STAFF SUMMARY OF FEDERAL TRADE COMMISSION ACTIVITIES AFFECTING OLDER AMERICANS SEPTEMBER 2001--AUGUST 2003

The Federal Trade Commission is the federal government's principal consumer protection agency, with broad jurisdiction extending over nearly the entire economy, including business and consumer transactions on the telephone, the Internet, and elsewhere.[1] Under the Federal Trade Commission Act, Congress has directed the Commission to prohibit unfair or deceptive acts or practices (its consumer protection mission) and unfair methods of competition (its competition mission).[2]

Much of the Commission's work addresses practices or industries that are of particular significance to older consumers. This Report describes those aspects of the Commission's work from September 2001 through August 2003. Section One describes recent Commission law enforcement initiatives within its consumer protection mission which are of particular importance to older consumers, including health care initiatives, financial practices initiatives, sales and promotional practices initiatives, and enforcement initiatives against fraud. Section One also highlights the Commission's consumer education program, including amendments to the Telemarketing Sales Rule, initiatives regarding the nationwide Do Not Call Registry, and initiatives against identity theft. Section Two describes Commission law enforcement and other initiatives within its competition mission, with a particular focus on health care, energy, and technology-related markets, as well as retail markets including groceries, household goods

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[1] The FTC has limited or no jurisdiction over some specified types of entities and activities. These include banks, savings associations, and federal credit unions; regulated common carriers; air carriers; non-retail sales of livestock and meat products under the Packers and Stockyards Act; certain activities of nonprofit corporations; and the business of insurance. *See, e.g.*, 15 U.S.C. §§ 44-46 (FTC Act); 15 U.S.C. § 21 (Clayton Act); 7 U.S.C. § 227 (Packers and Stockyards Act); 15 U.S.C. § 1011-1015 (McCarran-Ferguson Act).

[2] 15 U.S.C. § 45(a). The Commission also has responsibilities under 46 additional statutes, including, for example, the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.*, which establishes important privacy protections for consumers' sensitive financial information; the Truth in Lending Act, 15 U.S.C. §§ 1601 *et seq*., which mandates disclosures of credit terms; and the Fair Credit Billing Act, 15 U.S.C. §§ 1666 *et seq.*, which provides for the correction of billing errors on credit accounts. The Commission also enforces more than 35 Rules governing specific industries and practices, including, for example, the Telemarketing Sales Rule, 16 C.F.R. Part 310, which defines and prohibits deceptive telemarketing practices and other abusive telemarketing practices, and which has now been amended to create a national Do Not Call Registry; the Used Car Rule, 16 C.F.R. Part 455, which requires used car dealers to disclose warranty terms via a window sticker; and the Franchise Rule, 16 C.F.R. Part 436, which requires the provision of information to prospective franchisees.

moving, and musical recordings.

This report also includes three appendices. Appendix I provides detailed descriptions of representative Commission cases handled by the Bureau of Consumer Protection which involve older consumers, while Appendix II lists Congressional testimonies delivered by the Commission, and Appendix III lists the Commission's public hearings, workshops, and conferences.

THE CONSUMER PROTECTION MISSION

As the Committee is aware, the Commission actively enforces a broad range of consumer protection programs that protect all consumers. Many of these programs have special relevance to older Americans. Indeed, protection of older consumers continues to be an important focus of the FTC. Of the 218,284 non-identity theft fraud complaints entered into Consumer Sentinel[3] during calendar year 2002, 13% of the consumers reporting their age stated that they were sixty years or older. The top frauds identified by these consumers included prizes or sweepstakes promotions, health care products or services, foreign money offers, and advance-fee loans.[4]

The Commission's Bureau of Consumer Protection devotes substantial resources to protecting seniors from these and other frauds. Since its last report to the Senate Select Committee on Aging in October 2001, the Commission has pursued numerous law enforcement actions with substantial impact on seniors. In addition, the Commission is conducting a survey of the incidence of fraud generally which will provide information on the nature and incidence of fraud directed to older Americans.

HEALTH CARE

Truthful, accurate information about the costs and benefits of health care services, dietary supplements, drugs, devices, and other related products is critical for all consumers, but is of particular concern for older Americans. Older consumers constitute a large part of the market for health-related services, and it is therefore important that they not be subjected to misleading claims and fraudulent practices. The Commission has been especially active in challenging deceptive claims for dietary supplements and, according to a recent study, a greater proportion of

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[3] Consumer Sentinel is a web-based law enforcement network established by the FTC, the National Association of Attorneys General, and Canada's Phone Busters to collect consumer fraud complaints into a single database. Since its inception in late 1997, Consumer Sentinel has grown in both membership and use. More than 800 member organizations have access to the complaints, alerts for frauds, and other resources. In addition to the site restricted to law enforcement agencies, Consumer Sentinel has a public website, <http://www.consumer.gov/sentinel/>.

[4] Only 64% of complainants reported their ages.

elderly people use dietary supplements than any other age group in the United States.[5]

Under the FTC Act, the Commission strives to ensure that claims about the health benefits of over-the-counter drugs, devices, foods, and dietary supplements are truthful, not misleading, and substantiated by competent and reliable scientific evidence. In fulfilling its mission, the Commission monitors the marketing of health care products and services in both the traditional media and on the Internet. In some instances, the Commission works with individuals and corporations to voluntarily bring them into compliance. Efforts to achieve industry compliance are most effective, however, when they are backed up by traditional law enforcement.

This dual approach is best exemplified by the Commission's efforts in its on-going law enforcement project, *Operation Cure.All.* As more fully discussed in the Commission's last report to this Committee, *Operation Cure.All* is an on-going, coordinated law enforcement[6] and consumer/business education initiative targeting deceptive and misleading Internet promotion of products and services that promise to cure or treat serious diseases or conditions such as cancer, heart disease, arthritis, and diabetes. To identify appropriate law enforcement targets, *Operation Cure.All* partners periodically conduct Internet surfs.[7] Following each surf, the FTC sends e-mail alerts to those websites for which e-mail addresses can be obtained, warning them that any health claims they make must be substantiated by competent and reliable scientific evidence. The Commission urges the websites to review their claims to make sure that they comply with the law and provides them with a list of resources to consult for additional guidance. Those websites that fail to come into compliance with the law may find themselves the subject of an FTC lawsuit.

Offline, the Commission continues to fight deceptive advertising for health services. In December 2002, the Commission announced a joint enforcement initiative with FDA to attack false and unsubstantiated claims for dietary supplements. Since then, the Commission has enjoined deceptive claims for more than $1 billion in health care products, most of which were dietary supplements. Among the products targeted by the Commission was the "HeartBar," which the marketers claimed decreased leg pain, prevented age-related vascular problems, reduced the risk of cardiovascular disease, and reduced or eliminated the need for surgery and medications among patients with cardiovascular disease; "Coral Calcium," a supplement widely

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[5] NATIONAL INSTITUTES OF HEALTH, DIETARY SUPPLEMENT USE IN THE ELDERLY: CONFERENCE SUMMARY 6 (2003)

[6] Participants in *Operation Cure.All* include the Food and Drug Administration, Canada, Mexico, several state Attorney General offices, and state health departments.

[7] In an Internet surf, participants use search engines to find relevant Internet sites based on a set of predetermined search terms, for example, "cancer cure." Once a site is identified, it is forwarded to a central collection center, where the site is reviewed again to ascertain that it satisfies the selection criteria.

promoted as a cure for diseases such as multiple sclerosis and cancer; and the "Q-Ray Bracelet," a device marketed to older Americans as a cure for pain. Television infomercials and other advertisements for Q-Ray featured testimonials by older consumers, purportedly attesting to miraculous relief of pain.

CONSUMER CREDIT

Financial security and access to credit are essential to the well being of all consumers, but may be particularly critical for retired Americans. Unscrupulous lenders can deceive consumers about loan terms, rates, and fees. When lenders deceive mortgage borrowers in this manner, the resulting injury can be severe, including the loss of one's home. The Commission has taken law enforcement actions against such lenders and marketers of fraudulent or deceptive credit products who often target older Americans. 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 settled cases against Associates First Capital Corporation (now owned by Citigroup) for alleged deceptive sales of credit insurance and alleged violations of the Equal Credit Opportunity Act and the Fair Credit Reporting Act;[8] against First Alliance Mortgage for allegedly imposing deceptive loan terms and origination fees;[9] and against Mercantile Mortgage for alleged deception of consumers about loan terms and alleged violations of the Truth in Lending Act.[10] In addition, in September 2003, the Commission filed suit against Stewart Financial Company and its principals, alleging numerous abusive practices in marketing loans to subprime borrowers, many of whom were Social Security recipients.[11] Other areas the Commission focuses on include the Fair Debt Collection Practices Act,[12] which prohibits harassing or abusive behavior by debt collectors, and advance fee credit and credit protection scams.

SALES AND PROMOTIONAL PRACTICES

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[8] *FTC v. Associates First Capital Corporation, et al.*, No. 1:01-CV-00606 JTC (N.D. Ga. filed Sept. 19, 2003), *available at* <http://www.ftc.gov/opa/2002/09/associates.htm>.

[9] *FTC v. First Alliance Mortgage Co., et al.*, SACV 00-964 DOC (C.D. Cal. filed Mar. 21, 2002), *available at* < http://www.ftc.gov/opa/2002/03/famco.htm>.

[10] *U.S. v. Mercantile Mortgage Co., Inc., et al.*, No. 02C5079 (N.D. Ill. filed July 18, 2002), *available at* <http://www.ftc.gov/opa/2002/07/mercantilediamond.htm>. In addition to monetary relief, the Mercantile settlement gives hundreds of consumers the opportunity to refinance loans at low or no cost.

[11] *FTC v. Stewart Fin. Co. Holdings, Inc., et al.*, 1:03-CV-2648-JTC (N.D. Ga. Sept. 4, 2003) < www.ftc.gov/opa/2003/09/stewart.htm>.

[12] 15 U.S.C. §§ 1692-1692(o).

Telemarketing Fraud

Telemarketing fraud has a direct, if not disproportionate, impact on many older Americans. According to information in the Commission's Consumer Sentinel complaint database, 83% of consumers aged sixty and older who filed fraud complaints and identified the company's initial method of contact reported that they were called on the telephone.

In 2003, after receiving critical support from Congress, the Commission amended the Telemarketing Sales Rule ("TSR") to create a national Do Not Call list. Under the amended TSR, consumers can register their telephone numbers and, with certain exceptions, phone numbers on this list cannot be used by the telemarketers for calls relating to the sale of any product or service.[13] Telemarketers must update their lists every three months to allow for new numbers to be registered with the system. To date, 52 million phone numbers have been registered.[14]

To better ensure compliance with the Rule, the Commission enhanced the Consumer Sentinel to provide state law enforcement partners direct access to registration information and telephone numbers on the Do Not Call list. This state-of-the-art technology will assist the vigorous enforcement of Do Not Call and other consumer protection laws. The national Do Not Call Registry will be supplemented by continued aggressive enforcement against fraudulent telemarketing activity.

Cross-Border Fraud

Protecting American consumers increasingly requires the Commission to work cooperatively with law enforcement officials from other countries to attack fraudulent and deceptive practices originating outside U.S. borders. An increasing number of complaints to the FTC involve cross-border fraud and deception. For example, in 1995, less than 1% of Consumer Sentinel complaints involved cross-border fraud, a figure that increased to 14% by 2002. Seventy-nine percent of the cross-border complaints in 2002 involved U.S. consumers complaining about foreign businesses. These complaints concern entities operating in many countries, including Canada, Nigeria, United Kingdom, Romania, South Africa, Netherlands,

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[13] Exceptions are made for companies with pre-existing business relationships with the consumer. Also exempted from the rule are telephone surveys and calls from political organizations, charities, and insurance representatives to the extent regulated by state law.

