



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

DIRECTOR
OFFICE OF POLICY PLANNING

August 23, 2002

VIA MAIL AND FACSIMILE

Steven A. Ballmer
Chief Executive Officer
Microsoft Corporation
One Microsoft Way
Redmond, WA 98052

Re: Invitation to Appear at FTC Public Workshop on E-Commerce

Dear Mr. Ballmer:

I would like to invite you to appear at a three-day public workshop at the Federal Trade Commission on "Possible Anticompetitive Efforts to Restrict Competition on the Internet." If you are able to attend, we would ask you to testify on an overview panel with other leading executives to describe industry's perspectives on possible barriers to e-commerce. The public workshop will take place from October 8-10, 2002, at the FTC, 600 Pennsylvania Ave., N.W., Washington, DC 20580. The overview panel will take place during the morning of October 8.

The workshop will focus on two types of possible e-commerce barriers. The first type includes state and local regulations, such as occupational licensing and physical office requirements, that may have pro-consumer or pro-competition rationales, but that nevertheless may restrict the entry of new Internet competitors. The second type includes business conduct barriers that arise when private parties employ potentially anticompetitive tactics, such as when suppliers or dealers apply collective pressure to limit online sales. The workshop will have separate panels to address a variety of industries that may have been hampered significantly by such barriers, including retailing, automobile sales, cyber-charter schools, real estate and mortgages, pharmaceutical sales, telemedicine, wine sales, auctions, contact lens sales, and casket sales.

Particularly given the current economic climate, gaining a full understanding of the barriers facing new Internet entrants and ultimately developing strategies to promote robust competition in e-commerce is both timely and important. Indeed, some academic estimates of the aggregate impact of these various barriers suggest that they cost consumers billions of dollars every year.

I hope that the workshop will help policymakers and businesses better understand both the potentially pro-consumer and pro-competitive rationales behind these barriers and the actual impact of them on consumers. Because many of these issues are new, the workshop could help educate policymakers and businesses about policies that ultimately may have significant anticompetitive effects. To date, we have received dozens of calls from businesses, trade associations, consumer groups, and journalists who would like to participate in the workshop.

Along with this letter, I am sending you a copy of the Federal Register Notice announcing the workshop and a background fact sheet, both of which describe the Internet workshop in more detail. This letter will be followed up by a phone call to your office from Asheesh Agarwal, an attorney in the Office of Policy Planning who is organizing the workshop. If you or your staff have further questions, feel free to call me, at (202) 326-3683, or Asheesh at (202) 326-3558.

We look forward to hearing Microsoft's perspective on these important issues.

Sincerely,

A handwritten signature in black ink, appearing to read "Ted Cruz", with a long, sweeping horizontal stroke extending to the right.

Ted Cruz
Director, Office of Policy Planning
Federal Trade Commission

cc: Asheesh Agarwal

FEDERAL REGISTER NOTICE

Public Workshop: Possible Anticompetitive Efforts to Restrict Competition on the Internet

AGENCY: Federal Trade Commission

ACTION: Notice of Public Workshop and Opportunity for Comment

SUMMARY: The Federal Trade Commission ("FTC" or "Commission") announces a public workshop on "Possible Anticompetitive Efforts to Restrict Competition on the Internet." The workshop will focus on how certain state regulation may have anticompetitive effects, and how certain business practices may raise antitrust concerns, in the context of business-to-consumer e-commerce. The workshop will be held at and administered by the FTC.

DATES: The workshop will take place on October 8-10, 2002. The workshop will be transcribed and placed on the public record. Any interested person may submit written comments responsive to any of the topics to be addressed; such comments should be submitted no later than the last session of the workshop. Any written comments received also will be placed on the public record.

ADDRESSES: When in session, the workshop will be held at the FTC headquarters, 600 Pennsylvania Avenue, N.W., Washington, D.C. All interested parties are welcome to attend. Pre-registration is not required.

Written comments should be submitted in both hard copy and electronic form. Six hard copies of each submission should be addressed to Donald S. Clark, Office of the Secretary, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. Submissions should be captioned "Comments regarding ecompetition." Electronic submissions may be sent by electronic mail to "ecompetition@ftc.gov". Alternatively, electronic submissions may be filed on a 3-1/2 inch computer disk with a label on the disk stating the name of the submitter and the name and version of the word processing program used to create the document.

FOR FURTHER INFORMATION CONTACT: Jerry Ellig, Deputy Director, Office of Policy Planning, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580; telephone (202) 326-3528; e-mail: jellig@ftc.gov. Detailed agendas for the workshop will be available on the FTC Home Page (<http://www.ftc.gov>) and through Mildred Taylor, Staff Secretary, at (202) 326-2553.

SUPPLEMENTARY INFORMATION:

Overview

In the past decade, there has been growing concern about possibly anticompetitive efforts to restrict competition on the Internet. In particular, many states have enacted regulations that have the direct effect of protecting local merchants from competition over the Internet. For example, some states require that online vendors maintain an in-state office, while other states prohibit online sales of certain products entirely. Some scholars have argued that these regulations are often simply attempts by existing industries to forestall the entry of new and innovative Internet competitors, much as in prior eras, other entrenched producers have benefitted from regulatory efforts to impede new forms of competition.

Similarly, some private companies have engaged in conduct that may raise antitrust issues. For instance, some manufacturers and dealers do not list prices for certain items online, and others do not sell certain items over the Internet altogether and urge horizontal competitors to do the same. Depending on the circumstances, some of these restrictions could be viewed as potentially anticompetitive. While much of this regulation and conduct undoubtedly has pro-competitive and pro-consumer rationales, the regulations impose costs on consumers that, according to some

estimates, may exceed \$15 billion annually.

For these reasons, a workshop on possible anticompetitive efforts to restrict competition on the Internet is timely, and will build on previous FTC-sponsored events that addressed other aspects of e-commerce.⁽¹⁾ In order to enhance the Commission's understanding of particular practices and regulations, the workshop will have panels to address certain specific industries, including some or all of the following: retailing, automobiles, cyber-charter schools, real estate / mortgages, health care / pharmaceuticals / telemedicine, wine sales, auctions, contact lenses, and funerals (caskets).

Each of these industries has experienced some growth in commerce via the Internet, but according to various commentators, each also may have been hampered by anticompetitive state regulation or business practices. See, e.g., Atkinson, *The Revenge of the Disintermediated* (Jan. 2001) (report of the Progressive Policy Institute); Atkinson and Wilhelm, *The Best States for E-Commerce* (Mar. 2002) (second report of the Progressive Policy Institute). In addition, these industries involve goods and services that comprise a very large portion of a consumer's budget, such as homes, cars, schools, and health care.

It is intended that each industry panel have at least one independent analyst or academic, and also have representatives from the affected industries (on both sides of the issue). Where appropriate, the panel also will include a representative from a government agency, including (where appropriate) representatives from different states. We hope that each panel will provide all sides of the issue, including the perspectives of industry, intermediaries, consumers, and regulators.

The Commission also invites comments concerning other industries, not listed above, that may raise similar issues and merit similar examination.

Issues

Below is a non-exhaustive list of issues to be addressed by the workshop. Written comments need not address all of these issues.

1. General Issues

What role does competition law and policy play in fostering or hindering e-commerce?
From a practical business perspective, how does each foster or impede e-commerce?
What do empirical studies show?

Does state regulation have protectionist effects, and if so how? What are the benefits of such regulation, and do the benefits outweigh the costs? What is the prevalence of such state regulation? Are some types of regulations more friendly to e-commerce?

Do businesses try to limit competition over the Internet through anticompetitive efforts, and if so how? What are the business justifications for these efforts?

2. Issues for Particular Industries

Retailing:

How and why do manufacturers limit their distributors' sales of certain products over the Internet? What are the costs to consumers? Do distributors pressure manufacturers into limiting sales over the Internet, and if so how? Are such efforts facilitated by horizontal agreements? Does such conduct raise antitrust concerns, and are there legitimate business justifications, such as concerns about free-riding, for limiting e-commerce sales?

Automobiles:

Have manufacturers been forced to limit Internet sales of automobiles, and if so how? What are the costs to consumers? Are there legitimate concerns about free-riding or differentials in bargaining power? Are there different issues concerning the sale of new and used cars? What regulations have been applied to the sale of new or used cars through online auction sites? Does state regulation have the effect of protecting dealers from competition, to the possible detriment of consumers, or does existing state regulation provide important protection to consumers?

Cyber-Charter Schools:

How have states fostered or hindered cyber-charter schools? What are the competitive benefits of cyber-schools? Are there legitimate consumer protection concerns? Do the efforts of some school districts to limit cyber-charter schools raise any antitrust issues? What is the current status and focus of litigation, and what types of legislative solutions are possible?

Real Estate / Mortgages:

What types of state regulations limit online real estate and mortgage services? What are the costs to consumers? What is the impact of regulations requiring real estate closings or refinancings to be conducted solely by attorneys? What are the pro-consumer rationales for such regulations, and are there less restrictive means of achieving the same goals? What is the impact of Internet competition upon real estate commissions, and how are realtors responding to that competition?

Health Care / Pharmaceuticals / Telemedicine:

What types of state regulations limit online provision of health care goods and services, such as pharmaceuticals and telemedicine? What are the costs to consumers? Are these regulations directed mainly at out-of-state competitors? Are online prescriptions particularly susceptible to abuse? What are the pro-consumer rationales for regulations, and are there less restrictive means of achieving the same goals? Are reciprocity statutes an effective way to dealing with these issues?

Wine Sales:

How does the "three tier" system for distributing wine limit online sales, and are there legitimate justifications, such as temperance or taxation, for the system? What are the costs to consumers? Are there separate and measurable price and variety effects? Are there less restrictive means for achieving the same goals, and are reciprocity statutes a viable alternative? What is the status of the ongoing litigation addressing this system?

Auctions:

How have states applied their existing auctioneering regulations to online auction sites? What are the costs to consumers? Have states enacted new regulations targeted at online auctions? Do such regulations limit competition from online auctions, and if so how? Do those regulations impact large and small online auctioneers differently? To what extent are online auctions replacing traditional retail outlets, for consumer goods, automobiles (new or used), and other products? What types of state regulation can best protect consumers while still allowing competition from online auctions?

Contact Lenses:

What types of state regulations limit online sales of contact lenses? What are the costs to consumers? What are the health justifications for such regulations, and how valid are they? Are there separate issues for replacement lenses or disposable lenses? How should prescription requirements be administered? Have manufacturers limited the supply of contact lenses to online vendors, and if so why?

Funerals (Caskets):

What types of state regulations limit online casket sales? What are the costs to consumers? What are the pro-consumer rationales for such regulations, particularly in light of the recent controversies? Are there less restrictive means of achieving the same goals?

What is the status and focus of current litigation?

The Commission welcomes suggestions for other questions that also should be addressed. Proposed questions, identified as such, may be sent by electronic mail to ecompetition@ftc.gov.

By direction of the Commission.

Donald S. Clark
Secretary

Endnotes:

1. For more information on previous FTC-sponsored events regarding e-commerce, see <http://www.ftc.gov/opp/ecommerce/index.htm>; <http://www.ftc.gov/opa/2000/05/b2bworkshop.htm>.

Public Workshop: Possible Anticompetitive Efforts to Restrict Competition on the Internet
Federal Trade Commission
October 8-10, 2002

Many states have enacted regulations that may have the effect of protecting local bricks-and-mortar merchants from new Internet competitors. For example, all fifty states currently ban auto sales over the Internet unless they involve local franchise owners, and at least thirty states have laws that effectively preclude wine sales over the Internet. Seventeen states require online mortgage brokers to have a physical office in the state, which forces them to hire local residents. Many states also limit online competition for products ranging from contact lenses to funeral caskets. All of these restrictions may be justified by sound public policy, or they may ultimately prove to be attempts by existing industries to forestall the entry of Internet competitors and impede new forms of competition.

The aggregate costs of these restrictions may be very significant. Some scholars have estimated those costs as follows:

- the average purchaser of a car could save approximately two percent using an online service rather than buying in person from a dealer¹
- funeral homes commonly mark up caskets by over 500%, whereas third-party sellers (such as online sellers) typically mark up caskets only by around 100%²
- in the aggregate, potentially protectionist state regulation may cost consumers over \$15 billion annually.³

Similarly, some private companies have engaged in conduct that may raise antitrust issues. For instance, some dealers do not list prices for certain items they sell online; others don't sell certain items in their product line over the Internet at all, and urge horizontal competitors to follow suit. Again, some or all of these restrictions could be justified as procompetitive, or they could prove anticompetitive upon closer examination:

- in 1998, the FTC entered a consent decree with 25 car dealers in five Northwest

¹ Robert Atkinson and Thomas Wilhelm, *The Best States for E-Commerce* 19 (Mar. 2002) (second report of the Progressive Policy Institute) (citing Fiona Scott Morton, Florian Zettelmeyer, and Jorge Silva Riso, *Internet Car Retailing*, working paper, School of Management, Yale University, September 2000).

² See USA Today, Oct. 8, 1999 (reporting mark-ups of 500%); Modern Maturity, "R.I.P. Off" (Mar.-Apr. 2000).

³ Robert Atkinson, *The Revenge of the Disintermediated* 2 (Jan. 2001) (first report of the Progressive Policy Institute) ("First PPI Report").

states that had threatened to boycott Chrysler if it sold to low-cost Internet dealers⁴

- in one survey, 74 percent of manufacturers reported that they do not sell online because online sales could affect their retail channels⁵
- one analyst estimates that distributors and retailers often represent as much as 50% of the cost of some consumer products, and that much of this cost could disappear if consumers could buy online.⁶

The Federal Trade Commission has long sought to promote competition over the Internet. To advance these efforts, in August 2001 the FTC formed the Internet Task Force to evaluate potentially anticompetitive regulations and business practices that could impede e-commerce. Led by the FTC's Office of Policy Planning, the Task Force has examined the academic research and met with numerous industry participants and observers, including online companies, trade associations, and scholars. To date, the FTC has filed three competition advocacy comments due in large part to the Task Force's efforts:

- a joint FTC/Department of Justice comment to the North Carolina state bar opposing two new opinions that would require the physical presence of an attorney for all real estate closings and refinancings (which would significantly increase the costs of Internet lenders that rely disproportionately on lay closers);⁷
- a joint FTC/Department of Justice comment before the Rhode Island legislature on a similar real estate bill;⁸ and
- a staff comment before the Connecticut Board of Opticians, which is considering additional restrictions on out-of-state and Internet contact lens sellers.⁹

⁴ See Consent Agreement in *In re Fair Allocation System*, No. 971-0065 (1998), available at <http://www.ftc.gov/os/1998/9808/9710065.agr.htm>.

⁵ First PPI Report at 14 (citing Candace Talmadge, "Retailers concerned as manufacturers sell online," *Reuters Internet*, December 31, 2000, <http://www.mercurycenter.com/svtech/news/breaking/internet/docs/7956161.htm>).

⁶ Doug Bartholomew, *E-Commerce Bullies* 51 (Sept. 4, 2000) (published in industryweek.com).

⁷ FTC/DOJ Letter to the Ethics Committee of the North Carolina State Bar re: State Bar Opinions Restricting Involvement of Non-Attorneys in Real Estate Closings and Refinancing Transactions (Dec. 14, 2001) available at <http://www.ftc.gov/be/v020006.htm>.

⁸ FTC/DOJ Letter to the Rhode Island House of Representatives re: Bill Restricting Competition from Non-Attorneys in Real Estate Closing Activities (Mar. 29, 2002) available at <http://www.ftc.gov/be/v020013.pdf>.

⁹ FTC Staff Comment Before the Connecticut Board of Examiners for Opticians (Mar. 27, 2002) available at <http://www.ftc.gov/be/v020007.htm>.

To further build on these efforts, the FTC will host a public workshop to explore how certain state regulations may have anticompetitive effects on e-commerce and how certain e-commerce business practices may raise antitrust concerns. The workshop will take place at the FTC from October 8-10, 2002. The workshop will include consumer advocates, industry representatives (from all sides), academics, and state government representatives.

To focus the discussion, the workshop will organize panels to address certain specific industries that are important to consumers and that have experienced significant growth in online commerce, but that may also have been hampered by anticompetitive state regulation or business practices. These panels will address some or all of the following industries:

Retailing: E-commerce retail sales continue to have enormous potential. They grew 2.5 times faster than all retail sales in the fourth quarter of 2001, and according to some analysts are expected to reach \$3.2 trillion by 2004.

Automobiles: All 50 states restrict online auto sales. Dealers argue that these restrictions protect consumers against unscrupulous manufacturers, and that the Internet unfairly lets online sellers free ride off the dealers' personal services.

Cyber-Charter Schools: Cyber-charter schools currently enroll 50,000 students nationwide, and proponents hope to reach the 850,000 students nationally who receive home-schooling. In several states, however, legislators have introduced bills to place a moratorium on cyber-charter schools.

Real Estate / Mortgages: As a result of the multi-state licensing system and physical office requirements, only national mortgage firms that already have physical offices in all states can sell online services in all states.

Health Care / Pharmaceuticals / Telemedicine: In an era of skyrocketing costs, online prescription drug purchases could potentially lower prices for patients in the same way that online contact lenses lowered prices. At the same time, online pharmacies raise significant consumer protection issues. Similarly, telemedicine could give patients access to portable medical equipment and digital imaging technology even if they are too elderly or infirm to visit a hospital easily, or if they live in rural areas far from a full-service hospital. Most states, however, substantially limit online pharmaceuticals and telemedicine. Approximately thirteen states specifically prohibit electronic prescription transmission, and several states require physicians to examine the patient physically before prescribing medicine.

Wine Sales: The Internet offers consumers a broad array of wine choices. Although currently only six percent of U.S. wineries produce ninety-five percent of the wine consumed domestically, some scholars estimate that hundreds or even thousands of smaller vineyards have marketed their wines online. Moreover, studies indicate that, when sold through normal distribution channels, a typical bottle of wine has a markup from supplier to retailer of 100% or higher.

Auctions: Internet auctions have become a cultural phenomenon, and some businesses have started to use auction sites as an alternate means of distributing their products. Some states, however, are considering whether to apply existing licensing requirements designed for traditional auctioneers to these websites.

Contact Lenses: Consumers can save substantial sums of money by purchasing contact lenses online, as some studies suggest that optometrists mark up lenses from the manufacturer by between one and five times the cost. Some groups within the medical community, however, argue that online sales of contact lenses threaten consumer health, such as by making consumers less likely to visit their eye doctor.

Funerals (Caskets): In addition to cost savings, online casket sellers can offer consumers a greater variety of choices, such as individualized caskets. Many states, however, require that casket purchases be made only through a licensed, bricks-and-mortar vendor.

The Commission also invites comments concerning other industries, not listed above, that may raise similar issues and merit similar examination. The workshop will be open to the public, and should (1) enhance the FTC's understanding of these issues, (2) help educate policymakers about the effects of possibly protectionist state regulation, (3) help educate private entities about the types of business practices that may or may not be viewed as problematic, and (4) increase understanding about ways to promote robust competition from e-commerce, to the benefit of consumers.



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

DIRECTOR
OFFICE OF POLICY PLANNING

August 23, 2002

VIA MAIL AND FACSIMILE

Jeff Bezos
Chief Executive Officer
Amazon.com Inc.
1200 12th Avenue, South
Seattle, Washington 98144

Re: Invitation to Appear at FTC Public Workshop on E-Commerce

Dear Mr. Bezos:

I would like to invite you to appear at a three-day public workshop at the Federal Trade Commission on "Possible Anticompetitive Efforts to Restrict Competition on the Internet." If you are able to attend, we would ask you to testify on an overview panel with other leading executives to describe industry's perspectives on possible barriers to e-commerce. The public workshop will take place from October 8-10, 2002, at the FTC, 600 Pennsylvania Ave., N.W., Washington, DC 20580. The overview panel will take place during the morning of October 8.

The workshop will focus on two types of possible e-commerce barriers. The first type includes state and local regulations, such as occupational licensing and physical office requirements, that may have pro-consumer or pro-competition rationales, but that nevertheless may restrict the entry of new Internet competitors. The second type includes business conduct barriers that arise when private parties employ potentially anticompetitive tactics, such as when suppliers or dealers apply collective pressure to limit online sales. The workshop will have separate panels to address a variety of industries that may have been hampered significantly by such barriers, including retailing, automobile sales, cyber-charter schools, real estate and mortgages, pharmaceutical sales, telemedicine, wine sales, auctions, contact lens sales, and casket sales.

Particularly given the current economic climate, gaining a full understanding of the barriers facing new Internet entrants and ultimately developing strategies to promote robust competition in e-commerce is both timely and important. Indeed, some academic estimates of the aggregate impact of these various barriers suggest that they cost consumers billions of dollars every year.

I hope that the workshop will help policymakers and businesses better understand both the potentially pro-consumer and pro-competitive rationales behind these barriers and the actual impact of them on consumers. Because many of these issues are new, the workshop could help educate policymakers and businesses about policies that ultimately may have significant anticompetitive effects. To date, we have received dozens of calls from businesses, trade associations, consumer groups, and journalists who would like to participate in the workshop.

Along with this letter, I am sending you a copy of the Federal Register Notice announcing the workshop and a background fact sheet, both of which describe the Internet workshop in more detail. This letter will be followed up by a phone call to your office from Asheesh Agarwal, an attorney in the Office of Policy Planning who is organizing the workshop. If you or your staff have further questions, feel free to call me, at (202) 326-3683, or Asheesh at (202) 326-3558.

We look forward to hearing Amazon's perspective on these important issues.

Sincerely,



Ted Cruz
Director, Office of Policy Planning
Federal Trade Commission

cc: Asheesh Agarwal

FEDERAL REGISTER NOTICE

Public Workshop: Possible Anticompetitive Efforts to Restrict Competition on the Internet

AGENCY: Federal Trade Commission

ACTION: Notice of Public Workshop and Opportunity for Comment

SUMMARY: The Federal Trade Commission ("FTC" or "Commission") announces a public workshop on "Possible Anticompetitive Efforts to Restrict Competition on the Internet." The workshop will focus on how certain state regulation may have anticompetitive effects, and how certain business practices may raise antitrust concerns, in the context of business-to-consumer e-commerce. The workshop will be held at and administered by the FTC.

DATES: The workshop will take place on October 8-10, 2002. The workshop will be transcribed and placed on the public record. Any interested person may submit written comments responsive to any of the topics to be addressed; such comments should be submitted no later than the last session of the workshop. Any written comments received also will be placed on the public record.

ADDRESSES: When in session, the workshop will be held at the FTC headquarters, 600 Pennsylvania Avenue, N.W., Washington, D.C. All interested parties are welcome to attend. Pre-registration is not required.

Written comments should be submitted in both hard copy and electronic form. Six hard copies of each submission should be addressed to Donald S. Clark, Office of the Secretary, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. Submissions should be captioned "Comments regarding ecompetition." Electronic submissions may be sent by electronic mail to "ecompetition@ftc.gov". Alternatively, electronic submissions may be filed on a 3-1/2 inch computer disk with a label on the disk stating the name of the submitter and the name and version of the word processing program used to create the document.

FOR FURTHER INFORMATION CONTACT: Jerry Ellig, Deputy Director, Office of Policy Planning, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580; telephone (202) 326-3528; e-mail: jellig@ftc.gov. Detailed agendas for the workshop will be available on the FTC Home Page (<http://www.ftc.gov>) and through Mildred Taylor, Staff Secretary, at (202) 326-2553.

SUPPLEMENTARY INFORMATION:

Overview

In the past decade, there has been growing concern about possibly anticompetitive efforts to restrict competition on the Internet. In particular, many states have enacted regulations that have the direct effect of protecting local merchants from competition over the Internet. For example, some states require that online vendors maintain an in-state office, while other states prohibit online sales of certain products entirely. Some scholars have argued that these regulations are often simply attempts by existing industries to forestall the entry of new and innovative Internet competitors, much as in prior eras, other entrenched producers have benefitted from regulatory efforts to impede new forms of competition.

Similarly, some private companies have engaged in conduct that may raise antitrust issues. For instance, some manufacturers and dealers do not list prices for certain items online, and others do not sell certain items over the Internet altogether and urge horizontal competitors to do the same. Depending on the circumstances, some of these restrictions could be viewed as potentially anticompetitive. While much of this regulation and conduct undoubtedly has pro-competitive and pro-consumer rationales, the regulations impose costs on consumers that, according to some

estimates, may exceed \$15 billion annually.

For these reasons, a workshop on possible anticompetitive efforts to restrict competition on the Internet is timely, and will build on previous FTC-sponsored events that addressed other aspects of e-commerce.⁽¹⁾ In order to enhance the Commission's understanding of particular practices and regulations, the workshop will have panels to address certain specific industries, including some or all of the following: retailing, automobiles, cyber-charter schools, real estate / mortgages, health care / pharmaceuticals / telemedicine, wine sales, auctions, contact lenses, and funerals (caskets).

Each of these industries has experienced some growth in commerce via the Internet, but according to various commentators, each also may have been hampered by anticompetitive state regulation or business practices. See, e.g., Atkinson, *The Revenge of the Disintermediated* (Jan. 2001) (report of the Progressive Policy Institute); Atkinson and Wilhelm, *The Best States for E-Commerce* (Mar. 2002) (second report of the Progressive Policy Institute). In addition, these industries involve goods and services that comprise a very large portion of a consumer's budget, such as homes, cars, schools, and health care.

It is intended that each industry panel have at least one independent analyst or academic, and also have representatives from the affected industries (on both sides of the issue). Where appropriate, the panel also will include a representative from a government agency, including (where appropriate) representatives from different states. We hope that each panel will provide all sides of the issue, including the perspectives of industry, intermediaries, consumers, and regulators.

The Commission also invites comments concerning other industries, not listed above, that may raise similar issues and merit similar examination.

Issues

Below is a non-exhaustive list of issues to be addressed by the workshop. Written comments need not address all of these issues.

1. General Issues

What role does competition law and policy play in fostering or hindering e-commerce? From a practical business perspective, how does each foster or impede e-commerce? What do empirical studies show?

Does state regulation have protectionist effects, and if so how? What are the benefits of such regulation, and do the benefits outweigh the costs? What is the prevalence of such state regulation? Are some types of regulations more friendly to e-commerce?

Do businesses try to limit competition over the Internet through anticompetitive efforts, and if so how? What are the business justifications for these efforts?

2. Issues for Particular Industries

Retailing:

How and why do manufacturers limit their distributors' sales of certain products over the Internet? What are the costs to consumers? Do distributors pressure manufacturers into limiting sales over the Internet, and if so how? Are such efforts facilitated by horizontal agreements? Does such conduct raise antitrust concerns, and are there legitimate business justifications, such as concerns about free-riding, for limiting e-commerce sales?

Automobiles:

Have manufacturers been forced to limit Internet sales of automobiles, and if so how? What are the costs to consumers? Are there legitimate concerns about free-riding or differentials in bargaining power? Are there different issues concerning the sale of new and used cars? What regulations have been applied to the sale of new or used cars through online auction sites? Does state regulation have the effect of protecting dealers from competition, to the possible detriment of consumers, or does existing state regulation provide important protection to consumers?

Cyber-Charter Schools:

How have states fostered or hindered cyber-charter schools? What are the competitive benefits of cyber-schools? Are there legitimate consumer protection concerns? Do the efforts of some school districts to limit cyber-charter schools raise any antitrust issues? What is the current status and focus of litigation, and what types of legislative solutions are possible?

Real Estate / Mortgages:

What types of state regulations limit online real estate and mortgage services? What are the costs to consumers? What is the impact of regulations requiring real estate closings or refinancings to be conducted solely by attorneys? What are the pro-consumer rationales for such regulations, and are there less restrictive means of achieving the same goals? What is the impact of Internet competition upon real estate commissions, and how are realtors responding to that competition?

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What is the status and focus of current litigation?

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Donald S. Clark
Secretary

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Federal Trade Commission
October 8-10, 2002

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The aggregate costs of these restrictions may be very significant. Some scholars have estimated those costs as follows:

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- funeral homes commonly mark up caskets by over 500%, whereas third-party sellers (such as online sellers) typically mark up caskets only by around 100%²
- in the aggregate, potentially protectionist state regulation may cost consumers over \$15 billion annually.³

Similarly, some private companies have engaged in conduct that may raise antitrust issues. For instance, some dealers do not list prices for certain items they sell online; others don't sell certain items in their product line over the Internet at all, and urge horizontal competitors to follow suit. Again, some or all of these restrictions could be justified as procompetitive, or they could prove anticompetitive upon closer examination:

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states that had threatened to boycott Chrysler if it sold to low-cost Internet dealers⁴

- in one survey, 74 percent of manufacturers reported that they do not sell online because online sales could affect their retail channels⁵
- one analyst estimates that distributors and retailers often represent as much as 50% of the cost of some consumer products, and that much of this cost could disappear if consumers could buy online.⁶

The Federal Trade Commission has long sought to promote competition over the Internet. To advance these efforts, in August 2001 the FTC formed the Internet Task Force to evaluate potentially anticompetitive regulations and business practices that could impede e-commerce. Led by the FTC's Office of Policy Planning, the Task Force has examined the academic research and met with numerous industry participants and observers, including online companies, trade associations, and scholars. To date, the FTC has filed three competition advocacy comments due in large part to the Task Force's efforts:

- a joint FTC/Department of Justice comment to the North Carolina state bar opposing two new opinions that would require the physical presence of an attorney for all real estate closings and refinancings (which would significantly increase the costs of Internet lenders that rely disproportionately on lay closers);⁷
- a joint FTC/Department of Justice comment before the Rhode Island legislature on a similar real estate bill;⁸ and
- a staff comment before the Connecticut Board of Opticians, which is considering additional restrictions on out-of-state and Internet contact lens sellers.⁹

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To further build on these efforts, the FTC will host a public workshop to explore how certain state regulations may have anticompetitive effects on e-commerce and how certain e-commerce business practices may raise antitrust concerns. The workshop will take place at the FTC from October 8-10, 2002. The workshop will include consumer advocates, industry representatives (from all sides), academics, and state government representatives.

To focus the discussion, the workshop will organize panels to address certain specific industries that are important to consumers and that have experienced significant growth in online commerce, but that may also have been hampered by anticompetitive state regulation or business practices. These panels will address some or all of the following industries:

Retailing: E-commerce retail sales continue to have enormous potential. They grew 2.5 times faster than all retail sales in the fourth quarter of 2001, and according to some analysts are expected to reach \$3.2 trillion by 2004.

Automobiles: All 50 states restrict online auto sales. Dealers argue that these restrictions protect consumers against unscrupulous manufacturers, and that the Internet unfairly lets online sellers free ride off the dealers' personal services.

Cyber-Charter Schools: Cyber-charter schools currently enroll 50,000 students nationwide, and proponents hope to reach the 850,000 students nationally who receive home-schooling. In several states, however, legislators have introduced bills to place a moratorium on cyber-charter schools.

Real Estate / Mortgages: As a result of the multi-state licensing system and physical office requirements, only national mortgage firms that already have physical offices in all states can sell online services in all states.

Health Care / Pharmaceuticals / Telemedicine: In an era of skyrocketing costs, online prescription drug purchases could potentially lower prices for patients in the same way that online contact lenses lowered prices. At the same time, online pharmacies raise significant consumer protection issues. Similarly, telemedicine could give patients access to portable medical equipment and digital imaging technology even if they are too elderly or infirm to visit a hospital easily, or if they live in rural areas far from a full-service hospital. Most states, however, substantially limit online pharmaceuticals and telemedicine. Approximately thirteen states specifically prohibit electronic prescription transmission, and several states require physicians to examine the patient physically before prescribing medicine.

Wine Sales: The Internet offers consumers a broad array of wine choices. Although currently only six percent of U.S. wineries produce ninety-five percent of the wine consumed domestically, some scholars estimate that hundreds or even thousands of smaller vineyards have marketed their wines online. Moreover, studies indicate that, when sold through normal distribution channels, a typical bottle of wine has a markup from supplier to retailer of 100% or higher.

Auctions: Internet auctions have become a cultural phenomenon, and some businesses have started to use auction sites as an alternate means of distributing their products. Some states, however, are considering whether to apply existing licensing requirements designed for traditional auctioneers to these websites.

Contact Lenses: Consumers can save substantial sums of money by purchasing contact lenses online, as some studies suggest that optometrists mark up lenses from the manufacturer by between one and five times the cost. Some groups within the medical community, however, argue that online sales of contact lenses threaten consumer health, such as by making consumers less likely to visit their eye doctor.

Funerals (Caskets): In addition to cost savings, online casket sellers can offer consumers a greater variety of choices, such as individualized caskets. Many states, however, require that casket purchases be made only through a licensed, bricks-and-mortar vendor.

The Commission also invites comments concerning other industries, not listed above, that may raise similar issues and merit similar examination. The workshop will be open to the public, and should (1) enhance the FTC's understanding of these issues, (2) help educate policymakers about the effects of possibly protectionist state regulation, (3) help educate private entities about the types of business practices that may or may not be viewed as problematic, and (4) increase understanding about ways to promote robust competition from e-commerce, to the benefit of consumers.



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

DIRECTOR
OFFICE OF POLICY PLANNING

August 23, 2002

VIA MAIL AND FACSIMILE

Michael D. Capellas
President
Hewlett-Packard Company
2055 SH 249
Houston, TX 77070

Re: Invitation to Appear at FTC Public Workshop on E-Commerce

Dear Mr. Capellas:

I would like to invite you to appear at a three-day public workshop at the Federal Trade Commission on "Possible Anticompetitive Efforts to Restrict Competition on the Internet." If you are able to attend, we would ask you to testify on an overview panel with other leading executives to describe industry's perspectives on possible barriers to e-commerce. The public workshop will take place from October 8-10, 2002, at the FTC, 600 Pennsylvania Ave., N.W., Washington, DC 20580. The overview panel will take place during the morning of October 8.

