

Trans Atlantic Consumer Dialogue
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U.S. Federal Trade Commission
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*Institutional Innovation and the Future of Consumer Protection Policy*¹

I. Introduction

When we speak of consumer protection, we tend to focus on developments in doctrine or policy. We pay relatively less attention to the institutional arrangements through which policy and doctrine are formulated and through which a system of consumer protection laws is implemented. In addition to the statutes that define our powers and our capacity to obtain remedies, these arrangements include the manner in which our agencies set priorities, organize their operations, acquire knowledge about commercial phenomena, and collaborate with other government and nongovernment bodies having shared interests.

To an increasing degree, consumer protection authorities throughout the world have come to appreciate how the quality of institutional arrangements deeply influence the substantive results that a consumer protection system, or group of consumer protection systems can deliver. Today I want to focus on how institutional reforms have improved the consumer protection programs of the U.S. Federal Trade Commission (FTC) in recent decades and to underscore the need for continuing improvements. I will first identify lessons that I derive from modern FTC experience and then will discuss approaches the Commission can take to improve its capacity to perform its responsibilities effectively. As one step to this end, I will describe how the FTC in the months ahead will perform a basic self assessment to identify, in the years leading to its centennial in 2014, how to achieve the destiny our Congress intended for it to achieve.

II. Lessons Learned

To a great degree, the FTC set out on the path of institutional reform out of desperate necessity roughly forty years ago. In 1969, two studies of the Commission – one performed by researchers organized by Ralph Nader and one conducted by a blue ribbon panel created by the American Bar Association – evaluated the agency in dismal terms. Congress seriously considered the possibility of dismantling the agency and distributing its powers to other government bodies. It chose instead to give the agency another opportunity, perhaps a final chance, to improve its performance.

This life-threatening experience galvanized the Commission to strengthen its institutional capacity to perform its competition policy and consumer protection duties. As the FTC was repairing its own house, Congress dramatically enhanced its powers. Key among the legislative

¹ I thank Yael Weinman for her excellent assistance in preparing this presentation.

reforms was the grant of authority to the Commission to bring lawsuits in the federal courts to obtain injunctions and a broad range of other equitable relief to forestall violations of the law, such as serious fraud.

What has followed since the late 1960s is a transformation of the agency featuring dramatic enhancements in the FTC's programs, including its consumer protection work. Below I discuss some important lessons from that experience that we seek to apply every day.

A. Analyze Emerging Trends

No function of a government agency is more significant than setting priorities. Essential to our capacity to select priorities wisely is our effort to understand the current state of the marketplace. Without an accurate picture of what is on the horizon, the effort to rank priorities may take too little account of new developments.

One way that we monitor market developments is to ask communities outside our agency to educate us. Our external consultations use a variety of formats – workshops, roundtables, hearings, conferences, and town hall meetings. These events assemble experts from a wide range of institutions – industry representatives, academics, consumer advocates, government officials and others. A central focus of these proceedings is to identify innovations on the horizon and to consider how might these might affect consumers.

In the next few months, we will convene three noteworthy consultation events. On April 30th, we will hold a public workshop to examine developments in green packaging claims and the consumer perception of these claims.² This workshop is of the FTC's "Green Guide" review.³ These Guides were first issued in 1992 and were revised in 1998. The Home Depot, which calls itself the "world's largest home improvement specialty retailer" rolled out a major "ECO Options" product promotion. The Academy Awards this year was a "carbon neutral" event, as was the Super Bowl. We originally had scheduled the Green Guide review for 2009, but we moved it up in recognition of the explosion of Green claims in the marketplace.

The Green Guides outline general principles that apply to all environmental marketing claims and provide guidance regarding specific environmental claims. As part of the review, we will examine, and have sought public input on, a number of general issues, including the continuing need for the Guides and their economic impact, the effect of the Guides on the accuracy of various environmental claims, and the interaction of the Guides with other environmental marketing regulations.

At the April 30th workshop, we will discuss trends in packaging and environmental packaging claims. We will talk about packaging terms currently covered by the Guides, such as

² See <http://www.ftc.gov/bcp/workshops/packaging/index.shtml>

³ 16 C.F.R. 260.

“recyclable,” “compostable,” and “biodegradable.” We also will address claims that are not currently addressed in the Guides but appear frequently these days. Examples include “sustainable,” “renewable,” and “bio-based.”

This workshop is the second in a series relating to the Green Guide review. On January 8, 2008, we hosted a public workshop to examine the emerging market for carbon offsets – greenhouse gas emission reduction products.⁴ We also looked at renewable energy certificates and related advertising claims. This highly successful event focused on consumer protection issues in these markets, including consumer perception of carbon offset and renewable energy certificate claims and substantiation for these claims. The entire event is available via Webcast on the FTC website.