[14] On October 7, 2003, the U.S. Court of Appeals for the 10th Circuit granted the FTC's motion to stay the order of the U.S. District Court for the District of Colorado that halted enforcement of the national Do Not Call Registry. Accordingly, the FTC has moved forward with implementing and enforcing the Registry.

Germany, Ukraine, Australia, and Russia.[15]

Older consumers are often the targets of cross-border fraud. In 2002, complaints from consumers 50 years of age and older accounted for 35% of all cross-border complaints in Consumer Sentinel in which consumers reported their age.[16] Included among the top categories of all frauds reported by consumers age 60 and over were prize promotions, sweepstakes scams, foreign money offers, advance-fee loans, and foreign lotteries – all common cross-border schemes. Forty-six percent of these consumers reported that they were contacted by telephone.

The Commission is implementing a Five-Point Plan for Fighting Cross-Border Fraud.[17] Under the Five-Point Plan, the Commission works closely with other countries to combat cross-border fraud through cooperation and coordinated enforcement activities. In addition, the Commission has proposed certain legislative changes to Congress that would give the agency the additional tools needed to better address the problem of cross-border fraud.[18]

On the law enforcement front, in 2002, the FTC brought approximately twenty new federal district court lawsuits involving one or more foreign defendants or foreign consumers, and continued to litigate and settle dozens of other cases involving fraud and deception that operate across national borders. In the first half of 2003 alone, the FTC filed cases involving advance-fee credit cards peddled by Canadian telemarketers,[19] allegedly bogus international

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[15] FTC, CROSS-BORDER FRAUD TRENDS: JANUARY - DECEMBER 2002 (Feb. 19, 2003), *available at* <http://www.ftc.gov/bcp/conline/edcams/crossborder/PDFs/Cross-BorderCY-2002.pdf>.

[16] Consumers reported their age in 72% of cross-border fraud complaints. Of this number, 35% were over the age of fifty.

[17] TIMOTHY J. MURIS, THE INTERFACE OF COMPETITION AND CONSUMER PROTECTION, REMARKS AT THE FORDHAM CORPORATE LAW INSTITUTE'S TWENTY-NINTH ANNUAL CONFERENCE ON INTERNATIONAL ANTITRUST LAW AND POLICY (Oct. 31, 2002), *available at* <http://www.ftc.gov/speeches/muris/021031fordham.pdf>.

[18] *Cross-border Fraud Hearing Before the House Subcomm. on Commerce, Trade, and Consumer Protection of the House Comm. on Energy and Commerce*, 108th Cong. (Sept. 17, 2003) (prepared statement of the FTC), *available at* <http://www.ftc.gov/os/2003/09/030917crossbordertest.pdf >.

[19] *FTC v. STF Group Inc. et al.*, Civ. A. No. 02 C 0977 (N.D. Ill. filed Feb. 10, 2003), *available at* <http://www.ftc.gov/opa/2003/02/medplan.htm>; *FTC v. Assail, Inc. et al.*, Civ. A. No. W03CA007 (W.D. Tex. filed Jan. 9, 2003), *available at* <http://www.ftc.gov/opa/2003/02/assail.htm>.

driving licenses advertised through spam email by defendants in Denmark[20] and other foreign countries including Israel, the Bahamas, and Romania,[21] allegedly bogus business directory scams,[22] and products and programs sold over the Internet by defendants based in Switzerland, Canada, the U.K., and Mexico, that allegedly claimed to cure cancer, AIDS, and other serious diseases. In many of these cases, older consumers were targeted by the defendants, and in the case of alleged lottery and sweepstakes scams, were often the exclusive focus.

Funeral Rule Enforcement

Funerals are often among the highest cost purchases many consumers make. Consumers often make this major purchase at a time of emotional stress and grief. The Commission's Funeral Rule[23] is designed to ensure that funeral providers provide consumers timely and comprehensive information relating to the goods and services offered and the prices charged. The FTC has used various enforcement approaches since the Rule took effect in 1984, including traditional investigations and test-shopping sweeps of funeral homes in various geographic areas. The Commission has sustained its efforts to forge cooperative law enforcement with the state Attorneys General. For example, the Commission along with state and local investigators and, in some cases, volunteers from the AARP, test shopped more than 1500 homes in thirty-two states. These test-shopping efforts are ongoing, and to date 210 violators have been offered the opportunity to bring their homes into compliance with the Funeral Rule by enrolling in the FTC's non-litigation alternative, the Funeral Rule Offenders Program ("FROP"). In addition, funeral homes made voluntary payments in lieu of penalties totaling over $330,000. Funeral homes that refuse to comply with the conditions set by FROP will become subject to law enforcement action.

IDENTITY THEFT

The Commission maintains an active program to assist consumer victims of identity theft and to facilitate the efforts of criminal law enforcement agencies throughout the country. Although ID theft strikes all groups, regardless of age, race, geographic location or income level, certain types appear to be more common among older Americans. A recent survey commissioned by the FTC found that almost ten million American adults were the victims of ID theft, ranging from the theft of an existing account to the more serious opening of new accounts

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[20] *FTC v. Carlton Press, Inc. et al.*, Civ. A. No. 03-CV-0226-RLC (S.D.N.Y., filed Jan. 10, 2003), *available at* <http://www.ftc.gov/opa/2003/01/idpfinal.htm>.

[21] *FTC v. Mountain View Sys., Ltd. et al*., No.1:03-CV-OOO21-RMC (D.D.C., filed Jan. 7, 2003), *available at* <http://www.ftc.gov/opa/2003/02/fyi0314.htm>.

[22] *FTC v. Ambus Registry, Inc., et al.*, Civ. No. CV03-1294R (W.D. Wa., filed June 16, 2003), *available at* <http://www.ftc.gov/opa/2003/07/ambus.htm>.

[23] 16 C.F.R. § 435.

in their name.[24] Victims spent about $5 billion a year to resolve the thefts and businesses lost $50 billion.

Overall, the data shows similar experiences between ID theft victims over 60 and those under 60. Some differences do exist. For example, credit card fraud – the leading form of identity theft – affected about 52% of victims over age 60 in comparison to approximately 45% of those under 60. On the other hand, telecommunications or utility fraud, which frequently involves the purchase of cellular phones and service, affected about 15% of the victims over age 60 as opposed to approximately 24% of those under age 60.

The Commission's response to identity theft will continue to focus on consumer education, support of criminal law enforcement and cooperation with the private sector in identifying ways to protect consumers from this serious crime. One result of this cooperative effort is the automated "one call" fraud alert process. A consumer who has been the victim of identity theft can call the toll-free fraud number of any one of the three major credit bureaus to place a fraud alert on his or her credit report. As soon as the credit bureau confirms the fraud alert, the other two credit bureaus are notified automatically to place fraud alerts, and all three credit reports are sent to the consumer free of charge. In addition, the Commission, in partnership with consumer advocates, banks, and credit grantors, developed the ID Theft Affidavit, a single form that can be used to dispute fraudulent accounts wherever they are opened.[25] The FTC, along with the U.S. Secret Service, the U.S. Postal Inspection Service, the FBI and the U.S. Department of Justice conducts training for law enforcement throughout the country.

These efforts are supplemented by separate law enforcement and consumer and business education efforts by the Commission to improve the security of online and offline information. By improving security, the risk of unauthorized access or inadvertent disclosure of sensitive personal information of all types that could be used to facilitate identify theft is reduced.

Where businesses and individuals make deceptive claims regarding the privacy and security features of products and services, or fail to maintain adequate security for personal information, the Commission will take action. In May 2002, for example, 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

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[24] FTC, IDENTITY THEFT SURVEY REPORT (Sept. 2003), *available at* <http://www.ftc.gov/os/2003/09/synovatereport.pdf>.

[25] The affidavit is *available at* <http://www.ftc.gov/bcp/conline/pubs/credit/idtheft.pdf>.

anticipated threats or risks to its security, confidentiality, or integrity.[26] The following December, the FTC settled allegations that the Microsoft Corporation misrepresented the measures it used to maintain and protect the privacy and confidentiality of consumers' personal information collected through its Passport web services. Microsoft agreed to implement a comprehensive information security program for Passport and similar services.[27] Finally, in June 2003, the Commission settled charges that Guess?, Inc. exposed consumers' personal information, including credit card numbers, to commonly known attacks by hackers, contrary to the company's claims. The order prohibits misrepresentations about the security and confidentiality of any information collected from or about consumers online and, as in Microsoft and Lilly, requires Guess to implement a comprehensive information security program.[28]

In other areas, the Commission finalized its Safeguards Rule[29] in May 2002 to implement the security provisions of the Gramm-Leach-Bliley Act ("GLB"). The Safeguards 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.[30] The Commission has also developed a consumer security web site which contains practical tips for staying secure online and features "Dewie the Turtle," a colorful cartoon mascot, to promote effective online security.[31] 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.

CONSUMER AND BUSINESS OUTREACH AND EDUCATION

The FTC believes that education is the first line of defense consumers and businesses have against fraud and deception, and consumer education is integral to all the Commission's major law enforcement initiatives. The FTC's Office of Consumer and Business Education

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[26] *Eli Lilly*, C-4047 (FTC final order filed May 8, 2002), *available at* <http://www.ftc.gov/opa/2002/01/elililly.htm>.

[27] *Microsoft Corp.*, C-4069 (FTC final order filed Dec. 20, 2002), *available at* <http://www.ftc.gov/opa/2002/08/microsoft.htm>.

[28] *Guess?,Inc.*, C-4091 (FTC final order filed July 30, 2003), *available at* <http://www.ftc.gov/opa/2003/06/guess.htm>.

[29] 16 C.F.R. § 314.

[30] *See* FTC, THE GRAMM-LEACH-BLILEY ACT: THE SAFEGUARDS RULE, *available at* <http://www.ftc.gov/privacy/privacyinitiatives/safeguards.html>.

[31] <http://www.ftc.gov/infosecurity>.

("OCBE") takes an active role in educating older consumers about issues affecting their daily lives, including abusive lending practices, telemarketing fraud, bogus health claims, and identity theft.

Over the years, OCBE has developed a series of publications, launched dedicated web pages, and worked with numerous federal agencies and private sector partners to develop and disseminate plain-language consumer materials in both English and Spanish. Products include brochures, compliance guides, bookmarks, one-page "news you can use" alerts, feature stories for the media, radio public service announcements, transit posters, postcards, banner ads, special websites, puzzles, and newsletters. For example, OCBE developed and implemented an extensive public communications campaign for the roll-out of the national Do Not Call Registry, including information for the Registry and FTC websites, talking points, exhibits, public service messages, articles, and consumer publications.[32] In addition, some of OCBE's most recent efforts affecting older consumers include a series of publications on identity theft for consumers and businesses, including the comprehensive consumer guide, *ID Theft: When Bad Things Happen to Your Good Name*.[33] OCBE also manages www.consumer.gov/idtheft, which includes information for consumers, and the business and law enforcement communities.

OCBE collaborates with both private and public sector partners, including the states, AARP, and numerous Offices on Aging. This collaboration extends the Commission's ability to reach more consumers. In FY 2003, for example, the Commission distributed over five million print publications and logged over twenty-two million accesses of our publications online. In addition, the Commission places its consumer information in every major newspaper, magazine, news website, and broadcast outlet, in addition to specialty magazines and newsletters, billing statements, transit systems, grocery stores, restaurants, and delis.

In January 2002, the Commission began a campaign to reach Spanish-speaking consumers of all ages, which included the hiring of a Hispanic Outreach Specialist. The FTC now offers over fifty consumer publications in Spanish, with 200 more in the works, and regularly places consumer information in the nation's Spanish-language media. In FY 2003, the Commission distributed over 400,000 consumer publications in Spanish.

