



**The Federal Trade Commission and the
Future Development of U.S. Consumer Protection Policy**

Remarks by

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The views here are those of Chairman Muris
and not necessarily of the Commission or of any other Commissioner.

I. Introduction

On the calendar of an academic, the closing weeks of August mean that a new semester is about to start. To stand at a podium late summer is to recall the sensation of excitement and apprehension of gathering notes and texts and entering the classroom begin the school year.

For me, no memory of teaching is more vivid than my first year. After finishing school, I had spent two years at the Federal Trade Commission working in the Office of Policy Planning and Evaluation. When I arrived at the University of Miami as an assistant professor in 1976, my first assignments were to teach Contracts and then Antitrust.

Contracts came first in time and set a pattern that continued. I taught Contracts before I taught Antitrust. In the 1980s, I directed FTC's Bureau of Consumer Protection before I headed the Bureau of Competition. When I became Chairman two years ago, the prospect of shaping the agency's consumer protection program was no less an inducement than making competition policy.

My early years teaching Contracts deeply influenced my views about consumer protection. Contract law and theory are the antecedents of modern consumer protection. The first-year Contracts course forces you to address three basic questions about private bargaining that have powerful implications for consumer protection:

- Why should the state enforce private promises?
- What role should the state play in defining and enforcing the rules for private exchange?
- How should the relevant public institutions be designed?

These questions resonate as powerfully today as they did for me almost 30 years ago. Continuing to revisit and answer these questions is essential to the FTC's efforts to build consumer protection programs that best serve consumer interests.

Today, I want to examine these and related inquiries as part of a broader effort to present my vision for the FTC's consumer protection mission. This presentation is a companion to earlier ones that examined the design and implementation of the Commission's competition policy mission⁽¹⁾ and the exercise of the FTC's special role in advancing economic analysis and that economic learning to law enforcement and the agency's other policy instruments.⁽²⁾ As with previous papers, I wish to go

beyond simply reciting recent FTC activities and provide my perspective on the rationale for how the agency should formulate consumer protection policy.

I will proceed in three parts. The first describes the philosophy underlying a sound consumer protection program. The second segment discusses how that philosophy animates the design of specific, recent FTC consumer protection initiatives. The presentation concludes by discussing the critical importance to sensible policymaking of what we call the Commission's research and development function - the systematic effort to improve the base of knowledge that informs the agency's diverse initiatives in light of changes in the economic and policymaking environment at home and abroad.

II. General Principles

A. Economic and legal underpinnings and the role of the FTC

How do competition, consumer protection, and the Federal Trade Commission fit into the larger picture of the American economy? As much as I believe in the great value of the Commission to the U.S. economy, it is not immediately obvious why there is a national federal competition and consumer protection agency. It is obvious that any society must first make the fundamental choice of its economic system, whether it be competition through free enterprise and open markets, command-and-control regulation, or public collective ownership. As you know, the United States has largely chosen free enterprise and markets as the organizing principle of our economy. Free enterprise, however, does not mean a system without rules. Any market economy also needs a well-specified structure of property rights, contract law, and other rules of conduct.⁽³⁾

One can envision the American economic system as a three-legged stool: a first leg of competition based on free enterprise and a second leg the legal structure of contract, property, and other private law that largely focuses on the relative rights of particular parties. A two-legged stool will not be very stable. Likewise, markets and private legal rights, while indispensable to the American economic system, may falter in key respects. These legs can better support the American economic system when buttressed by a third leg.⁽⁴⁾ Public agencies - entrusted to promote consumer welfare by preserving competition and protecting consumers - via this third leg, reinforcing the other two. I will elaborate on the strengths and limitations of the first two legs, competition and private law, and how agencies, like the Federal Trade Commission, function as a third leg to complement these strengths and compensate for the limitations of these other institutions.⁽⁵⁾

B. Leg 1: Competition and its limits

Competition presses producers to offer the most attractive array of price and quality options possible. In competitive industries it is imperative to gain new sales by satisfying consumer needs increases the choices available. In competitive markets, when consumers dislike the offerings of one seller, they can turn to others. This ability to shift expenditures imposes a rigorous discipline on each seller to satisfy consumer preferences. Competition does more than simply increase choices for consumers, however; it also motivates sellers to provide truthful, useful information about their products.⁽⁶⁾

Competition also drives them to fulfill promises concerning price, quality, and other terms of sale.⁽⁷⁾ Consumers can punish a seller's deceptive failure to fulfill a promise by voting with their feet - and their pocketbooks. This punishment is usually swift for sellers of products purchased frequently whose qualities purchasers can readily evaluate.⁽⁸⁾

For products purchased infrequently, for which an individual consumer cannot usually rely on personal experience to evaluate a seller's truthfulness, private institutions can help provide the information that augments or substitutes for such experience. For example, third-party evaluations, such as Consumer Reports magazine, provide information on cars and appliances, which an average consumer may buy once every five, ten, or even twenty years.⁽⁹⁾ In addition, rivals may emphasize the gap between a competitor's promises and the product it delivers. Reputation is also important to sellers,⁽¹⁰⁾ and items like company brands and logos implicitly convey quality and other important product information.⁽¹¹⁾

Sometimes robust competition alone will not punish or deter seller dishonesty or renegeing. For products called "credence goods" consumers cannot readily use their own experiences to assess whether the seller's quality claims are true.⁽¹²⁾ Typical consumers know whether a food product "tastes great;" they cannot judge whether consuming the same product reduces the risk of cancer. Whether the cost of a car repair included items not necessary to restore the vehicle to its full capacity. Private rating systems help do the creation of regional or national firms with established reputations that would be severely damaged through exposure of such firms to fraud. Nevertheless, when information is costly to produce and to use, these market mechanisms will not correct all problems. Moreover, in certain circumstances, competing firms may not have strong incentives to identify their rivals' misrepresentations that would highlight a deficiency common to all such products.⁽¹³⁾

For credence goods, the market may not identify and discipline a deceptive seller because the product's qualities are so difficult to measure.⁽¹⁴⁾ Moreover, a product market with special attributes - consumers cannot determine quality before purchase, high quality products cost more to produce than lower quality products, and firms cannot credibly guarantee quality - may become a "lemons market" in which only low-quality products are sold.⁽¹⁵⁾ Under these circumstances, the market mechanism may break down.

down because, in the presence of information asymmetries, no seller can convince consumers that it is offering a high-quality product. Consumers would pay higher prices for better quality products if they could readily identify them; because they cannot, producers cannot recoup the additional costs of manufacture. Fortunately, these markets appear to be virtually nonexistent.⁽¹⁾

Legitimate companies care about how consumers regard them. They count on repeat business and word-of-mouth endorsements to increase sales. By contrast, the commercial thief loses no sleep over its standing in the community and is unconcerned about business. The fraudsters - as we call them - cheat consumers, grab the revenues, and disappear from sight, often to re-emerge under another guise to steal again.

When market forces cannot overcome these threats to consumer welfare, e.g., because some sellers are unconcerned about business and reputation or because deception is difficult to detect because of information asymmetries, there are other ways to regulate exchanges. The second leg of the stool, private legal rights, not only complements the competitive market, it can also overcome, or at least mitigate, some of these market problems.

C. Leg 2: Private legal rights and their limits

One of the crucial roles for government is to define and allocate property rights. Courts - and government agencies - can both be useful in defining and protecting those rights. The triad of property, contract, and tort law provide a basic set of legal rules for ownership, voluntary transference, and protection from involuntary transactions. David Hume's treatise on human nature specifies "three fundamental rules of nature, that of the stability of possession, of its transference by consent, and of the performance of promises."⁽¹⁷⁾

If parties could breach without legal consequence, the voluntary exchange of promises of future performance would not disappear, however.⁽¹⁸⁾ Indeed, before the rise of formal contract law, an active system of voluntary exchanges existed, in which people used credit bureaus, bonding, reliance on experience from past dealings, and similar devices to ensure performance.⁽¹⁹⁾ Nevertheless, compared to the system of contract law that developed, the alternative system was probably inefficient because it was almost certainly more costly.⁽²⁰⁾ Credit bureaus and bonding, for example, increase the cost of contracting, at least by the fact that they require parties to need another contract to protect themselves from the consequences of breach. In some cases - those economists like "at the margin" - the costs would be so high that certain exchanges would not be made at all.

One of the most useful roles for the government is to provide what are called default rules - terms that apply when the parties do not explicitly specify otherwise. The more efficient these rules, the greater the scope for exchange and thus the greater the gain in consumer welfare. When contracts are formed, even in the most complex transactions, parties do not find it useful to define terms for every contingency possible. Instead, courts, legislatures, and agencies have developed default rules that are like buy-off-the-rack clothing rather than specially tailored clothes. Rather than writing your own contract, you get it "off the rack," as it comes down in the judicial and legislative pronouncements.⁽²¹⁾ Many of these rules of exchange are so basic - for example, rules against fraud, breach of contract, and deceptive advertising - that we do not even think about them as rules at all. In this way, and increasingly sophisticated common law has evolved to govern consumer and other commercial transactions.

There are transaction costs involved in negotiating, forming, and enforcing contracts, however. Moreover, as is well known, recourse to courts for enforcement of consumer transactions is often economically infeasible. When disputes involve small losses to consumers, private lawsuits are not a rational economic option for most because the costs, including non-pecuniary ones, associated with them far outweigh any likely redress. Class actions also suffer from structural problems that increase the risk of outcomes - such as inadequate consumer redress and excessive attorneys fees - that fail to protect consumer welfare adequately.⁽²²⁾ Further, since claims courts often do not sufficiently reduce the costs of litigation.⁽²³⁾

Market factors, such as a business's concerns about repeat business and reputation, can augment the effectiveness of common law and overcome some of the incentives a seller might otherwise have to dishonor its agreements. In return, common law can complement the operation of the market. For example, having a judicial remedy reduces the risk of engaging in a transaction with a new entrant to a market, allowing the transaction to take place at lower cost.⁽²⁴⁾ This remedy encourages market participants to patronize new entrants, with whom they have not previously transacted business, who have no prior pattern of repeat dealing, who have not yet established a reputation.

In some cases, even market forces and common law together may be insufficient to discipline bad actors. One can easily imagine sellers unconcerned about repeat customers or reputation, or who make product claims that are difficult to verify, and who rely on the fact that few injured consumers will undertake the often difficult task of suing to vindicate their rights.

D. Leg 3: Government agencies, including the Federal Trade Commission

When the ability of common law to protect consumers' rights falters, as when injury claims are small individually but significant in aggregate, and market forces are ineffective for the reasons discussed earlier, another institution may overcome these weaknesses and thereby reinforce the effectiveness of competitive markets and common law. Public agencies - entrusted to promote consumer

welfare by preserving competition and protecting consumers - work as a third leg of the stool, reinforcing these other two legs support of the market economy.(25)

How the FTC supports competition (leg 1)

Our faith in the market is firmly grounded in the principle that free enterprise and competition best guarantee commercial free economic efficiency, and consumer welfare. The United States has chosen antitrust law to provide the governing rules for competition in most sectors of the economy. Competition policy protects consumers, not competitors.(26) Antitrust law helps maintain effective competition by prohibiting conduct that unreasonably restricts markets. I view antitrust law as "a form of regulation that competes with other regulatory structures"(27) and, in most instances, makes direct regulation unnecessary. The other of addressing market imperfections is comprehensive sectoral regulation, which ordinarily entails strict controls on prices, entry, conduct. For various segments of our economy, state and federal governments have adopted this latter strategy, often at great

Consumer protection policy also has a vital role in supporting markets. It helps ensure that consumers can make well-informed decisions about their choices and that sellers will fulfill their promises and not increase sales by lying about their products. The prevention of deception helps consumers in two ways: first, most obviously, by deterring deceptive sellers; and second by making it easier for honest sellers to make credible claims about their products.

Thus, loss of sales to a dishonest competitor is not the only harm the dishonest inflict on legitimate businesses. If many sellers about their products, a pernicious atmosphere of consumer distrust may develop. Such an atmosphere harms society in several ways. Deceit by one group of sellers may lead consumers to doubt the integrity of an entire industry or to distrust markets generally(28) Deception by Internet sellers, for example, could discourage consumers from using the Internet to gather information and purchases. In such a world, truthful sellers must resort to extraordinary measures to persuade consumers of their honesty. Even honest suppliers take such precautions to show their trustworthiness, some consumers may avoid purchases that otherwise would improve their well-being. By striving to keep sellers honest, consumer protection policy does more than safeguard the interest of individual victims - it serves the interest of *consumers* generally and facilitates competition.

How the FTC supports the common law (leg 2)

Under the FTC Act, we seek to stop unfair or deceptive acts or practices, thereby helping to reinforce the common law rules of exchange. Simply stated, the core of modern consumer protection policy is to protect consumer sovereignty by attacking practices that impede consumers' ability to make informed choices, such as fraud, unilateral breach of contract, and unauthorized billing. As discussed above, resort to courts for enforcement for consumer transactions often does not work well when many consumers suffer small injury. While private class actions can provide some relief for class members, the FTC can act in the interest of all consumers, free from the conflicting incentives in current class actions. In addition, administrative agencies, like the FTC, have developed areas of expertise, such as interpreting implied claims in advertising,(30) that provide an advantage over courts when ruling on consumer matters involving certain complex issues.

The Commission also can go beyond enforcing a particular contract provision to provide "rules of the game" that reduce consumer harm in the future. The Commission can establish new default rules and procedures for transference of rights when it is otherwise difficult to do so.(31)

Once these new rules of exchange are established, if transaction costs are low, parties can more easily transfer these rights.(

E. Why the FTC is uniquely well suited for this role

Earlier this year, I discussed how to improve the economic foundations of antitrust, concluding that antitrust analysis, if performed correctly, uses a careful, fact-based economic approach grounded in a thorough understanding of the relevant institutions.(33) In antitrust enforcement and litigation, the FTC routinely analyzes specific industry details and institutional arrangements. The agency's methodology is analogous to case studies and, in its finest form, pays proper attention to the institutions that influence competition. Beyond the context of individual enforcement matters, careful case studies have enriched our understanding of such issues as market power and efficiencies, contributing to improvements in antitrust policy.(34) The Commission has certain institutional attributes - such as having a Bureau of Economics with over 70 professional economists - that make it well suited to apply this approach, not only for competition but for consumer protection as well.

Both consumer protection and competition serve the common aim of improving consumer welfare, and they naturally complement each other. A focus on competition theory that excludes consumer protection is not only shortsighted but, given the growing importance of consumer issues, can ultimately be self-defeating. Consumer protection policy that ignores the impact on competition can result in a cure worse than the disease. The true measure of our contribution to the economy is our progress in increasing consumer welfare overall. Thus, well-conceived competition and consumer protection policies should take complementary paths toward the goal of promoting consumer welfare.

There may be multiple ways to ensure that competition and consumer protection policy work together. Experience has shown beneficial not only to use this approach but also to combine both the competition and the consumer protection functions in a public institution.⁽³⁵⁾ Our experience at the Federal Trade Commission suggests several synergies from this arrangement.⁽³⁶⁾

First, the consumer protection function can provide useful insights about how to execute competition policy. In several important instances, enforcement of our laws concerning advertising and marketing practices has improved our understanding of how they operate. For example, the development of our health care antitrust agenda benefitted from what we learned about the manner in which truthful advertising informs consumer choice.