A second initiative relates to health care. On April 24th, we will host a workshop to examine recent trends in health care delivery to consider the competition and consumer protection issues regarding innovations in this area.⁵ This event will assemble representatives of physician and healthcare associations, industry, government, privacy groups, academics, and other experts and will focus on such matters as limited service clinics which often are located in pharmacies, shopping malls, or retail stores. Some groups believe these clinics will improve access to care for underserved populations; others have raised questions about quality of care and adequacy of oversight.

We also will look at the issues surrounding electronic health records. One primary consumer protection issue here is patient privacy and the application of current federal and state privacy protections to electronic health records. Like our other workshops, this one will enable us to be better informed as we set future priorities.

On May 6th and 7th, we will convene Town Hall titled “Beyond Voice: Mapping the Mobile Marketplace.” The Town Hall will explore consumer protection issues, including fraud and security, in the rapidly expanding world of mobile commerce.⁶ We will examine consumers’ ability to control m-commerce applications and applications targeting children and teens. Other countries, including many in Europe and Asia, surpass the United States in the application of this technology, but it is only a matter of time before we see it here.

To look back for a moment, I also want to mention an event that we held in November. This was our Town Hall on Behavioral Advertising.⁷ It collected consumer advocates, industry representatives, technology experts, and academics to address consumer protection issues raised by the practice of tracking consumers’ activities online to target advertising. Following this

⁴ See <http://www.ftc.gov/bcp/workshops/carbonoffsets/index.shtml>

⁵ See <http://www.ftc.gov/bc/healthcare/hcd/index.shtm>

⁶ See <http://www.ftc.gov/bcp/workshops/mobilemarket/index.shtml>

⁷ See <http://www.ftc.gov/bcp/workshops/ehavioral/index.shtml>

Town Hall, the FTC released a set of proposed principles to guide the development of self-regulation for behavioral advertising. We continue to seek comments on these proposed guidelines. The deadline is April 11, 2008; we welcome your contributions.

Our ability to study market developments also benefits from our capacity to compel firms to provide information. The FTC Act provides the agency with a powerful information collection tool. Section 6(b) of the Act gives us the authority to require companies to respond to specific inquiries for the purpose of obtaining information about their business practices.⁸

Last July, we used this authority to issue requests to 44 food and beverage and fast food companies to collect information about their advertising and marketing activities.⁹ We will use this information to assist us in preparing a report to Congress about the food industry marketing activities and expenditures targeted toward children and adolescents. This topic has received extensive attention in the United States and abroad. We currently are reviewing the information we have collected, and we expect to issue our report this Summer.

B. Consult and Cooperate with Public Agencies and NGOs

Building knowledge by itself does not improve the quality of public policy. It is what you do with the information that really counts. From past experience, we have learned that some of the best applications of our accumulated knowledge involve cooperation with other government agencies at home and abroad.

Our most extensive experiences involving intergovernmental cooperation involve other public authorities in the United States. A recent successful initiative started in May 2006 brought together 17 agencies to combat one of the most serious consumer protection challenges in the United States – identity theft. The President’s Task Force on Identity Theft, co-chaired by my predecessor, Deborah Platt Majoras, was charged with developing a coordinated approach among government agencies to combat identity theft.¹⁰ The recommendations in the strategic plan issued by the Task Force seek to strengthen law enforcement efforts to combat identity theft.

We also coordinate with criminal authorities when the appropriate response to certain fraudulent conduct should be both civil and criminal. Our law enforcement experience has led us to conclude that the only way to address truly serious fraud is to seek the imposition of criminal sanctions for culpable individuals. Created earlier this decade, our Criminal Liaison Unit (CLU) works with other law enforcement bodies to facilitate criminal prosecutions. In 2007, CLU’s work with government prosecutors led to 81 FTC defendants and their associates

⁸ 15 U.S.C. § 46.

⁹ See http://www.ftc.gov/os/6b_orders/foodmktg6b/index.shtml

¹⁰ See <http://www.idtheft.gov>

being charged with crimes, and 47 such defendants and their associates being convicted or pleading guilty. Sentences imposed totaled more than 141 years.

Our cooperation with other agencies increasingly extends beyond our borders. Improving the effectiveness of international cooperation to combat fraud and related misconduct is among our highest priorities. One major means to our cooperation with other government bodies in the United States and overseas has been a significant investment in technology. A key example is Consumer Sentinel, a one-stop, secure investigative and complaint database (with the appropriate confidentiality protections) that provides hundreds of law enforcement agencies with immediate access to complaints about consumer fraud-related complaints.¹¹ Sentinel gives consumers a way to voice their complaints about fraud to law enforcement officials worldwide, and it allows law enforcement officials to tap into a database to learn about trends. Online since 1997, the creation and enhancement of Consumer Sentinel recognizes that sharing information makes law enforcement stronger and more effective. An international, multi-agency joint project, Consumer Sentinel also enhances cross-border consumer education and prevention efforts.

