

REAUTHORIZATION OF THE FEDERAL TRADE  
COMMISSION: POSITIONING THE COMMISSION  
FOR THE TWENTY-FIRST CENTURY

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HEARING  
BEFORE THE  
SUBCOMMITTEE ON  
COMMERCE, TRADE, AND CONSUMER PROTECTION  
OF THE  
COMMITTEE ON ENERGY AND  
COMMERCE  
HOUSE OF REPRESENTATIVES

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# REAUTHORIZATION OF THE FEDERAL TRADE COMMISSION: POSITIONING THE COMMISSION FOR THE TWENTY-FIRST CENTURY

WEDNESDAY, JUNE 11, 2003

HOUSE OF REPRESENTATIVES,  
COMMITTEE ON ENERGY AND COMMERCE,  
SUBCOMMITTEE ON COMMERCE, TRADE AND  
CONSUMER PROTECTION,  
*Washington, DC.*

The subcommittee met, pursuant to notice, at 10 a.m., in room 2123, Rayburn House Office Building, Hon. Cliff Stearns (chairman) presiding.

Members present: Representatives Stearns, Shimkus, Shadegg, Bass, Ferguson, Otter, Tauzin (ex officio), Schakowsky, Markey, Stupak, Green, McCarthy, and Strickland.

Staff present: Kelly Zerzan, majority counsel; Ramsen Betfarhad, majority counsel and policy coordinator; Jill Latham, legislative clerk; Jon Tripp, deputy communications director; and Jonathan Cordone, minority counsel.

Mr. STEARNS. Good morning. I would like to welcome all of you to the Reauthorization of the Federal Trade Commission: Positioning the Commission for the 21st Century hearing at the Subcommittee on Commerce, Trade, and Consumer Protection. I would like to welcome and thank the Chairman of the Federal Trade Commission, Mr. Muris, and three of the FTC Commissioners, Mr. Leary, Thompson, Swindle, for appearing before the committee on the matter of this reauthorization.

In working with the Commission we had specifically scheduled the hearing today as the schedule of all five Commissioners permitted them to be here. Unfortunately, due to urgent family matters, Commissioner Sheila Anthony is not available to testify this morning.

As I have suggested in the past, I think the Congress must undertake its basic household duties, and this is one of them, more diligently. One such duty is reauthorizing the various agencies of the Federal Government. That is what we are trying to accomplish starting this morning with this hearing.

Now, my colleagues, the last time we reauthorized the Commission was in 1996, some 7 years ago, when we authorized it through fiscal year 1998. The reauthorization process accords us with the opportunity to carefully examine the mission of the agency, its effectiveness in advancing the mission. In that light I am pleased that the Commission is presenting a number of legislative pro-

posals to the committee this morning that it deems necessary for its better fulfillment of its mission, in particular its consumer protection mission.

I commend the Commission for being proactive on these matters. I do want to perhaps express a little concern I had that the committee was not informed in a timely manner of the Commission's intent to present its legislative proposal with respect to spam at today's hearing.

That said, this hearing is a good opportunity for us to hear the Commission's argument in support of its three major legislative proposals. The first FTC legislative proposal calls for the elimination of the FTC Act's common carrier exemption. The statutory exemption precludes the Federal Trade Commission from investigating and prosecuting common carriers for both anticompetitive behavior and deceptive, unfair and fraudulent activities. The Commission seeks a revisit of that exemption, in particular with respect to its ability to pursue deceptive, unfair, fraudulent non-common carrier activities of a telecommunications common carrier.

As the subtitle of this hearing is "Positioning the Commission for the 21st Century," I will obviously listen very carefully to the Commission's arguments that the exception—exemption rather—was written into the statutes some 70 years ago. So this is sort of a landmark discussion that we are having here, and so I think everybody in the industry and here in government will follow this discussion very carefully because of its huge implications.

Now, my colleagues, the second Federal Trade Commission legislative proposal addresses spam, the modern scourge of e-mail users everywhere. The legislative proposal as opposed to the procedural one especially calls for investing the Federal Trade Commission with broad rulemaking authority addressing deceptive and abusive practices with respect to unsolicited commercial e-mail along the lines of similar authority granted to it with respect to telemarketing by Congress in the Telemarketing Consumer Fraud and Abuse Prevention Act of 1991.

What I find curious about the proposal, an issue that I would like to further explore with the Commissioners, is the qualifying language that surrounds the proposal making the proposal seem tentative. Specifically the Commission's testimony prefaces the proposal by stating that, "section 5 of the FTC Act provides a firm footing for spam prosecution. Additional law enforcement tools could make more explicit the boundaries of legal and illegal conduct." More significantly, the statement concludes by stating that, "admittedly the Commission recognized that these legal systems will not solve the growing spam problem, nor is it clear what impact these systems will have on some of the other problems associated with spam; for example, volume and security."

Mr. Tauzin, the chairman of this committee, the full committee, drafted a bill, H.R. 2214. I am an original cosponsor of that bill, Reduction and Distribution of Spam Act 2003. So we could be interested in working closely with the Commission so that we can advance from this committee and the Congress an effective spam legislation in light of some of your comments.

Another issue, the Commission's sweeping cross-border fraud legislative proposal is one that I think is quite worthy of careful con-

sideration by members. I believe if we derive the right formulation of that language it could indeed empower the FTC to be more effective in tackling this challenge in this century. It is important that the proposal be rigorously debated, making sure that civil liberties are not compromised.

Still, as the Commission is well aware, we need to respond more effectively to fraud that finds its genesis overseas. For example, one reason that spam has problems—as a problem defies easy solution is the fact that even if we combat it effectively within the United States, within our borders, spam will continue to be a serious nuisance and a costly problem because it is dispatched from overseas. Thus it is imperative that we explore ways to better protect our consumers from unfair, deceptive and fraudulent activities that increasingly have international dimensions to them.

I will work closely with the Commission in further developing its cross-border fraud proposals in ways that do not abridge our civil liberties with the objective of enacting legislation, if possible, this year.

In conclusion, I would like to raise a number of issues for the Commission's consideration. First, I think it is imperative that the Commission focus more resources on its efforts fighting ID theft and assisting the victims of this crime. I ask that the Commission consider any and all ideas that would help consumers find speedy redress. Time permitting, I will raise with you a few thoughts that I have during the question and answer session.

Second, I think it is time for the Commission to seriously consider promulgating a rule separate and distinct from the franchise rule addressing business opportunities.

Third, I have followed the Commission's activities with respect to information security, specifically the Eli Lilly and Microsoft consent agreements. I again commend the Commission for being proactive on an issue of very substantial importance. Still, I am concerned that consent decrees concluded at the agency level may now effectively become the corpus of legal guidance on information security obligations with respect to their customer's personal data. I seek to explore this issue this morning and in the near future with the Commission.

I thank all of them for coming and their participation this morning, and I look forward to their testimony. And with that, the ranking member is welcome for an opening statement.

Ms. SCHAKOWSKY. I thank you, Mr. Chairman, and I thank the chairman of the full committee for holding this important hearing today as well. I want to thank the Commissioners from the Federal Trade Commission for being here today. I am sorry that Commissioner Sheila Anthony was not able to be here and hope the other Commissioners will extend to her my gratitude for all her work on behalf of the consumers.

It is my understanding that later this session the subcommittee will consider legislation that will reauthorize the Federal Trade Commission for the next several years. The FTC is here today to share its views on what should be included in this legislation, and I look forward to hearing from all of you.

That being said, I hope that in the near future the subcommittee will have an opportunity to hear from consumers and law enforce-

ment officials and other experts on FTC reauthorization. I hope that the chairman will agree to hold more hearings to ensure that we have a record that includes a diverse range of views before we consider legislation that would reauthorize the FTC.

The FTC is responsible for protecting consumers and businesses from unfair deceptive trade practices. The FTC is responsible for policing the marketplace and holding bad actors accountable. This is an extremely important mission because our constituents are far too vulnerable to unscrupulous companies that put their own bottom line above all else, including obeying the law. And whether it is at the gas pump, while at the pharmacy, while purchasing a home, families need to be protected from unfair and deceptive business practices and other types of fraud.

It is very important that our laws and regulations are vigorously enforced by the FTC. Perpetrators of fraud need to know that they will be held accountable for their actions. The public needs to be assured that their rights are being protected. It is the FTC's job to put the interest of consumers first and foremost at all times without exceptions. It is the subcommittee's responsibility to ensure that the FTC enforces the law and vigorously protects the public from unfair and deceptive trade practices.

The FTC works to prevent fraud and deception from occurring in the first place. This is an increasingly difficult job because identity thieves and other scam artists are always working to be one step ahead of the law. The Internet and other technological advances have made it increasingly difficult to find perpetrators and protect consumers. No crime provides a better example of this challenge than the problem of identity theft.

And according to the Federal Trade Commission, in 2002 identity theft was the No. 1 consumer complaint for the third year in a row. The number of identity thefts doubled in 2002. In 2002, there were at least 7,400 victims in Illinois and over 2,700 in Chicago. This is—and I represent a district on the North Side of Chicago. This is probably just the tip of the iceberg. Leading consumer groups estimate that there were 800,000 victims last year.

Victims are frequently unaware that their identity has been stolen in the first place. Thieves can use stolen personal information to create fake IDs, cash checks, apply for credit cards, loans and mortgages. Consumers have spent years and thousands of dollars attempting to clear their credit reports. Many have lost their ability to borrow, buy a new home or refinance a mortgage through no fault of their own. I have heard from constituents who have had their identities stolen, and it is a difficult ordeal.

The FTC has worked hard to educate consumers on how they can protect their identity. The FTC has also worked to create a master complaint form that is used by the public and private institutions, and I commend the FTC for these efforts. Nevertheless, the fact remains that victims have a very, very difficult time restoring their credit record. I hope the FTC will take additional steps to help consumers.

I want to work with my colleagues to assist in your efforts to turn the tide on these serious problems. We also need to look at ways in which we can help the FTC work closer with foreign governments while at the same time ensuring that the constitutional



privacy rights of our constituents are not infringed upon. I want to hear the FTC's views on this issue.

Today the Commission will testify on a proposal to remove the FTC's exemption from regulating the advertisements of long distance telephone companies. Some telecommunication companies have evoked the common carriage exemption to prevent the FTC from taking enforcement actions. I question if the common carriage exemption serves the public interest. The FTC has expertise in fighting unfair and deceptive trade practices. I also look forward to hearing about the Commission's efforts to implement the National Do Not Call List, fight predatory lending and combat spam.

Thank you.

Mr. STEARNS. I thank the gentlelady. And the gentleman from Illinois, Mr. Shimkus.

Mr. SHIMKUS. Thank you, Mr. Chairman. Let me welcome the Commissioners back to this hearing to talk about the reauthorization. The FTC has an important role because it is one that the public really understands for the most part. I mean, they understand the issue of the Do Not Call List. They understand the crisis of identity theft. They understand the problems with spam. They may not have a full understanding nor do many legislators on the common carrier exemption, which will be addressed and discussed and debated. But that is why we are having this hearing today, to get in a position to move on a reauthorization bill and tweak the legislative language that we need to do to face a new era with new technology and new challenges.

So we are really pleased to have you here. I want to apologize up front. I have another competing hearing at 11, so I am going to stay to hear most of your statements. I don't know if I will be around to ask some questions, but I look forward to hearing your testimony. And with that, Mr. Chairman, I yield back my time.

Mr. STEARNS. I thank the gentleman. The gentleman from Michigan, Mr. Stupak.

Mr. STUPAK. Thank you, Mr. Chairman, and thank you for holding this hearing, and I welcome our distinguished panel here today. First, I would like to commend the Commissioners and the FTC for their aggressive pursuit of the Federal Do Not Call Registry. I have had countless constituents express frustration to me about the frequent telemarketing calls that they receive. I have been pleased to report to them that both Congress and the FTC have sought to address this problem and that help is on the way in the form of the FTC Do Not Call List.

Along these lines is my concern about another abusive practice, spam. I believe that Congress must take action on this subject, and I would support providing the FTC with greater authority to address the rise of spam. These unsolicited e-mails range from commercial e-mail that clog up Internet service providers and frustrate customers to offensive pornographic e-mails that can be opened by unsuspecting children. I support cracking down on spam so we can protect business, consumers and our children, and pledge to work with the FTC on the necessary measures that are needed.

Last, but certainly not least, I am very interested in the hearings the FTC is conducting on health care issues and competition, par-

ticularly as they relate to insurance companies, and I look forward to reviewing the results of the FTC report.

The FTC is involved in issues that are of the utmost importance to consumers: telemarketers, spam, health care as well as the ongoing antitrust enforcement in the oil and gas industries and identity theft. While I do not believe the FTC enforcement should take the place of the rights of individual consumers or the State Attorney Generals who seek remedies, I believe that by providing all of these parties with sufficient remedies we can make real progress in the area of consumer fraud and abuse.

Like Mr. Shimkus, I will have to leave shortly for another hearing in the Telecommunications and Internet Subcommittee, but I hope to hear some of the testimony today and look forward to proceeding with the reauthorization of the FTC.

And with that, Mr. Chairman, I would yield back the balance of my time.

Mr. STEARNS. Thank the gentleman. And the vice chairman of the subcommittee, the gentleman from Arizona, Mr. Shadegg.

Mr. SHADEGG. Thank you, Mr. Chairman. And first let me thank you for holding this important hearing. And let me also thank Chairman Muris and Commissioners Thompson, Swindle and Leary for their testimony today.

I am particularly interested to hear about the Commission's efforts to educate consumers and help them deal with and combat identity theft. My personal interest in identity theft began about 5 years ago when two of my constituents, Bob and JoAnn Hartle of Phoenix, Arizona, were the victims of an identity theft. My constituents were instrumental in securing passage of the first State law in the Nation to criminalize identity theft as a crime in and of itself.

Mr. And Mrs. Hartle suffered the devastation of identity theft when a convicted felon took Mr. Hartle's identity and made purchases totaling more than \$100,000. This individual also used Mr. Hartle's identity to obtain a pass to the secure areas of Phoenix Sky Harbor International Airport, an offense which today following 9/11 would be considered extremely grave. On top of that he obtained handguns using Mr. Hartle's clean record to get around the Brady gun law. As a result of their victimization, Mr. and Mrs. Hartle were forced to spend more than 4 years of their lives and more than \$15,000 of their own money to restore their credit because there were no Federal penalties for identity theft.

Their case led me to introduce a bill in the House that was eventually signed into law. The Identity Theft and Assumption Deterrence of 1998 gave Federal law enforcement agencies the authority to investigate and prosecute identity theft as a Federal crime for the first time. Mr. and Mrs. Hartle also turned their unfortunate circumstance into something positive by establishing a nonprofit organization to assist other victims of identity theft. Their website, [www.idfraud.net](http://www.idfraud.net), is available to provide guidance to identity theft victims nationwide.

Identity theft ranges from single individuals, like the criminal who victimized the Hartles, involving small or large amounts of money, to large organized professional crime rings. TriWest Healthcare Alliance, a company located in my district, may have

been the victim of a professional crime ring. On December 14, 2002, computer hard drives containing their clients' sensitive, personally identifiable information were stolen from TriWest's Phoenix office. The stolen data included personally identifiable information such as Social Security numbers, birth dates and addresses for military personnel, one quarter of whom were on active duty at the time, retirees and family members who were served by TriWest under a contract with the Department of Defense.

The nature of identity theft has changed over time and today it is more likely than ever to involve breaches of security data. According to an identity fraud manager at the Federal Trade Commission, there is a shift by identity thefts from going after single individuals to going after mass amounts of information. Law enforcement experts now estimate that half of all cases involve thefts of business data banks as more and more information is stored in computer data bases that are vulnerable to hackers.

The identity theft legislation that I introduced was signed into law in 1998 and was an important first step to crack down on identity fraud and identity theft. However, more legislation is needed in this area to protect consumers from identity theft and to ensure the soundness and secureness of our economy. I am currently in the process of developing a legislative response. I will look forward to hearing your testimony on this and other issues and appreciate your presence here today.

Yield back the balance of my time.

Mr. STEARNS. Thank the gentleman. The gentleman from Texas, Mr. Green.

Mr. GREEN. Thank you, Chairman Stearns and Ranking Member Schakowsky, for holding this important hearing on the reauthorization of the Federal Trade Commission. As the agency dedicated to protecting the interests of American consumers, the FTC has the important and admirable mission of ensuring both competition and consumer protection in the marketplace.

Like my colleagues, I would like to thank the FTC for its swift implementation of the Do Not Call Registry. While I initially urged that Congress approve stronger language, I am glad that beginning this summer consumers will have the power to reduce the number of annoying telemarketing calls that too often interrupt precious and yet increasingly limited time that the American families have to spend together. The implementation of this registry is truly a victory for our consumers.

Additionally, I would like to offer my personal thanks to the FTC for its role in protecting Spanish speaking consumers in my hometown of Houston and across America who have been victimized by deceptive and unfair debt collecting practices. As a result of the Commission's actions against Houston based United Recovery Systems, our Spanish speaking consumers can be assured that they are afforded the same consumer protections as English speaking consumers.

I understand our witnesses will be offering several specific legislative proposals to enhance the FTC's ability to protect consumer interests, and I agree with the Commission that the common carrier exemption is outdated and the FTC's ability to protect consumers from anticompetitive and deceptive practices should also

apply to the telecommunications industry. Times have changed and the telecommunications industry is no longer a government regulated monopoly. Telecommunications is a deregulated, competitive industry and its customers should be afforded the same consumer protections that they receive when dealing with our competitive industry.

Additionally, I am pleased that the Commission wishes to broaden its authority to address the problematic issue of spam. Last year Congresswoman Heather Wilson and I introduced spam legislation. We are putting together the final touches on similar but updated legislation for this Congress. Our legislation will provide for broad strong enforcement and seeks to eliminate loopholes, to provide consumers a true and effective opt out option from unwanted e-mail, much of what is pornographic.

One spam bill, H.R. 2214, imposes a knowledge standard that the Commission must prove to successfully bring a civil action for violations of three provisions of the bill. I am concerned with how this unusual proposal compares with traditional enforcement authority, and I would hope that would be addressed by our witnesses. It seems safe to say that the FTC would less likely bring an action in situations where it would be required to prove a knowledge standard.

Again, I look forward to working with you to crackdown on spammers, and I will listen with interest to the legislative proposals and further that goal. And again thank you, Mr. Chairman and ranking member, and for our witnesses being here today.

Mr. STEARNS. I thank the gentleman. Gentleman from Idaho.

Mr. OTTER. I will pass.

Mr. STEARNS. Okay. The gentleman from Idaho passes. Mr. Ferguson.

Mr. FERGUSON. Thank you, Mr. Chairman. I appreciate your holding this hearing. I thank Chairman Muris and the Commissioners for participating.

Mr. Chairman, the FTC provides a substantial service to the consumers of our country and to our economy as a whole. In many instances the FTC is the watchdog that stands up for consumers against bad actors in the marketplace who engage in deceptive marketing or other fraudulent activities. Whether combating telemarketing fraud, Internet scams or price fixing schemes, the FTC's primary mission is to protect consumers.

Today I look forward to hearing from the panel regarding their recommendations as the FTC looks forward in their role to protecting consumers in the future. We must, however, recognize that when reassessing the role of the FTC, that we do not duplicate authority or create further jurisdictional ambiguity. We all know that today's budgets are tight. It simply doesn't make sense to give one agency new authority to enforce laws and regulations already enforced by another agency. Our Nation's telecommunications sector has seen some tough times recently and it seems foolish to me to add one more layer of government red tape to stifle innovation and hamper growth.

I look forward to hearing the testimony of our panel today and also to hearing specifics on why the FTC needs perhaps a new and

broader mandate. Thank you again, Mr. Chairman. I thank the members of the panel for coming here today, and I yield back.

Mr. STEARNS. Thank the gentleman. Gentledady from Missouri, Ms. McCarthy.

Ms. MCCARTHY. Thank you, Mr. Chairman. I am going to submit my remarks for the record. They touch on many of the issues my colleagues on the committee have already raised. I am very grateful to you for this hearing and the Chairman and Commissioners for sharing their thoughts with us today. I yield back.

Mr. STEARNS. All right. I thank the gentledady.

[Additional statements submitted for the record follow:]

PREPARED STATEMENT OF HON. BARBARA CUBIN, A REPRESENTATIVE IN CONGRESS  
FROM THE STATE OF WYOMING

Thank you, Mr. Chairman, for holding this hearing. I commend your continued leadership of this Subcommittee, as we explore another timely and important matter in the reauthorization of the Federal Trade Commission.

I would also like to thank the distinguished panelists for coming before the subcommittee. It is appropriate for the Chairman and Commissioners to come before the subcommittee today and share with us the proposals for ensuring that the core mission of the FTC can continue to be effectively accomplished.

The Federal Trade Commission (FTC) has grown to play an invaluable role in the marketplace. In the presence of ever-changing economies both nationally and internationally, we must thoroughly examine the FTC's operating parameters and determine their relevance, effectiveness and flexibility when expansion might be necessary.

The FTC has already implemented a number of initiatives addressing recently raised consumer concerns. The "Do-Not-Call" registry is an excellent example. In reauthorizing the FTC, we must ensure its ability to examine, assess and enforce regulations in the marketplace remains intact and vibrant without exceeding its charter.

I look forward to reviewing the proposals before us today and continuing the dialogue throughout the reauthorization process.

I thank the Chairman again and yield back the remainder of my time.

PREPARED STATEMENT OF HON. W.J. "BILLY" TAUZIN, CHAIRMAN, COMMITTEE ON  
ENERGY AND COMMERCE

Thank you, Mr. Chairman, for holding this important hearing. We have nearly all of the Federal Trade Commissioners here today, and I thank them for coming.

The authorization for the Federal Trade Commission lapsed in fiscal year 1998, so it is time for this Committee to examine what the FTC does, how it does it, and where the Commission plans to move in the future.

The Federal Trade Commission has been remarkably active in the past two years. Its mission, which is to prevent unfair competition and unfair or deceptive acts or practices in the marketplace, has guided the Commission in vigorously pursuing bad actors, scam artists and hucksters.

We have seen a crack down on a range of deceptive marketing practices including identity theft and Internet fraud, enforcement of privacy policies, and the creation of a national do-not-call list. Today we will hear about a number of new proposals the FTC would like to tackle, including cross-border fraud, common carrier regulation, and spam.

I was surprised to find the FTC has a legislative proposal for spam included in its reauthorization package, although I'll note that many of the issues raised by the FTC are included in Mr. Burr's anti-spam bill, H.R. 2214. That bill provides the FTC with more streamlined APA rulemaking authority to give the Commission more flexibility to respond to changes in the marketplace. In addition, H.R. 2214 gives the FTC and the Department of Justice all of the enforcement powers they currently enjoy under the FTC Act—the same powers the Commission is requesting here today. Since H.R. 2214 does not supercede the FTC's authority to enforce against spam under its unfair and deceptive trade practices authority, it should be a nice supplement to the Commission's existing authority. In fact, H.R. 2214 may go even further than the FTC proposal as it allows consumers the opportunity to opt out of ALL commercial email, not just unsolicited commercial email.

I look forward to working with the FTC to refine and improve H.R. 2214, the Reduction in Distribution of SPAM Act. I encourage you, Chairman Muris, to continue to communicate your ideas and concerns regarding H.R. 2214 to this Committee.

Another aspect of the Commission's proposal is the removal of the jurisdictional exemption over telecommunications common carriers. Currently, common carriers are subject to rigorous regulation by the Federal Communications Commission as well as by the states. Moreover, to the extent that common carriers are engaged in non-common carrier activities, courts have found that the FTC has the jurisdiction necessary to enforce its regulations. If there is a need to codify this judicial interpretation, that is a course of action we can discuss.

I do not, however, believe that a wholesale removal of the exemption is necessary. If there are instances where common carrier activities are so intertwined with non-common carrier activities, I encourage the FTC and the FCC to work together and coordinate a joint enforcement response. However, dual regulation is *not* the answer.

Thank you again, Mr. Chairman for calling this hearing, and I look forward to hearing from our distinguished panel of witnesses.

Mr. STEARNS. And with that, we will have our witnesses, and I welcome the Honorable Timothy Muris, Chairman; the Honorable Mr. Thompson, Commissioner, Federal Trade Commission; Honorable Mr. Swindle, Commissioner; and the Honorable Mr. Leary. I think you have heard both sides of our opening statements, so you have created a little interest in the Federal Trade Commission with your proactive proposals. So we are anxious to hear, Mr. Chairman, your opening statement.

**STATEMENTS OF HON. TIMOTHY J. MURIS, CHAIRMAN, FEDERAL TRADE COMMISSION; HON. MOZELLE W. THOMPSON, COMMISSIONER, FEDERAL TRADE COMMISSION; HON. THOMAS B. LEARY, COMMISSIONER, FEDERAL TRADE COMMISSION; AND HON. ORSON SWINDLE, COMMISSIONER, FEDERAL TRADE COMMISSION**

Mr. MURIS. Thank you very much, Mr. Chairman. We certainly appreciate the opportunity to testify today to support the FTC's reauthorization request. On behalf of the Commission, let me first start by expressing our sincere thanks to you, Mr. Chairman, and all the members of the subcommittee for your continued support of the FTC. Our dedicated staff has continued to take innovative and aggressive actions to protect consumers and promote competition.

Today I would like to briefly outline our missions and some of our recent accomplishments. My colleagues will then each discuss specific legislative proposals that you mentioned that we are recommending. The FTC consumer protection mission focuses on attacking fraud and deception, consumer privacy, deceptive lending practices, and cross-border consumer protection. This program provides Americans with impressive results.

Since April 1, 2002, the FTC has organized 12 joint law enforcement efforts or sweeps with more than 165 partners. These sweeps resulted in more than 400 cases targeting Internet scams and telemarketing fraud, including deceptive work-at-home opportunities, deceptive health claims, advanced fee credit related fraud, fundraising fraud, and Internet auction fraud. Overall, since April 2002 we have obtained more than 65 final judgments, ordering more than \$865 million in consumer redress.

In addition to attacking fraud, the Commission devotes significant resources to protecting privacy. This year, the Commission, with assistance from Congress, is set to launch its National Do-

Not-Call Registry. Implementation of this registry will begin soon. Once it is in place, consumers who have registered will begin to review fewer and fewer unwanted telemarketing calls.

