundraising requires basic resources and specialized knowledge that nonprofit and charitable organizations lack. There must be a substantial investment of capital, a highly trained and supervised work force, and thorough knowledge of the state and federal regulatory requirements. Trained professionals offer significant resources, expertise and operational efficiencies that cannot be duplicated by nonprofit and charitable organizations. Indeed, that is why the substantial majority of nonprofit and charitable organizations rely on professional fundraisers.

The implications of the proposed TSR amendments are staggering as applied to nonprofit and charitable solicitations. The nature of nonprofit and charitable organizations' communications with current and prospective donors will change fundamentally. Nonprofit and charitable organizations will be forced to assume this communications role because, as the Commission advises, solicitation by their employees or volunteers is not covered by the Telemarketing Act and the TSR. This creates government imposed competitive disadvantages on smaller and mid-sized nonprofit and charitable organizations that do not have the resources, personnel and constituencies to take up the slack as compared to larger, national nonprofit and charitable organizations that are better funded and more capable of engaging in fundraising.[9] Many nonprofit and charitable organizations—including SOWI—would lack the ability and expertise to perform these functions. To be sure, the proposed TSR amendments will have an adverse effect on SOWI by eliminating a major source of support for our athletes, interfering with the recruiting of support from volunteers and solicitation of donations, and reducing our ability to provide our athletes with programs including competitions and other education endeavors. Comparable adverse results would be experienced by all nonprofit and charitable organizations that depend on the services provided by professional fundraisers.

V. The Commission Has Exceeded its Authority Under the Telemarketing Act and the USA PATRIOT Act by Expanding its Jurisdiction to Include Professional Fundraisers Acting on Behalf of Nonprofit and Charitable Organizations

The proposed TSR amendments misconstrue the Congressional purpose of the USA PATRIOT Act. Although the Commission acknowledges that the USA PATRIOT Act does not authorize the agency to regulate directly nonprofit and charitable organizations, Notice, 67 FED. REG. at 4497, nonetheless the agency employs a strained and flawed statutory construction that the USA PATRIOT Act amended the Telemarketing Act in a manner that "compels the conclusion that for-profit entities that solicit charitable donations now must comply with the TSR, although the Rule's applicability to charitable organizations is unaffected." Notice, 67 FED. REG. at 4497 (footnote omitted).

In reaching this conclusion, the Commission attributes three fundamental changes to the Telemarketing Act as a consequence of the USA PATRIOT Act. First, it contends that Section 1011(b)(3) of the USA PATRIOT Act amended and broadened the definition of "telemarketing" in the Telemarketing Act, 15 U.S.C. § 6306(4), by adding the term "charitable contribution," although excluding contributions to political and religious organizations. Notice, 67 FED. REG. at 4496. Second, it asserts that Section 1011(b)(2) added to the "abusive telemarketing acts or practices" listed in the TSR certain disclosures by persons engaged in "telemarketing for the solicitation of charitable contributions." Notice, 67 FED. REG. at 4496. And third, the Commission asserts that the USA PATRIOT Act amended the "deceptive telemarketing acts or practices" in the Telemarketing Act to include "fraudulent charitable solicitations." Notice, 67 FED. REG. at 4496.

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[8] SOWI relies on approximately 17,000 volunteers to contribute 350,000 hours to train our 9,000 athletes for 72 statewide competitions.

[9] A compelling argument can be made that it would create an appearance of impropriety for the many state trooper and police organizations in the Coalition directly to contact donors.

The Commission correctly notes a defect in the USA PATRIOT Act that is relevant to understanding the underlying Congressional intention. That is, Congress expressed no intention to expand upon the Commission's jurisdictional limitations under the Telemarketing Act. Notice, 67 FED. REG. at 4496 ("Notwithstanding its amendment of these provisions of the Telemarketing Act, *neither the text of section 1011 nor its legislative history suggest that it amends Sections 6105(a) of the Telemarketing Act*—the provision which incorporates the jurisdictional limitations of the FTC Act into the Telemarketing Act and, accordingly, the TSR") (emphasis added). One such jurisdictional limitation is the well-established lack of authority by the Commission over nonprofit and charitable organizations. Notice, 67 FED. REG. at 4497 & n.49. And, as Congress unambiguously expressed in the Telemarketing Act, the Commission has no authority under the statute to regulate any activity not committed to the Commission's jurisdiction under the Federal Trade Commission Act. 15 U.S.C. § 6105(a). *Accord* Notice, 67 FED. REG. at 4496–4497.