The workshop will focus on two types of possible e-commerce barriers. The first type includes state and local regulations, such as occupational licensing and physical office requirements, that may have pro-consumer or pro-competition rationales, but that nevertheless may restrict the entry of new Internet competitors. The second type includes business conduct barriers that arise when private parties employ potentially anticompetitive tactics, such as when suppliers or dealers apply collective pressure to limit online sales. The workshop will have separate panels to address a variety of industries that may have been hampered significantly by such barriers, including retailing, automobile sales, cyber-charter schools, real estate and mortgages, pharmaceutical sales, telemedicine, wine sales, auctions, contact lens sales, and casket sales.

Particularly given the current economic climate, gaining a full understanding of the barriers facing new Internet entrants and ultimately developing strategies to promote robust competition in e-commerce is both timely and important. Indeed, some academic estimates of the aggregate impact of these various barriers suggest that they cost consumers billions of dollars every year.

I hope that the workshop will help policymakers and businesses better understand both the potentially pro-consumer and pro-competitive rationales behind these barriers and the actual impact of them on consumers. Because many of these issues are new, the workshop could help educate policymakers and businesses about policies that ultimately may have significant anticompetitive effects. To date, we have received dozens of calls from businesses, trade associations, consumer groups, and journalists who would like to participate in the workshop.

Along with this letter, I am sending you a copy of the Federal Register Notice announcing the workshop and a background fact sheet, both of which describe the Internet workshop in more detail. This letter will be followed up by a phone call to your office from Asheesh Agarwal, an attorney in the Office of Policy Planning who is organizing the workshop. If you or your staff have further questions, feel free to call me, at (202) 326-3683, or Asheesh at (202) 326-3558.

We look forward to hearing Hewlett-Packard's perspective on these important issues.

Sincerely,

A handwritten signature in black ink, appearing to read "Ted Cruz", with a stylized flourish at the end.

Ted Cruz
Director, Office of Policy Planning
Federal Trade Commission

cc: Asheesh Agarwal

FEDERAL REGISTER NOTICE

Public Workshop: Possible Anticompetitive Efforts to Restrict Competition on the Internet

AGENCY: Federal Trade Commission

ACTION: Notice of Public Workshop and Opportunity for Comment

SUMMARY: The Federal Trade Commission ("FTC" or "Commission") announces a public workshop on "Possible Anticompetitive Efforts to Restrict Competition on the Internet." The workshop will focus on how certain state regulation may have anticompetitive effects, and how certain business practices may raise antitrust concerns, in the context of business-to-consumer e-commerce. The workshop will be held at and administered by the FTC.

DATES: The workshop will take place on October 8-10, 2002. The workshop will be transcribed and placed on the public record. Any interested person may submit written comments responsive to any of the topics to be addressed; such comments should be submitted no later than the last session of the workshop. Any written comments received also will be placed on the public record.

ADDRESSES: When in session, the workshop will be held at the FTC headquarters, 600 Pennsylvania Avenue, N.W., Washington, D.C. All interested parties are welcome to attend. Pre-registration is not required.

Written comments should be submitted in both hard copy and electronic form. Six hard copies of each submission should be addressed to Donald S. Clark, Office of the Secretary, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. Submissions should be captioned "Comments regarding ecompetition." Electronic submissions may be sent by electronic mail to "ecompetition@ftc.gov". Alternatively, electronic submissions may be filed on a 3-1/2 inch computer disk with a label on the disk stating the name of the submitter and the name and version of the word processing program used to create the document.

FOR FURTHER INFORMATION CONTACT: Jerry Ellig, Deputy Director, Office of Policy Planning, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580; telephone (202) 326-3528; e-mail: jellig@ftc.gov. Detailed agendas for the workshop will be available on the FTC Home Page (<http://www.ftc.gov>) and through Mildred Taylor, Staff Secretary, at (202) 326-2553.

SUPPLEMENTARY INFORMATION:

Overview

In the past decade, there has been growing concern about possibly anticompetitive efforts to restrict competition on the Internet. In particular, many states have enacted regulations that have the direct effect of protecting local merchants from competition over the Internet. For example, some states require that online vendors maintain an in-state office, while other states prohibit online sales of certain products entirely. Some scholars have argued that these regulations are often simply attempts by existing industries to forestall the entry of new and innovative Internet competitors, much as in prior eras, other entrenched producers have benefitted from regulatory efforts to impede new forms of competition.

Similarly, some private companies have engaged in conduct that may raise antitrust issues. For instance, some manufacturers and dealers do not list prices for certain items online, and others do not sell certain items over the Internet altogether and urge horizontal competitors to do the same. Depending on the circumstances, some of these restrictions could be viewed as potentially anticompetitive. While much of this regulation and conduct undoubtedly has pro-competitive and pro-consumer rationales, the regulations impose costs on consumers that, according to some

estimates, may exceed \$15 billion annually.

For these reasons, a workshop on possible anticompetitive efforts to restrict competition on the Internet is timely, and will build on previous FTC-sponsored events that addressed other aspects of e-commerce.⁽¹⁾ In order to enhance the Commission's understanding of particular practices and regulations, the workshop will have panels to address certain specific industries, including some or all of the following: retailing, automobiles, cyber-charter schools, real estate / mortgages, health care / pharmaceuticals / telemedicine, wine sales, auctions, contact lenses, and funerals (caskets).

Each of these industries has experienced some growth in commerce via the Internet, but according to various commentators, each also may have been hampered by anticompetitive state regulation or business practices. See, e.g., Atkinson, *The Revenge of the Disintermediated* (Jan. 2001) (report of the Progressive Policy Institute); Atkinson and Wilhelm, *The Best States for E-Commerce* (Mar. 2002) (second report of the Progressive Policy Institute). In addition, these industries involve goods and services that comprise a very large portion of a consumer's budget, such as homes, cars, schools, and health care.

It is intended that each industry panel have at least one independent analyst or academic, and also have representatives from the affected industries (on both sides of the issue). Where appropriate, the panel also will include a representative from a government agency, including (where appropriate) representatives from different states. We hope that each panel will provide all sides of the issue, including the perspectives of industry, intermediaries, consumers, and regulators.

The Commission also invites comments concerning other industries, not listed above, that may raise similar issues and merit similar examination.

Issues

Below is a non-exhaustive list of issues to be addressed by the workshop. Written comments need not address all of these issues.

1. General Issues

What role does competition law and policy play in fostering or hindering e-commerce?
From a practical business perspective, how does each foster or impede e-commerce?
What do empirical studies show?

Does state regulation have protectionist effects, and if so how? What are the benefits of such regulation, and do the benefits outweigh the costs? What is the prevalence of such state regulation? Are some types of regulations more friendly to e-commerce?

Do businesses try to limit competition over the Internet through anticompetitive efforts, and if so how? What are the business justifications for these efforts?

2. Issues for Particular Industries

Retailing:

How and why do manufacturers limit their distributors' sales of certain products over the Internet? What are the costs to consumers? Do distributors pressure manufacturers into limiting sales over the Internet, and if so how? Are such efforts facilitated by horizontal agreements? Does such conduct raise antitrust concerns, and are there legitimate business justifications, such as concerns about free-riding, for limiting e-commerce sales?

Automobiles:

Have manufacturers been forced to limit Internet sales of automobiles, and if so how? What are the costs to consumers? Are there legitimate concerns about free-riding or differentials in bargaining power? Are there different issues concerning the sale of new and used cars? What regulations have been applied to the sale of new or used cars through online auction sites? Does state regulation have the effect of protecting dealers from competition, to the possible detriment of consumers, or does existing state regulation provide important protection to consumers?

Cyber-Charter Schools:

How have states fostered or hindered cyber-charter schools? What are the competitive benefits of cyber-schools? Are there legitimate consumer protection concerns? Do the efforts of some school districts to limit cyber-charter schools raise any antitrust issues? What is the current status and focus of litigation, and what types of legislative solutions are possible?

Real Estate / Mortgages:

What types of state regulations limit online real estate and mortgage services? What are the costs to consumers? What is the impact of regulations requiring real estate closings or refinancings to be conducted solely by attorneys? What are the pro-consumer rationales for such regulations, and are there less restrictive means of achieving the same goals? What is the impact of Internet competition upon real estate commissions, and how are realtors responding to that competition?

Health Care / Pharmaceuticals / Telemedicine:

What types of state regulations limit online provision of health care goods and services, such as pharmaceuticals and telemedicine? What are the costs to consumers? Are these regulations directed mainly at out-of-state competitors? Are online prescriptions particularly susceptible to abuse? What are the pro-consumer rationales for regulations, and are there less restrictive means of achieving the same goals? Are reciprocity statutes an effective way to dealing with these issues?

Wine Sales:

How does the "three tier" system for distributing wine limit online sales, and are there legitimate justifications, such as temperance or taxation, for the system? What are the costs to consumers? Are there separate and measurable price and variety effects? Are there less restrictive means for achieving the same goals, and are reciprocity statutes a viable alternative? What is the status of the ongoing litigation addressing this system?

Auctions:

How have states applied their existing auctioneering regulations to online auction sites? What are the costs to consumers? Have states enacted new regulations targeted at online auctions? Do such regulations limit competition from online auctions, and if so how? Do those regulations impact large and small online auctioneers differently? To what extent are online auctions replacing traditional retail outlets, for consumer goods, automobiles (new or used), and other products? What types of state regulation can best protect consumers while still allowing competition from online auctions?

Contact Lenses:

What types of state regulations limit online sales of contact lenses? What are the costs to consumers? What are the health justifications for such regulations, and how valid are they? Are there separate issues for replacement lenses or disposable lenses? How should prescription requirements be administered? Have manufacturers limited the supply of contact lenses to online vendors, and if so why?

Funerals (Caskets):

What types of state regulations limit online casket sales? What are the costs to consumers? What are the pro-consumer rationales for such regulations, particularly in light of the recent controversies? Are there less restrictive means of achieving the same goals?

What is the status and focus of current litigation?

The Commission welcomes suggestions for other questions that also should be addressed. Proposed questions, identified as such, may be sent by electronic mail to ecompetition@ftc.gov.

By direction of the Commission.

Donald S. Clark
Secretary

Endnotes:

1. For more information on previous FTC-sponsored events regarding e-commerce, see <http://www.ftc.gov/opp/ecommerce/index.htm>; <http://www.ftc.gov/opa/2000/05/b2bworkshop.htm>.

Public Workshop: Possible Anticompetitive Efforts to Restrict Competition on the Internet
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UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

DIRECTOR
OFFICE OF POLICY PLANNING

August 27, 2002

VIA MAIL AND FACSIMILE

Stephen M. Case
Chairman and Chief Executive Officer
AOL Time Warner Inc.
22000 AOL Way
Dulles, VA 20166

Re: Invitation to Appear at FTC Public Workshop on E-Commerce

Dear Mr. Case:

I would like to invite you to appear at a three-day public workshop at the Federal Trade Commission on "Possible Anticompetitive Efforts to Restrict Competition on the Internet." If you are able to attend, we would ask you to testify on an overview panel with other leading executives to describe industry's perspectives on possible barriers to e-commerce. The public workshop will take place from October 8-10, 2002, at the FTC, 600 Pennsylvania Ave., N.W., Washington, DC 20580. The overview panel will take place during the morning of October 8.

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We look forward to hearing AOL's perspective on these important issues.

Sincerely,

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Ted Cruz
Director, Office of Policy Planning
Federal Trade Commission

cc: Asheesh Agarwal

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- funeral homes commonly mark up caskets by over 500%, whereas third-party sellers (such as online sellers) typically mark up caskets only by around 100%²
- in the aggregate, potentially protectionist state regulation may cost consumers over \$15 billion annually.³

Similarly, some private companies have engaged in conduct that may raise antitrust issues. For instance, some dealers do not list prices for certain items they sell online; others don't sell certain items in their product line over the Internet at all, and urge horizontal competitors to follow suit. Again, some or all of these restrictions could be justified as procompetitive, or they could prove anticompetitive upon closer examination:

- in 1998, the FTC entered a consent decree with 25 car dealers in five Northwest

¹ Robert Atkinson and Thomas Wilhelm, *The Best States for E-Commerce* 19 (Mar. 2002) (second report of the Progressive Policy Institute) (citing Fiona Scott Morton, Florian Zettelmeyer, and Jorge Silva Riso, *Internet Car Retailing*, working paper, School of Management, Yale University, September 2000).

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³ Robert Atkinson, *The Revenge of the Disintermediated* 2 (Jan. 2001) (first report of the Progressive Policy Institute) ("First PPI Report").

states that had threatened to boycott Chrysler if it sold to low-cost Internet dealers⁴

- in one survey, 74 percent of manufacturers reported that they do not sell online because online sales could affect their retail channels⁵
- one analyst estimates that distributors and retailers often represent as much as 50% of the cost of some consumer products, and that much of this cost could disappear if consumers could buy online.⁶

The Federal Trade Commission has long sought to promote competition over the Internet. To advance these efforts, in August 2001 the FTC formed the Internet Task Force to evaluate potentially anticompetitive regulations and business practices that could impede e-commerce. Led by the FTC's Office of Policy Planning, the Task Force has examined the academic research and met with numerous industry participants and observers, including online companies, trade associations, and scholars. To date, the FTC has filed three competition advocacy comments due in large part to the Task Force's efforts:

- a joint FTC/Department of Justice comment to the North Carolina state bar opposing two new opinions that would require the physical presence of an attorney for all real estate closings and refinancings (which would significantly increase the costs of Internet lenders that rely disproportionately on lay closers);⁷
- a joint FTC/Department of Justice comment before the Rhode Island legislature on a similar real estate bill;⁸ and
- a staff comment before the Connecticut Board of Opticians, which is considering additional restrictions on out-of-state and Internet contact lens sellers.⁹

⁴ See Consent Agreement in *In re Fair Allocation System*, No. 971-0065 (1998), available at <http://www.ftc.gov/os/1998/9808/9710065.agr.htm>.

⁵ First PPI Report at 14 (citing Candace Talmadge, "Retailers concerned as manufacturers sell online," *Reuters Internet*, December 31, 2000, <http://www.mercurycenter.com/svtech/news/breaking/internet/docs/7956161.htm>).

⁶ Doug Bartholomew, *E-Commerce Bullies* 51 (Sept. 4, 2000) (published in *industryweek.com*).

⁷ FTC/DOJ Letter to the Ethics Committee of the North Carolina State Bar re: State Bar Opinions Restricting Involvement of Non-Attorneys in Real Estate Closings and Refinancing Transactions (Dec. 14, 2001) available at <http://www.ftc.gov/be/V020006.htm>.

⁸ FTC/DOJ Letter to the Rhode Island House of Representatives re: Bill Restricting Competition from Non-Attorneys in Real Estate Closing Activities (Mar. 29, 2002) available at <http://www.ftc.gov/be/v020013.pdf>.

⁹ FTC Staff Comment Before the Connecticut Board of Examiners for Opticians (Mar. 27, 2002) available at <http://www.ftc.gov/be/v020007.htm>.

To further build on these efforts, the FTC will host a public workshop to explore how certain state regulations may have anticompetitive effects on e-commerce and how certain e-commerce business practices may raise antitrust concerns. The workshop will take place at the FTC from October 8-10, 2002. The workshop will include consumer advocates, industry representatives (from all sides), academics, and state government representatives.

To focus the discussion, the workshop will organize panels to address certain specific industries that are important to consumers and that have experienced significant growth in online commerce, but that may also have been hampered by anticompetitive state regulation or business practices. These panels will address some or all of the following industries:

Retailing: E-commerce retail sales continue to have enormous potential. They grew 2.5 times faster than all retail sales in the fourth quarter of 2001, and according to some analysts are expected to reach \$3.2 trillion by 2004.

Automobiles: All 50 states restrict online auto sales. Dealers argue that these restrictions protect consumers against unscrupulous manufacturers, and that the Internet unfairly lets online sellers free ride off the dealers' personal services.

Cyber-Charter Schools:

Cyber-charter schools currently enroll 50,000 students nationwide, and proponents hope to reach the 850,000 students nationally who receive home-schooling. In several states, however, legislators have introduced bills to place a moratorium on cyber-charter schools.

Real Estate / Mortgages:

As a result of the multi-state licensing system and physical office requirements, only national mortgage firms that already have physical offices in all states can sell online services in all states.

Health Care / Pharmaceuticals / Telemedicine:

In an era of skyrocketing costs, online prescription drug purchases could potentially lower prices for patients in the same way that online contact lenses lowered prices. At the same time, online pharmacies raise significant consumer protection issues. Similarly, telemedicine could give patients access to portable medical equipment and digital imaging technology even if they are too elderly or infirm to visit a hospital easily, or if they live in rural areas far from a full-service hospital. Most states, however, substantially limit online pharmaceuticals and telemedicine. Approximately thirteen states specifically prohibit electronic prescription transmission, and several states require physicians to examine the patient physically before prescribing medicine.

Wine Sales: The Internet offers consumers a broad array of wine choices. Although currently only six percent of U.S. wineries produce ninety-five percent of the wine consumed domestically, some scholars estimate that hundreds or even thousands of smaller vineyards have marketed their wines online. Moreover, studies indicate that, when sold through normal distribution channels, a typical bottle of wine has a markup from supplier to retailer of 100% or higher.

Auctions: Internet auctions have become a cultural phenomenon, and some businesses have started to use auction sites as an alternate means of distributing their products. Some states, however, are considering whether to apply existing licensing requirements designed for traditional auctioneers to these websites.

Contact Lenses: Consumers can save substantial sums of money by purchasing contact lenses online, as some studies suggest that optometrists mark up lenses from the manufacturer by between one and five times the cost. Some groups within the medical community, however, argue that online sales of contact lenses threaten consumer health, such as by making consumers less likely to visit their eye doctor.

Funerals (Caskets): In addition to cost savings, online casket sellers can offer consumers a greater variety of choices, such as individualized caskets. Many states, however, require that casket purchases be made only through a licensed, bricks-and-mortar vendor.

The Commission also invites comments concerning other industries, not listed above, that may raise similar issues and merit similar examination. The workshop will be open to the public, and should (1) enhance the FTC's understanding of these issues, (2) help educate policymakers about the effects of possibly protectionist state regulation, (3) help educate private entities about the types of business practices that may or may not be viewed as problematic, and (4) increase understanding about ways to promote robust competition from e-commerce, to the benefit of consumers.

FEDERAL REGISTER NOTICE

Public Workshop: Possible Anticompetitive Efforts to Restrict Competition on the Internet

AGENCY: Federal Trade Commission

ACTION: Notice of Public Workshop and Opportunity for Comment

SUMMARY: The Federal Trade Commission ("FTC" or "Commission") announces a public workshop on "Possible Anticompetitive Efforts to Restrict Competition on the Internet." The workshop will focus on how certain state regulation may have anticompetitive effects, and how certain business practices may raise antitrust concerns, in the context of business-to-consumer e-commerce. The workshop will be held at and administered by the FTC.

DATES: The workshop will take place on October 8-10, 2002. The workshop will be transcribed and placed on the public record. Any interested person may submit written comments responsive to any of the topics to be addressed; such comments should be submitted no later than the last session of the workshop. Any written comments received also will be placed on the public record.

ADDRESSES: When in session, the workshop will be held at the FTC headquarters, 600 Pennsylvania Avenue, N.W., Washington, D.C. All interested parties are welcome to attend. Pre-registration is not required.

Written comments should be submitted in both hard copy and electronic form. Six hard copies of each submission should be addressed to Donald S. Clark, Office of the Secretary, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. Submissions should be captioned "Comments regarding ecompetition." Electronic submissions may be sent by electronic mail to "ecompetition@ftc.gov". Alternatively, electronic submissions may be filed on a 3-1/2 inch computer disk with a label on the disk stating the name of the submitter and the name and version of the word processing program used to create the document.

FOR FURTHER INFORMATION CONTACT: Jerry Ellig, Deputy Director, Office of Policy Planning, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580; telephone (202) 326-3528; e-mail: jellig@ftc.gov. Detailed agendas for the workshop will be available on the FTC Home Page (<http://www.ftc.gov>) and through Mildred Taylor, Staff Secretary, at (202) 326-2553.

SUPPLEMENTARY INFORMATION:

Overview

In the past decade, there has been growing concern about possibly anticompetitive efforts to restrict competition on the Internet. In particular, many states have enacted regulations that have the direct effect of protecting local merchants from competition over the Internet. For example, some states require that online vendors maintain an in-state office, while other states prohibit online sales of certain products entirely. Some scholars have argued that these regulations are often simply attempts by existing industries to forestall the entry of new and innovative Internet competitors, much as in prior eras, other entrenched producers have benefitted from regulatory efforts to impede new forms of competition.

Similarly, some private companies have engaged in conduct that may raise antitrust issues. For instance, some manufacturers and dealers do not list prices for certain items online, and others do not sell certain items over the Internet altogether and urge horizontal competitors to do the same. Depending on the circumstances, some of these restrictions could be viewed as potentially anticompetitive. While much of this regulation and conduct undoubtedly has pro-competitive and pro-consumer rationales, the regulations impose costs on consumers that, according to some

estimates, may exceed \$15 billion annually.

For these reasons, a workshop on possible anticompetitive efforts to restrict competition on the Internet is timely, and will build on previous FTC-sponsored events that addressed other aspects of e-commerce.⁽¹⁾ In order to enhance the Commission's understanding of particular practices and regulations, the workshop will have panels to address certain specific industries, including some or all of the following: retailing, automobiles, cyber-charter schools, real estate / mortgages, health care / pharmaceuticals / telemedicine, wine sales, auctions, contact lenses, and funerals (caskets).

Each of these industries has experienced some growth in commerce via the Internet, but according to various commentators, each also may have been hampered by anticompetitive state regulation or business practices. See, e.g., Atkinson, *The Revenge of the Disintermediated* (Jan. 2001) (report of the Progressive Policy Institute); Atkinson and Wilhelm, *The Best States for E-Commerce* (Mar. 2002) (second report of the Progressive Policy Institute). In addition, these industries involve goods and services that comprise a very large portion of a consumer's budget, such as homes, cars, schools, and health care.

It is intended that each industry panel have at least one independent analyst or academic, and also have representatives from the affected industries (on both sides of the issue). Where appropriate, the panel also will include a representative from a government agency, including (where appropriate) representatives from different states. We hope that each panel will provide all sides of the issue, including the perspectives of industry, intermediaries, consumers, and regulators.

The Commission also invites comments concerning other industries, not listed above, that may raise similar issues and merit similar examination.

Issues

Below is a non-exhaustive list of issues to be addressed by the workshop. Written comments need not address all of these issues.

1. General Issues

What role does competition law and policy play in fostering or hindering e-commerce?
From a practical business perspective, how does each foster or impede e-commerce?
What do empirical studies show?

Does state regulation have protectionist effects, and if so how? What are the benefits of such regulation, and do the benefits outweigh the costs? What is the prevalence of such state regulation? Are some types of regulations more friendly to e-commerce?

Do businesses try to limit competition over the Internet through anticompetitive efforts, and if so how? What are the business justifications for these efforts?

2. Issues for Particular Industries

Retailing:

How and why do manufacturers limit their distributors' sales of certain products over the Internet? What are the costs to consumers? Do distributors pressure manufacturers into limiting sales over the Internet, and if so how? Are such efforts facilitated by horizontal agreements? Does such conduct raise antitrust concerns, and are there legitimate business justifications, such as concerns about free-riding, for limiting e-commerce sales?

Automobiles:

Have manufacturers been forced to limit Internet sales of automobiles, and if so how? What are the costs to consumers? Are there legitimate concerns about free-riding or differentials in bargaining power? Are there different issues concerning the sale of new and used cars? What regulations have been applied to the sale of new or used cars through online auction sites? Does state regulation have the effect of protecting dealers from competition, to the possible detriment of consumers, or does existing state regulation provide important protection to consumers?

Cyber-Charter Schools:

How have states fostered or hindered cyber-charter schools? What are the competitive benefits of cyber-schools? Are there legitimate consumer protection concerns? Do the efforts of some school districts to limit cyber-charter schools raise any antitrust issues? What is the current status and focus of litigation, and what types of legislative solutions are possible?

Real Estate / Mortgages:

What types of state regulations limit online real estate and mortgage services? What are the costs to consumers? What is the impact of regulations requiring real estate closings or refinancings to be conducted solely by attorneys? What are the pro-consumer rationales for such regulations, and are there less restrictive means of achieving the same goals? What is the impact of Internet competition upon real estate commissions, and how are realtors responding to that competition?

Health Care / Pharmaceuticals / Telemedicine:

What types of state regulations limit online provision of health care goods and services, such as pharmaceuticals and telemedicine? What are the costs to consumers? Are these regulations directed mainly at out-of-state competitors? Are online prescriptions particularly susceptible to abuse? What are the pro-consumer rationales for regulations, and are there less restrictive means of achieving the same goals? Are reciprocity statutes an effective way to dealing with these issues?

Wine Sales:

How does the "three tier" system for distributing wine limit online sales, and are there legitimate justifications, such as temperance or taxation, for the system? What are the costs to consumers? Are there separate and measurable price and variety effects? Are there less restrictive means for achieving the same goals, and are reciprocity statutes a viable alternative? What is the status of the ongoing litigation addressing this system?

Auctions:

How have states applied their existing auctioneering regulations to online auction sites? What are the costs to consumers? Have states enacted new regulations targeted at online auctions? Do such regulations limit competition from online auctions, and if so how? Do those regulations impact large and small online auctioneers differently? To what extent are online auctions replacing traditional retail outlets, for consumer goods, automobiles (new or used), and other products? What types of state regulation can best protect consumers while still allowing competition from online auctions?

Contact Lenses:

What types of state regulations limit online sales of contact lenses? What are the costs to consumers? What are the health justifications for such regulations, and how valid are they? Are there separate issues for replacement lenses or disposable lenses? How should prescription requirements be administered? Have manufacturers limited the supply of contact lenses to online vendors, and if so why?

Funerals (Caskets):

What types of state regulations limit online casket sales? What are the costs to consumers? What are the pro-consumer rationales for such regulations, particularly in light of the recent controversies? Are there less restrictive means of achieving the same goals?

What is the status and focus of current litigation?

The Commission welcomes suggestions for other questions that also should be addressed. Proposed questions, identified as such, may be sent by electronic mail to ecompetition@ftc.gov.

By direction of the Commission.

Donald S. Clark
Secretary

Endnotes:

1. For more information on previous FTC-sponsored events regarding e-commerce, see <http://www.ftc.gov/opp/ecommerce/index.htm>; <http://www.ftc.gov/opa/2000/05/b2bworkshop.htm>.



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

DIRECTOR
OFFICE OF POLICY PLANNING

August 23, 2002

VIA MAIL AND FACSIMILE

Michael Dell
Chairman and Chief Executive Officer
Dell Computer Corporation
One Dell Way
Round Rock, TX 78682

Re: Invitation to Appear at FTC Public Workshop on E-Commerce

Dear Mr. Dell:

I would like to invite you to appear at a three-day public workshop at the Federal Trade Commission on "Possible Anticompetitive Efforts to Restrict Competition on the Internet." If you are able to attend, we would ask you to testify on an overview panel with other leading executives to describe industry's perspectives on possible barriers to e-commerce. The public workshop will take place from October 8-10, 2002, at the FTC, 600 Pennsylvania Ave., N.W., Washington, DC 20580. The overview panel will take place during the morning of October 8.

The workshop will focus on two types of possible e-commerce barriers. The first type includes state and local regulations, such as occupational licensing and physical office requirements, that may have pro-consumer or pro-competition rationales, but that nevertheless may restrict the entry of new Internet competitors. The second type includes business conduct barriers that arise when private parties employ potentially anticompetitive tactics, such as when suppliers or dealers apply collective pressure to limit online sales. The workshop will have separate panels to address a variety of industries that may have been hampered significantly by such barriers, including retailing, automobile sales, cyber-charter schools, real estate and mortgages, pharmaceutical sales, telemedicine, wine sales, auctions, contact lens sales, and casket sales.

Particularly given the current economic climate, gaining a full understanding of the barriers facing new Internet entrants and ultimately developing strategies to promote robust competition in e-commerce is both timely and important. Indeed, some academic estimates of the aggregate impact of these various barriers suggest that they cost consumers billions of dollars every year.

I hope that the workshop will help policymakers and businesses better understand both the potentially pro-consumer and pro-competitive rationales behind these barriers and the actual impact of them on consumers. Because many of these issues are new, the workshop could help educate policymakers and businesses about policies that ultimately may have significant anticompetitive effects. To date, we have received dozens of calls from businesses, trade associations, consumer groups, and journalists who would like to participate in the workshop.

Along with this letter, I am sending you a copy of the Federal Register Notice announcing the workshop and a background fact sheet, both of which describe the Internet workshop in more detail. This letter will be followed up by a phone call to your office from Asheesh Agarwal, an attorney in the Office of Policy Planning who is organizing the workshop. If you or your staff have further questions, feel free to call me, at (202) 326-3683, or Asheesh at (202) 326-3558.

We look forward to hearing Dell's perspective on these important issues.

Sincerely,

A handwritten signature in black ink, appearing to read 'Ted Cruz', with a stylized flourish extending to the right.

Ted Cruz
Director, Office of Policy Planning
Federal Trade Commission

cc: Asheesh Agarwal

Billing Code: 6750-01P

FEDERAL REGISTER NOTICE

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SUMMARY: The Federal Trade Commission ("FTC" or "Commission") announces a public workshop on "Possible Anticompetitive Efforts to Restrict Competition on the Internet." The workshop will focus on how certain state regulation may have anticompetitive effects, and how certain business practices may raise antitrust concerns, in the context of business-to-consumer e-commerce. The workshop will be held at and administered by the FTC.

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Similarly, some private companies have engaged in conduct that may raise antitrust issues. For instance, some manufacturers and dealers do not list prices for certain items online, and others do not sell certain items over the Internet altogether and urge horizontal competitors to do the same. Depending on the circumstances, some of these restrictions could be viewed as potentially anticompetitive. While much of this regulation and conduct undoubtedly has pro-competitive and pro-consumer rationales, the regulations impose costs on consumers that, according to some

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For these reasons, a workshop on possible anticompetitive efforts to restrict competition on the Internet is timely, and will build on previous FTC-sponsored events that addressed other aspects of e-commerce.⁽¹⁾ In order to enhance the Commission's understanding of particular practices and regulations, the workshop will have panels to address certain specific industries, including some or all of the following: retailing, automobiles, cyber-charter schools, real estate / mortgages, health care / pharmaceuticals / telemedicine, wine sales, auctions, contact lenses, and funerals (caskets).

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Public Workshop: Possible Anticompetitive Efforts to Restrict Competition on the Internet
Federal Trade Commission
October 8-10, 2002

Many states have enacted regulations that may have the effect of protecting local bricks-and-mortar merchants from new Internet competitors. For example, all fifty states currently ban auto sales over the Internet unless they involve local franchise owners, and at least thirty states have laws that effectively preclude wine sales over the Internet. Seventeen states require online mortgage brokers to have a physical office in the state, which forces them to hire local residents. Many states also limit online competition for products ranging from contact lenses to funeral caskets. All of these restrictions may be justified by sound public policy, or they may ultimately prove to be attempts by existing industries to forestall the entry of Internet competitors and impede new forms of competition.

The aggregate costs of these restrictions may be very significant. Some scholars have estimated those costs as follows:

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- funeral homes commonly mark up caskets by over 500%, whereas third-party sellers (such as online sellers) typically mark up caskets only by around 100%²
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- in one survey, 74 percent of manufacturers reported that they do not sell online because online sales could affect their retail channels⁵
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The Federal Trade Commission has long sought to promote competition over the Internet. To advance these efforts, in August 2001 the FTC formed the Internet Task Force to evaluate potentially anticompetitive regulations and business practices that could impede e-commerce. Led by the FTC's Office of Policy Planning, the Task Force has examined the academic research and met with numerous industry participants and observers, including online companies, trade associations, and scholars. To date, the FTC has filed three competition advocacy comments due in large part to the Task Force's efforts:

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- a staff comment before the Connecticut Board of Opticians, which is considering additional restrictions on out-of-state and Internet contact lens sellers.⁹

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⁵ First PPI Report at 14 (citing Candace Talmadge, "Retailers concerned as manufacturers sell online," *Reuters Internet*, December 31, 2000, <http://www.mercurycenter.com/svtech/news/breaking/internet/docs/7956161.htm>).

⁶ Doug Bartholomew, *E-Commerce Bullies* 51 (Sept. 4, 2000) (published in industryweek.com).

⁷ FTC/DOJ Letter to the Ethics Committee of the North Carolina State Bar re: State Bar Opinions Restricting Involvement of Non-Attorneys in Real Estate Closings and Refinancing Transactions (Dec. 14, 2001) available at <http://www.ftc.gov/be/V020006.htm>.

⁸ FTC/DOJ Letter to the Rhode Island House of Representatives re: Bill Restricting Competition from Non-Attorneys in Real Estate Closing Activities (Mar. 29, 2002) available at <http://www.ftc.gov/be/v020013.pdf>.

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To further build on these efforts, the FTC will host a public workshop to explore how certain state regulations may have anticompetitive effects on e-commerce and how certain e-commerce business practices may raise antitrust concerns. The workshop will take place at the FTC from October 8-10, 2002. The workshop will include consumer advocates, industry representatives (from all sides), academics, and state government representatives.

To focus the discussion, the workshop will organize panels to address certain specific industries that are important to consumers and that have experienced significant growth in online commerce, but that may also have been hampered by anticompetitive state regulation or business practices. These panels will address some or all of the following industries:

Retailing: E-commerce retail sales continue to have enormous potential. They grew 2.5 times faster than all retail sales in the fourth quarter of 2001, and according to some analysts are expected to reach \$3.2 trillion by 2004.

Automobiles: All 50 states restrict online auto sales. Dealers argue that these restrictions protect consumers against unscrupulous manufacturers, and that the Internet unfairly lets online sellers free ride off the dealers' personal services.

Cyber-Charter Schools:

Cyber-charter schools currently enroll 50,000 students nationwide, and proponents hope to reach the 850,000 students nationally who receive home-schooling. In several states, however, legislators have introduced bills to place a moratorium on cyber-charter schools.

Real Estate / Mortgages:

As a result of the multi-state licensing system and physical office requirements, only national mortgage firms that already have physical offices in all states can sell online services in all states.