I want to thank you, Mr. Chairman, and this committee for your support of this important initiative. In addition to unwanted telemarketing calls, unsolicited commercial e-mail or spam is a growing concern. We are addressing consumer concerns about spam through law enforcement, consumer and business education and research. In addition, the Commission has several legislative ideas that Commissioner Swindle will discuss.

We have been equally as active protecting consumers from anti-competitive conduct that can raise prices, particularly in the health care, energy and high tech sectors. In health care, a number of our activities will likely provide consumers with more affordable drugs. For example, we published a study examining the frequency of anticompetitive abuses to block market entry of lower cost generic drugs, provided comments to the FDA on the potential for misusing the Hatch-Waxman Act procedures governing generic entry, and brought law enforcement actions against branded drug companies alleging improper efforts to delay generic entry. We recently announced a settlement with Bristol-Myers Squibb concerning alleged abuses of the Hatch-Waxman process to obstruct the entry of generic competition for two anti-cancer drugs and one anti-anxiety agent.

The FTC has also been active in protecting consumers from anti-competitive conduct that may raise the price of oil and gas. This year, we filed a complaint alleging that Unocal improperly manipulated the process through which California set regulations for the formulation of low emissions gasoline. We have also begun a project that monitors wholesale and retail prices of gasoline in approximately 360 cities across the United States in an effort to identify possible anticompetitive activity.

This year we are making, as the chairman noted, several recommendations for legislative changes. We would be happy to work with the committee staff on these recommendations. First, Commissioner Thompson will provide an overview of the Commission's recommendations to improve cross-border fraud enforcement. These proposals are also critical to the FTC fight against deceptive spam, as spammers often send their messages from anywhere in the world to anyone in the world.

Second, Commissioner Swindle will discuss the agency's recommendations to enhance the FTC's effectiveness in fighting fraudulent spam. These proposals will improve our ability to investigate and sue possible spam targets.

Finally, Commissioner Leary will discuss our recommendation to eliminate the FTC Act's exemption for communications common carriers.

Thank you very much for your attention, and I will turn it over, if I may, to Commissioner Thompson.

[The prepared statement of Hon. Timothy J. Muris follows:]

PREPARED STATEMENT OF THE FEDERAL TRADE COMMISSION

Mr. Chairman, the Federal Trade Commission ("Commission" or "FTC") is pleased to appear before the Subcommittee today to support the FTC's reauthorization re-

quest for Fiscal Years 2004 to 2006.<sup>1</sup> Since the last reauthorization hearing, the FTC has continued to take innovative and aggressive actions to protect consumers and promote competition. The Commission would like to thank the Chairman and members of the Subcommittee for their continued support of the agency's missions.

#### I. INTRODUCTION

The FTC acts to ensure that markets operate efficiently to benefit consumers. The FTC's twin missions of competition and consumer protection serve a common aim: to enhance consumer welfare. The FTC's competition mission promotes free and open markets, bringing consumers lower prices, innovation, and choice among products and services. The FTC's consumer protection mission fosters the exchange of accurate, non-deceptive information, allowing consumers to make informed choices in making purchasing decisions. Because accurate information in the marketplace facilitates fair and robust competition, the FTC's twin missions complement each other and maximize benefits for consumers.

Five principles guide the FTC's agenda for consumers. In exercising its competition and consumer protection authority, the FTC:

- Promotes competition and the unfettered exchange of accurate, non-deceptive information through strong enforcement and focused advocacy;
- Stops conduct that poses the greatest threat to consumer welfare, such as anti-competitive agreements among rivals and fraudulent and deceptive practices;
- Employs a systematic approach for identifying and addressing serious misconduct, with special attention to harmful behavior in key economic sectors;
- Uses the agency's distinctive institutional capabilities by applying its full range of tools—prosecuting cases, conducting studies, holding hearings and workshops, engaging in advocacy before other government bodies, and educating businesses and consumers—to address competition and consumer protection issues; and
- Improves the institutions and processes by which competition and consumer protection policies are formulated and applied.

During the past year, the FTC has applied its unique complement of law enforcement and policy instruments to address critical consumer concerns. Highlights include:

- **Privacy: “Do-Not-Call.”** The Commission promulgated far-reaching amendments to its Telemarketing Sales Rule (“TSR”). Among the most important changes, the agency is poised to launch its National Do-Not-Call registry, one of the most significant consumer protection initiatives in recent years. The registry will be a central database of telephone numbers of consumers who choose not to receive telemarketing calls. Once the registry is in place this summer, telemarketers will pay a fee to gain access to the registry and then must scrub their telemarketing lists against the telephone numbers in the database. This fall, consumers who have placed their telephone numbers on the registry will begin to receive fewer and fewer unwanted telemarketing calls.
- **Health Care: Prescription Drugs.** Medical therapy increasingly relies on new pharmaceuticals as alternatives to more invasive treatments, such as surgery. A number of FTC activities will likely, directly or indirectly, help consumers to afford drugs to meet their needs. The FTC published a study examining the frequency of anticompetitive abuses to block market entry of lower-cost generic drugs; provided comments to the Food and Drug Administration (“FDA”) on the potential for misusing the Hatch-Waxman Act procedures governing generic entry; and brought law enforcement actions against branded drug companies alleging improper efforts to delay generic entry. Among other significant matters, the Commission reached a settlement with Bristol-Myers Squibb (“BMS”) resolving charges that BMS abused the Hatch-Waxman process to obstruct the entry of generic competition for two anti-cancer drugs and an anti-anxiety agent.
- **Financial Practices: Fraudulent Lending.** In May 2003, the court finalized a settlement to resolve FTC charges that The Associates (now owned by Citigroup, Inc.) had engaged in widespread deceptive and abusive practices involving subprime home mortgage lending. The settlement is expected to provide \$215 million in redress through cash refunds and reduced loan balances to approximately 2.2 million consumers in the U.S., Puerto Rico, and the Virgin Is-

<sup>1</sup> This written statement represents the views of the Federal Trade Commission. My oral presentation and responses to questions are my own and do not necessarily reflect the views of the Commission or any other Commissioner.



lands. A related class action settlement is expected to yield an additional \$25 million, for total relief to consumers of \$240 million.

- **E-Commerce: A Unified Approach to Maintaining Efficient Markets.** The development of the Internet has created a host of consumer issues, requiring the FTC to draw on all its consumer protection and competition capabilities. Among other activities, the FTC has formed an Internet Task Force to analyze state regulations that may restrict the entry of new Internet competitors; hosted public workshops on both spam and potential anticompetitive barriers to e-commerce; and brought significant law enforcement actions that continue its historical role of leading efforts to keep e-commerce free from fraud, deception, and unfair or anticompetitive practices.
- **Energy: Gasoline.** In an administrative complaint issued in March 2003, the FTC alleged that Unocal improperly manipulated the process through which the California Air Resources Board set regulations for the formulation of low-emissions gasoline. The FTC contended that Unocal's anticompetitive conduct potentially could cost California consumers hundreds of millions of dollars per year in higher gasoline prices.
- **Innovation: Intellectual Property and Competition.** With the growth of the knowledge-based economy, the relationship between competition and patent policy as spurs to innovation has become increasingly important. The FTC, together with the Antitrust Division of the Department of Justice, held hearings over 24 days, with more than 300 participants, to explore this topic. A report will issue later this year.

In the next two years, the FTC will continue to address significant law enforcement and policy issues and to devote its resources to those areas in which it can have a major impact on behalf of consumers. With respect to the consumer protection mission, the focus will be on broad efforts to fight fraud and deception, as well as on consumer privacy and security initiatives, including efforts to address spam and ID theft. With respect to the competition mission, the FTC will continue merger and nonmerger policy development and law enforcement, with particular emphasis on health care, energy, high technology, and international issues.

This testimony addresses areas of FTC focus with discussions of specific activities and accomplishments on behalf of consumers. To further improve the FTC's ability to implement its mission and serve consumers, this testimony concludes with legislative recommendations to (1) eliminate the FTC Act's exemption for communications common carriers, (2) enact measures to improve the FTC's ability to combat cross-border fraud, (3) enact measures to improve the FTC's ability to combat spam, and (4) make technical changes to allow the agency to accept reimbursements and certain gifts and services that can enhance our mission performance.

## II. CONSUMER PROTECTION

### A. *Fraud and Deception*

The FTC targets the most pervasive types of fraud and deception in the marketplace, drawing substantially on data from Consumer Sentinel, the agency's award-winning consumer complaint database,<sup>2</sup> and from Internet "surfs" that focus on specific types of claims or solicitations that are likely to violate the law. Since April 1, 2002, the FTC has organized 12 joint law enforcement efforts ("sweeps") with more than 165 law enforcement partners.<sup>3</sup> These sweeps resulted in more than 400 law enforcement actions targeting Internet scams and telemarketing fraud, including deceptive work-at-home opportunities, deceptive health claims, advance-fee credit-related fraud, fundraising fraud, and Internet auction fraud. The FTC filed 70 of these law enforcement cases.

Overall, since April 2002, the FTC has filed more than 145 cases involving fraud or deception and has enjoyed significant success in obtaining redress orders to provide relief for defrauded consumers, with more than 65 final judgments to date or-

<sup>2</sup>In 2003, Consumer Sentinel was named one of the top 25 E-Government programs by the Industry Advisory Council and the Federal Chief Information Officer Council.

<sup>3</sup>The FTC works with various federal and state law enforcement agencies, as well as Canadian, Mexican, and other international authorities. See, e.g., FTC 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>>. See also FTC Press Release, *FTC, States Give "No Credit" to Finance Related Scams in Latest Joint Law Enforcement Sweep* (Sept. 5, 2002), available at <<http://www.ftc.gov/opa/2002/09/opnocredit.htm>>.

dering more than \$865 million in consumer redress.<sup>4</sup> The agency continues to ensure compliance with district court orders by bringing civil contempt proceedings when appropriate, and by assisting in criminal prosecution of FTC defendants who flagrantly violate court orders.

The FTC's actions against fraud and deception directly affect consumers. For example, in November 2002, the FTC finalized a consent order against Access Resource Services, Inc. and Psychic Readers Network, the promoters of "Miss Cleo" psychic services, who allegedly engaged in deceptive advertising, billing, and collection practices. The defendants stipulated to a court order requiring them to stop all collection efforts on accounts against consumers who purchased or purportedly purchased defendants' pay-per-call or audiotext services, to pay \$5 million in equitable relief, and to forgive an estimated \$500 million in outstanding consumer charges.<sup>5</sup>

In January 2003, the FTC obtained a permanent injunction against SkyBiz.com, Inc., an alleged massive international pyramid scheme. The final settlement includes \$20 million in consumer redress to be distributed to both domestic and foreign victims. The settlement also bans the principal individual defendants from multi-level marketing for a period of years.<sup>6</sup>

In March 2003, the FTC announced settlements with five individual defendants who allegedly engaged in deceptive charitable telemarketing by misrepresenting both the charities that donations would benefit and the percentage of donations that the charities would receive.<sup>7</sup> Between 1995 and early 1999, the defendants raised more than \$27 million. Among other terms of the settlements, defendant Mitchell Gold is subject to a \$10 million judgment. Following an FTC criminal referral, Gold was indicted for mail and wire fraud in connection with the fundraising business and another fraudulent telemarketing scheme. Gold pled guilty and was sentenced to 96 months in prison.

#### B. Consumer Privacy

The FTC will continue to devote significant resources to protecting consumer privacy. Consumers are deeply concerned about the security of their personal information, both online and offline. Although these concerns have been heightened by the rapid development of the Internet, they are by no means limited to the cyberworld. Consumers can be harmed as much by the thief who steals credit card information from a mailbox or from a discarded billing statement in the trash as by one who steals that information over the Internet. Of course, the nature of Internet technology raises its own special set of issues.

**1. Do-Not-Call.** As highlighted above, the FTC has initiated a national Do-Not-Call registry, a centralized database of telephone numbers of consumers who have asked to be placed on the list. The Do-Not-Call registry—part of the FTC's 2002 amendments to the TSR—will help consumers reduce the number of unwanted telemarketing phone calls.

**2. Identity Theft.** The FTC's toll-free number 1-877-ID-THEFT is the nation's central clearinghouse for identity theft complaints. Calls regarding identity theft have increased from more than 36,000 calls in FY 2000 to more than 185,000 calls in FY 2002. These complaints are available to the FTC's law enforcement partners through an online database, and now more than 620 law enforcement agencies can access this data. In addition, FTC investigators, working with the Secret Service, develop preliminary investigative reports that are referred to regional Financial Crimes Task Forces for possible prosecution.

Continuing a program begun in March 2002, the FTC, the Secret Service, and the Department of Justice ("DOJ") conduct training seminars to provide hundreds of local and state law enforcement officers with practical tools to combat identity theft. To date, the FTC and its partners have conducted six regional training sessions for 620 law enforcement officers.

The FTC also engages in extensive education of both businesses and consumers about preventing and responding to identity theft. One of the agency's most popular publications is "Identity Theft: When Bad Things Happen to Your Good Name."<sup>8</sup>

<sup>4</sup>This figure represents the amount of redress that has been ordered by the courts in more than 65 orders from April 2002 to May 2003. The figure does not represent the actual amount of money that has been or will be collected pursuant to those orders.

<sup>5</sup>*FTC v. Access Resource Services, Inc.*, Civ. Action No. 02-60226-CIV Gold/Simonton (S.D. Fla. Nov. 4, 2002).

<sup>6</sup>*FTC v. SkyBiz.com, Inc.*, Civ. Action No. 01-CV-396-EA (M) (N.D. Okla. Jan. 28, 2003).

<sup>7</sup>*FTC v. Mitchell Gold*, Civ. Action No. SAcv 98-968 DOC (Rzx) (C.D. Cal. Mar. 7, 2003).

<sup>8</sup>Since the FTC first published the booklet in February 2002, the FTC has distributed more than 1.2—million paper copies and logged more than 1 million "hits" accessing the booklet on the FTC web site. The publication is available at <<http://www.ftc.gov/bcp/online/pubs/credit/idtheft.htm>>.

**3. Safeguarding Consumer Information.** In May 2002, the FTC finalized an order settling charges that Eli Lilly & Company unintentionally disclosed e-mail addresses of users of its Prozac.com and Lilly.com sites as a result of failures 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 reasonably anticipated threats or risks to its security, confidentiality, or integrity.<sup>9</sup>

In December 2002, the FTC settled charges against Microsoft Corporation that, among other things, the company misrepresented the measures it used to maintain and protect the privacy and confidentiality of consumers' personal information collected through its Passport web services.<sup>10</sup> Microsoft has agreed to implement a comprehensive information security program for Passport and similar services. The FTC will continue to bring actions involving claims deceptively touting the privacy and security features of products and services, as well as failures to maintain adequate security for personal information.

In May 2002, the Commission finalized its Safeguards Rule to implement the security provisions of the Gramm-Leach-Bliley Act ("GLB").<sup>11</sup> The Rule establishes standards for financial institutions to maintain the security of customers' financial information, and became effective in May 2003. To help businesses comply with the Rule, the agency issued a new business education publication, and will conduct other initiatives to inform businesses of the Rule and provide compliance guidance.<sup>12</sup>

Commissioner Orson Swindle, in particular, has focused on issues involving information security. During the past year, he has served as head of the U.S. delegation to the Organization for Economic Cooperation and Development ("OECD") Experts Group for Review of the 1992 OECD Guidelines for the Security of Information Systems. The group released revised guidelines in August 2002 that consist of nine principles promoting a "culture of security."

The FTC has promoted the dissemination of these principles among industry and consumer groups. The FTC's consumer security web site, <[www.ftc.gov/infosecurity](http://www.ftc.gov/infosecurity)>, contains practical tips for staying secure online and features "Dewie the Turtle," a colorful cartoon mascot to promote effective online security. In addition, the FTC has worked with the White House Office of Cyberspace Security and the Department of Homeland Security to develop consumer awareness aspects of the National Strategy to Secure Cyberspace.

**4. Children's Online Privacy Protection Act ("COPPA").**<sup>13</sup> COPPA requires commercial web sites to give notice of their information practices and to obtain parental consent before collecting, using, or disclosing personal information about children under the age of 13. Since April 2001, the FTC has brought eight COPPA cases and obtained agreements requiring payment of civil penalties totaling more than \$350,000.<sup>14</sup> The two most recent cases involved settlements with Hershey Foods and Mrs. Fields.<sup>15</sup> Both companies agreed to settle charges that their web sites allegedly collected personal data from children without complying with COPPA requirements.

**5. Spam.** The problems caused by unsolicited commercial e-mail ("spam")<sup>16</sup> go well beyond the annoyance spam causes to the public. These problems include the fraudulent and deceptive content of most spam messages, the sheer volume of spam being sent across the Internet, and the security issues raised because spam can be used to disrupt service or as a vehicle for sending viruses.

In particular, deceptive spam is an ever-growing problem that the FTC is addressing through law enforcement efforts, consumer and business education, and re-

<sup>9</sup> *Eli Lilly & Co.*, Dkt. No. C-4047 (May 10, 2002).

<sup>10</sup> *Microsoft Corp.*, Dkt. No. C-4069 (Dec. 24, 2002).

<sup>11</sup> Standards for Safeguarding Customer Information; Final Rule, 67 Fed. Reg. 36,484 (May 23, 2002) (to be codified at 16 C.F.R. Part 314).

<sup>12</sup> FTC Facts for Businesses, Financial Institutions and Customer Data: Complying with the Safeguards Rule, available at <<http://www.ftc.gov/bcp/online/pubs/buspubs/safeguards.htm>>.

<sup>13</sup> 15 U.S.C. §§6501-6506.

<sup>14</sup> *United States v. Hershey Foods Corp.*, Civ. Action No. 4:03-cv-00350-JEJ (M.D. Pa. Feb. 26, 2003); *United States v. Mrs. Fields Famous Brands*, Civ. Action No. 2:03cv00205 (D. Utah Feb. 25, 2003); *United States v. The Ohio Art Co.*, Civ. Action No. 3:02CV7203 (N.D. Ohio Apr. 30, 2002); *United States v. American Pop Corn Co.*, Civ. Action No. C02-4008DEO (N.D. Iowa Feb. 28, 2002); *United States v. Lisa Frank, Inc.*, Civ. Action No. 01-1516-A (E.D. Va. Oct. 3, 2001); *United States v. Looksmart, Ltd.*, Civ. Action No. 01-606-A (E.D. Va. Apr. 23, 2001); *United States v. Bigmailbox.com, Inc.*, Civ. Action No. 01-605-A (E.D. Va. Apr. 23, 2001); *United States v. Monarch Servs., Inc.*, Civ. Action No. AMD 01 CV 1165 (D. Md. Apr. 20, 2001).

<sup>15</sup> *United States v. Hershey Foods Corp.*, Civ. Action No. 4:03-cv-00350-JEJ (M.D. Pa. Feb. 26, 2003); *United States v. Mrs. Fields Famous Brands*, Civ. Action No. 2:03cv00205 (D. Utah Feb. 25, 2003).

<sup>16</sup> Unsolicited commercial e-mail ("UCE" or "spam") is any commercial e-mail message that is sent—typically in bulk—to consumers without the consumers' prior request or consent.

search. An important tool the FTC uses to target law violations, identify trends, and conduct research for education is its spam database. Consumers forward spam they receive to the FTC database at [uce@ftc.gov](mailto:uce@ftc.gov). The database receives, on average, more than 110,000 e-mail messages each day, and currently contains a total of approximately 42 million pieces of spam.

In April 2003, the FTC released a report analyzing false claims made in spam. To prepare the report, the FTC staff reviewed a sample of approximately 1,000 pieces of spam, taken from a pool of more than 11 million e-mails in the FTC's database. Of the 1,000 pieces, 66 percent contained facial elements of deception in the "from" line, the "subject" line, or the text of the message.<sup>17</sup>

The FTC shares the database information with other federal and state law enforcement agencies to broaden the fight against deceptive spam. In November 2002, the FTC and 12 law enforcement partners brought 30 enforcement actions as part of an ongoing initiative to fight deceptive spam and Internet scams.<sup>18</sup> The FTC also announced, with ten participating agencies, a "Spam Harvest," a study designed to identify online actions that may put consumers at the greatest risk for receiving spam.<sup>19</sup>

The FTC recently settled an action against a company that allegedly profited from a particularly insidious spam scam. According to the complaint, the subject line of the e-mail said "Yahoo sweepstakes winner," and the message congratulated the recipient for being chosen as a winner of a prize in a recent Yahoo sweepstakes contest. Most often, the message mentioned that the prize was a Sony Playstation 2, making it particularly attractive to adolescents. But the message was not from Yahoo, and the recipients had not won anything. Instead, after clicking through five web pages, consumers were connected to a pornographic web site at a cost of up to \$3.00 a minute. The settlement enjoins the defendants from making misleading representations of material facts in e-mail and other marketing, including deceptive e-mail header information. The settlement also requires the defendants to prevent third parties that promote their videotext services, through e-mail or other means, from making deceptive statements.<sup>20</sup>

In April, the FTC filed an action against an allegedly illegal spam operation for using false return addresses, empty "reply-to" links, and deceptive subject lines to expose unsuspecting consumers, including children, to sexually explicit material.<sup>21</sup> The FTC alleged that the defendant used the spam in an attempt to drive business to an adult web site, "Married But Lonely." The FTC obtained a stipulated preliminary injunction to halt false or misleading spam.

The FTC recently hosted a three-day public forum to analyze the impact spam has on consumers' use of e-mail, e-mail marketing, and the Internet industry and to explore solutions in addition to law enforcement.<sup>22</sup> A major concern expressed at the forum was the dramatic rate at which spam is proliferating. For example, one ISP reported that in 2002, it experienced a 150 percent increase in spam traffic. America Online reported that it recently blocked 2.37 billion pieces of spam in a single day. Indeed, spam appears to be the marketing vehicle of choice for many fraudulent and deceptive marketers. In addition, and of particular concern, panelists noted that spam is increasingly used to disseminate malicious code such as viruses and "Trojan horses."

Solutions to the problems posed by spam will not be quick or easy; nor is one single approach likely to provide a cure. Instead, a balanced blend of technological fixes, business and consumer education, legislation, and enforcement will be required. Technology that empowers consumers in an easy-to-use manner is essential to getting immediate results for a number of frustrated end-users. Any solution to the problems caused by spam should contain the following elements:

1. Enhanced enforcement tools to combat fraud and deception;
2. Support for the development and deployment of technological tools to fight spam;
3. Enhanced business and consumer education; and
4. The study of business methods to reduce the volume of spam.

<sup>17</sup> FTC STAFF REPORT, FALSE CLAIMS IN SPAM (Apr. 2003), available at <http://www.ftc.gov/reports/spam/030429spamreport.pdf>. The remaining spam messages were not necessarily truthful, but they did not contain any obvious indicia of falsity.

<sup>18</sup> FTC Press Release, *Federal, State, and Local Law Enforcers Tackle Deceptive Spam and Internet Scams* (Nov. 13, 2002), available at <http://www.ftc.gov/opa/2002/11/netforce.htm>.

<sup>19</sup> See FTC Consumer Alert, *E-mail Address Harvesting: How Spammers Reap What You Sow* (Nov. 13, 2002), available at <http://www.ftc.gov/bcp/online/pubs/alerts/spamalert.htm>.

<sup>20</sup> *FTC v. BTV Indus.*, Civ. Action No. CV-S-02-0437-LRH-PAL (D. Nev. Jan. 6, 2003).

<sup>21</sup> *FTC v. Brian D. Westby*, Civ. Action No. 03-C-2540 (N.D. Ill. filed Apr. 15, 2003).

<sup>22</sup> Draft transcripts of the forum are available at <http://www.ftc.gov/bcp/workshops/spam/index.html>.

The Commission's legislative recommendations, outlined in Part IV, would enhance the agency's enforcement tools for fighting spam. In addition, the FTC will continue vigorous law enforcement and reach out to key law enforcement partners through the creation of a Federal/State Spam Task Force to strengthen cooperation with criminal authorities. The Task Force can help to overcome some of the obstacles that spam prosecutions present to law enforcement authorities. For example, in some instances, state agencies spent considerable front-end investigative resources to find a spammer, only to discover at the back end that the spammer was located outside the state's jurisdiction. State and federal agencies recognize the need to share the information obtained in investigations, so that the agency best placed to pursue the spammer can do so more efficiently and quickly. The Task Force should facilitate this process. Further, it can serve as a forum to apprise participating agencies of the latest spamming technology, spammer ploys, and investigational techniques.

Through the Task Force, the FTC will reach out not only to its civil law enforcement counterparts on the state level, but also to federal and state criminal authorities. Although few criminal prosecutions involving spam have occurred to date,<sup>23</sup> criminal prosecution may well be appropriate for the most egregious conduct. The FTC and its partners in criminal law enforcement agencies continue to work to assess existing barriers to successful criminal prosecutions. The FTC will explore whether increased coordination and cooperation with criminal authorities would be helpful in stopping the worst actors.

Improved technological tools will be an essential part of any solution as well. A great deal of spam is virtually untraceable, and an increasing amount crosses international boundaries. Panelists estimated that from 50 percent to 90 percent of e-mail is untraceable, either because it contains falsified routing information or because it comes through open relays or open proxies.<sup>24</sup> Because so much spam is untraceable, technological development will be an important element in solving spam problems. To this end, the FTC will continue to encourage industry to meet this challenge.

Action by consumers and businesses who may receive spam will be a crucial part of any solution to the problems caused by spam. A key component of the FTC's efforts against spam is educating consumers and businesses about the steps they can take to decrease the amount of spam they receive. The FTC's educational materials provide guidance on how to decrease the chances of having an e-mail address harvested and used for spam, and suggest several other steps to decrease the amount of spam an address may receive. The FTC's educational materials on spam are available on the FTC website.<sup>25</sup>

Finally, several initiatives for reducing the overwhelming volume of spam were discussed at the FTC's Spam Forum. At this point, questions remain about the feasibility and likely effectiveness of these initiatives. The FTC intends to continue its active role as catalyst and monitor of technological innovation and business approaches to addressing spam.

**6. Pretexting.** Through its Section 5 authority as well as its jurisdiction under the GLB Act, the FTC is also combating "pretexting," the use of false pretenses to

<sup>23</sup> See, e.g., *United States v. Barrero*, Crim. No. 03-30102-01 DRH (S.D. Ill. 2003) (guilty plea entered May 12, 2003). Like the related case, *FTC v. Stuffingforcash.com Corp.*, Civ. Action No. 02 C 5022 (N.D. Ill. Jan. 30, 2003), the allegations in this criminal prosecution were based on fraud in the seller's underlying business transaction.