The Commission claims that the failure of Congress to remove the jurisdictional limitations of the Telemarketing Act, when read in conjunction with the USA PATRIOT Act's mention of fraudulent charitable solicitations, "compels the conclusion" that the Congressional purpose in the USA PATRIOT Act was to regulate professional fundraisers soliciting charitable donations on behalf of nonprofit and charitable organizations. Notice, 67 FED. REG. at 4497. This interpretation is anything but compelled. It opens a Pandora's Box of inconsistencies and inequities under the Telemarketing Act and TSR that certainly were not intended by Congress. For example, though motivated by fraudulent charitable solicitations, there is no basis in the USA PATRIOT Act nor the legislative history to reach the conclusion that Congress believed that consumers are in more need of the Telemarketing Act protections where the charitable solicitation is performed by professional fundraisers on behalf of nonprofit and charitable organizations, as opposed to directly by the employees and volunteers of nonprofit and charitable organizations. And yet, under the proposed rule, this precisely is the outcome.

A more plausible interpretation of the USA PATRIOT Act is that Congress intended to regulate bogus charitable solicitations where the nonprofit or charitable cause itself is of a criminal or fraudulent nature. This is vastly different from regulating all professional fundraisers soliciting donations on behalf of legitimate nonprofit and charitable organizations such as SOWI. The most compelling evidence of this Congressional purpose is not even addressed in the Commission's proposed rulemaking, that is, the legislative history of the USA PATRIOT Act. The "Crimes Against Charitable Americans Act" was introduced by Sen. Mitch McConnell (R-KY) on October 2, 2001. In his explanation of the need for the legislation and its intended purpose, Sen. McConnell consistently stated that the bill was intended to address fraudulent charitable solicitations by "crooks" and "false charities" of a "criminal" nature:

- "But this largess have proven an irresistible target to criminals who prey upon the generous and good-hearted nature of Americans in this time of national emergency." 147 CONG. REC. S10059, S10065 (daily ed. Oct. 2, 2001) (statement of Sen. McConnell) (emphasis added).
- "We heard reports of false charities exploiting well-intentioned Americans during the Gulf War and after the Oklahoma City bombing and we now hear similar reports that the September 11 attacks have given these unusually heartless criminals new opportunities to perpetrate fraud." 147 CONG. REC. S10059, S10065 (daily ed. Oct. 2, 2001) (statement of Sen. McConnell) (emphasis added).
- "Almost daily we hear of American citizens receiving solicitations from phony charities." 147 CONG. REC. S10059, S10065 (daily ed. Oct. 2, 2001) (statement of Sen. McConnell) (emphasis added).
- "News reports from more than a dozen States, from New York to Florida to California, reveal that Americans are being asked to contribute to what turn[s] out [sic] to be bogus victim funds, phony firefighter funds and questionable charitable organizations." 147 CONG. REC. S10059, S10065 (daily ed. Oct. 2, 2001) (statement of Sen. McConnell) (emphasis added).
- "Instead, this money is siphoned into the pockets of cold-hearted criminals." 147 CONG. REC. S10059, S10065 (daily ed. Oct. 2, 2001) (statement of Sen. McConnell) (emphasis added).
- "These crooks often try to confuse their victims by using names that sound like reputable charities and relief efforts." 147 CONG. REC. S10059, S10065 (daily ed. Oct. 2, 2001) (statement of Sen. McConnell) (emphasis added).

- "Other crooks use the name 'firefighter fund' or 'victim's survivors fund' in their fraudulent appeals." 147 CONG. REC. S10065 (daily ed.) (Oct. 2, 2001) (emphasis added).
- "Not only do they steal valuable resources from the most worthy of recipients, but they erode the trust of the American people in legitimate charitable organizations." 147 CONG. REC. S10059, S10065 (daily ed. Oct. 2, 2001) (statement of Sen. McConnell) (emphasis added).