Expansion of existing cross-border initiatives is essential to effective law enforcement. The FTC actively participates in several international enforcement networks. The International Consumer Protection Enforcement Network (ICPEN) brings together enforcement agencies from around the world to share best practices and provides a framework for meaningful cooperation. The more specialized London Action Plan focuses on cooperation among agencies with enforcement authority in connection with spam and other online threats. The London Action Plan was created by the FTC and the UK's Office of Fair Trading in 2004, and it is the world's largest network of spam enforcement authorities. This network provides an enforcement cooperation framework and enables participants to share best practices.

We also have seen that non-government institutions can have much to contribute to these law enforcement networks. With spam, industry cooperation is enormously valuable, as some of the most powerful antidotes are likely to come from the private sector. Members of the London Action Plan include industry representatives and NGOs.

C. Self Regulation

_____Our consumer protection work over the past four decades has underscored the value of industry efforts to correct problems. We have learned that self regulation offers a valuable complement to, and sometimes substitute for, government intervention. In advertising, for example, several self-regulatory models have proven to be quite successful. For example, the National Advertising Division of the Better Business Bureau has developed into a widely respected forum for resolving advertising disputes quickly.¹²

¹¹ See <http://www.consumer.gov/sentinel>

¹² See <http://www.nadreview.org/>

A topic of particular longstanding interest to the global consumer protection community is food marketing to children. While some may view government regulation as the appropriate solution to the problem of childhood obesity, our experience has indicated the problem's causes are too complex to be solved by one approach alone. This is partly a function of our framework of constitutional protections for speech. Under the First Amendment to the Constitution, any government-imposed limit on advertising that is not deceptive must be based on a showing that the restriction would directly advance a substantial state interest and that the interest could not be served as well by less speech-restrictive, or non-speech-restrictive, limitations on commercial speech. This is a formidable requirement.

We have a vital stake in improving the diet and health of our children. Yet crafting restrictions on advertising that could be shown directly to advance that interest likely would be a daunting task. For that reason, we have pursued, and are encouraged by, self-regulatory initiatives such as the Children's Food and Beverage Advertising Initiative launched in late 2006 by the Council of Better Business Bureaus and the BBB's National Advertising Review Council.¹³ Thirteen major food companies are now participating. Most of these companies have pledged to limit their advertising to children under 12 to only those foods meeting specific calorie or nutritional standards. Three have pledged not to direct any advertising to children under 12. All 13 companies have also agreed to limit the use of licensed characters to healthier products and messages, to end advertising in elementary schools, and not to seek product placement in children's media. A Pledge program was recently announced this past December in Europe, and eleven major food and beverage companies in the European market are participating and pledging to change the way they advertise and market to children.

D. Multi-Dimensional Strategy

Our modern experience has revealed the importance of tackling issues by using the full panoply of policy instruments that our Congress has given us. In recent years, advances in technology have presented us with difficult, new consumer protection challenges. Vast amounts of personal information about consumers are stored in company databases, and all of us are aware of the hazards presented by data breaches.

1. Using tools aggressively

____ Since 2001, the FTC has taken a number of enforcement actions against companies that have failed to provide reasonable protections for sensitive consumer information. Enforcement in this area is challenging for various reasons. First, no single data security law applies to all entities that collect and handle consumer information; rather, varied laws apply to different entities and different forms of information. Second, what constitutes reasonable data security

¹³ See

<http://www.us.bbb.org/WWWRoot/SitePage.aspx?site=113&id=b712b7a7-fcd5-479c-af49-8649107a4b02>

measures depends heavily on the particular facts presented, including the sensitivity of the information to be protected and the types of risks a company faces.

The FTC has dealt with these challenges by developing an enforcement standard that harmonizes existing laws while providing valuable flexibility. The central principle is a simple one: companies should develop and implement safeguards that are reasonable and appropriate under the circumstances to protect sensitive consumer information. To date, we have used this standard to challenge the data security practices of 20 different companies alleged to have violated a variety of different laws. Using all of the tools available to us, we strive to establish the principle that reasonable security is the standard and the expectation.¹⁴

Spam and spyware is another area where we work aggressively to protect consumers. The CAN SPAM Act took effect in January of 2004, but consumers were being bombarded with spam well before then.¹⁵ The FTC brought its first spam case in 1997 using its authority under Section 5 of the FTC Act. The CAN SPAM Act gave us more authority and has provided a very useful tool in the fight against spam. Technology ordinarily moves faster than the legislative process, and we have used our other sources of authority, including Section 5, to address pressing needs.

Like spam, spyware is a serious consumer protection challenge. In the past few years, legislators have introduced bills to give us greater authority to pursue spyware operators. We welcome additional authority here. In the meantime, we have brought eleven actions under Section 5 of the FTC Act against spyware operators, and we will continue to challenge the distribution of spyware that injures consumers in the online marketplace.