Thus, when we studied the effect of advertising and commercial practice restrictions on the business of optometry in our consumer protection mission, we proposed Consumer Protection Trade Regulation Rules to challenge those restrictions and also pursue several antitrust challenges to attempts by professions to restrict new ways of delivering their services. We continue to share what we have learned as part of our competition advocacy program. Recently, the FTC staff argued in comments to a state board that sellers of replacement contact lenses should not be subject to state professional licensing requirements because the possible benefits to consumers from increased protection did not outweigh the costs from the diminution of competition. The board ultimately held that out of state lens sellers did not need a state license.⁽³⁷⁾

Our consumer protection program also has raised the possibility of new remedial strategies in competition cases. One of the top priorities during my tenure as Director of the Bureau of Consumer Protection in the early 1980s was to obtain redress for the victims of fraud.⁽³⁸⁾ Today, the disgorgement of revenues obtained by fraud is a centerpiece of our aggressive anti-fraud program. This experience with restitution and disgorgement in consumer protection laid the foundation for the Commission to use those remedies in antitrust.⁽³⁹⁾

The more important form of osmosis runs from competition to consumer protection policy. Because of its antitrust responsibility, the agency is well aware that robust competition is the best, single means to protect consumers. Rivalry among incumbent producers and the threat and fact of entry from new suppliers, fuels the contest to satisfy consumer needs. In competitive markets, firms prosper by surpassing their rivals. In turn, this competitive market has important implications for the design of consumer protection policies to regulate advertising and marketing practices. Without a continual reminder of the benefits of competition, consumer protection programs can impose controls that ultimately may diminish the very competition that increases consumer choice.

Competition principles can help ensure that consumer protection is consistent with consumer sovereignty. They remind us that consumer protection measures - even those motivated by the best of intentions - can create barriers to entry that limit the free market's ability to provide what consumers demand. We recently participated, for example, in a court challenge to a state law that bans anyone other than licensed funeral directors from selling caskets to members of the public over the Internet. While recognizing the state's intent to protect its consumers, we questioned whether the law did more harm than good. In an amicus brief, the FTC argued that "[r]ather than protect[ing] consumers by exposing funeral directors to meaningful competition, the [law] protects funeral directors from facing any competition from third-party casket sellers."⁽⁴⁰⁾ The synergy between protecting consumers from fraud or deception without unduly restricting their choices in the market or their ability to obtain truthful information undergirds all of the Commission's consumer protection initiatives today.

F. The Commission's positive agenda

In pursuit of its goal of improved consumer welfare, the Commission has developed an ideal combination of expertise and staff which complements its strengths as an institution. These elements are necessary to the Commission's success, but they are not sufficient. To animate its principles and make the best use of its institutional abilities, a coherent vision of its overall mission must guide the Commission. To draw a simple analogy, consider a manufacturer who has developed a great product prototype through studying what consumers need and has assembled a technologically advanced factory with a highly skilled workforce. That manufacturer still needs a concrete plan to instruct its workers how to take raw materials and, using the factory's tools, fashion them into a product that can be manufactured each day and provided to consumers at the optional price and quality level. For the Commission, the positive agenda is the concrete plan for how our staff, using the Commission's statutory and institutional tools, can effectively transform principles into reality for consumers through our daily actions.

The agency's success, in large part, reflects the shared vision of the agency's role that has evolved for over 20 years through successive administrations and Chairmen. My experience in public agencies confirms a vital, often-stated conclusion of academic research: no public institution achieves policy success without a coherent strategy for exercising its authority and spending its resources. The manifestation of an agency's strategy is its positive agenda - a statement of the measures the agency intends to pursue to accomplish its substantive aims. Without a general strategy and a positive agenda, an agency becomes a passive observer, shaped along by external developments and temporary exigencies.

A positive agenda also provides essential guidance. For the agency's staff, a positive agenda focuses effort on measures most likely to fulfill the institution's mission. For the business community and other interested parties, a clear statement of intentions reduces uncertainty and facilitates compliance with the law.

The FTC's positive agenda is founded on the principle that the first line of consumer protection is vibrant competition in a strong working market. In pursuing this agenda, the Commission, through aggressive enforcement and focused advocacy, strives to promote competition and encourage the unfettered exchange of accurate, non-deceptive information. We focus on stopping conduct that poses the greatest threat to consumer welfare, such as fraud, deceptive advertising, and unilateral breaches of contract, employing a systematic approach for identifying and addressing serious misconduct, with special attention to harmful behavior in certain industries. We also use the agency's distinct institutional capabilities through the application of its full range of tools - prosecute 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. Beyond the immediate goal of stopping particular bad practice or promoting a beneficial one, our activities improve the institutions and processes by which competitive consumer protection policies are formulated and applied.

Of course, prevention of consumer harm is far preferable to enforcement against bad actors, which is expensive and rarely makes injured consumers completely whole. One of the best ways to protect consumers is to arm them with knowledge to protect themselves. Thus, the FTC undertakes extensive consumer education on numerous topics, often working in tandem with other public and private institutions.⁽⁴¹⁾ Prevention is not solely up to consumers and government, however, and business can play an important role. Mindful that the regulatory powers of government should be the last, not the first, resort, we have urged industry to "Do the Right Thing" and police itself by stopping some of the most deceptive claims, which harm not only individual consumers but also the perception of the market system overall.⁽⁴²⁾

Two interrelated developments - the accelerated development of communications technology, like the Internet, and the increasing internationalization of commerce - are rapidly expanding opportunities for both consumer benefits and consumer harm. Although we strive to develop new tools to combat emerging harms, the pace of technological change and globalization is outstripping our ability to cope on our own.⁽⁴³⁾ Because the FTC cannot be everywhere, we are actively encouraging other consumer protection institutions to join us in our mission. Thus, the Commission's International Division of Consumer Protection works to ensure that the consumer protection rules around the globe focus on practices that distort consumer choice and raise a serious threat to the proper functioning of markets.

Part of our positive agenda is thus to increase our effectiveness through cooperation with other institutions at all levels. We have worked with a number of other public and private institutions in the United States to ensure that when taking action, they consider the full range of consumer interests, including the benefits of competition. For example, the FTC staff filed comments with the Food and Drug Administration discussing the value to consumers of truthful advertising,⁽⁴⁴⁾ and it has filed numerous comments with the Federal Energy Regulatory Commission on competition and electricity deregulation.⁽⁴⁵⁾ We routinely work with state agencies and private associations⁽⁴⁷⁾ to advocate on behalf of consumers. We also are trying to make our actions more effective by increasing cooperation with criminal authorities.⁽⁴⁸⁾

III. How the FTC Puts these Principles into Action

After this discussion of principles, institutional structure, and a positive agenda, I turn to how these attributes take form through the Commission's consumer protection initiatives. As our top priority is stopping conduct that poses the greatest threat to consumer welfare, I first discuss our actions to combat fraud and then consider our advertising enforcement activities, with a special emphasis on actions involving health claims. To illustrate how we use the agency's distinctive institutional capabilities to develop new rules and respond to changed situations, I next discuss our initiatives involving privacy and spam. Finally, as examples of how we try to expand our influence to meet the new challenges of increasing globalization and advances in communications technology, I discuss our international outreach and our e-commerce initiative.

A. Fraud

Preventing fraud is a crucial part of the Commission's support of the market system and the common law. Fraud is essentially deceptive. Fraud, like price fixing, distorts market forces and limits the ability of consumers to make informed choices. Fraud leads to inefficiency, causing consumers to allocate their resources unproductively. Fraud also reduces consumer confidence and the efficacy of legitimate advertising, thereby further diluting the amount of useful information to guide consumers' choices.

Because fraud is often national in scope, and scarce federal criminal law enforcement resources are primarily used against such matters as drug trafficking and terrorism, fraud will go largely unchecked without the active leadership of the nation's consumer protection agency. Yet, through the 1970s, the Commission essentially ignored fraud cases. Instead, the Commission was engaged in a rulemaking frenzy based on earlier court opinions that appeared to provide almost boundless authority to revamp whole industries based on authority to stop "unfair" practices.

The result was a series of proposed rules relying upon vague theories of unfairness that often had no empirical basis, could be based entirely upon the Commissioners' personal values, and did not have to consider the ultimate costs to consumers of foreclosing their ability to choose freely in the marketplace.⁽⁴⁹⁾ The most prominent example of overreaching under this unfocused authority was a proposal to ban all advertising directed to children on the grounds that it was "immoral, unscrupulous, and unethical" and based on generalized public policies to protect children.⁽⁵⁰⁾

The breadth, overreaching, and lack of focus in the FTC's ambitious rulemaking agenda outraged many in business, Congress, and the media. Even the Washington Post editorialized that the FTC had become the "National Nanny."⁽⁵¹⁾ Most significantly, the concerns reverberated in Congress. At one point, Congress refused to provide the necessary funding and simply shut down the agency for several days. Entire industries sought exemption from FTC jurisdiction, fortunately without success. So great were the concerns that, after 1980, Congress did not reauthorize the FTC for fourteen years. Thus chastened, the Commission abandoned most rulemaking initiatives and re-examined unfairness to develop a focused, injury-based test to evaluate allegedly unfair practices. In short, this rulemaking effort failed because it lost sight of the appropriate role of the Commission.

In stark contrast to the failure of the agency's unfocused 1970s rulemaking agenda, the development of a vibrant anti-fraud program at the FTC is a great success story. When I became Consumer Protection Bureau Director in 1981, one of my goals was to establish a strong anti-fraud program. Fortunately, we found the legal tools for such a program already existed. In 1973, Congress had amended the FTC Act to allow the Commission to sue in federal district court and obtain strong preliminary and permanent injunctive relief - including redress.⁽⁵³⁾

We determined to use this authority to fight fraud. We began by targeting the fraudulent sale of various types of unconventional investments.⁽⁵⁴⁾ The double-digit inflation of the period that made traditional investments relatively unattractive propelled these "alternative investment" scams. Our first case involved defendants that fraudulently sold \$300 million worth of diamonds for investment.⁽⁵⁵⁾ We followed with similar actions against boiler rooms selling advisory services for the federal oil and gas lease lottery, and shortly thereafter, against sellers of worthless oil and gas leases themselves. In this early period the Commission filed three cases against sellers of gemstones and five cases involving oil and gas.⁽⁵⁶⁾

Before the shift to federal court, most of the Commission's consumer protection work used our administrative process.⁽⁵⁷⁾ Most investigations relied upon voluntary production of requested documents and information from the investigated targets, who have been incentive to delay. This process had obvious drawbacks for addressing fraud. Federal district court cases proved much more effective, enabling the Commission to bring fraudulent schemes to an immediate halt, to take the targets by surprise so that money might be available for redress, and to prevent destruction of records showing the extent of the fraud and identifying injured parties.

Almost from the inception of the § 13(b) program, the Commission has used this tool not only to obtain court orders halting fraud schemes, but also to obtain consumer redress and other potent equitable remedies. Very early in the § 13(b) consumer protection cases, the Commission began to seek, as ancillary to issuance of permanent injunctions, provisional remedies such as a freeze on assets, expedited discovery, an accounting, and the appointment of a receiver on the ground that these remedies would insure effectiveness of any final injunction ordered.⁽⁵⁸⁾

To make the best use of this approach, however, required new investigative techniques geared for speed and stealth. The primary new tool was taping of defendants' sales presentations. It has been a critical technique in many of our fraud cases. At the same time, the FTC developed a group of professional investigators, trained to uncover fraudulent schemes, determine ownership and control of such schemes, trace assets, develop evidence, preserve evidence for trial, and testify in court. Recently, our investigators have become experts in Internet investigative techniques and have provided training for hundreds of local, state, federal, and international criminal and civil law enforcement offices.

Once launched, the fraud program grew in importance and success. Each succeeding FTC Chairman has expanded its scope and improved its operation. During the 1990s in particular, the agency formed strong, working relationships with state and local law enforcement agencies, leading sweeps against targeted types of fraud, thereby greatly increasing the program's effectiveness. During the late 1990s, the program matured under the strong leadership of Chairman Robert Pitofsky and Bureau Director Jocelyn Bernstein into the flagship of the Commission's consumer protection program. From FY 83 until FY 95 - the first full 13 years that the Commission filed § 13(b) actions - the average number brought was 23 per fiscal year. During the Pitofsky-Bernstein years, that average skyrocketed to 71 filings per fiscal year. Not surprisingly, as the number of filings increased, so has the amount of consumer redress awarded. In fiscal year 2001, for example, the redress ordered was more than \$250 million. In this fiscal year, nearly \$1 billion in consumer redress had been ordered as of June 30, 2003.

The Commission's ability to protect consumers from these scams was aided immeasurably by the creation of the Consumer Response Center (CRC) - a central facility with trained call center staff and an automated call distribution system to record and respond to consumer complaints and inquiries. The existing telemarketing fraud complaint database, in operation since the early 1990s, was dramatically upgraded and revamped into Consumer Sentinel, a system linking law enforcers through a secure Internet web site. The Consumer Sentinel system enabled the CRC staff to enter data from consumer complaint calls in real time. Initially, scores, and ultimately hundreds, of law enforcement agencies at the state, federal, and local levels joined the system, gaining access to the complaint database, as well as the opportunity to "cross-walk" their own complaint data into the Consumer Sentinel database. Other entities, such as local Better Business Bureaus, also were invited to contribute complaint data to the Sentinel database. Consumer Sentinel strengthened the fraud program by improving the staff's ability to spot emerging trends, to identify emerging bad actors more quickly, and to locate potential witnesses to support the Commission's cases.

Of course, any program, no matter how good, can be improved. To ensure that we are using our database to its maximum potential, we have for the first time undertaken national surveys of fraud victims. This information is vital to assess the significance of

complaints we receive, and more importantly, of complaints we do not receive. In addition, we believe that only an increased criminal prosecution will deter some hardcore scam artists. We continue to work hard to develop relationships with criminal law enforcement authorities to encourage the prosecution of the worst actors. This includes working with the Office of Criminal Litigation at the Department of Justice to determine the best cases for criminal prosecution, as well as developing staff-level relationships with Assistant United States Attorneys across the country to help them prosecute fraud that occurs in their back yards.⁽⁵⁹⁾ Many of the fraud cases we bring are criminal theft and involve wire fraud, mail fraud, money laundering, or all three. We have had tremendous success, but are constantly working to improve relationships and processes to increase the number of criminal prosecutions. A challenge is to use limited prosecutorial resources efficiently; improving this aspect of the fraud program is one of my highest priorities.

B. Advertising⁽⁶¹⁾

As discussed above, the prevention of deceptive advertising helps consumers both by deterring individual deceptive sellers and making it easier for honest sellers to make credible product claims. While the Commission has had a substantial national advertising program since the agency's creation in 1914, it became a central focus of the FTC's consumer protection mission in the 1970s. The Commission continues to maintain an active program, adjusted to reflect the plethora of new advertising methods, such as infomercials, telemarketing, and the Internet.⁽⁶²⁾

Comparative advertising provides a clear example of how advertising can implicate both competition and consumer protection issues. A company engages in comparative advertising when it claims that its own product is superior in price or other attributes to the products of its competitors, e.g., "A is 10% cheaper than B," or "Brand X has fewer calories than Brand Y." Up until the late 1970s, many trade associations prohibited or discouraged the use of comparative advertising. In 1979, after conducting an experiment, the Commission concluded that:

Comparative advertising, when truthful and non-deceptive, is a source of important information to consumers and assists them in making rational purchasing decisions. Comparative advertising encourages product improvement and innovation, and can lead to lower prices in the marketplace.⁽⁶³⁾

Because truthful comparative advertising has such a positive effect on competition and consumers, the Commission announced that the agency "will continue to scrutinize carefully restrictions upon [comparative advertising's] use."⁽⁶⁴⁾ Most trade associations no longer impose limits on comparative advertising.

Unduly expansive principles of deception can impede the vigorous competition that comparative advertising usually provides. For example, the Commission in *Kroger*⁽⁶⁵⁾ challenged a grocery store that in newspaper advertisements truthfully compared its prices for specific grocery store items to those of a competing grocery chain. Applying the standard that claims are deceptive if they lack the "tendency and capacity to deceive," the Commission concluded that these claims were deceptive, because they were not based on "methodologically sound" and "statistically projectible" surveys showing that the advertised price difference applied to all products sold in the two grocery chains. The Commission did not rely on any survey evidence to support its conclusion, but instead relied simply on intuition. Fortunately, this case and other cases like it⁽⁶⁶⁾ led the FTC in 1983 to issue its Deception Policy Statement replacing its outmoded "tendency or capacity to deceive" standard with the "reasonable consumer" standard. This change helped circumscribe the Commission's concept of deception, thereby diminishing the agency's ability to chill comparative advertising.