The legislative history confirms that Congress sought to authorize the Commission to address criminal and fraudulent charities, not the legitimate nonprofit and charitable organizations now singled out by the Commission. Sen. McConnell advised the Commission as such on June 14, 2002, when he wrote Chairman Muris and stated that "[w]hen Congress enacted this legislation, it did not envision, nor did it call for, the FTC to propose a federal 'do-not- call' list, and certainly not a list that applied to charitable organizations or their authorized agents . . .[T]he Crimes Against Charitable Americans Act never intended, called-for, required, or even envisioned the 'do-not-call' list that the FTC is now proposing." June 14, 2002 Letter from Senator Mitch McConnell to The Honorable Timothy J. Muris (*available at* http://wwwgrandlodgefop.org/letters/ltr—020614—ftc.pdf) (accessed July 14, 2002).

In fact, the best evidence in support of this interpretation is a Commission-issued Advisory Opinion interpreting the TSR and carefully distinguishing between legitimate professional fundraisers as opposed to fraudulent telemarketing. In an 1995 Advisory Opinion issued to American Telephone Fundraisers Association, Inc., a professional fundraiser, the Commission concluded that the TSR generally imposes no restrictions on the legitimate fundraising activities of nonprofits, including professional fundraisers, because seeking donations is not "telemarketing" under the statute and rule. *See* The Applicability of the Telemarketing Sales Rule—The Telemarketing Rule generally Imposes No Restrictions on the Legitimate Fundraising Activities of Nonprofit Organizations, 120 F.T.C. 1154 (Dec. 15, 1995). The advisory opinion states:

> The Commission's understanding is that telephone fundraising on behalf of nonprofit organizations is not, in fact, typically undertaken as part of a "plan, program or campaign . . .conducted to induce the purchase of goods or services." . . .Legitimate fundraising activity is conducted primarily to elicit donations and not to induce purchases. Even when donors receive gifts, premiums, memberships or other incentives, representatives of the non-profit sector have advised the Commission that legitimate charities generally do not conduct telephone solicitations in which the stated or actual value of goods or services offered exceeds the amount of a donor's payment. *The Commission's enforcement experience suggests that fraudulent telemarketers, in contrast, obtain money from consumers by promising goods or services with inflated values as consideration for smaller "donations."*

Id. (emphasis added). The Advisory Opinion also acknowledges that the "Commission's construction of the term 'telemarketing,' as defined in the Act and the Rule, is *fully consistent with the legislative purpose of the Telemarketing Act*. The Commission's interpretation permits efficient interdiction of fraud without encumbering the legitimate use of telemarketing by sellers of good or services or by non-profit entities. In summary, until the proposed TSR amendments were introduced, the Commission's interpretation was that the Telemarketing Rule generally imposes no restrictions on the legitimate fundraising activities of nonprofit organizations." *Id.* (emphasis added).

VI. The "Do-Not-Call" Registry is Unconstitutional as Applied to the Noncommercial Speech of Nonprofit and Charitable Organizations and Their Professional Fundraisers

As applied to the noncommercial speech of nonprofit and charitable organizations and their professional fundraisers, the proposed "Do-Not Call" registry is unconstitutional because it violates the First Amendment right to freedom of speech.[10] The Commission acknowledges that the First Amendment protections for nonprofit and charitable organizations "extend to their for-profit solicitors." Notice, 67 FED. REG.

[10] U.S. Const. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances").

at 4497 n.51 (citation omitted).[11] The Commission concedes a "strong First Amendment protection of charitable fundraising." Notice, 67 FED. REG. at 4522 n.286. And it agrees that solicitations by professional fundraisers on behalf of nonprofit and charitable organizations is fully protected speech, not commercial speech. Ultimately, the proposed TSR amendments and the "Do-Not-Call" registry "unduly intrude[s] upon the rights of free speech." *Schaumburg*, 444 U.S. at 633.

