

Prepared Statement of The Federal Trade Commission

Before the

Subcommittee on
Competition, Foreign Commerce, and Infrastructure
of the
Committee on Commerce, Science and Transportation
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Mr. Chairman, the Federal Trade Commission ("Commission" or "FTC") is pleased to appear before the Subcommittee today to support the FTC's reauthorization request for Fiscal Years 2004 to 2006.⁽¹⁾ Since the last reauthorization hearing, the FTC has continued to take innovative and aggressive actions to protect consumers and promote competition. The Commission would like to thank the Chairman and members of the Subcommittee for their continued support of the agency's missions.

I. Introduction

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

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

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

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

- **Privacy: "Do-Not-Call."** The Commission promulgated far-reaching amendments to its Telemarketing Sales Rule ("TSR"). Among the most important changes, the agency is poised to launch its National Do-Not-Call registry, one of the most significant consumer protection initiatives in recent years. The registry will be a central database of telephone numbers of consumers who choose not to receive telemarketing calls. Once the registry is in place this summer, telemarketers will pay a fee to gain access to the registry and then must scrub their telemarketing lists

against the telephone numbers in the database. This fall, consumers who have placed their telephone numbers on the registry will begin to receive fewer and fewer unwanted telemarketing calls.

- **Health Care: Prescription Drugs.** Medical therapy increasingly relies on new pharmaceuticals as alternatives to more invasive treatments, such as surgery. A number of FTC activities will likely, directly or indirectly, help consumers to afford drugs to meet their needs. The FTC published a study examining the frequency of anticompetitive abuses to block market entry of lower-cost generic drugs; provided comments to the Food and Drug Administration ("FDA") on the potential for misusing the Hatch-Waxman Act procedures governing generic entry; and brought law enforcement actions against branded drug companies alleging improper efforts to delay generic entry. Among other significant matters, the Commission reached a settlement with Bristol-Myers Squibb ("BMS") resolving charges that BMS abused the Hatch-Waxman process to obstruct the entry of generic competition for two anti-cancer drugs and an anti-anxiety agent.
- **Financial Practices: Fraudulent Lending.** In May 2003, the court finalized a settlement to resolve FTC charges that The Associates (now owned by Citigroup, Inc.) had engaged in widespread deceptive and abusive practices involving subprime home mortgage lending. The settlement is expected to provide \$215 million in redress through cash refunds and reduced loan balances to approximately 2.2 million consumers in the U.S., Puerto Rico, and the Virgin Islands. A related class action settlement is expected to yield an additional \$25 million, for total relief to consumers of \$240 million.
- **E-Commerce: A Unified Approach to Maintaining Efficient Markets.** The development of the Internet has created a host of consumer issues, requiring the FTC to draw on all its consumer protection and competition capabilities. Among other activities, the FTC has formed an Internet Task Force to analyze state regulations that may restrict the entry of new Internet competitors; hosted public workshops on both spam and potential anticompetitive barriers to e-commerce; and brought significant law enforcement actions that continue its historical role of leading efforts to keep e-commerce free from fraud, deception, and unfair or anticompetitive practices.
- **Energy: Gasoline.** In an administrative complaint issued in March 2003, the FTC alleged that Unocal improperly manipulated the process through which the California Air Resources Board set regulations for the formulation of low-emissions gasoline. The FTC contended that Unocal's anticompetitive conduct potentially could cost California consumers hundreds of millions of dollars per year in higher gasoline prices.
- **Innovation: Intellectual Property and Competition.** With the growth of the knowledge-based economy, the relationship between competition and patent policy as spurs to innovation has become increasingly important. The FTC, together with the Antitrust Division of the Department of Justice, held hearings over 24 days, with more than 300 participants, to explore this topic. A report will issue later this year.

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

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

A. Fraud and Deception

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

Overall, since April 2002, the FTC has filed more than 145 cases involving fraud or deception and has enjoyed significant success in obtaining redress orders to provide relief for defrauded consumers, with more than 65 final judgments to date ordering more than \$865 million in consumer redress.⁽⁴⁾ The agency continues to ensure

compliance with district court orders by bringing civil contempt proceedings when appropriate, and by assisting in criminal prosecution of FTC defendants who flagrantly violate court orders.