Because truthful and non-misleading advertising is critical for competition, the Commission also has been vigilant to prevent overbroad private and government restrictions on such advertising. During the 1970s, for example, the Commission mounted a precedent-setting challenge to the American Medical Association's prohibition on physician advertising.⁽⁶⁷⁾ Similarly, the FTC frequently has criticized limitations that states have imposed or considered imposing on attorney advertising.⁽⁶⁸⁾

The Commission similarly has been careful about the support it requires for claims under its advertising substantiation doctrine, created in the 1970s, which requires that all objective claims have a "reasonable basis" before the claim is distributed, and this is in line with fundamental deception principles. If an advertisement makes an express or implied representation about the particular level of support for a claim, (e.g., "clinical tests prove our supplement reduces the risk of colds"), then consumers expect the advertiser to have that amount of support and are deceived if it does not. On the other hand, if an advertisement does not make a representation about the support for an objective claim, consumers expect that the advertiser has a "reasonable basis" for the claim and are not deceived if it does not.⁽⁶⁹⁾

As applied in recent years, the doctrine provides sellers with substantial discretion in developing and making advertising claims. It does not set substantive standards (i.e., claims about "x" product must be supported by "y" tests), but instead takes a flexible approach, looking to the actual claim made by the advertisement (I have "x" support for my product) or to a series of seven flexible factors to determine whether the claim had a "reasonable" basis.⁽⁷¹⁾ These factors include consideration of the benefits of a claim and the costs of a false or misleading claim, thus expressly balancing the goal of preventing deception with the need to provide access to truthful information and vigorous competition.⁽⁷²⁾

C. Health Claims

An important part of our program to regulate advertising involves health claims. Products making such claims are prime example goods because of the difficulty in measuring the efficacy of a particular food in preventing any specific disease. The evolution of the Commission's treatment of such claims is an especially good example of the importance of pursuing a unified approach that respects the value of truthful advertising to both consumers and competition.

"Health claims" for food contend that eating more or less of particular foods can lower the risk of chronic diseases like cancer, disease, and diabetes. There is strong, developing, and continuously-changing scientific evidence concerning the relationship between specific foods and the risk of disease. Most of these studies examine the role of overall diet on health. Diets, of course comprised of individual foods, and healthy diets reflect individual food choices. Because the effects of a particular food on disease risk are difficult to study, however, claims for individual foods have long been a flash point for advertising and labeling policies. Regulatory agencies both in the United States and elsewhere have followed a variety of approaches, including prohibiting these claims in the name of protecting consumers from deception. Even the Federal Trade Commission in the 1970s flirted with the idea of a ban before shelving staff proposals to do so.⁽⁷³⁾

FTC staff economists have conducted empirical studies on the effects of these different approaches. One particularly important study looked at sales of high fiber cereal before and after the landmark National Cancer Institute/Kellogg's "All Bran" fiber advertising campaign in the 1980s.⁽⁷⁴⁾ Because that campaign occurred when such claims were technically impermissible under FDA regulations, it offers a unique opportunity to compare the effects of advertising against other efforts - such as government information programs to alert consumers to the same information.

The study looked at Kellogg's 1984 campaign claiming that All Bran cereal was high in fiber and that diets high in fiber could reduce the risk of cancer. By 1987, three years after these claims began appearing in the marketplace, the study found that consumers had substantially increased consumption of high-fiber cereals. The greatest increase occurred among consumers who had previously consumed the least amount of high-fiber cereal. Most significant is that consumption of high-fiber cereals increased the most among the least advantaged consumers. Thus, the study demonstrated that truthful advertising can efficiently spread information widely.

Fiber-cancer health claims changed the cereal market, too. Competing cereal manufacturers responded to Kellogg's health claims by making similar health claims for their own high-fiber cereals. The market share for high-fiber cereals increased by almost four percentage points, sales of high-fiber cereals increased by \$280 million, and more high-fiber cereal products were introduced.

These and other analyses from the Commission's Bureau of Economics make a powerful case for the role of advertising in helping consumers improve their health. They underscore the wisdom of the Commission's balanced approach that seeks vigorously to protect consumers from deception, while allowing them to benefit from the dissemination of truthful and non-misleading health information.

Other studies demonstrate that government regulatory policies directly impact the amount of helpful nutrition information available to consumers in advertising. For example, in 1990, Congress passed the Nutrition Labeling and Education Act ("NLEA"), which requires food companies to petition the FDA for approval prior to making health claims on labels. The NLEA also states that the FDA cannot approve such a petition unless "significant scientific agreement" among experts supports the claim.

A recent study by the FTC's Bureau of Economics examined a sample of 11,647 food advertisements that appeared in eight leading magazines between 1977 and 1997.⁽⁷⁵⁾ The sample revealed that heart disease and serum cholesterol health claims peaked in 1989, and then dropped substantially in the early 1990's following the NLEA's passage. Likewise, following the NLEA, advertisements for fats and oils no longer make claims about the health reasons to choose one fat over another. The FTC study concluded that experience under the NLEA supports the hypothesis that the law and its implementing regulations decreased health claims in food advertising.

Of course, the NLEA has led to important benefits. The NLEA's nutrition labeling information box is widely and appropriately recognized as one of the most helpful nutrition regulatory actions ever. But the FTC's enforcement experience and empirical studies clearly show that following a more market-oriented approach will best serve the goal of providing consumer access to truthful and non-misleading health information. Fortunately, the FDA's Commissioner, Dr. Mark McClellan, has seized the opportunity to adopt this approach. His Consumer Health Information for Better Nutrition Initiative will continue to protect consumers, but also allow them to receive more, truthful health information about foods and dietary supplements.⁽⁷⁶⁾

Under the Initiative, the FDA will determine the level of science supporting all proposed health claims. The agency will place each proposed health claim into a category based on the level of supporting science. Companies can make the proposed health claim if they include the qualifying language that the FDA has developed for claims within the category. Companies thus will have greater freedom to make health claims if they are properly qualified to describe the amount of supporting science.

This change may sound simply technical, but it can have a large impact. For example, there is accumulating evidence on the

relationship between foods high in Omega 3 fatty acids - like certain types of fish - and the reduced risk of heart disease. Based on this evidence, the American Heart Association has recommended that consumers eat more foods rich in these acids. Under the FDA's old approach to health claims, food manufacturers had to wait until all the evidence on this relationship was proven beyond reasonable doubt. They were prohibited from sharing emerging evidence about the benefits of Omega 3 fatty acids in reducing the risk of heart disease. The old approach ensured certainty, but at the cost of delay in getting important health information to consumers. The new approach will be a bit less definitive, yet it will get relevant health information to consumers far more quickly, allowing Americans to make better-informed choices sooner about what to eat.

Of course, greater access to health information only benefits consumers if it is true and non-misleading. Deception is unlikely to increase under the Initiative, however. First, the FDA must still *pre-approve* all health claims for foods and dietary supplements. Second, the FDA and the FTC have been increasingly coordinating their law enforcement efforts. In December 2002, the two agencies committed to cracking down on fraudulent health claims for dietary supplements and other products. We are delivering on that promise. Since last December, the FTC has filed or resolved 17 enforcement actions involving false or misleading advertising claims for dietary supplements and other devices and therapies. These were not small sellers; the estimated sales for these products exceeded \$1 billion. With these actions, we are proclaiming that we will not allow deception to increase with the greater freedom to make health claims under the FDA Initiative.

D. Privacy

Fueled by the development of the Internet, privacy emerged as a major consumer issue in the mid 1990s. Most observers would do *something* to protect privacy. *What* to do was less clear.

The debate over privacy showed clearly the importance of relying on strong principles to guide an institution like the FTC through new territory. Grappling with the issues surrounding privacy required careful consideration of the basic questions of common law: why should the government protect privacy and what role should the government play in defining and enforcing privacy rules in a private exchange? Strong principles were needed to ensure that if the Commission went beyond enforcing a particular contractual provision to provide new "rules of the game" that it develop those rules based on a deep understanding of the issues and an appreciation of the possible harm if the new rules restricted the many consumer benefits that an information-based economy could provide.

By the time I arrived at the Commission in June 2001, the agency had spent several years developing a sophisticated understanding of the issues through conferences and workshops. Industry, spurred by consumer interests and the Commission's activity, had been addressing consumers' concerns, especially by posting privacy policies on commercial web sites. Nevertheless, I was surprised during my confirmation process, those I talked to equated support for privacy protection as support for "notice, access, and choice" legislation on the Internet.⁽⁷⁷⁾ I wondered why the same information collected from the same consumer would be treated differently depending on whether it was collected online or off. That seemed like odd consumer protection, and it would certainly place our businesses at a competitive disadvantage. Like Peggy Lee, I wondered "Is that all there is?"⁽⁷⁸⁾

Privacy was a new topic for me, one that I studied in-depth for the first time in the summer of 2001. I therefore initiated an external review of the issues. Howard Beales, our Director of the Bureau of Consumer Protection, and I held dozens of meetings with groups with diverse perspectives on privacy - ranging from consumer groups to trade associations to information technology executives and professors. We read academic, legal, and policy literature in addition to numerous briefing memos from the FTC staff. During the process, I was impressed by the widespread agreement on the importance of privacy issues and the importance of the FTC in protecting consumers' privacy.

1. The Inadequacy of "Fair Information Practices"

Fair Information Practices or "FIPs" appears to be an appealing model because it is seemingly based on consumer consent, contracts between consumers and businesses. In practice, however, consent is illusory. For most consumers, the costs of exercising choice - although not high - are not worth the perceived benefits. Consider the billions of privacy notices sent to consumers under Gramm Leach Bliley. Very few have exercised their right to opt-out of information sharing. Part of the problem, no doubt, is the difficulty of understanding some of the notices. Although I hope we can improve these notices, a more fundamental problem is exercising just one opportunity to opt-out may take only a few minutes, but opting out for each of the companies you do business with would take much longer. Consumers have many other options - not to mention demands - for their time - from paying bills to getting dinner on the table to helping children with homework. Given that time is scarce and even reading the notice takes effort, it could be spent elsewhere, it is not surprising that few consumers opt-out, even when it is seemingly easy.

Neither is opt-in the solution. Because most consumers will not expend the time and effort to consider the choice, opt-in is only the correct default if most fully-informed consumers would refuse to share information. Explaining the benefits and costs of information sharing is beyond the competence of even the best drafted short notices. We cannot *make* people focus on this, or any other, issue.

Thus, the FIPs model has fundamental problems. Because considering the choice imposes costs apparently in excess of the benefits for many consumers, applying the model would not reveal consumer preferences. Moreover, legislation codifying the principle

the risk of unnecessarily hobbling development of the many benefits that an information-based economy could offer consumers. It is hard to describe in advance technology or beneficial information uses that have not been invented or even considered.

2. New Framework

a. The Information Economy

We decided to search for another model to guide privacy policy. Our review led to an alternative approach that better balances benefits of information sharing with protection of consumers from misuse of that information. It is true that surveys tell us the extent to which information is collected troubles consumers.⁽⁸⁰⁾ At the same time, consumers willingly part with personal information day to day to facilitate transactions. For example, few consumers seem worried about the many companies that have to share their information to clear checks or, for that matter, to process ATM transactions. They generally understand that the information must be collected and shared to complete the transaction. Indeed, surveys reveal that most Americans are "privacy pragmatists," who care about privacy but are willing to share information when they see tangible benefits and they believe care is taken to protect that information.⁽⁸¹⁾

Our economy generates an enormous amount of data, mostly used by honest businesses for purposes that benefit consumers. One example that was influential in forming our alternative approach to privacy is the nation's credit reporting system. The FTC has longstanding familiarity with this system through its enforcement of the nation's oldest commercial privacy law, the 1970 Fair Credit Reporting Act (FCRA).

We often take for granted that the average American today enjoys access to credit and financial services, shopping choices, and educational resources that earlier Americans could never have imagined. Today, we can check our credit card and bank balance over the phone 24 hours a day; order books, clothes, or gifts online while we are having our first cup of coffee in the morning; review our finances in a convenient, consolidated statement whenever we like. All over America, every day consumers who have good credit can borrow \$10,000 or more from a complete stranger and actually drive away in a new car in an hour or less. I call this the "miracle of instant credit."

This "miracle" is only possible because of our credit reporting system. The system works because, without consumer consent, sensitive information about consumers' credit history is given to the credit reporting agencies. If FIPs were used, requiring notification and choice, consumers could then decide - on a creditor-by-creditor basis - whether they wanted their information reported. Many consumers would not bother to exercise choice. Consumers with poor credit would have an incentive to withhold the sharing of their negative information. The current system would collapse, and with it, enormous benefits to consumers. The lack of choice does not mean consumers' privacy is unprotected. Because credit histories are one of our most sensitive pieces of information, their use and should be, carefully protected under the FCRA.⁽⁸²⁾

b. Focus on the Misuse of Consumer Information

Consumers benefit from legitimate uses of information; such uses do not cause their privacy concerns. Consumers are concerned, however, that information, once collected, may be misused to harm them or disrupt their daily lives. It is these adverse consequences that drive consumer concerns about privacy.

Thus, we concluded that the most important objective of a privacy agenda should be *stopping* practices that can harm consumers. These include *physical harm*: certainly, parents do not want information on the whereabouts of their kids to be freely available. They also want misuse of information also can cause *economic harm*. Such harm includes denial of credit - or even a job - based on inaccurate or incomplete information. In extreme cases, the misuse of information also can lead to identity theft, our top consumer complaint category for three years in a row. Finally, the misuse of information can cause *annoying, irritating, and unwanted intrusions* in consumers' lives. These include the unwanted phone calls that disrupt the dinner or the "spam" that clogs our computers.

Focusing on the harms that occur when information is misused or inaccurate, rather than on notice and choice about whether information can be collected or used at all, is a more workable approach. Concentrating on harm reflects what troubles consumers the most, while not unduly restricting the free flow of information that benefits our economy. It also imposes costs on harmful practices and the companies who use them, rather than raising the expenses of everyone engaged in commerce.

c. Explicit Recognition of Trade-Offs

Targeting practices that involve misuse of consumer information also recognizes the trade-offs inherent in any regulation designed to protect consumer privacy. Privacy is not, nor can it ever be, an absolute right. Everyday consumers make practical compromises between privacy and other desirable goals - like having our briefcase or backpack inspected at the airport or before entering a building or a sports arena. These trade-offs exist in the commercial sphere as well - where information-sharing poses risks, but also offers benefits. Like our approach to protecting consumers from deceptive advertising, our privacy agenda seeks both strong

protection of privacy *and* preservation of the important benefits of our information economy.

d. Focus on Online as well as Offline

The FTC's previous efforts were primarily focused on addressing consumers' concerns about *online* data collection. If the consumer can reduce the adverse consequences that can occur when information is misused, then it does not matter whether information was originally collected online or offline. It simply matters if it is misused. The risk of identity theft, for example, is no less real and the consequences no different if a thief steals your credit card number from a website or from the mailbox in front of your house. Equal treatment of information collected online or offline provides better protection for consumers. Moreover, an equal playing field for online and offline businesses is also less likely to impede continuing growth and development of Internet commerce.

3. FTC Privacy Program

For two years, we have implemented these principles through a variety of privacy initiatives. To achieve our goals, in each of the last two fiscal years, we have increased significantly the agency resources devoted to privacy. In Fiscal Year 2002, we increased the staff hours devoted to privacy issues by 60 percent. Compared to 2001, the FTC now spends several times more of its resources protecting consumer privacy.

a. National Do Not Call Registry

Perhaps the clearest illustration of the benefits of this approach is the Commission's "Do Not Call" rulemaking. It is no secret that intrusive phone calls that disrupt dinner and other increasingly scarce family time are a major annoyance to many. Not surprisingly, the response to our National Do Not Call Registry has been overwhelming: consumers have registered more than 32 million telephone numbers.