The regulation of charitable solicitations by professional fundraisers on behalf of nonprofit and charitable organizations does not survive strict scrutiny, because charitable solicitations are fully protected speech. *Memorial Hosp. v. Maricopa County*, 415 U.S. 250 n.21 (1974). The proposed rule is not narrowly tailored to further a strong interest that the Commission is entitled to protect without interfering with the First Amendment protections of members of the Coalition. *Secretary of the State of Md. v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 959–61 (1984); *Schaumburg*, 444 U.S. at 636–37. Where, as here, the Commission attempts to regulate the content of protected speech, it must employ the least restrictive means to advance the articulated interest. *Sable Communications of Cal., Inc. v. Federal Communications Comm'n*, 492 U.S. 115, 126 (1989). Clearly the Commission has not satisfied this burden.

Even assuming that the privacy protection and fraud prevention interests cited by the Commission warrant some change in the current regulatory scheme, it does not follow that the "Do-Not-Call" registry is narrowly tailored enough to accomplish this objective constitutionally. Time and again, the Supreme Court has held unconstitutional any effort by government to impinge upon free speech rights by imposing unreasonable restrictions on professional fundraisers acting on behalf of nonprofit and charitable organizations. In *Riley*, as in *Munson and Schaumburg*, the government imposed restrictions focused on unconstitutional economic regulations. Here, the Commission proposes an equally infirm national "Do-Not-Call" registry (1) to which all professional fundraisers acting on behalf of nonprofit and charitable organizations must subscribe, (2) through which all communications with prospective donors must be filtered monthly, and (3) by which the Commission will prohibit certain solicitations or face federal, state or civil penalties.

Other constitutional problems are created by exempting specific industries that engage in inherently commercial telemarketing (for example, airlines, insurance companies, credit unions, telephone companies, banks) and specific types of conduct (for example, religious and political telemarketing and solicitations directly by nonprofit and charitable organizations). This facially discriminatory approach raises grave equal protection issues. By exempting certain commercial telemarketing from the TSR[12] but not excluding professional fundraising on behalf of nonprofit and charitable organizations, the Commission favors commercial speech over protected speech. The Supreme Court has held unconstitutional a government ordinance that accorded a greater degree of protection to commercial speech than noncommercial protected speech. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 513 (1980). This is exactly what is accomplished by the proposed rule—the commercial speech freedoms of banks, insurance companies and other exempt industries would be unregulated by the Telemarketing Act, while the fully protected speech of the nonprofit and charitable organizations in the Coalition would be burdened.

No less of a concern is the proposal to exclude political and religious contributions from the TSR based on a policy decision that religious discourse is a "paramount societal value" and a legal conclusion that political contributions are neither commercial nor charitable within the meaning of the USA PATRIOT Act. Notice, 67 FED. REG. at 4499. The exclusions only reinforce the discriminatory effects and unconstitutionality of the proposed rule. Under the proposed rule, contributions for "political parties and candidates" are not covered by the TSR because "they involve neither purchases of goods or services nor solicitations of charitable contributions, donations or gifts . . . " Notice, 67 FED. REG. at 4499. And, purely "as a matter of policy," the Commission proposes to exclude religious contributions because "the risk of actual or perceived infringement on a *paramount societal value*—free and un-

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[11] *See Riley v. Nat'l Fed. of the Blind*, 487 U.S. 781 (1988) ("Our prior cases teach that the solicitation of charitable contributions is protected speech, and that using percentages to decide the legality of the fundraiser's fee is not narrowly tailored to the State's interest in preventing fraud"); *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980) ("Prior authorities, therefore, clearly establish that charitable appeals for funds . . . involve a variety of speech interests—communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes—that are within the protection of the First Amendment").

[12] *See* Notice, 67 FED. REG. at 4493 n.17 ("In addition to these exemptions, certain entities including banks, credit unions, savings and loans, companies engaged in common carrier activity, non-profit organizations, and companies engaged in the business of insurance are not covered by the Rule because they are specifically exempt from coverage under the FTC Act").

fettered religious discourse—likely outweighs the benefits of protection from fraud and abuse that might result from including contributions to such organizations . . . " (emphasis added).