<sup>24</sup> An open relay is an e-mail server that is configured to accept and transfer e-mail on behalf of any user anywhere, including unrelated third parties, which allows spammers to route their e-mail through servers of other organizations, disguising the origin of the e-mail. An open proxy is a mis-configured proxy server through which an unauthorized user can connect to the Internet. Spammers use open proxies to send spam from the computer network's ISP or to find an open relay.

Brightmail recently estimated that 90% of the e-mail that it analyzed was untraceable. Two panelists at the forum estimated that 40% to 50% of the e-mail it analyzed came through open relays or open proxies, making it virtually impossible to trace. Even when spam cannot be traced technologically, however, enforcement is possible. In some cases, the FTC has followed the money trail to pursue sellers who use spam. The process is resource intensive, frequently requiring a series of ten or more CIDs to identify and locate the seller in the real world. Frequently the seller and the spammer are different entities. In numerous instances, FTC staff cannot initially identify or locate the spammer and can only identify and locate the seller. In many of those cases, in the course of prosecuting the seller, staff has, through discovery, sought information about the spammer who actually sent the messages. This, too, involves resource-intensive discovery efforts. While the FTC actions have focused more on deception in the content of the spam *message*, recent actions have begun to attack deception in the sending of spam. As discussed above, the FTC has brought law enforcement actions targeting false subject lines and false "from" lines.

<sup>25</sup> See <<http://www.ftc.gov/spam>>.

obtain customer financial information. The agency has obtained stipulated court orders to halt these practices<sup>26</sup> and has sent warning letters to nearly 200 others about apparent violations of the GLB pretexting prohibitions.

### C. Deceptive Lending Practices

As highlighted above, the FTC has been aggressive in its fight against deceptive lending practices. Unscrupulous lenders can deceive consumers about loan terms, rates, and fees, and the resulting injury can be severe—including the loss of a home. Over the last year, the FTC has obtained settlements for nearly \$300 million in consumer redress for deceptive lending practices and other related law violations. The FTC has settled cases against Associates First Capital Corporation (now owned by Citigroup)<sup>27</sup> for alleged deceptive sales of credit insurance and alleged violations of the Equal Credit Opportunity Act<sup>28</sup> and the Fair Credit Reporting Act;<sup>29</sup> against First Alliance Mortgage<sup>30</sup> for alleged deceptive loan terms and origination fees; and against Mercantile Mortgage<sup>31</sup> for alleged deception of consumers about loan terms and alleged violations of the Truth in Lending Act.<sup>32</sup> In addition to monetary relief, the Mercantile settlement gives hundreds of consumers the opportunity to refinance loans at low or no cost.<sup>33</sup>

### D. Health Fraud and Deception

Truthful and substantiated advertising can serve as an important source of useful information for consumers about health care. Inaccurate information, on the other hand, can cause serious financial as well as physical harm. For that reason, combating deceptive health claims, both online and off, continues to be a priority for the FTC.

**1. Dietary Supplements.** Challenging misleading or unsubstantiated claims in the advertisement of dietary supplements is a significant part of the FTC's consumer protection agenda. During the past decade, the FTC has filed more than 80 law enforcement actions challenging false or unsubstantiated claims about the efficacy or safety of a wide variety of supplements.<sup>34</sup> The agency focuses its enforcement priorities on claims for products with unproven benefits or that present significant safety concerns to consumers, and on deceptive or unsubstantiated claims that products treat or cure serious diseases. The FTC has taken action against all parties responsible for the deceptive marketing, including manufacturers, advertising agencies, infomercial producers, distributors, retailers, and endorsers.

**2. Weight Loss Advertising.** Since the 1990s, the FTC has filed nearly 100 cases challenging false or misleading claims for all types of weight loss products, including over-the-counter drugs, dietary supplements, commercial weight loss centers, weight loss devices, and exercise equipment.<sup>35</sup> In September 2002, the FTC issued a "Report on Weight-Loss Advertising: An Analysis of Current Trends,"<sup>36</sup> which concludes that false or misleading claims for weight loss products are widespread and, despite

<sup>26</sup> *FTC v. Information Search, Inc.*, Civ. Action No. AMD 01 1121 (D. Md. Mar. 15, 2002); *FTC v. Guzzetta*, Civ. Action No. CV-01-2335 (E.D.N.Y. Feb. 25, 2002); *FTC v. Garrett*, Civ. Action No. H 01-1255 (S.D. Tex. Mar. 25, 2003).

<sup>27</sup> *FTC v. Associates First Capital Corp.*, Civ. Action No. 1:01-CV-00606 JTC (N.D. Ga. Feb. 26, 2002).

<sup>28</sup> 15 U.S.C. §§1691-1691f, as amended.

<sup>29</sup> *Id.* §§1681-1681(u), as amended.

<sup>30</sup> *FTC v. First Alliance Mortgage Co.*, Civ. Action No. SACV 00-964 DOC (MLGx) (C.D. Calif. Nov. 26, 2002).

<sup>31</sup> *U.S. v. Mercantile Mortgage Co.*, Civ. Action No. 02C 5079 (N.D. Ill. Aug. 15, 2002).

<sup>32</sup> 15 U.S.C. §§1601-1667f, as amended.

<sup>33</sup> The FTC continues its litigation against Chicago-area mortgage broker Mark Diamond and against D.C.-area mortgage lender Capital City Mortgage Corporation. *FTC v. Mark Diamond*, Civ. Action No. 02C-5078 (N.D. Ill. filed Nov. 1, 2002); *FTC v. Capital City Mortgage Corp.*, Civ. Action No. 1: 98-CV-00237 (D.D.C. Jan. 29, 1998). The *Diamond* case represents the FTC's first litigated case against a mortgage broker. In *Capital City*, the FTC alleges that Capital City deceived consumers into taking out high-rate, high-fee loans and then foreclosed on consumers' homes when they could not afford to pay.

<sup>34</sup> See, e.g., *FTC v. Dr. Clark Research Ass'n*, Civ. Action No. 1-03-00054-TRA (N.D. Ohio Jan. 8, 2003); *FTC v. Vital Dynamics*, Civ. Action No. 02-CV-9816 (C.D. Calif. Jan. 17, 2003) (consent decree); *FTC v. Rexall Sundown, Inc.*, Civ. Action No. 00-CV-7016 (S.D. Fla. Mar. 11, 2003) (proposed consent decree subject to court approval).

<sup>35</sup> See, e.g., *Enforma Natural Prods., Inc.*, Civ. Action No. 2:00cv04376JSL (CWx) (C.D. Cal. Dec. 9, 2002) (consent decree); *Weider Nutrition Int'l*, Dkt. No. C-3983, 2001 WL 1717579 (Nov. 15, 2000); *FTC v. SlimAmerica, Inc.*, 77 F. Supp. 2d 1263 (S.D. Fla. 1999); *Jenny Craig, Inc.*, 125 F.T.C. 333 (1998) (consent order); *Weight Watchers Int'l, Inc.*, 124 F.T.C. 610 (1997) (consent order); *NordicTrack, Inc.*, 121 F.T.C. 907 (1996) (consent order).

<sup>36</sup> FTC STAFF REPORT, WEIGHT LOSS ADVERTISING: AN ANALYSIS OF CURRENT TRENDS (Sept. 2002), available at <<http://www.ftc.gov/bcp/reports/weightloss.pdf>>.

an unprecedented level of FTC enforcement activity, appear to have increased over the last decade.

The FTC continues to explore ways to reduce the number of deceptive weight loss claims. On November 19, 2002, the FTC held a public workshop on the Advertising of Weight Loss Products.<sup>37</sup> Workshop participants included government officials, scientists, public health groups, marketers of weight loss products, advertising professionals, and representatives of the media. Participants explored both the impact of deceptive weight loss product ads on the public health and new approaches to fighting the proliferation of misleading claims, including a more active role for the media in screening out patently false weight loss advertising. Also, in an opinion piece in *Advertising Age*, **Commissioner Sheila Anthony noted that the FTC cannot solve this problem alone and challenged the industry and the media to play their part.**<sup>38</sup>

#### *E. Cross-Border Consumer Protection*

The Internet and electronic commerce know no boundaries, and cross-border fraud is a growing problem for consumers and businesses in the U.S. and abroad. During 2002, approximately 14% of the complaints collected in the Consumer Sentinel complaint database involved a cross-border element. The number of FTC cases involving offshore defendants, offshore evidence, or offshore assets also has increased. In 2002, the FTC brought approximately 22 law enforcement actions involving cross-border fraud.

Those who defraud consumers take advantage of the special problems faced by law enforcers in acting against foreign companies, including difficulties in sharing information with foreign law enforcement agencies, exercising jurisdiction, and enforcing judgments abroad. Thus, law enforcers worldwide, now more than ever, need to cooperate and expand their consumer protection efforts.

To address the growing problem of cross-border fraud, in October 2002, Chairman Muris announced a Five-Point Plan to Combat Cross-Border Fraud. Since then, the FTC has been implementing this plan by:

- **Developing OECD guidelines on cross-border fraud.** Commissioner Mozelle Thompson of the FTC chairs the OECD Committee on Consumer Policy and leads the U.S. delegation to the Committee, which is developing guidelines for international cooperation concerning cross-border fraud. The FTC is working with its foreign counterparts, and soon expects to finalize these guidelines.
- **Strengthening bilateral and multilateral relationships.** The FTC already has bilateral consumer protection cooperation agreements with agencies in Australia, Canada, and the U.K., and is working to strengthen these relationships and develop new ones. The FTC also participates in a network of consumer protection enforcement officials from more than 30 countries. Finally, the FTC has joined other agencies in various cross-border task forces, such as the Toronto Strategic Partnership, Project Emptor with British Columbia authorities, and MUCH—the Mexico-U.S.-Canada Health fraud task force. In the past year, the FTC has announced numerous joint law enforcement actions taken with the assistance of these task forces, including actions involving credit card loss protection,<sup>39</sup> advance fee credit cards,<sup>40</sup> and bogus cancer clinics.<sup>41</sup>
- **Continuing public-private partnerships.** The FTC continues to ask responsible industry to help fight cross-border fraud, which hurts businesses as well as consumers. The FTC held a workshop on this issue in February 2003 and continues to work with the private sector to follow up on some ideas discussed at the workshop, including better sharing of information between the private sector and the FTC.
- **Providing technical assistance.** The FTC wants to ensure that no developing country becomes a haven for fraud. Therefore, it is conducting U.S. AID-funded technical assistance on consumer protection issues in various developing countries. Last year, the FTC conducted technical assistance missions for consumer protection authorities from 13 Eastern European countries, including Hungary and Slovenia. This year, the FTC is planning to conduct missions in Romania, Russia, and Peru.

<sup>37</sup> See Public Workshop: Advertising of Weight Loss Products, 67 Fed. Reg. 59,289 (Sept. 20, 2002).

<sup>38</sup> Commissioner Sheila Anthony, Let's clean up the diet-ad mess, *Advertising Age*, Feb. 3, 2003, at 18.

<sup>39</sup> *FTC v. STF Group*, Civ. Action No. 03-C-0977 (N.D. Ill. filed Feb. 10, 2003).

<sup>40</sup> *FTC v. Pacific First Benefit, LLC*, Civ. Action No. 02-C-8678 (N.D. Ill. filed Dec. 2, 2003).

<sup>41</sup> *FTC v. CSCT, Inc.*, Civ. Action No. 03-C-00880 (N.D. Ill. filed Feb. 6, 2003).

- **Recommending proposals for legislative amendments.** Many of the challenges the FTC faces in combating cross-border fraud might best be addressed through legislative changes. The FTC's proposals for legislative changes are described in Section IV of this testimony.

#### *F. Initiatives Designed to Reach Specific Consumer Groups*

The FTC has implemented a variety of initiatives that assist particular consumer groups, including children, Spanish-speaking consumers, and military personnel and their families.

1. *Protecting Children.* The agency maintains an active program to monitor, report on, and provide educational materials about marketing activities affecting children. The FTC continues to monitor the marketing of violent entertainment products to children. Since September 2000, the agency has issued a series of reports on this issue.<sup>42</sup> The FTC intends to issue a fourth follow-up report on the industries' practices. The staff also is working with retailer trade groups to devise a consumer education message for parents, and is preparing to hold a public workshop on these issues later this year.

The FTC also conducted an informal survey of online gambling sites and published a consumer alert warning parents and their children that online gambling can pose huge risks, including money loss, impaired credit ratings, and addiction to gambling.<sup>43</sup>

Finally, the FTC monitors alcohol advertising to ensure that ads for these products do not involve potentially unfair or deceptive practices, including the targeting of alcohol advertisements to minors. In response to a Congressional request, the agency will prepare reports on two subjects related to alcohol advertising and youth: (1) the impact on underage consumers of the significant expansion of ads for new alcoholic beverages, and (2) the industry's response to recommendations for improved self-regulation contained in the FTC's 1999 report to Congress.<sup>44</sup>

2. *Spanish-Speaking Consumers.* In FY 2002, the FTC instituted a Hispanic Outreach Program, which resulted in hiring a Hispanic Outreach Coordinator. This effort includes the creation of a dedicated page on the FTC site, Protection Para el Consumidor ("Consumer Protection"), which mirrors the English version of the consumer protection page and provides Spanish translations of several popular consumer education publications. The FTC also has created an online Spanish-language consumer complaint form and has undertaken outreach efforts to Hispanic media.

In addition, the FTC has taken action against alleged law violations affecting Spanish-speaking consumers. The agency settled a civil penalty action against a Houston-based debt collection company for alleged violations of the rights of Spanish- and English-speaking consumers under the Fair Debt Collection Practices Act.<sup>45</sup> The settlement requires, among other things, that the company make disclosures in Spanish where applicable.

3. *Military Sentinel.* In September 2002, the FTC and the Department of Defense ("DOD") launched Military Sentinel, the first online consumer complaint database tailored to the unique needs of the military community. The system offers members of the military and their families a way to file complaints and gain immediate access to the FTC's full range of educational materials and information.<sup>46</sup> It also gives DOD and law enforcement officers secure access to the complaints entered into the database.

<sup>42</sup> FTC, *MARKETING VIOLENT ENTERTAINMENT TO CHILDREN: A REVIEW OF SELFREGULATION AND INDUSTRY PRACTICES IN THE MOTION PICTURE, MUSIC RECORDING & ELECTRONIC GAME INDUSTRIES* (Sept. 2000), available at <<http://www.ftc.gov/reports/violence/vioreport.pdf>>; FTC, *MARKETING VIOLENT ENTERTAINMENT TO CHILDREN: A SIXMONTH FOLLOWUP 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>>; FTC, *MARKETING VIOLENT ENTERTAINMENT TO CHILDREN: A ONEYEAR FOLLOWUP 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>>; FTC, *MARKETING VIOLENT ENTERTAINMENT TO CHILDREN: A TWENTY-ONE MONTH FOLLOWUP REVIEW OF INDUSTRY PRACTICES IN THE MOTION PICTURE, MUSIC RECORDING & ELECTRONIC GAME INDUSTRIES* (June 2002), available at <<http://www.ftc.gov/reports/violence/mvcrpt0206.pdf>>.

<sup>43</sup> FTC Consumer Alert, *Online Gambling and Kids: A Bad Bet* (June 26, 2002), available at <<http://www.ftc.gov/bcp/conline/pubs/alerts/olgamble.htm>>.

<sup>44</sup> Conference Report on the Omnibus Appropriations Bill for FY 2003, H. Rep. No. 108-10 (Feb. 13, 2003).

<sup>45</sup> *United States v. United Recovery Systems, Inc.*, Civ. Action No. H-02-1410 (sl) (S.D. Tex. Apr. 22, 2002).

<sup>46</sup> FTC Facts for Consumers, *Military Sentinel: Fact Sheet*, available at <<http://www.ftc.gov/bcp/conline/pubs/general/milsent—fact.htm>>.



## III. MAINTAINING COMPETITION

The FTC's competition mission, as its name suggests, promotes competition in the marketplace to give consumers the best products at the lowest prices. The FTC employs a variety of tools to promote and protect competition: in addition to enforcing the antitrust laws, the agency holds workshops, conducts studies, writes reports, and monitors the marketplace. The agency will continue to focus both its law enforcement activity and other initiatives in key sectors of the economy, such as health care, energy, and high-tech industries. The global economy also requires the FTC's competition mission, like its consumer protection mission, to be increasingly concerned with international issues.

## A. Health Care

The health care sector remains enormously important to both consumers and the national economy. Health-related products and services account for more than 15 percent of the U.S. gross domestic product ("GDP"), and that share has grown by about 25 percent since 1990. Without effective antitrust enforcement, health costs would be greater and the share of GDP would be even higher.

**1. Prescription Drugs.** As previously mentioned, the FTC recently reached a major settlement with Bristol-Myers Squibb ("BMS") to resolve charges that BMS engaged in a series of anticompetitive acts over the past decade to obstruct entry of low-price generic competition for three of BMS's widely-used pharmaceutical products: two anti-cancer drugs, Taxol and Platinol, and the anti-anxiety agent BuSpar.<sup>47</sup> Among other things, the FTC's complaint alleged that BMS abused FDA regulations to obstruct generic competitors; misled the FDA about the scope, validity, and enforceability of patents to secure listing in the FDA's "Orange Book" list of approved drugs and their related patents; breached its duty of good faith and candor with the U.S. Patent and Trademark Office ("PTO"), while pursuing new patents claiming these drugs; filed baseless patent infringement suits against generic drug firms that sought FDA approval to market lower-priced drugs; and paid a would-be generic rival \$72.5 million to abandon its legal challenge to the validity of a BMS patent and to stay out of the market until the patent expired. Because of BMS's alleged pattern of anticompetitive conduct and the extensive resulting consumer harm, the Commission's proposed order necessarily contains strong—and in some respects unprecedented—relief.<sup>48</sup>

The settlement with BMS represents the latest FTC milestone in settlements regarding allegedly anticompetitive conduct by branded or generic drug manufacturers designed to delay generic entry. Other recent FTC successes in this area include:

- **Biovail.** An October 2002 consent order settling charges that Biovail Corporation illegally acquired a license to a patent and improperly listed the patent in the FDA's Orange Book as claiming Biovail's high blood pressure drug Tiazac (under current law, the listing of the patent and the subsequent lawsuit brought by Biovail against a potential generic entrant triggered an automatic 30-month stay of FDA approval of the generic competitor);<sup>49</sup> and
- **Biovail/Elan.** An August 2002 settlement with Biovail and Elan Corporation, plc resolving charges that the companies entered into an agreement that provided substantial incentives for the two companies not to compete in the markets for 30 milligram and 60 milligram dosage strengths of the generic drug Adalat CC (an anti-hypertension drug).<sup>50</sup>

**2. Health Care Providers.** For decades, the FTC has worked to facilitate innovative and efficient arrangements for the delivery and financing of health care services by challenging artificial barriers to competition among health care providers. These efforts continue. In the last year, the FTC settled with seven groups of physicians for allegedly colluding to raise consumers' costs.<sup>51</sup> These settlements involved significant numbers of doctors—more than 1,200 in a case in the Dallas-Fort Worth

<sup>47</sup> *Bristol-Myers Squibb Co.*, Dkt. No. C-4076 (Apr. 14, 2003).

<sup>48</sup> The proposed order includes a provision prohibiting BMS from triggering a 30-month stay for any BMS product based on any patent BMS lists in the Orange Book after the filing of an application to market a generic drug.

<sup>49</sup> *Biovail Corp.*, Dkt. No. C-4060 (Oct. 2, 2002).

<sup>50</sup> *Biovail Corp. and Elan Corp.*, Dkt. No. C-4057 (Aug. 15, 2002).

<sup>51</sup> *Grossmont Anesthesia Servs. Med. Group, Inc.*, File No. 021-0006 (May 30, 2003) (agreement accepted for public comment); *Anesthesia Serv. Med. Group, Inc.*, File No. 021-0006 (May 30, 2003) (agreement accepted for public comment); *Carlsbad Physicians*, File No. 031-0002 (May 2, 2003) (agreement accepted for public comment); *System Health Providers*, Dkt. No. C-4064 (Oct. 24, 2002); *R.T. Welter & Assoc., Inc.* (Professionals in Women's Care), Dkt. No. C-4063 (Oct. 8, 2002); *Physician Integrated Servs. of Denver, Inc.*, Dkt. No. C-4054 (July 16, 2002); *Aurora Associated Primary Care Physicians, L.L.C.*, Dkt. No. C-4055 (July 16, 2002).

area and more than three-quarters of all doctors in the Carlsbad, New Mexico area. The Commission's orders put a stop to allegedly collusive conduct that harms employers, individual patients, and health plans by depriving them of the benefits of competition in the purchase of physician services.

**3. Health Care Mergers.** The FTC has taken action regarding a number of proposed mergers in the health care sector to ensure that consumers continue to receive the benefits of competitive markets. In April, the Commission reached a settlement with Pfizer Inc., the largest pharmaceutical company in the United States, and Pharmacia Corporation to resolve concerns that their \$60 billion merger would harm competition in nine separate and wide-ranging product markets, including drugs to treat overactive bladder, symptoms of menopause, skin conditions, coughs, motion sickness, erectile dysfunction, and three different veterinary conditions.<sup>52</sup> Annual sales in the nine product markets currently total more than \$3 billion. The settlement will require divestitures to protect consumers' interests in those markets while allowing the remainder of the transaction to go forward.

Other recent health care mergers investigated by the FTC include:

- **Cytyc/Digene.** In June 2002, the Commission authorized the staff to seek a preliminary injunction blocking Cytyc Corporation's proposed acquisition of Digene Corporation,<sup>53</sup> involving the merger of two manufacturers of complementary cervical cancer screening tests. The complaint alleged that the combined firm would have an incentive to use its market power in one product to stifle increased competition in the complementary product's market. Thus, if the merger had been consummated, rivals would have been substantially impeded from competing. Following the Commission's decision, the parties abandoned the transaction.
- **Baxter/Wyeth.** The FTC alleged that Baxter International's \$316 million acquisition of Wyeth Corporation raised competitive concerns in markets for a variety of drugs. Of particular concern were the \$400 million market for propofol, a general anesthetic commonly used for the induction and maintenance of anesthesia during surgery, and the \$225 million market for new injectable iron replacement therapies used to treat iron deficiency in patients undergoing hemodialysis.<sup>54</sup> To settle this matter, the parties agreed to divestitures that are expected to maintain competition in those markets.
- **Amgen/Immunex.** The FTC obtained an agreement settling allegations that Amgen Inc.'s \$16 billion acquisition of Immunex Corporation would reduce competition for three important biopharmaceutical products: (1) neutrophil regeneration factors used to treat a dangerously low white blood cell count that often results from chemotherapy; (2) tumor necrosis factors used to treat rheumatoid arthritis, Crohn's disease, and psoriatic arthritis; and (3) interleukin-1 inhibitors used in the treatment of rheumatoid arthritis.<sup>55</sup> The settlement required that the companies divest certain assets and license certain intellectual property rights in these markets.

**4. Promoting Competition in Prescription Drugs.** The FTC also has sought to promote competition in the pharmaceutical industry through published reports and speeches. Commissioner Leary has a special interest in pharmaceutical competition and has addressed this topic in speeches to solicit input from affected parties and to promote dialogue regarding practical solutions.<sup>56</sup>

In July 2002, the FTC issued a report entitled "Generic Drug Entry Prior to Patent Expiration: An FTC Study,"<sup>57</sup> which evaluated whether the Hatch-Waxman Amendments to the Federal Food, Drug, and Cosmetic Act are susceptible to strategies to delay or deter consumer access to generic alternatives to brand-name drug products. The report recommended changes in the law to ensure that generic entry is not delayed unreasonably, including through anticompetitive activity. In October 2002, President Bush directed the FDA to implement one of the key findings identi-

<sup>52</sup> *Pfizer Inc.*, Dkt. No. C-4075 (Apr. 14, 2003) (proposed consent agreement accepted for public comment).

<sup>53</sup> FTC 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>>.

<sup>54</sup> *Baxter International Inc. and Wyeth*, Dkt. No. C-4068 (Feb. 3, 2003).

<sup>55</sup> *Amgen Inc. and Immunex Corp.*, Dkt. No. C-4056 (Sept. 3, 2002).

<sup>56</sup> See Thomas B. Leary, *Antitrust Issues in Settlement of Pharmaceutical Patent Disputes* (Nov. 3, 2000), available at <<http://www.ftc.gov/speeches/leary/learypharma.htm>>; Thomas B. Leary, *Antitrust Issues in the Settlement of Pharmaceutical Patent Disputes, Part II* (May 17, 2001), available at <<http://www.ftc.gov/speeches/leary/learypharmaceuticalsettlement.htm>>.

<sup>57</sup> *GENERIC DRUG ENTRY PRIOR TO PATENT EXPIRATION: AN FTC STUDY* (July 2002), available at <<http://www.ftc.gov/opa/2002/07/genericdrugstudy.htm>>.

fied in the FTC study.<sup>58</sup> Specifically, the FDA has proposed a new rule to curb one of the abuses uncovered by the FTC study—pharmaceutical firms’ alleged misuse of the Hatch-Waxman patent listing provisions—to speed consumer access to lower-cost generic drugs.<sup>59</sup>

**5. Hearings on Health Care and Competition Law and Policy.** To keep abreast of developments in the dynamic health care market, the FTC, working with DOJ’s Antitrust Division, commenced a series of hearings on “Health Care and Competition Law and Policy” on February 26, 2003.<sup>60</sup> Over a seven-month period, the FTC and DOJ will spend almost 30 days of hearings in a comprehensive examination of a wide range of health care issues, involving hospitals, physicians, insurers, pharmaceuticals, long-term care, Medicare, and consumer information, among others. To date, the hearings have focused on the specific challenges and complications involved in applying competition law and policy to health care; issues involved in hospital merger cases and other joint arrangements, including geographic and product market definition; horizontal hospital networks and vertical arrangements with other health care providers; the competitive effects of mergers of health insurance providers; and consumer information and quality of care issues. A public report that incorporates the results of the hearings will be prepared after the hearings.

#### *B. Energy*

Antitrust law enforcement is critical in the oil and gas industry. Fuel price increases directly and significantly affect businesses of all sizes throughout the U.S. economy and can strain consumer budgets.