One possible approach to this problem would be a complicated system of notice and choice about the collection and use of consumers' telephone numbers. This approach has severe limitations. As our experience under the Gramm-Leach-Bliley Act demonstrates, it is expensive to implement. If the consumer even once gives permission to share his phone number, all prior permissions may be undone. In any event, given the widespread availability of telephone numbers, the approach is also likely to be ineffective.

In contrast, the approach encapsulated in our rule is simple and straightforward. It allows consumers themselves to decide whether they want to receive these calls at home.⁽⁸³⁾ Its "business relationship" exception ensures that the rule does not sweep too broadly.⁽⁸⁴⁾ The retention of the rule provisions allowing consumers to "opt out" of future calls from any individual company ensures that consumers control over even those calls. Most significantly, in contrast to the Gramm-Leach-Bliley notice approach that has been estimated to have *direct costs* of as much as \$1.25 billion⁽⁸⁵⁾, the Commission's Do Not Call rule has direct costs of only a small fraction of that amount.

b. Identity Theft

We have established our other privacy priorities using the same approach. Identity theft is a most serious form of misuse. The Commission addresses this problem with three main components: our Identity Theft Data Clearinghouse (the "Clearinghouse"); our consumer education and assistance resources, including our toll-free hotline, web site, and educational brochures; and our collaborative outreach efforts with law enforcement and private industry.

The FTC's primary role in combating identity theft derives from the 1998 Identity Theft Assumption and Deterrence Act ("the Identity Theft Act" or "the Act").⁽⁸⁶⁾ The Act directed the Commission to establish the federal government's central repository for identity theft complaints and to provide victim assistance and consumer education. The Commission also works extensively with industry to help victims, including providing direct advice and assistance when information has been compromised. The FTC has committed significant resources to assisting law enforcement. Investigation and prosecution not only stop the offender from destroying a person's financial well being, but also can deter would-be identity thieves from committing the crime. Moreover, as discussed above, the Commission can take enforcement action when companies fail to take adequate security precautions to protect consumer personal information.

c. Enforcing Privacy Promises

Another serious form of misuse is collecting information under false pretenses or misrepresenting the purposes for which the information was collected. We have undertaken aggressive enforcement against companies who violate promises they make about privacy, with a particular focus on promises made about the security provided for consumer information. Here, again, we focus on misuses of information that causes adverse consequences - in this case, the use of information for purposes different from those consumers bargained for or in a manner that creates unreasonable risks that information will be misused. Our focus on adverse consequences also makes us particularly concerned about misuses of sensitive information - for example, credit card and social

security numbers, medical data, and information about children.

Ensuring information security is a particular priority at the agency; poor security practices put consumer information at risk and ultimately lead to identity theft or other serious misuses of information. We have thus far brought three cases challenging companies made about the security provided for consumer information - against *Eli Lilly*,⁽⁸⁷⁾ *Microsoft*,⁽⁸⁸⁾ and *Guess*.⁽⁸⁹⁾ *E. case involved the failure to implement reasonable security procedures to protect sensitive information, despite promises to the contrary. Lilly involved information about consumers' health. Microsoft and Guess involved credit card numbers, and Microsoft involved personal information about children.*

The Commission is not simply condemning all security breaches. While a breach may indicate a problem with a company's security, breaches can happen even when a company has taken every reasonable precaution. In such instances, the breach will not violate the laws that the FTC enforces. Instead, the Commission recognizes that security is a process of using reasonable and appropriate measures given the circumstances.

In our first two offline privacy cases, we also challenged claims about how information collected from children - through survey administered at schools - would be used.⁽⁹⁰⁾ These cases, once again, involved sensitive information for which misuse could have serious consequences - including, for example, children's name, address, gender, grade point average, date of birth, academic interests, and racial and religious background. We alleged that, in collecting the information, the companies represented would be shared only with colleges, universities, and others providing education-related services. In fact, they shared the information with brokers who sold it to buyers for commercial marketing. In other words, students thought their information would be used to help them get into college but ended up with solicitations for beauty pageants, shaving cream, and credit cards.

d. Consumer Information Security

Information security is a core part of any program of preventing misuse of information. Good security is important to prevent the other misuses of sensitive information. If there was any doubt, consider the *TriWest*⁽⁹¹⁾ and *Ford/Experian*⁽⁹²⁾ incidents, in which major breaches of company databases put the sensitive personal information of tens of thousands of consumers at risk. To prevent these harms, we are emphasizing security on a number of fronts.

First, as just discussed, we have challenged false statements companies make about their security practices. These cases appear to be having an effect. We understand that word is spreading, that companies are changing their incentives, and that our cases are helping employees convince their CEOs to take appropriate care in this area.

We also have an important new tool here - the Gramm-Leach-Bliley Safeguards Rule - to help us promote and enforce good security practices. Under the Rule, financial institutions must undertake certain basic steps to ensure that they have security appropriate to their businesses and for the information they collect. These steps include designating someone to coordinate security efforts and assessing risk in all areas of the business that might affect the security of customer information.

We plan to enforce this Rule vigorously, and we are investigating companies that may not be complying. But the chief value of the Rule is educational. By requiring companies to take these basic steps, the Rule forces companies that may not have thought about security previously to study their practices and assess the risks to the information they collect and store. The Rule could substantially reduce potential misuses of information caused by simple inattention to basic safeguards - such as when a company puts sensitive financial documents outside in a dumpster instead of having them shredded or burned.

Moreover, we are attempting to educate the public about information security. We have developed a web site, disseminated educational materials, and held several workshops to promote better security practices by consumers and businesses alike.⁽⁹³⁾ As head of the U.S. delegation to the OECD Experts Group for Review of the 1992 OECD Guidelines for the Security of Information Systems, my colleague, Commissioner Orson Swindle, led efforts to revise the Guidelines, which were finalized in August 2002.⁽⁹⁴⁾

e. Increased FCRA Enforcement

We also are increasing enforcement of the Fair Credit Reporting Act. As discussed above, the FCRA strikes the same balance between privacy and the beneficial use of information that we are trying to achieve with the rest of our privacy program. The FCRA allows credit data to be used to grant credit and other benefits, but limits use of the data to certain "permissible purposes." It also requires steps to enhance the accuracy of the data, so that consumers are not denied important benefits due to errors in their credit reports. One of the most significant steps is that consumers be notified whenever information in their credit report is used to deny them credit, insurance, employment, or other benefits or grant less favorable terms. Consumers can then check their credit reports and correct any errors when they have the greatest incentive to do so. We have proposed that Congress strengthen this important safeguard.⁽⁹⁵⁾

All players in the credit reporting system must comply with these accuracy requirements. Among other steps, we are enforcing

provision requiring that users of reports give notice to consumers when the users take adverse action because of information report. We are also requiring that credit bureaus comply with their accuracy duties under the statute. For example, we recently settled allegations against Equifax that it violated an FTC order requiring it to make personnel accessible to answer consumer questions about possible errors in their credit reports.(96) We also are working closely with the credit bureaus on a voluntary i to address the consumer complaints we receive about information in credit reports, when consumers have used the credit bur dispute resolution process and are not satisfied with the result. We will send the credit bureaus the complaints so they can bot resolve them and identify and correct any systematic problems. The program, which does not limit our ability to pursue law enforcement, will provide us and the credit reporting industry with information on how well the system is working.

E. Spam

Although the principles the Commission applies for consumer protection have proven useful in formulating an effective privacy program, they face their most significant test in dealing with spam. There are some similarities between the spam problem and other actions. Just as the unwanted intrusion into our homes created by telemarketing calls implicates consumers' privacy, so does the clogging of our Internet mailboxes by unwanted and unsolicited commercial email, or "spam." Spam has become one of the biggest intrusions into consumers' daily lives. Everyone enjoys reading email they want, whether messages from friends or ne about a sale at your favorite store. Today, though, our inboxes are filled with objectionable and fraudulent messages.

As just discussed, the National Do Not Call Registry will protect consumers from the unwanted intrusion of telemarketing calls not unduly inhibiting the flow of useful information. It is not apparent, however, that any regulatory solution exists for spam. Sp one of the most daunting consumer protection problems that the Commission has ever faced.

The problems from spam go well beyond the annoyance it causes. 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 when spam is used to disrupt service or as a vehicle for sending viruses. Although a single piece of spam to a single consumer causes *de minimis* economic harm, the cumulative economic damage from spam is enormous, and growing. We lack reliable, empirical research regarding the costs of spam, but estimates - guesses might be a better word - have ranged from \$10 billion to \$87 billion a year.

Despite the concerted efforts of government regulators, legislators, Internet service providers, and other interested parties, the problem continues to worsen. Virtually all of the panelists at the Commission's recent Spam Forum(98) opined that the volume of unsolicited email is increasing exponentially and that we are at a "tipping point," requiring some action to avert deep erosion of confidence that could hinder, or even, for many, destroy, email as a tool for communication and online commerce. In other words, spam is "killing the killer app."(99)

Two facts make spam different from other forms of marketing. First, unlike telemarketers or direct mail users, spammers can easily hide their identity and cross international borders. Email can be sent from anywhere to anyone in the world, without the recipient knowing who sent it. Spammers are technologically adept at hiding their identities, using false header information, and routing emails across borders and through open relays,(100) making it extremely difficult even for experienced government investigators with subpoena power to track them. Our enforcement experience, and that of the few states that have tried to punish spammers, shows that it can take months of investigation, and the issuance of a dozen or more subpoenas, simply to locate a spammer. Although some are dedicating significant resources to attacking deceptive spam,(101) it is difficult to prosecute enough spammers to have a significant deterrent effect, let alone stop, or even slow down, the problem.

Second, there are fundamental differences between the costs of email and other forms of marketing. Unlike phone calls or mail solicitations, sending additional spam is essentially costless. Instead, recipients and Internet Service Providers bear most of the costs. Because email technology allows spammers to shift the costs almost entirely to third parties, there is no incentive for the spammers to reduce the volume. This shifting of costs encourages inefficiency because the total cost to send tens of millions of emails, if borne by the spammer, would presumably outweigh the proceeds that most spam generates. Yet at our Spam Forum, a bulk emailer testified that he could profit even if his response rate was less than 0.0001%. Because there is virtually no margin to increasing the number of messages, fraud artists and pornographers, who generally have little to gain from reputation, profit from extremely low response rates by sending untold millions of messages. If spammers had to pay the actual costs of spam, normal market forces would eliminate much of the spam problem.

Because of the anonymity the technology affords, spammers are often exceptionally bold fraud artists, flooding inboxes with outrageous claims. In April 2003, the FTC released a report analyzing false claims made in spam.(102) To prepare the report, FTC staff reviewed a sample of approximately 1,000 pieces of spam.(103) Of the 1,000 pieces, 66 percent contained facial evidence of obvious deception in the "from" line, the "subject" line, or the text of the message.(104) When these data are further analyzed to exclude sexually explicit email and email hawking products or services that are permeated with fraud - such as chain letters, car repair, and cable de-scramblers - only 16.5% of the spam did not contain obvious deception and came from possibly legitimate marketers.(105) We further analyzed a random sample of 114 of these spam, looking behind the header information to see if the sender registered the domain name for any web sites connected to the email by hyperlink. We found none from Fortune 500 companies, only one from a Fortune 1000 company.(106) The study also showed that only 2% of all of the sample contained an "ADV:" label, even though laws in 11 states, including California, require such a label. It thus appears that the overwhelming majority of spam

completely ignore state labeling laws.

Clearly, then, spam is a major problem that normal market forces will not solve and is therefore a prime candidate for government intervention. The very technology that makes email such a powerful and revolutionary tool for business, however, makes spam a problem that the application of the Commission's law enforcement and regulatory tools cannot solve. There is no quick or simple "silver bullet." Rather, solutions must be pursued from many directions - technological, legal, and consumer action. This is what we are doing at the FTC. First, we will continue to investigate and prosecute deceptive spam, as well as the deceptive and unfair email technology. To leverage our enforcement resources, we have formed a Spam Task Force consisting of federal, state, and law enforcement agencies. By providing technical support and coordination, we hope to encourage enforcement by state and agencies to prosecute scams that likely originate outside of their jurisdiction.⁽¹⁰⁷⁾

Although spam is universally regarded as a major problem, there has been relatively little research about it. Thus, as a second the Commission has conducted research on spam, including the Remove-Me Surf,⁽¹⁰⁸⁾ Spam Harvest,⁽¹⁰⁹⁾ False Claims in Study,⁽¹¹⁰⁾ and the April 2003 Spam Forum.⁽¹¹¹⁾ The Spam Forum in particular provided valuable information to hone our spam agenda and helped develop the contacts in the IT industry the Commission needs to stay well informed as we help lead the fight against spam. The Commission will continue to pursue research into spam and to work with its partners in industry, state government, and other federal agencies to provide the best possible information to consumers and businesses through consumer alerts, brochures, and other appropriate methods.

Third, a key component of the FTC's efforts against spam is educating consumers and businesses about how they can decrease the amount of spam they receive. The FTC's educational materials provide guidance on how to decrease the chances of having an address harvested and used for spam, and suggest several other steps to decrease the amount of spam an address may receive.⁽¹¹²⁾ The FTC's educational materials on spam are available on our website.⁽¹¹³⁾

Fourth, led by Commissioner Swindle, the Commission has brought together interested parties, including government, ISPs, marketers, and technologists. In our haste to reduce spam, we must avoid over-regulation that could impede the flow of useful information to consumers. It is important to include legitimate marketers in this discussion because they have a strong interest in solving the spam problem - the sheer volume of spam and its impact on consumer confidence is eroding a valuable form of marketing.

As you are no doubt aware, there are several legislative proposals to address spam. Parts of these proposals can help, but we should not expect any new law to make a substantial difference by itself. Unfortunately, the legislative debate seems to be veering the wrong track, exploring largely ineffective solutions. For example, a "Do Not Spam" list is an intriguing idea, but it is unclear how we can make it work. Most spam is already so clearly illegitimate that the senders are no more likely to comply than with the laws they now ignore. We are sure the National Do Not Call Registry will reduce calls significantly. There is no basis to conclude a Do Not Spam list would be enforceable or produce any noticeable reduction in spam. If it were established, my advice to consumers would be: Don't waste the time and effort to sign up. Let me explain the role that I see for legislation. There are three issues that any spam legislation must confront to be effective: First, legislation must enhance the ability to find the person sending the spam messages. Although technological changes will most effectively deal with this issue, we have proposed five procedural legislative changes that can provide some assistance in our law enforcement investigations.⁽¹¹⁴⁾ Thus far, proposed spam legislation has not included these additional changes that would make it easier for us to find and prosecute spammers, although some of them are included in other legislative proposals.⁽¹¹⁵⁾

Second, legislation must deal with how to punish the person sending the spam messages. Most spam we see already violates the FTC Act. Outside the spam context, when we find a fraudulent seller, we often can freeze assets and seek restitution of ill-gotten gains for consumers. Unfortunately, most of our spam enforcement targets to date have very limited assets. Our authority thus already entitles us to more money than many of the spammers have. Authority to get civil penalties, contained in the major legislative proposals, may help and certainly cannot hurt,⁽¹¹⁶⁾ but it will not make a dramatic difference. If spammers lack the money to provide consumer redress, they would similarly lack the money to pay civil penalties.

More important than civil penalties is clarifying criminal authority. When defendants have no assets, or when we cannot impose penalties sufficient to remove the financial incentive to engage in law violations, criminal sanctions are the only viable deterrent. Although there are criminal laws that can reach most of the worst spam-related problems, additional authority may be helpful.