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

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

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

B. Consumer Privacy

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

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

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

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

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

3. Safeguarding Consumer Information. In May 2002, the FTC finalized an order settling charges that Eli Lilly & Company unintentionally disclosed e-mail addresses of users of its Prozac.com and Lilly.com sites as a result of failures to take reasonable steps to protect the confidentiality and security of that information. The settlement requires Lilly to establish a security program to protect consumers' personal information against reasonably anticipated threats or risks to its security, confidentiality, or integrity.⁽⁹⁾

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

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

Commissioner Orson Swindle, in particular, has focused on issues involving information security. During the past year, he has served as head of the U.S. delegation to the Organization for Economic Cooperation and Development ("OECD") Experts Group for Review of the 1992 OECD Guidelines for the Security of Information Systems. The group released revised guidelines in August 2002 that consist of nine principles promoting a "culture of security." The FTC has promoted the dissemination of these principles among industry and consumer groups. The FTC's consumer security web site, <www.ftc.gov/infosecurity>, contains practical tips for staying secure online and features "Dewie the Turtle," a colorful cartoon mascot to promote effective online security. In addition, the FTC has worked with the White House Office of Cyberspace Security and the Department of Homeland Security to develop consumer awareness aspects of the National Strategy to Secure Cyberspace.

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

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

In particular, deceptive spam is an ever-growing problem that the FTC is addressing through law enforcement efforts, consumer and business education, and research. An important tool the FTC uses to target law violations, identify trends, and conduct research for education is its spam database. Consumers forward spam they receive to the FTC database at uce@ftc.gov. The database receives, on average, more than 110,000 e-mail messages each day, and currently contains a total of approximately 42 million pieces of spam.

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

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

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

including deceptive e-mail header information. The settlement also requires the defendants to prevent third parties that promote their videotext services, through e-mail or other means, from making deceptive statements.⁽²⁰⁾

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

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

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

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

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

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

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

Action by consumers and businesses who may receive spam will be a crucial part of any solution to the problems caused by spam. A key component of the FTC's efforts against spam is educating consumers and businesses about the steps they can take to decrease the amount of spam they receive. The FTC's educational materials provide

guidance on how to decrease the chances of having an e-mail address harvested and used for spam, and suggest several other steps to decrease the amount of spam an address may receive. The FTC's educational materials on spam are available on the FTC website.⁽²⁵⁾

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

6. *Pretexting.* Through its Section 5 authority as well as its jurisdiction under the GLB Act, the FTC is also combating "pretexting," the use of false pretenses to obtain customer financial information. The agency has obtained stipulated court orders to halt these practices⁽²⁶⁾ and has sent warning letters to nearly 200 others about apparent violations of the GLB pretexting prohibitions.

C. Deceptive Lending Practices

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

D. Health Fraud and Deception

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

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

2. *Weight Loss Advertising.* Since the 1990s, the FTC has filed nearly 100 cases challenging false or misleading claims for all types of weight loss products, including over-the-counter drugs, dietary supplements, commercial weight loss centers, weight loss devices, and exercise equipment.⁽³⁵⁾ In September 2002, the FTC issued a "Report on Weight-Loss Advertising: An Analysis of Current Trends,"⁽³⁶⁾ which concludes that false or misleading claims for weight loss products are widespread and, despite an unprecedented level of FTC enforcement activity, appear to have increased over the last decade.