THE COMPETITION MISSION

Through vigorous enforcement of the antitrust laws and related activities, the Commission helps ensure that markets operate freely and openly. Aggressive competition promotes lower prices, higher quality, and greater innovation. The FTC concentrates resources on anticompetitive conduct in areas of the economy that have a major impact on consumers' budgets. Commission activities of particular significance to senior citizens during the September

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[32] *See* <http://www.donotcall.gov>.

[33] *Available at* <http://www.ftc.gov/bcp/conline/pubs/credit/idtheft.pdf>.

2001-August 2003 period involve health care, energy, and technology-related markets, as well as retail markets including groceries, intrastate household goods moving services, and musical recordings. The FTC employs a variety of tools to promote and protect competition in these and other areas. In addition to enforcing the antitrust laws, the agency holds workshops, conducts studies, writes reports, and files competition advocacy presentations on behalf of consumers and competition before other government entities. For example, the FTC's Internet Task Force has drafted competition advocacy pieces on issues of particular interest to senior citizens, such as hospital mergers, physician collective bargaining, and the commercial practice of optometry. The FTC also assists and cooperates with competition agencies in countries throughout the world.

A. Health Care

Because of their greater health care needs and the larger percentage of their incomes that they likely devote to health care, senior citizens have a special interest in lowering health care costs and improving the quality of care. Health-related products and services account for more than 15 percent of the United States' gross domestic product, an increase of 25 percent since 1990. Without effective antitrust enforcement, those figures could grow even higher. In the twenty years since the Supreme Court affirmed the FTC's jurisdiction over health care professionals in the *American Medical Association* case,[34] the FTC has worked to enable new and more efficient arrangements for delivering and financing health care services by challenging artificial barriers to competition among health care providers and other participants in the health care industry.

Pharmaceutical prices, in particular, are of great importance to older Americans. Although about 13 percent of the U.S. population is over the age of 65, that age group consumes more than one third of all prescription drugs dispensed in the United States, and (excluding insurance premiums) medicines account for a full third of the health care costs paid by Americans over the age of 65. The Commission has pursued a number of antitrust enforcement actions in the pharmaceutical industry in recent years, including challenges to potentially anticompetitive mergers and to the efforts of pharmaceutical firms to thwart competition from generic drugs.

1. Law Enforcement Actions Involving the Health Care Industry

The FTC has placed renewed emphasis on stopping collusion and other anticompetitive practices that raise health care costs or reduce quality.

a. Law Enforcement Involving Pharmaceutical Companies. With the

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[34] *American Med. Ass'n*, 94 F.T.C. 701 (1979), *aff'd as modified*, 638 F.2d 443 (2d Cir. 1980), *aff'd by an equally divided court*, 455 U.S. 676 (1982) (order modified, 99 F.T.C. 440 (1982), 100 F.T.C. 572 (1982), and 114 F.T.C. 575 (1991)).

doubling of drug expenditures between 1995 and 2000,[35] the growing cost of prescription drugs is a significant concern for patients, employers, and government. In response to this concern, the FTC has increased its pharmaceutical-related investigations. In 1996, fewer than five percent of new competition investigations involved pharmaceuticals, while in 2002, almost 25 percent of new investigations involved pharmaceutical products.

- **Mergers Affecting the Pharmaceutical Industry.** In April 2003, the Commission secured a settlement with Pfizer Inc., the largest pharmaceutical company in the world, 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.[36] The settlement required divestitures in those markets to protect consumers' interests while allowing the remainder of the transaction to go forward.

  Other FTC pharmaceutical industry merger actions during the September 2001-August 2003 period included (1) *Baxter/Wyeth*, in which the FTC obtained a settlement requiring divestitures to protect competition in the market for propofol, a general anesthetic commonly used for the induction and maintenance of anesthesia during surgery, and in the market for new injectable iron replacement therapies used to treat iron deficiency in patients undergoing hemodialysis;[37] and (2) *Amgen/Immunex*, in which the FTC secured a settlement requiring the divestiture of assets and the licensing of intellectual property rights to cure alleged anticompetitive effects arising from Amgen Inc.'s $16 billion acquisition of Immunex Corporation in three important biopharmaceutical markets, involving products used to treat rheumatoid arthritis, Crohn's disease, psoriatic arthritis, and side effects of chemotherapy.[38]

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[35] *See* CTRS. FOR MEDICARE AND MEDICAID SERV., HEALTH ACCOUNTS, *available at* <http://cms.hhs.gov/statistics/nhe/default.asp>.

[36] *Pfizer Inc.*, C-4075 (order filed May 27, 2003), *available at* <http://www.ftc.gov/os/caselist/c4075.htm>.

[37] *Baxter Int'l Inc. and Wyeth*, C-4068 (order filed Feb. 3, 2003), *available at* <http://www.ftc.gov/os/caselist/c4068.htm>.

[38] *Amgen Inc. and Immunex Corp.*, C-4056 (order filed Sept. 3, 2002), *available at* <http://www.ftc.gov/os/caselist/c4056.htm>.

- **Pharmaceutical Firm Efforts to Thwart Competition from Generic Drugs.** To address the issue of escalating drug expenditures, and to ensure that the benefits of pharmaceutical innovation would continue, in 1984 Congress enacted the Hatch-Waxman Amendments[39] ("Hatch-Waxman") to the Food, Drug and Cosmetic Act ("FDC Act").[40] Hatch-Waxman established a regulatory framework that sought to balance incentives for continued innovation by research-based pharmaceutical companies and opportunities for market entry by generic drug manufacturers.[41] Hatch-Waxman has increased generic drug entry, helping consumers save $8 to $10 billion on retail prescription drug purchases in 1994 alone, according to the Congressional Budget Office.[42] Hatch-Waxman has been subject to some abuse, however. Some drug manufacturers have allegedly attempted to "game" the system, securing greater profits for themselves without providing a corresponding benefit to consumers. Many of the FTC's pharmaceutical industry investigations have focused on this problem.

  (1) First Generation Cases. The Commission has challenged conduct by firms that allegedly have "gamed" the Hatch-Waxman framework to deter or delay generic competition. Our "first generation" of such matters involved agreements through which a brand-name drug manufacturer allegedly paid a generic drug manufacturer not to enter and compete. One aspect of a recent major settlement with Bristol-Myers Squibb ("BMS") involved allegations of this type of conduct.[43] The FTC's complaint charged that BMS engaged in a series of anticompetitive acts over the past decade to obstruct the 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. The alleged conduct included a $72.5 million payment to a would-be generic rival to abandon its legal challenge to the validity of a BMS patent and to stay out of the market until the patent expired.

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[39] Drug Price Competition and Patent Restoration Act of 1984, Pub. L. No. 98-417, 98 Stat. 1585 (1984) (codified as amended 21 U.S.C. § 355 (1994)).

[40] 21 U.S.C. § 301 *et seq*.

[41] *See* H.R. Rep. No. 98-857, pt. 1, at 14 (1984), reprinted in 1984 U.S.C.C.A.N. 2647, 2647.

[42] CONGRESSIONAL BUDGET OFFICE, HOW INCREASED COMPETITION FROM GENERIC DRUGS HAS AFFECTED PRICES AND RETURNS IN THE PHARMACEUTICAL INDUSTRY (July 1998), *available at* <ftp://ftp.cbo.gov/6xx/doc655/pharm.pdf>.

[43] *Bristol-Myers Squibb Co.*, C-4076 (order filed Apr. 14, 2003), *available at* <http://www.ftc.gov/os/caselist/c4076.htm>.

The Commission has settled additional cases of this type, including an April 2002 settlement resolving charges that American Home Products entered into an agreement with Schering-Plough Corporation to delay the introduction of a generic potassium chloride supplement in exchange for millions of dollars.[44] An action against Schering-Plough and Upsher-Smith, which remains in administrative litigation, raises similar issues.

(2) Second Generation Cases. Pursuant to the Hatch-Waxman Act, a branded drug manufacturer must list any patent claiming its branded drug in the FDA's "Orange Book" list of approved drugs and their related patents. Companies seeking FDA approval to market a generic equivalent of that drug before patent expiration must provide notice to the branded manufacturer, which then has an opportunity to file a patent infringement action. The filing of such an action within the statutory time frame triggers an automatic 30-month stay of FDA approval of the generic drug. Our "second generation" of enforcement activities has involved allegations that individual brand-name manufacturers have delayed generic competition through the use of improper Orange Book listings that trigger the FDA's automatic 30-month stay of approval of a generic drug.

One facet of the FTC's settlement with BMS involved allegedly improper Orange Book listings. The complaint alleged that BMS misled the FDA about the scope, validity, and enforceability of patents to secure listing in the FDA's "Orange Book"; breached its duty of good faith and candor with the U.S. Patent and Trademark Office, while pursuing new patents claiming these drugs; and filed baseless patent infringement suits against generic drug firms that sought FDA approval to market lower-priced drugs.[45] Because of BMS's alleged pattern of anticompetitive conduct and the extensive resulting consumer harm, the Commission's order necessarily contains strong – and in some respects unprecedented – relief. In particular, the consent order prohibits 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.

Another recent FTC success in this area is an October 2002 settlement with Biovail Corporation, which resolved charges that Biovail illegally acquired a license to a patent and improperly listed the patent in the FDA's Orange Book for the purpose of blocking generic competition to its branded high blood pressure

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[44] *Schering-Plough Corp.*, No. 9297 (order as to Am. Home Prod. Corp. filed Apr. 3, 2002), *available at* <http://www.ftc.gov/os/caselist/d9297.htm>.

[45] *See Bristol-Myers Squibb Co.*, C-4076 (order filed Apr. 14, 2003), *available at* <http://www.ftc.gov/os/caselist/c4076.htm>.

drug Tiazac.[46]

(3) Agreements Between Generic Manufacturers. In a complaint accompanying a settlement with Biovail and Elan Corporation, plc, the Commission alleged that the companies entered into an agreement that provided substantial incentives for the two firms not to compete in the market for the 30 mg and 60 mg dosage strengths of generic Adalat CC, an anti-hypertension drug. The Commission approved a consent order in August 2002 requiring the firms to terminate their agreement and prohibiting them from entering into similar agreements in the future.[47]

b. Merger Enforcement Involving Other Health Care Companies. In June 2002, the Commission authorized the staff to seek a preliminary injunction blocking Cytyc Corporation's proposed $420 million acquisition of Digene Corporation.[48] The Commission had reason to believe that the combination of these companies would have reduced competition, increased consumer prices and delayed the release of improved testing mechanisms within the highly concentrated market for primary cervical cancer screening tests. Following the Commission's decision, the parties abandoned the transaction.

In 2003, the Commission secured a settlement with Quest Diagnostics, Inc. requiring that company to divest clinical laboratory services assets in Northern California in order to remedy alleged anticompetitive effects from its proposed $827 million acquisition of Unilab Corporation. According to the complaint accompanying the consent order, the transaction as proposed would have combined the two leading lab testing firms in Northern California and increased the possibility that the combined Quest/Unilab entity could unilaterally raise prices.[49]

In *FTC v. The Hearst Trust, et al*, the Commission charged Hearst and its subsidiary First DataBank, Inc. with illegally acquiring a monopoly in the market for electronic integratable drug information databases. According to the complaint, the 1998 acquisition of Medi-Span, Inc. allowed First DataBank to impose substantial price increases on its customers for use of the electronic databases that contain clinical, pricing and other information on prescription and non-prescription drugs. In December 2001, a federal district court entered a final judgment adopting

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[46] *Biovail Corp*., C-4060 (order filed Oct. 2, 2002), *available at* <http://www.ftc.gov/os/caselist/c4060.htm>.

[47] *Biovail Corp. and Elan Corp. plc.*, C-4057 (order filed Aug. 20, 2002), *available at* <http://www.ftc.gov/opa/2002/08/fyi0245.htm>.

[48] *FTC Seeks to Block Cytyc Corp.'s Acquisition of Digene Corp.*, FTC PRESS RELEASE, June 24, 2002, *available at* <http://www.ftc.gov/opa/2002/06/cytyc_digene.htm>.