**1. Oil Merger Investigations.** In recent years, the FTC has investigated numerous oil mergers. When necessary, the agency has insisted on divestitures to cure potential harm to competition. In the most recent case, Conoco/Phillips, the Commission required the merged company to divest two refineries and related marketing assets, terminal facilities for light petroleum and propane products, and certain natural gas gathering assets.<sup>61</sup>

**2. Natural Gas Merger Investigations.** The FTC also has investigated mergers in the natural gas industry and taken necessary action to preserve competition. Just two weeks ago, the Commission accepted for public comment a consent order designed to preserve competition in the market for the delivery of natural gas to the Kansas City area.<sup>62</sup> The proposed order conditionally would allow Southern Union Company’s \$1.8 billion purchase of the Panhandle pipeline from CMS Energy Corporation, while requiring Southern Union to terminate an agreement under which one of its subsidiaries managed the Central pipeline, which competes with Panhandle in the market for delivery of natural gas to the Kansas City area. Absent the settlement agreement, the transaction would have placed the two pipelines under common ownership or common management and control, eliminating direct competition between them, and likely resulting in consumers’ paying higher prices for natural gas in the Kansas City area.

**3. Gasoline Monopolization Case.** As highlighted above, the Commission recently issued an administrative complaint in an important nonmerger case involving the Union Oil Company of California (“Unocal”).<sup>63</sup> The complaint alleges that Unocal violated Section 5 of the FTC Act by subverting the California Air Resources Board’s (“CARB”) regulatory standard-setting procedures of the late 1980s relating to low-emissions reformulated gasoline (“RFG”). According to the complaint, Unocal misrepresented to industry participants that some of its emissions research was non-proprietary and in the public domain, while at the same time pursuing a patent that would permit Unocal to charge royalties if CARB used such emissions information. The complaint alleged that Unocal did not disclose its pending patent claims and that it intentionally perpetuated the false and misleading impression that it would not enforce any proprietary interests in its emissions research results. The

<sup>58</sup> President Takes Action to Lower Prescription Drug Prices by Improving Access to Generic Drugs (Oct. 21, 2002), available at <<http://www.whitehouse.gov/news/releases/2002/10/200210212.html>>.

<sup>59</sup> Applications for FDA Approval to Market a New Drug: Patent Listing Requirements and Application of 30-Month Stays on Approval of Abbreviated New Drug Applications Certifying That a Patent Claiming a Drug Is Invalid or Will Not Be Infringed; Proposed Rule, 67 Fed. Reg. 65448 (Oct. 24, 2002).

<sup>60</sup> The FTC web site for the hearings is <http://www.ftc.gov/ogc/healthcarehearings/index.htm>. To date, the FTC has released a detailed agenda for the hearings’ sessions in February through June. All of the documents relating to the hearings appear on the web site.

<sup>61</sup> *Conoco Inc. and Phillips Petroleum Company*, Dkt. No. C-4058 (Feb. 7, 2003) (consent order).

<sup>62</sup> *Southern Union Co.*, File No. 031-0068 (May 29, 2003) (agreement accepted for public comment).

<sup>63</sup> *Union Oil Co. of California*, Dkt. No. 9305 (complaint issued Mar. 4, 2003).

complaint states that Unocal's conduct has allowed it to acquire monopoly power for the technology to produce and supply California "summer-time" RFG, a low-emissions fuel mandated for sale in California from March through October, and could cost California consumers five cents per gallon in higher gasoline prices. This case is pending before an Administrative Law Judge.

**4. Study of Refined Petroleum Product Prices.** Building on its enforcement experience in the petroleum industry, the FTC is studying the causes of volatility in refined petroleum products prices. In two public conferences, held in August 2001 and May 2002,<sup>64</sup> participants discussed key factors that affect product prices, including increased dependency on foreign crude sources, changes in industry business practices, and new governmental regulations. The information gathered through these public conferences will form the basis for a report to be issued later this year.

**5. Gasoline Price Monitoring.** In May 2002, the FTC announced a project to monitor wholesale and retail prices of gasoline in an effort to identify possible anticompetitive activities to determine if a law enforcement investigation would be warranted. This project tracks retail gasoline prices in approximately 360 cities nationwide and wholesale (terminal rack) prices in 20 major urban areas. The FTC Bureau of Economics staff receives daily data purchased from the Oil Price Information Service ("OPIS"), a private data collection company. The economics staff uses an econometric (statistical) model to determine whether current retail and wholesale prices each week are anomalous in comparison with historical data. This model relies on current and historical price relationships across cities, as well as other variables.

As a complement to the analysis based on OPIS data, the FTC staff also regularly reviews reports from the Department of Energy's Consumer Gasoline Price Hotline, searching for prices significantly above the levels indicated by the FTC's econometric model or other indications of potential problems. Throughout most of the past two years, gasoline prices in U.S. markets have been within their predicted normal bounds. Of course, the major factor affecting U.S. gasoline prices is the substantial fluctuation in crude oil prices. Prices outside the normal bounds trigger further staff inquiry to determine what factors might be causing price anomalies in a given area. These factors could include supply disruptions such as refinery or pipeline outages, changes in taxes or fuel specifications, unusual changes in demand due to weather conditions and the like, and possible anticompetitive activity.

To enhance the Gasoline Price Monitoring Project, the FTC has recently asked each state Attorney General to forward to the FTC's attention consumer complaints they receive about gasoline prices. The staff will incorporate these complaints into its ongoing analysis of gasoline prices around the country, using the complaints to help locate price anomalies outside of the 360 cities for which the staff already receives daily pricing data.

The goal of the Monitoring Project is to alert the FTC to unusual changes in gasoline prices so that further inquiry can be undertaken expeditiously. When price increases do not appear to have market-driven causes, the FTC staff will consult with the Energy Information Agency of the Department of Energy. The FTC staff also will contact the offices of the appropriate state Attorneys General to discuss the anomaly and the appropriate course for any further inquiry, including the possible opening of a law enforcement investigation.

### *C. High Technology*

With its history of keeping pace with marketplace developments, the FTC is well-positioned to take a leading role in assessing the impact of technology on domestic and world markets. In addition to bringing enforcement actions in high tech areas, the FTC is studying the impact of the Internet and intellectual property on competition law and policy.

**1. Standard-Setting Cases.** As technology advances, efforts will increase to establish industry standards for the development and manufacture of new products. Standard setting is often procompetitive, but anticompetitive abuses can take place during the standard-setting process. When the standard-setting process appears to have been subverted, the FTC will take action. In addition to Unocal, discussed previously, the agency is currently conducting an administrative adjudication regarding Rambus, Inc. A June 2002 complaint alleges that Rambus, a participant in an electronics standard-setting organization, failed to disclose—in violation of the organiza-

<sup>64</sup> FTC Press Release, *FTC to Hold Public Conference/Opportunity for Comment on U.S. Gasoline Industry in Early August* (July 12, 2001), available at <<http://www.ftc.gov/opa/2001/07/gasconf.htm>>; FTC Press Release, *FTC Chairman Opens Public Conference Citing New Model To Identify and Track Gasoline Price Spikes, Upcoming Reports* (May 8, 2002), available at <<http://www.ftc.gov/opa/2002/05/gcr.htm>>.

tion's rules—that it had a patent and several pending patent applications on technologies that eventually were adopted as part of the industry standard.<sup>65</sup> 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 Commission'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.<sup>66</sup> Because standard-setting abuses can harm robust and efficiency-enhancing competition in high tech markets, the FTC will continue to pursue investigations in this area.<sup>67</sup>

**2. Intellectual Property Hearings.** In 2002, the FTC and DOJ commenced a series of ground-breaking hearings on "Competition and Intellectual Property Law and Policy in the Knowledge-Based Economy."<sup>68</sup> These hearings, which took place throughout 2002 and were held in Washington and Silicon Valley, heard testimony from academics, industry leaders, technologists and others about the increasing need to manage the issues at the intersection of competition and intellectual property law and policy. The FTC anticipates releasing a report on its findings later this year.

**3. Internet Task Force.** In 2001, the FTC's Internet Task Force began to evaluate potentially anticompetitive regulations and business practices that could impede e-commerce. The Task Force has discovered that some state regulations may have the effect of protecting existing bricks-and-mortar businesses from new Internet competitors. The Task Force also is considering whether private companies may be hindering e-commerce through the use of potentially anticompetitive tactics. In October 2002, the Task Force held a public workshop to: (1) enhance the FTC's understanding of these issues; (2) educate policymakers about the potential anticompetitive effects of state regulations; and (3) educate private entities about the types of business practices that may be viewed as problematic.<sup>69</sup>

#### *D. International Competition*

Because competition increasingly takes place in a worldwide market, cooperation with competition agencies in the world's major economies is a key component of the FTC's 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 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.

**1. ICN and ICPAC.** In the fall of 2001, the FTC, DOJ, and 12 other antitrust agencies from around the world launched the International Competition Network ("ICN"), an outgrowth of a recommendation of the International Competition Policy Advisory Committee ("ICPAC"). ICPAC suggested 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. The 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-seven jurisdictions already have joined the ICN, and the FTC staff is working on initial projects relating to mergers and competition advocacy.

**2. OECD.** The FTC continues to participate in the 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.

#### *E. Other Enforcement*

**1. General Merger Enforcement.** The FTC reviews and challenges mergers in any economic sectors that have significant potential to harm competition and con-

<sup>65</sup> *Rambus, Inc.*, Dkt. No. 9302 (complaint issued June 18, 2002).

<sup>66</sup> *Id.*

<sup>67</sup> In 1996, the FTC settled a similar complaint against Dell Computer, alleging that Dell had failed to disclose an existing patent on a personal computer component that was adopted as the standard for a video electronics game. *Dell Computer Co.*, 121 F.T.C. 616 (1996).

<sup>68</sup> FTC Press Release, *Muris Announces Plans for Intellectual Property Hearings* (Nov. 15, 2001), available at <<http://www.ftc.gov/opa/2001/11/iprelease.htm>>.

<sup>69</sup> FTC Press Release, *FTC to Host Public Workshop to Explore Possible Anticompetitive Efforts to Restrict Competition on the Internet* (July 17, 2002), available at <<http://www.ftc.gov/opa/2002/07/eocom.htm>>.

sumers. For example, last summer the Commission settled allegations that Bayer AG's \$6.2 billion purchase of Aventis S.A.'s crop science business raised antitrust concerns in the markets for a number of crop science products, including markets for (1) new generation chemical insecticide products and active ingredients; (2) post-emergent grass herbicides for spring wheat; and (3) cool weather cotton defoliants. These new generation products are at the forefront of pesticide, insecticide, and herbicide products, and maintaining competition in these markets is significant because they appear to offer greater effectiveness, with less environmental impact than current generation products. In settling this matter, the Commission required Bayer to divest businesses and assets used in the manufacture of these products to parties capable of maintaining competitive conditions in these markets.<sup>70</sup>

Also, in October 2002, the Commission authorized the staff to seek a preliminary injunction in federal court blocking the proposed acquisition of the Claussen Pickle Company by the owner of the Vlasic Pickle Company.<sup>71</sup> If allowed to proceed, the combined firm would have had a monopoly share of the refrigerated pickle market in the United States. Following the FTC's decision, the parties abandoned the proposed acquisition.

**2. Mergers Not Reportable Under HSR.** The FTC will continue to devote resources to monitoring merger activities that are not subject to premerger reporting requirements under HSR, but that could be anticompetitive. In 2000, Congress raised the HSR size-of-transaction filing threshold to eliminate the reporting requirement for smaller mergers, but of course it did not eliminate the substantive prohibition under Section 7 of the Clayton Act<sup>72</sup> against smaller mergers that may substantially lessen competition. Consequently, the FTC must identify—through means such as the trade press and other news articles, consumer and competitor complaints, hearings, and economic studies—and remedy those unreported, usually consummated mergers that could harm consumers.

One notable example is the case against MSC Software Corporation.<sup>73</sup> In this case, the company ultimately agreed to settle FTC allegations that MSC's 1999 acquisitions of Universal Analytics, Inc. and Computerized Structural Analysis & Research Corporation violated federal antitrust laws by eliminating competition in, and monopolizing the market for, advanced versions of Nastran, an engineering simulation software program used throughout the aerospace and automotive industries. Under the terms of the settlement agreement, MSC must divest at least one clone copy of its current advanced Nastran software, including the source code. The divestiture will be through royalty-free, perpetual, non-exclusive licenses to one or two acquirers who must be approved by the FTC.

**3. Enforcement of FTC Merger Orders.** The FTC also will litigate, when necessary, to ensure compliance with Commission orders protecting competition. In March, a federal judge fined Boston Scientific Corporation ("BSC") for violating a licensing requirement in a merger settlement involving medical technology used to diagnose and treat heart disease.<sup>74</sup> To preserve competition in the market for intravascular ultrasound catheters following its acquisition of two competitors, BSC had agreed to license its catheter technology to Hewlett-Packard Company. Finding that BSC "acted in bad faith" and took an "obstreperous approach" to its obligation, the court assessed a civil penalty of more than \$7 million. This represents the largest civil penalty ever imposed for violation of an FTC order.

#### IV. LEGISLATIVE RECOMMENDATIONS

To improve the agency's ability to implement its mission and to serve consumers, the FTC makes the following recommendations for legislative changes. The FTC staff will be happy to work with Subcommittee staff on these recommendations.

##### A. *Elimination of 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 or deceptive acts or practices and unfair methods of competition. This exemption dates from a period when telecommunications services 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

<sup>70</sup> *Bayer AG and Aventis S.A.*, Dkt. No. C-4049 (July 24, 2002) (consent order).

<sup>71</sup> *FTC v. Hicks, Muse, Tate & Furst Equity Fund V, LP*, Civ. Action No. 1:02-cv-02070-RWR (D.D.C. filed Oct. 23, 2002). A notice of voluntary dismissal was filed on October 31, 2002.

<sup>72</sup> 15 U.S.C. § 18.

<sup>73</sup> *MSC Software Corp.*, Dkt. No. 9299 (Oct. 29, 2002).

<sup>74</sup> *United States v. Boston Scientific Corp.*, Civ. Action No. 00-12247-PBS, Memorandum and Order (D. Mass. Mar. 28, 2003).

Commission (“FCC”) have replaced much of the economic regulatory apparatus formerly applicable to the industry with competition. Moreover, technological advances have blurred traditional boundaries between telecommunications, entertainment, and high technology. Telecommunications firms have expanded into numerous non-common-carrier activities. For these reasons, FTC jurisdiction over telecommunications firms’ activities 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, economic, and industry expertise regarding competition to mergers and other possible anticompetitive practices, not only involving common carriage but also in other high-tech fields involving telecommunications. The FTC believes that Congress should eliminate the special exemption to reflect the fact that competition and deregulation have replaced comprehensive economic regulation.

The common carrier exemption sometimes has stymied FTC efforts to halt fraudulent or deceptive practices by telecommunications firms. While common carriage has been outside the FTC’s authority, the agency believes that the FTC Act applies to non-common-carrier activities of telecommunications firms, even if the firms also provide common carrier services. 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 may not have 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. It may have additional serious consequences to new areas of industry convergence, e.g., high technology and entertainment, where the FTC’s inability to protect consumers can undermine consumer confidence.

The FTC has the necessary expertise to address these issues. The FTC has 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. Legislation to Improve the FTC’s Ability to Combat Cross-Border Fraud*

As stated earlier, consumer fraud is now more global than ever before. To better protect consumers, the FTC requests that Congress enact legislation that would better address the changing nature of the consumer marketplace and improve the agency’s ability to cooperate and share information in cases and investigations relating to cross-border fraud. The agency’s recommendations focus primarily on improving its ability to combat fraud involving foreign parties, evidence, or assets. At the same time, some of the recommendations may also benefit the pursuit of purely domestic investigations and cases. Indeed, it is often not immediately evident whether a matter has a cross-border component.

These proposals also would help the FTC fight deceptive spam. As the agency has learned from investigations and discussions at the recent FTC spam forum, spammers easily can hide their identity, forge the electronic path of their e-mail messages, or send their messages from anywhere in the world to anyone in the world. Also, a large percentage of spam comes from outside our borders. For these reasons, the spam forum participants emphasized that successful efforts to combat deceptive spam will require international enforcement cooperation. These legislative proposals can improve the FTC’s ability to cooperate with international partners on this issue.

The FTC staff has discussed these legislative proposals with other affected agencies, and these agencies generally support the goals of the proposals. The FTC staff is continuing to work with these agencies on the details of a few of the proposals. The FTC’s cross-border proposal includes four main components. First, the FTC is seeking to strengthen, in a number of ways, its ability to cooperate with foreign

counterparts, who are often investigating the same targets. Under current law, for example, the FTC is prohibited from sharing with foreign counterparts certain information that the FTC has obtained in its investigations. Legislation is necessary to allow the agency to share such information and provide other investigative assistance in appropriate cases.<sup>75</sup>

Second, the FTC is seeking enhancements to its information-gathering capabilities to enable it to obtain more easily information from federal financial regulators about those who may be defrauding consumers. The FTC is also seeking enhancement of its ability to obtain information from third parties without the request triggering advance notice to investigative targets and thus prompting the targets to move their assets overseas.

Third, the FTC is seeking improvements to its ability to obtain consumer redress in cross-border litigation, by clarifying the agency's authority to take action in cross-border cases and expanding its ability to use foreign counsel to pursue offshore assets.

Finally, the FTC is seeking to strengthen international cooperative relationships by obtaining authority to facilitate staff exchanges and to provide financial support for certain joint projects.

#### *C. Legislation to Enhance the FTC's Effectiveness To Fight Fraudulent Spam*

As discussed earlier, a recent study by the Commission found that 66 percent of spam contained obvious indicia of falsity. Moreover, a significant portion of spam is likely to be routed through foreign servers. For these reasons, it would be useful to have additional legislative authority, addressing both procedural and substantive issues, that would enhance the agency's effectiveness in fighting fraud and deception. The procedural legislative proposals would improve the FTC's ability to investigate possible spam targets, and the substantive legislative proposals would improve the agency's ability to sue these targets successfully.

**1. Procedural Proposals.** The FTC's law enforcement experience shows that the path from a fraudulent spammer to a consumer's in-box frequently crosses at least one international border and often several. Thus, fraudulent spam exemplifies the growing problem of cross-border fraud. Two of the provisions in the proposed cross-border fraud legislation discussed above also would be particularly helpful to enable the FTC to investigate deceptive spammers more effectively and work better with international law enforcement partners.

First, we request that the FTC Act be amended to allow FTC attorneys to seek a court order requiring a recipient of a Civil Investigative Demand ("CID") to maintain the confidentiality of the CID for a limited period of time. Several third parties have told us that they will provide notice to the target before they will share information with us, sometimes because they believe notice may be required and sometimes even if such notice clearly is not required by law.

Second, we are requesting that the FTC Act be amended to provide that FTC attorneys may apply for a court order temporarily delaying notice to an investigative target of a CID issued to a third party in specified circumstances, when the Right to Financial Privacy Act ("RFPA") or the Electronic Communications Privacy Act ("ECPA") would require such notice.

The FTC's experience is that when fraud targets are given notice of FTC investigations they often destroy documents or secrete assets. Currently RFPA and ECPA provide a mechanism for delaying notice, but the FTC's ability to investigate would be improved by tailoring the bases for a court-ordered delay more specifically to the types of difficulties the FTC encounters, such as transfers of assets offshore. In addition, it is unclear whether FTC attorneys can file such applications, or whether the Commission must seek the assistance of the Department of Justice. Explicit authority for the FTC, by its own attorneys, to file such applications would streamline the agency's investigations of purveyors of fraud on the Internet, ensuring that the agency can rapidly pursue investigative leads.

Other legislative proposals would enhance the FTC's ability to track deceptive spammers. First, we request that the ECPA be clarified to allow the FTC to obtain complaints received by an ISP regarding a subscriber. Frequently, spam recipients complain first to their ISPs, and access to the information in those complaints would help the agency to determine the nature and scope of the spammer's potential law violations, as well as lead the agency to potential witnesses.

<sup>75</sup> The Securities Exchange Commission, the Commodity Futures Trading Commission, and the federal financial regulators already have the authority to share information and cooperate with their foreign counterparts. See 15 U.S.C. § 78x(c); 15 U.S.C. § 78u(a)(2); 7 U.S.C. § 12(e); 7 U.S.C. § 16(f); 12 U.S.C. § 3109(a)-(b); and 12 U.S.C. § 1818(v)(2). The FTC's proposal is modeled after these statutes.



Second, we request that the scope of the ECPA be clarified so that a hacker or a spammer who has hijacked a bona fide customer's email account is deemed a mere unauthorized user of the account, not a "customer" entitled to the protections afforded by the statute. Because of the lack of a statutory definition for the term "customer," the current statutory language may cover hackers or spammers. Such a reading of the ECPA would permit the FTC to obtain only limited information about a hacker or spammer targeted in an investigation. Clarification to eliminate such a reading would be very helpful.

Third, we request that the ECPA be amended to include the term "discovery subpoena" in the language of 18 U.S.C. §2703. This change is particularly important because a district court has ruled that the FTC staff cannot obtain information under the ECPA from ISPs during the discovery phase of a case, which limits the agency's ability to investigate spammers.<sup>76</sup>

**2. Substantive Proposals.** Substantive legislative changes also could aid in the FTC's law enforcement efforts against spam. Although Section 5 of the FTC Act provides a firm footing for spam prosecutions, additional law enforcement tools could make more explicit the boundaries of legal and illegal conduct, and they could enhance the sanctions that the agency can impose on violators. The Telemarketing and Consumer Fraud and Abuse Prevention Act ("TCFAPA"), 15 U.S.C. §§6101-6108, provides a model for addressing unsolicited commercial e-mail. Amendments to the TCFAPA would authorize the FTC to adopt rules addressing deceptive and abusive<sup>77</sup> practices with respect to the sending of unsolicited commercial e-mail. Approaching spam through this statutory model would provide the market with direction, but would do so within a framework that could change as the problems evolve. It also would provide several more specific, important benefits.

First, amendment of the statute would give the FTC general discretionary authority via rulemaking to address *deceptive* practices relating to spam. The rule would set out bright lines between acceptable and unacceptable practices for the business community. The list of deceptive practices could include: the use of false header or routing information; the use of false representations in the "subject" line; the use of false claims that an unsolicited commercial e-mail message was solicited; and the use of false representations that an opt-out request will be honored. As with telemarketing, a rule also could prohibit assisting and facilitating any of the above, i.e., providing substantial assistance to another party engaged in any rule violation knowing or consciously avoiding knowing that such party is engaged in such violation.

Second, amendment of the statute would give discretionary authority via rulemaking to address *abusive* practices relating to spam. Specific abusive practices might include: sending any recipient an unsolicited commercial e-mail message after such recipient has requested not to receive such commercial e-mail messages; failing to provide a reasonable means to "opt out" of receiving future e-mail messages; and sending unsolicited commercial e-mail to an address obtained through harvesting or a dictionary attack.

Third, amendment of the TCFAPA would ensure that the Rule embodies the same standard of liability that is embodied in Section—5 of the FTC Act, without a general requirement to show intent or scienter. Imposition of intent or scienter requirements would unnecessarily complicate enforcement, and also would actually constrict the scope of the FTC's existing authority under Section 5 to attack spam.

Fourth, the amended statute would provide that the Rule would be enforceable, like all FTC Rules, through FTC actions in federal district court, and it further would provide that violators would be subject to preliminary and permanent injunctions and could be ordered to pay redress to consumers. In addition, in an action brought by DOJ on behalf of the FTC, violators would be liable to pay civil penalties of up to \$11,000 per violation (the amount of civil penalties is governed by statutory factors, such as ability to pay, previous history of such conduct, egregiousness of the conduct, etc.).

Like the existing statute, the amended TCFAPA would authorize states to enforce the FTC Rule in federal court to obtain injunctions and redress for their citizens, but not civil penalties.

The TCFAPA authorizes a private right of action for any person adversely affected by a violation of the FTC's Telemarketing Sales Rule if the amount in controversy exceeds \$50,000 in actual damages for each person adversely affected by such action. The FTC, however, will need to assess whether the inclusion of an analogous

<sup>76</sup>See *FTC v. Netscape Comm. Corp.*, 196 F.R.D. 559 (N.D. Cal. 2000).

<sup>77</sup>The FTC has determined, in the Statement of Basis and Purpose for the Amended TSR, that the undefined term "abusive" used in the legislation authorizing that Rule will be interpreted to encompass "unfairness." 68 Fed. Reg. 4580, 4614 (2003).

provision in an amended TCFAPA that addresses spam would be appropriate, effective, and feasible.

Finally, the rulemaking authority granted through this amendment could be adapted to new changes in technology without hindering technological innovation.

An amended TCFAPA should seek to assure consistency between state and federal laws. The scope of the Internet and of e-mail communication is global, transcending national boundaries. Congress should seek to minimize artificial barriers that would break up this market.

In addition to the TCFAPA amendments, the possible criminalization of false header and routing information should be explored. There is some debate over whether the wire fraud statute covers fraud in the sending of e-mail communications. The FTC staff is discussing this issue with criminal authorities to determine whether a specific statute that criminalized this conduct would clear up any statutory confusion or encourage spam prosecutions. At this time, the FTC has no recommendations on whether changes in the criminal code are necessary or appropriate.<sup>78</sup> Admittedly, we recognize that these legal steps will not solve the growing spam problem. Nor is it clear what impact these steps will have on some of the other problems associated with spam (e.g., volume and security). These issues may need to be addressed separately. Nevertheless, the FTC believes that the proposed legislation would provide more effective investigative and enforcement tools and would enhance the FTC's continuing law enforcement efforts.

#### *D. Technical Changes*

Finally, the FTC requests two new 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 would be especially useful in connection with the FTC's close coordination 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, the FTC's 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.

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. 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.

#### V. CONCLUSION

Mr. Chairman, the FTC appreciates the strong support for its agenda demonstrated by you and the Subcommittee. I would be happy to answer any questions that you and other Senators may have about the FTC's reauthorization request.

Mr. STEARNS. Welcome. Thank you, Mr. Chairman. Mr. Thompson.

#### **STATEMENT OF HON. MOZELLE W. THOMPSON**

Mr. THOMPSON. Good morning. Thank you, Mr. Chairman and members of the committee, for the opportunity to appear before you today and offer testimony in support of the FTC's reauthorization.