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

E. Cross-Border Consumer Protection

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

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

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

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

F. Initiatives Designed to Reach Specific Consumer Groups

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

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

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

Finally, the FTC monitors alcohol advertising to ensure that ads for these products do not involve potentially unfair or deceptive practices, including the targeting of alcohol advertisements to minors. In response to a Congressional request, the agency will prepare reports on two subjects related to alcohol advertising and youth: (1) the impact on

underage consumers of the significant expansion of ads for new alcoholic beverages, and (2) the industry's response to recommendations for improved self-regulation contained in the FTC's 1999 report to Congress.⁽⁴⁴⁾

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

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

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

III. Maintaining Competition

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

A. Health Care

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

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

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

- **Biovail.** An October 2002 consent order settling charges that Biovail Corporation illegally acquired a license to a patent and improperly listed the patent in the FDA's Orange Book as claiming Biovail's high blood pressure drug

Tiazac (under current law, the listing of the patent and the subsequent lawsuit brought by Biovail against a potential generic entrant triggered an automatic 30-month stay of FDA approval of the generic competitor);⁽⁴⁹⁾ and

- **Biovail/Elan.** An August 2002 settlement with Biovail and Elan Corporation, plc resolving charges that the companies entered into an agreement that provided substantial incentives for the two companies not to compete in the markets for 30 milligram and 60 milligram dosage strengths of the generic drug Adalat CC (an anti-hypertension drug).⁽⁵⁰⁾

2. Health Care Providers. For decades, the FTC has worked to facilitate innovative and efficient arrangements for the delivery and financing of health care services by challenging artificial barriers to competition among health care providers. These efforts continue. In the last year, the FTC settled with seven groups of physicians for allegedly colluding to raise consumers' costs.⁽⁵¹⁾ These settlements involved significant numbers of doctors -- more than 1,200 in a case in the Dallas-Fort Worth area and more than three-quarters of all doctors in the Carlsbad, New Mexico area. The Commission's orders put a stop to allegedly collusive conduct that harms employers, individual patients, and health plans by depriving them of the benefits of competition in the purchase of physician services.

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

Other recent health care mergers investigated by the FTC include:

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

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

In July 2002, the FTC issued a report entitled "Generic Drug Entry Prior to Patent Expiration: An FTC Study,"⁽⁵⁷⁾ which evaluated whether the Hatch-Waxman Amendments to the Federal Food, Drug, and Cosmetic Act are susceptible to strategies to delay or deter consumer access to generic alternatives to brand-name drug products. The report recommended changes in the law to ensure that generic entry is not delayed unreasonably, including through anticompetitive activity. In October 2002, President Bush directed the FDA to implement one of the key findings identified in the FTC study.⁽⁵⁸⁾ Specifically, the FDA has proposed a new rule to curb one of the abuses uncovered by the FTC study - pharmaceutical firms' alleged misuse of the Hatch-Waxman patent listing provisions - to speed consumer access to lower-cost generic drugs.⁽⁵⁹⁾

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

B. Energy

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

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

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

3. Gasoline Monopolization Case. As highlighted above, the Commission recently issued an administrative complaint in an important nonmerger case involving the Union Oil Company of California ("Unocal").⁽⁶³⁾ The complaint alleges that Unocal violated Section 5 of the FTC Act by subverting the California Air Resources Board's ("CARB") regulatory standard-setting procedures of the late 1980s relating to low-emissions reformulated gasoline ("RFG"). According to the complaint, Unocal misrepresented to industry participants that some of its emissions research was non-proprietary and in the public domain, while at the same time pursuing a patent that would permit Unocal to charge royalties if CARB used such emissions information. The complaint alleged that Unocal did not disclose its pending patent claims and that it intentionally perpetuated the false and misleading impression that it would not enforce any proprietary interests in its emissions research results. The complaint states that Unocal's conduct has allowed it to acquire monopoly power for the technology to produce and supply California "summer-time" RFG, a low-emissions fuel mandated for sale in California from March through October, and could cost California consumers five cents per gallon in higher gasoline prices. This case is pending before an Administrative Law Judge.