[49] *Quest Diagnostics Inc. and Unilab Corp.*, C-4074 (order filed Apr. 3, 2003), *available at* <http://www.ftc.gov/os/caselist/c4074.htm>.

a Commission settlement requiring Hearst to divest the former Medi-Span and to pay $19 million in disgorgement of illegal profits to its customers.[50]

c. Law Enforcement Involving 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 September 2001- August 2003 time period, the FTC reached settlements with twelve groups of physicians resolving allegations of collusion to raise consumers' costs,[51] and issued an administrative complaint against another group.[52] These cases involve significant numbers of doctors, including more than three-quarters of all doctors in the Carlsbad, New Mexico area in one matter; more than 1,000 physicians in Dallas, Texas in another matter; and an organization consisting of more than 1,500 San Francisco physicians in the case in administrative litigation. The Commission's consent orders ended allegedly collusive conduct harming employers, individual patients, and health plans by depriving them of the benefits of competition in the purchase of physician services.

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[50] *FTC v. The Hearst Trust, et. al.*, No. 1:01CV00734 (D.D.C.) (final order filed Dec. 18, 2001), *available at* <http://www.ftc.gov/opa/2001/12/hearst.htm>.

[51] *The Maine Health Alliance*, C-4095 (order filed Aug. 27, 2003), *available at* <http://www.ftc.gov/os/caselist/0210017.htm>; *Physician Network Consulting, L.L.C.*, C-4094 (order filed Aug. 27, 2003), *available at* <http://www.ftc.gov/opa/2003/08/fyi0353.htm>; *Wash. Univ. Physician Network*, C-4093 (order filed Aug. 22, 2003), *available at* <http://www.ftc.gov/os/caselist/0210188.htm>; *SPA Health Org., dba Southwest Physician Assoc.*, C-4088 (order filed July 17, 2003), *available at* <http://www.ftc.gov/os/caselist/0110197.htm>; *Anesthesia Serv. Med. Group, Inc.*, C-4085 (order filed July 11, 2003), *available at* <http://www.ftc.gov/os/caselist/c4085.htm>; *Grossmont Anesthesia Serv. Med. Group, Inc.*,C-4086 (order filed July 11, 2003), *available at* <http://www.ftc.gov/opa/2003/07/fyi0344.htm>; *Carlsbad Physician Assoc., Inc.*, C-4081 (order filed June 13, 2003), *available at* <http://www.ftc.gov/os/caselist/c4081.htm>; *System Health Providers*, C-4060 (order filed Oct. 24, 2002), *available at* <http://www.ftc.gov/os/caselist/c4064.htm>; *R.T. Welter and Assoc.*, C-4063 (order filed Oct. 8, 2002), *available at* <http://www.ftc.gov/opa/2002/10/fyi0254.htm>; *Aurora Associated Primary Care Physicians, L.L.C.*, C-4055 (order filed July 16, 2002), *available at* <http://www.ftc.gov/opa/2002/07/fyi0240.htm>; *Physician Integrated Serv. of Denver, Inc.*, C-4054 (order filed July 12, 2002), *available at* <http://www.ftc.gov/opa/2002/07/fyi0240.htm>; *Obstetrics and Gynecology Med. Corp. of Napa Valley*, C-4048 (order filed May 14, 2002), *available at* <http://www.ftc.gov/opa/2002/05/fyi0227.htm>.

[52] *Cal. Pac. Med. Group, Inc. dba Brown and Toland Med. Group*, Dkt. No. 9306 (complaint issued July 8, 2003), *available at* <http://www.ftc.gov/os/caselist/d9306.htm>.

2. Other Health Care Initiatives

In addition to enforcement action, the FTC has used its research and reporting capabilities as well as its powers of persuasion to foster competition in health care.

- ***In re Buspirone* Amicus Brief.** In January 2002, the FTC filed an *amicus* brief in pivotal private litigation involving allegations of improper Orange Book listing practices.[53] *In re Buspirone* involves allegations that BMS violated the antitrust laws by wrongfully listing a patent on its branded drug, BuSpar, in the FDA's Orange Book, thereby foreclosing generic competition. BMS argued that the conduct in question was covered by the *Noerr-Pennington* doctrine, which provides a degree of immunity from liability under the Sherman Act in certain circumstances for conduct that constitutes "petitioning" of a governmental authority. In its *amicus* brief opposing *Noerr* immunity, the Commission argued that submitting patent information for listing in the Orange Book did not constitute "petitioning" the FDA and that, even if it did, various exceptions to *Noerr* immunity applied. The district court subsequently issued an order declining to immunize the conduct at issue on the basis of the *Noerr* doctrine, and adopting much of the Commission's reasoning.[54]

- **Generic Drug Study.** In July 2002, the FTC issued a report entitled "Generic Drug Entry Prior to Patent Expiration: An FTC Study," which evaluated whether Hatch-Waxman is susceptible to strategies to delay or deter consumer access to generic alternatives to brand-name drug products.[55] 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 identified in the FTC

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[53] *In re Buspirone Patent Litigation/In re Buspirone Antitrust Litigation*, MDL Dkt. No. 1410 (JGK) (S.D.N.Y. memorandum of law of *amicus curiae* the FTC in opposition to defendant's motion to dismiss filed Jan. 8, 2002), *available at* <http://www.ftc.gov/os/2002/01/busparbrief.pdf>.

[54] *In re Buspirone*, 185 F. Supp. 2d 363 (S.D.N.Y. 2002). The Court's ruling does not mean that all improper Orange Book filings will give rise to antitrust liability. An antitrust plaintiff still must prove an underlying antitrust claim. The *Buspirone* decision merely establishes that Orange Book filings are not automatically immune from antitrust scrutiny.

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

study.[56] In July 2003, the FDA approved 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.[57] In addition, both the Senate and the House of Representatives recently passed bills that incorporate the FTC study's two major legislative recommendations.[58]

There already are indications that the FDA's new rule has accelerated generic drug competition. A generic drug manufacturer, Apotex Corp., recently announced that it was commencing U.S. sales of a generic version of the GlaxoSmithKline plc ("Glaxo") antidepressant, Paxil – a prescription drug with annual sales in excess of $2 billion.[59] Apotex was able to launch the product earlier than previously expected because, shortly after the FDA published its final rule, Glaxo asked the FDA to de-list three Paxil-related patents, thus clearing the way for FDA to grant final approval to the generic drug. All three patents were among those identified in the FTC's July 2002 generic drug report as questionably listed, and one of those patent listings had resulted in a 30-month stay that was continuing to block generic entry. Patent listings can delay FDA approval of generic drugs for 30 months, or even longer if a branded company lists multiple patents.

- **Hearings on Health Care and Competition Law and Policy**. To explore developments in the dynamic health care market, the FTC, working with DOJ's Antitrust Division, commenced a series of hearings on "Health Care and

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[56] *President Takes Action to Lower Prescription Drug Prices by Improving Access to Generic Drugs*, WHITE HOUSE PRESS RELEASE, Oct. 21, 2002, *available at* <http://www.whitehouse.gov/news/releases/2002/10/20021021-2.html>.

[57] Applications for FDA Approval to Market a New Drug: Patent Submission and 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, 68 Fed. Reg. 36675 (2003); *see also Statement of FTC Chairman Supporting FDA's Final Generic Drug Rule*, FTC PRESS RELEASE, June 12, 2003, *available at* <http://www.ftc.gov/opa/2003/06/030612murisstmtgdr.htm>.

[58] H.R. 1, 108th Cong. §§ 1101-1118 (2003); H.R. 1, incorporating S. 1, 108th Cong. §§ 701-706, 901-911 (2003).

[59] *Statement by Federal Trade Commission Chairman Timothy J. Muris on Generic Paxil Launch*, FTC PRESS RELEASE, Sept. 11, 2003, *available at* <http://www.ftc.gov/opa/2003/09/paxillaunch.htm>

Competition Law and Policy" on February 26, 2003.[60] Over a seven-month period, the FTC and DOJ devoted almost 30 days of hearings to a comprehensive examination of a wide range of health care issues, involving hospitals, physicians, insurers, pharmaceuticals, long-term care, Medicare, Medicaid, and consumer information, among others. 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; horizontal hospital networks and vertical arrangements with other health care providers; information sharing, integration, and unionization trends involving physicians; the competitive effects of mergers of health insurance providers; and consumer information and quality of care issues.[61] A public report that incorporates the results of the hearings will be prepared after the hearings.

- **Hospital Merger Retrospectives**. The Bureau of Economics and the Bureau of Competition are evaluating the effects of consummated hospital mergers in several cities, in order to determine whether the mergers in question may have benefitted or harmed consumers. If the analysis reveals that one or more of the mergers considered has had anticompetitive effects, then the Commission will carefully consider whether an administrative law enforcement action would be warranted, with the availability of an appropriate remedy being one relevant consideration. The Commission will announce the results of these retrospective studies, which will provide useful real-world information about the consequences of particular transactions and the nature of competitive forces in health care, and will therefore be helpful in analyzing and possibly challenging future hospital mergers.

- **Comments on Proposed State Laws Permitting Collective Bargaining By Physicians**. The Commission has opposed federal legislation that would create an antitrust exemption for physician collective bargaining,[62] and the Commission has authorized its staff to express concerns about similar bills pending before state

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[60] *See FTC Chairman Announces Public Hearings on Health Care and Competition Law and Policy to Begin in February 2003*, FTC PRESS RELEASE, Nov. 7, 2002, *available at* <http://www.ftc.gov/opa/2002/11/murishealthcare.htm>; Public Hearings: Health Care and Competition Law and Policy, 67 Fed. Reg. 68672 (2002).

[61] Agendas, public comments, transcripts, and other materials related to the hearings are available on the FTC's website at <http://www.ftc.gov/ogc/healthcarehearings/index.htm>.

[62] *See Quality Health-Care Coalition Act of 1999: Hearing Before the House Comm. on Judiciary*, 106th Cong. (June 22, 1999) (prepared statement of the FTC), *available at* <http://www.ftc.gov/os/1999/06/healthcaretestimony.htm>.

legislatures. For example, bills were withdrawn in state legislatures in Alaska, Washington, and Ohio after Commission staff expressed concerns that permitting competing physicians to engage in collective bargaining with health plans over fees and other contract terms likely would raise health care costs and reduce access to care without ensuring better care for patients.[63]

B. Energy

Energy is vital to the entire economy and represents a significant portion of total U.S. economic output. Older Americans with low and moderate incomes are greatly affected by increases in refined petroleum product prices, as well as by increases in electricity and natural gas prices. The FTC has focused considerable resources on energy issues, including investigating mergers in the petroleum and natural gas industries, systematically monitoring wholesale and retail prices of gasoline in an effort to identify possible anticompetitive activities, conducting in-depth studies of evolving energy markets, and submitting competition advocacy pieces.

1. Law Enforcement Actions Involving Energy

- **Oil Merger Investigations.** The Commission has an extensive history of carefully investigating mergers in the petroleum industry. These mergers typically involve a host of individual product/geographic market combinations. When necessary, the agency has insisted on remedial divestitures to cure potential harm to competition. Most recently, in the *Conoco/Phillips* merger, the Commission issued a consent order requiring 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.[64] Other oil merger actions pursued by the Commission during the September 2001-August 2003

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[63] Letter from FTC Staff to the Ohio House of Representatives on Ohio House Bill 325 (October 16, 2002), *available at* <http://www.ftc.gov/os/2002/10/ohb325.htm>; Letter from FTC Staff to the Washington House of Representatives on Washington House Bill 2360 (Feb. 8, 2002), *available at* <http://www.ftc.gov/be/v020009.pdf>; Letter from FTC Staff to the Alaska House of Representatives on Alaska Senate Bill 37 (Jan. 18, 2002), *available at* <http://www.ftc.gov/be/v020003.htm>; The Threat of Consumer Harm Resulting from Physician Collective Bargaining Under Alaska Senate Bill 37: Hearing Before the Alaska House Comm. On Labor and Commerce (Mar. 22, 2002) (prepared statement of FTC staff,) *available at* <http://www.ftc.gov/opa/2002/03/alaskaphysicians.htm>.