Finally, legislation can determine what standards will govern non-deceptive, unsolicited commercial email. This is the least important issue for dealing with the current spam problem, which involves few legitimate marketers. Ironically, because the legislation will do little to solve the current spam plague, this is the issue to which the proposals are most clearly addressed. These standards should include clear identification of the sender of a message and empower consumers to opt-out of messages that they do not wish to receive. Legitimate businesses are easy to find, because they want to be found. That is what legitimate marketing is all about. Legitimate marketers need guidance more than they need punishment. The current morass of conflicting state laws, particularly regarding labeling, make it very difficult for legitimate marketers to use email. The stigma associated with spam because of the volume of fraud also makes legitimate email marketing less attractive and effective. There is a place for legitimate commercial email just as there is for telemarketing and direct mail, but the spam problem first needs to be addressed to make it a useful marketing

for legitimate companies.

In the end, legislation cannot do much to solve the spam problem, because it can only make a limited contribution to the crucial problems of anonymity and cost shifting. Some of the proposed legislation, unfortunately, could be harmful or, at best, useless. I will give two examples.

First, proposals in both the House and the Senate require us to prove knowledge to bring an action against a seller that hires a spammer. Under one of the Senate bills, it would be extremely difficult successfully to sue a seller that hires a third-party to send email that is deceptive or otherwise violates the act, such as by not providing a working "opt-out." The FTC would have to prove the seller knew, or consciously avoided knowing, that the third-party emailer it hired *intended* to violate the law. This standard requires proof of *both* the seller's and spammer's level of knowledge. In its entirety, this bill contains thirteen separate provisions requiring a showing of some level of knowledge. Indeed, there are five different levels of knowledge required, but not defined or explained.⁽¹¹⁷⁾ These various requirements to prove intent pose a serious hurdle that we do not have to meet to obtain an injunction under our current jurisdiction.⁽¹¹⁸⁾

Although criminal prosecutors must satisfy such tests, they have penalties and investigative tools we lack, including the grand

The breadth of remedies currently available to us under the FTC Act include immediate and permanent injunctive relief and the whole range of traditional equitable remedies, such as an asset freeze and appointment of receivers. As a result, the authority proposed spam legislation, as a practical matter, will likely prove less useful than our existing tools under Section 5 of the FTC Act. I do not know why the proposals seek to make it so hard for us to prosecute problematic spam. I do know that a future FTC will likely choose a more cumbersome statute to attack spam.

A second example of the problems new legislation could cause is the triggers for criminal sanctions contained in some of the proposals. Under one proposed standard, federal prosecutors would have to show beyond a reasonable doubt that a spammer falsified his identity in 10,000 different emails to bring a felony charge. As the Justice Department has noted in testimony, such a standard simply will often be impracticable.⁽¹¹⁹⁾

In the end, spam will be reduced, if at all, through several technological improvements, as well as safer computing practices by users, that decrease the amount of spam evading ISPs' anti-spam filters, and the seamless integration of anti-spam technology into the email services consumers use. Ultimately, the Internet protocols for email may need to be changed.⁽¹²⁰⁾

Such a solution, however, is unlikely in the near term. Until then, ISPs need to empower consumers by providing them the means to deal with spam more easily.

F. International cooperation

As noted earlier, the development of the Internet and the related increase in international commerce provide enormous benefits to consumers, but also have multiplied opportunities for consumer harm. In developing new tools to fight these harms, we also seek to multiply our effectiveness by working with other consumer protection institutions around the world. Through these efforts, we seek to ensure that consumer protection rules outside the U.S. focus on practices that distort consumer choice and raise a serious threat to the proper functioning of markets. To this end, we hope to foster consistent, market-driven policies internationally.

The emergence of new technologies, especially global communication systems, has changed the marketing landscape. Today we see satellite networks broadcasting advertisements around the world, with operators waiting to take orders in the caller's own language. Telemarketers routinely call U.S. consumers from Canada. Most significantly, in many markets the Internet is transnational. Thus, we cannot avoid global consumer protection issues.

Given this trend, international convergence of consumer protection rules is especially important. Greater consistency among consumer protection rules will reduce compliance burdens for businesses selling internationally. In particular, the more consistency among different consumer protection regimes, the less burdened merchants are in complying with different, and potentially conflicting, rules. Indeed, the European Commission recently found that 68% of businesses it surveyed agreed that harmonizing national consumer protection regulations would make cross-border advertising within the European Union more efficient.⁽¹²¹⁾ A study by the European Mail Order Trade Association found that five of the top ten barriers to selling across borders related in part to differences in national rules on commercial practices.⁽¹²²⁾

More consistent consumer protection rules internationally also benefit consumers by ensuring that they have more choices. Inconsistent rules can drive businesses from the marketplace, or deter their entry in the first place, thus reducing consumer choice. Because there will be more competition with better rules, consumers should also benefit from lower prices.

For these reasons, the development of international consumer protection policies is a priority. In 2002, we created an Internati

Division of Consumer Protection, which seeks international rules that promote a consistent market-oriented approach to consumer protection. As with consumer protection in general, the first priority of an international consumer protection program should be combating fraud. Indeed, as our *domestic* efforts have become more effective, scam artists have recognized that the FTC and foreign counterparts face significant obstacles in trying to fight *cross-border* fraud. Increasingly, scam artists take advantage of law enforcement difficulties by using facilities in one country to target consumers in others. In 2000, 11% of our consumer complaints involved cross-border fraud; by 2002, the number of cross-border fraud complaints had risen to over 14%.⁽¹²³⁾ There also has been an increase in FTC cases involving offshore defendants, offshore evidence, or offshore assets. In 2002, for example, the FTC brought over 20 law enforcement actions involving cross-border fraud. Cases this year involve advance fee credit cards peddled by Canadian telemarketers,⁽¹²⁴⁾ allegedly bogus international driving licenses advertised through spam email by defendants in Denmark,⁽¹²⁵⁾ Israel, the Bahamas, and Romania,⁽¹²⁶⁾ and products and programs sold over the Internet by defendants based in Switzerland,⁽¹²⁷⁾ Canada, the U.K., and Mexico⁽¹²⁸⁾ that allegedly falsely claim to cure cancer, AIDS, and other serious diseases.

Fraud harms any economy, even a well-established one. In emerging markets, the damage of fraud may be even greater. It is enough that consumers suffer out-of-pocket losses. In a transition environment, fraud can undermine consumer confidence and create uncertainty that often accompanies the abandonment of central planning. The inability of Albania, for example, to address effectively the pyramid schemes that masqueraded as legitimate investments led to the fall of the government and a serious setback to market reforms.⁽¹²⁹⁾ Unless a nation visibly and effectively suppresses seller deceit, consumers may perceive that in a market system commercial dishonesty is the norm, not the exception.

Moreover, consumers in countries that fail to develop effective anti-fraud strategies may become especially attractive targets for fraudsters. Countries that house the targets of cross-border fraud are not the only victims; countries that unwittingly host them as well. What country wants the dubious reputation as a haven for perpetrators of international fraud? Thus, Canada is deterring attempts by fraudulent telemarketers to make Canada their safe haven. A consortium of Canadian agencies that include the Competition Bureau, the Royal Canadian Mounted Police, and provincial and local authorities have worked with us effectively to attack fraud.⁽¹³⁰⁾

We are building international consensus on the importance of combating cross-border fraud. My colleague Commissioner Mo Thompson chairs the OECD Committee on Consumer Policy, which, this past June, announced new Guidelines for international cooperation to combat the growing problem of cross-border fraud.⁽¹³¹⁾ Importantly, the Guidelines will help governments work more effectively and efficiently to combat the increasing incidence of cross-border fraud. The Guidelines create a common definition of "fraudulent and deceptive commercial practices" and express a commitment among OECD member countries to cooperate in combating these practices. In the United States, we have begun to implement these Guidelines to ensure that the FTC has the tools it needs to combat cross-border fraud. In June, we proposed legislation to Congress that would make it easier to share information and cooperate with our counterparts abroad.⁽¹³²⁾

G. E-Commerce

Our e-commerce initiative is another example of the Commission using its institutional strengths to support competitive markets and the common law as they adapt to technological change. Although the Internet can provide consumers with important benefits, e-commerce also has pitfalls. As already noted, the Commission has undertaken many enforcement and educational efforts to protect online consumers against fraud and other problems. These consumer protection initiatives will help the Internet continue to be a legitimate and reputable sphere of commerce and likely lead to greater consumer confidence in, and use of, the medium.

The Internet also raises competition issues. While many states are regulating e-commerce to promote important public interest objectives, such as protecting consumers from deception and fraud, some of these actions also shield local businesses from interstate competition. For example, some states require that online vendors maintain a physical office in the state, others completely prohibit online sales or shipments of certain products. Many states also require that out-of-state sellers obtain an in-state license before selling particular goods, such as caskets or contact lenses, or services, such as medical or legal advice. Some observers question whether the attendant higher prices and loss of variety outweigh the consumer protection benefits.⁽¹³³⁾

In March 2002, Commission staff commented to the Connecticut Board of Examiners for Opticians against the Board requiring Internet sellers of replacement contact lenses have a Connecticut optician's license.⁽¹³⁴⁾ Such sellers merely mail out prepackaged lenses pursuant to a valid prescription. The staff concluded that the proposed requirement would increase consumer costs without offsetting health benefits and would hinder the expansion of Internet commerce. Indeed, such licensing could harm public health by raising the cost of replacement contact lenses, inducing consumers to replace the lenses less frequently than doctors recommend, to substitute other types of contact lenses that pose greater health risks. On June 24, 2003, the Board ruled that contact lens sellers located outside of the state who sell lenses to Connecticut residents do not need a Connecticut license, but must merely sell pursuant to a lawfully issued prescription. The effect of the Board's ruling is that state licensing or other requirements will not impede Internet commerce in replacement contact lenses, which was the goal of the Commission's advocacy.⁽¹³⁵⁾

The issue of industry members imposing restrictions on consumer choice led the Commission, with the Department of Justice, to oppose a proposed bar opinion in North Carolina that required the physical presence of an attorney at residential loan closings, including simple refinancings.⁽¹³⁶⁾ The Commission argued that the proposal would not only raise costs for consumers, who

have to pay for additional services, but also created an uneven playing field for out-of-state Internet lenders, because in-state were allowed to close loans without attorneys. In January 2003, the state bar adopted a pair of opinions that eliminate the requirement that an attorney be physically present at closings. The opinions also allow non-attorneys to obtain signatures and receive and disburse funds. This outcome preserved competition for consumers in real estate closings, ensured even greater consumer choice, and helped promote Internet lending options for North Carolina consumers.

The Commission also has addressed these issues in other states⁽¹³⁷⁾ and on a national scale. Late last year, the FTC and the Department of Justice wrote to an American Bar Association (ABA) task force that was considering a proposed model definition of the practice of law.⁽¹³⁸⁾ We urged the ABA not to adopt the proposed definition, which was over broad and could restrain competition between lawyers and nonlawyers to provide similar services to consumers. The agencies cautioned that, if adopted by state governments, the proposed definition likely would raise costs for consumers and limit their competitive choices. The letter noted the lack of evidence that this competition hurts consumers and the substantial evidence that they benefit from it. The ABA task force ultimately withdrew the proposed model definition and instead suggested that each jurisdiction adopt its own definition to determine who may provide services based upon the potential harm and benefit to the public.⁽¹³⁹⁾

It is important to stress that the policy issue in our e-commerce activities is not whether licensing and certification regimes should be scrapped. The question is instead whether legitimate consumer protection, safety, and other objectives motivate refusals to provide reasonable accommodations of such licensing regimes or instead they represent a desire to exclude competitors from the marketplace.

IV. Policy Research and Development

This discussion of our positive agenda identifies a necessary condition for the FTC's future success in consumer protection. Continuing, substantial efforts to increase the Commission's base of knowledge are indispensable to address new commercial phenomena, to analyze complex technical issues involving health and safety, and to respond to new technologies that, among other capabilities, permit the assembly and rapid transmission of vast amounts of information. All of these developments occur in a regulatory environment in which the Commission must use the force of its arguments, not fiat, to persuade public authorities at home and abroad to cooperate in law enforcement and other forms of policymaking.

I have called the expansion of the FTC's knowledge base an investment in policy research and development (R&D).⁽¹⁴⁰⁾ The Commission is the public equivalent of a private firm whose success requires substantial R&D. Just as a high technology company must perform research to develop new products, so too must the FTC expand its knowledge to design law enforcement and other policies to conquer current and anticipated consumer protection problems.

We can meet this test. A far-sighted feature of the FTC's institutional design is that Congress gave the agency flexible tools to perform the necessary consumer protection R&D.⁽¹⁴¹⁾ Several examples illustrate how the Commission uses its distinctive institutional strengths to ensure that it accurately understands and properly responds to new challenges.

Possible Barriers to E-commerce workshop

In October 2002, the Commission sponsored a three-day workshop on Possible Anticompetitive Efforts to Restrict Competition on the Internet.⁽¹⁴²⁾ The workshop examined state regulations and private arrangements, often adopted for purposes unrelated to competition, that may aid existing bricks-and-mortar businesses at the expense of new Internet competitors, ultimately hurting consumers. The workshop sought to enhance the FTC's understanding of these issues, inform policymakers about how restrictive state regulation affects competition and consumers, educate private entities about business practices that may raise concerns, and learn of additional avenues to promote competition through e-commerce.

More than 70 representatives of industry, academia, state and federal government agencies, and independent public policy organizations participated in the workshop and discussed possible barriers to e-commerce in ten different industries ranging from financial services to automobiles to wine. The workshop spawned several projects. For example, the FTC Bureau of Economic Analysis issued a working paper on the availability of wine over the Internet.⁽¹⁴³⁾ The paper examined the effect of Virginia's ban on direct wine shipments from out-of-state sellers on price and variety available to Virginia consumers. The study found that Virginia's direct shipment ban reduces the varieties of wine available to consumers and prevents them from purchasing certain premium wines at lower prices online. We then issued an FTC staff report assessing the impact on wine consumers of barriers to e-commerce.⁽¹⁴⁴⁾ The report found that states could significantly enhance consumer welfare by allowing the direct shipment of wine to consumers.

The wine report will be followed by reports on other industries discussed at the workshop. Each report will analyze the competition and consumer protection aspects of the possible anticompetitive barriers, including regulations and business practices. What was learned from the barriers to e-commerce workshop will continue to inform the Commission's advocacy and enforcement agenda.

Information flows workshop

In June, the Commission held a workshop on Information Flows to examine the benefits and costs to consumers and businesses: the collection and use of consumer information. As discussed above, the Commission's privacy agenda focuses on stopping practices that cause real harm to consumers, while not restricting unduly the free flow of information that benefits our economy. To help ensure that the Commission's approach both protects privacy and preserves important benefits, we convened the workshop to learn from knowledgeable observers with a range of perspectives, including executives from a variety of businesses that use consumer information extensively, academic researchers, consumer privacy advocates, and government officials. Panelists presented their original research and debated the appropriate methodology for evaluating information practices from consumer and business perspectives, including the appropriate use of benefit/cost analysis.

More research is needed so that we as policy makers can understand more fully the role of information practices in our information economy. The knowledge we gathered at this workshop, and the future research that it is likely to spur, will help inform the Commission and other policymakers as we debate the difficult issues involving privacy and the free flow of consumer information.