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

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

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

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

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

C. High Technology

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

1. Standard-Setting Cases. As technology advances, efforts will increase to establish industry standards for the development and manufacture of new products. Standard setting is often procompetitive, but anticompetitive abuses can take place during the standard-setting process. When the standard-setting process appears to have been subverted, the FTC will take action. In addition to *Unocal*, discussed previously, the agency is currently conducting an administrative adjudication regarding Rambus, Inc. A June 2002 complaint alleges that Rambus, a participant in an electronics standard-setting organization, failed to disclose - in violation of the organization's rules - that it had a patent and several pending patent applications on technologies that eventually were adopted as part of the industry standard.⁽⁶⁵⁾ The standard at issue involved a common form of computer memory used in a wide variety of popular consumer electronic products, such as personal computers, fax machines, video games, and personal digital assistants. The Commission's complaint alleges that, once the standard was adopted, Rambus was in a position to reap millions in royalty fees each year, and potentially more than a billion dollars over the life of the patents.⁽⁶⁶⁾ Because standard-setting abuses can harm robust and efficiency-enhancing competition in high tech markets, the FTC will continue to pursue investigations in this area.⁽⁶⁷⁾

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

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

D. International Competition

Because competition increasingly takes place in a worldwide market, cooperation with competition agencies in the world's major economies is a key component of the FTC's enforcement program. Given differences in laws, cultures, and priorities, it is unlikely that there will be complete convergence of antitrust policy in the foreseeable future. Areas of agreement far exceed those of divergence, however, and instances in which differences will result in conflicting results are likely to remain rare. The agency has increased its cooperation with agencies around the world, both on individual cases and on policy issues, and is committed to addressing and minimizing policy divergences.

1. ICN and ICPAC. In the fall of 2001, the FTC, DOJ, and 12 other antitrust agencies from around the world launched the International Competition Network ("ICN"), an outgrowth of a recommendation of the International Competition Policy Advisory Committee ("ICPAC"). ICPAC suggested that competition officials from developed and developing countries convene a forum in which to work together on competition issues raised by economic globalization and the proliferation of antitrust regimes. The ICN provides a venue for antitrust officials worldwide to work toward consensus on proposals for procedural and substantive convergence on best practices in antitrust enforcement and policy. Sixty-seven jurisdictions already have joined the ICN, and the FTC staff is working on initial projects relating to mergers and competition advocacy.

2. OECD. The FTC continues to participate in the work of the OECD on, among other things, merger process convergence, implementation of the OECD recommendation on hard-core cartels (e.g., price-fixing agreements), and regulatory reform.

E. Other Enforcement

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

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

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

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

3. Enforcement of FTC Merger Orders. The FTC also will litigate, when necessary, to ensure compliance with Commission orders protecting competition. In March, a federal judge fined Boston Scientific Corporation ("BSC") for violating a licensing requirement in a merger settlement involving medical technology used to diagnose and treat heart disease.⁽⁷⁴⁾ To preserve competition in the market for intravascular ultrasound catheters following its acquisition of two competitors, BSC had agreed to license its catheter technology to Hewlett-Packard Company. Finding that

BSC "acted in bad faith" and took an "obstreperous approach" to its obligation, the court assessed a civil penalty of more than \$7 million. This represents the largest civil penalty ever imposed for violation of an FTC order.

IV. Legislative Recommendations

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

A. Elimination of the FTC Act's Exemption for Communications Common Carriers The FTC Act exempts common carriers subject to the Communications Act from its prohibitions on unfair or deceptive acts or practices and unfair methods of competition. This exemption dates from a period when telecommunications services were provided by government-authorized, highly regulated monopolies. The exemption is now outdated. In the current world, firms are expected to compete in providing telecommunications services. Congress and the Federal Communications Commission ("FCC") have replaced much of the economic regulatory apparatus formerly applicable to the industry with competition. Moreover, technological advances have blurred traditional boundaries between telecommunications, entertainment, and high technology. Telecommunications firms have expanded into numerous non-common-carrier activities. For these reasons, FTC jurisdiction over telecommunications firms' activities has become increasingly important.

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

The common carrier exemption sometimes has stymied FTC efforts to halt fraudulent or deceptive practices by telecommunications firms. While common carriage has been outside the FTC's authority, the agency believes that the FTC Act applies to non-common-carrier activities of telecommunications firms, even if the firms also provide common carrier services. Continuing disputes over the breadth of the FTC Act's common carrier exemption hamper the FTC's oversight of the non-common-carrier activities. These disputes have arisen even when the FCC may not have jurisdiction over the non-common-carrier activity. These disputes may increase the costs of pursuing an enforcement action or may cause the agency to narrow an enforcement action - for example, by excluding some participants in a scheme - to avoid protracted jurisdictional battles and undue delay in providing consumer redress. It may have additional serious consequences to new areas of industry convergence, e.g., high technology and entertainment, where the FTC's inability to protect consumers can undermine consumer confidence.