[64] *Conoco Inc.*, C-4058 (order filed Feb. 7, 2003), *available at* <http://www.ftc.gov/os/caselist/c4058.htm>.

period include *Chevron/Texaco* (consent order requiring divestitures to preserve competition in various petroleum markets and other energy markets); *Valero/Ultramar* (consent order requiring divestitures to preserve competition in gasoline refining bulk supply markets in California); and *Shell/Pennzoil-Quaker State* (consent order requiring divestitures to preserve competition in the U.S. and Canadian market for a paraffinic base oil).[65]

- **Natural Gas Merger Investigations.** The FTC also has investigated mergers in the natural gas industry and taken necessary action to preserve competition. In July 2003, the Commission issued a consent order designed to preserve competition in the market for the delivery of natural gas to the Kansas City area.[66] The order permitted Southern Union Company's $1.8 billion purchase of the Panhandle pipeline from CMS Energy Corporation to proceed, but required Southern Union to terminate an agreement under which one of its subsidiaries managed the Central pipeline, which competes with Panhandle in the market for the delivery of natural gas to the Kansas City area. Absent the consent order, 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.

- **Gasoline Monopolization Case**. In March 2003, the Commission issued an administrative complaint in an important nonmerger case involving the Union Oil Company of California ("Unocal").[67] 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 both CARB and 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 alleges that Unocal did

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[65] *Chevron Corp.*, C-4023 (order filed Jan. 2, 2002), *available at* <http://www.ftc.gov/os/caselist/c4023.htm>; *Valero Energy Corp.*, C-4031 (order filed Feb. 19, 2002), *available at* <http://www.ftc.gov/os/caselist/c4031.htm>; *Shell Oil Co.*, C-4059 (order filed Nov. 18, 2002), *available at* <http://www.ftc.gov/os/caselist/c4059.htm>.

[66] *Southern Union Co.*, C-4087 (order filed July 22, 2003), *available at* <http://www.ftc.gov/os/caselist/0310068.htm>.

[67] *Union Oil Co. of Cal.*, Dkt. No. 9305 (complaint filed Mar. 4, 2003), *available at* <http://www.ftc.gov/os/caselist/d9305.htm>.

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 complaint further alleges that Unocal's conduct has allowed it to acquire monopoly power over the technology used 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 being litigated before an Administrative Law Judge.

2. Other Energy Industry Initiatives

- **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 product prices. In two public conferences, held in August 2001 and May 2002, participants discussed key factors that affect product prices, including increased dependency on foreign crude oil sources, changes in industry business practices, and new governmental regulations.[68] The information gathered through these public conferences will form the basis for a report to be issued.

- **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 whether a law enforcement investigation would be warranted.[69] 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

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[68] *FTC to Hold Public Conference/Opportunity for Comment on U.S. Gasoline Industry in Early August*, FTC PRESS RELEASE, July 12, 2001, *available at* <http://www.ftc.gov/opa/2001/07/gasconf.htm>; *Factors That Affect Gasoline Prices To Be Discussed at FTC Conference*, FTC PRESS RELEASE, May 1, 2002, *available at* <http://www.ftc.gov/opa/2002/05/gasolineprices.htm>. Agendas, public comments, transcripts, and other materials related to the hearings are available on the FTC's website at <http://www.ftc.gov/bc/gasconf/index.htm>.

[69] *FTC Chairman Opens Public Conference Citing New Model To Identify and Track Gasoline Price Spikes, Upcoming Reports*, FTC PRESS RELEASE, May 8, 2002, *available at* <http://www.ftc.gov/opa/2002/05/gcr.htm>.

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 fallen 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 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 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.

- **Supporting Efforts to Increase Competition in Electric Power Markets**. FTC staff regularly file Commission-authorized comments with the Federal Energy Regulatory Commission ("FERC") and various state utility commissions supporting efforts by FERC and the states to introduce increased competition in electric power markets where appropriate. Effective competition in electricity markets is likely to benefit consumers through lower prices, improved reliability, increased customer choice of products and services, and greater innovation. In addition to filing comments, the Commission issued a Staff Report in September 2001 on electric power market restructuring issues at the wholesale and retail levels. The Staff Report reviewed those features of state retail competition plans

that have provided benefits to consumers and those that have not. It also highlighted certain jurisdictional limitations on the states' authority to design successful retail competition plans, and discussed whether there is a need for federal legislative or regulatory action in this regard.[70]

- **Comments on Proposed State Laws Banning Sales of Motor Fuels Below Cost.** The Commission has authorized its staff to file comments on proposed state laws covering various aspects of gasoline sales, including proposed laws banning sales of motor fuels below cost. For example, proposed laws in Virginia, New York, and North Carolina were not enacted after Commission staff, in Commission-authorized filings, expressed concerns that they may invalidate more types of pricing behavior than federal antitrust laws do and may discourage or prevent competitive pricing of gasoline products.[71]

C. Retail Sector

1. Food

a. Law Enforcement Actions. Many older Americans, especially those on fixed incomes, may be particularly vulnerable to excessively high prices for groceries. The Commission's antitrust enforcement activities during the September 2001-August 2003 period included challenges to several potentially anticompetitive mergers involving grocery products. The Commission issued or provisionally accepted consent orders requiring divestitures or other remedies to resolve allegations that proposed mergers involving dry cat food, super-premium ice

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[70] FTC STAFF REPORT, COMPETITION AND CONSUMER PROTECTION PERSPECTIVES ON ELECTRIC POWER REGULATORY REFORM, FOCUS ON RETAIL COMPETITION (Sept. 2001), *available at* <http://www.ftc.gov/reports/elec/electricityreport.pdf>.

[71] Letter from FTC Staff to N.C. Senator Daniel G. Clodfelter, Chairman, Judiciary I Committee, on Proposed Amendments to the N.C. Motor Fuel Mktg. Act (May 19, 2003), *available at* <http://www.ftc.gov/os/2003/05/ncclsenatorclodfelter.pdf>; Letter from FTC Staff to N.C. Attorney General Roy Cooper on Proposed Amendments to the N.C. Motor Fuel Mktg. Act (May 19, 2003), *available at* <http://www.ftc.gov/os/2003/05/ncclattorneygeneralcooper.pdf>; Letter from FTC Staff to N.Y. Attorney General, Eliot Spitzer on the Motor Fuel Marketing Practices Act, Bill Nos. A.8398 and S.4947 (July 24, 2003), *available at* <http://www.ftc.gov/be/nymfmpa.pdf>; Letter from FTC Staff to N.Y. Governor George E. Pataki on the Motor Fuel Marketing Practices Act, Bill Nos. A.8398 and S.4947 (Aug. 8, 2002), *available at* <http://www.ftc.gov/be/v020019.pdf>; Letter from FTC Staff to the Commonwealth of Virginia House of Delegates (Feb. 15, 2002), *available at* <http://www.ftc.gov/be/V020011.htm>.

cream, and gelatin (found in gelatin desserts, confections, and other products) might substantially lessen competition.[72] In addition, two leading makers of refrigerated pickles abandoned their proposed merger after the Commission determined to initiate a federal court action to preliminarily enjoin consummation of the proposed transaction, due to concerns about likely anticompetitive effects.[73] The Commission also obtained consent agreements resolving allegations of potential anticompetitive effects arising from two proposed mergers in the retail grocery sector.[74]

b. Study of Slotting Allowances and Other Grocery Marketing Practices. The Commission has been studying slotting allowance practices in the grocery industry. Slotting allowances are lump-sum, up-front payments from a manufacturer or producer to a retailer to have a new product carried by the retailer and placed on its shelf. Because of substantial debate over the competitive significance of slotting allowances and other shelf allocation practices, the FTC conducted a public workshop on these issues in 2000, and, in February 2001, the Commission issued a staff report discussing the information gathered and antitrust issues addressed at that public workshop.[75]

At a September 2000 hearing, the U.S. Senate Committee on Small Business and Entrepreneurship, under the leadership of Chairman Christopher Bond and Ranking Member John Kerry, requested that the FTC conduct a study of slotting allowances in the grocery

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[72] *Nestle Holdings, Inc.*, C-4028 (order filed Feb. 4, 2002), *available at* <http://www.ftc.gov/os/caselist/c4028.htm>; *Nestle Holdings, Inc.*, C-4082 (consent order accepted for public comment June 25, 2003), *available at* <http://www.ftc.gov/opa/2003/06/nestle.htm>; *Deutsche Gelatine-Fabriken Stoess AG*, C-4045 (order filed Apr. 17, 2002), *available at* <http://www.ftc.gov/os/caselist/c4045.htm>.

[73] *FTC Votes to Challenge Hicks, Muse's Proposed Acquisition of Claussen Pickle Company*, FTC PRESS RELEASE, Oct. 22, 2002, *available at* <http://www.ftc.gov/opa/2002/10/vlasic.htm>.

[74] *Wal-Mart Stores, Inc.*, C-4066 (order filed Feb. 27, 2003), *available at* <http://www.ftc.gov/os/caselist/c4066.htm>; *Koninklijke Ahold N.V.*, C-4027 (order filed Jan. 16, 2002), *available at* <http://www.ftc.gov/os/caselist/c4027.htm>.

[75] FTC STAFF, REPORT ON THE FEDERAL TRADE COMMISSION WORKSHOP ON SLOTTING ALLOWANCES AND OTHER MARKETING PRACTICES IN THE GROCERY INDUSTRY: A REPORT BY FEDERAL TRADE COMMISSION STAFF (Feb. 2001), *available at* <http://www.ftc.gov/opa/2001/02/slotting.htm>.

industry.[76] Congress formalized this request in the Conference Report accompanying H.R. 4577, Commerce, Justice and State Appropriations for FY2001. The report stated that "[o]f the funds recommended for the Bureau of Competition, the Committee expects the FTC to expend up to $900,000 for the completion of its investigation into slotting allowances in order to ensure fair competition in the retail grocery business."[77] The FTC expects to release the report on slotting allowances in the near future.

2. Intrastate Household Goods Moving Services

Senior citizens who are relocating, for example, to a retirement venue or to be near a close relative, are susceptible to excessively high prices for household goods moving services. The Commission recently issued administrative complaints against state-wide associations of household goods movers in Kentucky, Alabama, and Mississippi, and subsequently reached settlements with the Alabama and Mississippi associations.[78] In addition, the Commission reached settlements resolving allegations in accompanying draft complaints with four other state-wide associations in Indiana, Minnesota, Iowa, and New Hampshire.[79] The complaints in

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[76] After a hearing in September 1999, the Committee had requested that the General Accounting Office ("GAO") conduct a study of the use of slotting allowances and other related fees in the retail grocery industry. The GAO, however, was unable to obtain the necessary proprietary information from retailers and manufacturers to conduct such a study and reported this fact in testimony delivered on September 14, 2000.

[77] *See* <http://thomas.loc.gov/cgi-bin/cpquery/T?&report=sr404&dbname=cp106&>. *See also* <http://thomas.loc.gov/cgi-bin/cpquery/T?&report=hr1005&dbname=cp106&> ("The conference agreement adopts by reference the Senate report lotting on slotting allowances . . .").

[78] *Kentucky Household Goods Carriers Association, Inc.*, Dkt. No. 9309 (complaint issued July 8, 2003), *available at* <http://www.ftc.gov/os/adjpro/d9309/index.htm>; *Alabama Trucking Association, Inc.*, Dkt. No. 9307 (consent order announced for public comment on Oct. 30, 2003), *available at* <http://www.ftc.gov/os/caselist/d9307.htm>; *Movers Conference of Mississippi, Inc.*, Dkt. No. 9308 (consent order announced for public comment on Oct. 30, 2003), *available at* <http://www.ftc.gov/os/caselist/d9308.htm>.