In doing so, the Commission favors political and religious speech over fully protected free speech and discriminates against nonprofit and charitable organizations. As the Supreme Court has explained, however, appeals for charitable contributions are inextricably intertwined with the underlying conveyance of information and ideas—that is, speech. *Schaumburg*, 444 U.S. at 632 ("solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues, and for the reality that without solicitation the flow of such information and advocacy would likely cease"). These protections are fully vested even where a professional fundraiser is the conduit of the nonprofit and charitable organization's speech. These speech rights are entitled to the full protection of the First Amendment, and must receive no less protection than political speech or religious discourse. [13]

VII. Conclusion

Thank you for the opportunity to share the views of SOWI and the Coalition on the substantial harm to nonprofit and charitable organizations as a result of the Commission's proposed TSR amendments and, specifically, the "Do-Not-Call" registry. We look forward to working with the Subcommittee to assure that the many important consumer benefits conferred by nonprofit and charitable organizations are not reduced or eliminated by the Commission's proposed TSR amendments.

Senator WYDEN. Very good.

Mr. Cannon.

STATEMENT OF LOU CANNON, PRESIDENT, DC LODGE OF THE FRATERNAL ORDER OF POLICE

Mr. CANNON. Good morning, Mr. Chairman. I would like to especially thank you, Ranking Member Fitzgerald and Senator McCain for allowing me to appear before you here today.

My name is Lou Cannon. I am the President of the District of Columbia Lodge Number 1. I am here this morning at the request of the National President of the FOP, Steve Young, to provide the Subcommittee with the concerns of the more than 300,000 members of the FOP with respect to the recent proposed rulemaking by the FTC and specifically the proposed national Do-Not-Call registry.

The FOP is the Nation's largest law enforcement labor organization, with members in 43 State lodges and more than 2,000 local lodges. The majority of these lodges and members are constantly engaged in charitable endeavors, and play an active role in the life of the communities they serve. Here in the District of Columbia, for example, the FOP is actively supporting such worthwhile organizations as the Boys & Girls Club, Concerns of Police Survivors, Easter Seals, Mothers Against Drunk Driving, Special Olympics, and in conjunction with the *Washington Times*, a local youth education program. All of these charitable enterprises are supported in part by the D.C. Lodge.

In turn, we depend on the generosity of the community through grassroots fundraising efforts which enable us to support these community-wide programs and services. Since our organization is voluntary in nature, we do not have the staff nor the resources to raise the necessary funds to carry out these programs, and many

[13] The Coalition's written comments to the Commission discuss other constitutional infirmities with the proposed TSR amendments including unconstitutional prior restraint and content based restrictions and are incorporated by reference.

of our State and local lodges must rely on the efforts of professional fundraisers.

Sound public policy dictates that it would be inappropriate for public safety personnel themselves to call residents of their community and seek financial support. Indeed, in some jurisdictions it is illegal to do so. Thus, the use of an outside commercial telemarketing service bureau is a necessity for the FOP.

The State and local lodges that hire these firms mandate that they maintain their own Do-Not-Call lists, placing the names of those who request it on the list. The creation of a second Do-Not-Call list would cause unnecessary confusion, and essentially mean that the firms employed by the FOP would be forced to follow two sets of rules on behalf of a single organization.

In January of this year, the FTC published in the *Federal Register* a notice of proposed rulemaking to amend the Telemarketing Sales Rule, (TSR), which will negatively impact organizations like the FOP. As you know, the TSR prohibits specific deceptive and abusive telemarketing acts or practices, and it is currently limited to telemarketing for commercial purposes only.

The proposed rule is aimed to implement Section 1011 of the USA Patriot Act, also known as the Crimes Against Charitable Americans Act. Although Section 1011 did not call for the FTC to establish a national Do-Not-Call registry, it has been included in the provisions of the proposed rule to implement that Act. The intent of Section 1011 was to crack down on fraudulent telemarketers using the September 11 terrorist attacks to pose as fake charities in order to take advantage of the compassion of American citizens.