2. New authority

We use our authority aggressively, and we recognize when our authority needs to be expanded. In cooperating with our international counterparts, we have identified some major gaps. Until recently we were limited in the nature of information that we were able to share with foreign colleagues, and we were limited in the kind of assistance we were able to provide. In December 2006, that changed when the President signed the US SAFE WEB Act into law.¹⁶ This law strengthens our ability to cooperate with our international colleagues. We have already used our new authority under this law, and it has proven to be invaluable.

There are other holes in our authority that we think are worth filling and we are working on those. In areas that I've already discussed – spyware and data security – areas that can

¹⁴ See <http://www.ftc.gov/privacy/index.html> for information about these enforcement actions and other FTC privacy initiatives.

¹⁵ See 15 U.S.C. § 7701, et seq.

¹⁶ U.S. SAFE WEB Act of 2006, Pub. L. No. 109-455, § 9 (codified at 15 U.S.C. § 57c-1 (2008)).

potentially cause significant harm to consumers, consumer redress and disgorgement have been inadequate. Authority to obtain civil penalties would be a useful addition to our portfolio of policy tools.

3. Innovations in Consumer and Business Education

In addition to our enforcement, research, and public consultations, a major cornerstone of the FTC's mission is to educate businesses and consumers. Just as we innovate in how we enforce, we also innovate how we educate. While technology advances have created a new set of consumer protection challenges, they also have offered us new outlets for getting our message out. To supplement print publications, we increasingly rely upon online tutorials and teaser Web sites. We created a Web site for a fraudulent weight loss product so that when consumers clicked on it to order it, they were told that it was a fake product and that certain claims about weight loss products were almost always false.¹⁷ Consumers are communicating in new ways, and so are we.

III. Matching Commitments to Capabilities

Our modern experiences also have taught us to ensure that our commitments do not dramatically outrun our capacity to deliver excellent results. One of the best examples of taking this lesson to heart is the FTC's Do Not Call Rulemaking.¹⁸ For years, American consumers would receive disruptive phone calls that always seemed to come at the most inconvenient time. The rule we developed is simple and straightforward. It allows consumers to decide for themselves whether they want to receive certain calls at home. The formulation of the rule took careful account of the legal and practical challenges that its implementation would pose.

There are now more than 155 million registered numbers on the Do Not Call Registry. There is a tremendous compliance rate with the Registry and American consumers have praised its effectiveness. A number of our international counterparts have sought guidance from us as they contemplate setting up similar registries.

IV. The Need for Additional Upgrades

Advances in technology have also magnified the impediments posed by some of the jurisdictional limits we have lived with since our formation in 1914. Among the most important is the common carrier exception to the FTC's jurisdiction. The FTC Act exempts common carriers subject to the Communications Act from its prohibitions on unfair or deceptive acts or practices and unfair methods of competition. The exemption took shape in an era when telecommunications services were provided by highly regulated monopolies. This sector has changed, but the exemption has not.

¹⁷ See <http://www.wemarket4u.net/fatfoe/>

¹⁸ 16 C.F.R. 310.

In today's world, companies are expected to compete in providing telecommunications services. Technological advances have blurred traditional boundaries between telecommunications, entertainment, and high technology. Telecommunications firms have expanded into numerous non-common-carrier activities. For these reasons, FTC jurisdiction over telecommunications firms' activities is now more important than it has ever been because it is a barrier to effective consumer protection. The FTC's inability to protect consumers can undermine consumer confidence. We expect to continue to work with our Congress to eliminate this anachronism.

V. A Look Ahead: The FTC at 100

Our future success will require continued efforts to improve the institutional mechanism through which we execute our responsibilities. In the coming months, we will undertake a program to identify the way ahead. Our focus will extend beyond the next year or so. We will ask what steps we must take to be the type of agency we want to be when our centennial arrives in 2014, and beyond.

The vehicle for this self-assessment will be a combination of internal deliberations and external consultations in the United States and overseas with the community of government and non-government bodies that have an interest in competition and consumer protection policy. Key focal points for this self-assessment will include:

- The proper framework for evaluating the performance of the FTC
- The optimal means for assessing the impact of specific programs
- The adequacy of the Commission's existing powers, including its enforcement, information-gathering, and remedial tools
- The best vehicle for planning the allocation of our resources
- The best way to enhance our human capital and physical infrastructure, including needs for new investments in information technology
- Approaches for improving our cooperation with other government and nongovernment institutions

In undertaking this project, our aim is to engage our own resources and the energies of outsiders in the United States and abroad to identify directions for institutional improvements that will serve us well in the many years to come. In May we will announce a specific framework for undertaking this initiative. I ask for your contributions to help us succeed.