[79] *Ind. Household Movers and Warehousemen, Inc.*, C-4077 (order filed Apr. 25, 2003), *available at* <http://www.ftc.gov/os/caselist/c4077.htm>; *Minn. Transp. Serv. Assoc.*, C-4097 (order filed Sept. 15, 2003), *available at* <http://www.ftc.gov/opa/2003/08/mtsa.htm>; *Iowa Movers and Warehousemen's Assoc.*, C-4096 (order filed Sept. 10, 2003), *available at* <http://www.ftc.gov/opa/2003/08/mtsa.htm>; *New Hampshire Motor Transport Association*, File No. 021-0115 (consent order announced for public comment on Oct. 30, 2003), *available at* <http://www.ftc.gov/os/caselist/0210115.htm>.

six of these cases alleged that the association involved harmed competition and consumers by filing collectively established intrastate rate tariffs in violation of Section 5 of the FTC Act. The consent orders issued or provisionally accepted in those six cases require the respondent associations to cease and desist from filing collective rates, and to rescind existing tariffs based on jointly established rates. The complaint against the Kentucky association remains in administrative litigation.

D. Technology

In an increasingly technology-based economy, the maintenance of competition in technology-related markets is important to consumers of all ages, including the elderly. Many of the Commission's competition initiatives in technology markets involve consumer products and services, such as consumer electronics and Internet-based services. Competition in the production and marketing of these products and services has direct bearing on the economic well being of senior citizens by ensuring that those goods are competitively priced and accessible.

1. Law Enforcement

The continuing development of "high-tech" industries also influences our antitrust agenda. As technology advances, there will be increased efforts to establish industry standards for the development and manufacture of new products. While the adoption of standards is often procompetitive, the standards setting *process*, which involves competitors meeting to set product specifications, can be an area for antitrust concern. In June 2002, the Commission issued an administrative complaint alleging that Rambus, Inc., a participant in an electronics industry standards-setting organization, failed to disclose – in violation of the organization's rules – that it possessed a patent and several pending patent applications on technologies that eventually were adopted as part of the industry standard.[80] 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 administrative complaint, which is currently being litigated before an Administrative Law Judge, alleges that once the standard was adopted, Rambus was in a position to secure millions of dollars in royalty fees each year, and potentially more than one billion dollars over the lives of the patents.[81] Because standard-setting abuses can harm robust and efficiency-enhancing

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[80] *Rambus Inc.*, Dkt. No. 9302 (complaint filed June 18, 2002), *available at* <http://www.ftc.gov/opa/2002/06/rambus.htm>.

[81] *Id.*

competition in high-tech markets, the Commission will continue to pursue investigations in this important area.[82]

2. Other Technology-related Initiatives

- **Internet Task Force.** The Internet boom, heralded by many as the next industrial revolution, has immense potential as an engine for commerce and offers senior citizens and other consumers enormous freedom; for example, the Internet provides important commercial avenues for those older Americans with limited mobility or transportation options. Contrary to the perception of the Internet as a virtually unfettered free market, however, the extension of pre-existing state regulations or potentially anticompetitive business practices to the Internet may limit the cost savings or convenience that the Internet produces, without offsetting benefits. The FTC's Internet Task Force has been analyzing state regulations that may have pro-consumer or pro-competition rationales, but that nevertheless may restrict the entry of new Internet competitors or otherwise constrain competition. The Task Force also is examining barriers that arise when private parties employ potentially anticompetitive tactics, such as when suppliers or dealers apply collective pressure to limit online sales.
- **Internet Competition Workshop.** In October 2002, the Commission hosted a three-day public workshop examining potential barriers to e-commerce in ten different industries.[83] The purposes of the workshop included (1) to enhance the Commission's understanding of the nature of competition in e-commerce; (2) to help educate policymakers about the effects of overly restrictive state regulations; and (3) to help educate private entities about the types of business practices that may or may not be viewed as problematic. The workshop included panel discussions addressing specific industries that have grown via the Internet, but in which competition may be constrained by state regulations or business practices. The workshop included panels on the following industries: (1) wine sales; (2) cyber-charter schools; (3) contact lenses; (4) automobiles; (5) caskets; (6) online legal services; (7) health care (telemedicine and online pharmaceutical sales); (8)

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[82] In 1996, the FTC issued a consent order settling similar allegations that Dell Computer had failed to disclose that it had an existing patent on a personal computer component that was adopted as the standard by a video electronics group. *Dell Computer Co.*, 121 F.T.C. 616 (1996).

[83] *FTC Releases Agenda for Public Workshop on Possible Anticompetitive Efforts to Restrict Competition on the Internet*, FTC PRESS RELEASE, Sept. 30, 2002, *available at* <http://www.ftc.gov/opa/2002/09/ecomagenda.htm>. Agendas, public comments, transcripts, and other materials related to the hearings are available on the FTC's Web site at <http://www.ftc.gov/opp/ecommerce/anticompetitive/index.htm>.

auctions; (9) real estate, mortgages, and financial services; and (10) retailing.

- **E-Commerce Advocacy**. Commission staff has filed a number of Commission-authorized advocacy pieces expressing concerns about the adoption or interpretation of state licensing regulations that could unnecessarily limit competition from other types of providers of goods and services, including e-commerce providers. A number of these filings have clearly helped decision-makers take consumers' interests into account: (1) the Connecticut Board of Examiners for Opticians decided in June 2003, consistent with a Commission staff comment, that out-of-state sellers who ship contact lenses to Connecticut residents need not have a Connecticut optician's license, provided that the lenses are sold pursuant to a lawful prescription;[84] (2) on January 24, 2003, the North Carolina State Bar released two opinions eliminating the requirement that an attorney be physically present at real estate closings, and allowing non-attorneys to obtain signatures and receive and disburse funds, as the Commission had recommended in joint comments with the U.S. Department of Justice (DOJ);[85] (3) in accordance with joint FTC/DOJ comments, the American Bar Association did not adopt what the agencies considered to be an overly broad and possibly anticompetitive proposed model definition of the practice of law; in the alternative, the ABA recommended to state decision makers in August 2003 that they weigh the costs and benefits to consumers in defining the unauthorized practice of law, including the impact on competition, and that they use studies and other evidence to make that determination;[86] and (4) consistent with the Commission's *amicus* brief in a lawsuit filed by an Internet-based casket seller against a state licensing board, the court stated in dictum that an Oklahoma statute requiring all casket sellers to be licensed funeral directors did not advance the objectives of the FTC's Funeral Rule.[87]

APPENDIX I

REPRESENTATIVE BCP CASES INVOLVING OLDER CONSUMERS

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[84] *See In re: Declaratory Ruling Proceeding on the Interpretation and Applicability of Various Statutes and Regulations Concerning the Sale of Contact Lenses*, Conn. Bd. of Exam'rs for Opticians (comments of FTC staff, intervenor, Mar. 27, 2002), *available at* <http://www.ftc.gov/be/v020007.htm>.

[85] *See* Letter from FTC and DOJ to N.C. State Bar (July 11, 2002), *available at* <http://www.ftc.gov/os/2002/07/non-attorneyinvolvment.pdf>.

[86] *See* Letter from FTC and DOJ to the American Bar Association (Dec. 20, 2002), *available at* <http://www.ftc.gov/opa/2002/12/lettertoaba.htm>.

[87] *Powers v. Harris*, No. CIV-010445-F, 2002 WL 32026155 (W.D. Okla. Dec. 12, 2002). The Commission's *amicus* brief in *Powers v. Harris* is available at <http://www.ftc.gov/opa/2002/09/okcasketsales.htm>.

This section of the Consumer Protection Mission discussion provides more detailed descriptions of representative Commission cases handled by the Bureau of Consumer Protection which involve older consumers.

HEALTH CARE

Pain Relief

- In *FTC v. Blue Stuff, Inc., et al.*, No. Civ 02 1631W (W.D. Okla. stipulated final order entered Nov. 21, 2002), the Commission alleged that the marketers of Super Blue Stuff and Blue Stuff lacked reliable scientific evidence for their claims that the products provide significant or complete relief of severe pain, such as "excruciating sciatic nerve pain," pain due to "crushed vertebrae," and "awful" pain due to a brain tumor. The complaint further alleged that defendants marketed and sold two other products, using false claims about the products' ability to reduce cholesterol and slow or reverse bone loss. The order required the defendants to pay a $3 million judgment and refrain from making false and unsubstantiated claims. <http://www.ftc.gov/opa/2002/11/bluestuff.htm>.

Supplements

- In *U.S. v. Lifestyle Fascination, Inc.*, No. 03-3295 (MLC) (D. N.J. modified consent decree entered Aug. 6, 2003), the Commission challenged as unsubstantiated claims that Carni-Q Gel, a dietary supplement capsule, improved heart function in users with angina and other heart conditions. The complaint also challenged claims made for a weight loss and other products. The consent decree modifies a 1997 order against the company and requires payment of a $175,000 civil penalty. The modified consent decree also establishes a stringent standard for claims that tests prove or establish the efficacy of certain products, including dietary supplements. <http://www.ftc.gov/opa/2003/07/lifestyle2.htm>

- In *Unither Pharma, Inc.*, C-4089 (FTC consent order July 22, 2003), the defendants agreed to settle FTC charges that they made deceptive claims in advertising for the "HeartBar," a chewy food bar and powder containing the amino acid L-Arginine. The FTC challenged as unsubstantiated the respondents' claims that HeartBar decreases leg pain, prevents age-related vascular problems, reduces the risk of cardiovascular disease, and reduces or eliminates the need for surgery and medications among patients with cardiovascular disease. The

complaint also alleged that the respondents falsely claimed that scientific studies prove that HeartBar decreases angina pain by 70% and leg pain by 66%, and reverses the effects of high cholesterol, smoking, diabetes, and estrogen deficiency on the heart. The consent agreement prohibits the respondents from making the challenged unsubstantiated claims for HeartBar, or any other product containing L-Arginine, used in or marketed for the treatment, cure, or prevention of cardiovascular disease. The consent order further requires the respondents to contact all of their distributors and sellers and request that they immediately stop using any false or deceptive advertisements. <http://www.ftc.gov/opa/2003/06/unither.htm>.

- In *FTC v. Seasilver USA, Inc., et al.*, CV-S-03-0676-RLH (LRL) (D. Nev. stipulated preliminary injunction entered July 15, 2003), the Commission's complaint alleges that the defendants made unsubstantiated claims that "Seasilver," a liquid multi-vitamin/mineral/amino acid dietary supplement, safely treats or cures serious diseases such as diabetes, cancer, and pulmonary disease. Following the Commission's action, the U.S. Attorney for the Southern District of California filed a complaint resulting in the seizure of 132,480 bottles of Seasilver as an unapproved new drug under the Federal Food, Drug, and Cosmetic Act. <http://www.ftc.gov/opa/2003/06/seasilver.htm>.

- In *U.S. v. Michael S. Levey, et al.*, No. CV-03-4670 GAF (AJWx) (C.D. Cal. complaint filed June 30, 2003), the Commission challenged as unsubstantiated and in violation of a prior order claims that CartazyneDS, a dietary supplement containing glucosamine and chondroitin, "cures" arthritis, "rebuilds" cartilage in human joints "within days," and is an effective alternative to joint replacement surgery. <http://www.ftc.gov/opa/2003/07/ephedra.htm>.