The FOP strongly opposes the establishment of this national Do-Not-Call registry. We further believe that the Government should not restrict the right of non-profit organizations to deliver their message and seek public support based solely upon who compensates the caller. This proposed list would not apply to all non-profits, only to those calls made on behalf of non-profits by paid telemarketers, an issue on which the FOP has no choice. We must hire telemarketers.

The fact that non-profits using paid employees to make the same calls will not be subject to the Do-Not-Call list creates a prohibited prior restraint on the non-profit organization that does not have the resources to use its own employees. The proposed rule places our regular supporters out of reach. Individuals wishing to minimize or eliminate calls received from annoying long distance companies will not realize they have placed themselves in a position whereby they cannot be called by organizations with which they have a prior, longstanding existing relationship.

An added layer of the Do-Not-Call regulation will also have the unintended effect of raising the costs of fundraising by increasing compliance costs, and thereby reducing the net amount of funds available for community services and activities.

In conclusion, the FOP believes the FTC's proposed amendments to the Telemarketing Sales Rules should be revised so that it does not apply to calls made by, or on behalf of, non-profit organizations that are not selling goods or services. We further believe that the Commission's proposed Do-Not-Call registry is outside of the scope

or intent of the Crimes Against Charitable Americans Act and should be eliminated from the proposed rule.

On behalf of the membership of the FOP, let me thank you again, Mr. Chairman, for the opportunity to appear here and testify. I would be pleased to answer any questions you may have.

Senator WYDEN. Thank you very much.

My first question for the panel—and anyone who wants to respond is welcome to. Twenty-two States have enacted Do-Not-Call lists. Do any of you believe that there have been significant—and I want to emphasize that—significant problems for consumers, businesses, non-profits, others at the State level?

Let me just go down the row, just significant problems.

Mr. Mendoza.

Mr. MENDOZA. I do not think there have been significant problems.

Mr. SARJEANT. I do not have any input on that.

Mr. SCHWARTZ. I have not heard of any significant input. I have spoken to many of the States.

Mr. ALLDRIDGE. Indiana has lost a significant amount of money in charities because of the law.

Senator WYDEN. One State out of 22. Any others?

Mr. ALLDRIDGE. Not that I am aware of.

Mr. CANNON. I do not have the specific States, but talking to some of the telemarketers, they have said there have been significant reductions.

Senator WYDEN. We can keep it open if you folks at the Fraternal Order of Police want to give us a further answer. What I am looking for, obviously, I want to find out first if there are any big problems for anybody at the State level of the 22 States.

Mr. WIENTZEN. Senator, I think a number of small businesses are telling us that they have had significant reductions in their revenue as a result of lost business, and certainly the teleservices industry has suffered in many of those States where there is a large number of people who have signed up, and the teleservices industry reports in a recent conference we held that they are having a rather significant amount of difficulty integrating the different rules that many of those States have imposed.

Senator WYDEN. If you all could get us some specific examples, and particularly what I would like to know is, four States, eight States, 12 States, every State, and some specific examples so we can really kind of get our teeth into some of the concrete problems that some seem to be concerned about.

Mr. ALLDRIDGE. Senator, Indiana is one of only two States that does not have an exemption for the charitable call.

Mr. SCHWARTZ. Can I add something, too? I have had a problem doing the education, as someone who does education on privacy issues, educating different States on what the Do-Not-Call lists are.

One of the advantages of the national list is the ability to give one number, one easy way to be able to do this.

Senator WYDEN. Thank you for, in that adroit way, getting into a new argument.

Mr. WIENTZEN. Senator, can I add one other point?

Senator WYDEN. Then I want to move on.

Mr. WIENTZEN. Most of the States that have implemented Do-Not-Call lists have prior business relation exemptions, I think 21 of the existing State laws exempt any prior business relationship. If you start to have a situation where you cannot call your customers, I think you will see a very significant difference in a national list reaction.

Senator WYDEN. For the DMA, how different is your list from what the Federal Trade Commission is proposing?

Mr. WIENTZEN. Well, I do not think it is different. That is one of our arguments. We have allowed people to get on this list. It is free. In our case, people stay on for 5 years. Perhaps the biggest difference is, we ask the individuals to give their address as well as their name and phone number in order that we can update that list as people change addresses.