FCRA Recommendation

Our efforts to increase knowledge through workshops, such as the Information Flows event, are not merely aspirational. Research presented at the Information Flows workshop helped guide our recommendations on FCRA reauthorization. As mentioned above, the Fair Credit Reporting Act tries to balance the beneficial use of information with the costs. Participants at the Information Flows workshop provided research on likely effects from changes to the FCRA's current uniform standards and preemption of state law with respect to certain matters.⁽¹⁴⁵⁾ This research indicated that allowing the national standards to expire likely would harm consumers. One study measured the impact of different scenarios of possible state regulation on credit score modeling and, ultimately, on the cost and availability of credit. The results suggested that the hypothesized changes in FCRA standards would lower most consumers' credit scores and lower the predictive power of scoring models, leading to increased delinquency rates or (to maintain current delinquency rates) restricted availability of credit.⁽¹⁴⁶⁾ Based in part on this research, the Commission recommended in testimony before Congress that all of the standards be made permanent.⁽¹⁴⁷⁾

V. Conclusion

The FTC's consumer protection program has been transformed during my professional career. This transformation clarified the agency's mission and enhanced its effectiveness by better deploying its inherent strengths, to the benefit of both the agency and more important, consumers. What can one learn from this discussion of the underlying principles for formulating an effective consumer protection policy and the recitation of FTC activities that illustrate these principles? One key lesson is that, of course, principles matter. An institution that merely reacts to circumstances and does not work from a coherent philosophy will ultimately fail to achieve lasting success. Even if it wins a few battles, it is not orchestrating an overall strategy to succeed on a larger scale by reinforcing its strengths, filling gaps in the lines of defense, and carefully venturing into new terrain with a compass firmly in hand.

Beyond principles, we need a plan for implementation. The heart of the agency's strategy for consumer protection is the search for and elimination of practices that harm consumers by hampering the competitive process and violating the basic rules of exchange. While we will do much of this work through case selection and prosecution, we will also make full use of our distinctive institutional attributes, including the ability to perform advocacy and conduct studies.

A necessary condition for the FTC's future success in consumer protection is to increase the Commission's base of knowledge by addressing new commercial phenomena, to analyze complex technical issues involving health and safety, and to respond to new technologies. This base of knowledge will enable the Commission to retain the intellectual leadership necessary to persuade Congress to join us in our mission to foster consistent, market-driven consumer protection policies.

Endnotes:

1. Timothy J. Muris, Chairman, FTC, *Looking Forward: The Federal Trade Commission and the Future Development of U.S. Competition Policy*, Milton Handler Annual Antitrust Review (Dec. 10, 2002), available at <http://www.ftc.gov/speeches/muris/handler.htm>.
2. Timothy J. Muris, Chairman, FTC, *Improving the Economic Foundations of Competition Policy*, George Mason University Law Review's Winter Antitrust Symposium, Wash., D.C. (Jan. 15, 2003), available at <http://www.ftc.gov/speeches/muris/improvefoundatio.htm>.
3. See William E. Kovacic, *Institutional Foundations for Economic Legal Reform in Transition Economies: The Case of Competition Policy and Antitrust Enforcement*, 77 Chi.-Kent L. Rev. 265, 269-70 (2001) (describing views of commentators concerning the legal framework for a market economy).
4. The analogy of the three-legged stool is drawn from Todd J. Zywicki, *Bankruptcy Law as Social Legislation*, 5 Tex. Rev. of L.

Pol. 393, 400 (2001), which applies it in a different context.

5. As discussed throughout this paper, besides the FTC, other agencies exist to pursue these priorities, including the Antitrust Division of the Department of Justice, parts of the Food and Drug Administration, many state attorneys general, and local, state and federal criminal enforcement agencies.

6. See, e.g., Paul H. Rubin, *Regulating Deception*, 10 *Cato J.* 667, 679 (1991) ("There is much support in the recent literature proposition that, as long as deception is not allowed, there are incentives for sellers to disclose even the negative attributes of products. This is because consumers will rationally assume that any advertisement which omits a critical piece of information (the durability of a product) will imply that the value of that attribute for that product is at the lowest level.") See also J. Howard III et al., *The Efficient Regulation of Consumer Information*, 24 *J. L. & Econ.* 491 (1981).

7. See, e.g., Lester G. Telser, *A Theory of Self-Enforcing Agreements*, 53 *J. Bus.* 27 (1980) (noting that when a stream of benefits from repeated interaction is promised, and that stream of benefits would be lost by acting opportunistically, it is in a party's self interest to forego the one-time gain of opportunism in favor of preserving the prospect of a future stream of benefits.)

8. Each year, tens of thousands of new products are introduced, many of which fail. An famous example was the Coca Cola Company's introduction of its "New Coke". Introduced with great fanfare, the product fizzled and has virtually disappeared from market.

9. See, e.g., Consumer Reports magazine, online version available at <<http://www.consumerreports.org/main/home.jsp>>; Cnet Product Reviews available at <<http://www.cnet.com/>>.

10. See Timothy J. Muris, *Opportunistic Behavior and the Law of Contracts*, 65 *Minn. L. Rev.* 521, 527 (1981) (concluding that reputation is the main constraint on opportunistic behavior).

11. See Paul H. Rubin, *Regulating Deception*, 10 *Cato J.* 667, 675 (1991) ("Investments in non-salvageable firm-specific capital (capital that would become worthless if the firm were to shut down) would serve to guarantee quality since the firm would lose value of these investments if consumers dissatisfied with low-quality products forced it to shut down by withdrawing patronage in addition to advertising, including endorsements by celebrities, such capital includes investments in establishing trademarks and brand names, and investments in physical assets such as signs and decor.")

12. See Michael R. Darby & Edi Karni, *Free Competition and the Optimal Amount of Fraud*, 16(1) *J. of L. & Econ.*, 67, 68-69 (1973) ("Credence qualities are those which, although worthwhile, cannot be evaluated in normal use. Instead the assessment value requires additional costly information. An example would be the claimed advantages of the removal of an appendix, which may be correct or not according to whether the organ is diseased. The purchaser will have no different experience after the operation whether or not the organ was diseased. A similar example would apply to replacement of a television tube, certain automobile parts and the like. The line between experience and credence qualities of a good may not always be sharp, particularly if they will be discerned in use, but only after the lapse of a considerable period of time.")

13. In part for this reason industries often acquiesce to private restraints on comparative advertising claims, particularly restraints on truthful claims that "disparage" competitors' products. See 16 C.F.R. § 14.15 and discussion, *infra*, at notes 63-64 and accompanying text. This reluctance also justifies certain government actions to require disclosures of health or safety risks that are common to a class of products, for example requiring health warnings on tobacco products. See, e.g., Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331- 1340, *as amended*.

14. See Michael R. Darby & Edi Karni, *Free Competition and the Optimal Amount of Fraud*, 16(1) *J. of L. & Econ.* 67, 68 (Apr. 1973) ("Hence, the contention that competitive markets are sufficient to prevent fraud by, at least, established firms, because of the threat of loss of future sales of the eventual discovery of the fraud, does not hold in this case. The provision of joint diagnosis and repair implies that some fraud can be successful because of the high, if not prohibitive, costs of discovery of the fraud.")

15. George A. Akerlof, *The Market for Lemons: Qualitative Uncertainty and the Market Mechanism*, 84 *Q. J. of Econ.* 488-517 (Aug. 1970).

16. See Timothy J. Muris, *California Dental Association v. FTC: The Revenge of Footnote 17*, 8 *S. Ct. Econ. Rev.* 265, 288-89 (discussing lemons markets).

17. 3 David Hume, *A Treatise of Human Nature* § VI (L.A. Selby-Bigge ed., 1888); see also Todd J. Zywicki, *The Past, Present and Future of Contract Governance: An Economic Theory of Contract Governance* (Working Paper, 2003).

18. See, e.g., Benjamin Klein & Keith B. Leffler, *The Role of Market Forces in Assuring Contractual Performance*, 89 *J. of Pol.*

615 (1981) (examining the repeat-purchase, contract-enforcement mechanism of private arrangements).

19. See, e.g., Todd J. Zywicki, *Bankruptcy and Reciprocity: An Evolutionary Analysis of Promise-Keeping Norms*, and *Bankru Law* 28 (Geo. Mason Univ. Sch. of Law, Working Paper, 2001) ("For centuries commerce [based largely on promise-keeping] outside of the jurisdiction of any political authority . . . Modern commercial law was invented and enforced not by governments merchants themselves."); Daniel B. Klein, *Promise Keeping in the Great Society: A Model of Credit Information Sharing, from Reputation: Studies in the Voluntary Elicitation of Good Conduct* (Daniel B. Klein, ed., Univ. of Mich. Press 1997); Avner Greif *Contract Enforceability and Economic Institutions in Early Trade: The Maghribi Traders' Coalition*, 83 *Am. Econ. Rev.* 525, 533 (1993).

20. For certain industries, the system of contract rules can itself be inefficient. See Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 *J. Legal Stud.* 115 (1992) (concluding in study of diamond industry "extralegal contracts are more likely to become an industry norm in situations where traditional contract remedies are likely to be inefficiently high levels of breach of contract and the market is organized in a way that makes other methods of enforcing these agreements possible.")

21. See Ian Ayres & Robert Gertner, *Strategic Contractual Inefficiency and the Optimal Choice of Default Rules*, 101 *Yale L.J.* (1992); Charles J. Goetz & Robert E. Scott, *The Limits of Expanded Choice: An Analysis of the Interactions Between Express and Implied Contract Terms*, 73 *Calif. L. Rev.* 261 (1985).

22. See Thomas B. Leary, Commissioner, FTC, *The FTC and Class Actions* (June 26, 2003) (identifying flaws in the class action system arising from the lack of an actual plaintiff, which increases the risk of collusive settlements between class counsel and defendant's counsel, inadequate consumer redress, excessive attorneys fees, and the prosecution of meritless cases that harm consumers indirectly), available at, <<http://www.ftc.gov/speeches/leary/classactions Summit.htm>>

23. See, e.g., Arthur Best et al., *Peace, Wealth, Happiness, and Small Claims Courts: A Case Study*, 21 *Fordham Urb. L.J.* 34 (1994) ("The complexity of the existing apparatus for collection in Denver forces many small claims judgment creditors to go to attorney for assistance in collecting a judgment. These additional costs can severely undercut the otherwise low cost of winning judgment.")

24. See, e.g., Richard A. Posner, *Economic Analysis of Law* § 4.1 (6th ed. 2003); Todd J. Zywicki, *The Past, Present, and Future of Contract Governance: An Economic Theory of Contract Governance* 65 (Working Paper, 2003) (noting that with reduced information about a potential trading partner, parties will be less willing to enter into contracts and trades that would be consummated if information could be made more enforceable. "Thus, at some point, the overall costs of relying on informal norms becomes sufficiently high that it becomes efficient to create institutions to enforce promises, despite the administrative costs of doing so.")

25. Although other agencies are crucial to this task, see note 5 supra, the focus here is on the FTC. Of course, government has its own limits, which must be considered when developing public policies.

26. See, e.g., *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (noting that federal antitrust laws are designed "for the protection of competition, not competitors." (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962))).

27. Timothy J. Muris, *Antitrust's Next Decade*, in Betty Bock, *Is Antitrust Dead?* 55 (1989).

28. Of course, some level of consumer awareness of potential deception is an important part of consumer self-protection and the FTC has an active consumer education program. See discussion of consumer education, *infra*, at note 41 and accompanying text.

29. After a long struggle with the extent of its unfairness jurisdiction, the Commission adopted a benefit cost analysis for unfairness which was subsequently codified. See 15 U.S.C. § 45(n). See J. Howard Beales III, *The FTC's Use of Unfairness Authority: Its History, Fall, and Resurrection*, Wash., DC (May 30, 2003) (presenting remarks before the Marketing and Public Policy Conference) for history and current use of the FTC's unfairness jurisdiction. Consumer sovereignty may be frustrated *ex ante* if, for example, important information is not provided. See *Labeling and Advertising of Home Insulation*, Statement of Basis and Purpose, 44 *F.R.* 50218 (1979). It may be frustrated *ex post* if sellers do not honor their contracts with consumers. See *Orkin Exterminating*, 108 F.T.C. 263 (1986), *aff'd sub nom, FTC v. Orkin*, 849 F.2d 1354 (11th Cir. 1988). The three-part unfairness test - the injury to (1) substantial, (2) without offsetting benefits that outweigh the harm, and (3) one that consumers cannot reasonably avoid - is designed to provide a rational, empirical means to determine whether the challenged acts or practices interfere with consumer ability to make choices.

30. Memorandum to FTC Chairman James C. Miller III from Timothy J. Muris, Director of Consumer Protection Bureau, on Deceptive Advertising, 42 *Antitrust & Trade Reg. Rep. (BNA) No.* 1058, at 699-708 (Apr. 1, 1982).

31. See discussion of Do Not Call Rule, *infra*.
32. See R.H. Coase, *The Problem of Social Cost*, 3 J. L. & Econ. 1, 15-16 (1960) ("Once the costs of carrying out market transactions are taken into account it is clear that such a rearrangement of rights will only be undertaken when the increase in value of production consequent upon the rearrangement is greater than the costs which would be involved in bringing it about
33. Timothy J. Muris, Chairman, FTC, *Improving the Economic Foundations of Competition Policy*, George Mason University I Review's Winter Antitrust Symposium, Wash., D.C. (Jan. 15, 2003), available at <http://www.ftc.gov/speeches/muris/improveconfoundatio.htm>.
34. Noteworthy examples of this type work can be found in Federal Trade Commission, Impact Evaluations of Federal Trade Commission Vertical Restraints Cases (Ronald N. Lafferty, et al., eds., 1984).
35. See Thomas B. Leary, Commissioner, FTC, *The Federal Trade Commission and the Defense of Free Markets*, at the Dav Chase Free Enterprise Institute, Eastern Connecticut State University, Willimantic, Conn. (Oct. 7, 2002) ("Competitive restraint antitrust violations), tend to raise the supply curve because they increase offering prices or restrain sellers in the market. False advertising tends to raise the demand curve because it creates the impression that products are worth more than they otherwise would be if they were advertised honestly. So supply and demand will intersect at a higher price, to the detriment of consumer society's resources will be misallocated. That is the nexus between our two missions and that is the fundamental justification for having both of these responsibilities in the same agency . . .")
36. See American Bar Association, *Report of the American Bar Association Section of Antitrust Law Special Committee to Study the Role of the Federal Trade Commission* 109-110 (Apr. 7, 1989) [hereinafter "*Kirkpatrick II Report*"] (noting, *inter alia*, that combination of functions allows consideration of whether antitrust or consumer protection remedies are most appropriate and permits considerations of economic efficiency to inform consumer protection decisions).
37. Connecticut Board of Examiners for Opticians, *In re: Petition for Declaratory Ruling Concerning Sales of Contact Lenses*, Declaratory Ruling Memorandum of Decision (June 24, 2003). For another example of competition advocacy in the area of eye care see Letter from the FTC to Ward Crutchfield, Tennessee Senate Majority Leader regarding Senate Bill 855 involving regulatory practice of Optometry (Apr. 29, 2003), available at <http://www.ftc.gov/be/v030009.htm>.
38. *E.g.*, *FTC v. H.N. Singer*, 668 F.2d 1982 (9th Cir. 1982); *FTC v. Southwest Sunsites*, 665 F.2d 711 (5th Cir. 1982); *FTC v. of Nevada, Inc.*, 612 F.Supp. 1280 (D. Minn. 1985).
39. Federal Trade Commission, *Policy Statement on Monetary Equitable Remedies in Competition Cases* (July 25, 2003), available at <http://www.ftc.gov/os/2003/07/disgorgementfrn.htm>.
40. Memorandum of Law of *Amicus Curiae* Federal Trade Commission, *Powers v. Harris*, Case No. CIV-01-445-F (W.D. Okla. 5, 2002), available at <http://www.ftc.gov/os/2002/09/okamicus.pdf>. The district court upheld the state law, and the matter is currently on appeal. *Powers v. Harris*, No. CIV-01-445-F (W.D. Okla. Dec. 12, 2002). *But see Pennsylvania Funeral Directors v. FTC*, 41 F.3d 81 (3d Cir. 1994) (noting that forcing consumers to pay the funeral home mark-up on a casket constitutes substantial consumer injury); *Craigmiles v. Giles*, 110 F. Supp.2d 658, 663 (E.D. Tenn. 2000) (overturning state law limiting casket sales by funeral directors); *Casket Royale, Inc. v. Mississippi*, 124 F. Supp. 2d 434, 440 (S.D. Miss. 2000) (same).
41. The gateway site to the FTC's inventory of business and consumer education publications is www.ftc.gov/ftc/consumer.htm. In addition, we have dedicated Web pages for hot topics, including the National Do Not Call Registry (www.donotcall.gov). Exam publications produced with other entities, both public and private, are: *Looking for the Best Mortgage?*, available at <http://www.ftc.gov/bcp/online/pubs/homes/bestmorg.pdf>; *Miracle Health Claims*, available at <http://www.ftc.gov/bcp/online/pubs/health/frdheal.pdf>; *Businessperson's Guide to the Mail and Telephone Order Merchandise Rule*, available at <http://www.ftc.gov/bcp/online/pubs/buspubs/mailorder.pdf>; and *Telemarketing Travel Fraud*, available at <http://www.ftc.gov/bcp/online/pubs/tmarkg/trvlfird.pdf>.
42. Timothy J. Muris, Chairman, FTC, *Do The Right Thing (Apologies to Spike Lee)*, Cable Television Advertising Bureau, N.Y. (Feb. 11, 2003) (encouraging publishers and broadcasters to engage in more rigorous screening for obviously deceptive weight claims), available at <http://www.ftc.gov/speeches/muris/030211rightthing.htm>.
43. See, *e.g.*, discussion on International Cooperation, *infra*.
44. Comment of the Staff of the Federal Trade Commission to the FDA on First Amendment Issues (Sept. 13, 2002), available at <http://www.ftc.gov/os/2002/09/fdatextversion.pdf>.