- On June 10, 2003, the Commission filed two related complaints against Kevin Trudeau, Robert Barefoot, and their companies concerning "Coral Calcium Supreme" and "Biotape." In *FTC v. Trudeau, et al.*, No. 03C904 (N.D. Ill. complaint filed June 9, 2003), the Commission alleged that the defendants violated the FTC Act by making false and deceptive claims in an infomercial for their dietary supplement, Coral Calcium Supreme. The FTC alleges that the infomercial deceptively claimed that Coral Calcium Supreme could cure or treat cancer, heart disease, multiple sclerosis and lupus, and that the product was more absorbable than less expensive calcium supplements. In addition, the Commission alleged that Trudeau violated the terms of his 1998 consent decree with the FTC by making the challenged Coral Calcium Supreme claims and through a separate infomercial for Biotape. That infomercial allegedly falsely claimed that Biotape, which resembles electrical tape, provides significant or permanent relief from severe pain caused by conditions such as arthritis, sciatica,

and migraines. *FTC v. Trudeau*, No. 98C0168 (N.D. Ill. filed June 9, 2003). The Court entered preliminary injunctions that prohibit the parties from making the challenged claims. <http://www.ftc.gov/opa/2003/06/trudeau.htm>.

- In the case against A. Glenn Braswell and four of his corporations, *FTC v. A. Glenn Braswell, et al.*, CV 03-3700 DT (PJWx)(C.D. Cal. complaint filed May 27, 2003) the Commission alleged that the defendants made false and unsubstantiated advertising claims for numerous dietary supplements marketed under the Gero Vita and Theraceuticals brand names. The complaint challenges claims, aimed at older consumers and those with chronic illnesses, that five dietary supplements treat or cure respiratory disease, diabetes, Alzheimer's disease, obesity, and erectile dysfunction. This case is in litigation. <http://www.ftc.gov/opa/2003/05/gerovita.htm>.

- In *U.S. v. ValueVision Int'l, Inc.*, No. 03-2890 (D. Minn. complaint and consent decree entered Apr.17, 2003), the Commission challenged claims that defendant's dietary supplement, "Physician's RX," reduced fatigue associated with certain illnesses, such as cancer, and certain prescription drugs. The consent decree entered against ValueVision requires payment of a $215,000 civil penalty and prohibits future violations of the prior order. <http://www.ftc.gov/opa/2003/04/valuevision.htm>.

- Two Commission cases challenged purported snore-relief products. In *Snore Formula, Inc.*, C-4090 (FTC consent order July 29, 2003) and *Dr. Robert Currier*, C-4067 (FTC consent order Dec. 13, 2002), the Commission challenged as unsubstantiated claims that the products prevent sleep apnea and reduce snoring. Both consent agreements require the respondents to possess competent and reliable scientific evidence to substantiate these and other representations. <http://www.ftc.gov/opa/2003/04/snore.htm>.

- In *FTC v. Christopher Enter., Inc., et al.*, No. 2:01 CV-0505ST (D. Utah stipulated final order filed Nov. 29, 2001), the defendants allegedly claimed that its comfrey-based products were safe and could treat diseases such as cancer, stroke, and arthritis. The court order prohibits the defendants from marketing any comfrey product for ingestion, for use as a suppository, or for external use on open wounds, unless they have evidence that the product is safe. The defendants are also required to place a warning disclosure in any ad, promotional material or product label for any comfrey products intended for topical use. <http://www.ftc.gov/opa/2001/12/chrisenterprises2.htm>.

Products and Treatments

- In *FTC v. QT, Inc., et al.*, No 03 C-3578 (N.D. Ill. complaint filed June 2, 2003), the Commission challenged claims that defendants' "Q-Ray Ionized Bracelet" relieves chronic pain such as arthritis and back pain. According to the FTC, a recent study conducted by the Mayo Clinic shows that the Q-Ray Bracelet is no more effective than a placebo bracelet at relieving muscular and joint pain. Under the preliminary injunction, the defendants are prohibited from making deceptive pain-relief claims. The case is in litigation. <http://www.ftc.gov/opa/2003/06/qtinc.htm>.

- In March, two of the largest providers of LASIK refractive eye surgery services settled charges that their advertisements were not substantiated by scientific evidence. The Commission challenged ads that claimed that LASIK surgery would eliminate the need for glasses or contacts for life, eliminate the need for reading glasses, and eliminate the need for bifocals. The proposed consent orders are designed to prevent the two companies from engaging in similar acts or practices in the future when advertising their LASIK services. *LCA-Vision, Inc. d/b/a LASIKPLUS*, C-4083 (FTC consent order July 8, 2003); *Laser Vision Institute, LLC*, C-4084 (FTC consent order July 8, 2003). <http://www.ftc.gov/opa/2003/03/lasikads.htm>.

- Two FTC cases challenged claims that certain foreign clinics could provide effective cancer treatment. In *FTC v. Biopulse Int'l, Inc., et al.*, No. C023511(N.D. Cal. stipulated permanent injunction entered August 16, 2002), the Commission targeted misrepresentations made by a marketer of cancer therapies offered to patients through the company's Mexican clinics. The therapies placed patients at a substantial risk to their health. <http://www.ftc.gov/opa/2002/07/biopulse2>. The defendants in *FTC v. CSCT, Inc., et al.*, 03-C-00880 (N.D. Ill. preliminary injunction filed Feb. 21, 2003) claimed that their electromagnetic device, the "Zoetron machine" killed cancer cells. The defendants charged consumers $15,000 up front for several weeks of "treatments" at their clinic in Mexico. Concurrent with the Commission's action, Mexico's Federal Commission for the Protection Against Sanitary Risks inspected the clinic and shut down the office that provided the unapproved treatment. <http://www.ftc.gov/opa/2003/02/csct.htm>.

CONSUMER CREDIT

Predatory Lending Practices

- On September 4, 2003, the Commission charged Stewart Financial Company and its principals with numerous abusive practices in marketing loans to subprime borrowers. The Commission's complaint alleges that Stewart Financial offered small personal loans to subprime borrowers to be repaid within a year. Many of the borrowers are recipients of Social Security. The FTC alleges that Stewart Financial engages in deceptive and other illegal practices to induce consumers to unknowingly purchase expensive add-on products, such as insurance and Car Club membership, to obtain costly refinance loans, and to participate in a "direct deposit" program, which imposed additional fees. The case is currently in litigation. *FTC v. Stewart Fin. Co. Holdings, Inc., et al.*, 1:03-CV-2648-JTC (N.D. Ga. Sept. 4, 2003) < www.ftc.gov/opa/2003/09/stewart.htm>.

- In July 2002, the Commission, the Department of Housing and Urban Development, and the State of Illinois, settled an action with Mercantile Mortgage Company. The complaint alleged that Mercantile deceived borrowers about the terms of their loans resulting in many borrowers not knowing that their loans required large "balloon" payments at the end of their terms. The settlement required Mercantile to make a $250,000 payment for consumer redress and create a program to offer refinanced loans on favorable terms to certain borrowers with balloon loans. *U.S. v. Mercantile Mortgage Co., Inc., et al.*, No. 02C5079 (N.D. Ill. stipulated final judgment filed July 18, 2002). <http://www.ftc.gov/opa/2002/07/mercantilediamond.htm>.

- In March 2002, the Commission settled charges that First Alliance Mortgage Company and its chief executive officer violated federal and state laws in making home mortgage loans to customers. The Commission alleged that First Alliance deceptively lured consumers, including elderly and low-income persons, into their branch offices and misled them about mortgage terms. The settlement provided for more than $60 million in consumer redress and included a payment of $20 million by Brian Chisick, the founder, CEO and president of First Alliance. *FTC v. First Alliance Mortgage Co., et al.*, SACV 00-964 DOC (C.D. Cal. Mar. 21, 2002) < http://www.ftc.gov/opa/2002/03/famco.htm>.

- In *Associates First Capital Corporation and Associates Corporation of North America* (the Associates)(consent order filed September 19, 2002), Citigroup, which had acquired the Associates in November 2000, agreed to pay $215 million to resolve Commission charges that it engaged in systematic and widespread deceptive and abusive lending practices. The complaint alleged that the Associates engaged in deceptive practices designed to induce borrowers, including elderly persons, to unknowingly purchase optional credit insurance

products, a practice known as "packing." <http://www.ftc.gov/opa/2002/09/associates.htm>.

- In July 2002, the Commission filed a complaint against Illinois mortgage broker *Mark Diamond and his company, OSI Financial Services, Inc.*, alleging that the defendants target homeowners with poor credit, offering to arrange mortgage loans. Diamond routinely solicited low-income individuals, including elderly persons and individuals who have significant equity in their homes and who may not otherwise be considering a home equity loan. The complaint charged Diamond with deceiving consumers about the existence of balloon payments, the monthly payment amount, amount of fees charged to the borrower, the existence of a prepayment penalty, and that the loans did not include payment into escrow for taxes and insurance. This case is in litigation**.** <http://www.ftc.gov/opa/2002/07/mercantilediamond.htm>.

- In the case against *Capital City*, filed in January 1998 and still in litigation, the Commission alleged that the defendants frequently made high interest rate (20% - 24%) loans to minority borrowers, elderly persons, or those with fixed or low incomes. The loans were often interest-only balloon loans in which a borrower, after making payments for the term of the loan, still owed the entire amount of the loan principal. The complaint further alleged that these loans were often secured by the borrowers' homes and were typically based on the worth of the home rather than on a borrower's creditworthiness or income. <http://www.ftc.gov/opa/1998/01/capcity.htm>.

Debt Collection Practices Cases

- In April 2002, the Commission obtained a settlement with *United Recovery Systems, Inc*. (URS), including payment of a $240,000 civil penalty to resolve allegations that the company violated the FDCPA. The FTC's complaint alleged that URS discussed the details of the debt with third parties, used harassing and abusive language, and falsely stated or implied that failure to pay the debt could result in imprisonment. This was the FTC's first enforcement action against a debt collection company that targeted Spanish-speaking consumers. <http://www.ftc.gov/opa/2002/04/unitedrecovery.htm>.

- In its case against *DC Credit Services and David Cohen*, the defendants agreed to pay a $300,000 civil penalty in settlement of charges that they violated the Fair Credit Reporting Act (FCRA) and the FDCPA. In its June 2002 complaint, the Commission alleged that the defendants used harassing or abusive language, threatened to convey adverse information to credit reporting agencies when they knew such information was false, and reported adverse information to the credit reporting agencies without noting that the consumer had disputed the accuracy of the information. In addition to requiring the civil penalty, the consent decree

permanently bans defendant David Cohen from engaging in debt collection activity. <http://www.ftc.gov/opa/2002/07/dccredserv.htm>.

Advance Fee Credit and Credit Protection

- *Operation No Credit*, a coordinated sweep of advance fee credit and credit card protection, produced forty-three cases brought by fifteen different law enforcement offices around the country in September 2002. <http://www.ftc.gov/opa/2002/09/opnocredit.htm>. In one of the FTC cases, *Star Credit Services, Inc*., the defendants were permanently enjoined from deceptively offering or selling advance-fee loans, were ordered to pay $120,000 in consumer redress as a result of a settlement with the Federal Trade Commission. <http://www.ftc.gov/opa/2003/08/starcredit.htm>. This type of high impact, high visibility law enforcement sends a clear message both to the malefactors and consumers that these types of credit-offers are hoaxes that will not be tolerated by law enforcement at any level.

- In April, 2002, the Commission filed a complaint against *Credit Enhancement Services*, alleging that the defendants were deceptively promoting an advance fee credit scam that targeted seniors and others. This case is in litigation. <http://www.ftc.gov/opa/2002/04/dialing.htm>.

CROSS-BORDER FRAUD

- In consent orders filed in September 2003, the FTC and Canadian law enforcers settled two separate cases with operators who targeted senior citizens in cross-border lottery schemes. The settlements bar both defendants from selling, promoting, or participating in the sale of chances, tickets, or shares of any foreign lottery or bond program in the future. Together, the settlements will return approximately $1.9 million to consumers from assets seized by Canadian law enforcers working in conjunction with the FTC. One defendant also was charged under criminal statutes and will serve a six-year jail sentence for wire fraud. < http://www.ftc.gov/opa/2003/09/naggsherif.htm>.