<sup>78</sup> Any legislation that criminalizes certain types of spam activities should not negatively impact the FTC's existing Section 5 authority or change the present standards of proof, scienter, or evidence for cases of civil fraud, deception, or unfairness.

In recent years the FTC has been doing significant work in the area of international consumer protection. Improvements in communication and technology have created a global marketplace in which American consumers and American businesses play an important and active role. But these same improvements have left American consumers open to new types of harm in numbers that are growing at an exponential rate.

Today, I would like to talk about one of the most significant consumer protection problems in the last several years; the globalization of fraud and deception and the FTC's response, because not only has the marketplace for consumers been global, so have the purveyors of fraud and deception.

Now, as you can see from the first exhibit, right behind me, the same technological tools that have expanded markets across international boundaries have allowed fraudsters to act more effectively and quickly to extend their reach from domestic markets. The FTC needs new tools to effectively combat cross-border fraud and deception and we ask you for them today.

Now, this first exhibit shows you just where some of our complaints come from, from U.S. consumers to businesses, and you can just see this from our data right now, all around the world. Now, there was a time not very long ago when the biggest challenge to American consumers was whether they wanted to do business with a mail order company on the other side of the United States. Most of our consumer protection laws are based on what we knew then, and they have served us well. Today, however, America represents the largest and richest consumer marketplace in the world. Improvements in technologies have opened world markets to American consumers and vice versa.

So it is not surprising that American consumers are bombarded with new opportunities to spend their money. These opportunities arrive from around the world via mail, telephone, television and even spam. While many of these opportunities may be legitimate, a rapidly growing number are fraudulent and deceptive.

Now, as you can see from the second chart, from some of our data, just what is in red are American consumer complaints against Canadian companies. And the other, the blue part, represents American consumer complaints against other companies from around the world. It is amazing what percentage of those complaints come from outside of our borders.

Now, in response to this dramatic increase, the FTC has taken a leadership role in reaching a mutual understanding with our international colleagues that we must plus bring down barriers to prosecuting fraudsters who prey on victims across borders. Consumer protection law enforcers around the world now agree that this problem is serious and that international cooperation is a key to any effort to combat cross-border fraud and deception. We work in a variety of international fora to address these problems. Our efforts have resulted in bilateral memorandum of understanding and include our participation in the International Consumer Protection Enforcement Network, a group of consumer protection law enforcement agencies from around the world.

The issue of cross-border fraud and deception is also at the forefront of our discussions at the Organization for Economic Coopera-

tion and Development, the OECD, and their Committee on Consumer Policy. That committee, which I chair, has worked to develop guidelines that provide the 30 OECD governments with a blueprint for cooperation in combatting cross-border fraud. We hope those guidelines will be finalized and approved later this month.

But participation in international fora is not enough. Criminal law enforcers saw the need for international cooperation a long time ago and they found ways to permit governments to share investigatory information and to engage in cooperative law enforcement. Later, the Federal Government recognized the negative market impacts of such activities as securities and commodities fraud. Consequently, agencies like the SEC and the CFTC were given certain powers that enable them to better prosecute such fraud across national borders.

But unlike our sister agencies, the FTC's tools to combat fraud and deception have not quite caught up with the times. In many instances the statutes under which we operate do not address the increasingly cross-border nature of fraud and sometimes even hinder our ability to engage in strong law enforcement activity. The growth of cross-border fraud demonstrates the pressing need for new tools.

As you can see from the third exhibit, our statistics show a sharp increase in the number of cross-border complaints from American consumers about foreign companies, from 7,609 in calendar year 1998 to 24,213 in calendar year 2002. In fact, from 2001 to 2002 the number of complaints almost doubled. And as the chairman recognized in his remarks, participants in our spam forum have even noted how much fraudulent and deceptive e-mail comes from outside of the United States. So for this reason alone, cross-border fraud legislation is a necessary element to make spam legislation effective.

So the legislative proposal that we have presented to you is intended to address some of the problems that I have outlined and improve the FTC's ability to protect consumers in cross-border cases. Quite simply, we are asking for the tools to make us more effective in meeting the challenges posed by cross-border fraud.

I would be happy to provide you with more details and answer any questions you may have on this or any other subject of the FTC's activities. Thank you.

[The prepared statement of Hon. Mozelle W. Thompson follows:]

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

Good morning Mr. Chairman and members of the Committee, and thank you for the opportunity to appear before you and to offer testimony in support of the FTC's reauthorization. In recent years, the FTC has been doing significant work in the area of international consumer protection. Improvements in communication and technology have created a global marketplace in which American consumers and American businesses play an important and active role. But these same improvements have left American consumers open to new types of harm in numbers that are growing at an exponential rate.

Today, I would like to talk about one of the most significant consumer protection problems in the last several years—the globalization of fraud and deception—and the FTC's response. Because not only has the consumer marketplace become global, so have the purveyors of fraud and deception. The same technological tools that have expanded markets across international boundaries have also allowed fraudsters to act more quickly and efficiently—and to extend their reach beyond

their domestic markets. The FTC needs new tools to effectively combat cross border fraud and deception, and we ask you for them today.

There was a time when the biggest challenge to American consumers was whether they wanted to do business with a mail order company on the other side of the country. Most of our consumer protection laws are based on what we knew then, and they have served us well. Today, however, America represents the largest and richest consumer marketplace in the world. Improved technologies have opened world markets to American consumers and vice versa. So, it is not surprising that American consumers are bombarded with new opportunities to spend their money. These opportunities arrive from around the world via mail, telephone, television, and even spam. While many of these opportunities may be legitimate, a rapidly growing number are fraudulent or deceptive.

In response to this dramatic increase, the FTC has taken a leadership role in reaching a mutual understanding with our international colleagues that we have to bring down barriers to prosecuting fraudsters who prey on victims across borders. Consumer protection law enforcers around the world now agree that this problem is serious and that international cooperation is the key to any effort to combat cross border fraud and deception.

We work in a variety of international fora to address the problems posed by cross border fraud.

Our efforts have resulted in bilateral memoranda of understanding, and include our participation in the International Consumer Protection and Enforcement Network (ICPEN), a group of consumer protection law enforcement agencies from around the world.

The issue of cross-border fraud and deception is also at the forefront of our discussions at the Organization for Economic Cooperation and Development (OECD) Committee on Consumer Policy (CCP). The CCP has worked to develop guidelines that provide the thirty OECD governments with a blueprint for cooperation in combating cross-border fraud. We hope that the guidelines will be finalized and approved later this month.

But participation in international fora is not enough.

Criminal law enforcers saw the need for international cooperation many years ago. They found ways to permit government authorities to share investigatory information and to engage in cooperative law enforcement. Later, the Federal government recognized the negative market impact of such activities as securities and commodities fraud. Consequently, agencies such as the SEC and CFTC were given certain powers enabling them to better prosecute such fraud across national borders.

Unlike our sister agencies, the FTC's tools to combat fraud and deception have not kept up with the times. In many instances the statutes under which we operate do not address the increasingly cross-border nature of fraud and deception and sometimes even hinder our ability to engage in strong enforcement activity against those who use international borders to the detriment of consumers.

The growth of cross-border consumer fraud demonstrates the pressing need for new tools to protect consumers. Our statistics show a sharp increase in the number of cross-border complaints from American consumers about foreign companies, from 7,609 in calendar year 1998 to 24,213 in calendar year 2002. In fact, from 2001 to 2002, the number of complaints almost doubled. Even at our recent Spam Forum, participants noted that unsolicited e-mail increasingly crosses borders to subject consumers to fraudulent and deceptive offers.

The legislative proposal that we have presented to you is intended to address some of these problems and improve the FTC's ability to protect consumers in such cases. Quite simply, we are asking for the tools to make us more effective in meeting the challenges posed by cross-border fraud.

I would be happy to answer any questions that you have on this subject or any other part of the FTC's activities.

Mr. STEARNS. Thank you, Commissioner. Commissioner Swindle.

#### STATEMENT OF HON. ORSON SWINDLE

Mr. SWINDLE. Thank you, Mr. Chairman—pardon me—and members of the committee, for this opportunity to appear before you and Chairman Muris and—

Mr. STEARNS. You might just pull the mike up a little bit.

Mr. SWINDLE. If I turn it on, it would help immensely. Modern technology. I will start again with the clearing of the throat.

Thank you, Mr. Chairman and members of the committee, for this opportunity to appear before you and with Chairman Muris and my fellow Commissioners. Today I would like to briefly address a growing problem for all of us, the unsolicited commercial e-mail, unwanted e-mail or spam. Consumers must have trust and confidence in technology and its uses, particularly when it comes to the privacy and security of their personal and sensitive information. Spam undermines consumer trust and confidence and is rapidly growing threat to Web-based services.

The Commission's testimony provides the committee with an overview of our efforts to combat spam and also legislative recommendations to address spam. The legislative recommendations are modeled on the Telemarketing Act. However, many of the Commission's recommendations are already contained in the Burr spam bill. For example, like the Telemarketing Act, the Burr bill provides for State law enforcement action in Federal court, allows for the collection of civil penalties and grants the Commission narrow rulemaking authority to implement key provisions of the bill.

Spam raises a number of concerns. The volume of spam is increasing at astonishing rates. In addition, recent Commission studies indicate that spam has become the weapon of choice for those engaged in fraud and deception. Spam also can transmit viruses, Trojan horses and other damaging code capable of inflicting major damage on the Internet and our critical infrastructure. These concerns represent enormous cost to businesses, consumers and the economy.

There is no easy solution to the spam problem, certainly, no single approach that will solve the problem. Nevertheless, spam raises problems that demand attention by policymakers and industry leaders. First, there is a complex combination of technology, market forces and public policy that will be evolving for years to come. In addition, the spam problem is heavily influenced by the emotions of millions of computer users who are literally fed up with spam.

Spam is about to kill the "Killer Ap" of the Internet, specifically consumer use of e-mail and e-commerce. If consumers lose trust and confidence in Web-based services and stop using them as tools for communications and on-line commerce, tremendous harm will be done to the economic potential of information technology. Solving these problems requires innovation, resources and time. However, dealing with the emotional reaction of spam by millions of users requires our immediate attention before it gets out of hand.

Internet service providers, software manufacturers and those engaged in designing operating systems must empower consumers with better control over their incoming e-mail. Easing the spam burden on consumers will help to shore up trust and confidence.

Surely this is possible right now. Why has industry not done so? Frankly, I am not convinced that industry really wants to empower consumers by giving them easy to use tools to control their incoming e-mail. Spam is a crisis today. We need great minds to quickly find solutions. Empowering consumers would be a good first step. Industry must do this and do it now.

The Commission will continue its multifaceted efforts to address spam. For example, the Commission will continue its aggressive

law enforcement programs against deceptive spam. However, it is both resource intensive and technically challenging to find the guilty parties. Consumer education and awareness are also essential. Our Web site, [ftc.gov/infosecurity](http://ftc.gov/infosecurity), our consumer outreach and partnerships with industry on fighting spam and promoting safe computing are expanding our reach.

The Commission also conducts research on various aspects of spam. Three recent Commission studies helped us to better understand the magnitude of deceptive spam and how consumers are victimized. The Commission's spam forum in May was intended to better inform the dialog and to explore possible solutions for spam. The forum was remarkable in its discussions and participants. Over 80 panelists and over 400 people attended the conference over its 3-day span. I would like to share some of the forum's revelations about the realities of spam.

First and foremost, the private sector must lead the way to finding solutions to spam. We likely will not find the perfect solution. The target will be constantly moving as technology evolves. More laws are not necessarily the right answer. Laws bestowing a competitive advantage to larger firms over smaller firms are questionable. Unenforceable laws will have little real effect. Overreaching laws will have unintended adverse consequences. Passing legislation to mandate best practices for good actors will not help us track down the bad actors engaged in fraud and deception. Industry and government, consumers and other user's and civil society organizations must be a part of a continuing dialog to find solutions.

In addition, consumer awareness and developing safe computing practices by all participants are essential. Developing a culture of security where all participants work to enhance consumer security and minimize the vulnerabilities to the Internet and our critical infrastructure is an imperative, not an option. The effort to solve the spam problem and secure our information systems and networks is a journey. It is not a destination, and we have miles to go before we sleep.

Thank you, Mr. Chairman.

Mr. STEARNS. I thank the Commissioner. Commissioner Leary.

#### **STATEMENT OF THE HON. THOMAS B. LEARY**

Mr. LEARY. Yes. Thank you, Mr. Chairman and members of the subcommittee. My role here is to discuss our unanimous recommendation that the Federal Trade Commission Act be amended to eliminate the special exemption for telecommunications common carriers. When the common carrier exemption was included in the FTC Act many years ago the exemption made sense. It was logical to exempt monopoly providers of common carrier services who were not disciplined by competition, but rather by detailed rate and service regulation. Since that time, the telecommunications industry has changed dramatically and, perhaps even more important, the regulatory role of the Federal Government has also changed dramatically. Let me summarize some of the changes that are particularly significant.

One, the common carrier activities of telecom companies are less regulated by government fiat today and more by competition. At the same time, telecom companies have been allowed to expand

into non-common carrier activities like Internet services. They provide these services in competition with companies that are unqualifiably subject to our jurisdiction. These telecom companies no longer occupy a special niche in our economy.

Two, over the last century you have passed myriad laws and regulations and created entirely new agencies to monitor and regulate specific activities of business enterprises whether they are common carriers or not. Sector specific regulation of the kind that the FCC or the FDA provides has been supplemented everywhere by specific substantive law enforcement of agencies like the SEC, OSHA or the EPA—agencies like the FTC that have a broad jurisdiction over a large number of sectors, but monitor a limited range of activities in any one sector. We no longer look to a single government agency to address all problems that may appear in a single sector.

Three, we in the FTC have a long experience cooperating with other agencies to avoid duplication or inconsistency in these situations. Specifically, we want to cooperate with the FCC, and we have no ability or desire to intrude in their core mission as gatekeeper into the limited communications spectrum. We do not make the same kinds of public interest determinations that they do. We are not concerned with the qualifications of companies that compete or the nature of services that they provide.

The core mission that you have assigned to us is to see that any company, whatever it does, conducts its business with fairness and with honesty. In carrying out that mission, we have acquired an in-house expertise and a body of precedent that I really believe is unmatched anywhere in this country or indeed the world.

Now, some may ask why we are asking for a change after all these years, and that is a fair question. The short answer is that technologies are continually converging and we have become increasingly frustrated by our inability to obtain complete relief in situations where (A) there are multiple parties, some of whom are common carriers and some who are not; (B) a common carrier engages in deceptive practices involving a mix of common carrier and non-common carrier activities; or (C) the jurisdiction lines are unclear and resources are wasted dealing with an issue that has nothing to do with the merits.

Finally, an admitted common carrier may engage in deceptive practices that are similar to those we see all the time, that do the same consumer harm and for which we have special remedies, but we are paralyzed by the jurisdictional barrier. Potential agency overlaps may require discussion and cooperation. We have had and continue to have an ongoing exchange with the FCC on this subject. We are trying to address the situation where companies that engage in the same conduct in competition with one another are subject to different regulatory regimes. We will not have duplicate regulation, but we want to avoid inconsistent regulation.

In conclusion, let me assure you that we do not want to intrude into other agencies' business and we do not seek to impose remedial relief absent a need for it. But you decided long ago that the issues we are talking about here are our business, and we cannot do the best possible job for consumers whom we both seek to serve while we are constrained by a barrier that has long outlived its usefulness.



Thank you, Mr. Chairman.

Mr. STEARNS. I thank you. I think we will have two rounds of questioning, 5 minutes each, and I will start out with my first line of questioning. I think one of the most alarming statistics in your testimony deals with identity theft and I guess according to your prepared statement regarding ID theft, it has increased over 500 percent just in 2 years. In 2002 identity theft was the No. 1 consumer complaint made to the Federal Trade Commission, approximately 43 percent of all complaints, from your testimony. I have a person on my staff who has actually had identity, ID theft, so he can speak to this and he has pointed out to me he has been very happy and was very clearly pleased with the response of the Federal Trade Commission. So you have one case example where it is working. Once a person logs on, in fact, I might point out that I guess if a person has a complaint with ID theft, you have a toll free number which is 1-877-IDTHEFT. And then you have a Web site, of course it is [www.consumer.gov/idtheft](http://www.consumer.gov/idtheft). But the question is once a person logs a complaint into your ID theft data base, what can they expect in terms of action at that moment from the law enforcement agencies that use this data base? Is there a particular threshold as to whether or not an ID theft complaint will be investigated by either a local or Federal law enforcement agency?

I will just start with the Chairman.

Mr. MURIS. Well, we provide victim assistance. We don't have the ability to bring cases. We also provide assistance to law enforcement. In fact, we work with and train law enforcement. I have actually sat and listened to several consumer calls. When someone calls what we are particularly good at is helping walk them through the steps they need to take, both in filing a police report and in dealing with their creditors and the credit reporting agencies. We published a runaway best selling booklet that we can't print enough of, to advise people on what to do if they are a victim of identity theft. Since I became Chairman 2 years ago now, we now print the booklet in Spanish, Robo Identidad. We have a very large circulation in Spanish as well.

We continue to try to improve what we do. We have only very recently increased dramatically our training and we are trying to work with law enforcement officials. The Secret Service works with us on this and we have tried to put together packages using our data of possible problems to send to law enforcement. Finally, I have supported increased criminal penalties in the identity theft area. There are some bills that would do that.

Mr. STEARNS. Well, I guess one thing I think we should do immediately, once there is suspicion of fraudulent activity under his or her name is to file a fraud alert with the three credit reporting bureaus and their report will reflect a notice for any credit lender to contact the individual directly before extending any credit. It is my understanding that some credit lenders will continue to extend credit despite the fraud alert and subsequently fail to actually contact the consumer.

I guess the question is, has your agency encountered any complaints like that and how do we encourage credit companies to heed the fraud alert when a credit report is pulled?

Mr. MURIS. We have been talking to the credit reporting agencies and creditors. One thing that we have done in the last year or so is created a common form that people who are victims of identity theft can use. More and more creditors accept this form. In connection with the reauthorization of the Fair Credit Reporting Act discussing possible reforms. We haven't come to any recommendations yet. But we are considering changes and improvements that would make it easier to attack identity theft.

I think that in talking to the credit reporting agencies, the problem that you are identifying does not come up very often. We are the main regulator of the credit reporting agencies and we talk to them quite a bit about this and other issues.

Mr. STEARNS. Do these credit reporting agencies talk to each other, so once an account is fraudulent by one bureau, does that bureau share that information with the other credit bureaus if they also have records of the same fraudulent account? And so should these companies be required to share this information, I think is the question for you.

Mr. MURIS. Well, at the moment I don't think they share the information. They have different algorithms for determining credit-worthiness and this is a good thing in terms of competition. They use fairly complex credit scoring models. We are trying to work with them though in ways to deal with identity theft, such as the common affidavit that I just mentioned.

If you look at the three major credit reporting agencies there are significant differences in the information that they have and in how they use the information. The information comes from so-called furnishers. The people who grant credit are a primary example. The big picture is that, since the Congress put us in the business of tracking identity theft information and providing victim assistance, we have been on a very steep curve in providing better assistance to consumers, better working with the credit reporting agencies, and better assistance to law enforcement. We are also doing, if I could add for just a second, a nationally projectable survey which will be the first time that we have a systematic estimate of the scale of the problem of identity theft. The survey is out in the field; they are compiling the results. We hope to announce the results fairly soon, and we will do some very useful things there. For example, we will look at different kinds of problems. The problem of having your account number stolen is significantly different, or can be, from someone who actually goes out and gets a new credit card in your name. We will look at different kind of problems, and I think that will allow us to assist victims and law enforcement in a better way. Finally, one thing we have encouraged and we are still talking to the credit reporting agencies about, is to establish that one call to us from a credit reporting agency will place a fraud alert with all the three major credit reporting agencies. I think that will be a positive step.

Mr. STEARNS. Just in conclusion, TransUnion is one, credit reporting, and Equifax is another. And TransUnion let us say, takes it off of your report but Equifax doesn't. How do you get these two to do it at the same time, so that the consumer isn't constantly badgering one while the other did it, and I guess how do we do that? Maybe that is not in your jurisdiction but—

Mr. MURIS. The credit reporting agencies have been very responsive in dealing with us. They understand the problem of identity theft. The creditors are, obviously, extremely interested. As you know, under current law, the credit card companies get left holding a very large bill. ID theft is a very damaging problem to consumers because of the time involved in getting your good name back. The out-of-pocket costs are borne by someone else. So I think the business community has a lot of interest. We are working with them, and are making progress.

Mr. STEARNS. Thank you.

Ms. SCHAKOWSKY. Thank you, Mr. Chairman. Mr. Muris, I am very happy that you put your book out in Spanish because I think one of the problems that foreign language speakers may find themselves in are immigration complications when there is identity theft; so I am glad that you have done that. In my district, we could probably use about 50 languages.

But I wanted to talk to you about the current law that says that a person has 2 years from the time of theft, identity theft, to seek court action. The Supreme Court in the TRW versus Andrews supported this 2-year time limit. The Bush Administration, I am happy to say, filed a brief in opposition to the Supreme Court decision, and I also oppose that decision. And in the last Congress, I introduced bipartisan legislation that would have extended the statute of limitation to 5 years from the time a victim learned or should have learned that the identity theft had occurred. The current statute of limitations makes it extremely difficult for victims to seek redress and restore their good name in a timely fashion, and it is your data that says that it takes on average 12.3 months for a consumer to learn of the theft. Sixteen percent of the victims are unaware of the theft for 2 years. So I wanted to get your feelings on this to see if you support the administration's earlier decision and advocate briefing in that case, and to find out if you, if the credit, would support the legislation to extend the statute of limitations.

Mr. MURIS. I wasn't on the Commission at the time but I believe the Commission signed on to that brief. My colleagues are shaking their head yes. I guess I am not sure if we have taken a position on legislation, but I personally believe that 2 years is too short. Let me turn to my colleagues.

Mr. THOMPSON. I would agree. Extending the time would be helpful and especially because this kind of problem poses a more heinous risk to underserved communities where people don't necessarily know what their rights and remedies are or how to exercise them. We have found at the FTC, with our educational brochures in different languages and trying to reach out to people, they are now getting more sophisticated and even the credit reporting agencies are more sophisticated in how they approach the problem. But the idea of the fact that the people who are most victimized are often the people who are probably less equipped to know what to do about it would dictate, at least from my perspective, a longer period of time, I think that would be helpful.

Ms. SCHAKOWSKY. Anyone else want to comment on that?

Thank you.

I wanted to ask about the Fair Credit Reporting Act. This year financial institutions and credit bureaus are lobbying Congress to extend the FCRA's preemption of State privacy laws. While the legislation does not fall in this committee's jurisdiction, it is the responsibility of the FTC and the subcommittee to ensure that the FTC is enforcing the law. Late last year, the Consumer Federation of America and the National Credit Reporting Association performed a study that concluded 29 percent of credit files were inaccurate by a range of 50 points, and this is a big problem. These errors have serious consequences. They can prevent people from being able to get a mortgage or a student loan, a new job.

What steps has the Commission taken to monitor the accuracy of the data supplied by credit reporting agencies and also what steps has the Commission taken to ensure that credit reporting agencies share information in a responsible manner? And, finally, do you need additional authority to improve your monitoring of credit reporting agencies?

Mr. MURIS. We are the primary regulator over the credit reporting agencies. The Fair Credit Reporting Act is quite an ingenious statute in certain ways, although, some of its complexity leaves something to be desired. The model of the statute is extremely important to the credit economy, which has been an extremely important part of the growth in our economy in the last 10 or 12 years. What the statute does is it allows the credit world to receive information on individuals without their consent, but the information can only be used for permissible purpose. It takes important steps about accuracy. The most important step that it takes, and the one in which the Commission in the last several years has really dramatically emphasized, is when consumers are denied a benefit, when they are denied credit insurance employment, because of information in the credit report, they are to receive what is called an adverse action notice. That way consumers are put on notice to correct the information if it is wrong. We have brought a recent important case involving that issue. We have other investigations underway. We have a compliance project. We did a compliance project with landlords, and we found there was pretty good compliance with landlords in this. We also have outlined additional steps that they could take.

On the particular study that you mentioned, I looked at that with our staff. Unfortunately, I thought that there were some problems with that study. There is different information in different files as I was mentioning before. Although I didn't agree with some of what was in that study, I do agree that the accuracy issue is very important, the adverse action notice is extremely important. In connection with the reauthorization that you mentioned, it may be that we do propose some additional legislative steps but we are not there yet.

Ms. SCHAKOWSKY. Mr. Chairman, if I could ask unanimous consent that all members' statements and extraneous material be included in the record?

Mr. STEARNS. By unanimous consent, so ordered.

The gentleman from New Jersey.

Mr. FERGUSON. Thank you, Mr. Chairman.

Obviously, I am interested in this common carrier exemption. I have a couple of questions for Mr. Leary. I am going to try to be brief, and I would to ask you to be brief because my time is limited. There are several industries, in addition to telecommunications, that are exempt from FTC right now. Banks, savings and loan's, airlines, air carriers, others. These are all competitive industries. They have all undergone enormous changes, convulsions in the last several years, 10 years or more. They have probably, in many cases, less oversight than the telecommunications industry right now does, by the FCC. Why is your recommendation to engage the telecom sector, which already has substantial FCC oversight and not perhaps other industries?

Mr. LEARY. That's a very good question. I guess the short and really serious answer is we are trying to be as unimperialistic as possible. We don't want to take on an enormous range of additional problems in this agency without any compelling need for it. This particular one addresses a situation where we are running into problems all the time, and what we are trying to do is extend our jurisdiction in the least intrusive way into the business of another agency or indeed into the regulation of common carriers generally.

Mr. FERGUSON. Do you see a scenario whereby—common carriers, if they engage in noncommon carrier practices, they are already subject to FTC regulation or oversight?

Mr. LEARY. Theoretically, they are. If common carrier's engage in noncommon carrier activities, we believe, and I think the FCC agrees with us, that they are subject to our jurisdiction. The problem is that this jurisdictional issue can arise in litigation. Maybe I am anticipating a question that is not in your mind, but we have a problem when people say, "why don't you just work it out with the FCC in your own way?" We are trying to do that, but that alone won't do it because any deal that we make with the FCC to handle these concurrent things won't mean anything if some private party out there says that you, the FTC, are exceeding your jurisdiction.