Health Care / Pharmaceuticals / Telemedicine:

In an era of skyrocketing costs, online prescription drug purchases could potentially lower prices for patients in the same way that online contact lenses lowered prices. At the same time, online pharmacies raise significant consumer protection issues. Similarly, telemedicine could give patients access to portable medical equipment and digital imaging technology even if they are too elderly or infirm to visit a hospital easily, or if they live in rural areas far from a full-service hospital. Most states, however, substantially limit online pharmaceuticals and telemedicine. Approximately thirteen states specifically prohibit electronic prescription transmission, and several states require physicians to examine the patient physically before prescribing medicine.

Wine Sales: The Internet offers consumers a broad array of wine choices. Although currently only six percent of U.S. wineries produce ninety-five percent of the wine consumed domestically, some scholars estimate that hundreds or even thousands of smaller vineyards have marketed their wines online. Moreover, studies indicate that, when sold through normal distribution channels, a typical bottle of wine has a markup from supplier to retailer of 100% or higher.

Auctions: Internet auctions have become a cultural phenomenon, and some businesses have started to use auction sites as an alternate means of distributing their products. Some states, however, are considering whether to apply existing licensing requirements designed for traditional auctioneers to these websites.

Contact Lenses: Consumers can save substantial sums of money by purchasing contact lenses online, as some studies suggest that optometrists mark up lenses from the manufacturer by between one and five times the cost. Some groups within the medical community, however, argue that online sales of contact lenses threaten consumer health, such as by making consumers less likely to visit their eye doctor.

Funerals (Caskets): In addition to cost savings, online casket sellers can offer consumers a greater variety of choices, such as individualized caskets. Many states, however, require that casket purchases be made only through a licensed, bricks-and-mortar vendor.

The Commission also invites comments concerning other industries, not listed above, that may raise similar issues and merit similar examination. The workshop will be open to the public, and should (1) enhance the FTC's understanding of these issues, (2) help educate policymakers about the effects of possibly protectionist state regulation, (3) help educate private entities about the types of business practices that may or may not be viewed as problematic, and (4) increase understanding about ways to promote robust competition from e-commerce, to the benefit of consumers.



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

DIRECTOR
OFFICE OF POLICY PLANNING

August 23, 2002

VIA MAIL AND FACSIMILE

Andrew S. Grove
Chairman of the Board
Intel Corporation
2200 Mission College Boulevard
Santa Clara, CA 95052

Re: Invitation to Appear at FTC Public Workshop on E-Commerce

Dear Mr. Grove:

I would like to invite you to appear at a three-day public workshop at the Federal Trade Commission on "Possible Anticompetitive Efforts to Restrict Competition on the Internet." If you are able to attend, we would ask you to testify on an overview panel with other leading executives to describe industry's perspectives on possible barriers to e-commerce. The public workshop will take place from October 8-10, 2002, at the FTC, 600 Pennsylvania Ave., N.W., Washington, DC 20580. The overview panel will take place during the morning of October 8.

The workshop will focus on two types of possible e-commerce barriers. The first type includes state and local regulations, such as occupational licensing and physical office requirements, that may have pro-consumer or pro-competition rationales, but that nevertheless may restrict the entry of new Internet competitors. The second type includes business conduct barriers that arise when private parties employ potentially anticompetitive tactics, such as when suppliers or dealers apply collective pressure to limit online sales. The workshop will have separate panels to address a variety of industries that may have been hampered significantly by such barriers, including retailing, automobile sales, cyber-charter schools, real estate and mortgages, pharmaceutical sales, telemedicine, wine sales, auctions, contact lens sales, and casket sales.

Particularly given the current economic climate, gaining a full understanding of the barriers facing new Internet entrants and ultimately developing strategies to promote robust

competition in e-commerce is both timely and important. Indeed, some academic estimates of the aggregate impact of these various barriers suggest that they cost consumers billions of dollars every year.

I hope that the workshop will help policymakers and businesses better understand both the potentially pro-consumer and pro-competitive rationales behind these barriers and the actual impact of them on consumers. Because many of these issues are new, the workshop could help educate policymakers and businesses about policies that ultimately may have significant anticompetitive effects. To date, we have received dozens of calls from businesses, trade associations, consumer groups, and journalists who would like to participate in the workshop.

Along with this letter, I am sending you a copy of the Federal Register Notice announcing the workshop and a background fact sheet, both of which describe the Internet workshop in more detail. This letter will be followed up by a phone call to your office from Asheesh Agarwal, an attorney in the Office of Policy Planning who is organizing the workshop. If you or your staff have further questions, feel free to call me, at (202) 326-3683, or Asheesh at (202) 326-3558.

We look forward to hearing Intel's perspective on these important issues.

Sincerely,

A handwritten signature in black ink, appearing to read 'Ted Cruz', with a stylized flourish at the end.

Ted Cruz
Director, Office of Policy Planning
Federal Trade Commission

cc: Asheesh Agarwal

FEDERAL REGISTER NOTICE

Public Workshop: Possible Anticompetitive Efforts to Restrict Competition on the Internet

AGENCY: Federal Trade Commission

ACTION: Notice of Public Workshop and Opportunity for Comment

SUMMARY: The Federal Trade Commission ("FTC" or "Commission") announces a public workshop on "Possible Anticompetitive Efforts to Restrict Competition on the Internet." The workshop will focus on how certain state regulation may have anticompetitive effects, and how certain business practices may raise antitrust concerns, in the context of business-to-consumer e-commerce. The workshop will be held at and administered by the FTC.

DATES: The workshop will take place on October 8-10, 2002. The workshop will be transcribed and placed on the public record. Any interested person may submit written comments responsive to any of the topics to be addressed; such comments should be submitted no later than the last session of the workshop. Any written comments received also will be placed on the public record.

ADDRESSES: When in session, the workshop will be held at the FTC headquarters, 600 Pennsylvania Avenue, N.W., Washington, D.C. All interested parties are welcome to attend. Pre-registration is not required.

Written comments should be submitted in both hard copy and electronic form. Six hard copies of each submission should be addressed to Donald S. Clark, Office of the Secretary, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. Submissions should be captioned "Comments regarding ecompetition." Electronic submissions may be sent by electronic mail to "ecompetition@ftc.gov". Alternatively, electronic submissions may be filed on a 3-1/2 inch computer disk with a label on the disk stating the name of the submitter and the name and version of the word processing program used to create the document.

FOR FURTHER INFORMATION CONTACT: Jerry Ellig, Deputy Director, Office of Policy Planning, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580; telephone (202) 326-3528; e-mail: jellig@ftc.gov. Detailed agendas for the workshop will be available on the FTC Home Page (<http://www.ftc.gov>) and through Mildred Taylor, Staff Secretary, at (202) 326-2553.

SUPPLEMENTARY INFORMATION:

Overview

In the past decade, there has been growing concern about possibly anticompetitive efforts to restrict competition on the Internet. In particular, many states have enacted regulations that have the direct effect of protecting local merchants from competition over the Internet. For example, some states require that online vendors maintain an in-state office, while other states prohibit online sales of certain products entirely. Some scholars have argued that these regulations are often simply attempts by existing industries to forestall the entry of new and innovative Internet competitors, much as in prior eras, other entrenched producers have benefitted from regulatory efforts to impede new forms of competition.

Similarly, some private companies have engaged in conduct that may raise antitrust issues. For instance, some manufacturers and dealers do not list prices for certain items online, and others do not sell certain items over the Internet altogether and urge horizontal competitors to do the same. Depending on the circumstances, some of these restrictions could be viewed as potentially anticompetitive. While much of this regulation and conduct undoubtedly has pro-competitive and pro-consumer rationales, the regulations impose costs on consumers that, according to some

estimates, may exceed \$15 billion annually.

For these reasons, a workshop on possible anticompetitive efforts to restrict competition on the Internet is timely, and will build on previous FTC-sponsored events that addressed other aspects of e-commerce.⁽¹⁾ In order to enhance the Commission's understanding of particular practices and regulations, the workshop will have panels to address certain specific industries, including some or all of the following: retailing, automobiles, cyber-charter schools, real estate / mortgages, health care / pharmaceuticals / telemedicine, wine sales, auctions, contact lenses, and funerals (caskets).

Each of these industries has experienced some growth in commerce via the Internet, but according to various commentators, each also may have been hampered by anticompetitive state regulation or business practices. See, e.g., Atkinson, *The Revenge of the Disintermediated* (Jan. 2001) (report of the Progressive Policy Institute); Atkinson and Wilhelm, *The Best States for E-Commerce* (Mar. 2002) (second report of the Progressive Policy Institute). In addition, these industries involve goods and services that comprise a very large portion of a consumer's budget, such as homes, cars, schools, and health care.

It is intended that each industry panel have at least one independent analyst or academic, and also have representatives from the affected industries (on both sides of the issue). Where appropriate, the panel also will include a representative from a government agency, including (where appropriate) representatives from different states. We hope that each panel will provide all sides of the issue, including the perspectives of industry, intermediaries, consumers, and regulators.

The Commission also invites comments concerning other industries, not listed above, that may raise similar issues and merit similar examination.

Issues

Below is a non-exhaustive list of issues to be addressed by the workshop. Written comments need not address all of these issues.

1. General Issues

What role does competition law and policy play in fostering or hindering e-commerce?
From a practical business perspective, how does each foster or impede e-commerce?
What do empirical studies show?

Does state regulation have protectionist effects, and if so how? What are the benefits of such regulation, and do the benefits outweigh the costs? What is the prevalence of such state regulation? Are some types of regulations more friendly to e-commerce?

Do businesses try to limit competition over the Internet through anticompetitive efforts, and if so how? What are the business justifications for these efforts?

2. Issues for Particular Industries

Retailing:

How and why do manufacturers limit their distributors' sales of certain products over the Internet? What are the costs to consumers? Do distributors pressure manufacturers into limiting sales over the Internet, and if so how? Are such efforts facilitated by horizontal agreements? Does such conduct raise antitrust concerns, and are there legitimate business justifications, such as concerns about free-riding, for limiting e-commerce sales?

Automobiles:

Have manufacturers been forced to limit Internet sales of automobiles, and if so how? What are the costs to consumers? Are there legitimate concerns about free-riding or differentials in bargaining power? Are there different issues concerning the sale of new and used cars? What regulations have been applied to the sale of new or used cars through online auction sites? Does state regulation have the effect of protecting dealers from competition, to the possible detriment of consumers, or does existing state regulation provide important protection to consumers?

Cyber-Charter Schools:

How have states fostered or hindered cyber-charter schools? What are the competitive benefits of cyber-schools? Are there legitimate consumer protection concerns? Do the efforts of some school districts to limit cyber-charter schools raise any antitrust issues? What is the current status and focus of litigation, and what types of legislative solutions are possible?

Real Estate / Mortgages:

What types of state regulations limit online real estate and mortgage services? What are the costs to consumers? What is the impact of regulations requiring real estate closings or refinancings to be conducted solely by attorneys? What are the pro-consumer rationales for such regulations, and are there less restrictive means of achieving the same goals? What is the impact of Internet competition upon real estate commissions, and how are realtors responding to that competition?

Health Care / Pharmaceuticals / Telemedicine:

What types of state regulations limit online provision of health care goods and services, such as pharmaceuticals and telemedicine? What are the costs to consumers? Are these regulations directed mainly at out-of-state competitors? Are online prescriptions particularly susceptible to abuse? What are the pro-consumer rationales for regulations, and are there less restrictive means of achieving the same goals? Are reciprocity statutes an effective way to dealing with these issues?

Wine Sales:

How does the "three tier" system for distributing wine limit online sales, and are there legitimate justifications, such as temperance or taxation, for the system? What are the costs to consumers? Are there separate and measurable price and variety effects? Are there less restrictive means for achieving the same goals, and are reciprocity statutes a viable alternative? What is the status of the ongoing litigation addressing this system?

Auctions:

How have states applied their existing auctioneering regulations to online auction sites? What are the costs to consumers? Have states enacted new regulations targeted at online auctions? Do such regulations limit competition from online auctions, and if so how? Do those regulations impact large and small online auctioneers differently? To what extent are online auctions replacing traditional retail outlets, for consumer goods, automobiles (new or used), and other products? What types of state regulation can best protect consumers while still allowing competition from online auctions?

Contact Lenses:

What types of state regulations limit online sales of contact lenses? What are the costs to consumers? What are the health justifications for such regulations, and how valid are they? Are there separate issues for replacement lenses or disposable lenses? How should prescription requirements be administered? Have manufacturers limited the supply of contact lenses to online vendors, and if so why?

Funerals (Caskets):

What types of state regulations limit online casket sales? What are the costs to consumers? What are the pro-consumer rationales for such regulations, particularly in light of the recent controversies? Are there less restrictive means of achieving the same goals?

What is the status and focus of current litigation?

The Commission welcomes suggestions for other questions that also should be addressed. Proposed questions, identified as such, may be sent by electronic mail to ecompetition@ftc.gov.

By direction of the Commission.

Donald S. Clark
Secretary

Endnotes:

1. For more information on previous FTC-sponsored events regarding e-commerce, see <http://www.ftc.gov/opp/ecommerce/index.htm>; <http://www.ftc.gov/opa/2000/05/b2bworkshop.htm>.

Public Workshop: Possible Anticompetitive Efforts to Restrict Competition on the Internet
Federal Trade Commission
October 8-10, 2002

Many states have enacted regulations that may have the effect of protecting local bricks-and-mortar merchants from new Internet competitors. For example, all fifty states currently ban auto sales over the Internet unless they involve local franchise owners, and at least thirty states have laws that effectively preclude wine sales over the Internet. Seventeen states require online mortgage brokers to have a physical office in the state, which forces them to hire local residents. Many states also limit online competition for products ranging from contact lenses to funeral caskets. All of these restrictions may be justified by sound public policy, or they may ultimately prove to be attempts by existing industries to forestall the entry of Internet competitors and impede new forms of competition.

The aggregate costs of these restrictions may be very significant. Some scholars have estimated those costs as follows:

- the average purchaser of a car could save approximately two percent using an online service rather than buying in person from a dealer¹
- funeral homes commonly mark up caskets by over 500%, whereas third-party sellers (such as online sellers) typically mark up caskets only by around 100%²
- in the aggregate, potentially protectionist state regulation may cost consumers over \$15 billion annually.³

Similarly, some private companies have engaged in conduct that may raise antitrust issues. For instance, some dealers do not list prices for certain items they sell online; others don't sell certain items in their product line over the Internet at all, and urge horizontal competitors to follow suit. Again, some or all of these restrictions could be justified as procompetitive, or they could prove anticompetitive upon closer examination:

- in 1998, the FTC entered a consent decree with 25 car dealers in five Northwest

¹ Robert Atkinson and Thomas Wilhelm, *The Best States for E-Commerce* 19 (Mar. 2002) (second report of the Progressive Policy Institute) (citing Fiona Scott Morton, Florian Zettelmeyer, and Jorge Silva Risso, *Internet Car Retailing*, working paper, School of Management, Yale University, September 2000).

² See USA Today, Oct. 8, 1999 (reporting mark-ups of 500%); Modern Maturity, "R.I.P. Off" (Mar.-Apr. 2000).

³ Robert Atkinson, *The Revenge of the Disintermediated* 2 (Jan. 2001) (first report of the Progressive Policy Institute) ("First PPI Report").

states that had threatened to boycott Chrysler if it sold to low-cost Internet dealers⁴

- in one survey, 74 percent of manufacturers reported that they do not sell online because online sales could affect their retail channels⁵
- one analyst estimates that distributors and retailers often represent as much as 50% of the cost of some consumer products, and that much of this cost could disappear if consumers could buy online.⁶

The Federal Trade Commission has long sought to promote competition over the Internet. To advance these efforts, in August 2001 the FTC formed the Internet Task Force to evaluate potentially anticompetitive regulations and business practices that could impede e-commerce. Led by the FTC's Office of Policy Planning, the Task Force has examined the academic research and met with numerous industry participants and observers, including online companies, trade associations, and scholars. To date, the FTC has filed three competition advocacy comments due in large part to the Task Force's efforts:

- a joint FTC/Department of Justice comment to the North Carolina state bar opposing two new opinions that would require the physical presence of an attorney for all real estate closings and refinancings (which would significantly increase the costs of Internet lenders that rely disproportionately on lay closers);⁷
- a joint FTC/Department of Justice comment before the Rhode Island legislature on a similar real estate bill;⁸ and
- a staff comment before the Connecticut Board of Opticians, which is considering additional restrictions on out-of-state and Internet contact lens sellers.⁹

⁴ See Consent Agreement in *In re Fair Allocation System*, No. 971-0065 (1998), available at <<http://www.ftc.gov/os/1998/9808/9710065.agr.htm>>.

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UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

DIRECTOR
OFFICE OF POLICY PLANNING

August 23, 2002

VIA MAIL AND FACSIMILE

Mr. Wayne Huizenga
Huizenga Holdings
Las Olas Center
450 E. Las Olas Boulevard, Suite 1500
Ft. Lauderdale, FL 33301

Re: Invitation to Appear at FTC Public Workshop on E-Commerce

Dear Mr. Huizenga:

I would like to invite you to appear at a three-day public workshop at the Federal Trade Commission on "Possible Anticompetitive Efforts to Restrict Competition on the Internet." If you are able to attend, we would ask you to testify on an overview panel with other leading executives to describe industry's perspectives on possible barriers to e-commerce. The public workshop will take place from October 8-10, 2002, at the FTC, 600 Pennsylvania Ave., N.W., Washington, DC 20580. The overview panel will take place during the morning of October 8.

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Billing Code: 6750-01P

FEDERAL REGISTER NOTICE

Public Workshop: Possible Anticompetitive Efforts to Restrict Competition on the Internet

AGENCY: Federal Trade Commission

ACTION: Notice of Public Workshop and Opportunity for Comment

SUMMARY: The Federal Trade Commission ("FTC" or "Commission") announces a public workshop on "Possible Anticompetitive Efforts to Restrict Competition on the Internet." The workshop will focus on how certain state regulation may have anticompetitive effects, and how certain business practices may raise antitrust concerns, in the context of business-to-consumer e-commerce. The workshop will be held at and administered by the FTC.

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FOR FURTHER INFORMATION CONTACT: Jerry Ellig, Deputy Director, Office of Policy Planning, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580; telephone (202) 326-3528; e-mail: jellig@ftc.gov. Detailed agendas for the workshop will be available on the FTC Home Page (<http://www.ftc.gov>) and through Mildred Taylor, Staff Secretary, at (202) 326-2553.

SUPPLEMENTARY INFORMATION:

Overview

In the past decade, there has been growing concern about possibly anticompetitive efforts to restrict competition on the Internet. In particular, many states have enacted regulations that have the direct effect of protecting local merchants from competition over the Internet. For example, some states require that online vendors maintain an in-state office, while other states prohibit online sales of certain products entirely. Some scholars have argued that these regulations are often simply attempts by existing industries to forestall the entry of new and innovative Internet competitors, much as in prior eras, other entrenched producers have benefitted from regulatory efforts to impede new forms of competition.

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estimates, may exceed \$15 billion annually.

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The Commission also invites comments concerning other industries, not listed above, that may raise similar issues and merit similar examination.

Issues

Below is a non-exhaustive list of issues to be addressed by the workshop. Written comments need not address all of these issues.

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What role does competition law and policy play in fostering or hindering e-commerce?
From a practical business perspective, how does each foster or impede e-commerce?
What do empirical studies show?

Does state regulation have protectionist effects, and if so how? What are the benefits of such regulation, and do the benefits outweigh the costs? What is the prevalence of such state regulation? Are some types of regulations more friendly to e-commerce?

Do businesses try to limit competition over the Internet through anticompetitive efforts, and if so how? What are the business justifications for these efforts?

2. Issues for Particular Industries

Retailing:

How and why do manufacturers limit their distributors' sales of certain products over the Internet? What are the costs to consumers? Do distributors pressure manufacturers into limiting sales over the Internet, and if so how? Are such efforts facilitated by horizontal agreements? Does such conduct raise antitrust concerns, and are there legitimate business justifications, such as concerns about free-riding, for limiting e-commerce sales?

Automobiles:

Have manufacturers been forced to limit Internet sales of automobiles, and if so how? What are the costs to consumers? Are there legitimate concerns about free-riding or differentials in bargaining power? Are there different issues concerning the sale of new and used cars? What regulations have been applied to the sale of new or used cars through online auction sites? Does state regulation have the effect of protecting dealers from competition, to the possible detriment of consumers, or does existing state regulation provide important protection to consumers?

Cyber-Charter Schools:

How have states fostered or hindered cyber-charter schools? What are the competitive benefits of cyber-schools? Are there legitimate consumer protection concerns? Do the efforts of some school districts to limit cyber-charter schools raise any antitrust issues? What is the current status and focus of litigation, and what types of legislative solutions are possible?

Real Estate / Mortgages:

What types of state regulations limit online real estate and mortgage services? What are the costs to consumers? What is the impact of regulations requiring real estate closings or refinancings to be conducted solely by attorneys? What are the pro-consumer rationales for such regulations, and are there less restrictive means of achieving the same goals? What is the impact of Internet competition upon real estate commissions, and how are realtors responding to that competition?

Health Care / Pharmaceuticals / Telemedicine:

What types of state regulations limit online provision of health care goods and services, such as pharmaceuticals and telemedicine? What are the costs to consumers? Are these regulations directed mainly at out-of-state competitors? Are online prescriptions particularly susceptible to abuse? What are the pro-consumer rationales for regulations, and are there less restrictive means of achieving the same goals? Are reciprocity statutes an effective way to dealing with these issues?

Wine Sales:

How does the "three tier" system for distributing wine limit online sales, and are there legitimate justifications, such as temperance or taxation, for the system? What are the costs to consumers? Are there separate and measurable price and variety effects? Are there less restrictive means for achieving the same goals, and are reciprocity statutes a viable alternative? What is the status of the ongoing litigation addressing this system?

Auctions:

How have states applied their existing auctioneering regulations to online auction sites? What are the costs to consumers? Have states enacted new regulations targeted at online auctions? Do such regulations limit competition from online auctions, and if so how? Do those regulations impact large and small online auctioneers differently? To what extent are online auctions replacing traditional retail outlets, for consumer goods, automobiles (new or used), and other products? What types of state regulation can best protect consumers while still allowing competition from online auctions?

Contact Lenses:

What types of state regulations limit online sales of contact lenses? What are the costs to consumers? What are the health justifications for such regulations, and how valid are they? Are there separate issues for replacement lenses or disposable lenses? How should prescription requirements be administered? Have manufacturers limited the supply of contact lenses to online vendors, and if so why?

Funerals (Caskets):

What types of state regulations limit online casket sales? What are the costs to consumers? What are the pro-consumer rationales for such regulations, particularly in light of the recent controversies? Are there less restrictive means of achieving the same goals?

What is the status and focus of current litigation?

The Commission welcomes suggestions for other questions that also should be addressed. Proposed questions, identified as such, may be sent by electronic mail to ecompetition@ftc.gov.

By direction of the Commission.

Donald S. Clark
Secretary

Endnotes:

1. For more information on previous FTC-sponsored events regarding e-commerce, see <http://www.ftc.gov/opp/ecommerce/index.htm>; <http://www.ftc.gov/opa/2000/05/b2bworkshop.htm>.

Public Workshop: Possible Anticompetitive Efforts to Restrict Competition on the Internet
Federal Trade Commission
October 8-10, 2002

Many states have enacted regulations that may have the effect of protecting local bricks-and-mortar merchants from new Internet competitors. For example, all fifty states currently ban auto sales over the Internet unless they involve local franchise owners, and at least thirty states have laws that effectively preclude wine sales over the Internet. Seventeen states require online mortgage brokers to have a physical office in the state, which forces them to hire local residents. Many states also limit online competition for products ranging from contact lenses to funeral caskets. All of these restrictions may be justified by sound public policy, or they may ultimately prove to be attempts by existing industries to forestall the entry of Internet competitors and impede new forms of competition.

The aggregate costs of these restrictions may be very significant. Some scholars have estimated those costs as follows:

- the average purchaser of a car could save approximately two percent using an online service rather than buying in person from a dealer¹
- funeral homes commonly mark up caskets by over 500%, whereas third-party sellers (such as online sellers) typically mark up caskets only by around 100%²
- in the aggregate, potentially protectionist state regulation may cost consumers over \$15 billion annually.³

Similarly, some private companies have engaged in conduct that may raise antitrust issues. For instance, some dealers do not list prices for certain items they sell online; others don't sell certain items in their product line over the Internet at all, and urge horizontal competitors to follow suit. Again, some or all of these restrictions could be justified as procompetitive, or they could prove anticompetitive upon closer examination:

- in 1998, the FTC entered a consent decree with 25 car dealers in five Northwest

¹ Robert Atkinson and Thomas Wilhelm, *The Best States for E-Commerce* 19 (Mar. 2002) (second report of the Progressive Policy Institute) (citing Fiona Scott Morton, Florian Zettelmeyer, and Jorge Silva Riso, *Internet Car Retailing*, working paper, School of Management, Yale University, September 2000).

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states that had threatened to boycott Chrysler if it sold to low-cost Internet dealers⁴

- in one survey, 74 percent of manufacturers reported that they do not sell online because online sales could affect their retail channels⁵
- one analyst estimates that distributors and retailers often represent as much as 50% of the cost of some consumer products, and that much of this cost could disappear if consumers could buy online.⁶

The Federal Trade Commission has long sought to promote competition over the Internet. To advance these efforts, in August 2001 the FTC formed the Internet Task Force to evaluate potentially anticompetitive regulations and business practices that could impede e-commerce. Led by the FTC's Office of Policy Planning, the Task Force has examined the academic research and met with numerous industry participants and observers, including online companies, trade associations, and scholars. To date, the FTC has filed three competition advocacy comments due in large part to the Task Force's efforts:

- a joint FTC/Department of Justice comment to the North Carolina state bar opposing two new opinions that would require the physical presence of an attorney for all real estate closings and refinancings (which would significantly increase the costs of Internet lenders that rely disproportionately on lay closers);⁷
- a joint FTC/Department of Justice comment before the Rhode Island legislature on a similar real estate bill;⁸ and
- a staff comment before the Connecticut Board of Opticians, which is considering additional restrictions on out-of-state and Internet contact lens sellers.⁹

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To further build on these efforts, the FTC will host a public workshop to explore how certain state regulations may have anticompetitive effects on e-commerce and how certain e-commerce business practices may raise antitrust concerns. The workshop will take place at the FTC from October 8-10, 2002. The workshop will include consumer advocates, industry representatives (from all sides), academics, and state government representatives.

To focus the discussion, the workshop will organize panels to address certain specific industries that are important to consumers and that have experienced significant growth in online commerce, but that may also have been hampered by anticompetitive state regulation or business practices. These panels will address some or all of the following industries:

Retailing: E-commerce retail sales continue to have enormous potential. They grew 2.5 times faster than all retail sales in the fourth quarter of 2001, and according to some analysts are expected to reach \$3.2 trillion by 2004.

Automobiles: All 50 states restrict online auto sales. Dealers argue that these restrictions protect consumers against unscrupulous manufacturers, and that the Internet unfairly lets online sellers free ride off the dealers' personal services.

Cyber-Charter Schools:

Cyber-charter schools currently enroll 50,000 students nationwide, and proponents hope to reach the 850,000 students nationally who receive home-schooling. In several states, however, legislators have introduced bills to place a moratorium on cyber-charter schools.

Real Estate / Mortgages:

As a result of the multi-state licensing system and physical office requirements, only national mortgage firms that already have physical offices in all states can sell online services in all states.

Health Care / Pharmaceuticals / Telemedicine:

In an era of skyrocketing costs, online prescription drug purchases could potentially lower prices for patients in the same way that online contact lenses lowered prices. At the same time, online pharmacies raise significant consumer protection issues. Similarly, telemedicine could give patients access to portable medical equipment and digital imaging technology even if they are too elderly or infirm to visit a hospital easily, or if they live in rural areas far from a full-service hospital. Most states, however, substantially limit online pharmaceuticals and telemedicine. Approximately thirteen states specifically prohibit electronic prescription transmission, and several states require physicians to examine the patient physically before prescribing medicine.

Wine Sales: The Internet offers consumers a broad array of wine choices. Although currently only six percent of U.S. wineries produce ninety-five percent of the wine consumed domestically, some scholars estimate that hundreds or even thousands of smaller vineyards have marketed their wines online. Moreover, studies indicate that, when sold through normal distribution channels, a typical bottle of wine has a markup from supplier to retailer of 100% or higher.

Auctions: Internet auctions have become a cultural phenomenon, and some businesses have started to use auction sites as an alternate means of distributing their products. Some states, however, are considering whether to apply existing licensing requirements designed for traditional auctioneers to these websites.

Contact Lenses: Consumers can save substantial sums of money by purchasing contact lenses online, as some studies suggest that optometrists mark up lenses from the manufacturer by between one and five times the cost. Some groups within the medical community, however, argue that online sales of contact lenses threaten consumer health, such as by making consumers less likely to visit their eye doctor.

Funerals (Caskets): In addition to cost savings, online casket sellers can offer consumers a greater variety of choices, such as individualized caskets. Many states, however, require that casket purchases be made only through a licensed, bricks-and-mortar vendor.

The Commission also invites comments concerning other industries, not listed above, that may raise similar issues and merit similar examination. The workshop will be open to the public, and should (1) enhance the FTC's understanding of these issues, (2) help educate policymakers about the effects of possibly protectionist state regulation, (3) help educate private entities about the types of business practices that may or may not be viewed as problematic, and (4) increase understanding about ways to promote robust competition from e-commerce, to the benefit of consumers.



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

DIRECTOR
OFFICE OF POLICY PLANNING

August 16, 2002

Mr. Leonard Leo
Vice President, Lawyers Division
The Federalist Society for Law & Public Policy Studies
1015 18th Street, NW, Suite 425
Washington, D.C. 20036

VIA U.S. MAIL AND FACSIMILE

Re: FTC Public Workshop on E-Commerce

Dear Leonard:

The Federal Trade Commission will host a three-day public workshop in mid-October that could be of great interest to Federalist Society members. The workshop, "Possible Anticompetitive Efforts to Restrict Competition on the Internet," will take place from October 8-10, 2002, at FTC Headquarters, 600 Pennsylvania Ave., N.W., Washington, DC. Federalist Society members are welcome to attend the workshop and to submit relevant research or other written materials for the public record.

The workshop will focus on two types of possible e-commerce barriers. The first type includes state and local regulations, such as occupational licensing and physical office requirements, that may have pro-consumer or pro-competition rationales, but that nevertheless may restrict the entry of new Internet competitors. The second type includes business conduct barriers that arise when private parties employ potentially anticompetitive tactics, such as when suppliers or dealers apply collective pressure to limit online sales. The workshop will have separate panels to address a variety of industries that may have been hampered significantly by such barriers, including retailing, automobile sales, cyber-charter schools, real estate and mortgages, pharmaceutical sales, telemedicine, wine sales, auctions, contact lens sales, and casket sales.

We believe that this workshop may interest the Federalist Society and its members. Particularly given the current economic climate, we believe that state policymakers could benefit from a full understanding of the barriers facing new Internet entrants, including the potentially

pro-consumer and pro-competitive rationales behind these barriers and their actual impact on consumers. Indeed, some academic estimates suggest that the aggregate impact of these various barriers may cost consumers billions of dollars every year.

Ultimately, we hope that the workshop will allow state and federal law enforcement agencies to develop strategies to promote robust competition from e-commerce. Because many of these issues are new, the workshop could help educate policymakers and businesses about policies that may result in significant anticompetitive effects. To date, we have received dozens of calls from businesses, trade associations, consumer groups, and journalists who would like to participate in the workshop.

Along with this letter, I am sending you a background fact sheet and a copy of the Federal Register Notice announcing the workshop (also available at <http://www.ftc.gov/os/2002/07/ecomfrn.htm>), both of which describe the Internet workshop in more detail. I will also e-mail this letter to you, in case you should wish to e-mail any of this information to your members.

Again, we would welcome any information that the Federalist Society could provide on any of these issues, and in particular, we would welcome any specific examples of possible anticompetitive barriers to e-commerce. Comments may be mailed to the Commission, or, preferably, e-mailed to ecompetition@ftc.gov.

If you have comments or questions, feel free to call me at (202) 326-3683, or Jerry Ellig, our Deputy Director, at (202) 326-3528.

I very much hope that we will be able to work together to explore this important new area, and, ultimately, to help consumers realize the full benefits of e-commerce. We look forward to working with you and your members.

Sincerely,

A handwritten signature in black ink that reads "TED" in a stylized, slightly slanted font.

Ted Cruz
Director, Office of Policy Planning
Federal Trade Commission

cc: Jerry Ellig

FEDERAL REGISTER NOTICE

Public Workshop: Possible Anticompetitive Efforts to Restrict Competition on the Internet

AGENCY: Federal Trade Commission

ACTION: Notice of Public Workshop and Opportunity for Comment

SUMMARY: The Federal Trade Commission ("FTC" or "Commission") announces a public workshop on "Possible Anticompetitive Efforts to Restrict Competition on the Internet." The workshop will focus on how certain state regulation may have anticompetitive effects, and how certain business practices may raise antitrust concerns, in the context of business-to-consumer e-commerce. The workshop will be held at and administered by the FTC.

DATES: The workshop will take place on October 8-10, 2002. The workshop will be transcribed and placed on the public record. Any interested person may submit written comments responsive to any of the topics to be addressed; such comments should be submitted no later than the last session of the workshop. Any written comments received also will be placed on the public record.

ADDRESSES: When in session, the workshop will be held at the FTC headquarters, 600 Pennsylvania Avenue, N.W., Washington, D.C. All interested parties are welcome to attend. Pre-registration is not required.

Written comments should be submitted in both hard copy and electronic form. Six hard copies of each submission should be addressed to Donald S. Clark, Office of the Secretary, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. Submissions should be captioned "Comments regarding ecompetition." Electronic submissions may be sent by electronic mail to "ecompetition@ftc.gov". Alternatively, electronic submissions may be filed on a 3-1/2 inch computer disk with a label on the disk stating the name of the submitter and the name and version of the word processing program used to create the document.