45. See, e.g., Comment of the Staff of the Federal Trade Commission, *Remedying Undue Discrimination through Open Access Transmission Service and Standard Electricity Market Design: Wholesale Power Market Platform White Paper*, FERC Dkt. No RM01-12-000 (June 27, 2003), available at <<http://www.ftc.gov/os/2003/07/030627ferc.htm>>.

46. See, e.g., Letter from Staff of the Federal Trade Commission to the Louisiana Attorney General (Apr. 1, 2003), available at <<http://www.ftc.gov/be/v030008.htm>>; Letter from Staff of the Federal Trade Commission to the Ohio House of Representative House Bill 325: Physician Collective Bargaining (Oct. 16, 2002), available at <<http://www.ftc.gov/os/2002/10/ohb325.htm>>; Letter from Staff of the Federal Trade Commission to the Alaska House of Representatives on Senate Bill 37: Physician Antitrust Im (Jan. 18, 2002), available at <<http://www.ftc.gov/be/v020003.htm>>.

47. See, e.g., Letter from the FTC and the Department of Justice, Comments on the American Bar Association's Proposed Model Definition of the Practice of Law (Dec. 20, 2002), available at <<http://www.ftc.gov/opa/2002/12/lettertoaba.htm>>.

48. The FTC staff frequently assists the Department of Justice and local United States Attorneys' offices in criminal prosecution. Commission staff attorneys have been cross-designated as Special Assistant United States Attorneys, pursuant to 28 U.S.C. 543, to assist several contempt prosecutions as well as other criminal investigations and prosecutions. In addition, the Commission often provides significant investigative assistance. See Report to the Commission On Project Scofflaw's First Five Years from Bureau of Consumer Protection (Jan. 2002), available at <<http://www.ftc.gov/os/2002/01/projectscofflawreport.pdf>>; Comment of the Staff of the FTC to the United States Sentencing Commission on Emergency Amendments to Sentencing Guidelines, Policy Statements and Commentary Implementing the Sarbanes-Oxley Act of 2002 (Dec. 2002), available at <<http://www.ftc.gov/opa/2002/12/sarganesoxley.htm>> .

49. For a detailed contemporaneous critique, see Timothy J. Muris, *Rules Without Reason: The Case of the FTC*, AEI J. on Gov't & Soc'y Reg. 20-26 (Sept./Oct. 1982).

50. See FTC Staff Report on Television Advertising to Children (Feb. 1978); Notice of Proposed Rulemaking on Television Advertising to Children, 43 Fed. Reg. 17,967 (1978). A possible ban was one of three alternative remedies the staff recommended the Commission consider. The other two were a ban limited to advertising of sugared food products thought to pose the most dental health risks and requirements that ads for sugared food products be balanced by nutritional or health disclosures funded by the industry. At the same time, Chairman Pertschuk opined that the Commission could use unfairness, *inter alia*, to regulate the employment of illegal aliens and to punish tax cheats and polluters. Michael Pertschuk, Chairman, FTC, Remarks before the Meeting of the Section on Antitrust and Economic Regulation of the Association of American Law Schools, Atlanta, Ga. (Dec. 1977).

51. *The FTC as National Nanny*, Wash. Post, Mar. 1, 1978, at A22.

52. See Letter from the FTC to Hon. Wendell Ford and Hon. John Danforth, Committee on Commerce, Science and Transportation, United States Senate, Commission Statement of Policy on the Scope of Consumer Unfairness Jurisdiction (Dec. 17, 1980), *reprinted in International Harvester Co.*, 104 F.T.C. 949, 1070, 1073 (1984) ("Unfairness Policy Statement"); Letter from the FTC to Hon. Packwood and Hon. Bob Kasten, Committee on Commerce, Science and Transportation, United States Senate, *reprinted in F.T.C. Antitrust & Trade Reg. Rep. (BNA) 1055*, at 568-570 ("Packwood-Kasten letter"); and 15 U.S.C. § 45(n), which codified the FTC's modern approach.

53. Under the "second proviso" of the new § 13(b), "in proper cases the Commission may seek, and after proper proof, the court to issue, a permanent injunction." Trans-Alaska Pipeline Authorization Act, Pub. L. No. 93-153, § 408(f), 87 Stat. 576 (1973) (codified as amended at 15 U.S.C. § 53(b) (1997)). The statute provides that this authority may be used "whenever the Commission has reason to believe that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the FTC."

54. Nevertheless, from the beginning of the § 13(b) program, the Commission has used this tool against a wide variety of schemes including real estate equity schemes, *FTC v. Rita A. Walker & Assoc.*, No. 83-2462 (D.D.C. filed Oct. 5, 1983); business opportunity scams, *FTC v. H. N. Singer Inc.*, 668 F.2d 1108 (9th Cir. 1982), *FTC v. Kitco, Inc.*, No. 83-467 (D. Minn. filed Apr. 9, 1983); and travel scams, *FTC v. Paradise Palms Vacation Club*, No. 81-116 (W.D. Wash. filed Sept. 25, 1981).

55. *FTC v. International Diamond Corp.*, 1983-2 Trade Cas. (CCH) ¶ 65,725 (N.D. Cal. 1983). The Commission previously has pursued administrative cases against unconventional investments. *American Diamond Corp.*, 100 F.T.C. 461 (Sept. 28, 1982) (complaint and consent order).

56. In these initial consumer protection § 13(b) cases, Commission staff began the practice, still followed today, of working closely with other government agencies, such as the Department of the Interior's Bureau of Land Management, and federal criminal enforcement authorities such as the United States Postal Inspection Service and the Secret Service in developing and litigating cases. Parallel investigation and prosecution by both the FTC and criminal authorities have remained an important aspect

the Commission's § 13(b) program.

57. Prior to the amendment that created § 13(b), the Commission occasionally used the pre-existing § 13(a) authority, 15 U.S.C. § 1453(a), to seek and the district courts to issue injunctions to stop the dissemination of false advertising pending the issuance of an administrative complaint. See *FTC v. Thomsen-King & Co.*, 109 F.2d 516 (7th Cir. 1940).

58. *FTC v. H.N. Singer, Inc.* 668 F.2d 1108 (9th Cir. 1982) is a seminal case establishing the Commission's authority to seek, and the district courts' power to grant, all the traditional equitable remedies inherent in the authority granted by § 13(b) to obtain permanent injunctions. *Singer* was the first § 13(b) case to attack a franchise or business opportunity scam.

59. For example, the Commission works closely with the Department of Justice, and directly with United States Attorneys, to bring criminal cases against fraudulent telemarketers after we obtain preliminary relief, including access to the premises and assets. See, e.g., *FTC v. First Credit Alliance*, Civ. Dkt. No. 3:00CV1049 (D.Conn. Dec. 5, 2001) (final settlement) (principal indicted by the Connecticut U.S. Attorney's office); *FTC v. North American Charitable Services*, Civ. Dkt. No. SACV 98-968-DOC (C.D.Calif. 1/11/2003) (final settlement) (principals Mitch Gold and J.P. Cohen were prosecuted by the U.S. Attorney's office for the Central District of California, plead guilty, and were sentenced to eight and three years, respectively).

60. For example, our Internet training program has helped create relationships with local, state, and federal prosecutors around the country, and has led directly to criminal prosecution of Internet fraud. In April, our joint crackdown on Internet auction fraud with the National Association of Attorneys General included fifteen criminal actions. See <<http://www.ftc.gov/opa/2003/04/bidderbeware>>

61. The previous section discussed FTC enforcement actions against sellers engaged in fraud. In contrast, this section discusses the Commission's enforcement actions against sellers who normally do not make deceptive claims and whose products normally are reputable. For short hand, the FTC refers to its law enforcement activities related to such sellers as its "national advertising program."

62. See, e.g., *Kent & Spiegel Direct, Inc.*, 124 F.T.C. 300 (1997) (informercial); *FTC v. Lane-Labs-USA, Inc.*, No. 00 Civ. 3174 (S.D.N.Y. June 28, 2000) (stipulated final order) (Internet); Telemarketing and Consumer Fraud and Abuse Prevention Act of 1994, 15 U.S.C. § 6101 *et seq.*

63. FTC Policy Statement in Regard to Comparative Advertising, 16 C.F.R. § 14.15(b) (2003); see also R. Pitofsky, *Beyond National Consumer Protection and the Regulation of Advertising*, 90 Harv. L. Rev. 661, 671 (1977) (discussing the advantages to consumers and competition that flow from comparative advertising).

64. FTC Policy Statement in Regard to Comparative Advertising, 16 C.F.R. § 14.15(b) (2003)

65. *The Kroger Co.*, 98 F.T.C. 639 (1981), *order modified*, 100 F.T.C. 573 (1982).

66. Some courts likewise were wary of blessing overly broad deception principles in Commission cases. For example, in *Stan Oil Co. v. FTC*, the Commission had concluded that consumers took away from an ad depicting clear automobile exhaust in a claim that the gasoline used had removed "all harmful emissions from automobile exhaust." 577 F. 2d 653, 657 (9th Cir. 1978). On appeal, the Ninth Circuit, in an opinion by Judge, now-Justice, Kennedy, rejected the FTC's claim interpretation, explaining "neither the courts nor the Commission should freely speculate that the viewing public will place a patently absurd interpretation on an advertisement. . . . We do not think that any television viewer would have a level of credulity so primitive that he could expect to breathe fresh air if he stuck his head into a bag inflated by exhaust, no matter how clean it looked." *Id.* at 657.

67. *American Medical Association*, 94 F.T.C. 701, 993-96 (1979), *enforced as modified*, 638 F. 2d 443 (2d Cir. 1980), *aff'd per curiam by an equally divided court*, 455 U.S. 676 (1982).

68. See, e.g., Letter from Staff of the Federal Trade Commission to the Clerk of the Alabama Supreme Court (Sept. 30, 2002) available at <<http://www.ftc.gov/be/v020023.pdf>>; Submission of the Staff of the Federal Trade Commission to the American Medical Association Commission on Attorney Advertising, Wash., D.C. (June 24, 1994).

69. *Thompson Medical Co.*, 104 F.T.C. 648, 813 n. 37 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 108 (1987).

70. See, e.g., *Novartis Corp. v. FTC*, 223 F.3d 783 (D.C. Cir. 2000) (unsubstantiated claims for over-the-counter-drug), *Unithel*, Civ. Dkt. No. C-4089 (July 29, 2003) (unsubstantiated claims for dietary supplement) (consent order); *Interstate Bakeries Corp.*, Dkt. No. C-4043 (Apr. 19, 2002) (unsubstantiated claims for food) (consent order).

71. FTC Policy Statement Regarding Advertising Substantiation, 49 Fed. Reg. 31000, 31000 (Aug. 2, 1984) ("The Commission determination of what constitutes a reasonable basis depends, as it does in an unfairness analysis, on a number of factors related to the benefits and costs of substantiating a particular claim."); see *Pfizer*, 81 F.T.C. 23, 64 (1972).

72. FTC Policy Statement Regarding Advertising Substantiation, 49 Fed. Reg. at 31000; see also John E. Calfee & Janis K. Pappalardo, FTC Bureau of Economics, How Should Health Claims for Foods Be Regulated? An Economic Perspective, *Econ Issues Paper* 35 (1989).

73. In 1974, the Commission commenced an industry-wide rulemaking that would have banned all diet-disease claims as inherently deceptive. The Presiding Officer in 1978 recommended that the agency at least allow a fatty acid and heart disease claim. In 1979, the FTC voted to terminate most of this rulemaking to focus on case-by-case law enforcement, except that it decided to continue part of its rulemaking concerning the fatty acid and heart disease claim. In 1982, the Commission discontinued its rulemaking in favor of a case-by-case approach to health claims.

74. Pauline M. Ippolito & Alan D. Mathios, FTC Staff Report, Health Claims in Advertising and Labeling: A Study of the Cereal Market (1989); see also *Information, Advertising and Health Choices: A Study of the Cereal Market*, 21 *Rand J. of Econ.* 459-80 (Autumn 1990).

75. Pauline M. Ippolito & Janis K. Pappalardo, FTC Bureau of Economics Staff Report, Advertising Nutrition & Health, Evidence on Food Advertising 1977-1997 (Sept. 2002).

76. See Announcement of FDA Task Force Report on Consumer Health Information Initiative (July 10, 2003), available at <http://www.ftc.gov/os/2003/07/diethealthstmnt.html>.

77. In its 1998 Report, *Privacy Online: A Report to Congress*, the FTC summarized widely-accepted principles regarding the collection, use, and dissemination of personal information, known as Fair Information Practices (FIPs): (1) **notice**: data collectors must disclose their information practices before collecting personal information from consumers; (2) **choice**: consumers must be given options about how personal information collected from them may be used for purposes beyond those for which the information was provided; (3) **access**: consumers should be able to view and contest the accuracy and completeness of data collected about them; and (4) **security**: data collectors must take reasonable steps to assure that information collected from consumers is accurate and secure from unauthorized use. The report also identified **enforcement** - the use of a reliable mechanism to impose sanctions for noncompliance with these fair information practices - as a critical ingredient in any governmental or self-regulatory program to protect privacy online. See *Privacy Online: A Report to Congress* (June 1998), available at <http://www.ftc.gov/reports/privacy3/privacy3.htm>.

78. Peggy Lee, *Is That All There Is?* (Capital Records 1969).

79. Implementing Fair Information Practices can itself require difficult distinctions. In our recent Info Flows workshop, discussed fully in Section IV below, a Senior Vice President of an international hotel company stated that a caller in Germany who wishes to make a reservation for a hotel in Washington, D.C., would probably call a reservation center in Amsterdam, which would use a computer data center in Georgia to make the reservation. The company might be pulling data from other countries as well. He stated that under the European opt-in privacy model, his company must go to great lengths to disclose to consumers that their reservation information will be transferred overseas to be processed by a computer in Atlanta. He stated that this is very costly in the aggregate even if it only adds 5 to 10 seconds to each call and that consumers do not find this information helpful and may even find it confusing or annoying. Of course, a sensitive application of FIPs leads to the conclusion that notice and choice are unnecessary in this context. But if we make an exception here, why not elsewhere? This example, and many others like it, illustrate the difficulty of making reasonable distinctions when applying FIPs in practice.

80. That concern has been expressed in many public opinion polls. See e.g., Alan F. Westin/Harris Interactive, *Privacy On the Internet: What Consumers Want* (Nov. 2001); IBM/Harris Interactive, *Multi-National Consumer Privacy Survey* (Oct. 1999); Faith Cranor et al., *Beyond Concern: Understanding Net Users' Attitudes About Online Privacy*, AT&T Labs-Research Technical Report TR 99.4.1 (Mar. 1999).