Mr. FERGUSON. But the Communications Act doesn't seem to be ambiguous to me in my reading of it, and I will quote from it, "A telecommunications carrier shall be treated as a common carrier under this act only to the extent that it has engaged in providing telecommunications services." When a company is not engaged in providing telecommunications services, then the company is not be considered a common carrier and would, therefore, be subject to FTC scrutiny.

Mr. LEARY. That is true, but we have encountered arguments in dealing with actual matters where there is some dispute as to whether the activity that people are engaged in is or is not telecommunications. It is a definitional problem.

Mr. FERGUSON. Just jumping back to something you just said, it is not your belief that the FTC and the FCC could sort this out?

Mr. LEARY. We can try to sort it out among ourselves without a statutory change, theoretically. All I am saying is that whatever we agree to between ourselves is not binding on some private party which would still be free to raise the jurisdictional matter if we were to attempt to act pursuant to agreement of the FTC.

Mr. FERGUSON. Are there some examples of specific cases that have brought to your attention—

Mr. LEARY. We have specific examples, which quite frankly I would rather not identify in a public forum, situations where we decided not to sue someone, but we would be delighted to supplement the record in any level of detail you would like.

Mr. FERGUSON. I am not interested in the specific cases. I am interested in what you do with those cases.

Mr. LEARY. Some cases we take a pass because—

Mr. FERGUSON. Do you ever refer them to the FTC?

Mr. LEARY. Sure. Sure. And they refer them to us. We have had an ongoing relationship with them—

Mr. FERGUSON. It sounds like you have got it worked out pretty well.

Mr. LEARY. Well, we have a relationship that is working better than it used to. You know, up until 5 years ago, the FCC took the position they had no jurisdiction over advertising at all, which was in some ways unfortunate because there were some areas that then fell through the slats completely. The situation is improving, but I think an optimal situation would be one where the jurisdictional issue was laid to rest.

Mr. FERGUSON. I am out of time.

Mr. STEARNS. Would the chairman or any of the other commissioners like to add to that? Feel free to do that.

Mr. THOMPSON. I think this is an area where the market would probably benefit from some clarification. You know, as Commissioner Leary raised, it wasn't very long ago that the FCC didn't claim jurisdiction over certain things, and it left a gap sort of, where consumers were sort of left in limbo. While we are working on—trying to work through those gaps, trying to find situations where we can have mutual agreement, it doesn't prevent any telecom company which is engaged in nontelecom activities from trying to characterize what they are doing as telecom anyway, and that presents a certain kind of defense within a court challenge, that challenge that could possibly lead to some market confusion, and, actually, in the process, leaves consumers without very much assistance.

Mr. FERGUSON. Mr. Chairman, could I just respond to that. What you are describing sounds in the way you are talking about as if we need is an adjustment, we need a modest—we just need to kind of sort this out a little bit. My interpretation is something much more radical than that. You are talking about a repeal of an exemption for an entire sector. My read on that is that is not kind of a tweaking, a modest—you are talking about an entire industry being subject to the FTC and the FCC. I think the potential there for increased ambiguity, increased miscommunication, or doubling of oversight sounds a little chaotic to me, not a kind of a minor adjustment to oversight.

Mr. THOMPSON. I think—well, I guess this is a place where I think working together with the FCC, which we have been doing—I think we can reach understanding so there wouldn't be that kind of overlap.

Mr. FERGUSON. Precisely, but does that require a repeal of an exemption of an entire industry? That's my concern.

Mr. THOMPSON. I think when you have something that is 70 years old that is on the books that doesn't really reflect what is happening in the marketplace now, I don't think that's necessarily helpful to anyone.

Mr. LEARY. I understand what you are saying but we have got to be careful if we were to try to fine tune an exemption to the exemption, if you will, that addresses today's reality. We are dealing in an extremely fast moving situation. As you know, and as I think I said in my statement, there is an increasing convergence and a blurring of the lines between what is common carrier and what is not common carrier. So we don't want to substitute one set of jurisdictional issues for another set of jurisdictional issues, and that is one of the problems with trying to fine tune it.

Mr. FERGUSON. Thank you.

Mr. STEARNS. The gentleman from New Hampshire, Mr. Bass.

Mr. BASS. Thank you, Mr. Chairman.

As a follow-up to my friend from New Jersey's question, Mr. Leary you requested here an exemption for telecommunications common carriers, and in answer to somebody's question, you said that you didn't want to expand that request to other common carriers. Now, there has been some publicity over the past few months involving fraud and abuse in furniture moving companies, and I believe if I am not mistaken, that you testified before the Transportation and Infrastructure Committee, at some point regarding this issue whether or not the Federal Trade Commission should take from the Transportation Department some jurisdiction over alleged fraud and abuse issues associated with moving companies. Is this true or not?

Mr. LEARY. Do you if—

Mr. MURIS. Not to my knowledge but—

Mr. LEARY. It doesn't ring a bell with me. We can look into that Congressman, and see—

Mr. BASS. Is the Federal Trade Commission aware of this problem? Is it a problem, and do you have any position on it?

Mr. MURIS. We are certainly going to have to get back to you. For the record, my general view is we are the experts of dealing with advertising. It would make sense to apply for us, with our expertise, to cover as broad a sector of the economy as possible. We don't have jurisdiction over airlines. Airlines have our statute, and we just filed a comment with the Department of Transportation on Monday. In our comment, we noted that they have the exact same statutory language we have, yet they are relying on FTC cases in proposing the rulemaking that the FTC repudiated 20 years ago and that the Congress repudiated about 9 years ago. The point is that, if you believe in agency expertise, and there is a question on what you could disagree, but if you agree with agency expertise, it doesn't make a lot of sense to kick us out of areas where there are potential problems.

Mr. BASS. It does or doesn't?

Mr. MURIS. It does not. I personally would repeal a lot more than the common carrier exemption.

Mr. BASS. Are you going to get back to me on the issue of whether the Federal Trade Commission feels that it should have some

regulatory authority with fraud and abuse allegations associated with furniture moving companies?

Mr. MURIS. I am told that we testified on this issue about 2 years ago, and I don't know what we said. So I will have to get back to you on the record.

Mr. BASS. Thank you very much.

On the other subject, the FTC Do-Not-Call list is moving forward, and we all support that effort. But there are some concerns about the cost of this Do-Not-Call list that are being assessed to the telemarketers. Now, the telemarketers themselves apparently have these kinds of lists which they sell for something like 10 percent of what the FTC is proposing to charge. I understand it is on the order of something like \$700 or \$800 versus \$5,000. Why does this list cost so much?

Mr. MURIS. Well, first of all, we anticipate having something like 60 million telephone numbers. There is no list that is in any universe near that amount today. The law that Congress passed, at our recommendation, that the President signed, I think was based on the premise that if the telemarketers can go into your home and force consumers to sign up on a list, if they want to prevent that, then the costs should be borne by the telemarketers, and we think that the cost is a fair estimate. We have a rulemaking which we are about to finish, but the size of our list is—borders a magnitude bigger than anything else.

Mr. BASS. So what you are saying is, in essence, the cost of your list to telemarketers will reflect what is normally charged for lists of that size and will not be higher or out of line from what they would normally charge themselves? In other words, if they had a list of 60 million individuals on it, they'd charge the same thing that you're planning to charge.

Mr. MURIS. Well, let me put it this way. If you are a telemarketer right now and you have to comply, there are 27 and I think growing number of state lists. It will be much cheaper to have one national list than all the individual State lists from the standpoint of the telemarketer.

Mr. BASS. Mr. Chairman, am I on an 8-minute question or a 5-minute?

Mr. STEARNS. We are going to give you an 8-minute.

Mr. BASS. I wanted to make sure because I was going to yield back. During the 107th, 108th Congress, we had hearings on the American Spirit Fraud Bill, which is a bill that doubles penalties for charitable organization fraud in the aftermath of 9/11 and so forth. At that time, you commented that you were having difficulty in quantifying the problem of keeping records. Is there any progress on this issue? Do you know what I am talking about?

Mr. MURIS. Yes. One of the ramifications of Do-Not-Call, which we were just talking about, is that the very large complaint volume, large relative to the number of complaints that we receive now, that we are anticipating is forcing us to redesign our system of receiving complaints and getting information. We are just in that process now. We are doing it in a way that we hope we can better address that issue and a myriad of other issues about information of the incidence of fraud.



I mentioned the identity theft survey which is further along than a second survey we are doing which is a nationally projectable survey of fraud-type problems, and we are hoping that these surveys will provide us better information on the incidence of problems that consumers have in the economy.

Mr. BASS. In your proposal, you suggest allowing the FTC to obtain ISP consumer complaints on spam. Would you support requiring the ISPs to provide clear notice to the consumers of this access when they either make a complaint to the ISP or to you?

Mr. MURIS. I think, in general, my experience from looking at surveys is that consumers understand law enforcement use and exceptions to various policies. I certainly wouldn't object to that kind of notification, but I think consumers are what lawyers like to call "constructively on notice," and it is a reasonable expectation.

Mr. BASS. But you wouldn't oppose having some sort of notification on the complaint form that would alert the consumer to the effect that that complaint will be going to a Federal regulatory agency for their review, and it is automatically done or—

Mr. MURIS. Well, no. It certainly wouldn't be automatic. We are not asking for the routine forwarding of all complaint information. We wouldn't want it. What we are asking for is the ability, in a particular case when we are investigating someone for violating our statute, to be able to get this information.

Mr. BASS. So you don't expect, for example, a system that would have a consumer complaint to be automatically forwarded to you and the ISP at the same time? Rather, you want to be able to decide what complaints you ask for from the ISP and just have the consumer—you have no objection to the consumer knowing that his or her complaint may be forwarded to you if you request it?

Mr. MURIS. That's correct. I think if you ask consumers now, they understand that for law enforcement purposes, that information they share with businesses may go to law enforcement agencies.

Mr. BASS. Thank you, Mr. Chairman.

Mr. STEARNS. I thank the gentleman. Mr. Shadegg you're welcome for a first round of questioning.

Mr. SHADEGG. Thank you, Mr. Chairman. I appreciate that.

I want to ask a series of questions on identity theft to begin with. One complaint that I have heard from identity theft victims is the lack of accountability between Federal law enforcement agencies and also among State law enforcement agencies. Usually, one law enforcement agency will refer the matter to another State or to another agency and so on and so on. Victims do not know where it is they go for help. I think that is one of the roles the FTC was supposed to play, was assisting victims in finding the agency that would be of assistance to them.

I guess my first question is do you think the FTC's regional training sessions have helped alleviate that problem by educating law enforcement agencies about their responsibility? And what I mean by that is shortly after the law passed, we met with a number of enforcement agencies in Arizona to try to educate them about the law, and their first position was, well, tell us what credit card was stolen, and we explained, well, no, there was no credit card stolen. This is the theft of an identity, and we had to begin

by explaining to them the essence of the crime, and then we had to go on and explain to them that somebody had jurisdiction and somebody had to take it over.

So my first question is, for any of you, do you think that your efforts to educate law enforcement have been of value in this regard, and what more could we do to try to assist the law enforcement community in accepting and carrying out its responsibility for identity theft?

Mr. MURIS. We we are very active in this area, and you helped us recently. It was May 22, where we just had a law enforcement workshop in your State. We are on a very steep part of the curve in improving our relationships with law enforcement. In many parts of the country, the reaction that you found was there, but we have been training a great many people recently. We have been trying to put together a task force. We have put together referrals working with the Secret Service. I did a press conference recently with the Attorney General announcing a very large number of cases including, believe it or not, where someone was murdered to obtain the particular identity. Fortunately, that is an extremely rare event. We are doing a nationally projectable survey, which the results are in and they are being tabulated, about various kinds of identity theft. I think this will have a significant impact on law enforcement. We will share the results with our partners.

It is a fact of life that the system that we have, because we don't have the criminal enforcement authority ourselves—puts us in a coordinating position and not an enforcement position, but I think that we are doing this task very well. When we were discussing the Fair Credit Reporting Act here a few minutes ago, I wouldn't be at all surprised if we make some recommendations that will help in the identity theft area in terms of the Fair Credit Reporting Act. We are waiting for staff recommendations on that. We have some statistics I will would be glad to share with you that show just how much more active we have been each year. We have only been in this business for a few years. Personally, I very much, and I am sure my colleagues do as well, appreciate your particular interest and help in this area.

Mr. SHADEGG. Let me ask for a quick answer on this question. Has the FTC developed guidelines for businesses which are themselves victimized by identity theft?

Mr. MURIS. That is an excellent question. With some of these very large identity thefts recently, we are also in the victims' assistance business. Several of them have called us for help. We have developed materials. I'd be glad to supply those materials to you, as this is a growing problem. The problem of security itself is something that we are very active in with consumers. My colleague, Commissioner Swindle, has been very active in this. It is very important in the identity theft area, particularly with smaller businesses who are not as sophisticated, particularly in some of the techniques they need to use to protect the security of the on-line information.

Mr. SHADEGG. Third question, there has been some concern expressed by victims of identity theft that in order to clean up their record, they have to contact multiple credit reporting agencies and that takes a substantial amount of time. In some instances it is

three and in some instances it's more than three. Some have proposed, and we are considering in the current draft legislation that I am working on, that you be given the responsibility for requiring that there be a centralization of that process. That is to say, that you would report to one credit reporting agency, and they would be required to tell the others. So that a victim could only contact a single credit reporting agency and explain that they have been victimized. Have you looked at that issue? Do you think it is a responsible—

Mr. MURIS. We have been encouraging the one call process. My understanding is it is happening now. We are also encouraging creditors to accept a single form, which we developed in working with many in the business community, where the victim of identity theft can fill out the relevant information and then can submit that form without having to be faced with someone asking slightly different variations of the questions to some of the creditors. I think all of these victims' assistance measures are extremely important, and the business community has been very corroborative and quite interested, as I mentioned earlier. They are left holding the bag, the credit card companies, for example, in a very large way, and their cooperation is important to us.

Mr. SHADEGG. My time has expired. I appreciate your efforts in this area, and I look forward to working with you in the future.

Mr. STEARNS. I thank the gentleman. We will now start a second round of questioning.

In dealing with spam, I guess under Section 5, under fraudulent practices is the area that you use your jurisdiction for the rule-making. I see on a lot of publications there is a lot of software that is coming out to prevent spam, and I saw your opening statement when you mentioned, Mr. Chairman, that the Commission's statement on spam legislative proposals qualified, "admittedly, the Commission recognizes that these legal steps will not solve the growing spam problem."

I guess the question should be how should we interpret those words and further explain your statement that, "nor is it clear what impact what these steps—that is, spam legislative proposals—will have on some of the other problems associated with spam in terms of security and volume." How best the interrelated problems of volume and security be handled?

So, I mean, that is just the sense I have. I just need an explanation.

Mr. MURIS. I will let Commissioner Swindle answer.

Mr. STEARNS. Sure.

Mr. SWINDLE. Mr. Chairman, I think your questioning goes right to the heart of the problem with spam, and that is its complexity. I have stated, and I think I have stated in my opening statement, that no single act or device due to a new piece of legislation, is really going to solve the problem, and I think our statement merely is just recognizing that difficulty. Having said that, we have suggested that there are steps and we recommend—we are recommending some amendments possibly to the Telemarketing Act that would give brighter definition to certain things and give more clarity to interpreting everybody else as to what is acceptable and what

is not. Our problem today is not in a sense a lack of laws because if you—

Mr. STEARNS. Rules on the books, you mean?

Mr. SWINDLE. Yes, sir. If you falsify the from—to put it very simply, if you falsify who you are when you send a message and you are engaged in spam, that is deception. If you have a misleading subject line, that might be considered deception, and also unfairness, because it might be something that you feel compelled to look at. You know, a subject line “about your recent billing” or something of this nature. The problem is finding these people who do this. And that is more a technological problem, than it is a lack of a law problem, and the point of my comments is to say we have got a tremendous problem that we are all going to have to deal with.

Representative Shadegg was talking about the education program we are on. Awareness alone is probably the biggest challenge we have got. Collectively, all of us have got to make consumers more aware of some of the dangers here. But we have suggested, specifically, some possible amendments to the Telemarketing Act, using that model, not all of it, but some specific features that might be more precisely written that would help us. But, again, it is not going to be the—

Mr. STEARNS. It’s not a panacea.

Mr. SWINDLE. I don’t think there is a panacea, in all honesty.

Mr. STEARNS. Right. Like how are you going to handle international spam?

Mr. SWINDLE. I mean, we could frame up the United States with all the great laws and make it all perfect, and we still have no control of what is coming from outside because there are literally no laws out there, no boundaries.

Mr. STEARNS. Would someone else like to speak?

Mr. THOMPSON. I agree with Commissioner Swindle to a certain extent, but let me try to frame this a little differently. What we learned in our spam forum is that the problem is bigger than we may have originally thought. In other words, for a long time we thought the problem is the annoyance factor of just getting a whole bunch of e-mail in your mailbox. What we have learned is that there are a lot of different problems going on. One is the fraudulent and deceptive e-mail that we are getting that victimizes certain people. The second thing is we are learning about the volume, the possibility that this inundation of spam actually could clog the arteries of the Internet, and that is a real problem, not only in terms of national security that this whole channel might be closed down, but we also learned that there is another security problem because e-mail is the vehicle of choice in many instances of viruses. So we cannot address that problem alone just by legislation. Legislation may have some piece involved into it, but we also have to educate consumers and businesses. We have to encourage technological answers that give consumers more choices on how this information is managed, and in some areas, like the volume problem, we may have to study a little bit more. But all of those things—there is no one silver bullet.

Mr. STEARNS. Let me just conclude by this breaching—coming about crossborder fraud. Some of the materials you gave us said

that many of the proposed crossborder provisions were modeled after existing authority enjoyed by a number of other Federal Government agencies. Could you just explain that for me?

Mr. THOMPSON. Sure. That for example the SEC and the CFTC, for example, and some other financial regulators already have specific provisions that allow them to share information with law enforcers, similar types of law enforcers overseas. That is their way of being able to combat what we see as financial fraud that goes on around the world. What we are seeing is the same kind of invidious action taking place in the consumer fraud area where money moves around and people lie outside of our borders trying to come in and victimize our citizens. We see that all the time. It is a growing problem. So being able to share information, for example, with those law enforcers is going to be very very helpful. As I said, the CFTC, the SEC has similar kinds of provisions right now.

Mr. STEARNS. My time has expired. The gentlelady.

Ms. SCHAKOWSKY. Thank you.

I wanted to talk about sharing information as well. So I understand that part of the proposal is to have Congress grant you additional authority to share information, but let me ask you some questions that it raises in my mind about privacy, protection of that information. How can it be assured that the data you share will only go to appropriate officials and will not be shared with third parties by the foreign government? I am just going to ask them all. Two, how do we guarantee the rights of the accused if we share information with foreign governments, what are the conditions? Three, how can we assure that American citizens are not prosecuted for exercising their freedom of speech? I am concerned that this information could be used against those who simply have dissenting political views from foreign leaders. And I want to understand the additional FOIA exemptions that have been asked for. I am concerned that this could weaken our oversight, not yours, but our oversight of your agency's activities.

Mr. THOMPSON. Thank you. Let me first address your first point, which is about confidentiality of information in foreign governments. I think that the first thing is that we have discretion about the information that we share with foreign entities, and I think what we would do is ensure that they have some of the same safeguards that protect the information that we have in the investigatory process. That is a threshold. I think right now we are not able to share at all. So for us they have the same concerns about us so that information doesn't get here either that could help us prosecute cases for our citizens. So I think we would look for that kind of protection in discussing before we share any information with anyone. But as I said, this is similar to the kinds of protocols that exist in other areas, for example sharing information about criminal prosecutions or in securities or commodities. We would look for the same kinds of protection.

Now, about the rights of the accused, I think that—I guess it depends on which way it goes. I would like to understand your question a little better. You are talking about American companies who might be victimizing citizens overseas? I would like to understand that question a little better.

Ms. SCHAKOWSKY. Yes. Exactly what we said, the rights of American companies.

Mr. THOMPSON. Well, I think that to a certain extent American companies who are availing themselves of going overseas and dealing with another country's victims, citizens, then they are already subject to whatever those countries' laws are anyway. I think the kind of information that we have seen that is the traditional request is just pretty basic information about whether we have a similar type of prosecution. Let us say there is a case involving one company that victimizes citizens in both places. To be able to share witness information or—I think that they have their right in court to protect themselves the way they would in any other type of legal proceeding.

The third question you asked about American citizens and freedom of speech, I think that in terms of the cases that we wind up prosecuting, I think that we are talking about hard-core fraud and deception here, and I think we are clear in looking at the cases that we wind up bringing and we would look at those kinds of standards and the requests of other countries as the distinction between what we think is a mere freedom of speech problem or fraudulent, deceptive solicitations of consumers. And I think that this is merely to sharing information, I think that we would be free to make our own judgments about whether we do share that information and that includes inquiring how that information is going to be used.

You bring up a final question about FOIA, and I think it is important to recognize that FOIA, right now, has an exemption for prosecution. In other words, there is a protection for the sanctity of investigation process when you are prosecuting a case. I think that exists now. I think similar kinds of protections would still exist here too. In other words, that kind of information is not freely available. There is an exception for that kind of information under FOIA.

Ms. SCHAKOWSKY. What I am asking is there are currently exemptions in FOIA, as you say, business information, personal privacy, records of financial institutions. So why do you need an extension of the current FOIA exemptions?

Mr. THOMPSON. One of the keys is when we wind up sharing information or getting information from a foreign entity to assist us in a prosecution, that what we would like to have is a more express understanding that that information is covered under the same umbrella of an investigatory process.

Ms. SCHAKOWSKY. I am wondering if Commissioner Swindle wanted to comment at all about this. Let me just say my concern is that sometimes when we deal with these privacy questions that there are unintended consequences of the goals that we have in mind, and I think that Americans are very, very concerned both about prosecuting fraud and deception but also about the protection of privacy, and maintaining that balance is very important.

Mr. THOMPSON. Can I add one thing though? Under FOIA we provide confidentiality to foreigners the same way that we seek assurances when sharing information, and one of the problems is the FTC Act doesn't apply to foreign governments. So we need to sit down and talk to them. We don't get that information at all now

if we are not able to at least provide some protection of that information and the sanctity of that information because there are many witnesses who would not come forward. There is a lot of evidence that wouldn't exist, and that prevents us from actually helping our consumers.

I will also say one other thing, that I share your concerns about privacy. That is one of the issues that I am particularly concerned about at the Commission. I think that this proposal does not jeopardize privacy, and, in fact, actually recognizes the investigatory process that we have now and allows us to get information to protect consumers that we would not be able to protect otherwise.

Mr. MURIS. Could I ask Commissioner Swindle to answer the question?

Ms. SCHAKOWSKY. Absolutely.

Mr. SWINDLE. Thank you. I think I would like to make a short general comment to the concerns that you expressed, and I guess one big word for it would be the Patriot Act would certainly get a lot of attention, and people are a little bit squeamish about this, and I am too because we respect consumers, we respect the privacy of personal information. But I think we are talking about two things here. One is our ability to share information, and we sense because things are now worldwide, we need the capacity and ability to share information. That is one issue and we don't have it in the cases where we think we need it. The second issue is protecting that information from misuse. The first issue, needing that ability, I think, can be debated without emotion to find the bad guys and it is the same kind of a situation whether you are looking for terrorists or fraud in selling business opportunities, ripping people off. We need that as an investigative tool.

The second issue of protecting that information that is shared on either end, and then, God forbid, it gets out in all the extremities for whom you share it with, this is an age-old problem. It will never be solved. We have it right here in this body, in Congress. Confidential briefings, things leak out. I come from a military background where we have very rigid classification of information, confidential secrets, top secret, out of this world, and interestingly it is always—not always. That is an exaggeration, it is constantly divulged wrongfully so. And I think in all honesty the only way we will ever solve that problem is just constant awareness, reeducating ourselves, reminding ourselves, great leadership that says don't you do that, and having people understand what they are dealing with. And I don't know the solution to that. We might solve it yet in my lifetime. So I think for us, from a law enforcement standpoint, we feel a need and we have expressed it in recommendations to have this capacity, to share information, to retrieve information from other countries. The crossborder thing, the jurisdictional issue are extremely complicated and we try to work with our associated countries who are concerned about these things and we realize right off the bat we agree on 80 percent of the things, and then there is this 20 percent that we have really got some difference of opinion because very few people know what we mean when we talk about freedom of speech. It is certainly not codified into their constitutions and documents that set them up to recognize and respect that and honor it; so we have to work out

those details, and we are in constant contact and dialog with our foreign partners trying to work out things such as this, but the need to be able to reach out and find the bad guys is an overpowering thing. It is made more dramatic by the Internet and the capacity broad dissemination. So I think we have got to be rational as opposed to being emotional about this and think it through and recognize it. And then the last leg of the stool is this goes for all of us, the administration, Congress, us and everybody else. We have got to learn a way to discuss this without creating the emotion of alarm that seems to surround this whole issue. We are never going to get to that which we need, if we quickly try to point out that there are extremists on both ends or the people who are on both ends, acting in a manner that conveys the idea that they are extremists. We have really got a PR problem here, and I think we all need to get together to work on it and do a better job of it.

Mr. STEARNS. The gentleman from Arizona.

Mr. SHADEGG. Thank you, Mr. Chairman. I will endeavor not to use my full time.

From my opening statement, I think you can see that I come at the issue of identity theft from the viewpoint of the individual victim. My first approach or concern was this needs to be a crime and it currently isn't a crime. You can steal somebody's identity, but until you have taken the money, actually stolen some money from them, or in some other way committed a conventional crime, it was not a criminal conduct at all, and we dealt with that issue. I think the second problem we tried to address, and I think you are trying to address, is the problem of convincing law enforcement that the mere theft of identity, of inidentity, is in fact a crime and that there is somebody that is responsible for it. One of the issues is who is responsible? If I live in Virginia, and my identity is stolen here, and somebody applies for a credit card with Sears which is based in Chicago, but they apply for that credit or seek that credit in LA, which one of the U.S. Attorneys or which one of the county attorneys is going to take care of that crime? What I found early on was they each kind of said, well, the site of that crime is Virginia where you live or in Chicago where Sears is located or it is LA and they would each point at each other and not get anything done. The head of your Identity Theft Unit has indicated to my office, as I said in my opening statement, that this is now not so much an individual case, a crime where an individual identity is stolen, as it is the theft of massive amounts of information.