FOR FURTHER INFORMATION CONTACT: Jerry Ellig, Deputy Director, Office of Policy Planning, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580; telephone (202) 326-3528; e-mail: jellig@ftc.gov. Detailed agendas for the workshop will be available on the FTC Home Page (<http://www.ftc.gov>) and through Mildred Taylor, Staff Secretary, at (202) 326-2553.

SUPPLEMENTARY INFORMATION:

Overview

In the past decade, there has been growing concern about possibly anticompetitive efforts to restrict competition on the Internet. In particular, many states have enacted regulations that have the direct effect of protecting local merchants from competition over the Internet. For example, some states require that online vendors maintain an in-state office, while other states prohibit online sales of certain products entirely. Some scholars have argued that these regulations are often simply attempts by existing industries to forestall the entry of new and innovative Internet competitors, much as in prior eras, other entrenched producers have benefitted from regulatory efforts to impede new forms of competition.

Similarly, some private companies have engaged in conduct that may raise antitrust issues. For instance, some manufacturers and dealers do not list prices for certain items online, and others do not sell certain items over the Internet altogether and urge horizontal competitors to do the same. Depending on the circumstances, some of these restrictions could be viewed as potentially anticompetitive. While much of this regulation and conduct undoubtedly has pro-competitive and pro-consumer rationales, the regulations impose costs on consumers that, according to some

estimates, may exceed \$15 billion annually.

For these reasons, a workshop on possible anticompetitive efforts to restrict competition on the Internet is timely, and will build on previous FTC-sponsored events that addressed other aspects of e-commerce.⁽¹⁾ In order to enhance the Commission's understanding of particular practices and regulations, the workshop will have panels to address certain specific industries, including some or all of the following: retailing, automobiles, cyber-charter schools, real estate / mortgages, health care / pharmaceuticals / telemedicine, wine sales, auctions, contact lenses, and funerals (caskets).

Each of these industries has experienced some growth in commerce via the Internet, but according to various commentators, each also may have been hampered by anticompetitive state regulation or business practices. See, e.g., Atkinson, *The Revenge of the Disintermediated* (Jan. 2001) (report of the Progressive Policy Institute); Atkinson and Wilhelm, *The Best States for E-Commerce* (Mar. 2002) (second report of the Progressive Policy Institute). In addition, these industries involve goods and services that comprise a very large portion of a consumer's budget, such as homes, cars, schools, and health care.

It is intended that each industry panel have at least one independent analyst or academic, and also have representatives from the affected industries (on both sides of the issue). Where appropriate, the panel also will include a representative from a government agency, including (where appropriate) representatives from different states. We hope that each panel will provide all sides of the issue, including the perspectives of industry, intermediaries, consumers, and regulators.

The Commission also invites comments concerning other industries, not listed above, that may raise similar issues and merit similar examination.

Issues

Below is a non-exhaustive list of issues to be addressed by the workshop. Written comments need not address all of these issues.

1. General Issues

What role does competition law and policy play in fostering or hindering e-commerce?
From a practical business perspective, how does each foster or impede e-commerce?
What do empirical studies show?

Does state regulation have protectionist effects, and if so how? What are the benefits of such regulation, and do the benefits outweigh the costs? What is the prevalence of such state regulation? Are some types of regulations more friendly to e-commerce?

Do businesses try to limit competition over the Internet through anticompetitive efforts, and if so how? What are the business justifications for these efforts?

2. Issues for Particular Industries

Retailing:

How and why do manufacturers limit their distributors' sales of certain products over the Internet? What are the costs to consumers? Do distributors pressure manufacturers into limiting sales over the Internet, and if so how? Are such efforts facilitated by horizontal agreements? Does such conduct raise antitrust concerns, and are there legitimate business justifications, such as concerns about free-riding, for limiting e-commerce sales?

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Have manufacturers been forced to limit Internet sales of automobiles, and if so how? What are the costs to consumers? Are there legitimate concerns about free-riding or differentials in bargaining power? Are there different issues concerning the sale of new and used cars? What regulations have been applied to the sale of new or used cars through online auction sites? Does state regulation have the effect of protecting dealers from competition, to the possible detriment of consumers, or does existing state regulation provide important protection to consumers?

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Funerals (Caskets): In addition to cost savings, online casket sellers can offer consumers a greater variety of choices, such as individualized caskets. Many states, however, require that casket purchases be made only through a licensed, bricks-and-mortar vendor.

The Commission also invites comments concerning other industries, not listed above, that may raise similar issues and merit similar examination. The workshop will be open to the public, and should (1) enhance the FTC's understanding of these issues, (2) help educate policymakers about the effects of possibly protectionist state regulation, (3) help educate private entities about the types of business practices that may or may not be viewed as problematic, and (4) increase understanding about ways to promote robust competition from e-commerce, to the benefit of consumers.



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

DIRECTOR
OFFICE OF POLICY PLANNING

August 23, 2002

VIA MAIL AND FACSIMILE

The Honorable Howard M. Metzenbaum
Chairman of the Board
Consumer Federation of America
1424 16th Street, N.W., Suite 504
Washington, D.C. 20036

Re: Invitation to Appear at FTC Public Workshop on E-Commerce

Dear Senator Metzenbaum:

I would like to invite you to appear at a three-day public workshop at the Federal Trade Commission on "Possible Anticompetitive Efforts to Restrict Competition on the Internet." If you are able to attend, we would ask you to testify on an overview panel with other leading scholars, commentators, and industry executives to describe their perspectives on possible barriers to e-commerce. The public workshop will take place from October 8-10, 2002, at the FTC, 600 Pennsylvania Ave., N.W., Washington, DC 20580. The overview panel will take place during the morning of October 8.

The workshop will focus on two types of possible e-commerce barriers. The first type includes state and local regulations, such as occupational licensing and physical office requirements, that may have pro-consumer or pro-competition rationales, but that nevertheless may restrict the entry of new Internet competitors. The second type includes business conduct barriers that arise when private parties employ potentially anticompetitive tactics, such as when suppliers or dealers apply collective pressure to limit online sales. The workshop will have separate panels to address a variety of industries that may have been hampered significantly by such barriers, including retailing, automobile sales, cyber-charter schools, real estate and mortgages, pharmaceutical sales, telemedicine, wine sales, auctions, contact lens sales, and casket sales.

Particularly given the current economic climate, gaining a full understanding of the barriers facing new Internet entrants and ultimately developing strategies to promote robust competition in e-commerce is both timely and important. Indeed, some academic estimates of the aggregate impact of these various barriers suggest that they cost consumers billions of dollars every year.

I hope that the workshop will help policymakers and businesses better understand both the potentially pro-consumer and pro-competitive rationales behind these barriers and the actual impact of them on consumers. Because many of these issues are new, the workshop could help educate policymakers and businesses about policies that ultimately may have significant anticompetitive effects. To date, we have received dozens of calls from businesses, trade associations, consumer groups, and journalists who would like to participate in the workshop.

Along with this letter, I am sending you a copy of the Federal Register Notice announcing the workshop and a background fact sheet, both of which describe the Internet workshop in more detail. This letter will be followed up by a phone call to your office from Asheesh Agarwal, an attorney in the Office of Policy Planning who is organizing the workshop. If you or your staff have further questions, feel free to call me, at (202) 326-3683, or Asheesh at (202) 326-3558.

We look forward to hearing your perspective on these important issues.

Sincerely,



Ted Cruz
Director, Office of Policy Planning
Federal Trade Commission

P.S.: Mark Cooper has agreed to be on the workshop panel on the auto industry, but we would welcome the chance to hear a more general consumer perspective on all of these issues from you as well.

FEDERAL REGISTER NOTICE

Public Workshop: Possible Anticompetitive Efforts to Restrict Competition on the Internet

AGENCY: Federal Trade Commission

ACTION: Notice of Public Workshop and Opportunity for Comment

SUMMARY: The Federal Trade Commission ("FTC" or "Commission") announces a public workshop on "Possible Anticompetitive Efforts to Restrict Competition on the Internet." The workshop will focus on how certain state regulation may have anticompetitive effects, and how certain business practices may raise antitrust concerns, in the context of business-to-consumer e-commerce. The workshop will be held at and administered by the FTC.

DATES: The workshop will take place on October 8-10, 2002. The workshop will be transcribed and placed on the public record. Any interested person may submit written comments responsive to any of the topics to be addressed; such comments should be submitted no later than the last session of the workshop. Any written comments received also will be placed on the public record.

ADDRESSES: When in session, the workshop will be held at the FTC headquarters, 600 Pennsylvania Avenue, N.W., Washington, D.C. All interested parties are welcome to attend. Pre-registration is not required.

Written comments should be submitted in both hard copy and electronic form. Six hard copies of each submission should be addressed to Donald S. Clark, Office of the Secretary, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. Submissions should be captioned "Comments regarding ecompetition." Electronic submissions may be sent by electronic mail to "ecompetition@ftc.gov". Alternatively, electronic submissions may be filed on a 3-1/2 inch computer disk with a label on the disk stating the name of the submitter and the name and version of the word processing program used to create the document.

FOR FURTHER INFORMATION CONTACT: Jerry Ellig, Deputy Director, Office of Policy Planning, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580; telephone (202) 326-3528; e-mail: jellig@ftc.gov. Detailed agendas for the workshop will be available on the FTC Home Page (<http://www.ftc.gov>) and through Mildred Taylor, Staff Secretary, at (202) 326-2553.

SUPPLEMENTARY INFORMATION:

Overview

In the past decade, there has been growing concern about possibly anticompetitive efforts to restrict competition on the Internet. In particular, many states have enacted regulations that have the direct effect of protecting local merchants from competition over the Internet. For example, some states require that online vendors maintain an in-state office, while other states prohibit online sales of certain products entirely. Some scholars have argued that these regulations are often simply attempts by existing industries to forestall the entry of new and innovative Internet competitors, much as in prior eras, other entrenched producers have benefitted from regulatory efforts to impede new forms of competition.

Similarly, some private companies have engaged in conduct that may raise antitrust issues. For instance, some manufacturers and dealers do not list prices for certain items online, and others do not sell certain items over the Internet altogether and urge horizontal competitors to do the same. Depending on the circumstances, some of these restrictions could be viewed as potentially anticompetitive. While much of this regulation and conduct undoubtedly has pro-competitive and pro-consumer rationales, the regulations impose costs on consumers that, according to some

estimates, may exceed \$15 billion annually.

For these reasons, a workshop on possible anticompetitive efforts to restrict competition on the Internet is timely, and will build on previous FTC-sponsored events that addressed other aspects of e-commerce.⁽¹⁾ In order to enhance the Commission's understanding of particular practices and regulations, the workshop will have panels to address certain specific industries, including some or all of the following: retailing, automobiles, cyber-charter schools, real estate / mortgages, health care / pharmaceuticals / telemedicine, wine sales, auctions, contact lenses, and funerals (caskets).

Each of these industries has experienced some growth in commerce via the Internet, but according to various commentators, each also may have been hampered by anticompetitive state regulation or business practices. See, e.g., Atkinson, *The Revenge of the Disintermediated* (Jan. 2001) (report of the Progressive Policy Institute); Atkinson and Wilhelm, *The Best States for E-Commerce* (Mar. 2002) (second report of the Progressive Policy Institute). In addition, these industries involve goods and services that comprise a very large portion of a consumer's budget, such as homes, cars, schools, and health care.

It is intended that each industry panel have at least one independent analyst or academic, and also have representatives from the affected industries (on both sides of the issue). Where appropriate, the panel also will include a representative from a government agency, including (where appropriate) representatives from different states. We hope that each panel will provide all sides of the issue, including the perspectives of industry, intermediaries, consumers, and regulators.

The Commission also invites comments concerning other industries, not listed above, that may raise similar issues and merit similar examination.

Issues

Below is a non-exhaustive list of issues to be addressed by the workshop. Written comments need not address all of these issues.

1. General Issues

What role does competition law and policy play in fostering or hindering e-commerce?
From a practical business perspective, how does each foster or impede e-commerce?
What do empirical studies show?

Does state regulation have protectionist effects, and if so how? What are the benefits of such regulation, and do the benefits outweigh the costs? What is the prevalence of such state regulation? Are some types of regulations more friendly to e-commerce?

Do businesses try to limit competition over the Internet through anticompetitive efforts, and if so how? What are the business justifications for these efforts?

2. Issues for Particular Industries

Retailing:

How and why do manufacturers limit their distributors' sales of certain products over the Internet? What are the costs to consumers? Do distributors pressure manufacturers into limiting sales over the Internet, and if so how? Are such efforts facilitated by horizontal agreements? Does such conduct raise antitrust concerns, and are there legitimate business justifications, such as concerns about free-riding, for limiting e-commerce sales?

Automobiles:

Have manufacturers been forced to limit Internet sales of automobiles, and if so how? What are the costs to consumers? Are there legitimate concerns about free-riding or differentials in bargaining power? Are there different issues concerning the sale of new and used cars? What regulations have been applied to the sale of new or used cars through online auction sites? Does state regulation have the effect of protecting dealers from competition, to the possible detriment of consumers, or does existing state regulation provide important protection to consumers?

Cyber-Charter Schools:

How have states fostered or hindered cyber-charter schools? What are the competitive benefits of cyber-schools? Are there legitimate consumer protection concerns? Do the efforts of some school districts to limit cyber-charter schools raise any antitrust issues? What is the current status and focus of litigation, and what types of legislative solutions are possible?

Real Estate / Mortgages:

What types of state regulations limit online real estate and mortgage services? What are the costs to consumers? What is the impact of regulations requiring real estate closings or refinancings to be conducted solely by attorneys? What are the pro-consumer rationales for such regulations, and are there less restrictive means of achieving the same goals? What is the impact of Internet competition upon real estate commissions, and how are realtors responding to that competition?

Health Care / Pharmaceuticals / Telemedicine:

What types of state regulations limit online provision of health care goods and services, such as pharmaceuticals and telemedicine? What are the costs to consumers? Are these regulations directed mainly at out-of-state competitors? Are online prescriptions particularly susceptible to abuse? What are the pro-consumer rationales for regulations, and are there less restrictive means of achieving the same goals? Are reciprocity statutes an effective way to dealing with these issues?

Wine Sales:

How does the "three tier" system for distributing wine limit online sales, and are there legitimate justifications, such as temperance or taxation, for the system? What are the costs to consumers? Are there separate and measurable price and variety effects? Are there less restrictive means for achieving the same goals, and are reciprocity statutes a viable alternative? What is the status of the ongoing litigation addressing this system?

Auctions:

How have states applied their existing auctioneering regulations to online auction sites? What are the costs to consumers? Have states enacted new regulations targeted at online auctions? Do such regulations limit competition from online auctions, and if so how? Do those regulations impact large and small online auctioneers differently? To what extent are online auctions replacing traditional retail outlets, for consumer goods, automobiles (new or used), and other products? What types of state regulation can best protect consumers while still allowing competition from online auctions?

Contact Lenses:

What types of state regulations limit online sales of contact lenses? What are the costs to consumers? What are the health justifications for such regulations, and how valid are they? Are there separate issues for replacement lenses or disposable lenses? How should prescription requirements be administered? Have manufacturers limited the supply of contact lenses to online vendors, and if so why?

Funerals (Caskets):

What types of state regulations limit online casket sales? What are the costs to consumers? What are the pro-consumer rationales for such regulations, particularly in light of the recent controversies? Are there less restrictive means of achieving the same goals?

What is the status and focus of current litigation?

The Commission welcomes suggestions for other questions that also should be addressed. Proposed questions, identified as such, may be sent by electronic mail to ecompetition@ftc.gov.

By direction of the Commission.

Donald S. Clark
Secretary

Endnotes:

1. For more information on previous FTC-sponsored events regarding e-commerce, see <http://www.ftc.gov/opp/ecommerce/index.htm>; <http://www.ftc.gov/opa/2000/05/b2bworkshop.htm>.

Public Workshop: Possible Anticompetitive Efforts to Restrict Competition on the Internet
Federal Trade Commission
October 8-10, 2002

Many states have enacted regulations that may have the effect of protecting local bricks-and-mortar merchants from new Internet competitors. For example, all fifty states currently ban auto sales over the Internet unless they involve local franchise owners, and at least thirty states have laws that effectively preclude wine sales over the Internet. Seventeen states require online mortgage brokers to have a physical office in the state, which forces them to hire local residents. Many states also limit online competition for products ranging from contact lenses to funeral caskets. All of these restrictions may be justified by sound public policy, or they may ultimately prove to be attempts by existing industries to forestall the entry of Internet competitors and impede new forms of competition.

The aggregate costs of these restrictions may be very significant. Some scholars have estimated those costs as follows:

- the average purchaser of a car could save approximately two percent using an online service rather than buying in person from a dealer¹
- funeral homes commonly mark up caskets by over 500%, whereas third-party sellers (such as online sellers) typically mark up caskets only by around 100%²
- in the aggregate, potentially protectionist state regulation may cost consumers over \$15 billion annually.³

Similarly, some private companies have engaged in conduct that may raise antitrust issues. For instance, some dealers do not list prices for certain items they sell online; others don't sell certain items in their product line over the Internet at all, and urge horizontal competitors to follow suit. Again, some or all of these restrictions could be justified as procompetitive, or they could prove anticompetitive upon closer examination:

- in 1998, the FTC entered a consent decree with 25 car dealers in five Northwest

¹ Robert Atkinson and Thomas Wilhelm, *The Best States for E-Commerce* 19 (Mar. 2002) (second report of the Progressive Policy Institute) (citing Fiona Scott Morton, Florian Zettelmeyer, and Jorge Silva Riso, *Internet Car Retailing*, working paper, School of Management, Yale University, September 2000).

² See USA Today, Oct. 8, 1999 (reporting mark-ups of 500%); Modern Maturity, "R.I.P. Off" (Mar.-Apr. 2000).

³ Robert Atkinson, *The Revenge of the Disintermediated* 2 (Jan. 2001) (first report of the Progressive Policy Institute) ("First PPI Report").

states that had threatened to boycott Chrysler if it sold to low-cost Internet dealers⁴

- in one survey, 74 percent of manufacturers reported that they do not sell online because online sales could affect their retail channels⁵
- one analyst estimates that distributors and retailers often represent as much as 50% of the cost of some consumer products, and that much of this cost could disappear if consumers could buy online.⁶

The Federal Trade Commission has long sought to promote competition over the Internet. To advance these efforts, in August 2001 the FTC formed the Internet Task Force to evaluate potentially anticompetitive regulations and business practices that could impede e-commerce. Led by the FTC's Office of Policy Planning, the Task Force has examined the academic research and met with numerous industry participants and observers, including online companies, trade associations, and scholars. To date, the FTC has filed three competition advocacy comments due in large part to the Task Force's efforts:

- a joint FTC/Department of Justice comment to the North Carolina state bar opposing two new opinions that would require the physical presence of an attorney for all real estate closings and refinancings (which would significantly increase the costs of Internet lenders that rely disproportionately on lay closers);⁷
- a joint FTC/Department of Justice comment before the Rhode Island legislature on a similar real estate bill;⁸ and
- a staff comment before the Connecticut Board of Opticians, which is considering additional restrictions on out-of-state and Internet contact lens sellers.⁹

⁴ See Consent Agreement in *In re Fair Allocation System*, No. 971-0065 (1998), available at <http://www.ftc.gov/os/1998/9808/9710065.agr.htm>.

⁵ First PPI Report at 14 (citing Candace Talmadge, "Retailers concerned as manufacturers sell online," *Reuters Internet*, December 31, 2000, <http://www.mercurycenter.com/svtech/news/breaking/internet/docs/7956161.htm>).

⁶ Doug Bartholomew, *E-Commerce Bullies* 51 (Sept. 4, 2000) (published in industryweek.com).

⁷ FTC/DOJ Letter to the Ethics Committee of the North Carolina State Bar re: State Bar Opinions Restricting Involvement of Non-Attorneys in Real Estate Closings and Refinancing Transactions (Dec. 14, 2001) available at <http://www.ftc.gov/be/V020006.htm>.

⁸ FTC/DOJ Letter to the Rhode Island House of Representatives re: Bill Restricting Competition from Non-Attorneys in Real Estate Closing Activities (Mar. 29, 2002) available at <http://www.ftc.gov/be/v020013.pdf>.

⁹ FTC Staff Comment Before the Connecticut Board of Examiners for Opticians (Mar. 27, 2002) available at <http://www.ftc.gov/be/v020007.htm>.

To further build on these efforts, the FTC will host a public workshop to explore how certain state regulations may have anticompetitive effects on e-commerce and how certain e-commerce business practices may raise antitrust concerns. The workshop will take place at the FTC from October 8-10, 2002. The workshop will include consumer advocates, industry representatives (from all sides), academics, and state government representatives.

To focus the discussion, the workshop will organize panels to address certain specific industries that are important to consumers and that have experienced significant growth in online commerce, but that may also have been hampered by anticompetitive state regulation or business practices. These panels will address some or all of the following industries:

Retailing: E-commerce retail sales continue to have enormous potential. They grew 2.5 times faster than all retail sales in the fourth quarter of 2001, and according to some analysts are expected to reach \$3.2 trillion by 2004.

Automobiles: All 50 states restrict online auto sales. Dealers argue that these restrictions protect consumers against unscrupulous manufacturers, and that the Internet unfairly lets online sellers free ride off the dealers' personal services.

Cyber-Charter Schools: Cyber-charter schools currently enroll 50,000 students nationwide, and proponents hope to reach the 850,000 students nationally who receive home-schooling. In several states, however, legislators have introduced bills to place a moratorium on cyber-charter schools.

Real Estate / Mortgages: As a result of the multi-state licensing system and physical office requirements, only national mortgage firms that already have physical offices in all states can sell online services in all states.

Health Care / Pharmaceuticals / Telemedicine: In an era of skyrocketing costs, online prescription drug purchases could potentially lower prices for patients in the same way that online contact lenses lowered prices. At the same time, online pharmacies raise significant consumer protection issues. Similarly, telemedicine could give patients access to portable medical equipment and digital imaging technology even if they are too elderly or infirm to visit a hospital easily, or if they live in rural areas far from a full-service hospital. Most states, however, substantially limit online pharmaceuticals and telemedicine. Approximately thirteen states specifically prohibit electronic prescription transmission, and several states require physicians to examine the patient physically before prescribing medicine.

Wine Sales: The Internet offers consumers a broad array of wine choices. Although currently only six percent of U.S. wineries produce ninety-five percent of the wine consumed domestically, some scholars estimate that hundreds or even thousands of smaller vineyards have marketed their wines online. Moreover, studies indicate that, when sold through normal distribution channels, a typical bottle of wine has a markup from supplier to retailer of 100% or higher.

Auctions: Internet auctions have become a cultural phenomenon, and some businesses have started to use auction sites as an alternate means of distributing their products. Some states, however, are considering whether to apply existing licensing requirements designed for traditional auctioneers to these websites.

Contact Lenses: Consumers can save substantial sums of money by purchasing contact lenses online, as some studies suggest that optometrists mark up lenses from the manufacturer by between one and five times the cost. Some groups within the medical community, however, argue that online sales of contact lenses threaten consumer health, such as by making consumers less likely to visit their eye doctor.

Funerals (Caskets): In addition to cost savings, online casket sellers can offer consumers a greater variety of choices, such as individualized caskets. Many states, however, require that casket purchases be made only through a licensed, bricks-and-mortar vendor.

The Commission also invites comments concerning other industries, not listed above, that may raise similar issues and merit similar examination. The workshop will be open to the public, and should (1) enhance the FTC's understanding of these issues, (2) help educate policymakers about the effects of possibly protectionist state regulation, (3) help educate private entities about the types of business practices that may or may not be viewed as problematic, and (4) increase understanding about ways to promote robust competition from e-commerce, to the benefit of consumers.



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

DIRECTOR
OFFICE OF POLICY PLANNING

August 23, 2002

VIA MAIL AND FACSIMILE

The Honorable Daniel Patrick Moynihan
One Woodrow Wilson Plaza
1300 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-3027

Re: Invitation to Appear at FTC Public Workshop on E-Commerce

Dear Senator Moynihan:

I would like to invite you to appear at a three-day public workshop at the Federal Trade Commission on "Possible Anticompetitive Efforts to Restrict Competition on the Internet." If you are able to attend, we would ask you to testify on an overview panel with other leading scholars, commentators, and industry executives to describe their perspectives on possible barriers to e-commerce. The public workshop will take place from October 8-10, 2002, at the FTC, 600 Pennsylvania Ave., N.W., Washington, DC 20580. The overview panel will take place during the morning of October 8.

The workshop will focus on two types of possible e-commerce barriers. The first type includes state and local regulations, such as occupational licensing and physical office requirements, that may have pro-consumer or pro-competition rationales, but that nevertheless may restrict the entry of new Internet competitors. The second type includes business conduct barriers that arise when private parties employ potentially anticompetitive tactics, such as when suppliers or dealers apply collective pressure to limit online sales. The workshop will have separate panels to address a variety of industries that may have been hampered significantly by such barriers, including retailing, automobile sales, cyber-charter schools, real estate and mortgages, pharmaceutical sales, telemedicine, wine sales, auctions, contact lens sales, and casket sales.

Particularly given the current economic climate, gaining a full understanding of the barriers facing new Internet entrants and ultimately developing strategies to promote robust competition in e-commerce is both timely and important. Indeed, some academic estimates of the aggregate impact of these various barriers suggest that they cost consumers billions of dollars every year.

I hope that the workshop will help policymakers and businesses better understand both the potentially pro-consumer and pro-competitive rationales behind these barriers and the actual impact of them on consumers. Because many of these issues are new, the workshop could help educate policymakers and businesses about policies that ultimately may have significant anticompetitive effects. To date, we have received dozens of calls from businesses, trade associations, consumer groups, and journalists who would like to participate in the workshop.

Along with this letter, I am sending you a copy of the Federal Register Notice announcing the workshop and a background fact sheet, both of which describe the Internet workshop in more detail. This letter will be followed up by a phone call to your office from Asheesh Agarwal, an attorney in the Office of Policy Planning who is organizing the workshop. If you or your staff have further questions, feel free to call me, at (202) 326-3683, or Asheesh at (202) 326-3558.

We look forward to hearing your perspective on these important issues.

Sincerely,

A handwritten signature in black ink, appearing to read 'Ted Cruz', with a long, sweeping horizontal line extending to the right.

Ted Cruz
Director, Office of Policy Planning
Federal Trade Commission

Billing Code: 6750-01P

FEDERAL REGISTER NOTICE

Public Workshop: Possible Anticompetitive Efforts to Restrict Competition on the Internet

AGENCY: Federal Trade Commission

ACTION: Notice of Public Workshop and Opportunity for Comment

SUMMARY: The Federal Trade Commission ("FTC" or "Commission") announces a public workshop on "Possible Anticompetitive Efforts to Restrict Competition on the Internet." The workshop will focus on how certain state regulation may have anticompetitive effects, and how certain business practices may raise antitrust concerns, in the context of business-to-consumer e-commerce. The workshop will be held at and administered by the FTC.

DATES: The workshop will take place on October 8-10, 2002. The workshop will be transcribed and placed on the public record. Any interested person may submit written comments responsive to any of the topics to be addressed; such comments should be submitted no later than the last session of the workshop. Any written comments received also will be placed on the public record.

ADDRESSES: When in session, the workshop will be held at the FTC headquarters, 600 Pennsylvania Avenue, N.W., Washington, D.C. All interested parties are welcome to attend. Pre-registration is not required.

Written comments should be submitted in both hard copy and electronic form. Six hard copies of each submission should be addressed to Donald S. Clark, Office of the Secretary, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. Submissions should be captioned "Comments regarding ecompetition." Electronic submissions may be sent by electronic mail to "ecompetition@ftc.gov". Alternatively, electronic submissions may be filed on a 3-1/2 inch computer disk with a label on the disk stating the name of the submitter and the name and version of the word processing program used to create the document.

FOR FURTHER INFORMATION CONTACT: Jerry Ellig, Deputy Director, Office of Policy Planning, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580; telephone (202) 326-3528; e-mail: jellig@ftc.gov. Detailed agendas for the workshop will be available on the FTC Home Page (<http://www.ftc.gov>) and through Mildred Taylor, Staff Secretary, at (202) 326-2553.

SUPPLEMENTARY INFORMATION:

Overview

In the past decade, there has been growing concern about possibly anticompetitive efforts to restrict competition on the Internet. In particular, many states have enacted regulations that have the direct effect of protecting local merchants from competition over the Internet. For example, some states require that online vendors maintain an in-state office, while other states prohibit online sales of certain products entirely. Some scholars have argued that these regulations are often simply attempts by existing industries to forestall the entry of new and innovative Internet competitors, much as in prior eras, other entrenched producers have benefitted from regulatory efforts to impede new forms of competition.

Similarly, some private companies have engaged in conduct that may raise antitrust issues. For instance, some manufacturers and dealers do not list prices for certain items online, and others do not sell certain items over the Internet altogether and urge horizontal competitors to do the same. Depending on the circumstances, some of these restrictions could be viewed as potentially anticompetitive. While much of this regulation and conduct undoubtedly has pro-competitive and pro-consumer rationales, the regulations impose costs on consumers that, according to some

estimates, may exceed \$15 billion annually.

For these reasons, a workshop on possible anticompetitive efforts to restrict competition on the Internet is timely, and will build on previous FTC-sponsored events that addressed other aspects of e-commerce.⁽¹⁾ In order to enhance the Commission's understanding of particular practices and regulations, the workshop will have panels to address certain specific industries, including some or all of the following: retailing, automobiles, cyber-charter schools, real estate / mortgages, health care / pharmaceuticals / telemedicine, wine sales, auctions, contact lenses, and funerals (caskets).

Each of these industries has experienced some growth in commerce via the Internet, but according to various commentators, each also may have been hampered by anticompetitive state regulation or business practices. See, e.g., Atkinson, *The Revenge of the Disintermediated* (Jan. 2001) (report of the Progressive Policy Institute); Atkinson and Wilhelm, *The Best States for E-Commerce* (Mar. 2002) (second report of the Progressive Policy Institute). In addition, these industries involve goods and services that comprise a very large portion of a consumer's budget, such as homes, cars, schools, and health care.

It is intended that each industry panel have at least one independent analyst or academic, and also have representatives from the affected industries (on both sides of the issue). Where appropriate, the panel also will include a representative from a government agency, including (where appropriate) representatives from different states. We hope that each panel will provide all sides of the issue, including the perspectives of industry, intermediaries, consumers, and regulators.

The Commission also invites comments concerning other industries, not listed above, that may raise similar issues and merit similar examination.

Issues

Below is a non-exhaustive list of issues to be addressed by the workshop. Written comments need not address all of these issues.

1. General Issues

What role does competition law and policy play in fostering or hindering e-commerce? From a practical business perspective, how does each foster or impede e-commerce? What do empirical studies show?

Does state regulation have protectionist effects, and if so how? What are the benefits of such regulation, and do the benefits outweigh the costs? What is the prevalence of such state regulation? Are some types of regulations more friendly to e-commerce?

Do businesses try to limit competition over the Internet through anticompetitive efforts, and if so how? What are the business justifications for these efforts?

2. Issues for Particular Industries

Retailing:

How and why do manufacturers limit their distributors' sales of certain products over the Internet? What are the costs to consumers? Do distributors pressure manufacturers into limiting sales over the Internet, and if so how? Are such efforts facilitated by horizontal agreements? Does such conduct raise antitrust concerns, and are there legitimate business justifications, such as concerns about free-riding, for limiting e-commerce sales?

Automobiles:

Have manufacturers been forced to limit Internet sales of automobiles, and if so how? What are the costs to consumers? Are there legitimate concerns about free-riding or differentials in bargaining power? Are there different issues concerning the sale of new and used cars? What regulations have been applied to the sale of new or used cars through online auction sites? Does state regulation have the effect of protecting dealers from competition, to the possible detriment of consumers, or does existing state regulation provide important protection to consumers?

Cyber-Charter Schools:

How have states fostered or hindered cyber-charter schools? What are the competitive benefits of cyber-schools? Are there legitimate consumer protection concerns? Do the efforts of some school districts to limit cyber-charter schools raise any antitrust issues? What is the current status and focus of litigation, and what types of legislative solutions are possible?

Real Estate / Mortgages:

What types of state regulations limit online real estate and mortgage services? What are the costs to consumers? What is the impact of regulations requiring real estate closings or refinancings to be conducted solely by attorneys? What are the pro-consumer rationales for such regulations, and are there less restrictive means of achieving the same goals? What is the impact of Internet competition upon real estate commissions, and how are realtors responding to that competition?

Health Care / Pharmaceuticals / Telemedicine:

What types of state regulations limit online provision of health care goods and services, such as pharmaceuticals and telemedicine? What are the costs to consumers? Are these regulations directed mainly at out-of-state competitors? Are online prescriptions particularly susceptible to abuse? What are the pro-consumer rationales for regulations, and are there less restrictive means of achieving the same goals? Are reciprocity statutes an effective way to dealing with these issues?

Wine Sales:

How does the "three tier" system for distributing wine limit online sales, and are there legitimate justifications, such as temperance or taxation, for the system? What are the costs to consumers? Are there separate and measurable price and variety effects? Are there less restrictive means for achieving the same goals, and are reciprocity statutes a viable alternative? What is the status of the ongoing litigation addressing this system?

Auctions:

How have states applied their existing auctioneering regulations to online auction sites? What are the costs to consumers? Have states enacted new regulations targeted at online auctions? Do such regulations limit competition from online auctions, and if so how? Do those regulations impact large and small online auctioneers differently? To what extent are online auctions replacing traditional retail outlets, for consumer goods, automobiles (new or used), and other products? What types of state regulation can best protect consumers while still allowing competition from online auctions?

Contact Lenses:

What types of state regulations limit online sales of contact lenses? What are the costs to consumers? What are the health justifications for such regulations, and how valid are they? Are there separate issues for replacement lenses or disposable lenses? How should prescription requirements be administered? Have manufacturers limited the supply of contact lenses to online vendors, and if so why?

Funerals (Caskets):

What types of state regulations limit online casket sales? What are the costs to consumers? What are the pro-consumer rationales for such regulations, particularly in light of the recent controversies? Are there less restrictive means of achieving the same goals?