You know, America is a very changing society. About 16 to 17 percent of the American society moves each year, gets a new telephone number for the most part. With the Federal Trade Commission proposal, we seriously doubt that those people will have their new number put on the list and the old number removed, and so our system is different in that regard.

Senator WYDEN. Well, my only point for all of you at DMA, and we have worked with you on a great many things, and I appreciate it, I would urge you to work with the Federal Trade Commission and see if we can find a way to resolve this, because if you all believe that your list is a lot like theirs, there ought to be at least some common ground here to see if we can come up with something.

Mr. SCHWARTZ. Can I also make an additional point here? I have to disagree with Mr. Wientzen. His list is not free for people who want to sign up on the Internet. It costs $5 if you want to sign up on the Internet, and then also you cannot call in to a toll-free number, as Chairman Muris suggested they would allow at the FTC. You have to mail the piece in as well. It is much more complex for consumers than the system that the FTC is proposing.

Senator WYDEN. Well, that is fair to comment on, but I do think that the DMA folks, to their credit, if they are saying what you are doing is in many respects like the Federal Trade Commission, we ought to have an opportunity to bring people together.

Mr. WIENTZEN. We are prepared to have those discussions, Mr. Chairman.

Senator WYDEN. Good. That is the point. For our non-profit friends, tell us what percentage of the organization's funds come from unsolicited telephone solicitations by professionals. Even a ballpark sense would be good.

Mr. ALLDRIDGE. In the State of Wisconsin, that is 37 percent of our revenue out of a $5.5 million budget.

Mr. CANNON. It can vary depending on the amount of the agreements, anywhere from, I would say 20 percent on up, and there is a wide range across, with different agreements that you have with the telemarketers.

Senator WYDEN. Now, the Chairman, Chairman Muris said earlier the Federal Trade Commission ought to consider whether non-profits ought to be treated differently with respect to Do-Not-Call lists. For those of you in the non-profits, what is your view of what

different could mean, and what would be appropriate? Should soliciting by non-profits be totally unregulated, or the other modifications that could help you? Give us your sense of what that might consist of in a way, again, that would strike a balance, and would allow an effort to move forward.

Mr. CANNON. As I testified, we have our own Do-Not-Call lists in place, so if you come across somebody that wishes to be removed, we automatically take them off. We tried to do this internally by using retired officers, and it was virtually impossible to do, because of the nature of the equipment that is needed, the cost of that equipment, and the amount of time that has to be dedicated to that, thereby making it impossible for it to be done internally, whereas the companies that do this have all the necessary resources.

Also, we have developed longstanding lists that we have as contributors, so to be able to force us to remove them because of somebody that is calling for communications or something puts us at an extreme disadvantage.

Senator WYDEN. What if the Federal Trade Commission—and this is for the two non-profits—gave consumers the option of requesting to be put on the Do-Not-Call list for commercial calls only? Would that be helpful to you?

Mr. CANNON. I think that would be extremely helpful, and that it would also solve part of the problem, that you do not want to be inundated by three or four long distance companies, as I can tell you I personally have over the course of a week. But, if you are interested, all of these deal with the community which they are in.

It is not like DCFOP is going to call Wisconsin or something like that. You are dealing with your community base. You are bringing issues to the forefront that they may not know about, affording them an opportunity to help their own community by doing this. So I think that would certainly be a step in the right direction, by eliminating the commercial calls or separating them from your charitable calls.

Senator WYDEN. Mr. Mendoza I know has to leave. Is there anything you would like to add further?

Mr. MENDOZA. No, thank you.

Senator WYDEN. Anyone else?

Mr. ALLDRIDGE. That is exactly what happened in Wisconsin. They were able to exempt the professional representatives and the non-profits.

Senator WYDEN. I am going to move on to cover a couple of matters on the common carrier issue. I would only say I just think this is doable, folks. I look at all of you, and I think there ought to be a way to find common ground. The DMA people have indicated they will talk to the Federal Trade Commission. That sounds constructive. Our folks with the non-profits have talked about various exemptions that could be helpful. I hope you will leave this and go out and try to find a way to put this together and do it in a way that works for all of the parties.