My first question of you is looking at that trend, No. 1, do you agree with that? Is there a trend that it is the theft of massive data bases? And No. 2, since we are looking at the reauthorization of the FTC, do you need or do you perceive a need for additional authority at the FTC to deal with those large volume thefts of information?

Mr. MURIS. We clearly see more cases of large-scale identity theft. It is very hard since there hasn't been very good information for very many years. Our whole process in terms of getting the consumer complaints is very new to know what the historical trends look like. We also don't have a good idea of the national incidence of a lot of these problems. The survey that we have just finished and are tabulating the results will help there. I personally have supported increased penalties at the Federal level for identity



theft—I know there are bills working their way through Congress—as part of this procedure of reauthorizing the Fair Credit Reporting Act. As I mentioned, we are getting a recommendation from the staff, and we may propose some additional protections or changes in the Fair Credit Reporting Act that would help on the identity theft front.

The primary enforcement obviously is not us but the crime because we don't do the criminal work.

Mr. SHADEGG. Would any of the others like to comment?

Mr. THOMPSON. I think this is a very interesting challenge. The bulk theft of the information especially as it appears on line is one that may also fall under the umbrella of a Cyber Security Act. So that is one area to pursue as well.

But I think you have highlighted the challenge. One of the reasons why we have engaged in a lot of cooperative efforts and in education efforts is not just having something on the books but raising the priority of that item with law enforcement, even criminal law enforcement officials throughout the United States so it doesn't fall below the radar screen. That is a very interesting challenge. But it is a very difficult challenge.

Because what we see is that some jurisdictions are just much more cooperative than others. What we are seeing, and it is very helpful, is their willingness to talk to us about it raises the profile of the issue; and I am sure that a large percentage, for example, of the information and educational materials that we put out goes to those localities who are using them.

Mr. SHADEGG. Thank you very much.

I yield back the balance of my time.

Mr. STEARNS. Thank the gentleman.

The gentleman from Ohio.

Mr. STRICKLAND. Thank you, Mr. Chairman.

I have two questions, and I have got 5 minutes, so I am going to try to get both of them answered, if I can, as succinctly as possible.

In 1997, the FTC proposed lowering the standards by which the agency would determine whether a good could carry the made in the USA label to acknowledge the globalization of production that is occurring around the world. My question to you, what are your views on the present standards that all or virtually all of the product must be made in the USA? I think it is a standard that we have had for 5 years or more. What is your present view regarding that standard? Should it be maintained? Should it be weakened or—I am just interested in knowing what the thinking of the Commission may be in regard to the made in the USA label.

Mr. MURIS. I was on the Commission when it went through all of this. I mean, in general, for me, for any issue it is a question of consumer interpretation. Let me defer to my colleagues who may have been on the Commission when it—oh, no one was.

Mr. THOMPSON. Well, I think that Commissioner Swindle and I came on just after, and I can tell you from talking to staff I don't sense that there is a great clamoring of people asking for changes here.

Mr. STRICKLAND. Very good. You know I am willing to settle for that answer.

Mr. THOMPSON. Okay. So either a lot of people are silent or maybe we got it right.

Mr. STRICKLAND. I think there was rather strong feelings expressed on the part of the Congress in regard to that issue.

The second issue—

Mr. THOMPSON. In fact, Congressman, I—the one thing that I was warned about when I first came on the Commission was don't get involved in the made in the USA because there was a big fight over it and people agree on what it is. So—

Mr. STRICKLAND. Thank you so much.

The second question deals with gasoline pricing. In the summer, spring and summer of 2000, the Midwestern part of the country, including my State of Ohio, experienced soaring gasoline prices; and at that time we approached the FTC and asked for an investigation. In March of 2001, the FTC released a report stating, and I am quoting, while the Commission found no credible evidence of collusion or other anti-competitive conduct by the oil industry, the investigation found a combination of many factors that were likely responsible for the price spike. These factors included circumstances beyond the control of the industry, as well as those within their control, quote, conscious but independent choices by industry participants to engage in profit-maximizing strategies.

Now, I understand that the FTC is conducting a relatively new and ongoing gasoline price monitoring project. The question I would like to ask, would you please share with us the status of this 2002 gasoline price monitoring project, and will you regularly share updated information regarding that project with the Congress?

Mr. MURIS. We have begun in earnest to track gas prices on a real-time basis all over the country at retail and also in some places at wholesale. What have a model about historical relationship of prices and we are looking for what we call anomalies, when the price can't be explained by factors that normally explain the price. When we find those anomalies, we look to see what the source of the problem is.

I sent a letter to all 50 State attorneys general. The response was overwhelmingly positive. One of the things we do—they are often closer to the facts than we are—is talk to them when we find these anomalies in place. When the anomalies can't be explained by some natural cause, for example, a refinery fire or a refinery outage, we investigate further; and it has been a tool that has led us to have a much better understanding and in some cases has led to further investigation.

Mr. STRICKLAND. Do you believe that the FTC may need more authority than you currently have to do this monitoring and any follow-up corrective or remedial action that may be necessary to prevent—

Mr. MURIS. I think our antitrust and consumer protection laws are adequate. This is an industry in which we spent a tremendous amount of resources. We just brought a very large case, which I mentioned in my opening statement, that is in litigation now involving Unocal in California. The Commission, through its merger review policy, has required more divestitures in both size and just the sheer number of divestitures than I believe in any other industry. I think our presence is important and helpful here.

We are working on some reports as well to talk about our merger enforcement policy and to discuss a couple of conferences on the issue of the volatility of changes in gas prices. We are going to be issuing reports on that. So this is an area that both in the enforcement and trying to explain what happens level we are quite active.

Mr. STRICKLAND. Thank you. And thank you, Mr. Chairman.

Mr. STEARNS. Thank you, gentlemen.

The gentleman from Massachusetts is recognized.

Mr. MARKEY. Thank you, Mr. Chairman.

Chairman Muris, where do we stand on the implementation of the national Do Not Call data base?

Mr. MURIS. We just announced, I believe it was last week—we had thought we were going to have to roll it out across country in terms of—there are two ways you could sign up. One is by e-mail, and one is by the telephone. We had thought we were going to have eight different zones in the country visa telephone and we reduced that to two. We hope to begin the launch in the sign-up very shortly, certainly by early next month at the latest.

Mr. MARKEY. Have you spoken with Chairman Powell of the Federal Communication Commission about their role in this?

Mr. MURIS. Well, we have had extensive conversations with them. As you know, Congress has directed them—and they were working on this anyway—to decide if a similar rule to ours is appropriate. I have every expectation that very shortly they will make that decision. If they implement a rule like ours, it will fill some jurisdictional holes that we have. We filed an extensive comment with them, and I am optimistic that we will move forward together. I obviously can't speak for the FCC.

Mr. MARKEY. So you are hopeful that they will act in a timely fashion so that the expectations of consumers with regard to those protections will be built in.

Mr. MURIS. Yes, sir.

Mr. MARKEY. But you can't speak for them.

Mr. MURIS. That is for sure.

Mr. MARKEY. Is it your observation that they are moving in a timely fashion?

Mr. MURIS. Yes, they have a rulemaking process. We filed comments. We have had extensive discussions with them at the staff level. I have—all the indications are they are moving in a timely fashion.

Mr. MARKEY. Over in the spamming area, can you deal with the question of how we are going to regulate off-shore spammers? Since it is just as easy to spam from Boston or Bermuda, how do we deal with those jurisdictional issues in order to ensure that anything that is put on the books ultimately winds up working, given all of the jurisdictional conflicts issues that are raised?

Mr. MURIS. Let me summarize very briefly. My two colleagues have been talking about these issues at some length. We have proposals we have been working on for over a year, fairly extensive proposals dealing with cross-border fraud. Unfortunately, more and more of the fraud in the United States comes from outside the borders. A lot of that fraud is done via spam, so there is a close intersection between the two.

We have some suggestions which we have made for dealing with the cross-border fraud problem generally and the spam problem particularly. They will provide better procedural remedies for us and an ability to cooperate with law enforcement agencies overseas. Spam is a very specific example. When we send a CID to the ISPs—I am speaking jargon here.

Mr. MARKEY. CID for our C-SPAN viewers.

Mr. MURIS. It is like a subpoena. It is a civil investigative demand. What happens is, we are trying to investigate someone who we think is committing fraud. Some of the ISPs think that they are required to turn around and inform the target that they have a CID from us, and we are asking that the law be amended so that they don't have to do that.

That is just one of many procedural examples.

Mr. MARKEY. So we need kind of a spam coalition of the willing around the world who will help us to isolate these forces of evil.

Mr. MURIS. Spam is the toughest problem I have seen for two reasons. One, because of the nature of the Internet protocols, you cannot track who is sending the spam. Through the way the Internet works you have to follow the money and that could be very hard to do. Second, unlike the telephone calls or the letters, the cost of sending another 10,000 letters or making an additional 10,000 phone calls is real. The cost of sending an additional 10,000 spam is effectively zero. That makes an extraordinarily difficult problem.

Mr. MARKEY. I only have 24 seconds left. It is my understanding that the FTC and the State AGs work closely to enforce the telemarketing sales rules. Is this a model that works?

Mr. MURIS. Yes. Our cooperation with the States is excellent.

Mr. MARKEY. Is it a model as a result that you believe should be included in the spam legislation?

Mr. MURIS. We have suggested a model that follows the Telemarketing Act. As Commissioner Swindle mentioned, the bills that exist, the bill that has been introduced out of this committee could easily follow that act. We think it has been successful.

Mr. MARKEY. Do you agree with that, Mr. Swindle?

Mr. SWINDLE. I think it is a good model, certainly. He is my boss. I have to agree with him, Mr. Markey. Thank you for putting me in that box.

Mr. MARKEY. I have been reading a lot of your interviews.

Mr. SWINDLE. Yes, sir. I think it is a good model. Not in its entirety, but we have laid out some specific things that we think would give us more definition, more clarity.

It would also be good for industry to know, you know, the bright light concept of making sure we all know what we are talking about. And I think we are just going to have to grow with the problem. I guess a better way to put that is we have got to catch up with the problem, then we can grow along with it and find solutions to it. But technology is going to have to play an incredibly big role in this.

Mr. MARKEY. Could I ask do you agree with that, Mr. Thompson?

Mr. THOMPSON. Sure. If not for any reason, the rulemaking process allows a degree of flexibility; and, as we have seen in this area, this is an area that changes fairly quickly. The spammers are very

smart and have every financial incentive to be creative. But there are lots of things going on here with regard to spam, including technological efforts, et cetera; and I think a rulemaking under TSR would allow us to have that kind of flexibility.

Let me just make one other point on your earlier question about international spam, that this is a topic that is being discussed at the OECD and other forums, that they are looking to the U.S. for leadership here. I think we have the floor. I think they are looking to find out what kind of balanced response that we come up with, and the cross-border fraud initiative that we have is also going to be an important element because, to the extent that we want to be effective in our enforcement, we have to be able to share information with our counterparts around the world. I think they are looking to us for guidance on how we do it.

Mr. MARKEY. Mr. Chairman, my mother would be very upset if I didn't ask the Irishman on the panel for his opinion.

Mr. Leary, could you give us your view on the subject? What high school did you go to, Mr. Leary?

Mr. LEARY. I grew up in New Jersey.

Mr. MARKEY. So what high school?

Mr. LEARY. I went to a place called Newark Academy, which was a boys day school.

Mr. MARKEY. Catholic school.

Mr. LEARY. It was not.

Mr. MARKEY. Oh.

Mr. LEARY. Better not tell your mother that.

Mr. MARKEY. Actually, my mother would be impressed that such a high-class Irish family was giving advice to her son.

Mr. LEARY. I agree with the others. There is no magic bullet, and we have to keep plugging away and plugging away and plugging away. The only thing I would say is that, you know, that is true to some degree of everything we do. We plug away and we plug away and plug away at false and deceptive advertising in this country, and it is still around us everywhere. One of the biggest advantages of plugging away and, quite frankly, publicizing what we do highly is that the more consumer information is out there, the more wary consumers there are out there, the less the problem.

Mr. MARKEY. Well, as you know, Mr. Leary, the great Jesuit theologian Tiehhard de Chardin, in his concept of the neosphere and the interconnectivity of all of us on this planet, was that essentially each of us working together collectively advances bit by bit the perfectibility of mankind, making us more worthy ultimately as a species of the next world.

In many ways, Marshall McLuhan pointed back to Tiehhard as his model anticipating the birth of the Internet; and many people believe that Tiehhard, the great Jesuit philosopher, is the spiritual father of the Internet and all of those things that are made possible. So you are right. You have to just keep working at it, make it better, as good as you can make it in your generation and then, you know, pass it on to the next generation. But, as these problems emerge, you have that great responsibility. And you, as an Irishman, presented the opportunity for me talk about Tiehhard de Chardin here today; and I want to thank you for that.

Mr. LEARY. Always pleased to oblige.

Mr. MARKEY. Thank you, Mr. Chairman.

Mr. MURIS. And, unfortunately, he is a Yankee fan.

Mr. MARKEY. No one is perfect, so we are trying to improve the species in each generation.

Mr. STEARNS. I thank the gentleman. We are going to plug away and plug away and bit by bit try and get reauthorization for the FTC which has not been done since 1966—1996.

Let me also, Chairman Muris, thank you for coming. It is always nice to have you before our subcommittee and fellow commissioners, and we will work certainly in the area of cross-border fraud and spam to get a bill. So we want to thank you very much for coming.

With that, the subcommittee is adjourned.

[Whereupon, at 12:15 p.m., the subcommittee was adjourned.]

[Additional material submitted for the record follows:]

FEDERAL TRADE COMMISSION  
OFFICE OF THE SECRETARY  
July 2, 2003

The Honorable JOHN D. DINGELL  
*Ranking Member*  
*Committee on Energy and Commerce*  
*U.S. House of Representatives*  
*Washington, DC 20515-6115*

The Honorable JAN SCHAKOWSKY  
*Ranking Member*  
*Subcommittee on Commerce, Trade, and Consumer Protection*  
*Committee on Energy and Commerce*  
*U.S. House of Representatives*  
*Washington, DC 20515-6115*

DEAR REPRESENTATIVE DINGELL AND REPRESENTATIVE SCHAKOWSKY: This responds to your letter of June 16, 2003, submitting questions from several members of the Committee on Energy and Commerce to the Commission, following up on the Committee's June 11 hearing entitled "The Reauthorization of the Federal Trade Commission: Positioning the Commission for the Twenty-First Century."

Enclosed, for the hearing record, are the Commission's formal responses to your questions.

Should you or your staff require further information or assistance, please contact Anna Davis at (202) 326-3680.

By direction of the Commission.

DONALD S. CLARK  
*Secretary*

Enclosure

RESPONSES TO QUESTIONS FROM THE HON. JAN SCHAKOWSKY

IDENTITY THEFT

*Question:* What resources has the Federal Trade Commission (FTC) dedicated to address the problem of identity theft?

*Response:* The FTC launched its formal identity theft program following the enactment of the Identity Theft and Assumption Deterrence Act in 1998. That law directed the FTC to provide victim assistance, develop a central repository of identity theft complaints, and share complaints with law enforcement and private entities as appropriate. Since that time the FTC has directed substantial resources to this area, devoting 9.25 staff FTE and an additional approximately \$2.3 million in non-compensation expenditures in fiscal year 2002.

These resources support an extensive program. From the beginning of the ID Theft Program at the Commission we have:

1. Created the Identity Theft Data Clearinghouse, the database of identity theft complaints, and its interface with the Consumer Sentinel system to make the complaint data available to law enforcement. The Clearinghouse currently

- houses more than 373,000 complaints, which are available to law enforcement through the secure (and free) Sentinel network.
2. Established a toll-free number for callers with identity theft issues and complaints, and staffed the call center with well-trained phone counselors. On average, our toll-free number receives more than 10,000 consumer contacts each week.
  3. Developed the ID Theft Affidavit in coordination with financial institutions and privacy organizations, to simplify victims' efforts to dispute fraudulent accounts with creditors. The FTC has distributed more than 600,000 copies of the form through the web and in hard copy.
  4. Developed and distributed consumer education materials including *Identity Theft: When Bad Things Happen to Your Good Name*, a comprehensive publication for ID theft victims in both English and Spanish, and the newly released ID THEFT: What's It All About?, a primer for the general population. We have distributed more than 1.2 million copies of *When Bad Things Happen* in hard copy.
  5. Built and maintained the nation's central ID theft website, [www.consumer.gov/idtheft](http://www.consumer.gov/idtheft), which contains an online complaint form, our ID theft publications, testimony, state laws and other resources.
  6. Trained law enforcement officers around the country through workshops organized with the US Secret Service, US Department of Justice, US Postal Inspection Service and the International Association of Chiefs of Police. To date more than 700 officers have been trained through these sessions. Three more sessions are planned for the coming months.
  7. Developed preliminary investigative reports on high impact leads for further investigation by criminal law enforcement.
  8. Assisted entities that have been subject to an information breach. Such breaches could lead to identity theft for those whose data was compromised.

*Question:* What further steps are you considering taking to help victims regain control of their credit histories and their lives?

*Response:* We are continuously looking for new ways to assist victims of identity theft and assist criminal enforcement in this area.

*Extending The Accessibility of Our Consumer Education Materials and Resources.* We encourage multiple governmental agencies and private entities to print, post, or otherwise make available our consumer education material. We also make this material available through CD ROM, enabling other organizations to print copies of the publications and affidavit. We encourage the states to take advantage of the resources we have developed. One model of cooperation is the Office of the Attorney General of North Carolina, which has used FTC materials to develop a victim response kit for state residents. The Attorney General's website links to the FTC's complaint form and affidavit, and he actively encourages law enforcement agencies throughout his state to become Sentinel members with access to the ID Theft Clearinghouse data.

*Working With Financial Institutions and Credit Reporting Agencies to Streamline Victim Assistance.* To simplify the process that victims must go through to dispute accounts opened in their names, we are working with the financial industry to modify the ID Theft Affidavit and increase its usefulness for financial institutions and law enforcement. We also encourage the consumer reporting agencies to continue their initiatives to ease the burden on ID theft victims and help them to restore their financial security. The three national consumer reporting agencies recently launched a program to enable callers to their fraud lines to call just one of the three consumer reporting agencies with their request for a fraud alert and copy of their credit report. That agency will then share the fraud alert request with the other two agencies, thus eliminating the need for the victim to call each of the three agencies. Through another program to assist victims, the police report initiative, the consumer reporting agencies have agreed to block trade lines if a consumer provides a police report documenting the incident of ID theft.

*Facilitating Criminal Enforcement.* The FTC has continued to promote aggressive prosecution of identity theft by local and federal agencies. Our training of law enforcement and improvements to the Identity Theft Data Clearinghouse should facilitate more efficient and focused investigation and prosecution of this crime.

*Improving Electronic Access.* Our website is also scheduled for substantial revisions, which will be unveiled in the next few weeks. Additional educational material, geared to businesses, will debut with the new website. A self audit guide and a business record theft response kit will enable companies to safeguard consumer data, and better respond when a breach occurs. The FTC is also working on a major upgrade of the system that houses the Identity Theft Data Clearinghouse. The upgrade will allow us to provide better customer service to hotline callers, will facilitate the use of the data by our in-house analysts, and will substantially improve

performance of the system for our law enforcement users around the country. Ultimately, each of these improvements will benefit victims of ID theft.

*Question:* Have you considered creating a separate office within the department that is solely dedicated to combating identity theft and helping victims restore their credit record? Do you have adequate resources to address this problem?

*Response:* Currently, the Bureau of Consumer Protection's ID Theft program maintains a core team that is focused solely on ID theft issues. Other parts of the Bureau of Consumer Protection help support the ID theft programs. The Commission's Consumer Response Center plays a key role, with an off-site phone center that handles incoming calls and consumer complaints and in-house FTC staff who ensure data quality and performance standards by the phone counselors. FTC data analysts play another central role, reviewing the ID theft data in the Clearinghouse to develop reports and analyses. The Bureau's Office of Consumer and Business Education supports the program by developing, promoting, and distributing ID theft educational and outreach materials.

The work of the ID theft program is also supported by other Bureau units that enforce issues related to privacy, including security. For example, enforcement of the safeguard rules, which were promulgated under Gramm-Leach-Bliley, and law enforcement actions against companies that misrepresent their security measures (see, for example, the recent settlement with Guess.com at [www.ftc.gov/opa/2003/06/guess](http://www.ftc.gov/opa/2003/06/guess)) are important features of our consumer protection program.

Additionally, colleagues in other agencies complement the work of our staff. We have forged strong partnerships with many agencies and work closely with them on most aspects of our work. The US Secret Service has detailed a special agent to work with the ID theft team to enhance our work with criminal law enforcement. The Office of Inspector General for the Social Security Administration systematically transfers the ID theft complaints from their Social Security Number fraud system into our Data Clearinghouse. Assistance from these agencies is critical to the program.

Finally, deterrence of ID Theft by increased criminal enforcement remains a critical need. Recent interagency training efforts focusing on local law enforcement as well as efforts to increase participation by state and local law enforcement agencies in the ID Theft Data Clearinghouse are all essential to this effort.

Thus, we continue to place a priority on our work in the ID Theft program and this work extends across several offices of the Bureau of Consumer Protection. Although additional resources would always be desirable, the current resources allocated to the program are balanced with our many other consumer protection responsibilities. We do not believe that creating a separate office through which all ID Theft-related efforts are conducted would improve our efficiency or productivity.

#### CONSUMER REPORTING AGENCIES

*Question:* Can you please tell me about the Commission's efforts to monitor smaller consumer reporting agencies?

*Response:* The Commission is aware of several categories of smaller consumer reporting agencies.<sup>1</sup> First, there are a small and dwindling number of local credit bureaus that are affiliates of the "big three" nationwide repositories. These bureaus own records of local consumers that are maintained on the centralized databases of the nationwide repositories. Almost no small credit bureaus still maintain their own, local-level databases.

Another type of small credit bureau is represented by "resellers," consumer reporting agencies that purchase consumer information from one or more of the major repositories and then resell it, usually after re-formatting, categorizing, or otherwise assembling the information.

Finally, the consumer reporting industry has also witnessed the emergence of companies that collect and report specialized, non-credit information such as check writing histories, rental records (including evictions), drivers' records (for the truck-

<sup>1</sup>"Consumer reporting agency" is the term used in the Fair Credit Reporting Act ("FCRA"), and reflects the fact that consumer information is collected and reported for a variety of purposes in addition to credit transactions. In common terminology, however, the agencies are known as "credit bureaus" or "credit reporting agencies." The term "repository" is most often reserved for the large, national bureaus that collect and store information on over 190 million consumers. As your question recognizes, there are large credit bureaus, which operate nationally, and smaller credit bureaus, which operate regionally or offer more specialized services. The major bureaus are sometimes referred to as the "big three," in recognition of the three major companies that have predominated for several years—Equifax, Experian, and Trans Union. (A fourth company, Innovis Data Services (an affiliate of CBC Companies), also maintains "a national database of consumers with unfavorable current or past credit histories." See <http://www.innovis-cbc.com/products.htm>.)



ing industry<sup>2</sup> and other users), utility exchanges (records of consumer payment histories with electric companies and other utilities), and criminal history and other public records databases. Each of these entities is covered by the FCRA if the data are used, among other things, for purposes of determining a consumer's eligibility for credit, insurance, employment, or other goods or services for which the consumer has initiated a business transaction.

The Commission stays abreast of developments with smaller consumer reporting agencies in a number of ways. The Commission maintains a Consumer Response Center (CRC) to receive and record consumer complaints against all kinds of businesses. The CRC logs consumer complaints by, among other items, type of business (in this case, credit bureaus) and the company named in the complaints. We can review individual complaints against smaller bureaus.

Commission staff meets from time to time with representatives of smaller consumer reporting agencies and their trade association, both to learn of new developments in the industry and to respond to concerns and inquiries. The staff also responds to numerous telephone inquiries from small or specialized consumer reporting agencies, and from their representatives, about interpretation of FCRA requirements in the sometimes-unique contexts of their individual businesses and needs.

The Commission also undertakes efforts to insure that those entities that use smaller consumer reporting agencies with specialized databases, such as landlords or insurance companies, comply with FCRA requirements to supply adverse action notices when the user takes an adverse action, such as denial of apartment rental, based on information from a consumer report. Adverse action notices must disclose the name of the consumer reporting agency from which the user obtained the information, and consumers can thus obtain disclosure of the information on file at the agency and dispute any incomplete or inaccurate information that they find. Adverse action notices, a key provision of the FCRA, are thus of even greater importance in the context of small, non-credit reporting agencies, the existence of which is likely even less evident to consumers than conventional credit bureaus.

The Commission has given high priority to assuring compliance with FCRA adverse action notice requirements by all consumer report users,<sup>3</sup> and places special emphasis on compliance by users of smaller, specialized consumer reporting agencies. For example, staff recently conducted an investigation of fifteen landlords in five cities across the United States. The staff found a high level of compliance with the adverse action requirements of the FCRA.<sup>4</sup> The Commission has taken actions to assure compliance by resellers of consumer reports (small agencies that purchase consumer reports from the major bureaus and resell them),<sup>5</sup> as well as specialized agencies that issue bad check lists,<sup>6</sup> or supply medical information.<sup>7</sup>

*Question:* How accurate are the data at smaller credit reporting agencies?

*Response:* The FCRA uses two major avenues to achieve the goal of optimal accuracy. First, the FCRA establishes mechanisms for consumers to learn about possible errors in their credit reports and have them corrected. The statute gives consumers both the right to know what information the credit bureau maintains on them, and the right to dispute errors. Second, it provides that consumer reporting agencies

<sup>2</sup>Changes to the FCRA provision governing use of consumer reports for employment purposes were enacted by Congress in recognition of the unique needs of the interstate trucking industry. Pub. L. No. 105-347, 112 Stat. 3208 (1998), §§2 and 3 (codified at FCRA §§604(b)(2)(B) and (C); 15 U.S.C. §§1681b(b)(2)(B) and (C)).

<sup>3</sup>See, e.g., *Quicken Loans Inc.*, D-9304 (Apr. 8, 2003).

<sup>4</sup>The Commission's January 15, 2002 press release on the investigation and resulting business education brochure can be found at <http://www.ftc.gov/opa/2002/01/fcraguide.htm>.