What is the status and focus of current litigation?

The Commission welcomes suggestions for other questions that also should be addressed. Proposed questions, identified as such, may be sent by electronic mail to ecompetition@ftc.gov.

By direction of the Commission.

Donald S. Clark
Secretary

Endnotes:

1. For more information on previous FTC-sponsored events regarding e-commerce, see <http://www.ftc.gov/opp/ecommerce/index.htm>; <http://www.ftc.gov/opa/2000/05/b2bworkshop.htm>.

Public Workshop: Possible Anticompetitive Efforts to Restrict Competition on the Internet
Federal Trade Commission
October 8-10, 2002

Many states have enacted regulations that may have the effect of protecting local bricks-and-mortar merchants from new Internet competitors. For example, all fifty states currently ban auto sales over the Internet unless they involve local franchise owners, and at least thirty states have laws that effectively preclude wine sales over the Internet. Seventeen states require online mortgage brokers to have a physical office in the state, which forces them to hire local residents. Many states also limit online competition for products ranging from contact lenses to funeral caskets. All of these restrictions may be justified by sound public policy, or they may ultimately prove to be attempts by existing industries to forestall the entry of Internet competitors and impede new forms of competition.

The aggregate costs of these restrictions may be very significant. Some scholars have estimated those costs as follows:

- the average purchaser of a car could save approximately two percent using an online service rather than buying in person from a dealer¹
- funeral homes commonly mark up caskets by over 500%, whereas third-party sellers (such as online sellers) typically mark up caskets only by around 100%²
- in the aggregate, potentially protectionist state regulation may cost consumers over \$15 billion annually.³

Similarly, some private companies have engaged in conduct that may raise antitrust issues. For instance, some dealers do not list prices for certain items they sell online; others don't sell certain items in their product line over the Internet at all, and urge horizontal competitors to follow suit. Again, some or all of these restrictions could be justified as procompetitive, or they could prove anticompetitive upon closer examination:

- in 1998, the FTC entered a consent decree with 25 car dealers in five Northwest

¹ Robert Atkinson and Thomas Wilhelm, *The Best States for E-Commerce* 19 (Mar. 2002) (second report of the Progressive Policy Institute) (citing Fiona Scott Morton, Florian Zettelmeyer, and Jorge Silva Riso, *Internet Car Retailing*, working paper, School of Management, Yale University, September 2000).

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states that had threatened to boycott Chrysler if it sold to low-cost Internet dealers⁴

- in one survey, 74 percent of manufacturers reported that they do not sell online because online sales could affect their retail channels⁵
- one analyst estimates that distributors and retailers often represent as much as 50% of the cost of some consumer products, and that much of this cost could disappear if consumers could buy online.⁶

The Federal Trade Commission has long sought to promote competition over the Internet. To advance these efforts, in August 2001 the FTC formed the Internet Task Force to evaluate potentially anticompetitive regulations and business practices that could impede e-commerce. Led by the FTC's Office of Policy Planning, the Task Force has examined the academic research and met with numerous industry participants and observers, including online companies, trade associations, and scholars. To date, the FTC has filed three competition advocacy comments due in large part to the Task Force's efforts:

- a joint FTC/Department of Justice comment to the North Carolina state bar opposing two new opinions that would require the physical presence of an attorney for all real estate closings and refinancings (which would significantly increase the costs of Internet lenders that rely disproportionately on lay closers);⁷
- a joint FTC/Department of Justice comment before the Rhode Island legislature on a similar real estate bill;⁸ and
- a staff comment before the Connecticut Board of Opticians, which is considering additional restrictions on out-of-state and Internet contact lens sellers.⁹

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To further build on these efforts, the FTC will host a public workshop to explore how certain state regulations may have anticompetitive effects on e-commerce and how certain e-commerce business practices may raise antitrust concerns. The workshop will take place at the FTC from October 8-10, 2002. The workshop will include consumer advocates, industry representatives (from all sides), academics, and state government representatives.

To focus the discussion, the workshop will organize panels to address certain specific industries that are important to consumers and that have experienced significant growth in online commerce, but that may also have been hampered by anticompetitive state regulation or business practices. These panels will address some or all of the following industries:

Retailing: E-commerce retail sales continue to have enormous potential. They grew 2.5 times faster than all retail sales in the fourth quarter of 2001, and according to some analysts are expected to reach \$3.2 trillion by 2004.

Automobiles: All 50 states restrict online auto sales. Dealers argue that these restrictions protect consumers against unscrupulous manufacturers, and that the Internet unfairly lets online sellers free ride off the dealers' personal services.

Cyber-Charter Schools:

Cyber-charter schools currently enroll 50,000 students nationwide, and proponents hope to reach the 850,000 students nationally who receive home-schooling. In several states, however, legislators have introduced bills to place a moratorium on cyber-charter schools.

Real Estate / Mortgages:

As a result of the multi-state licensing system and physical office requirements, only national mortgage firms that already have physical offices in all states can sell online services in all states.

Health Care / Pharmaceuticals / Telemedicine:

In an era of skyrocketing costs, online prescription drug purchases could potentially lower prices for patients in the same way that online contact lenses lowered prices. At the same time, online pharmacies raise significant consumer protection issues. Similarly, telemedicine could give patients access to portable medical equipment and digital imaging technology even if they are too elderly or infirm to visit a hospital easily, or if they live in rural areas far from a full-service hospital. Most states, however, substantially limit online pharmaceuticals and telemedicine. Approximately thirteen states specifically prohibit electronic prescription transmission, and several states require physicians to examine the patient physically before prescribing medicine.

Wine Sales: The Internet offers consumers a broad array of wine choices. Although currently only six percent of U.S. wineries produce ninety-five percent of the wine consumed domestically, some scholars estimate that hundreds or even thousands of smaller vineyards have marketed their wines online. Moreover, studies indicate that, when sold through normal distribution channels, a typical bottle of wine has a markup from supplier to retailer of 100% or higher.

Auctions: Internet auctions have become a cultural phenomenon, and some businesses have started to use auction sites as an alternate means of distributing their products. Some states, however, are considering whether to apply existing licensing requirements designed for traditional auctioneers to these websites.

Contact Lenses: Consumers can save substantial sums of money by purchasing contact lenses online, as some studies suggest that optometrists mark up lenses from the manufacturer by between one and five times the cost. Some groups within the medical community, however, argue that online sales of contact lenses threaten consumer health, such as by making consumers less likely to visit their eye doctor.

Funerals (Caskets): In addition to cost savings, online casket sellers can offer consumers a greater variety of choices, such as individualized caskets. Many states, however, require that casket purchases be made only through a licensed, bricks-and-mortar vendor.

The Commission also invites comments concerning other industries, not listed above, that may raise similar issues and merit similar examination. The workshop will be open to the public, and should (1) enhance the FTC's understanding of these issues, (2) help educate policymakers about the effects of possibly protectionist state regulation, (3) help educate private entities about the types of business practices that may or may not be viewed as problematic, and (4) increase understanding about ways to promote robust competition from e-commerce, to the benefit of consumers.



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

DIRECTOR
OFFICE OF POLICY PLANNING

August 16, 2002

Mr. Duane Parde
Executive Director
American Legislative Exchange Council
910 17th St, NW, Fifth Floor
Washington, D.C. 20006

VIA U.S. MAIL AND FACSIMILE

Re: FTC Public Workshop on E-Commerce

Dear Mr. Parde:

The Federal Trade Commission will host a three-day public workshop in mid-October that could be of great interest to ALEC and its members. The workshop, "Possible Anticompetitive Efforts to Restrict Competition on the Internet," will take place from October 8-10, 2002, at FTC Headquarters, 600 Pennsylvania Ave., N.W., Washington, DC. ALEC members are welcome to attend the workshop and to submit relevant research or other written materials for the public record.

The workshop will focus on two types of possible e-commerce barriers. The first type includes state and local regulations, such as occupational licensing and physical office requirements, that may have pro-consumer or pro-competition rationales, but that nevertheless may restrict the entry of new Internet competitors. The second type includes business conduct barriers that arise when private parties employ potentially anticompetitive tactics, such as when suppliers or dealers apply collective pressure to limit online sales. The workshop will have separate panels to address a variety of industries that may have been hampered significantly by such barriers, including retailing, automobile sales, cyber-charter schools, real estate and mortgages, pharmaceutical sales, telemedicine, wine sales, auctions, contact lens sales, and casket sales.

We believe that this workshop may interest ALEC and its members. Particularly given the current economic climate, we believe that state policymakers could benefit from a full understanding of the barriers facing new Internet entrants, including the potentially pro-consumer and pro-competitive rationales behind these barriers and their actual impact on consumers.

Indeed, some academic estimates suggest that the aggregate impact of these various barriers may cost consumers billions of dollars every year.

Ultimately, we hope that the workshop will allow state and federal law enforcement agencies to develop strategies to promote robust competition from e-commerce. Because many of these issues are new, the workshop could help educate policymakers and businesses about policies that may result in significant anticompetitive effects. To date, we have received dozens of calls from businesses, trade associations, consumer groups, and journalists who would like to participate in the workshop.

Along with this letter, I am sending you a background fact sheet and a copy of the Federal Register Notice announcing the workshop (also available at <http://www.ftc.gov/os/2002/07/ecomfrn.htm>), both of which describe the Internet workshop in more detail. I will also e-mail this letter to ALEC, in case you should wish to e-mail any of this information to your members.

Again, we would welcome any information that ALEC could provide on any of these issues, and in particular, we would welcome any specific examples of possible anticompetitive barriers to e-commerce. Comments may be mailed to the Commission, or, preferably, e-mailed to ecompetition@ftc.gov.

If you have comments or questions, feel free to call me at (202) 326-3683, or Jerry Ellig, our Deputy Director, at (202) 326-3528.

I very much hope that we will be able to work together to explore this important new area, and, ultimately, to help consumers realize the full benefits of e-commerce. We look forward to working with you and your members.

Sincerely,



Ted Cruz
Director, Office of Policy Planning
Federal Trade Commission

cc: Jerry Ellig

Billing Code: 6750-01P

FEDERAL REGISTER NOTICE

Public Workshop: Possible Anticompetitive Efforts to Restrict Competition on the Internet

AGENCY: Federal Trade Commission

ACTION: Notice of Public Workshop and Opportunity for Comment

SUMMARY: The Federal Trade Commission ("FTC" or "Commission") announces a public workshop on "Possible Anticompetitive Efforts to Restrict Competition on the Internet." The workshop will focus on how certain state regulation may have anticompetitive effects, and how certain business practices may raise antitrust concerns, in the context of business-to-consumer e-commerce. The workshop will be held at and administered by the FTC.

DATES: The workshop will take place on October 8-10, 2002. The workshop will be transcribed and placed on the public record. Any interested person may submit written comments responsive to any of the topics to be addressed; such comments should be submitted no later than the last session of the workshop. Any written comments received also will be placed on the public record.

ADDRESSES: When in session, the workshop will be held at the FTC headquarters, 600 Pennsylvania Avenue, N.W., Washington, D.C. All interested parties are welcome to attend. Pre-registration is not required.

Written comments should be submitted in both hard copy and electronic form. Six hard copies of each submission should be addressed to Donald S. Clark, Office of the Secretary, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. Submissions should be captioned "Comments regarding ecompetition." Electronic submissions may be sent by electronic mail to "ecompetition@ftc.gov". Alternatively, electronic submissions may be filed on a 3-1/2 inch computer disk with a label on the disk stating the name of the submitter and the name and version of the word processing program used to create the document.

FOR FURTHER INFORMATION CONTACT: Jerry Ellig, Deputy Director, Office of Policy Planning, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580; telephone (202) 326-3528; e-mail: jellig@ftc.gov. Detailed agendas for the workshop will be available on the FTC Home Page (<http://www.ftc.gov>) and through Mildred Taylor, Staff Secretary, at (202) 326-2553.

SUPPLEMENTARY INFORMATION:

Overview

In the past decade, there has been growing concern about possibly anticompetitive efforts to restrict competition on the Internet. In particular, many states have enacted regulations that have the direct effect of protecting local merchants from competition over the Internet. For example, some states require that online vendors maintain an in-state office, while other states prohibit online sales of certain products entirely. Some scholars have argued that these regulations are often simply attempts by existing industries to forestall the entry of new and innovative Internet competitors, much as in prior eras, other entrenched producers have benefitted from regulatory efforts to impede new forms of competition.

Similarly, some private companies have engaged in conduct that may raise antitrust issues. For instance, some manufacturers and dealers do not list prices for certain items online, and others do not sell certain items over the Internet altogether and urge horizontal competitors to do the same. Depending on the circumstances, some of these restrictions could be viewed as potentially anticompetitive. While much of this regulation and conduct undoubtedly has pro-competitive and pro-consumer rationales, the regulations impose costs on consumers that, according to some

estimates, may exceed \$15 billion annually.

For these reasons, a workshop on possible anticompetitive efforts to restrict competition on the Internet is timely, and will build on previous FTC-sponsored events that addressed other aspects of e-commerce.⁽¹⁾ In order to enhance the Commission's understanding of particular practices and regulations, the workshop will have panels to address certain specific industries, including some or all of the following: retailing, automobiles, cyber-charter schools, real estate / mortgages, health care / pharmaceuticals / telemedicine, wine sales, auctions, contact lenses, and funerals (caskets).

Each of these industries has experienced some growth in commerce via the Internet, but according to various commentators, each also may have been hampered by anticompetitive state regulation or business practices. See, e.g., Atkinson, *The Revenge of the Disintermediated* (Jan. 2001) (report of the Progressive Policy Institute); Atkinson and Wilhelm, *The Best States for E-Commerce* (Mar. 2002) (second report of the Progressive Policy Institute). In addition, these industries involve goods and services that comprise a very large portion of a consumer's budget, such as homes, cars, schools, and health care.

It is intended that each industry panel have at least one independent analyst or academic, and also have representatives from the affected industries (on both sides of the issue). Where appropriate, the panel also will include a representative from a government agency, including (where appropriate) representatives from different states. We hope that each panel will provide all sides of the issue, including the perspectives of industry, intermediaries, consumers, and regulators.

The Commission also invites comments concerning other industries, not listed above, that may raise similar issues and merit similar examination.

Issues

Below is a non-exhaustive list of issues to be addressed by the workshop. Written comments need not address all of these issues.

1. General Issues

What role does competition law and policy play in fostering or hindering e-commerce?
From a practical business perspective, how does each foster or impede e-commerce?
What do empirical studies show?

Does state regulation have protectionist effects, and if so how? What are the benefits of such regulation, and do the benefits outweigh the costs? What is the prevalence of such state regulation? Are some types of regulations more friendly to e-commerce?

Do businesses try to limit competition over the Internet through anticompetitive efforts, and if so how? What are the business justifications for these efforts?

2. Issues for Particular Industries

Retailing:

How and why do manufacturers limit their distributors' sales of certain products over the Internet? What are the costs to consumers? Do distributors pressure manufacturers into limiting sales over the Internet, and if so how? Are such efforts facilitated by horizontal agreements? Does such conduct raise antitrust concerns, and are there legitimate business justifications, such as concerns about free-riding, for limiting e-commerce sales?

Automobiles:

Have manufacturers been forced to limit Internet sales of automobiles, and if so how? What are the costs to consumers? Are there legitimate concerns about free-riding or differentials in bargaining power? Are there different issues concerning the sale of new and used cars? What regulations have been applied to the sale of new or used cars through online auction sites? Does state regulation have the effect of protecting dealers from competition, to the possible detriment of consumers, or does existing state regulation provide important protection to consumers?

Cyber-Charter Schools:

How have states fostered or hindered cyber-charter schools? What are the competitive benefits of cyber-schools? Are there legitimate consumer protection concerns? Do the efforts of some school districts to limit cyber-charter schools raise any antitrust issues? What is the current status and focus of litigation, and what types of legislative solutions are possible?

Real Estate / Mortgages:

What types of state regulations limit online real estate and mortgage services? What are the costs to consumers? What is the impact of regulations requiring real estate closings or refinancings to be conducted solely by attorneys? What are the pro-consumer rationales for such regulations, and are there less restrictive means of achieving the same goals? What is the impact of Internet competition upon real estate commissions, and how are realtors responding to that competition?

Health Care / Pharmaceuticals / Telemedicine:

What types of state regulations limit online provision of health care goods and services, such as pharmaceuticals and telemedicine? What are the costs to consumers? Are these regulations directed mainly at out-of-state competitors? Are online prescriptions particularly susceptible to abuse? What are the pro-consumer rationales for regulations, and are there less restrictive means of achieving the same goals? Are reciprocity statutes an effective way to dealing with these issues?

Wine Sales:

How does the "three tier" system for distributing wine limit online sales, and are there legitimate justifications, such as temperance or taxation, for the system? What are the costs to consumers? Are there separate and measurable price and variety effects? Are there less restrictive means for achieving the same goals, and are reciprocity statutes a viable alternative? What is the status of the ongoing litigation addressing this system?

Auctions:

How have states applied their existing auctioneering regulations to online auction sites? What are the costs to consumers? Have states enacted new regulations targeted at online auctions? Do such regulations limit competition from online auctions, and if so how? Do those regulations impact large and small online auctioneers differently? To what extent are online auctions replacing traditional retail outlets, for consumer goods, automobiles (new or used), and other products? What types of state regulation can best protect consumers while still allowing competition from online auctions?

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The Commission welcomes suggestions for other questions that also should be addressed. Proposed questions, identified as such, may be sent by electronic mail to ecompetition@ftc.gov.

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Donald S. Clark
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Endnotes:

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UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

DIRECTOR
OFFICE OF POLICY PLANNING

August 16, 2002

Mr. William T. Pound
Executive Director
National Conference of State Legislatures
444 North Capitol Street, N.W., Suite 515
Washington, D.C. 20001

VIA U.S. MAIL AND FACSIMILE

Re: FTC Public Workshop on E-Commerce

Dear Mr. Pound:

The Federal Trade Commission will host a three-day public workshop in mid-October that could be of great interest to NCSL and its members. The workshop, "Possible Anticompetitive Efforts to Restrict Competition on the Internet," will take place from October 8-10, 2002, at FTC Headquarters, 600 Pennsylvania Ave., N.W., Washington, DC. NCSL members are welcome to attend the workshop and to submit relevant research or other written materials for the public record.

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We believe that this workshop may interest NCSL and its members. Particularly given the current economic climate, we believe that state policymakers could benefit from a full understanding of the barriers facing new Internet entrants, including the potentially pro-consumer and pro-competitive rationales behind these barriers and their actual impact on consumers.

Indeed, some academic estimates suggest that the aggregate impact of these various barriers may cost consumers billions of dollars every year.

Ultimately, we hope that the workshop will allow state and federal law enforcement agencies to develop strategies to promote robust competition from e-commerce. Because many of these issues are new, the workshop could help educate policymakers and businesses about policies that may result in significant anticompetitive effects. To date, we have received dozens of calls from businesses, trade associations, consumer groups, and journalists who would like to participate in the workshop.

Along with this letter, I am sending you a background fact sheet and a copy of the Federal Register Notice announcing the workshop (also available at <http://www.ftc.gov/os/2002/07/ecomfrn.htm>), both of which describe the Internet workshop in more detail. I will also e-mail this letter to NCSL, in case you should wish to e-mail any of this information to your members.

Again, we would welcome any information that NCSL could provide on any of these issues, and in particular, we would welcome any specific examples of possible anticompetitive barriers to e-commerce. Comments may be mailed to the Commission, or, preferably, e-mailed to ecompetition@ftc.gov.

If you have comments or questions, feel free to call me at (202) 326-3683, or Jerry Ellig, our Deputy Director, at (202) 326-3528.

I very much hope that we will be able to work together to explore this important new area, and, ultimately, to help consumers realize the full benefits of e-commerce. We look forward to working with you and your members.

Sincerely,

A handwritten signature in black ink, appearing to read 'Ted Cruz', with a stylized flourish at the end.

Ted Cruz
Director, Office of Policy Planning
Federal Trade Commission

cc: Jerry Ellig

FEDERAL REGISTER NOTICE

Public Workshop: Possible Anticompetitive Efforts to Restrict Competition on the Internet

AGENCY: Federal Trade Commission

ACTION: Notice of Public Workshop and Opportunity for Comment

SUMMARY: The Federal Trade Commission ("FTC" or "Commission") announces a public workshop on "Possible Anticompetitive Efforts to Restrict Competition on the Internet." The workshop will focus on how certain state regulation may have anticompetitive effects, and how certain business practices may raise antitrust concerns, in the context of business-to-consumer e-commerce. The workshop will be held at and administered by the FTC.

DATES: The workshop will take place on October 8-10, 2002. The workshop will be transcribed and placed on the public record. Any interested person may submit written comments responsive to any of the topics to be addressed; such comments should be submitted no later than the last session of the workshop. Any written comments received also will be placed on the public record.

ADDRESSES: When in session, the workshop will be held at the FTC headquarters, 600 Pennsylvania Avenue, N.W., Washington, D.C. All interested parties are welcome to attend. Pre-registration is not required.

Written comments should be submitted in both hard copy and electronic form. Six hard copies of each submission should be addressed to Donald S. Clark, Office of the Secretary, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. Submissions should be captioned "Comments regarding ecompetition." Electronic submissions may be sent by electronic mail to "ecompetition@ftc.gov". Alternatively, electronic submissions may be filed on a 3-1/2 inch computer disk with a label on the disk stating the name of the submitter and the name and version of the word processing program used to create the document.

FOR FURTHER INFORMATION CONTACT: Jerry Ellig, Deputy Director, Office of Policy Planning, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580; telephone (202) 326-3528; e-mail: jellig@ftc.gov. Detailed agendas for the workshop will be available on the FTC Home Page (<http://www.ftc.gov>) and through Mildred Taylor, Staff Secretary, at (202) 326-2553.

SUPPLEMENTARY INFORMATION:

Overview

In the past decade, there has been growing concern about possibly anticompetitive efforts to restrict competition on the Internet. In particular, many states have enacted regulations that have the direct effect of protecting local merchants from competition over the Internet. For example, some states require that online vendors maintain an in-state office, while other states prohibit online sales of certain products entirely. Some scholars have argued that these regulations are often simply attempts by existing industries to forestall the entry of new and innovative Internet competitors, much as in prior eras, other entrenched producers have benefitted from regulatory efforts to impede new forms of competition.

Similarly, some private companies have engaged in conduct that may raise antitrust issues. For instance, some manufacturers and dealers do not list prices for certain items online, and others do not sell certain items over the Internet altogether and urge horizontal competitors to do the same. Depending on the circumstances, some of these restrictions could be viewed as potentially anticompetitive. While much of this regulation and conduct undoubtedly has pro-competitive and pro-consumer rationales, the regulations impose costs on consumers that, according to some

estimates, may exceed \$15 billion annually.

For these reasons, a workshop on possible anticompetitive efforts to restrict competition on the Internet is timely, and will build on previous FTC-sponsored events that addressed other aspects of e-commerce.⁽¹⁾ In order to enhance the Commission's understanding of particular practices and regulations, the workshop will have panels to address certain specific industries, including some or all of the following: retailing, automobiles, cyber-charter schools, real estate / mortgages, health care / pharmaceuticals / telemedicine, wine sales, auctions, contact lenses, and funerals (caskets).

Each of these industries has experienced some growth in commerce via the Internet, but according to various commentators, each also may have been hampered by anticompetitive state regulation or business practices. See, e.g., Atkinson, *The Revenge of the Disintermediated* (Jan. 2001) (report of the Progressive Policy Institute); Atkinson and Wilhelm, *The Best States for E-Commerce* (Mar. 2002) (second report of the Progressive Policy Institute). In addition, these industries involve goods and services that comprise a very large portion of a consumer's budget, such as homes, cars, schools, and health care.

It is intended that each industry panel have at least one independent analyst or academic, and also have representatives from the affected industries (on both sides of the issue). Where appropriate, the panel also will include a representative from a government agency, including (where appropriate) representatives from different states. We hope that each panel will provide all sides of the issue, including the perspectives of industry, intermediaries, consumers, and regulators.

The Commission also invites comments concerning other industries, not listed above, that may raise similar issues and merit similar examination.

Issues

Below is a non-exhaustive list of issues to be addressed by the workshop. Written comments need not address all of these issues.

1. General Issues

What role does competition law and policy play in fostering or hindering e-commerce?
From a practical business perspective, how does each foster or impede e-commerce?
What do empirical studies show?

Does state regulation have protectionist effects, and if so how? What are the benefits of such regulation, and do the benefits outweigh the costs? What is the prevalence of such state regulation? Are some types of regulations more friendly to e-commerce?

Do businesses try to limit competition over the Internet through anticompetitive efforts, and if so how? What are the business justifications for these efforts?

2. Issues for Particular Industries

Retailing:

How and why do manufacturers limit their distributors' sales of certain products over the Internet? What are the costs to consumers? Do distributors pressure manufacturers into limiting sales over the Internet, and if so how? Are such efforts facilitated by horizontal agreements? Does such conduct raise antitrust concerns, and are there legitimate business justifications, such as concerns about free-riding, for limiting e-commerce sales?

Automobiles:

Have manufacturers been forced to limit Internet sales of automobiles, and if so how? What are the costs to consumers? Are there legitimate concerns about free-riding or differentials in bargaining power? Are there different issues concerning the sale of new and used cars? What regulations have been applied to the sale of new or used cars through online auction sites? Does state regulation have the effect of protecting dealers from competition, to the possible detriment of consumers, or does existing state regulation provide important protection to consumers?

Cyber-Charter Schools:

How have states fostered or hindered cyber-charter schools? What are the competitive benefits of cyber-schools? Are there legitimate consumer protection concerns? Do the efforts of some school districts to limit cyber-charter schools raise any antitrust issues? What is the current status and focus of litigation, and what types of legislative solutions are possible?

Real Estate / Mortgages:

What types of state regulations limit online real estate and mortgage services? What are the costs to consumers? What is the impact of regulations requiring real estate closings or refinancings to be conducted solely by attorneys? What are the pro-consumer rationales for such regulations, and are there less restrictive means of achieving the same goals? What is the impact of Internet competition upon real estate commissions, and how are realtors responding to that competition?

Health Care / Pharmaceuticals / Telemedicine:

What types of state regulations limit online provision of health care goods and services, such as pharmaceuticals and telemedicine? What are the costs to consumers? Are these regulations directed mainly at out-of-state competitors? Are online prescriptions particularly susceptible to abuse? What are the pro-consumer rationales for regulations, and are there less restrictive means of achieving the same goals? Are reciprocity statutes an effective way to dealing with these issues?

Wine Sales:

How does the "three tier" system for distributing wine limit online sales, and are there legitimate justifications, such as temperance or taxation, for the system? What are the costs to consumers? Are there separate and measurable price and variety effects? Are there less restrictive means for achieving the same goals, and are reciprocity statutes a viable alternative? What is the status of the ongoing litigation addressing this system?

Auctions:

How have states applied their existing auctioneering regulations to online auction sites? What are the costs to consumers? Have states enacted new regulations targeted at online auctions? Do such regulations limit competition from online auctions, and if so how? Do those regulations impact large and small online auctioneers differently? To what extent are online auctions replacing traditional retail outlets, for consumer goods, automobiles (new or used), and other products? What types of state regulation can best protect consumers while still allowing competition from online auctions?

Contact Lenses:

What types of state regulations limit online sales of contact lenses? What are the costs to consumers? What are the health justifications for such regulations, and how valid are they? Are there separate issues for replacement lenses or disposable lenses? How should prescription requirements be administered? Have manufacturers limited the supply of contact lenses to online vendors, and if so why?

Funerals (Caskets):

What types of state regulations limit online casket sales? What are the costs to consumers? What are the pro-consumer rationales for such regulations, particularly in light of the recent controversies? Are there less restrictive means of achieving the same goals?

What is the status and focus of current litigation?

The Commission welcomes suggestions for other questions that also should be addressed. Proposed questions, identified as such, may be sent by electronic mail to ecompetition@ftc.gov.

By direction of the Commission.

Donald S. Clark
Secretary

Endnotes:

1. For more information on previous FTC-sponsored events regarding e-commerce, see <http://www.ftc.gov/opp/ecommerce/index.htm>; <http://www.ftc.gov/opa/2000/05/b2bworkshop.htm>.

Public Workshop: Possible Anticompetitive Efforts to Restrict Competition on the Internet
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October 8-10, 2002

Many states have enacted regulations that may have the effect of protecting local bricks-and-mortar merchants from new Internet competitors. For example, all fifty states currently ban auto sales over the Internet unless they involve local franchise owners, and at least thirty states have laws that effectively preclude wine sales over the Internet. Seventeen states require online mortgage brokers to have a physical office in the state, which forces them to hire local residents. Many states also limit online competition for products ranging from contact lenses to funeral caskets. All of these restrictions may be justified by sound public policy, or they may ultimately prove to be attempts by existing industries to forestall the entry of Internet competitors and impede new forms of competition.

The aggregate costs of these restrictions may be very significant. Some scholars have estimated those costs as follows:

- the average purchaser of a car could save approximately two percent using an online service rather than buying in person from a dealer¹
- funeral homes commonly mark up caskets by over 500%, whereas third-party sellers (such as online sellers) typically mark up caskets only by around 100%²
- in the aggregate, potentially protectionist state regulation may cost consumers over \$15 billion annually.³

Similarly, some private companies have engaged in conduct that may raise antitrust issues. For instance, some dealers do not list prices for certain items they sell online; others don't sell certain items in their product line over the Internet at all, and urge horizontal competitors to follow suit. Again, some or all of these restrictions could be justified as procompetitive, or they could prove anticompetitive upon closer examination:

- in 1998, the FTC entered a consent decree with 25 car dealers in five Northwest

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states that had threatened to boycott Chrysler if it sold to low-cost Internet dealers⁴

- in one survey, 74 percent of manufacturers reported that they do not sell online because online sales could affect their retail channels⁵
- one analyst estimates that distributors and retailers often represent as much as 50% of the cost of some consumer products, and that much of this cost could disappear if consumers could buy online.⁶

The Federal Trade Commission has long sought to promote competition over the Internet. To advance these efforts, in August 2001 the FTC formed the Internet Task Force to evaluate potentially anticompetitive regulations and business practices that could impede e-commerce. Led by the FTC's Office of Policy Planning, the Task Force has examined the academic research and met with numerous industry participants and observers, including online companies, trade associations, and scholars. To date, the FTC has filed three competition advocacy comments due in large part to the Task Force's efforts:

- a joint FTC/Department of Justice comment to the North Carolina state bar opposing two new opinions that would require the physical presence of an attorney for all real estate closings and refinancings (which would significantly increase the costs of Internet lenders that rely disproportionately on lay closers);⁷
- a joint FTC/Department of Justice comment before the Rhode Island legislature on a similar real estate bill;⁸ and
- a staff comment before the Connecticut Board of Opticians, which is considering additional restrictions on out-of-state and Internet contact lens sellers.⁹

⁴ See Consent Agreement in *In re Fair Allocation System*, No. 971-0065 (1998), available at <http://www.ftc.gov/os/1998/9808/9710065.agr.htm>.

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⁶ Doug Bartholomew, *E-Commerce Bullies* 51 (Sept. 4, 2000) (published in industryweek.com).

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⁹ FTC Staff Comment Before the Connecticut Board of Examiners for Opticians (Mar. 27, 2002) available at <http://www.ftc.gov/be/v020007.htm>.

To further build on these efforts, the FTC will host a public workshop to explore how certain state regulations may have anticompetitive effects on e-commerce and how certain e-commerce business practices may raise antitrust concerns. The workshop will take place at the FTC from October 8-10, 2002. The workshop will include consumer advocates, industry representatives (from all sides), academics, and state government representatives.

To focus the discussion, the workshop will organize panels to address certain specific industries that are important to consumers and that have experienced significant growth in online commerce, but that may also have been hampered by anticompetitive state regulation or business practices. These panels will address some or all of the following industries:

Retailing: E-commerce retail sales continue to have enormous potential. They grew 2.5 times faster than all retail sales in the fourth quarter of 2001, and according to some analysts are expected to reach \$3.2 trillion by 2004.

Automobiles: All 50 states restrict online auto sales. Dealers argue that these restrictions protect consumers against unscrupulous manufacturers, and that the Internet unfairly lets online sellers free ride off the dealers' personal services.

Cyber-Charter Schools:

Cyber-charter schools currently enroll 50,000 students nationwide, and proponents hope to reach the 850,000 students nationally who receive home-schooling. In several states, however, legislators have introduced bills to place a moratorium on cyber-charter schools.

Real Estate / Mortgages:

As a result of the multi-state licensing system and physical office requirements, only national mortgage firms that already have physical offices in all states can sell online services in all states.

Health Care / Pharmaceuticals / Telemedicine:

In an era of skyrocketing costs, online prescription drug purchases could potentially lower prices for patients in the same way that online contact lenses lowered prices. At the same time, online pharmacies raise significant consumer protection issues. Similarly, telemedicine could give patients access to portable medical equipment and digital imaging technology even if they are too elderly or infirm to visit a hospital easily, or if they live in rural areas far from a full-service hospital. Most states, however, substantially limit online pharmaceuticals and telemedicine. Approximately thirteen states specifically prohibit electronic prescription transmission, and several states require physicians to examine the patient physically before prescribing medicine.

Wine Sales: The Internet offers consumers a broad array of wine choices. Although currently only six percent of U.S. wineries produce ninety-five percent of the wine consumed domestically, some scholars estimate that hundreds or even thousands of smaller vineyards have marketed their wines online. Moreover, studies indicate that, when sold through normal distribution channels, a typical bottle of wine has a markup from supplier to retailer of 100% or higher.

Auctions: Internet auctions have become a cultural phenomenon, and some businesses have started to use auction sites as an alternate means of distributing their products. Some states, however, are considering whether to apply existing licensing requirements designed for traditional auctioneers to these websites.

Contact Lenses: Consumers can save substantial sums of money by purchasing contact lenses online, as some studies suggest that optometrists mark up lenses from the manufacturer by between one and five times the cost. Some groups within the medical community, however, argue that online sales of contact lenses threaten consumer health, such as by making consumers less likely to visit their eye doctor.