A question for USTA and the Center for Democracy and Technology, and that relates to the proposal to end the exemption for the common carriers. Are there some areas like the Telephone Consumer Protection Act, where the FTC and the FCC both currently

have some jurisdiction and responsibilities, and are working together?

Mr. SARJEANT. Well, I think from an enforcement standpoint with respect to common carriers, it is principally the FCC. There may be some incidental areas where the FTC has been involved with common carriers, but I think it is almost exclusively the FCC.

Mr. SCHWARTZ. Actually, there is one area that we are focusing on that we focus on in our written testimony, which was the customer privacy network information rule that the FCC has really had quite a bit of back-and-forth on with the courts, and actually just came up with a new ruling yesterday. It would cover privacy of customer information, and that is where our concerns lay. How will the jurisdictional issues on privacy may go forward if the exemption is lifted. We would just like more information on that. That was really our main point here. How would the FTC deal with those issues where the jurisdiction does overlap? Currently, the FCC has stronger rules for consumers in some privacy areas.

Senator WYDEN. Mr. Sarjeant, the FTC Commissioners indicated that when the FTC tries to pursue enforcement against a company that has got common carrier activities, the agency goes out, spends a lot of resources and time repeatedly litigating the question of whether the common carrier exemption applies. What is your reaction to that? It does not look like a good use of the FTC's limited resources. I want them to go out and help my people with gas prices rather than wasting money.

Mr. SARJEANT. As I listened to the Commissioners speak this morning, they seemed to be fairly accepting of the fact that the jurisdiction as established by statute over common carriers rests with the FCC. Certainly it is within their prerogative to test judicially whether or not there may be some areas where the statute may permit them concurrent jurisdiction, but what little case law exists that I have seen would seem to suggest that the courts have fairly well settled that the jurisdiction over common carriers rests with the FCC or those other agencies that regulate common carriers.

Senator WYDEN. I think that essentially what we are trying to do is make sure that we are not talking about common carrier activities like phone service and not the other lines of business the company may engage in like Internet services. Those are kind of the lines we are trying to draw here, and it seems to me that the Federal Trade Commission has got a good argument here. We will want to follow it up again with you. Is there anything you would like to add?

Mr. SARJEANT. Well, I would just say Internet is a very good example. As the Senator probably knows, today the FCC has before it several proceedings where it is wrestling with just exactly what is Internet, and access to the Internet, whether or not you are a common carrier providing transport and you are connecting with an affiliated or an unaffiliated Internet service provider.

The FCC is trying to get its arms around just exactly what that is. I think this would be a very bad time, in particular, for the FTC to begin to assert jurisdiction when we do not even have clarity concerning exactly what the appropriate regulatory classification for access to the Internet is.

Senator WYDEN. I guess we could continue this. I am the author of the Internet Tax Freedom Act, the Senate sponsor, so I think I have a pretty decent sense of what the Internet is, but I think we have gotten the drift with respect to your remarks.

Does anybody want to add anything further? We wanted you all to give us good information with respect to the do-not-call issue and also on the common carrier exemption. I think it has been constructive. We will give you the last word if anybody wants to add anything.

Mr. WIENTZEN. Mr. Chairman, I think the Subcommittee would be well-served to spend some energy looking into the proposed cost, the estimated cost of a national Do-Not-Call registry both to put it together and how it will be maintained. I think it is far more complicated than perhaps has been uncovered to this point.

Some of our folks are telling me that it is estimated it will cost $80 million to put it together to start with, which is way more, I think, than some of the initial estimates.

Senator WYDEN. You might have quit while you were ahead, because it sure is not going to cost $80 million if your good people who are operating something that seems to be close to the FTC work together with the FTC.

Mr. WIENTZEN. That might well be the case, Mr. Chairman. That is why we are willing to talk about it.

Senator WYDEN. Good. That is the bottom line, is trying to figure out a way to get the stakeholders together and to get it done.

We appreciate all of you. We have worked with you on many occasions, and your organizations, and it has been very constructive, and we look forward to working with you in the days ahead.

The hearing is adjourned.

[Whereupon, at 12:15 p.m., the hearing adjourned.]

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