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

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

B. Legislation to Improve the FTC's Ability to Combat Cross-Border Fraud

As stated earlier, consumer fraud is now more global than ever before. To better protect consumers, the FTC requests that Congress enact legislation that would better address the changing nature of the consumer marketplace and improve the agency's ability to cooperate and share information in cases and investigations relating to cross-border fraud. The agency's recommendations focus primarily on improving its ability to combat fraud involving foreign parties, evidence, or assets. At the same time, some of the recommendations may also benefit the pursuit of purely

domestic investigations and cases. Indeed, it is often not immediately evident whether a matter has a cross-border component.

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

The FTC staff has discussed these legislative proposals with other affected agencies, and these agencies generally support the goals of the proposals. The FTC staff is continuing to work with these agencies on the details of a few of the proposals.

The FTC's cross-border proposal includes four main components. First, the FTC is seeking to strengthen, in a number of ways, its ability to cooperate with foreign counterparts, who are often investigating the same targets. Under current law, for example, the FTC is prohibited from sharing with foreign counterparts certain information that the FTC has obtained in its investigations. Legislation is necessary to allow the agency to share such information and provide other investigative assistance in appropriate cases.⁽⁷⁵⁾

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Fourth, the amended statute would provide that the Rule would be enforceable, like all FTC Rules, through FTC actions in federal district court, and it further would provide that violators would be subject to preliminary and permanent injunctions and could be ordered to pay redress to consumers. In addition, in an action brought by DOJ on

behalf of the FTC, violators would be liable to pay civil penalties of up to \$11,000 per violation (the amount of civil penalties is governed by statutory factors, such as ability to pay, previous history of such conduct, egregiousness of the conduct, etc.).

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

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

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

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

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

D. Technical Changes

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

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

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

V. Conclusion

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

Endnotes:

1. This written statement represents the views of the Federal Trade Commission. My oral presentation and responses to questions are my own and do not necessarily reflect the views of the Commission or any other Commissioner.
2. In 2003, Consumer Sentinel was named one of the top 25 E-Government programs by the Industry Advisory Council and the Federal Chief Information Officer Council.
3. The FTC works with various federal and state law enforcement agencies, as well as Canadian, Mexican, and other international authorities. See, e.g., FTC Press Release, *State, Federal Law Enforcers Launch Sting on Business Opportunity, Work-at-Home Scams* (June 20, 2002), available at <<http://www.ftc.gov/opa.2002/06/bizopswe.htm>>. See also FTC Press Release, *FTC, States Give "No Credit" to Finance Related Scams in Latest Joint Law Enforcement Sweep* (Sept. 5, 2002), available at <<http://www.ftc.gov/opa/2002/09/opnocredit.htm>>.
4. This figure represents the amount of redress that has been ordered by the courts in more than 65 orders from April 2002 to May 2003. The figure does not represent the actual amount of money that has been or will be collected pursuant to those orders.
5. *FTC v. Access Resource Services, Inc.*, Civ. Action No. 02-60226-CIV Gold/Simonton (S.D. Fla. Nov. 4, 2002).
6. *FTC v. SkyBiz.com, Inc.*, Civ. Action No. 01-CV-396-EA (M) (N.D. Okla. Jan. 28, 2003).
7. *FTC v. Mitchell Gold*, Civ. Action No. SAcv 98-968 DOC (Rzx) (C.D. Cal. Mar. 7, 2003).
8. Since the FTC first published the booklet in February 2002, the FTC has distributed more than 1.2 million paper copies and logged more than 1 million "hits" accessing the booklet on the FTC web site. The publication is available at <<http://www.ftc.gov/bcp/edu/pubs/consumer/idtheft/idth04.shtm>>.
9. *Eli Lilly & Co.*, Dkt. No. C-4047 (May 10, 2002).
10. *Microsoft Corp.*, Dkt. No. C-4069 (Dec. 24, 2002).
11. Standards for Safeguarding Customer Information; Final Rule, 67 Fed. Reg. 36,484 (May 23, 2002) (to be codified at 16 C.F.R. Part 314).
12. FTC Facts for Businesses, *Financial Institutions and Customer Data: Complying with the Safeguards Rule*, available at <<http://www.ftc.gov/bcp/edu/pubs/business/idtheft/bus54.shtm>>.
13. 15 U.S.C. §§ 6501-6506.
14. *United States v. Hershey Foods Corp.*, Civ. Action No. 4:03-cv-00350-JEJ (M.D. Pa. Feb. 26, 2003); *United States v. Mrs. Fields Famous Brands*, Civ. Action No. 2:03cv00205 (D. Utah Feb. 25, 2003); *United States v. The Ohio Art Co.*, Civ. Action No. 3:02CV7203 (N.D. Ohio Apr. 30, 2002); *United States v. American Pop Corn Co.*, Civ. Action No. C02-4008DEO (N.D. Iowa Feb. 28, 2002); *United States v. Lisa Frank, Inc.*, Civ. Action No. 01-1516-A (E.D. Va. Oct. 3, 2001); *United States v. Looksmart, Ltd.*, Civ. Action No. 01-606-A (E.D. Va. Apr. 23, 2001); *United States v. Bigmailbox.com, Inc.*, Civ. Action No. 01-605-A (E.D. Va. Apr. 23, 2001); *United States v. Monarch Servs., Inc.*, Civ. Action No. AMD 01 CV 1165 (D. Md. Apr. 20, 2001).
15. *United States v. Hershey Foods Corp.*, Civ. Action No. 4:03-cv-00350-JEJ (M.D. Pa. Feb. 26, 2003); *United States v. Mrs. Fields Famous Brands*, Civ. Action No. 2:03cv00205 (D. Utah Feb. 25, 2003).
16. Unsolicited commercial e-mail ("UCE" or "spam") is any commercial e-mail message that is sent - typically in bulk - to consumers without the consumers' prior request or consent.

17. FTC Staff Report, False Claims in Spam (Apr. 2003), available at <http://www.ftc.gov/reports/spam/030429spamreport.pdf>. The remaining spam messages were not necessarily truthful, but they did not contain any obvious indicia of falsity.

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

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

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

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

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

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

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

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

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

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

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

28. 15 U.S.C. §§ 1691-1691f, as amended.

29. *Id.* §§ 1681-1681(u), as amended.

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

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

32. 15 U.S.C. §§ 1601-1667f, as amended.

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

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

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

36. FTC Staff Report, Weight Loss Advertising: An Analysis of Current Trends (Sept. 2002), available at <http://www.ftc.gov/bcp/reports/weightloss.pdf>.

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

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

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

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

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

42. FTC, Marketing Violent Entertainment to Children: A Review of Self-Regulation and Industry Practices in the Motion Picture, Music Recording & Electronic Game Industries (Sept. 2000), available at <http://www.ftc.gov/reports/violence/vioreport.pdf>; FTC, Marketing Violent Entertainment to Children: A Six-Month Follow-Up Review of Industry Practices in the Motion Picture, Music Recording & Electronic Game Industries (Apr. 2001), available at <http://www.ftc.gov/reports/violence/violence010423.pdf>;

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

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

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

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

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

46. FTC Facts for Consumers, *Military Sentinel: Fact Sheet*, available at http://www.ftc.gov/bcp/online/pubs/general/milsent_fact.htm.