<sup>5</sup>See *I.R.S.C.*, 116 F.T.C. 266 (1993); *CDB Infotek*, 116 F.T.C. 280 (1993); *Inter-Fact, Inc.*, 116 F.T.C. 294 (1993); *W.D.I.A.*, 117 F.T.C. 757 (1994) (consent orders against resellers settling allegations of failure to adequately insure that users had permissible purposes to obtain the reports). See also *First American Real Estate Solutions, LLC*, 1999 FTC LEXIS 137 (Jan. 27, 1998) (consent order with a reseller concerning the dispute obligations of consumer reporting agencies).

<sup>6</sup>*Howard Enterprises*, 93 F.T.C. 909 (1979).

<sup>7</sup>*MIB, Inc.*, 101 F.T.C. 415 (1983) (prohibits a non-profit medical reporting agency from conditioning the release of information to a consumer on his/her execution of a waiver of claims against the firm; requires timely reinvestigations of disputed information; requires that agency contact, when possible, the source(s) of disputed information or other persons identified by the consumer who may possess information relevant to the challenged data and modify its files accordingly). In 1995, the Commission reached a further agreement with MIB, to ensure that insurance company users of MIB reports would supply consumer applicants with adverse action notices in those cases where information from an MIB report figured in adverse action by the insurers. See <http://www.ftc.gov/opa/1995/06/mib.htm>.

must follow “reasonable procedures to assure maximum possible accuracy of the information” they report.<sup>8</sup>

The Commission does not directly examine the content of consumer reporting databases. Some specialized consumer reporting agencies, such as employment screening services, do not maintain databases of their own (using public record databases if reporting criminal or driving history as part of their report). Others, such as tenant screening services, keep information on local apartment residents and also provide landlords with a credit report from one of the national repositories in the agency’s report to a landlord on an individual rental applicant.

With respect to the accuracy of reports from smaller reporting agencies, we have only limited information, but our complaint statistics do not suggest that consumers lodge a significant number of accuracy complaints against smaller agencies.

*Question:* Have you taken enforcement actions against these smaller agencies?

Response: Yes. The Commission has taken action when patterns of practices indicated a problem with FCRA compliance. See *supra*, e.g., notes 3 through 7, and accompanying text.

#### PREDATORY LENDING

*Question:* I am pleased that last year the FTC took an enforcement action against Citicorp which was formerly known as Associates because it was deceiving consumers. Nevertheless, is the FTC working with other regulators to bring additional cases under the FTC Act? If yes, can you discuss with us today any particulars regarding these cases or what has prompted actions by the FTC?

Response: As you know, the FTC’s case against The Associates and Citigroup was recently settled, requiring the defendants to fund a \$215 million consumer redress program. It is worth noting that the FTC’s case followed on the heels of an action brought by the State of North Carolina, the settlement of which returned \$20 million to consumers in that state.

The FTC’s enforcement program in the subprime lending area is ongoing, and we continue to work closely with state and federal agencies to enforce lending laws. We maintain close relationships with several federal agencies with responsibility in this area, including the Federal Reserve Board, the Department of Housing and Urban Development, the Office of the Comptroller of the Currency, the Office of Thrift Supervision, the Federal Deposit Insurance Corporation, and the Department of Justice. The ties we have cultivated allow us to exchange information about potential law enforcement targets and, in some cases, to join efforts to pursue cases. In the past few years, for example, we have partnered with HUD to pursue cases against Mercantile Mortgage Company and Action Loan Company, and with the Department of Justice and HUD against Delta Funding Corp. All of these cases resulted in settlements providing substantial relief for consumers.

State regulators have also been important partners in our law enforcement efforts, providing leads for potential cases and bringing joint enforcement actions. For example, we are currently pursuing a case in federal court jointly with the State of Illinois against a mortgage broker for allegedly deceptive and other illegal practices in brokering subprime loans. This particular defendant was brought to our attention by the Legal Assistance Foundation of Chicago. Last year, we partnered with the Attorneys General of Florida, California, Arizona, Illinois, and Massachusetts and the New York State Banking Department to pursue a case against First Alliance Mortgage Company, a California-based subprime lender charged with numerous unlawful practices. The case was settled jointly by the government parties, as well as a number of private plaintiffs, resulting in an approximately \$60 million redress fund.

In addition to our joint litigation, the FTC routinely consults with state regulators to learn more about problematic practices occurring in their states. For example, Kentucky regulators assisted our investigation of two companies, Granite Mortgage, LLC and LAP Financial Services, allegedly engaged in violations of the Homeownership and Equity Protection Act of 1994.

Last month, the FTC co-sponsored a law enforcement summit meeting on subprime lending issues, attended by dozens of federal and state law enforcers from around the country. At the day-long meeting, the attendees shared ideas and experiences and developed strategies to further our combined efforts to combat subprime

<sup>8</sup>By its terms (“reasonable procedures . . . maximum possible accuracy”), the statute itself recognizes that absolute accuracy is impossible. Section 607(b); 15 U.S.C. § 1681e(b). Pragmatic consideration of the large volume of data that credit bureaus must store and process also bears on this issue.

lending fraud. At the present time, we have several active investigations of subprime lenders.

*Question:* Can you discuss your general investigation and enforcement efforts in this area?

Response: The FTC has focused its efforts to target lenders that deceive consumers about the terms of their loans. Since early 1998, the Commission has brought 17 actions alleging deceptive or other illegal practices by subprime lenders. These cases have included lenders of all sizes and from different regions of the country.

Our cases have involved a variety of allegedly deceptive or other illegal practices that occur at or prior to loan origination, including deceptive representations about costs or other loan terms. For example, some of our cases have alleged that lenders hid origination fees or balloon payments from borrowers or made misrepresentations about prepayment penalties. We also have brought cases alleging that lenders deceived consumers into purchasing costly credit insurance and other ancillary products in connection with their loans, a practice known as “packing.” Still other cases alleged that lenders made false claims that consumers would achieve savings by refinancing their debt with the lender. Several of our cases have alleged violations of specific federal credit laws, in addition to the FTC Act, including the Fair Credit Reporting Act, Truth in Lending Act, Equal Credit Opportunity Act, Homeownership and Equity Protection Act, and Fair Debt Collection Practices Act. We have also challenged deceptive and unfair loan servicing practices. For example, in our Capital City Mortgage case, currently in litigation in federal court, the FTC complaint alleges that the lender imposed charges on borrowers’ accounts for fees that the borrower did not owe.

Of the Commission’s seventeen recent cases, fifteen have resulted in settlements, returning in the aggregate hundreds of millions of dollars to defrauded consumers. The FTC settlement with The Associates and Citigroup includes a \$215 million redress judgment, the largest in FTC history. Two cases are currently in litigation: the Capital City Mortgage case and an action against Mark Diamond, a mortgage broker in Illinois who allegedly misrepresented loan terms to borrowers.

In addition to its seventeen subprime lending cases, the Commission recently filed two cases alleging that firms had sent unsolicited email to the public with false promises for low-rate mortgages. The cases also allege that the spammers were using the lure of attractive mortgages to dupe consumers into divulging detailed financial information, which they then tried to sell to third parties.

*Question:* What is the most effective way for our constituents to bring abusive lending cases to your attention? When do my constituents go to the FTC versus another regulatory agency?

Response: Individuals can file a complaint online, at [www.FTC.gov](http://www.FTC.gov) or can call toll free at 877-FTC-HELP. Although we cannot resolve individual disputes, consumer complaints are an extremely valuable source in enabling us to identify patterns of violations.

The FTC has jurisdiction over most lenders other than banks regulated by the Federal Reserve Board, the OCC, or the FDIC; thrifts regulated by the OTS; and credit unions regulated by the National Credit Union Administration. If consumers are not sure of the agency to which they should complain, our counselors can direct them to the appropriate agency.

Another way for consumers to know which federal agency regulates their lender is to access the website at [www.ffiec.gov/nic](http://www.ffiec.gov/nic), click on “institution search,” and input information about their lender. Individuals can also file complaints with their own state attorney general’s office or state banking department.

#### RESPONSES TO QUESTIONS FROM THE HON. DIANA DEGETTE

*Question:* Let me start by asking how the FTC has maintained a high level of service in the regions that do not have offices, most specifically the Rocky Mountain Region?

Response: The FTC’s level of service is higher now than ever. Thanks to an expanded Consumer Response Center, an improved Consumer Sentinel, more and better communications with state and local law enforcers, and an aggressive outreach, communications and training program, more consumers know about the FTC, report their fraud and identity theft complaints to the FTC, and ask for information from the FTC than at any time in the agency’s past.

### Law Enforcement

Law enforcement is a core mission at the FTC. And, Rocky Mountain consumers, including Colorado consumers, directly benefit from the FTC's law enforcement efforts. Some recent examples include:

- *Operation Phoney Philanthropy*—In May 2003, our Northwest Region coordinated a nationwide law enforcement sweep targeting fraudulent charities and fundraisers. With assistance from the Colorado Attorney General's Office, the Commission filed a case against a Canadian telemarketer which claimed to be affiliated with local hospitals and represented that donations would be used to send children's activity books to the hospitals. The alleged scam affected a number of hospitals in Colorado, including Denver Children's Hospital. *FTC v. DPS Activity Publishing*, Civ. No. CO3-1078C (W.D. Wash. May 2003).
- *FTC v. Leasecomm*, Civ. No. 0311034-REK (D. Mass. May 2003)—In May 2003, the Commission entered a settlement with a Massachusetts finance company that provided for cancellation of millions of dollars in judgments that the finance company allegedly obtained through deception. This provided relief totaling over \$1 million to 300 consumers in the eight states previously served by the Denver office. (See attachment 1)
- *FTC v. Triad Discount Buying Club*, Civ. No. 01-8922-CIV-Zloch (S.D. Fla. 2001)—Also this past year, we sent redress checks to over 11,000 consumers in the Rocky Mountain Region as their share of a redress pool in a case against an allegedly deceptive buying club. (See attachment 2)
- *Cooperative Law Enforcement*—We continue to work with state and local law enforcement to bring joint enforcement actions. Since 1999, the Commission has announced 40 of these actions, known as sweeps. A total of 35 state and local agencies in the Rocky Mountain Region participated in 15 separate sweeps. (See attachment 3)
- *Local Antitrust Cases*—In the past year, staff from the headquarters office of the FTC has been involved in the investigation and eventual settlement of *Aurora Associated Primary Care Physicians, C-4063 (July 16, 2002)*; *Physician Integrated Services of Denver, C-4054 (July 16, 2002)*; and *Professionals in Women's Care, C-4063 (Oct. 11, 2002)*, three cases involving groups of competing, independent physicians in Denver, Colorado. These cases are significant, as they are among the first in which the FTC has taken action against non-physician agents for coordinating the allegedly illegal activities of physicians, including price-fixing and concerted refusals to deal except on collectively determined terms. Commission staff from both the headquarters office and the Western Regional Office in San Francisco also have been involved in another two non-public investigations in Colorado involving antitrust issues.

### Consumer Response Center

Through the Consumer Response Center, the FTC responds to about 24,000 consumer calls, emails, voice mails, and letters each week. In the past three years, the number of contacts from Colorado consumers has almost doubled, from 6554 in calendar year 2000, to 12,761 in calendar year 2002. Much of this increase can be attributed to marketing the new toll-free number which was established in July 1999, and the ability of consumers to file complaints directly over the Internet.

### Consumer Sentinel

More fraud complaints mean a more robust pool for investigators to determine trends and identify law enforcement targets, and ultimately, better protection for consumers. Fraud complaints are shared with law enforcers throughout the country through Consumer Sentinel, the FTC's award-winning database. There are currently 44 Sentinel members in the states formerly served by the Denver Regional Office, including 11 located in Colorado. (See attachment 4) Non-law enforcement organizations also contribute information to Sentinel; 11 Better Business Bureaus ("BBBs") located in the Rocky Mountain Region (including those in Denver and Fort Collins) are Sentinel contributors.

### Outreach

Consumer and business education is a significant part of the FTC's mission. Through publications, Web sites, media outreach, partnerships, exhibits and presentations, the Commission is able to reach millions of consumers and businesspeople each year. The more the FTC reaches out to consumers, the more they respond: more and more consumers are contacting the Commission to report fraud and identity theft, and to request information; and the information on [www.ftc.gov](http://www.ftc.gov) is attracting more hits than ever. Much of the Commission's outreach program is based on a "wholesale/retail"—or intermediary—concept: the Office of Consumer and Busi-

ness Education (“OCBE”) distributes information about spotting, stopping and avoiding scams and frauds to organizations and media that, in turn, disseminate it directly to consumers.

Every law enforcement action that the Bureau of Consumer Protection announces has an education component. In addition to the mass media, the FTC sends publications to local newspapers, special interest publications and organizations that would have a special interest in a particular topic. The Commission also frequently sends out consumer information that is not directly related to a law enforcement action. For example, OCBE recently sent articles on buying a used car, negative option plans, ID theft, weight loss, and tar & nicotine ratings to community college and university newspapers in every state. OCBE also sent information to high school newspaper editors on scholarship scams and other age-appropriate subjects.

A review of our records for FY 2003 shows that the FTC has many “customers” in Colorado who are ordering hundreds—and in some cases thousands—of the Commission’s brochures at a time. They then distribute these publications to their own constituents. For example, since October 2002, FTC customers have included:

- Boulder County Justice Center: 19 publications, totaling 5,060 copies.
- Western National Bank, Colorado Springs: Identity Theft, 500 copies
- Douglas County Adult Services: 11 publications, totaling 1,100 copies.
- ENT Federal Credit Union, Colorado Springs: Site Seeing on the Internet, 500 copies.
- DC County Sheriffs Office, Castle Rock: 9 publications totaling 900 copies.
- District Attorney, Denver: 2 publications on ID Theft, 110 copies.
- Denver Federal Credit Union: Site Seeing on the Internet, 250 copies.
- BBB of Colorado Springs: 17 publications totaling 1,710 copies.
- Small Business Development Center, Colorado Springs: 35 publications totaling 3,100 copies.
- National Association of Retired Federal Executives, Denver: ID Theft, 110 copies.
- Keller Williams Realty, Woodland Park: 6 publications totaling 910 copies.
- GMAC Mortgage, Englewood: 1 credit publication, 200 copies.

Our regional offices are involved in additional outreach efforts. For example, an attorney in the Western Region’s San Francisco office recently delivered a “Report From the FTC” to presidents and vice presidents of 18 Western BBBs and several representatives of the national BBB at the BBB Western conference. She covered a range of topics, including the Telemarketing Sales rule, ID Theft, privacy, spam, Internet auction fraud, office supply scams and Consumer Sentinel, as well as the upcoming national Do Not Call Registry. (See attachment 5 for examples of other regional outreach efforts in the Rocky Mountain Region states.)

*Question:* Have you been in contact with the external stakeholders since the restructuring to get an outside assessment of how well consumers needs are being met? In areas that you have no regional offices nearby, and let’s use the example of Denver, how are you evaluating how well consumer needs are being met? How do you conduct outreach in these areas?

*Response:* As described above, the Commission maintains regular contact with local law enforcers and consumer groups in all of the Rocky Mountain Region states, including the State Attorneys General, and representatives of AARP and the local BBBs. Through these contacts, the Commission continually evaluates how it can best meet the needs of consumers. The FTC’s law enforcement and outreach efforts in the Denver area are discussed above.

*Question:* How can staff located in an office in San Francisco be as responsive to consumer fraud problems in Colorado as a more centrally located office?

*Response:* The FTC finds that its staff is able to communicate effectively with many agencies and organizations through frequent telephone calls, e-mails, and occasional visits. In addition, the Commission is fortunate to have members of the former Denver Regional Office in both the San Francisco Office of the Western Region and the Northwest Regional Office. These staff members have kept in touch with their contacts in the states previously served by the Denver office, and have also introduced members of WR-SF and NWR staffs to these contacts.

Sentinel data suggest that Colorado consumers are as likely to be targeted by fraudsters operating outside Colorado as they are by fraudsters within the state. (See attachment 6) Indeed, in the cases we discussed above, where redress was provided to Colorado victims, defendant companies were located outside Colorado.

*Question:* The Denver FTC office used to work very closely with a local senior advocacy group and met with them regularly to exchange information on fraudulent activities, hold public outreach conferences and distributed educational materials. I think this is a good example of some of the most important consumer protection work that needs to be done, and my concern is that these seniors’ needs are not being met as effectively since the restructuring. Can you address this?

At the time the restructuring proposal was made, FTC officials expressed confidence that technological advancements and new innovations, including the new consumer complaint handling center and the Internet site, would allow the FTC to be able to fill in the gaps left by fewer regional offices.

However, wouldn't you agree that certain targeted populations (meaning likely targets by fraudsters), such as immigrants, low-income individuals and seniors, might be less likely to proactively seek out assistance, go online to get information and report fraud or be as willing/able to navigate an automated phone mail system to get the information or help they need?

Response: Reaching out to groups that are targeted by scammers, including seniors, immigrants, and low-income groups, remains a high priority for the FTC. The Commission recognizes that some consumers may not seek information over the Internet, so we continue to reach out to consumers through more traditional means. The Office of Consumer and Business Education supports all regional offices as they participate in local events like Senior Scam Jams, produced by BBBs, and Consumer Universities, held by state chapters of AARP. Regional staff also participate in community outreach, with local law enforcers, local libraries, local community colleges, and local business consortia; display publications at local malls; and give presentations to seniors and other citizen groups as well as industry associations.

Over the last few years, the FTC has taken a proactive role in encouraging the media to carry stories that will benefit consumers. Our Office of Public Affairs maintains a list of local media outlets that receive all FTC press releases. (See attachment 7) The agency also relies on local media to highlight particularly important consumer issues. For example, when the FTC conducted a major outreach project on ID Theft, each of our regional offices (including the offices that serve Colorado and the other Rocky Mountain States) contacted its major media outlets, provided data on the number of ID Theft victims in each of their respective states, and participated in a number of radio interviews about how consumers can protect themselves against ID Theft. (Staff in the San Francisco Office of the Western Region were interviewed by radio stations in Colorado.) This approach has expanded our ability to provide information to targeted populations—whether located in urban or rural areas.

#### RESPONSES TO QUESTIONS FROM THE HON. GENE GREEN

*Question:* One spam bill, H.R. 2214 (Burr/Tauzin/Sensenbrenner) imposes a knowledge standard that the Commission must prove to successfully bring a civil action for violations of three provisions of the bill.

How does this compare with common FTC's enforcement authority?

Is it safe to say that the FTC would be less likely to bring an action in situations where it would be required to prove a knowledgeable standard?

#### *Knowledge standards under the FTC Act*

Response: The key statutory provision respecting the FTC's consumer protection mission is Section 5 of the FTC Act. That section empowers the Commission to take action against "unfair or deceptive acts or practices in or affecting commerce." A showing of knowledge or intent is not required for the agency to obtain injunctive relief or issue an administrative cease-and-desist order. If the act or practice is indeed unfair or deceptive, "harm to the public interest is presumed,"<sup>9</sup> and remedial action is appropriate.<sup>10</sup> The court or the Commission can order a halt to the practice and can adopt a range of additional remedies suitable to the particular circumstances of the case.

On the other hand, an FTC action seeking civil penalties for violation of a rule issued under Section 18 of the FTC Act requires a showing that the defendant acted "with actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by such rule." 15 U.S.C. § 5(m)(1)(A).

In general, the seller or marketer of a product or service is liable for any misleading or unsubstantiated claims it makes or authorizes to be made about its product or service. Similarly, under the do-not-call provisions of the Telemarketing Sales Rule, issued to prevent abusive telemarketing, both the seller and the telemarketer (the party actually conducting telemarketing calls) are liable for failure to honor consumers' do-not-call opt out requests. 16 C.F.R. § 310.4(b)(1)(iii).<sup>11</sup> This provision

<sup>9</sup>*FTC v. World Wide Factors, Ltd.*, 882 F.2d 344, 346 (9th Cir. 1989).

<sup>10</sup>The legal tests for deception and unfairness incorporate standards to assume that the Commission acts in the public interest.

<sup>11</sup>"It is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer to engage in, or for a seller to cause a telemarketer to engage in, the following conduct: Initi-

includes telemarketer liability for calling consumers who have made company-specific do-not-call requests to a seller.

*Knowledge standards under H.R. 2214*

H.R. 2214 as introduced contains three knowledge requirements:

*Section 101(b)(2)*

Section 101(b)(2) of H.R. 2214 provides that, if an email recipient requests to “opt out” of receiving email from a sender, it is unlawful for any person acting on behalf of the sender<sup>12</sup> to initiate<sup>13</sup> the transmission of an unsolicited commercial email (“UCE” or “spam”) message to that recipient if such person “knows, should have known, or consciously avoids knowing” that the transmission falls within the scope of the recipient’s “opt out” request.

This provision deals with the situation when one party actually transmits UCE messages on behalf of another party—the “sender.” H.R. 2214 places responsibility for providing the method of opting out on the “sender.” § 101(a)(1)(C). The bill also contemplates that recipients will direct their opt out notices to the “sender.” § 101(b). There does not appear to be an affirmative duty on “senders” to ensure that persons acting on their behalf are aware of opt out requests they have received. This omission, coupled with the defense for persons acting on the sender’s behalf who lack the requisite knowledge that a UCE message is within the scope of a recipient’s opt out request, weaken the enforceability of this provision. Without an affirmative requirement that the initiator inquire into opt-out requests received by the “sender,” the knowledge requirement may be difficult to establish when the person transmitting the email is different from the sender.

The analogous provision in the Telemarketing Sales Rule places liability on both the “seller” (analogous to the “sender” of spam) and the “telemarketer” (analogous to the initiator of spam) for failure to honor consumers’ do-not-call opt out requests. 16 C.F.R. § 310.4(b)(1)(iii). This approach reflects our law enforcement experience showing that telemarketing scammers typically structured their scams in a manner designed to make it difficult for law enforcement to pin down various parts of the scam, such as who had responsibility for writing the script, delivering the pitch, fulfilling the order. This approach provides for straightforward enforcement, by making both parties responsible.<sup>14</sup> This approach also seems appropriate in the commercial e-mail context.

*Section 101(b)(3)*

Section 101(b)(3) of H.R. 2214 provides that if an email recipient requests to “opt out” of receiving email from a sender, then it is unlawful for any person acting on behalf of the sender to assist in initiating the transmission to the recipient, through the provision or selection of addresses to which the message will be transmitted, of a UCE message that such person *knows, should have known, or consciously avoids knowing* would violate the bill’s prohibition on sending a UCE message to a recipient who has made an opt out request. This raises the same issues discussed above.

*Section 101(d)*

Finally, § 101(d) of H.R. 2214 prohibits any person from initiating a commercial email message prohibited by certain of the bill’s requirements,<sup>15</sup> or from assisting in the origination of such message by providing or selecting email addresses to which the transmission of such message is initiated, if such person *knows, should*

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ating any outbound telephone call to a person when [that person has placed his or her number on the national do-not-call registry or] previously has stated that he or she does not wish to receive an outbound telephone call made by or on behalf of the seller.”

<sup>12</sup>The term “sender,” when used with respect to a commercial electronic mail message, means a person who initiates such a message *and* whose product, service, or Internet web site is advertised or promoted by the message, or such person’s successor in interest. § 304(15) (emphasis supplied).

<sup>13</sup>The term “initiate,” when used with respect to an electronic mail message, means to originate such message or to procure the origination of such message, but shall not include actions that constitute routine conveyance of such message. § 304(10).

<sup>14</sup>The Rule contains a narrow safe-harbor for telemarketers that allows for a defense by showing that the telemarketer had established procedures to comply with the “do-not-call” provisions, maintains, among other things, a list of people not to contact, and any subsequent call is an error. We believe that this safe harbor avoids any undue finding of liability

<sup>15</sup>Specifically, the bill’s requirements that the email message contain:

- an identification that the message is an advertisement or solicitation;
- a notice of the opportunity to opt out;
- a functioning method to opt out through a return electronic mail address or other Internet-based mechanism; and
- the sender’s street address.

*have known, or consciously avoids knowing*, that the email address was harvested from an Internet website or proprietary online service in contravention of the wishes or posted policy of the website or service. As a practical matter, proof of a violation of this provision may be difficult. Proving knowledge would add to the burden.

#### *Conclusion*

The knowledge standards contained in H.R. 2214 exceed those required to obtain a district court injunction or administrative cease and desist order under Section 5 of the FTC Act. Further, the knowledge standards contained in H.R. 2214 are unnecessary in connection with a civil penalty action, in light of the knowledge standard imposed for civil penalty actions under FTC Act Section 18 rule violations. Moreover, the knowledge standards set forth in H.R. 2214 are expressed differently from those of the FTC Act, potentially giving rise to litigation issues about differences in the standards. Given the harmful nature of the conduct proscribed by this proposed legislation, the FTC should be able to enjoin future violations readily, and to impose civil penalties where appropriate without a duplicative burden of meeting two arguably different knowledge standards. Therefore, we anticipate that retention of the knowledge standards in H.R. 2214 would reduce the enforceability of its provisions.

*Question:* On April 30, 2003, the FTC released a report entitled “False Claims in Spam.” In that study, the commission reported that 22 percent of the unsolicited commercial email it studied contained false information in the “Subject” line. The Burns-Wyden bill (S. 877) includes a prohibition against deceptive “Subject” headings, which is not in H.R. 2214. Is such a provision important and something you think should be included in a spam bill?

*Response:* It is important that companies know that placing false information in the “subject” line of an email is illegal. Currently the FTC can reach false or deceptive claims within the FTC’s jurisdiction,<sup>16</sup> regardless of the medium in which they are made. Thus the FTC could reach false or deceptive claims occurring in the subject line of an unsolicited commercial email.

Legislation expressly prohibiting false or deceptive representations in subject lines of commercial email messages could provide additional useful law enforcement tools to the FTC, if the prohibition follows the current standard of liability and proof under Section 5 of the FTC Act.<sup>17</sup> The particular provision in S. 877, Section 5(a)(2), however, is narrower than the reach of Section 5 of the FTC Act because it imposes knowledge as a requisite element of proof in every case.<sup>18</sup>

<sup>16</sup>The FTC has limited or no authority over banks, common carriers, and insurers, for example.

<sup>17</sup>As discussed above, the FTC’s proof would include the statutory knowledge standard in order to obtain civil penalties.

<sup>18</sup>“It is unlawful for any person to initiate the transmission to a protected computer of a commercial electronic mail message with a subject heading that such person knows would be likely to mislead a recipient, acting reasonably under the circumstances, about a material fact regarding the contents or subject matter of the message.”