Funerals (Caskets): In addition to cost savings, online casket sellers can offer consumers a greater variety of choices, such as individualized caskets. Many states, however, require that casket purchases be made only through a licensed, bricks-and-mortar vendor.

The Commission also invites comments concerning other industries, not listed above, that may raise similar issues and merit similar examination. The workshop will be open to the public, and should (1) enhance the FTC's understanding of these issues, (2) help educate policymakers about the effects of possibly protectionist state regulation, (3) help educate private entities about the types of business practices that may or may not be viewed as problematic, and (4) increase understanding about ways to promote robust competition from e-commerce, to the benefit of consumers.



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

DIRECTOR
OFFICE OF POLICY PLANNING

August 16, 2002

Ms. Sarah Reznek
Ms. Saira Nayak-Lieb
National Association of Attorneys General
750 First Street, NE, Suite 1100
Washington, D.C. 20002

VIA U.S. MAIL AND FACSIMILE

Re: FTC Public Workshop on E-Commerce

Dear Sarah and Saira:

It was a pleasure meeting with you last Tuesday, and we look forward to working with you and NAAG in developing the workshop. As we discussed, below is a draft of an e-mail for your membership:

The Federal Trade Commission will host a three-day public workshop in mid-October that could be of great interest to NAAG and its members. The workshop, "Possible Anticompetitive Efforts to Restrict Competition on the Internet," will take place from October 8-10, 2002, at FTC Headquarters, 600 Pennsylvania Ave., N.W., Washington, DC. NAAG members are welcome to attend the workshop and to submit relevant research or other written materials for the public record.

The workshop will focus on two types of possible e-commerce barriers. The first type includes state and local regulations, such as occupational licensing and physical office requirements, that may have pro-consumer or pro-competition rationales, but that nevertheless may restrict the entry of new Internet competitors. The second type includes business conduct barriers that arise when private parties employ potentially anticompetitive tactics, such as when suppliers or dealers apply collective pressure to limit online sales. The workshop will have separate panels to address a variety of industries that may have been hampered significantly by such barriers, including retailing, automobile sales, cyber-charter schools, real estate and mortgages, pharmaceutical sales, telemedicine, wine sales, auctions, contact lens sales, and casket sales.

estimates, may exceed \$15 billion annually.

For these reasons, a workshop on possible anticompetitive efforts to restrict competition on the Internet is timely, and will build on previous FTC-sponsored events that addressed other aspects of e-commerce.⁽¹⁾ In order to enhance the Commission's understanding of particular practices and regulations, the workshop will have panels to address certain specific industries, including some or all of the following: retailing, automobiles, cyber-charter schools, real estate / mortgages, health care / pharmaceuticals / telemedicine, wine sales, auctions, contact lenses, and funerals (caskets).

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Issues

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1. General Issues

What role does competition law and policy play in fostering or hindering e-commerce? From a practical business perspective, how does each foster or impede e-commerce? What do empirical studies show?

Does state regulation have protectionist effects, and if so how? What are the benefits of such regulation, and do the benefits outweigh the costs? What is the prevalence of such state regulation? Are some types of regulations more friendly to e-commerce?

Do businesses try to limit competition over the Internet through anticompetitive efforts, and if so how? What are the business justifications for these efforts?

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How and why do manufacturers limit their distributors' sales of certain products over the Internet? What are the costs to consumers? Do distributors pressure manufacturers into limiting sales over the Internet, and if so how? Are such efforts facilitated by horizontal agreements? Does such conduct raise antitrust concerns, and are there legitimate business justifications, such as concerns about free-riding, for limiting e-commerce sales?

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Donald S. Clark
Secretary

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To further build on these efforts, the FTC will host a public workshop to explore how certain state regulations may have anticompetitive effects on e-commerce and how certain e-commerce business practices may raise antitrust concerns. The workshop will take place at the FTC from October 8-10, 2002. The workshop will include consumer advocates, industry representatives (from all sides), academics, and state government representatives.

To focus the discussion, the workshop will organize panels to address certain specific industries that are important to consumers and that have experienced significant growth in online commerce, but that may also have been hampered by anticompetitive state regulation or business practices. These panels will address some or all of the following industries:

Retailing: E-commerce retail sales continue to have enormous potential. They grew 2.5 times faster than all retail sales in the fourth quarter of 2001, and according to some analysts are expected to reach \$3.2 trillion by 2004.

Automobiles: All 50 states restrict online auto sales. Dealers argue that these restrictions protect consumers against unscrupulous manufacturers, and that the Internet unfairly lets online sellers free ride off the dealers' personal services.

Cyber-Charter Schools:

Cyber-charter schools currently enroll 50,000 students nationwide, and proponents hope to reach the 850,000 students nationally who receive home-schooling. In several states, however, legislators have introduced bills to place a moratorium on cyber-charter schools.

Real Estate / Mortgages:

As a result of the multi-state licensing system and physical office requirements, only national mortgage firms that already have physical offices in all states can sell online services in all states.

Health Care / Pharmaceuticals / Telemedicine:

In an era of skyrocketing costs, online prescription drug purchases could potentially lower prices for patients in the same way that online contact lenses lowered prices. At the same time, online pharmacies raise significant consumer protection issues. Similarly, telemedicine could give patients access to portable medical equipment and digital imaging technology even if they are too elderly or infirm to visit a hospital easily, or if they live in rural areas far from a full-service hospital. Most states, however, substantially limit online pharmaceuticals and telemedicine. Approximately thirteen states specifically prohibit electronic prescription transmission, and several states require physicians to examine the patient physically before prescribing medicine.

Wine Sales: The Internet offers consumers a broad array of wine choices. Although currently only six percent of U.S. wineries produce ninety-five percent of the wine consumed domestically, some scholars estimate that hundreds or even thousands of smaller vineyards have marketed their wines online. Moreover, studies indicate that, when sold through normal distribution channels, a typical bottle of wine has a markup from supplier to retailer of 100% or higher.

Auctions: Internet auctions have become a cultural phenomenon, and some businesses have started to use auction sites as an alternate means of distributing their products. Some states, however, are considering whether to apply existing licensing requirements designed for traditional auctioneers to these websites.

Contact Lenses: Consumers can save substantial sums of money by purchasing contact lenses online, as some studies suggest that optometrists mark up lenses from the manufacturer by between one and five times the cost. Some groups within the medical community, however, argue that online sales of contact lenses threaten consumer health, such as by making consumers less likely to visit their eye doctor.

Funerals (Caskets): In addition to cost savings, online casket sellers can offer consumers a greater variety of choices, such as individualized caskets. Many states, however, require that casket purchases be made only through a licensed, bricks-and-mortar vendor.

The Commission also invites comments concerning other industries, not listed above, that may raise similar issues and merit similar examination. The workshop will be open to the public, and should (1) enhance the FTC's understanding of these issues, (2) help educate policymakers about the effects of possibly protectionist state regulation, (3) help educate private entities about the types of business practices that may or may not be viewed as problematic, and (4) increase understanding about ways to promote robust competition from e-commerce, to the benefit of consumers.



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

DIRECTOR
OFFICE OF POLICY PLANNING

August 23, 2002

VIA MAIL AND FACSIMILE

Mr. Leonard H. Roberts
Chairman and Chief Executive Officer
RadioShack Corporation
100 Throckmorton Street, Suite 1800
Fort Worth, TX 76102

Re: Invitation to Appear at FTC Public Workshop on E-Commerce

Dear Mr. Roberts:

I would like to invite you to appear at a three-day public workshop at the Federal Trade Commission on "Possible Anticompetitive Efforts to Restrict Competition on the Internet." If you are able to attend, we would ask you to testify on an overview panel with other leading executives to describe industry's perspectives on possible barriers to e-commerce. The public workshop will take place from October 8-10, 2002, at the FTC, 600 Pennsylvania Ave., N.W., Washington, DC 20580. The overview panel will take place during the morning of October 8.

The workshop will focus on two types of possible e-commerce barriers. The first type includes state and local regulations, such as occupational licensing and physical office requirements, that may have pro-consumer or pro-competition rationales, but that nevertheless may restrict the entry of new Internet competitors. The second type includes business conduct barriers that arise when private parties employ potentially anticompetitive tactics, such as when suppliers or dealers apply collective pressure to limit online sales. The workshop will have separate panels to address a variety of industries that may have been hampered significantly by such barriers, including retailing, automobile sales, cyber-charter schools, real estate and mortgages, pharmaceutical sales, telemedicine, wine sales, auctions, contact lens sales, and casket sales.

Particularly given the current economic climate, gaining a full understanding of the barriers facing new Internet entrants and ultimately developing strategies to promote robust competition in e-commerce is both timely and important. Indeed, some academic estimates of the aggregate impact of these various barriers suggest that they cost consumers billions of dollars every year.

I hope that the workshop will help policymakers and businesses better understand both the potentially pro-consumer and pro-competitive rationales behind these barriers and the actual impact of them on consumers. Because many of these issues are new, the workshop could help educate policymakers and businesses about policies that ultimately may have significant anticompetitive effects. To date, we have received dozens of calls from businesses, trade associations, consumer groups, and journalists who would like to participate in the workshop.

Along with this letter, I am sending you a copy of the Federal Register Notice announcing the workshop and a background fact sheet, both of which describe the Internet workshop in more detail. This letter will be followed up by a phone call to your office from Asheesh Agarwal, an attorney in the Office of Policy Planning who is organizing the workshop. If you or your staff have further questions, feel free to call me, at (202) 326-3683, or Asheesh at (202) 326-3558.

We look forward to hearing RadioShack's perspective on these important issues.

Sincerely,

A handwritten signature in black ink, appearing to read "Ted Cruz", with a stylized flourish at the end.

Ted Cruz
Director, Office of Policy Planning
Federal Trade Commission

cc: Asheesh Agarwal

FEDERAL REGISTER NOTICE

Public Workshop: Possible Anticompetitive Efforts to Restrict Competition on the Internet

AGENCY: Federal Trade Commission

ACTION: Notice of Public Workshop and Opportunity for Comment

SUMMARY: The Federal Trade Commission ("FTC" or "Commission") announces a public workshop on "Possible Anticompetitive Efforts to Restrict Competition on the Internet." The workshop will focus on how certain state regulation may have anticompetitive effects, and how certain business practices may raise antitrust concerns, in the context of business-to-consumer e-commerce. The workshop will be held at and administered by the FTC.

DATES: The workshop will take place on October 8-10, 2002. The workshop will be transcribed and placed on the public record. Any interested person may submit written comments responsive to any of the topics to be addressed; such comments should be submitted no later than the last session of the workshop. Any written comments received also will be placed on the public record.

ADDRESSES: When in session, the workshop will be held at the FTC headquarters, 600 Pennsylvania Avenue, N.W., Washington, D.C. All interested parties are welcome to attend. Pre-registration is not required.

Written comments should be submitted in both hard copy and electronic form. Six hard copies of each submission should be addressed to Donald S. Clark, Office of the Secretary, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. Submissions should be captioned "Comments regarding ecompetition." Electronic submissions may be sent by electronic mail to "ecompetition@ftc.gov". Alternatively, electronic submissions may be filed on a 3-1/2 inch computer disk with a label on the disk stating the name of the submitter and the name and version of the word processing program used to create the document.

FOR FURTHER INFORMATION CONTACT: Jerry Ellig, Deputy Director, Office of Policy Planning, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580; telephone (202) 326-3528; e-mail: jellig@ftc.gov. Detailed agendas for the workshop will be available on the FTC Home Page (<http://www.ftc.gov>) and through Mildred Taylor, Staff Secretary, at (202) 326-2553.

SUPPLEMENTARY INFORMATION:

Overview

In the past decade, there has been growing concern about possibly anticompetitive efforts to restrict competition on the Internet. In particular, many states have enacted regulations that have the direct effect of protecting local merchants from competition over the Internet. For example, some states require that online vendors maintain an in-state office, while other states prohibit online sales of certain products entirely. Some scholars have argued that these regulations are often simply attempts by existing industries to forestall the entry of new and innovative Internet competitors, much as in prior eras, other entrenched producers have benefitted from regulatory efforts to impede new forms of competition.

Similarly, some private companies have engaged in conduct that may raise antitrust issues. For instance, some manufacturers and dealers do not list prices for certain items online, and others do not sell certain items over the Internet altogether and urge horizontal competitors to do the same. Depending on the circumstances, some of these restrictions could be viewed as potentially anticompetitive. While much of this regulation and conduct undoubtedly has pro-competitive and pro-consumer rationales, the regulations impose costs on consumers that, according to some

estimates, may exceed \$15 billion annually.

For these reasons, a workshop on possible anticompetitive efforts to restrict competition on the Internet is timely, and will build on previous FTC-sponsored events that addressed other aspects of e-commerce.⁽¹⁾ In order to enhance the Commission's understanding of particular practices and regulations, the workshop will have panels to address certain specific industries, including some or all of the following: retailing, automobiles, cyber-charter schools, real estate / mortgages, health care / pharmaceuticals / telemedicine, wine sales, auctions, contact lenses, and funerals (caskets).

Each of these industries has experienced some growth in commerce via the Internet, but according to various commentators, each also may have been hampered by anticompetitive state regulation or business practices. See, e.g., Atkinson, *The Revenge of the Disintermediated* (Jan. 2001) (report of the Progressive Policy Institute); Atkinson and Wilhelm, *The Best States for E-Commerce* (Mar. 2002) (second report of the Progressive Policy Institute). In addition, these industries involve goods and services that comprise a very large portion of a consumer's budget, such as homes, cars, schools, and health care.

It is intended that each industry panel have at least one independent analyst or academic, and also have representatives from the affected industries (on both sides of the issue). Where appropriate, the panel also will include a representative from a government agency, including (where appropriate) representatives from different states. We hope that each panel will provide all sides of the issue, including the perspectives of industry, intermediaries, consumers, and regulators.

The Commission also invites comments concerning other industries, not listed above, that may raise similar issues and merit similar examination.

Issues

Below is a non-exhaustive list of issues to be addressed by the workshop. Written comments need not address all of these issues.

1. General Issues

What role does competition law and policy play in fostering or hindering e-commerce? From a practical business perspective, how does each foster or impede e-commerce? What do empirical studies show?

Does state regulation have protectionist effects, and if so how? What are the benefits of such regulation, and do the benefits outweigh the costs? What is the prevalence of such state regulation? Are some types of regulations more friendly to e-commerce?

Do businesses try to limit competition over the Internet through anticompetitive efforts, and if so how? What are the business justifications for these efforts?

2. Issues for Particular Industries

Retailing:

How and why do manufacturers limit their distributors' sales of certain products over the Internet? What are the costs to consumers? Do distributors pressure manufacturers into limiting sales over the Internet, and if so how? Are such efforts facilitated by horizontal agreements? Does such conduct raise antitrust concerns, and are there legitimate business justifications, such as concerns about free-riding, for limiting e-commerce sales?

Automobiles:

Have manufacturers been forced to limit Internet sales of automobiles, and if so how? What are the costs to consumers? Are there legitimate concerns about free-riding or differentials in bargaining power? Are there different issues concerning the sale of new and used cars? What regulations have been applied to the sale of new or used cars through online auction sites? Does state regulation have the effect of protecting dealers from competition, to the possible detriment of consumers, or does existing state regulation provide important protection to consumers?

Cyber-Charter Schools:

How have states fostered or hindered cyber-charter schools? What are the competitive benefits of cyber-schools? Are there legitimate consumer protection concerns? Do the efforts of some school districts to limit cyber-charter schools raise any antitrust issues? What is the current status and focus of litigation, and what types of legislative solutions are possible?

Real Estate / Mortgages:

What types of state regulations limit online real estate and mortgage services? What are the costs to consumers? What is the impact of regulations requiring real estate closings or refinancings to be conducted solely by attorneys? What are the pro-consumer rationales for such regulations, and are there less restrictive means of achieving the same goals? What is the impact of Internet competition upon real estate commissions, and how are realtors responding to that competition?

Health Care / Pharmaceuticals / Telemedicine:

What types of state regulations limit online provision of health care goods and services, such as pharmaceuticals and telemedicine? What are the costs to consumers? Are these regulations directed mainly at out-of-state competitors? Are online prescriptions particularly susceptible to abuse? What are the pro-consumer rationales for regulations, and are there less restrictive means of achieving the same goals? Are reciprocity statutes an effective way to dealing with these issues?

Wine Sales:

How does the "three tier" system for distributing wine limit online sales, and are there legitimate justifications, such as temperance or taxation, for the system? What are the costs to consumers? Are there separate and measurable price and variety effects? Are there less restrictive means for achieving the same goals, and are reciprocity statutes a viable alternative? What is the status of the ongoing litigation addressing this system?

Auctions:

How have states applied their existing auctioneering regulations to online auction sites? What are the costs to consumers? Have states enacted new regulations targeted at online auctions? Do such regulations limit competition from online auctions, and if so how? Do those regulations impact large and small online auctioneers differently? To what extent are online auctions replacing traditional retail outlets, for consumer goods, automobiles (new or used), and other products? What types of state regulation can best protect consumers while still allowing competition from online auctions?

Contact Lenses:

What types of state regulations limit online sales of contact lenses? What are the costs to consumers? What are the health justifications for such regulations, and how valid are they? Are there separate issues for replacement lenses or disposable lenses? How should prescription requirements be administered? Have manufacturers limited the supply of contact lenses to online vendors, and if so why?

Funerals (Caskets):

What types of state regulations limit online casket sales? What are the costs to consumers? What are the pro-consumer rationales for such regulations, particularly in light of the recent controversies? Are there less restrictive means of achieving the same goals?

What is the status and focus of current litigation?

The Commission welcomes suggestions for other questions that also should be addressed. Proposed questions, identified as such, may be sent by electronic mail to ecompetition@ftc.gov.

By direction of the Commission.

Donald S. Clark
Secretary

Endnotes:

1. For more information on previous FTC-sponsored events regarding e-commerce, see <http://www.ftc.gov/opp/ecommerce/index.htm>; <http://www.ftc.gov/opa/2000/05/b2bworkshop.htm>.

Public Workshop: Possible Anticompetitive Efforts to Restrict Competition on the Internet
Federal Trade Commission
October 8-10, 2002

Many states have enacted regulations that may have the effect of protecting local bricks-and-mortar merchants from new Internet competitors. For example, all fifty states currently ban auto sales over the Internet unless they involve local franchise owners, and at least thirty states have laws that effectively preclude wine sales over the Internet. Seventeen states require online mortgage brokers to have a physical office in the state, which forces them to hire local residents. Many states also limit online competition for products ranging from contact lenses to funeral caskets. All of these restrictions may be justified by sound public policy, or they may ultimately prove to be attempts by existing industries to forestall the entry of Internet competitors and impede new forms of competition.

The aggregate costs of these restrictions may be very significant. Some scholars have estimated those costs as follows:

- the average purchaser of a car could save approximately two percent using an online service rather than buying in person from a dealer¹
- funeral homes commonly mark up caskets by over 500%, whereas third-party sellers (such as online sellers) typically mark up caskets only by around 100%²
- in the aggregate, potentially protectionist state regulation may cost consumers over \$15 billion annually.³

Similarly, some private companies have engaged in conduct that may raise antitrust issues. For instance, some dealers do not list prices for certain items they sell online; others don't sell certain items in their product line over the Internet at all, and urge horizontal competitors to follow suit. Again, some or all of these restrictions could be justified as procompetitive, or they could prove anticompetitive upon closer examination:

- in 1998, the FTC entered a consent decree with 25 car dealers in five Northwest

¹ Robert Atkinson and Thomas Wilhelm, *The Best States for E-Commerce* 19 (Mar. 2002) (second report of the Progressive Policy Institute) (citing Fiona Scott Morton, Florian Zettelmeyer, and Jorge Silva Risso, *Internet Car Retailing*, working paper, School of Management, Yale University, September 2000).

² See USA Today, Oct. 8, 1999 (reporting mark-ups of 500%); Modern Maturity, "R.I.P. Off" (Mar.-Apr. 2000).

³ Robert Atkinson, *The Revenge of the Disintermediated* 2 (Jan. 2001) (first report of the Progressive Policy Institute) ("First PPI Report").

states that had threatened to boycott Chrysler if it sold to low-cost Internet dealers⁴

- in one survey, 74 percent of manufacturers reported that they do not sell online because online sales could affect their retail channels⁵
- one analyst estimates that distributors and retailers often represent as much as 50% of the cost of some consumer products, and that much of this cost could disappear if consumers could buy online.⁶

The Federal Trade Commission has long sought to promote competition over the Internet. To advance these efforts, in August 2001 the FTC formed the Internet Task Force to evaluate potentially anticompetitive regulations and business practices that could impede e-commerce. Led by the FTC's Office of Policy Planning, the Task Force has examined the academic research and met with numerous industry participants and observers, including online companies, trade associations, and scholars. To date, the FTC has filed three competition advocacy comments due in large part to the Task Force's efforts:

- a joint FTC/Department of Justice comment to the North Carolina state bar opposing two new opinions that would require the physical presence of an attorney for all real estate closings and refinancings (which would significantly increase the costs of Internet lenders that rely disproportionately on lay closers);⁷
- a joint FTC/Department of Justice comment before the Rhode Island legislature on a similar real estate bill;⁸ and
- a staff comment before the Connecticut Board of Opticians, which is considering additional restrictions on out-of-state and Internet contact lens sellers.⁹

⁴ See Consent Agreement in *In re Fair Allocation System*, No. 971-0065 (1998), available at <http://www.ftc.gov/os/1998/9808/9710065.agr.htm>.

⁵ First PPI Report at 14 (citing Candace Talmadge, "Retailers concerned as manufacturers sell online," *Reuters Internet*, December 31, 2000, <http://www.mercurycenter.com/svtech/news/breaking/internet/docs/7956161.htm>).

⁶ Doug Bartholomew, *E-Commerce Bullies* 51 (Sept. 4, 2000) (published in industryweek.com).

⁷ FTC/DOJ Letter to the Ethics Committee of the North Carolina State Bar re: State Bar Opinions Restricting Involvement of Non-Attorneys in Real Estate Closings and Refinancing Transactions (Dec. 14, 2001) available at <http://www.ftc.gov/be/V020006.htm>.

⁸ FTC/DOJ Letter to the Rhode Island House of Representatives re: Bill Restricting Competition from Non-Attorneys in Real Estate Closing Activities (Mar. 29, 2002) available at <http://www.ftc.gov/be/v020013.pdf>.

⁹ FTC Staff Comment Before the Connecticut Board of Examiners for Opticians (Mar. 27, 2002) available at <http://www.ftc.gov/be/v020007.htm>.

To further build on these efforts, the FTC will host a public workshop to explore how certain state regulations may have anticompetitive effects on e-commerce and how certain e-commerce business practices may raise antitrust concerns. The workshop will take place at the FTC from October 8-10, 2002. The workshop will include consumer advocates, industry representatives (from all sides), academics, and state government representatives.

To focus the discussion, the workshop will organize panels to address certain specific industries that are important to consumers and that have experienced significant growth in online commerce, but that may also have been hampered by anticompetitive state regulation or business practices. These panels will address some or all of the following industries:

Retailing: E-commerce retail sales continue to have enormous potential. They grew 2.5 times faster than all retail sales in the fourth quarter of 2001, and according to some analysts are expected to reach \$3.2 trillion by 2004.

Automobiles: All 50 states restrict online auto sales. Dealers argue that these restrictions protect consumers against unscrupulous manufacturers, and that the Internet unfairly lets online sellers free ride off the dealers' personal services.

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In an era of skyrocketing costs, online prescription drug purchases could potentially lower prices for patients in the same way that online contact lenses lowered prices. At the same time, online pharmacies raise significant consumer protection issues. Similarly, telemedicine could give patients access to portable medical equipment and digital imaging technology even if they are too elderly or infirm to visit a hospital easily, or if they live in rural areas far from a full-service hospital. Most states, however, substantially limit online pharmaceuticals and telemedicine. Approximately thirteen states specifically prohibit electronic prescription transmission, and several states require physicians to examine the patient physically before prescribing medicine.

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Funerals (Caskets): In addition to cost savings, online casket sellers can offer consumers a greater variety of choices, such as individualized caskets. Many states, however, require that casket purchases be made only through a licensed, bricks-and-mortar vendor.

The Commission also invites comments concerning other industries, not listed above, that may raise similar issues and merit similar examination. The workshop will be open to the public, and should (1) enhance the FTC's understanding of these issues, (2) help educate policymakers about the effects of possibly protectionist state regulation, (3) help educate private entities about the types of business practices that may or may not be viewed as problematic, and (4) increase understanding about ways to promote robust competition from e-commerce, to the benefit of consumers.



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

DIRECTOR
OFFICE OF POLICY PLANNING

August 23, 2002

VIA MAIL AND FACSIMILE

Robert Samuelson
Newsweek Magazine
1750 Pennsylvania Avenue, N.W.
Suite 1220
Washington, D.C. 20006

Re: Invitation to Appear at FTC Public Workshop on E-Commerce

Dear Mr. Samuelson:

I would like to invite you to appear at a three-day public workshop at the Federal Trade Commission on "Possible Anticompetitive Efforts to Restrict Competition on the Internet." If you are able to attend, we would ask you to testify on an overview panel with other leading scholars, commentators, and industry executives to describe their perspectives on possible barriers to e-commerce. The public workshop will take place from October 8-10, 2002, at the FTC, 600 Pennsylvania Ave., N.W., Washington, DC 20580. The overview panel will take place during the morning of October 8.

The workshop will focus on two types of possible e-commerce barriers. The first type includes state and local regulations, such as occupational licensing and physical office requirements, that may have pro-consumer or pro-competition rationales, but that nevertheless may restrict the entry of new Internet competitors. The second type includes business conduct barriers that arise when private parties employ potentially anticompetitive tactics, such as when suppliers or dealers apply collective pressure to limit online sales. The workshop will have separate panels to address a variety of industries that may have been hampered significantly by such barriers, including retailing, automobile sales, cyber-charter schools, real estate and mortgages, pharmaceutical sales, telemedicine, wine sales, auctions, contact lens sales, and casket sales.

Particularly given the current economic climate, gaining a full understanding of the barriers facing new Internet entrants and ultimately developing strategies to promote robust competition in e-commerce is both timely and important. Indeed, some academic estimates of the aggregate impact of these various barriers suggest that they cost consumers billions of dollars every year.

I hope that the workshop will help policymakers and businesses better understand both the potentially pro-consumer and pro-competitive rationales behind these barriers and the actual impact of them on consumers. Because many of these issues are new, the workshop could help educate policymakers and businesses about policies that ultimately may have significant anticompetitive effects. To date, we have received dozens of calls from businesses, trade associations, consumer groups, and journalists who would like to participate in the workshop.

Along with this letter, I am sending you a copy of the Federal Register Notice announcing the workshop and a background fact sheet, both of which describe the Internet workshop in more detail. This letter will be followed up by a phone call to your office from Asheesh Agarwal, an attorney in the Office of Policy Planning who is organizing the workshop. If you or your staff have further questions, feel free to call me, at (202) 326-3683, or Asheesh at (202) 326-3558.

We look forward to hearing your perspective on these important issues.

Sincerely,

A handwritten signature in black ink, appearing to read "Ted Cruz", with a long, sweeping flourish extending to the right.

Ted Cruz
Director, Office of Policy Planning
Federal Trade Commission

cc: Asheesh Agarwal

FEDERAL REGISTER NOTICE

Public Workshop: Possible Anticompetitive Efforts to Restrict Competition on the Internet

AGENCY: Federal Trade Commission

ACTION: Notice of Public Workshop and Opportunity for Comment

SUMMARY: The Federal Trade Commission ("FTC" or "Commission") announces a public workshop on "Possible Anticompetitive Efforts to Restrict Competition on the Internet." The workshop will focus on how certain state regulation may have anticompetitive effects, and how certain business practices may raise antitrust concerns, in the context of business-to-consumer e-commerce. The workshop will be held at and administered by the FTC.

DATES: The workshop will take place on October 8-10, 2002. The workshop will be transcribed and placed on the public record. Any interested person may submit written comments responsive to any of the topics to be addressed; such comments should be submitted no later than the last session of the workshop. Any written comments received also will be placed on the public record.

ADDRESSES: When in session, the workshop will be held at the FTC headquarters, 600 Pennsylvania Avenue, N.W., Washington, D.C. All interested parties are welcome to attend. Pre-registration is not required.

Written comments should be submitted in both hard copy and electronic form. Six hard copies of each submission should be addressed to Donald S. Clark, Office of the Secretary, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. Submissions should be captioned "Comments regarding ecompetition." Electronic submissions may be sent by electronic mail to "ecompetition@ftc.gov". Alternatively, electronic submissions may be filed on a 3-1/2 inch computer disk with a label on the disk stating the name of the submitter and the name and version of the word processing program used to create the document.

FOR FURTHER INFORMATION CONTACT: Jerry Ellig, Deputy Director, Office of Policy Planning, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580; telephone (202) 326-3528; e-mail: jellig@ftc.gov. Detailed agendas for the workshop will be available on the FTC Home Page (<http://www.ftc.gov>) and through Mildred Taylor, Staff Secretary, at (202) 326-2553.

SUPPLEMENTARY INFORMATION:

Overview

In the past decade, there has been growing concern about possibly anticompetitive efforts to restrict competition on the Internet. In particular, many states have enacted regulations that have the direct effect of protecting local merchants from competition over the Internet. For example, some states require that online vendors maintain an in-state office, while other states prohibit online sales of certain products entirely. Some scholars have argued that these regulations are often simply attempts by existing industries to forestall the entry of new and innovative Internet competitors, much as in prior eras, other entrenched producers have benefitted from regulatory efforts to impede new forms of competition.

Similarly, some private companies have engaged in conduct that may raise antitrust issues. For instance, some manufacturers and dealers do not list prices for certain items online, and others do not sell certain items over the Internet altogether and urge horizontal competitors to do the same. Depending on the circumstances, some of these restrictions could be viewed as potentially anticompetitive. While much of this regulation and conduct undoubtedly has pro-competitive and pro-consumer rationales, the regulations impose costs on consumers that, according to some

estimates, may exceed \$15 billion annually.

For these reasons, a workshop on possible anticompetitive efforts to restrict competition on the Internet is timely, and will build on previous FTC-sponsored events that addressed other aspects of e-commerce.⁽¹⁾ In order to enhance the Commission's understanding of particular practices and regulations, the workshop will have panels to address certain specific industries, including some or all of the following: retailing, automobiles, cyber-charter schools, real estate / mortgages, health care / pharmaceuticals / telemedicine, wine sales, auctions, contact lenses, and funerals (caskets).

Each of these industries has experienced some growth in commerce via the Internet, but according to various commentators, each also may have been hampered by anticompetitive state regulation or business practices. See, e.g., Atkinson, *The Revenge of the Disintermediated* (Jan. 2001) (report of the Progressive Policy Institute); Atkinson and Wilhelm, *The Best States for E-Commerce* (Mar. 2002) (second report of the Progressive Policy Institute). In addition, these industries involve goods and services that comprise a very large portion of a consumer's budget, such as homes, cars, schools, and health care.

It is intended that each industry panel have at least one independent analyst or academic, and also have representatives from the affected industries (on both sides of the issue). Where appropriate, the panel also will include a representative from a government agency, including (where appropriate) representatives from different states. We hope that each panel will provide all sides of the issue, including the perspectives of industry, intermediaries, consumers, and regulators.

The Commission also invites comments concerning other industries, not listed above, that may raise similar issues and merit similar examination.

Issues

Below is a non-exhaustive list of issues to be addressed by the workshop. Written comments need not address all of these issues.

1. General Issues

What role does competition law and policy play in fostering or hindering e-commerce? From a practical business perspective, how does each foster or impede e-commerce? What do empirical studies show?

Does state regulation have protectionist effects, and if so how? What are the benefits of such regulation, and do the benefits outweigh the costs? What is the prevalence of such state regulation? Are some types of regulations more friendly to e-commerce?

Do businesses try to limit competition over the Internet through anticompetitive efforts, and if so how? What are the business justifications for these efforts?

2. Issues for Particular Industries

Retailing:

How and why do manufacturers limit their distributors' sales of certain products over the Internet? What are the costs to consumers? Do distributors pressure manufacturers into limiting sales over the Internet, and if so how? Are such efforts facilitated by horizontal agreements? Does such conduct raise antitrust concerns, and are there legitimate business justifications, such as concerns about free-riding, for limiting e-commerce sales?

Automobiles:

Have manufacturers been forced to limit Internet sales of automobiles, and if so how? What are the costs to consumers? Are there legitimate concerns about free-riding or differentials in bargaining power? Are there different issues concerning the sale of new and used cars? What regulations have been applied to the sale of new or used cars through online auction sites? Does state regulation have the effect of protecting dealers from competition, to the possible detriment of consumers, or does existing state regulation provide important protection to consumers?

Cyber-Charter Schools:

How have states fostered or hindered cyber-charter schools? What are the competitive benefits of cyber-schools? Are there legitimate consumer protection concerns? Do the efforts of some school districts to limit cyber-charter schools raise any antitrust issues? What is the current status and focus of litigation, and what types of legislative solutions are possible?

Real Estate / Mortgages:

What types of state regulations limit online real estate and mortgage services? What are the costs to consumers? What is the impact of regulations requiring real estate closings or refinancings to be conducted solely by attorneys? What are the pro-consumer rationales for such regulations, and are there less restrictive means of achieving the same goals? What is the impact of Internet competition upon real estate commissions, and how are realtors responding to that competition?

Health Care / Pharmaceuticals / Telemedicine:

What types of state regulations limit online provision of health care goods and services, such as pharmaceuticals and telemedicine? What are the costs to consumers? Are these regulations directed mainly at out-of-state competitors? Are online prescriptions particularly susceptible to abuse? What are the pro-consumer rationales for regulations, and are there less restrictive means of achieving the same goals? Are reciprocity statutes an effective way to dealing with these issues?

Wine Sales:

How does the "three tier" system for distributing wine limit online sales, and are there legitimate justifications, such as temperance or taxation, for the system? What are the costs to consumers? Are there separate and measurable price and variety effects? Are there less restrictive means for achieving the same goals, and are reciprocity statutes a viable alternative? What is the status of the ongoing litigation addressing this system?