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

48. The proposed order includes a provision prohibiting BMS from triggering a 30-month stay for any BMS product based on any patent BMS lists in the Orange Book after the filing of an application to market a generic drug.
49. *Biovail Corp.*, Dkt. No. C-4060 (Oct. 2, 2002).
50. *Biovail Corp. and Elan Corp.*, Dkt. No. C-4057 (Aug. 15, 2002).
51. *Grossmont Anesthesia Servs. Med. Group, Inc.*, File No. 021-0006 (May 30, 2003) (agreement accepted for public comment); *Anesthesia Serv. Med. Group, Inc.*, File No. 021-0006 (May 30, 2003) (agreement accepted for public comment); *Carlsbad Physicians*, File No. 031-0002 (May 2, 2003) (agreement accepted for public comment); *System Health Providers*, Dkt. No. C-4064 (Oct. 24, 2002); *R.T. Welter & Assoc., Inc.* (Professionals in Women's Care), Dkt. No. C-4063 (Oct. 8, 2002); *Physician Integrated Servs. of Denver, Inc.*, Dkt. No. C-4054 (July 16, 2002); *Aurora Associated Primary Care Physicians, L.L.C.*, Dkt. No. C-4055 (July 16, 2002).
52. *Pfizer Inc.*, Dkt. No. C-4075 (Apr. 14, 2003) (proposed consent agreement accepted for public comment).
53. FTC Press Release, *FTC Seeks to Block Cytyc Corp.'s Acquisition of Digene Corp.* (June 24, 2002), available at http://www.ftc.gov/opa/2002/06/cytyc_digene.htm.
54. *Baxter International Inc. and Wyeth*, Dkt. No. C-4068 (Feb. 3, 2003).
55. *Amgen Inc. and Immunex Corp.*, Dkt. No. C-4056 (Sept. 3, 2002).
56. See Thomas B. Leary, *Antitrust Issues in Settlement of Pharmaceutical Patent Disputes* (Nov. 3, 2000), available at <http://www.ftc.gov/speeches/leary/learypharma.htm>; Thomas B. Leary, *Antitrust Issues in the Settlement of Pharmaceutical Patent Disputes, Part II* (May 17, 2001), available at <http://www.ftc.gov/speeches/leary/learypharmaceuticalsettlement.htm>.
57. Generic Drug Entry Prior to Patent Expiration: An FTC Study (July 2002), available at <http://www.ftc.gov/opa/2002/07/genericdrugstudy.htm>.
58. President Takes Action to Lower Prescription Drug Prices by Improving Access to Generic Drugs (Oct. 21, 2002), available at <http://www.whitehouse.gov/news/releases/2002/10/20021021-2.html>.
59. Applications for FDA Approval to Market a New Drug: Patent Listing Requirements and Application of 30-Month Stays on Approval of Abbreviated New Drug Applications Certifying That a Patent Claiming a Drug Is Invalid or Will Not Be Infringed; Proposed Rule, 67 Fed. Reg. 65448 (Oct. 24, 2002).
60. The FTC web site for the hearings is <http://www.ftc.gov/ogc/healthcarehearings/index.htm>. To date, the FTC has released a detailed agenda for the hearings' sessions in February through June. All of the documents relating to the hearings appear on the web site.
61. *Conoco Inc. and Phillips Petroleum Company*, Dkt. No. C-4058 (Feb. 7, 2003) (consent order).
62. *Southern Union Co.*, File No. 031-0068 (May 29, 2003) (agreement accepted for public comment).
63. *Union Oil Co. of California*, Dkt. No. 9305 (complaint issued Mar. 4, 2003).
64. FTC Press Release, *FTC to Hold Public Conference/Opportunity for Comment on U.S. Gasoline Industry in Early August* (July 12, 2001), available at <http://www.ftc.gov/opa/2001/07/gasconf.htm>; FTC Press Release, *FTC Chairman Opens Public Conference Citing New Model To Identify and Track Gasoline Price Spikes, Upcoming Reports* (May 8, 2002), available at <http://www.ftc.gov/opa/2002/05/gcr.htm>.
65. *Rambus, Inc.*, Dkt. No. 9302 (complaint issued June 18, 2002).
66. *Id.*

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

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

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

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

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

72. 15 U.S.C. § 18.

73. *MSC Software Corp.*, Dkt. No. 9299 (Oct. 29, 2002).

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

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

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

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

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