- In *FTC v. Nanda Kumar Duraisami, et al.*, No. 2:03-CV-01284-BJR (W.D. Wa. filed June 13, 2003), the Commission obtained an order shutting down a foreign lottery scheme promoted by Canadian telemarketers. <http://www.ftc.gov/opa/2003/07/duraisami.htm>.

FUNERAL RULE

- New York-based Morehead McKim Gallaher Funeral Home failed to provide information that the FTC had requested in order to process the funeral home into FROP. http://www.ftc.gov/opa/2002/12/morehead.htm The requested materials and information included financial information that would enable the FTC staff to determine the amount of the funeral home's voluntary payment and other information concerning the home's alleged Rule violations. The Commission obtained a federal court order citing Morehead for civil contempt and imposing fines and possible arrest if it failed to produce the information needed to administer the FROP program as to Morehead. Morehead ultimately complied with the request and participated fully in the FROP system. http://www.ftc.gov/opa/2003/05/moreheadmckim.htm.

PUBLICATIONS

Although OCBE's publications are of interest to consumers of all ages, some have special relevance to older people:

- *Are You A Target of... Telephone Scams?* <http://www.ftc.gov/bcp/conline/pubs/tmarkg/target.htm>.

- *Funerals: A Consumer Guide* <http://www.ftc.gov/bcp/conline/pubs/services/funeral.htm>.

- *Getting Credit When You're Over 62* <http://www.ftc.gov/bcp/conline/pubs/credit/over62.htm>.

- *Helping Older Consumers Avoid Charity Fraud* <http://www.ftc.gov/bcp/conline/pubs/tmarkg/oldercharity.htm>.

- *High-Rate, High-Fee Loans (Section 32 Mortgages)* <http://www.ftc.gov/bcp/conline/pubs/homes/32mortgs.htm>.

- *Hoax Targets Elderly African Americans* <http://www.ftc.gov/bcp/conline/pubs/alerts/hoaxalrt.htm>.

- *Identity Theft: What's It All About?* <http://www.ftc.gov/bcp/conline/pubs/credit/idtheftmini.htm>.

- *Living Trust Offers: How to Make Sure They're Trust-worthy* <http://www.ftc.gov/bcp/conline/pubs/services/livtrust.htm>.

- *'Miracle' Health Claims: Add a Dose of Skepticism*

<http://www.ftc.gov/bcp/conline/pubs/health/frdheal.htm>.

- *Need a Loan? Think Twice About Using Your Home as Collateral* <http://www.ftc.gov/bcp/conline/pubs/homes/hoepa.htm>.

- Reverse Mortgages <http://www.ftc.gov/bcp/conline/pubs/homes/rms.htm>.

APPENDIX II
COMMISSION TESTIMONY BEFORE CONGRESS
SEPTEMBER 2001 - AUGUST 2003
***Available at* <http://www.ftc.gov/os/testimony/index.html>**

Health Fraud and the Elderly: A Continuing Health Epidemic: Hearing Before the Senate Special Comm. on Aging, 107th Cong. (Sept. 10, 2001) (prepared statement of the FTC).

The Credit Card Industry: Hearing Before the House Subcomm. on Fin. Inst. and Consumer Credit of the House Fin. Serv. Comm., 107th Cong. (Nov. 1, 2001) (prepared statement of the FTC).

Charitable Solicitation Fraud: Hearing Before the House Subcomm. on Oversight and Investigations of the House Energy and Commerce Comm., 107th Cong. (Nov. 6, 2001) (prepared statement of the FTC).

Law Enforcement and Programmatic Priorities: Hearing Before the House Subcomm. on Commerce, Trade and Consumer Protection of the House Energy and Commerce Committee, 107th Cong. (Nov. 7, 2001) (prepared statement of the FTC).

Identity Theft: the FTC's Response: Hearing Before the Senate Subcomm. on Tech., Terrorism and Gov't Info. of the Senate Comm. on the Judiciary., 107th Cong.(Mar. 20, 2002) (prepared statement of the FTC).

Factors that May Affect Gasoline Prices: Hearing Before the House Subcomm. on Energy Policy, Natural Resources and Regulatory Affairs of the House Gov't Reform Comm., 107th Cong. (Apr. 23, 2002) (prepared statement of the FTC).

Competition in the Pharmaceutical Industry: Hearing Before the Senate Comm. on Commerce, 107th Cong. (Apr. 23, 2002) (prepared statement of the FTC).

The Funeral Rule: Hearing Before the Senate Subcomm. on Children and Families of the Senate Comm. on Health, Educ., Labor and Pensions, 107th Cong. (Apr. 26, 2002) (prepared statement of the FTC).

The Franchise Rule: Hearing Before the House Subcomm. on Commerce, Trade and Consumer Protection of the House Comm. on Energy and Commerce, 107th Cong.(June 25, 2002) (prepared statement of the FTC).

The Identity Theft Penalty Enhancement Act of 2002: Hearing Before the Senate Subcomm. on Tech., Terrorism and Gov't Info. of the Senate Comm. on the Judiciary, 107th Cong. (July 9, 2002) (prepared statement of the FTC).

Identity Theft: The Impact on Seniors: Hearing Before the Senate Special Comm. on Aging, 107th

Cong. (Jul. 18, 2002) (prepared statement of the FTC).

An Overview of FTC Antitrust Activities: Hearing Before the Senate Subcomm. on Antitrust, Competition Policy and Consumer Rights of the Senate Comm. on the Judiciary, 107th Cong.(Sept. 19, 2002) (prepared statement of the FTC).

Marketing of Dietary Supplements: Hearing Before the Senate Subcomm. on Oversight of Gov't Management of the Senate Governmental Affairs Comm., 107th Cong. (Oct. 8, 2002) (prepared statement of the FTC).

Competition in the U.S. Pharmaceutical Industry: Hearing Before the House Subcomm. on Health of the House Energy and Commerce Comm., (Oct. 9, 2002) (prepared statement of the FTC).

The Do-Not-Call Amendments to the FTC's Telemarketing Sales Rule: Hearing Before the House Comm. on Energy and Commerce, 108th Cong. (Jan. 8, 2003) (prepared statement of the FTC).

The Internet Sale of Prescription Drugs From Domestic Websites: Hearing Before the House Comm. On Gov't Reform, 108th Cong. (Mar. 27, 2003) (prepared statement of the FTC).

Identity Theft: Hearing Before the House Comm. on Fin. Serv., 108th Cong. (Apr. 3, 2003) (prepared statement of the FTC).

Unsolicited Commercial Email: Hearing Before the Senate Comm. on Commerce, Science and Transp., 108th Cong. (May 21, 2003) (prepared statement of the FTC).

The Fair Credit Reporting Act: Hearing Before the House Subcomm. On Fin. Inst. and Consumer Credit of the House Comm. on Fin. Serv., 108th Cong. (June 4, 2003) (prepared statement of the FTC).

Competition in the Pharmaceutical Industry: Hearing Before the Senate Comm. on the Judiciary, 108th Cong. (June 17, 2003) (prepared statement of the FTC).

Identity Theft: Prevention and Victim Assistance: Hearing Before the Senate Banking Comm., 108th Cong. (June 19, 2003) (prepared statement of the FTC).

Identity Theft: Prevention and Victim Assistance: Hearing Before the House Comm. on Fin. Serv., 108th Cong. (June 24, 2003) (prepared statement of the FTC).

Unsolicited Commercial Email: Hearing Before the House Subcomm. On Commerce, Trade and Consumer Protection and the House Subcomm. on Telecomm. and the Internet of the House Comm. on Energy and Commerce, 108th Cong. (July 9, 2003) (prepared statement of the FTC).

The Fair Credit Reporting Act: Hearing Before the House Comm. On Fin. Serv., 108th Cong. (July 9, 2003) (prepared statement of the FTC).

The Fair Credit Reporting Act: Hearing Before the Senate Comm. On Banking, 108th Cong. (July 10, 2003) (prepared statement of the FTC).

Issues Relating to Ephedra-Containing Dietary Supplements: Hearing Before the House Subcomm. on Oversight and Investigations and the House Subcomm. on Commerce, Trade and Consumer Protection of the House Comm. on Energy and Commerce, 108th Cong. (July 24, 2003) (prepared statement of the FTC).

An Overview of Federal Trade Commission Antitrust Activities: Hearing Before the Antitrust Task Force of the House Comm. on the Judiciary, 108th Cong. (July 24, 2003) (prepared statement of the FTC).

APPENDIX III
COMMISSION PUBLIC HEARINGS, WORKSHOPS, AND CONFERENCES
SEPTEMBER 2001-AUGUST 2003
(Organized in Reverse Chronological Order)
***Available at*:**
<http://www.ftc.gov/ftc/hearings.htm>
<http://www.ftc.gov/ftc/workshops.htm>

2003

Health Care and Competition Law and Policy: Joint Hearings of the FTC and DOJ (June 25-26, 2003).

Costs and Benefits to Consumers and Businesses of the Collection and Use of Consumer Information: FTC Workshop (June 18, 2003).

Health Care and Competition Law and Policy: Joint Hearings of the FTC and DOJ (June10-12, 2003).

Technologies for Protecting Personal Information: F TC Workshop (June 4, 2003).

Health Care and Competition Law and Policy: Joint Hearings of the FTC and DOJ (May 27-30, 2003).

Technologies for Protecting Personal Information: F TC Workshop (May 14, 2003).

Health Care and Competition Law and Policy: Joint Hearings of the FTC and DOJ (May 7-8, 2003).

Health Care and Competition Law and Policy: Joint Hearings of the FTC and DOJ (Apr. 23-25, 2003).

Health Care and Competition Law and Policy: Joint Hearings of the FTC and DOJ (Apr. 9-11, 2003).

Health Care and Competition Law and Policy: Joint Hearings of the FTC and DOJ (Mar. 26-28, 2003).

Health Care and Competition Law and Policy: Joint Hearings of the FTC and DOJ (Feb. 26-28, 2003).

Public/Private Partnerships to Combat Cross-border Fraud Against Consumers: FTC Workshop (Feb. 19-20, 2003).

Fifth Annual National Consumer Protection Week, Information Security: Putting the Pieces Together: Sponsored By the FTC, AARP, the Better Business Bureau, the Consumer Federation of America, the Federal Citizen Information Center, the National Association of Attorneys General, the National Association of Consumer Agency Administrators, the National Consumers League, the U.S. Postal Inspection Service, and the U.S. Postal Service (Feb. 2- 8, 2003).

Green Lights & Red Flags: FTC Rules of the Road for Advertisers: FTC Workshop (Jan. 14, 2003).

2002

Economic Perspectives on the Home Mortgage Market: FTC Roundtable (Oct. 16, 2002).

Internet Security: Philadelphia Town Hall Meeting (Oct. 3, 2002) (Commissioner Orson Swindle, and Howard A. Schmidt, Vice Chair, President's Critical Infrastructure Protection Board participating).

ORSON SWINDLE, CREATING A CULTURE OF SECURITY, REMARKS AT PRIVACY2002: INFORMATION, SECURITY AND NEW GLOBAL REALITIES (Sept. 26, 2002).

Competition Law and Policy for Health Care Financing and Delivery: FTC Workshop (Sept. 9-10, 2002).

Proposed Amendments to the Telemarketing Sales Rule: FTC Workshop (June 5-7, 2002).

Consumer Information Security: FTC Workshop (May 20-21, 2002).

Green Lights & Red Flags: FTC/BBB Rules of the Road for Advertisers: FTC Workshop (Apr. 30, 2002).

2001

Consumer Aspects of Hague Convention on Jurisdiction and Foreign Judgments: FTC Roundtable (Dec. 19, 2001).

Get Noticed: Effective Financial Privacy Notices: Interagency Workshop (Dec. 4, 2001).