Auctions:

How have states applied their existing auctioneering regulations to online auction sites? What are the costs to consumers? Have states enacted new regulations targeted at online auctions? Do such regulations limit competition from online auctions, and if so how? Do those regulations impact large and small online auctioneers differently? To what extent are online auctions replacing traditional retail outlets, for consumer goods, automobiles (new or used), and other products? What types of state regulation can best protect consumers while still allowing competition from online auctions?

Contact Lenses:

What types of state regulations limit online sales of contact lenses? What are the costs to consumers? What are the health justifications for such regulations, and how valid are they? Are there separate issues for replacement lenses or disposable lenses? How should prescription requirements be administered? Have manufacturers limited the supply of contact lenses to online vendors, and if so why?

Funerals (Caskets):

What types of state regulations limit online casket sales? What are the costs to consumers? What are the pro-consumer rationales for such regulations, particularly in light of the recent controversies? Are there less restrictive means of achieving the same goals?

What is the status and focus of current litigation?

The Commission welcomes suggestions for other questions that also should be addressed. Proposed questions, identified as such, may be sent by electronic mail to ecompetition@ftc.gov.

By direction of the Commission.

Donald S. Clark
Secretary

Endnotes:

1. For more information on previous FTC-sponsored events regarding e-commerce, see <http://www.ftc.gov/opp/ecommerce/index.htm>; <http://www.ftc.gov/opa/2000/05/b2bworkshop.htm>.

states that had threatened to boycott Chrysler if it sold to low-cost Internet dealers⁴

- in one survey, 74 percent of manufacturers reported that they do not sell online because online sales could affect their retail channels⁵
- one analyst estimates that distributors and retailers often represent as much as 50% of the cost of some consumer products, and that much of this cost could disappear if consumers could buy online.⁶

The Federal Trade Commission has long sought to promote competition over the Internet. To advance these efforts, in August 2001 the FTC formed the Internet Task Force to evaluate potentially anticompetitive regulations and business practices that could impede e-commerce. Led by the FTC's Office of Policy Planning, the Task Force has examined the academic research and met with numerous industry participants and observers, including online companies, trade associations, and scholars. To date, the FTC has filed three competition advocacy comments due in large part to the Task Force's efforts:

- a joint FTC/Department of Justice comment to the North Carolina state bar opposing two new opinions that would require the physical presence of an attorney for all real estate closings and refinancings (which would significantly increase the costs of Internet lenders that rely disproportionately on lay closers);⁷
- a joint FTC/Department of Justice comment before the Rhode Island legislature on a similar real estate bill;⁸ and
- a staff comment before the Connecticut Board of Opticians, which is considering additional restrictions on out-of-state and Internet contact lens sellers.⁹

⁴ See Consent Agreement in *In re Fair Allocation System*, No. 971-0065 (1998), available at <http://www.ftc.gov/os/1998/9808/9710065.agr.htm>.

⁵ First PPI Report at 14 (citing Candace Talmadge, "Retailers concerned as manufacturers sell online," *Reuters Internet*, December 31, 2000, <http://www.mercurycenter.com/svtech/news/breaking/internet/docs/7956161.htm>).

⁶ Doug Bartholomew, *E-Commerce Bullies* 51 (Sept. 4, 2000) (published in industryweek.com).

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⁸ FTC/DOJ Letter to the Rhode Island House of Representatives re: Bill Restricting Competition from Non-Attorneys in Real Estate Closing Activities (Mar. 29, 2002) available at <http://www.ftc.gov/be/v020013.pdf>.

⁹ FTC Staff Comment Before the Connecticut Board of Examiners for Opticians (Mar. 27, 2002) available at <http://www.ftc.gov/be/v020007.htm>.

To further build on these efforts, the FTC will host a public workshop to explore how certain state regulations may have anticompetitive effects on e-commerce and how certain e-commerce business practices may raise antitrust concerns. The workshop will take place at the FTC from October 8-10, 2002. The workshop will include consumer advocates, industry representatives (from all sides), academics, and state government representatives.

To focus the discussion, the workshop will organize panels to address certain specific industries that are important to consumers and that have experienced significant growth in online commerce, but that may also have been hampered by anticompetitive state regulation or business practices. These panels will address some or all of the following industries:

Retailing: E-commerce retail sales continue to have enormous potential. They grew 2.5 times faster than all retail sales in the fourth quarter of 2001, and according to some analysts are expected to reach \$3.2 trillion by 2004.

Automobiles: All 50 states restrict online auto sales. Dealers argue that these restrictions protect consumers against unscrupulous manufacturers, and that the Internet unfairly lets online sellers free ride off the dealers' personal services.

Cyber-Charter Schools:

Cyber-charter schools currently enroll 50,000 students nationwide, and proponents hope to reach the 850,000 students nationally who receive home-schooling. In several states, however, legislators have introduced bills to place a moratorium on cyber-charter schools.

Real Estate / Mortgages:

As a result of the multi-state licensing system and physical office requirements, only national mortgage firms that already have physical offices in all states can sell online services in all states.

Health Care / Pharmaceuticals / Telemedicine:

In an era of skyrocketing costs, online prescription drug purchases could potentially lower prices for patients in the same way that online contact lenses lowered prices. At the same time, online pharmacies raise significant consumer protection issues. Similarly, telemedicine could give patients access to portable medical equipment and digital imaging technology even if they are too elderly or infirm to visit a hospital easily, or if they live in rural areas far from a full-service hospital. Most states, however, substantially limit online pharmaceuticals and telemedicine. Approximately thirteen states specifically prohibit electronic prescription transmission, and several states require physicians to examine the patient physically before prescribing medicine.

Wine Sales: The Internet offers consumers a broad array of wine choices. Although currently only six percent of U.S. wineries produce ninety-five percent of the wine consumed domestically, some scholars estimate that hundreds or even thousands of smaller vineyards have marketed their wines online. Moreover, studies indicate that, when sold through normal distribution channels, a typical bottle of wine has a markup from supplier to retailer of 100% or higher.

Auctions: Internet auctions have become a cultural phenomenon, and some businesses have started to use auction sites as an alternate means of distributing their products. Some states, however, are considering whether to apply existing licensing requirements designed for traditional auctioneers to these websites.

Contact Lenses: Consumers can save substantial sums of money by purchasing contact lenses online, as some studies suggest that optometrists mark up lenses from the manufacturer by between one and five times the cost. Some groups within the medical community, however, argue that online sales of contact lenses threaten consumer health, such as by making consumers less likely to visit their eye doctor.

Funerals (Caskets): In addition to cost savings, online casket sellers can offer consumers a greater variety of choices, such as individualized caskets. Many states, however, require that casket purchases be made only through a licensed, bricks-and-mortar vendor.

The Commission also invites comments concerning other industries, not listed above, that may raise similar issues and merit similar examination. The workshop will be open to the public, and should (1) enhance the FTC's understanding of these issues, (2) help educate policymakers about the effects of possibly protectionist state regulation, (3) help educate private entities about the types of business practices that may or may not be viewed as problematic, and (4) increase understanding about ways to promote robust competition from e-commerce, to the benefit of consumers.



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

DIRECTOR
OFFICE OF POLICY PLANNING

August 16, 2002

Ms. Tracie Sharp, President
State Policy Network
255 Arlington Boulevard
Richmond, CA 94805-1601

VIA U.S. MAIL AND FACSIMILE

Re: FTC Public Workshop on E-Commerce

Dear Tracie:

The Federal Trade Commission will host a three-day public workshop in mid-October that could be of great interest to State Policy Network members. The workshop, "Possible Anticompetitive Efforts to Restrict Competition on the Internet," will take place from October 8-10, 2002, at FTC Headquarters, 600 Pennsylvania Ave., N.W., Washington, DC. SPN members are welcome to attend the workshop and to submit relevant research or other written materials for the public record.

The workshop will focus on two types of possible e-commerce barriers. The first type includes state and local regulations, such as occupational licensing and physical office requirements, that may have pro-consumer or pro-competition rationales, but that nevertheless may restrict the entry of new Internet competitors. The second type includes business conduct barriers that arise when private parties employ potentially anticompetitive tactics, such as when suppliers or dealers apply collective pressure to limit online sales. The workshop will have separate panels to address a variety of industries that may have been hampered significantly by such barriers, including retailing, automobile sales, cyber-charter schools, real estate and mortgages, pharmaceutical sales, telemedicine, wine sales, auctions, contact lens sales, and casket sales.

We believe that this workshop may interest SPN and its members. Particularly given the current economic climate, we believe that state policymakers could benefit from a full understanding of the barriers facing new Internet entrants, including the potentially pro-consumer

and pro-competitive rationales behind these barriers and their actual impact on consumers. Indeed, some academic estimates suggest that the aggregate impact of these various barriers may cost consumers billions of dollars every year.

Ultimately, we hope that the workshop will allow state and federal law enforcement agencies to develop strategies to promote robust competition from e-commerce. Because many of these issues are new, the workshop could help educate policymakers and businesses about policies that may result in significant anticompetitive effects. To date, we have received dozens of calls from businesses, trade associations, consumer groups, and journalists who would like to participate in the workshop.

Along with this letter, I am sending you a background fact sheet and a copy of the Federal Register Notice announcing the workshop (also available at <http://www.ftc.gov/os/2002/07/ecomfrn.htm>), both of which describe the Internet workshop in more detail. I will also e-mail this letter to SPN, in case you should wish to e-mail any of this information to your members.

Again, we would welcome any information that SPN could provide on any of these issues, and in particular, we would welcome any specific examples of possible anticompetitive barriers to e-commerce. Comments may be mailed to the Commission, or, preferably, e-mailed to ecompetition@ftc.gov.

If you have comments or questions, feel free to call me at (202) 326-3683, or Jerry Ellig, our Deputy Director, at (202) 326-3528.

I very much hope that we will be able to work together to explore this important new area, and, ultimately, to help consumers realize the full benefits of e-commerce. We look forward to working with you and your members.

Sincerely,

A handwritten signature in black ink that reads "TED" in a stylized, cursive font.

Ted Cruz
Director, Office of Policy Planning
Federal Trade Commission

cc: Jerry Ellig

Billing Code: 6750-01P

FEDERAL REGISTER NOTICE

Public Workshop: Possible Anticompetitive Efforts to Restrict Competition on the Internet

AGENCY: Federal Trade Commission

ACTION: Notice of Public Workshop and Opportunity for Comment

SUMMARY: The Federal Trade Commission ("FTC" or "Commission") announces a public workshop on "Possible Anticompetitive Efforts to Restrict Competition on the Internet." The workshop will focus on how certain state regulation may have anticompetitive effects, and how certain business practices may raise antitrust concerns, in the context of business-to-consumer e-commerce. The workshop will be held at and administered by the FTC.

DATES: The workshop will take place on October 8-10, 2002. The workshop will be transcribed and placed on the public record. Any interested person may submit written comments responsive to any of the topics to be addressed; such comments should be submitted no later than the last session of the workshop. Any written comments received also will be placed on the public record.

ADDRESSES: When in session, the workshop will be held at the FTC headquarters, 600 Pennsylvania Avenue, N.W., Washington, D.C. All interested parties are welcome to attend. Pre-registration is not required.

Written comments should be submitted in both hard copy and electronic form. Six hard copies of each submission should be addressed to Donald S. Clark, Office of the Secretary, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. Submissions should be captioned "Comments regarding ecompetition." Electronic submissions may be sent by electronic mail to "ecompetition@ftc.gov". Alternatively, electronic submissions may be filed on a 3-1/2 inch computer disk with a label on the disk stating the name of the submitter and the name and version of the word processing program used to create the document.

FOR FURTHER INFORMATION CONTACT: Jerry Ellig, Deputy Director, Office of Policy Planning, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580; telephone (202) 326-3528; e-mail: jellig@ftc.gov. Detailed agendas for the workshop will be available on the FTC Home Page (<http://www.ftc.gov>) and through Mildred Taylor, Staff Secretary, at (202) 326-2553.

SUPPLEMENTARY INFORMATION:

Overview

In the past decade, there has been growing concern about possibly anticompetitive efforts to restrict competition on the Internet. In particular, many states have enacted regulations that have the direct effect of protecting local merchants from competition over the Internet. For example, some states require that online vendors maintain an in-state office, while other states prohibit online sales of certain products entirely. Some scholars have argued that these regulations are often simply attempts by existing industries to forestall the entry of new and innovative Internet competitors, much as in prior eras, other entrenched producers have benefitted from regulatory efforts to impede new forms of competition.

Similarly, some private companies have engaged in conduct that may raise antitrust issues. For instance, some manufacturers and dealers do not list prices for certain items online, and others do not sell certain items over the Internet altogether and urge horizontal competitors to do the same. Depending on the circumstances, some of these restrictions could be viewed as potentially anticompetitive. While much of this regulation and conduct undoubtedly has pro-competitive and pro-consumer rationales, the regulations impose costs on consumers that, according to some

estimates, may exceed \$15 billion annually.

For these reasons, a workshop on possible anticompetitive efforts to restrict competition on the Internet is timely, and will build on previous FTC-sponsored events that addressed other aspects of e-commerce.⁽¹⁾ In order to enhance the Commission's understanding of particular practices and regulations, the workshop will have panels to address certain specific industries, including some or all of the following: retailing, automobiles, cyber-charter schools, real estate / mortgages, health care / pharmaceuticals / telemedicine, wine sales, auctions, contact lenses, and funerals (caskets).

Each of these industries has experienced some growth in commerce via the Internet, but according to various commentators, each also may have been hampered by anticompetitive state regulation or business practices. See, e.g., Atkinson, *The Revenge of the Disintermediated* (Jan. 2001) (report of the Progressive Policy Institute); Atkinson and Wilhelm, *The Best States for E-Commerce* (Mar. 2002) (second report of the Progressive Policy Institute). In addition, these industries involve goods and services that comprise a very large portion of a consumer's budget, such as homes, cars, schools, and health care.

It is intended that each industry panel have at least one independent analyst or academic, and also have representatives from the affected industries (on both sides of the issue). Where appropriate, the panel also will include a representative from a government agency, including (where appropriate) representatives from different states. We hope that each panel will provide all sides of the issue, including the perspectives of industry, intermediaries, consumers, and regulators.

The Commission also invites comments concerning other industries, not listed above, that may raise similar issues and merit similar examination.

Issues

Below is a non-exhaustive list of issues to be addressed by the workshop. Written comments need not address all of these issues.

1. General Issues

What role does competition law and policy play in fostering or hindering e-commerce? From a practical business perspective, how does each foster or impede e-commerce? What do empirical studies show?

Does state regulation have protectionist effects, and if so how? What are the benefits of such regulation, and do the benefits outweigh the costs? What is the prevalence of such state regulation? Are some types of regulations more friendly to e-commerce?

Do businesses try to limit competition over the Internet through anticompetitive efforts, and if so how? What are the business justifications for these efforts?

2. Issues for Particular Industries

Retailing:

How and why do manufacturers limit their distributors' sales of certain products over the Internet? What are the costs to consumers? Do distributors pressure manufacturers into limiting sales over the Internet, and if so how? Are such efforts facilitated by horizontal agreements? Does such conduct raise antitrust concerns, and are there legitimate business justifications, such as concerns about free-riding, for limiting e-commerce sales?

Automobiles:

Have manufacturers been forced to limit Internet sales of automobiles, and if so how? What are the costs to consumers? Are there legitimate concerns about free-riding or differentials in bargaining power? Are there different issues concerning the sale of new and used cars? What regulations have been applied to the sale of new or used cars through online auction sites? Does state regulation have the effect of protecting dealers from competition, to the possible detriment of consumers, or does existing state regulation provide important protection to consumers?

Cyber-Charter Schools:

How have states fostered or hindered cyber-charter schools? What are the competitive benefits of cyber-schools? Are there legitimate consumer protection concerns? Do the efforts of some school districts to limit cyber-charter schools raise any antitrust issues? What is the current status and focus of litigation, and what types of legislative solutions are possible?

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What types of state regulations limit online real estate and mortgage services? What are the costs to consumers? What is the impact of regulations requiring real estate closings or refinancings to be conducted solely by attorneys? What are the pro-consumer rationales for such regulations, and are there less restrictive means of achieving the same goals? What is the impact of Internet competition upon real estate commissions, and how are realtors responding to that competition?

Health Care / Pharmaceuticals / Telemedicine:

What types of state regulations limit online provision of health care goods and services, such as pharmaceuticals and telemedicine? What are the costs to consumers? Are these regulations directed mainly at out-of-state competitors? Are online prescriptions particularly susceptible to abuse? What are the pro-consumer rationales for regulations, and are there less restrictive means of achieving the same goals? Are reciprocity statutes an effective way to dealing with these issues?

Wine Sales:

How does the "three tier" system for distributing wine limit online sales, and are there legitimate justifications, such as temperance or taxation, for the system? What are the costs to consumers? Are there separate and measurable price and variety effects? Are there less restrictive means for achieving the same goals, and are reciprocity statutes a viable alternative? What is the status of the ongoing litigation addressing this system?

Auctions:

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What is the status and focus of current litigation?

The Commission welcomes suggestions for other questions that also should be addressed. Proposed questions, identified as such, may be sent by electronic mail to ecompetition@ftc.gov.

By direction of the Commission.

Donald S. Clark
Secretary

Endnotes:

1. For more information on previous FTC-sponsored events regarding e-commerce, see <http://www.ftc.gov/opp/ecommerce/index.htm>; <http://www.ftc.gov/opa/2000/05/b2bworkshop.htm>.

Public Workshop: Possible Anticompetitive Efforts to Restrict Competition on the Internet
Federal Trade Commission
October 8-10, 2002

Many states have enacted regulations that may have the effect of protecting local bricks-and-mortar merchants from new Internet competitors. For example, all fifty states currently ban auto sales over the Internet unless they involve local franchise owners, and at least thirty states have laws that effectively preclude wine sales over the Internet. Seventeen states require online mortgage brokers to have a physical office in the state, which forces them to hire local residents. Many states also limit online competition for products ranging from contact lenses to funeral caskets. All of these restrictions may be justified by sound public policy, or they may ultimately prove to be attempts by existing industries to forestall the entry of Internet competitors and impede new forms of competition.

The aggregate costs of these restrictions may be very significant. Some scholars have estimated those costs as follows:

- the average purchaser of a car could save approximately two percent using an online service rather than buying in person from a dealer¹
- funeral homes commonly mark up caskets by over 500%, whereas third-party sellers (such as online sellers) typically mark up caskets only by around 100%²
- in the aggregate, potentially protectionist state regulation may cost consumers over \$15 billion annually.³

Similarly, some private companies have engaged in conduct that may raise antitrust issues. For instance, some dealers do not list prices for certain items they sell online; others don't sell certain items in their product line over the Internet at all, and urge horizontal competitors to follow suit. Again, some or all of these restrictions could be justified as procompetitive, or they could prove anticompetitive upon closer examination:

- in 1998, the FTC entered a consent decree with 25 car dealers in five Northwest

¹ Robert Atkinson and Thomas Wilhelm, *The Best States for E-Commerce* 19 (Mar. 2002) (second report of the Progressive Policy Institute) (citing Fiona Scott Morton, Florian Zettelmeyer, and Jorge Silva Rizzo, *Internet Car Retailing*, working paper, School of Management, Yale University, September 2000).

² See USA Today, Oct. 8, 1999 (reporting mark-ups of 500%); Modern Maturity, "R.I.P. Off" (Mar.-Apr. 2000).

³ Robert Atkinson, *The Revenge of the Disintermediated* 2 (Jan. 2001) (first report of the Progressive Policy Institute) ("First PPI Report").

states that had threatened to boycott Chrysler if it sold to low-cost Internet dealers⁴

- in one survey, 74 percent of manufacturers reported that they do not sell online because online sales could affect their retail channels⁵
- one analyst estimates that distributors and retailers often represent as much as 50% of the cost of some consumer products, and that much of this cost could disappear if consumers could buy online.⁶

The Federal Trade Commission has long sought to promote competition over the Internet. To advance these efforts, in August 2001 the FTC formed the Internet Task Force to evaluate potentially anticompetitive regulations and business practices that could impede e-commerce. Led by the FTC's Office of Policy Planning, the Task Force has examined the academic research and met with numerous industry participants and observers, including online companies, trade associations, and scholars. To date, the FTC has filed three competition advocacy comments due in large part to the Task Force's efforts:

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- a joint FTC/Department of Justice comment before the Rhode Island legislature on a similar real estate bill;⁸ and
- a staff comment before the Connecticut Board of Opticians, which is considering additional restrictions on out-of-state and Internet contact lens sellers.⁹

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UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Director
Office of Policy Planning

August 20, 2002

Ms. Bridgett Wagner
Director, Coalition Relations
The Heritage Foundation
214 Massachusetts Ave., NE
Washington, DC 20002

VIA U.S. MAIL AND FAX (202-546-8328)

Re: FTC Public Workshop on E-Commerce

Dear Bridgett:

The Federal Trade Commission will host a three-day public workshop in mid-October that could be of great interest to Heritage and other public policy organizations. The workshop, "Possible Anticompetitive Efforts to Restrict Competition on the Internet," will take place from October 8-10, 2002, at FTC Headquarters, 600 Pennsylvania Ave., N.W., Washington, DC. Researchers from The Heritage Foundation and other public interest groups are welcome to attend the workshop and to submit relevant research or other written materials for the public record.

The workshop will focus on two types of possible e-commerce barriers. The first type includes state and local regulations, such as occupational licensing and physical office requirements, that may have pro-consumer or pro-competition rationales, but that nevertheless may restrict the entry of new Internet competitors. The second type includes business conduct barriers that arise when private parties employ potentially anticompetitive tactics, such as when suppliers or dealers apply collective pressure to limit online sales. The workshop will have separate panels to address a variety of industries that may have been hampered significantly by such barriers, including retailing, automobile sales, cyber-charter schools, real estate and mortgages, pharmaceutical sales, telemedicine, wine sales, auctions, contact lens sales, and casket sales.

We believe that this workshop may interest researchers at Heritage and other policy organizations with which you are in contact. Particularly given the current economic climate, we believe that state policymakers could benefit from a full understanding of the barriers facing new Internet entrants, including the potentially pro-consumer and pro-competitive rationales behind these barriers and their actual impact on consumers. Indeed, some academic estimates suggest that the aggregate impact of these various barriers may cost consumers billions of dollars every year.

Ultimately, we hope that the workshop will allow state and federal law enforcement agencies to develop strategies to promote robust competition from e-commerce. Because many of these issues are new, the workshop could help educate policymakers and businesses about policies that may result in significant anticompetitive effects. To date, we have received dozens of calls from businesses, trade associations, consumer groups, and journalists who would like to participate in the workshop.

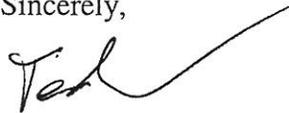
Along with this letter, I am sending you a background fact sheet and a copy of the Federal Register Notice announcing the workshop (also available at <http://www.ftc.gov/os/2002/07/ecomfrn.htm>), both of which describe the Internet workshop in more detail. I will also e-mail this letter to you in case you should wish to e-mail any of this information to others who might be interested.

Again, we would welcome any information that public policy research organizations could provide on any of these issues, and in particular, we would welcome any specific examples of possible anticompetitive barriers to e-commerce. Comments may be mailed to the Commission, or, preferably, e-mailed to ecompetition@ftc.gov.

If you have comments or questions, feel free to call me at (202) 326-3683, or Jerry Ellig, our Deputy Director, at (202) 326-3528.

I very much hope that we will be able to work together to explore this important new area, and, ultimately, to help consumers realize the full benefits of e-commerce. We look forward to working with you.

Sincerely,



Ted Cruz
Director, Office of Policy Planning
Federal Trade Commission

cc: Jerry Ellig

FEDERAL REGISTER NOTICE

Public Workshop: Possible Anticompetitive Efforts to Restrict Competition on the Internet

AGENCY: Federal Trade Commission

ACTION: Notice of Public Workshop and Opportunity for Comment

SUMMARY: The Federal Trade Commission ("FTC" or "Commission") announces a public workshop on "Possible Anticompetitive Efforts to Restrict Competition on the Internet." The workshop will focus on how certain state regulation may have anticompetitive effects, and how certain business practices may raise antitrust concerns, in the context of business-to-consumer e-commerce. The workshop will be held at and administered by the FTC.

DATES: The workshop will take place on October 8-10, 2002. The workshop will be transcribed and placed on the public record. Any interested person may submit written comments responsive to any of the topics to be addressed; such comments should be submitted no later than the last session of the workshop. Any written comments received also will be placed on the public record.

ADDRESSES: When in session, the workshop will be held at the FTC headquarters, 600 Pennsylvania Avenue, N.W., Washington, D.C. All interested parties are welcome to attend. Pre-registration is not required.

Written comments should be submitted in both hard copy and electronic form. Six hard copies of each submission should be addressed to Donald S. Clark, Office of the Secretary, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. Submissions should be captioned "Comments regarding ecompetition." Electronic submissions may be sent by electronic mail to "ecompetition@ftc.gov". Alternatively, electronic submissions may be filed on a 3-1/2 inch computer disk with a label on the disk stating the name of the submitter and the name and version of the word processing program used to create the document.

FOR FURTHER INFORMATION CONTACT: Jerry Ellig, Deputy Director, Office of Policy Planning, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580; telephone (202) 326-3528; e-mail: jellig@ftc.gov. Detailed agendas for the workshop will be available on the FTC Home Page (<http://www.ftc.gov>) and through Mildred Taylor, Staff Secretary, at (202) 326-2553.

SUPPLEMENTARY INFORMATION:

Overview

In the past decade, there has been growing concern about possibly anticompetitive efforts to restrict competition on the Internet. In particular, many states have enacted regulations that have the direct effect of protecting local merchants from competition over the Internet. For example, some states require that online vendors maintain an in-state office, while other states prohibit online sales of certain products entirely. Some scholars have argued that these regulations are often simply attempts by existing industries to forestall the entry of new and innovative Internet competitors, much as in prior eras, other entrenched producers have benefitted from regulatory efforts to impede new forms of competition.

Similarly, some private companies have engaged in conduct that may raise antitrust issues. For instance, some manufacturers and dealers do not list prices for certain items online, and others do not sell certain items over the Internet altogether and urge horizontal competitors to do the same. Depending on the circumstances, some of these restrictions could be viewed as potentially anticompetitive. While much of this regulation and conduct undoubtedly has pro-competitive and pro-consumer rationales, the regulations impose costs on consumers that, according to some

estimates, may exceed \$15 billion annually.

For these reasons, a workshop on possible anticompetitive efforts to restrict competition on the Internet is timely, and will build on previous FTC-sponsored events that addressed other aspects of e-commerce.⁽¹⁾ In order to enhance the Commission's understanding of particular practices and regulations, the workshop will have panels to address certain specific industries, including some or all of the following: retailing, automobiles, cyber-charter schools, real estate / mortgages, health care / pharmaceuticals / telemedicine, wine sales, auctions, contact lenses, and funerals (caskets).

Each of these industries has experienced some growth in commerce via the Internet, but according to various commentators, each also may have been hampered by anticompetitive state regulation or business practices. *See, e.g.*, Atkinson, *The Revenge of the Disintermediated* (Jan. 2001) (report of the Progressive Policy Institute); Atkinson and Wilhelm, *The Best States for E-Commerce* (Mar. 2002) (second report of the Progressive Policy Institute). In addition, these industries involve goods and services that comprise a very large portion of a consumer's budget, such as homes, cars, schools, and health care.

It is intended that each industry panel have at least one independent analyst or academic, and also have representatives from the affected industries (on both sides of the issue). Where appropriate, the panel also will include a representative from a government agency, including (where appropriate) representatives from different states. We hope that each panel will provide all sides of the issue, including the perspectives of industry, intermediaries, consumers, and regulators.

The Commission also invites comments concerning other industries, not listed above, that may raise similar issues and merit similar examination.

Issues

Below is a non-exhaustive list of issues to be addressed by the workshop. Written comments need not address all of these issues.

1. General Issues

What role does competition law and policy play in fostering or hindering e-commerce? From a practical business perspective, how does each foster or impede e-commerce? What do empirical studies show?

Does state regulation have protectionist effects, and if so how? What are the benefits of such regulation, and do the benefits outweigh the costs? What is the prevalence of such state regulation? Are some types of regulations more friendly to e-commerce?

Do businesses try to limit competition over the Internet through anticompetitive efforts, and if so how? What are the business justifications for these efforts?

2. Issues for Particular Industries

Retailing:

How and why do manufacturers limit their distributors' sales of certain products over the Internet? What are the costs to consumers? Do distributors pressure manufacturers into limiting sales over the Internet, and if so how? Are such efforts facilitated by horizontal agreements? Does such conduct raise antitrust concerns, and are there legitimate business justifications, such as concerns about free-riding, for limiting e-commerce sales?

Automobiles:

Have manufacturers been forced to limit Internet sales of automobiles, and if so how? What are the costs to consumers? Are there legitimate concerns about free-riding or differentials in bargaining power? Are there different issues concerning the sale of new and used cars? What regulations have been applied to the sale of new or used cars through online auction sites? Does state regulation have the effect of protecting dealers from competition, to the possible detriment of consumers, or does existing state regulation provide important protection to consumers?

Cyber-Charter Schools:

How have states fostered or hindered cyber-charter schools? What are the competitive benefits of cyber-schools? Are there legitimate consumer protection concerns? Do the efforts of some school districts to limit cyber-charter schools raise any antitrust issues? What is the current status and focus of litigation, and what types of legislative solutions are possible?

Real Estate / Mortgages:

What types of state regulations limit online real estate and mortgage services? What are the costs to consumers? What is the impact of regulations requiring real estate closings or refinancings to be conducted solely by attorneys? What are the pro-consumer rationales for such regulations, and are there less restrictive means of achieving the same goals? What is the impact of Internet competition upon real estate commissions, and how are realtors responding to that competition?

Health Care / Pharmaceuticals / Telemedicine:

What types of state regulations limit online provision of health care goods and services, such as pharmaceuticals and telemedicine? What are the costs to consumers? Are these regulations directed mainly at out-of-state competitors? Are online prescriptions particularly susceptible to abuse? What are the pro-consumer rationales for regulations, and are there less restrictive means of achieving the same goals? Are reciprocity statutes an effective way to dealing with these issues?

Wine Sales:

How does the "three tier" system for distributing wine limit online sales, and are there legitimate justifications, such as temperance or taxation, for the system? What are the costs to consumers? Are there separate and measurable price and variety effects? Are there less restrictive means for achieving the same goals, and are reciprocity statutes a viable alternative? What is the status of the ongoing litigation addressing this system?

Auctions:

How have states applied their existing auctioneering regulations to online auction sites? What are the costs to consumers? Have states enacted new regulations targeted at online auctions? Do such regulations limit competition from online auctions, and if so how? Do those regulations impact large and small online auctioneers differently? To what extent are online auctions replacing traditional retail outlets, for consumer goods, automobiles (new or used), and other products? What types of state regulation can best protect consumers while still allowing competition from online auctions?

Contact Lenses:

What types of state regulations limit online sales of contact lenses? What are the costs to consumers? What are the health justifications for such regulations, and how valid are they? Are there separate issues for replacement lenses or disposable lenses? How should prescription requirements be administered? Have manufacturers limited the supply of contact lenses to online vendors, and if so why?

Funerals (Caskets):

What types of state regulations limit online casket sales? What are the costs to consumers? What are the pro-consumer rationales for such regulations, particularly in light of the recent controversies? Are there less restrictive means of achieving the same goals?

What is the status and focus of current litigation?

The Commission welcomes suggestions for other questions that also should be addressed. Proposed questions, identified as such, may be sent by electronic mail to ecompetition@ftc.gov.

By direction of the Commission.

Donald S. Clark
Secretary

Endnotes:

1. For more information on previous FTC-sponsored events regarding e-commerce, see <http://www.ftc.gov/opp/ecommerce/index.htm>; <http://www.ftc.gov/opa/2000/05/b2bworkshop.htm>.

Public Workshop: Possible Anticompetitive Efforts to Restrict Competition on the Internet
Federal Trade Commission
October 8-10, 2002

Many states have enacted regulations that may have the effect of protecting local bricks-and-mortar merchants from new Internet competitors. For example, all fifty states currently ban auto sales over the Internet unless they involve local franchise owners, and at least thirty states have laws that effectively preclude wine sales over the Internet. Seventeen states require online mortgage brokers to have a physical office in the state, which forces them to hire local residents. Many states also limit online competition for products ranging from contact lenses to funeral caskets. All of these restrictions may be justified by sound public policy, or they may ultimately prove to be attempts by existing industries to forestall the entry of Internet competitors and impede new forms of competition.

The aggregate costs of these restrictions may be very significant. Some scholars have estimated those costs as follows:

- the average purchaser of a car could save approximately two percent using an online service rather than buying in person from a dealer¹
- funeral homes commonly mark up caskets by over 500%, whereas third-party sellers (such as online sellers) typically mark up caskets only by around 100%²
- in the aggregate, potentially protectionist state regulation may cost consumers over \$15 billion annually.³

Similarly, some private companies have engaged in conduct that may raise antitrust issues. For instance, some dealers do not list prices for certain items they sell online; others don't sell certain items in their product line over the Internet at all, and urge horizontal competitors to follow suit. Again, some or all of these restrictions could be justified as procompetitive, or they could prove anticompetitive upon closer examination:

- in 1998, the FTC entered a consent decree with 25 car dealers in five Northwest

¹ Robert Atkinson and Thomas Wilhelm, *The Best States for E-Commerce* 19 (Mar. 2002) (second report of the Progressive Policy Institute) (citing Fiona Scott Morton, Florian Zettelmeyer, and Jorge Silva Riso, *Internet Car Retailing*, working paper, School of Management, Yale University, September 2000).

² See USA Today, Oct. 8, 1999 (reporting mark-ups of 500%); Modern Maturity, "R.I.P. Off" (Mar.-Apr. 2000).

³ Robert Atkinson, *The Revenge of the Disintermediated* 2 (Jan. 2001) (first report of the Progressive Policy Institute) ("First PPI Report").

states that had threatened to boycott Chrysler if it sold to low-cost Internet dealers⁴

- in one survey, 74 percent of manufacturers reported that they do not sell online because online sales could affect their retail channels⁵
- one analyst estimates that distributors and retailers often represent as much as 50% of the cost of some consumer products, and that much of this cost could disappear if consumers could buy online.⁶

The Federal Trade Commission has long sought to promote competition over the Internet. To advance these efforts, in August 2001 the FTC formed the Internet Task Force to evaluate potentially anticompetitive regulations and business practices that could impede e-commerce. Led by the FTC's Office of Policy Planning, the Task Force has examined the academic research and met with numerous industry participants and observers, including online companies, trade associations, and scholars. To date, the FTC has filed three competition advocacy comments due in large part to the Task Force's efforts:

- a joint FTC/Department of Justice comment to the North Carolina state bar opposing two new opinions that would require the physical presence of an attorney for all real estate closings and refinancings (which would significantly increase the costs of Internet lenders that rely disproportionately on lay closers);⁷
- a joint FTC/Department of Justice comment before the Rhode Island legislature on a similar real estate bill;⁸ and
- a staff comment before the Connecticut Board of Opticians, which is considering additional restrictions on out-of-state and Internet contact lens sellers.⁹

⁴ See Consent Agreement in *In re Fair Allocation System*, No. 971-0065 (1998), available at <http://www.ftc.gov/os/1998/9808/9710065.agr.htm>.

⁵ First PPI Report at 14 (citing Candace Talmadge, "Retailers concerned as manufacturers sell online," *Reuters Internet*, December 31, 2000, <http://www.mercurycenter.com/svtech/news/breaking/internet/docs/7956161.htm>).

⁶ Doug Bartholomew, *E-Commerce Bullies* 51 (Sept. 4, 2000) (published in industryweek.com).

⁷ FTC/DOJ Letter to the Ethics Committee of the North Carolina State Bar re: State Bar Opinions Restricting Involvement of Non-Attorneys in Real Estate Closings and Refinancing Transactions (Dec. 14, 2001) available at <http://www.ftc.gov/be/V020006.htm>.

⁸ FTC/DOJ Letter to the Rhode Island House of Representatives re: Bill Restricting Competition from Non-Attorneys in Real Estate Closing Activities (Mar. 29, 2002) available at <http://www.ftc.gov/be/v020013.pdf>.

⁹ FTC Staff Comment Before the Connecticut Board of Examiners for Opticians (Mar. 27, 2002) available at <http://www.ftc.gov/be/v020007.htm>.

To further build on these efforts, the FTC will host a public workshop to explore how certain state regulations may have anticompetitive effects on e-commerce and how certain e-commerce business practices may raise antitrust concerns. The workshop will take place at the FTC from October 8-10, 2002. The workshop will include consumer advocates, industry representatives (from all sides), academics, and state government representatives.

To focus the discussion, the workshop will organize panels to address certain specific industries that are important to consumers and that have experienced significant growth in online commerce, but that may also have been hampered by anticompetitive state regulation or business practices. These panels will address some or all of the following industries:

Retailing: E-commerce retail sales continue to have enormous potential. They grew 2.5 times faster than all retail sales in the fourth quarter of 2001, and according to some analysts are expected to reach \$3.2 trillion by 2004.

Automobiles: All 50 states restrict online auto sales. Dealers argue that these restrictions protect consumers against unscrupulous manufacturers, and that the Internet unfairly lets online sellers free ride off the dealers' personal services.

Cyber-Charter Schools:

Cyber-charter schools currently enroll 50,000 students nationwide, and proponents hope to reach the 850,000 students nationally who receive home-schooling. In several states, however, legislators have introduced bills to place a moratorium on cyber-charter schools.

Real Estate / Mortgages:

As a result of the multi-state licensing system and physical office requirements, only national mortgage firms that already have physical offices in all states can sell online services in all states.

Health Care / Pharmaceuticals / Telemedicine:

In an era of skyrocketing costs, online prescription drug purchases could potentially lower prices for patients in the same way that online contact lenses lowered prices. At the same time, online pharmacies raise significant consumer protection issues. Similarly, telemedicine could give patients access to portable medical equipment and digital imaging technology even if they are too elderly or infirm to visit a hospital easily, or if they live in rural areas far from a full-service hospital. Most states, however, substantially limit online pharmaceuticals and telemedicine. Approximately thirteen states specifically prohibit electronic prescription transmission, and several states require physicians to examine the patient physically before prescribing medicine.

Wine Sales: The Internet offers consumers a broad array of wine choices. Although currently only six percent of U.S. wineries produce ninety-five percent of the wine consumed domestically, some scholars estimate that hundreds or even thousands of smaller vineyards have marketed their wines online. Moreover, studies indicate that, when sold through normal distribution channels, a typical bottle of wine has a markup from supplier to retailer of 100% or higher.

Auctions: Internet auctions have become a cultural phenomenon, and some businesses have started to use auction sites as an alternate means of distributing their products. Some states, however, are considering whether to apply existing licensing requirements designed for traditional auctioneers to these websites.

Contact Lenses: Consumers can save substantial sums of money by purchasing contact lenses online, as some studies suggest that optometrists mark up lenses from the manufacturer by between one and five times the cost. Some groups within the medical community, however, argue that online sales of contact lenses threaten consumer health, such as by making consumers less likely to visit their eye doctor.

Funerals (Caskets): In addition to cost savings, online casket sellers can offer consumers a greater variety of choices, such as individualized caskets. Many states, however, require that casket purchases be made only through a licensed, bricks-and-mortar vendor.

The Commission also invites comments concerning other industries, not listed above, that may raise similar issues and merit similar examination. The workshop will be open to the public, and should (1) enhance the FTC's understanding of these issues, (2) help educate policymakers about the effects of possibly protectionist state regulation, (3) help educate private entities about the types of business practices that may or may not be viewed as problematic, and (4) increase understanding about ways to promote robust competition from e-commerce, to the benefit of consumers.



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

DIRECTOR
OFFICE OF POLICY PLANNING

August 23, 2002

VIA MAIL AND FACSIMILE

Jerry Yang
Chief
Yahoo, Inc.
701 First Avenue
Sunnyvale, CA 94089

Re: Invitation to Appear at FTC Public Workshop on E-Commerce

Dear Mr. Yang:

I would like to invite you to appear at a three-day public workshop at the Federal Trade Commission on "Possible Anticompetitive Efforts to Restrict Competition on the Internet." If you are able to attend, we would ask you to testify on an overview panel with other leading executives to describe industry's perspectives on possible barriers to e-commerce. The public workshop will take place from October 8-10, 2002, at the FTC, 600 Pennsylvania Ave., N.W., Washington, DC 20580. The overview panel will take place during the morning of October 8.

The workshop will focus on two types of possible e-commerce barriers. The first type includes state and local regulations, such as occupational licensing and physical office requirements, that may have pro-consumer or pro-competition rationales, but that nevertheless may restrict the entry of new Internet competitors. The second type includes business conduct barriers that arise when private parties employ potentially anticompetitive tactics, such as when suppliers or dealers apply collective pressure to limit online sales. The workshop will have separate panels to address a variety of industries that may have been hampered significantly by such barriers, including retailing, automobile sales, cyber-charter schools, real estate and mortgages, pharmaceutical sales, telemedicine, wine sales, auctions, contact lens sales, and casket sales.

Particularly given the current economic climate, gaining a full understanding of the barriers facing new Internet entrants and ultimately developing strategies to promote robust competition in e-commerce is both timely and important. Indeed, some academic estimates of the aggregate impact of these various barriers suggest that they cost consumers billions of dollars every year.

I hope that the workshop will help policymakers and businesses better understand both the potentially pro-consumer and pro-competitive rationales behind these barriers and the actual impact of them on consumers. Because many of these issues are new, the workshop could help educate policymakers and businesses about policies that ultimately may have significant anticompetitive effects. To date, we have received dozens of calls from businesses, trade associations, consumer groups, and journalists who would like to participate in the workshop.

Along with this letter, I am sending you a copy of the Federal Register Notice announcing the workshop and a background fact sheet, both of which describe the Internet workshop in more detail. This letter will be followed up by a phone call to your office from Asheesh Agarwal, an attorney in the Office of Policy Planning who is organizing the workshop. If you or your staff have further questions, feel free to call me, at (202) 326-3683, or Asheesh at (202) 326-3558.

We look forward to hearing Yahoo's perspective on these important issues.

Sincerely,

A handwritten signature in black ink, appearing to read 'Ted Cruz', with a long horizontal flourish extending to the right.

Ted Cruz
Director, Office of Policy Planning
Federal Trade Commission

cc: Asheesh Agarwal

FEDERAL REGISTER NOTICE

Public Workshop: Possible Anticompetitive Efforts to Restrict Competition on the Internet

AGENCY: Federal Trade Commission

ACTION: Notice of Public Workshop and Opportunity for Comment

SUMMARY: The Federal Trade Commission ("FTC" or "Commission") announces a public workshop on "Possible Anticompetitive Efforts to Restrict Competition on the Internet." The workshop will focus on how certain state regulation may have anticompetitive effects, and how certain business practices may raise antitrust concerns, in the context of business-to-consumer e-commerce. The workshop will be held at and administered by the FTC.

DATES: The workshop will take place on October 8-10, 2002. The workshop will be transcribed and placed on the public record. Any interested person may submit written comments responsive to any of the topics to be addressed; such comments should be submitted no later than the last session of the workshop. Any written comments received also will be placed on the public record.

ADDRESSES: When in session, the workshop will be held at the FTC headquarters, 600 Pennsylvania Avenue, N.W., Washington, D.C. All interested parties are welcome to attend. Pre-registration is not required.

Written comments should be submitted in both hard copy and electronic form. Six hard copies of each submission should be addressed to Donald S. Clark, Office of the Secretary, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. Submissions should be captioned "Comments regarding ecompetition." Electronic submissions may be sent by electronic mail to "ecompetition@ftc.gov". Alternatively, electronic submissions may be filed on a 3-1/2 inch computer disk with a label on the disk stating the name of the submitter and the name and version of the word processing program used to create the document.

FOR FURTHER INFORMATION CONTACT: Jerry Ellig, Deputy Director, Office of Policy Planning, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580; telephone (202) 326-3528; e-mail: jellig@ftc.gov. Detailed agendas for the workshop will be available on the FTC Home Page (<http://www.ftc.gov>) and through Mildred Taylor, Staff Secretary, at (202) 326-2553.

SUPPLEMENTARY INFORMATION:

Overview

In the past decade, there has been growing concern about possibly anticompetitive efforts to restrict competition on the Internet. In particular, many states have enacted regulations that have the direct effect of protecting local merchants from competition over the Internet. For example, some states require that online vendors maintain an in-state office, while other states prohibit online sales of certain products entirely. Some scholars have argued that these regulations are often simply attempts by existing industries to forestall the entry of new and innovative Internet competitors, much as in prior eras, other entrenched producers have benefitted from regulatory efforts to impede new forms of competition.

Similarly, some private companies have engaged in conduct that may raise antitrust issues. For instance, some manufacturers and dealers do not list prices for certain items online, and others do not sell certain items over the Internet altogether and urge horizontal competitors to do the same. Depending on the circumstances, some of these restrictions could be viewed as potentially anticompetitive. While much of this regulation and conduct undoubtedly has pro-competitive and pro-consumer rationales, the regulations impose costs on consumers that, according to some

estimates, may exceed \$15 billion annually.

For these reasons, a workshop on possible anticompetitive efforts to restrict competition on the Internet is timely, and will build on previous FTC-sponsored events that addressed other aspects of e-commerce.⁽¹⁾ In order to enhance the Commission's understanding of particular practices and regulations, the workshop will have panels to address certain specific industries, including some or all of the following: retailing, automobiles, cyber-charter schools, real estate / mortgages, health care / pharmaceuticals / telemedicine, wine sales, auctions, contact lenses, and funerals (caskets).

Each of these industries has experienced some growth in commerce via the Internet, but according to various commentators, each also may have been hampered by anticompetitive state regulation or business practices. See, e.g., Atkinson, *The Revenge of the Disintermediated* (Jan. 2001) (report of the Progressive Policy Institute); Atkinson and Wilhelm, *The Best States for E-Commerce* (Mar. 2002) (second report of the Progressive Policy Institute). In addition, these industries involve goods and services that comprise a very large portion of a consumer's budget, such as homes, cars, schools, and health care.

It is intended that each industry panel have at least one independent analyst or academic, and also have representatives from the affected industries (on both sides of the issue). Where appropriate, the panel also will include a representative from a government agency, including (where appropriate) representatives from different states. We hope that each panel will provide all sides of the issue, including the perspectives of industry, intermediaries, consumers, and regulators.

The Commission also invites comments concerning other industries, not listed above, that may raise similar issues and merit similar examination.

Issues

Below is a non-exhaustive list of issues to be addressed by the workshop. Written comments need not address all of these issues.

1. General Issues

What role does competition law and policy play in fostering or hindering e-commerce? From a practical business perspective, how does each foster or impede e-commerce? What do empirical studies show?

Does state regulation have protectionist effects, and if so how? What are the benefits of such regulation, and do the benefits outweigh the costs? What is the prevalence of such state regulation? Are some types of regulations more friendly to e-commerce?

Do businesses try to limit competition over the Internet through anticompetitive efforts, and if so how? What are the business justifications for these efforts?

2. Issues for Particular Industries

Retailing:

How and why do manufacturers limit their distributors' sales of certain products over the Internet? What are the costs to consumers? Do distributors pressure manufacturers into limiting sales over the Internet, and if so how? Are such efforts facilitated by horizontal agreements? Does such conduct raise antitrust concerns, and are there legitimate business justifications, such as concerns about free-riding, for limiting e-commerce sales?

Automobiles:

Have manufacturers been forced to limit Internet sales of automobiles, and if so how? What are the costs to consumers? Are there legitimate concerns about free-riding or differentials in bargaining power? Are there different issues concerning the sale of new and used cars? What regulations have been applied to the sale of new or used cars through online auction sites? Does state regulation have the effect of protecting dealers from competition, to the possible detriment of consumers, or does existing state regulation provide important protection to consumers?

Cyber-Charter Schools:

How have states fostered or hindered cyber-charter schools? What are the competitive benefits of cyber-schools? Are there legitimate consumer protection concerns? Do the efforts of some school districts to limit cyber-charter schools raise any antitrust issues? What is the current status and focus of litigation, and what types of legislative solutions are possible?

Real Estate / Mortgages:

What types of state regulations limit online real estate and mortgage services? What are the costs to consumers? What is the impact of regulations requiring real estate closings or refinancings to be conducted solely by attorneys? What are the pro-consumer rationales for such regulations, and are there less restrictive means of achieving the same goals? What is the impact of Internet competition upon real estate commissions, and how are realtors responding to that competition?

Health Care / Pharmaceuticals / Telemedicine:

What types of state regulations limit online provision of health care goods and services, such as pharmaceuticals and telemedicine? What are the costs to consumers? Are these regulations directed mainly at out-of-state competitors? Are online prescriptions particularly susceptible to abuse? What are the pro-consumer rationales for regulations, and are there less restrictive means of achieving the same goals? Are reciprocity statutes an effective way to dealing with these issues?

Wine Sales:

How does the "three tier" system for distributing wine limit online sales, and are there legitimate justifications, such as temperance or taxation, for the system? What are the costs to consumers? Are there separate and measurable price and variety effects? Are there less restrictive means for achieving the same goals, and are reciprocity statutes a viable alternative? What is the status of the ongoing litigation addressing this system?

Auctions:

How have states applied their existing auctioneering regulations to online auction sites? What are the costs to consumers? Have states enacted new regulations targeted at online auctions? Do such regulations limit competition from online auctions, and if so how? Do those regulations impact large and small online auctioneers differently? To what extent are online auctions replacing traditional retail outlets, for consumer goods, automobiles (new or used), and other products? What types of state regulation can best protect consumers while still allowing competition from online auctions?

Contact Lenses:

What types of state regulations limit online sales of contact lenses? What are the costs to consumers? What are the health justifications for such regulations, and how valid are they? Are there separate issues for replacement lenses or disposable lenses? How should prescription requirements be administered? Have manufacturers limited the supply of contact lenses to online vendors, and if so why?

Funerals (Caskets):

What types of state regulations limit online casket sales? What are the costs to consumers? What are the pro-consumer rationales for such regulations, particularly in light of the recent controversies? Are there less restrictive means of achieving the same goals?

What is the status and focus of current litigation?

The Commission welcomes suggestions for other questions that also should be addressed. Proposed questions, identified as such, may be sent by electronic mail to ecompetition@ftc.gov.

By direction of the Commission.

Donald S. Clark
Secretary

Endnotes:

1. For more information on previous FTC-sponsored events regarding e-commerce, see <http://www.ftc.gov/opp/ecommerce/index.htm>; <http://www.ftc.gov/opa/2000/05/b2bworkshop.htm>.

Public Workshop: Possible Anticompetitive Efforts to Restrict Competition on the Internet
Federal Trade Commission
October 8-10, 2002

Many states have enacted regulations that may have the effect of protecting local bricks-and-mortar merchants from new Internet competitors. For example, all fifty states currently ban auto sales over the Internet unless they involve local franchise owners, and at least thirty states have laws that effectively preclude wine sales over the Internet. Seventeen states require online mortgage brokers to have a physical office in the state, which forces them to hire local residents. Many states also limit online competition for products ranging from contact lenses to funeral caskets. All of these restrictions may be justified by sound public policy, or they may ultimately prove to be attempts by existing industries to forestall the entry of Internet competitors and impede new forms of competition.

The aggregate costs of these restrictions may be very significant. Some scholars have estimated those costs as follows:

- the average purchaser of a car could save approximately two percent using an online service rather than buying in person from a dealer¹
- funeral homes commonly mark up caskets by over 500%, whereas third-party sellers (such as online sellers) typically mark up caskets only by around 100%²
- in the aggregate, potentially protectionist state regulation may cost consumers over \$15 billion annually.³

Similarly, some private companies have engaged in conduct that may raise antitrust issues. For instance, some dealers do not list prices for certain items they sell online; others don't sell certain items in their product line over the Internet at all, and urge horizontal competitors to follow suit. Again, some or all of these restrictions could be justified as procompetitive, or they could prove anticompetitive upon closer examination:

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states that had threatened to boycott Chrysler if it sold to low-cost Internet dealers⁴

- in one survey, 74 percent of manufacturers reported that they do not sell online because online sales could affect their retail channels⁵
- one analyst estimates that distributors and retailers often represent as much as 50% of the cost of some consumer products, and that much of this cost could disappear if consumers could buy online.⁶

The Federal Trade Commission has long sought to promote competition over the Internet. To advance these efforts, in August 2001 the FTC formed the Internet Task Force to evaluate potentially anticompetitive regulations and business practices that could impede e-commerce. Led by the FTC's Office of Policy Planning, the Task Force has examined the academic research and met with numerous industry participants and observers, including online companies, trade associations, and scholars. To date, the FTC has filed three competition advocacy comments due in large part to the Task Force's efforts:

- a joint FTC/Department of Justice comment to the North Carolina state bar opposing two new opinions that would require the physical presence of an attorney for all real estate closings and refinancings (which would significantly increase the costs of Internet lenders that rely disproportionately on lay closers);⁷
- a joint FTC/Department of Justice comment before the Rhode Island legislature on a similar real estate bill;⁸ and
- a staff comment before the Connecticut Board of Opticians, which is considering additional restrictions on out-of-state and Internet contact lens sellers.⁹

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To further build on these efforts, the FTC will host a public workshop to explore how certain state regulations may have anticompetitive effects on e-commerce and how certain e-commerce business practices may raise antitrust concerns. The workshop will take place at the FTC from October 8-10, 2002. The workshop will include consumer advocates, industry representatives (from all sides), academics, and state government representatives.

To focus the discussion, the workshop will organize panels to address certain specific industries that are important to consumers and that have experienced significant growth in online commerce, but that may also have been hampered by anticompetitive state regulation or business practices. These panels will address some or all of the following industries:

Retailing: E-commerce retail sales continue to have enormous potential. They grew 2.5 times faster than all retail sales in the fourth quarter of 2001, and according to some analysts are expected to reach \$3.2 trillion by 2004.

Automobiles: All 50 states restrict online auto sales. Dealers argue that these restrictions protect consumers against unscrupulous manufacturers, and that the Internet unfairly lets online sellers free ride off the dealers' personal services.

Cyber-Charter Schools:

Cyber-charter schools currently enroll 50,000 students nationwide, and proponents hope to reach the 850,000 students nationally who receive home-schooling. In several states, however, legislators have introduced bills to place a moratorium on cyber-charter schools.

Real Estate / Mortgages:

As a result of the multi-state licensing system and physical office requirements, only national mortgage firms that already have physical offices in all states can sell online services in all states.

Health Care / Pharmaceuticals / Telemedicine:

In an era of skyrocketing costs, online prescription drug purchases could potentially lower prices for patients in the same way that online contact lenses lowered prices. At the same time, online pharmacies raise significant consumer protection issues. Similarly, telemedicine could give patients access to portable medical equipment and digital imaging technology even if they are too elderly or infirm to visit a hospital easily, or if they live in rural areas far from a full-service hospital. Most states, however, substantially limit online pharmaceuticals and telemedicine. Approximately thirteen states specifically prohibit electronic prescription transmission, and several states require physicians to examine the patient physically before prescribing medicine.

Wine Sales: The Internet offers consumers a broad array of wine choices. Although currently only six percent of U.S. wineries produce ninety-five percent of the wine consumed domestically, some scholars estimate that hundreds or even thousands of smaller vineyards have marketed their wines online. Moreover, studies indicate that, when sold through normal distribution channels, a typical bottle of wine has a markup from supplier to retailer of 100% or higher.

Auctions: Internet auctions have become a cultural phenomenon, and some businesses have started to use auction sites as an alternate means of distributing their products. Some states, however, are considering whether to apply existing licensing requirements designed for traditional auctioneers to these websites.

Contact Lenses: Consumers can save substantial sums of money by purchasing contact lenses online, as some studies suggest that optometrists mark up lenses from the manufacturer by between one and five times the cost. Some groups within the medical community, however, argue that online sales of contact lenses threaten consumer health, such as by making consumers less likely to visit their eye doctor.

Funerals (Caskets): In addition to cost savings, online casket sellers can offer consumers a greater variety of choices, such as individualized caskets. Many states, however, require that casket purchases be made only through a licensed, bricks-and-mortar vendor.

The Commission also invites comments concerning other industries, not listed above, that may raise similar issues and merit similar examination. The workshop will be open to the public, and should (1) enhance the FTC's understanding of these issues, (2) help educate policymakers about the effects of possibly protectionist state regulation, (3) help educate private entities about the types of business practices that may or may not be viewed as problematic, and (4) increase understanding about ways to promote robust competition from e-commerce, to the benefit of consumers.



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

DIRECTOR
OFFICE OF POLICY PLANNING

August 16, 2002

The Honorable Charles Zogby
Education Secretary
333 Market St., Harristown 2
Harrisburg, PA 17126-0333

VIA U.S. MAIL AND FACSIMILE

Re: Invitation to Appear at FTC Workshop on E-Commerce

Dear Secretary Zogby:

I would like to invite you to appear at a three-day public workshop at the Federal Trade Commission on "Possible Anticompetitive Efforts to Restrict Competition on the Internet." If you are able to attend, we would ask you to testify on a panel with other educators on possible barriers to cyber-charter schools. The public workshop will take place from October 8-10, 2002, at the FTC, 600 Pennsylvania Ave., N.W., Washington, DC 20580. The panel on cyber-charter schools is tentatively scheduled for Tuesday, October 8, from 4:00-5:30 PM.

The workshop will focus on two types of possible e-commerce barriers. The first type includes state and local regulations, such as occupational licensing and physical office requirements, that may have pro-consumer or pro-competition rationales, but that nevertheless may restrict the entry of new Internet competitors. The second type includes business conduct barriers that arise when private parties employ potentially anticompetitive tactics, such as when suppliers or dealers apply collective pressure to limit online sales. The workshop will have separate panels to address a variety of industries that may have been hampered significantly by such barriers, including retailing, automobile sales, cyber-charter schools, real estate and mortgages, pharmaceutical sales, telemedicine, wine sales, auctions, contact lens sales, and casket sales.

Particularly given the current economic climate, gaining a full understanding of the barriers facing new Internet entrants and ultimately developing strategies to promote robust competition in e-commerce is both timely and important. Indeed, some academic estimates of the aggregate impact of these various barriers suggest that they cost consumers billions of dollars every year. And, of course, the need for continued innovation in developing new ways to bring the promise of quality education to every child in America remains a critical priority.

I hope that the workshop will help policymakers and businesses better understand both the potentially pro-consumer and pro-competitive rationales behind these barriers and the actual impact of them on consumers. Because many of these issues are new, the workshop could help educate policymakers and businesses about policies that ultimately may have significant anticompetitive effects. To date, we have received dozens of calls from businesses, trade associations, consumer groups, and journalists who would like to participate in the workshop.

Because Pennsylvania has led the efforts with cyber-charter schools, we would be very interested in hearing about Pennsylvania's experience. We believe that the workshop will provide an opportunity for Pennsylvania to share its experiences with other states, as well as federal policymakers, about the lessons to be learned from developing cyber-charter schools.

Along with this letter, I am sending you a copy of the Federal Register Notice announcing the workshop and a background factsheet, both of which describe the Internet workshop in more detail. This letter will be followed up by a phone call to your office from Asheesh Agarwal, who is an attorney in the Office of Policy Planning at the FTC and who is responsible for organizing the panel on cyber charter schools. If you or your staff have further questions, feel free to call me, at (202) 326-3683, or Asheesh at (202) 326-3558.

I very much hope that we will be able to work together to explore this important new area of education, and, ultimately, to help consumers realize the full benefits of e-commerce. We look forward to working with you and your office.

Sincerely,

A handwritten signature in black ink, appearing to read "Ted Cruz", with a large, stylized flourish at the end.

Ted Cruz
Director, Office of Policy Planning
Federal Trade Commission

cc: Asheesh Agarwal

FEDERAL REGISTER NOTICE

Public Workshop: Possible Anticompetitive Efforts to Restrict Competition on the Internet

AGENCY: Federal Trade Commission

ACTION: Notice of Public Workshop and Opportunity for Comment

SUMMARY: The Federal Trade Commission ("FTC" or "Commission") announces a public workshop on "Possible Anticompetitive Efforts to Restrict Competition on the Internet." The workshop will focus on how certain state regulation may have anticompetitive effects, and how certain business practices may raise antitrust concerns, in the context of business-to-consumer e-commerce. The workshop will be held at and administered by the FTC.

DATES: The workshop will take place on October 8-10, 2002. The workshop will be transcribed and placed on the public record. Any interested person may submit written comments responsive to any of the topics to be addressed; such comments should be submitted no later than the last session of the workshop. Any written comments received also will be placed on the public record.

ADDRESSES: When in session, the workshop will be held at the FTC headquarters, 600 Pennsylvania Avenue, N.W., Washington, D.C. All interested parties are welcome to attend. Pre-registration is not required.

Written comments should be submitted in both hard copy and electronic form. Six hard copies of each submission should be addressed to Donald S. Clark, Office of the Secretary, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. Submissions should be captioned "Comments regarding ecompetition." Electronic submissions may be sent by electronic mail to "ecompetition@ftc.gov". Alternatively, electronic submissions may be filed on a 3-1/2 inch computer disk with a label on the disk stating the name of the submitter and the name and version of the word processing program used to create the document.

FOR FURTHER INFORMATION CONTACT: Jerry Ellig, Deputy Director, Office of Policy Planning, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580; telephone (202) 326-3528; e-mail: jellig@ftc.gov. Detailed agendas for the workshop will be available on the FTC Home Page (<http://www.ftc.gov>) and through Mildred Taylor, Staff Secretary, at (202) 326-2553.

SUPPLEMENTARY INFORMATION:

Overview

In the past decade, there has been growing concern about possibly anticompetitive efforts to restrict competition on the Internet. In particular, many states have enacted regulations that have the direct effect of protecting local merchants from competition over the Internet. For example, some states require that online vendors maintain an in-state office, while other states prohibit online sales of certain products entirely. Some scholars have argued that these regulations are often simply attempts by existing industries to forestall the entry of new and innovative Internet competitors, much as in prior eras, other entrenched producers have benefitted from regulatory efforts to impede new forms of competition.

Similarly, some private companies have engaged in conduct that may raise antitrust issues. For instance, some manufacturers and dealers do not list prices for certain items online, and others do not sell certain items over the Internet altogether and urge horizontal competitors to do the same. Depending on the circumstances, some of these restrictions could be viewed as potentially anticompetitive. While much of this regulation and conduct undoubtedly has pro-competitive and pro-consumer rationales, the regulations impose costs on consumers that, according to some

estimates, may exceed \$15 billion annually.

For these reasons, a workshop on possible anticompetitive efforts to restrict competition on the Internet is timely, and will build on previous FTC-sponsored events that addressed other aspects of e-commerce.⁽¹⁾ In order to enhance the Commission's understanding of particular practices and regulations, the workshop will have panels to address certain specific industries, including some or all of the following: retailing, automobiles, cyber-charter schools, real estate / mortgages, health care / pharmaceuticals / telemedicine, wine sales, auctions, contact lenses, and funerals (caskets).

Each of these industries has experienced some growth in commerce via the Internet, but according to various commentators, each also may have been hampered by anticompetitive state regulation or business practices. See, e.g., Atkinson, *The Revenge of the Disintermediated* (Jan. 2001) (report of the Progressive Policy Institute); Atkinson and Wilhelm, *The Best States for E-Commerce* (Mar. 2002) (second report of the Progressive Policy Institute). In addition, these industries involve goods and services that comprise a very large portion of a consumer's budget, such as homes, cars, schools, and health care.

It is intended that each industry panel have at least one independent analyst or academic, and also have representatives from the affected industries (on both sides of the issue). Where appropriate, the panel also will include a representative from a government agency, including (where appropriate) representatives from different states. We hope that each panel will provide all sides of the issue, including the perspectives of industry, intermediaries, consumers, and regulators.

The Commission also invites comments concerning other industries, not listed above, that may raise similar issues and merit similar examination.

Issues

Below is a non-exhaustive list of issues to be addressed by the workshop. Written comments need not address all of these issues.

1. General Issues

What role does competition law and policy play in fostering or hindering e-commerce? From a practical business perspective, how does each foster or impede e-commerce? What do empirical studies show?

Does state regulation have protectionist effects, and if so how? What are the benefits of such regulation, and do the benefits outweigh the costs? What is the prevalence of such state regulation? Are some types of regulations more friendly to e-commerce?

Do businesses try to limit competition over the Internet through anticompetitive efforts, and if so how? What are the business justifications for these efforts?

2. Issues for Particular Industries

Retailing:

How and why do manufacturers limit their distributors' sales of certain products over the Internet? What are the costs to consumers? Do distributors pressure manufacturers into limiting sales over the Internet, and if so how? Are such efforts facilitated by horizontal agreements? Does such conduct raise antitrust concerns, and are there legitimate business justifications, such as concerns about free-riding, for limiting e-commerce sales?

Automobiles:

Have manufacturers been forced to limit Internet sales of automobiles, and if so how? What are the costs to consumers? Are there legitimate concerns about free-riding or differentials in bargaining power? Are there different issues concerning the sale of new and used cars? What regulations have been applied to the sale of new or used cars through online auction sites? Does state regulation have the effect of protecting dealers from competition, to the possible detriment of consumers, or does existing state regulation provide important protection to consumers?

Cyber-Charter Schools:

How have states fostered or hindered cyber-charter schools? What are the competitive benefits of cyber-schools? Are there legitimate consumer protection concerns? Do the efforts of some school districts to limit cyber-charter schools raise any antitrust issues? What is the current status and focus of litigation, and what types of legislative solutions are possible?

Real Estate / Mortgages:

What types of state regulations limit online real estate and mortgage services? What are the costs to consumers? What is the impact of regulations requiring real estate closings or refinancings to be conducted solely by attorneys? What are the pro-consumer rationales for such regulations, and are there less restrictive means of achieving the same goals? What is the impact of Internet competition upon real estate commissions, and how are realtors responding to that competition?

Health Care / Pharmaceuticals / Telemedicine:

What types of state regulations limit online provision of health care goods and services, such as pharmaceuticals and telemedicine? What are the costs to consumers? Are these regulations directed mainly at out-of-state competitors? Are online prescriptions particularly susceptible to abuse? What are the pro-consumer rationales for regulations, and are there less restrictive means of achieving the same goals? Are reciprocity statutes an effective way to dealing with these issues?

Wine Sales:

How does the "three tier" system for distributing wine limit online sales, and are there legitimate justifications, such as temperance or taxation, for the system? What are the costs to consumers? Are there separate and measurable price and variety effects? Are there less restrictive means for achieving the same goals, and are reciprocity statutes a viable alternative? What is the status of the ongoing litigation addressing this system?

Auctions:

How have states applied their existing auctioneering regulations to online auction sites? What are the costs to consumers? Have states enacted new regulations targeted at online auctions? Do such regulations limit competition from online auctions, and if so how? Do those regulations impact large and small online auctioneers differently? To what extent are online auctions replacing traditional retail outlets, for consumer goods, automobiles (new or used), and other products? What types of state regulation can best protect consumers while still allowing competition from online auctions?

Contact Lenses:

What types of state regulations limit online sales of contact lenses? What are the costs to consumers? What are the health justifications for such regulations, and how valid are they? Are there separate issues for replacement lenses or disposable lenses? How should prescription requirements be administered? Have manufacturers limited the supply of contact lenses to online vendors, and if so why?

Funerals (Caskets):

What types of state regulations limit online casket sales? What are the costs to consumers? What are the pro-consumer rationales for such regulations, particularly in light of the recent controversies? Are there less restrictive means of achieving the same goals?

What is the status and focus of current litigation?

The Commission welcomes suggestions for other questions that also should be addressed. Proposed questions, identified as such, may be sent by electronic mail to ecompetition@ftc.gov.

By direction of the Commission.

Donald S. Clark
Secretary

Endnotes:

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