81. According to the March 2003 Westin/Harris Interactive poll, 64% of adults polled are "privacy pragmatists" who are often willing to permit the use of their personal information if they are given a rationale and tangible benefits for such use and if they sense that safeguards are in place to prevent the misuse of their information. See http://www.harrisinteractive.com/harris_poll/index.asp?PID=365. In a notice and choice system, however, most of these consumers are unlikely to take the time and effort in individual transactions to understand the benefits and costs of a specific sharing of information.

82. 15 U.S.C. § 1681 *et seq.* The FCRA privacy protections are discussed in Section 3.e., *infra*.

83. This approach also reduces the transaction costs for consumers by making it easier to express their preferences about re telemarketing calls. See R.H. Coase, *The Problem of Social Cost*, 3 J. L. & Econ. at 15-16.
84. One example of the exception's benefits is for consumers who subscribe to a magazine and also register for the National Call Registry. When the subscription is about to end, the telemarketer for the magazine can call the consumer and ask if she to renew without violating the Do Not Call provision of the Telemarketing Sales Rule. For consumers who desire to renew but mail requests, this phone call is beneficial.
85. See <<http://www.cei.org/gencon/004,01724.cfm>>. This article estimates that, on average, each of the 103 million U.S. households will receive 30 to 50 privacy notices, resulting in the generation of 3 to 5 billion notices annually. At a cost of 25 cents to prepare, print, and mail the notice as an insert with a customer statement, the annual price will range between \$750 million and \$1.25 billion. The article notes that these estimates do not include customer service and other administrative expenses - for example, the cost of adding paper inventory, rewriting software, printing, processing, postage and handling, adjusting operating machinery, and customer service.
86. Pub. L. No. 105-318, 112 Stat. 3007 (1998) (codified at 18 U.S.C. § 1028).
87. *Eli Lilly & Co.*, Dkt. No. C-4047 (May 10, 2002).
88. *Microsoft Corp.*, Dkt. No. C-4069 (Dec. 24, 2002).
89. *Guess? Inc. and Guess.com., Inc.*, File No. 022 3260 (June 18, 2003).
90. *Educational Research Center of America, Inc.*, Dkt. No. C- 4079 (May 6, 2003); *The National Research Center for College University Admissions*, Dkt. Nos. C-4071 & C-4072 (Jan. 28, 2003).
91. Adam Clymer, *Officials Say Troops Risk Identity Theft After Burglary*, N.Y. Times, Jan. 12, 2003, § 1 (Late Edition), at 12.
92. Kathy M. Kristof & John J. Goldman, *3 Charged in Identity Theft Case*, LA Times, Nov. 6, 2002, Main News, Part 1 (Home Edition), at 1.
93. See <<http://www.ftc.gov/infosecurity>>. On September 26, 2002, FTC Commissioner Orson Swindle announced a multifaceted consumer education effort to increase public awareness of the importance of good information security practices. FTC's information security home page has registered more than 200,000 accesses. In addition, the Commission produced a video news release, which was seen on local news stations by an estimated 1.5 million consumers and distributed 160,000 postcards featuring Dewie the Turtle, the campaign mascot, and his information security message to about 400 college campuses nationwide.
94. See <<http://www.ftc.gov/opa/2002/08/ocdsecurity.htm>>.
95. See Commission Testimony before the Committee on Banking, Housing, and Urban Affairs, United States Senate (July 10, 2003), available at <<http://www.ftc.gov/os/2003/07/fcrasenatestest.htm>>.
96. *United States v. Equifax Credit Info. Serv.*, Civil No. 1:00-CV-0087-MHS (N.D. Ga. Jan. 13, 2000) (joint motion for modification of consent decree stipulating to payment of \$250,000 in disgorgement by defendant). See <<http://www.ftc.gov/opa/2003/07/equifax.htm>>.
97. These estimates cover everything from the cost of anti-spam technology, such as filters, to the cost of lost worker productivity. See Saul Hansell, *Totaling Up the Bill for Spam*, N.Y. Times, July 28, 2003, § C, col. 2 (Late Edition):
- Ferris Research, says the cost is \$10 billion in the United States this year. The Radicati Group estimates the worldwide cost at \$20.5 billion. Another firm, Nucleus Research, shoots higher. By its reckoning, the economic cost is \$874 a year for every office worker with an e-mail account, which multiplied by 100 million such workers amounts to about \$87 billion for the United States.
98. The Commission convened a three-day forum to discuss the problems posed by spam from April 30 to May 2, 2003. The panelists included representatives of ISPs, marketers, law enforcement, legislators, technologists, and bulk emailers.
99. See Prepared Statement of the Federal Trade Commission on Unsolicited Commercial Email before the Committee on Commerce, Science, and Transportation, United States Senate (May 21, 2003) (presented by Commissioner Mozelle Thompson).

Commissioner Orson Swindle), available at <<http://www.ftc.gov/os/2003/os/spamtestimony.pdf>>.

100. Because an open relay is an email server configured to accept and transfer email on behalf of any user anywhere, including unrelated third parties, spammers can route their email through servers of other organizations, disguising the origin of the email. An open proxy is a mis-configured proxy server through which an unauthorized user can connect to the Internet. Spammers use proxies to send spam from the computer network's ISP or to find an open relay. See FTC Facts for Business, *Open Relays - Closing the Door on Spam* (May 2003), available at <<http://www.ftc.gov/bcp/online/pubs/buspubs/openrelay.htm>>.

101. In February, 2002, we announced the FTC's first systematic crackdown on deceptive spam. Since then we have tackled on three fronts: law enforcement, education, and research. To date, we have announced 55 enforcement actions targeting deceptive spam, and the staff continues to investigate and prepare new cases. Among other unfair or deceptive practices, we have challenged

- false subject line information;
- false "remove me" representations;
- false representations that a service could stop spam from other sources;
- false claims that buying a spamming business opportunity could make you rich; and
- "spoofing" - forging the "from" line in an email to make it appear that the email

was sent from an innocent third-party.

102. FTC Staff Report, False Claims in Spam (Apr. 2003), available at <<http://www.ftc.gov/reports/spam/030429spamreport.pdf>>.

103. The sample came from three sources. First, we took 450 emails from our "Spam Refrigerator" - a database of unsolicited commercial email forwarded by consumers to uce@ftc.gov; second, we took 450 emails from our "Harvest" database - collect email accounts that we set up to accept email, but from which no emails were ever sent; finally, we reviewed 100 unsolicited commercial emails forwarded by FTC staff.

104. The remaining spam messages were not necessarily truthful, but they did not contain any obvious indicia of falsity.

105. We say "possibly" because we have not analyzed this subsample in detail to screen for truthfulness.

106. Our statistical analysis provides 95% confidence that less than 3% of the email in our database of over 11 million emails sent by or on behalf of Fortune 500 companies, and less than 5% was sent by or on behalf of Fortune 1000 companies.

107. We have dozens of open investigations, many with criminal authorities. Recently, we announced a case developed in conjunction with the FBI and the Department of Justice's Computer Crimes and Intellectual Property Section that addressed a practice called "phishing" or "brand spoofing," whereby spammers trick consumers into giving sensitive financial information by spoofing the brands of companies with whom they have existing accounts. See <<http://www.ftc.gov/opa/2003/07/phishing.htm>>.

108. In April, 2002, the Commission announced the results of its Remove-Me surf. The FTC and ten law enforcement partners tested whether "remove me" or "unsubscribe" options in spam were honored. From email forwarded to the FTC's spam database, the agencies culled more than 200 emails that purported to allow recipients to remove their name from a spam list. The agencies used dummy email accounts to test the pledges, but discovered that the vast majority of addresses to which they sent the requests were invalid. Most of the "remove me" requests did not get through. Based on information we gathered, the FTC has sent more than 100 letters warning spammers that deceptive "removal" claims in unsolicited email are illegal. See <<http://www.ftc.gov/bcp/online/edcams/spam/pubs/removeme.pdf>>. Since then, the Commission has brought two cases alleging that the defendants failed to honor their removal representations. See *FTC v. GM Funding*, Civ. Action No. SACV 02-1026 DC (C.D. Cal. filed Nov. 6, 2002); *FTC v. Brian Westby*, Civ. Action No. 032-3030 (N.D. Ill. filed Apr. 15, 2003).

109. Ten agencies participated in the FTC's *Spam Harvest*, an initiative designed to test which actions consumers take online that put them most at risk for receiving spam. According to the investigators, spammers typically use computer programs that search for vulnerable areas on the Internet to compile, capture, or otherwise "harvest" lists of email addresses from web pages, newsgroups, chat rooms, and other online destinations. See <<http://www.ftc.gov/bcp/online/pubs/alerts/spamalert.htm>>.

110. FTC Marketing Practices Report, False Claims in Spam (Apr. 30, 2003), available at <<http://www.ftc.gov/reports/spam/030429spamreport.pdf>>.

111. Information on the spam forum is available at <<http://www.ftc.gov/bcp/workshops/spam/index.html>>.

112. FTC's tips for consumers to avoid unwanted spam include: (1) try not to display your email address in public; (2) check the privacy policy before you give a website your email address; (3) use a unique email address, containing both letters and numbers; (4) read the entire form before transmitting your personal information through a website; (5) consider using two email addresses: one for personal use and one for newsgroups and chat rooms. See <<http://www.ftc.gov/bcp/online/pubs/online/inbox>>.

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

114. Our proposals seek the following legislative enhancements or clarifications:

(1) authority 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; (2) 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; (3) that the ECPA be clarified to allow the FTC to obtain complaints received by an ISP regarding a subscriber;

(4) 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; and (5) that the ECPA be amended to include the term "discovery subpoena" in the language of 18 U.S.C. § 2703, a particularly important change 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 our ability to investigate spammers. See *FTC v. Netscape Comm. Corp.*, 196 F.R.D. 559 (N.D. Cal. 2000). For a fuller discussion of these legislative proposals, see FTC Reauthorization Testimony before the Subcommittee on Commerce, Trade, and Consumer Protection of the Committee on Energy and Commerce, U.S. House of Representatives (June 11, 2003), available at <<http://www.ftc.gov/os/2003/06/030611reauthr.htm>>.

115. On June 19, 2003, the U.S. Senate Commerce Committee reported out S. 1234, the FTC Reauthorization Act of 2003, which includes all of the Commission's legislative recommendations addressing cross-border fraud. The first three spam legislative recommendations set forth in note 114, *supra*, correspond substantially with several of the cross-border fraud legislative recommendations adopted in S. 1234. Indeed, our legislative recommendations to fight spam are also designed to strengthen international enforcement capabilities given that the path from a fraudulent spammer to a consumer's inbox frequently crosses at least one international border and often several. Thus, fraudulent spam exemplifies the growing problem of cross-border fraud and our overlapping proposals would be particularly helpful to investigate deceptive spammers more effectively and work better with international law enforcement partners. The relevant House committee has yet to act on these cross-border proposals.

116. Civil penalties could enhance our law enforcement efforts against spam because it is often difficult to determine who was responsible by any given spammer and by how much. Thus, seeking \$11,000 per violation in civil penalties could be an effective tool in these cases. Unfortunately, the knowledge requirements contained in various pending legislative proposals may make these ineffective tools against spam. The "knowledge" issue is discussed *infra*, at notes 117-119 and accompanying text.

117. These five levels are in the provisions of the bill that the FTC would be authorized to enforce. A lawyer seeking to enforce a provision seeking to comply with - the various provisions of this bill could be faced with determining how to prove or disprove that a party "knows" (or acted "knowingly") with respect to several issues. In other instances, the question is whether a party possesses "actual knowledge." In one provision this question is whether a party "knows, should have known, or consciously avoids knowing;" and in still others, whether the party only "knows or should have known."

118. Currently, the Commission can challenge a materially false or misleading commercial email message under Section 5 of the FTC Act, as it could any other deceptive representation. The applicable legal standard that must be met to demonstrate that a deceptive practice is that it is "likely to mislead consumers acting reasonably under the circumstances about a material fact." *Cliffdale Associates, Inc.*, 103 F.T.C. 110, 165, *appeal dismissed sub nom., Koven v. F.T.C.*, No. 84-5337 (11th Cir. 1984). Proof of knowledge is not required to obtain an injunction. We do have to prove that a defendant acted "with actual knowledge or knowledge fairly on the basis of objective circumstances that such act is unfair or deceptive and is prohibited" to obtain civil penalties, but this standard is less burdensome than some of the provisions currently under consideration. See 15 U.S.C. § 5(m)(1)(A).

One provision in the proposed Senate bill would allow the FTC to target businesses that know or should know that their products being promoted through email messages that contain false header information. Although we have brought cases targeting the practice of "spoofing" - the forging of "from" lines in email messages - under Section 5, this provision would expand our authority to circumstances where the only problem with the email was a deceptive header.

119. The Department of Justice's testimony is available at <<http://www.house.gov/judiciary/moschella070803.htm>>.

120. At the Spam Forum, panelists discussed many technical initiatives, including possible changes in the email protocol by the Internet Research Task Force's Anti-Spam Research Working Group. One proposed change is to insert identity, or authentication into the email system, such as requiring correct routing information, which would prevent spoofing. Other proposals are to create systems for charging senders for bulk email. Panelists at the forum noted that while such changes might be necessary to add spam, an effective protocol change will be difficult to achieve in the near future given the consensus-driven procedures of the Engineering Task Force (the group of technologists that devises Internet protocols) and the need for any protocol changes to "backward compatible," *i.e.*, to enable email to be transmitted using technologies that predate the change.

121. European Opinion Research Group EEIG and EOS Gallup Europe, *Public Opinion in Europe: Views on Business-to-Consumer Cross-Border Trade*, 57.2 Eurobarometer 52 (Nov. 14, 2002).

122. Proposal for a Directive of the European Parliament and of the Council Concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market, Extended Impact Assessment at ¶ 1.4, *available at* http://europa.eu.int/comm/consumers/cons_int/safe_shopping/fair_bus_pract/impact_assessment_en.pdf.

123. For complete statistics on the growth of cross-border fraud, see <http://www.consumer.gov/sentinel>.

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

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

126. *FTC v. Mountain View Systems, Ltd.*, Civ. Action No. 1:03-CV-00021-RMC (D.D.C. filed Jan. 7, 2003), *available at* <http://www.ftc.gov/opa/2003/02/fyi0314.htm>.

127. *FTC v. Dr. Clark Research Ass'n*, Civ. Action No. 1:03CV0054 (N.D. Ohio filed Jan. 8, 2003), *available at* <http://www.ftc.gov/opa/2003/01/drclark.htm>.

128. *FTC v. CSCT, Inc.*, Civ. Action No. 03 C 00880 (N.D. Ill. filed Feb. 6, 2003), *available at* <http://www.ftc.gov/opa/2003/02/csct.htm>.

129. *E.g.*, Radio Free Europe/Radio Liberty, Albania, *Pyramid Schemes Common Across Eastern Europe* (Jan. 16, 1997), *available at* <http://www.rferl.org/nca/features/1997/01/F.RU.970116172653.htm>. Chris Jarvis, *The Rise and Fall of Pyramid Schemes in Albania*, 47 I.M.F. Staff Papers No. 1 (2000), *available at* <http://www.imf.org/external/pubs/ft/staffp/2000/00-01/jarvis.htm>.

130. See, *e.g.*, Cross Border case list at <http://www.ftc.gov/opa/2002/06/crossbordercaselist.htm>.

131. 131OECD Guidelines for Protecting Consumers from Fraudulent and Deceptive Commercial Practices Across Borders, (2003)116 (June 2003), *available at* <http://www.oecd.org/sti/crossborderfraud>.

132. See S. 1234, 108th Cong. (2003). The bill also contains provisions that would (1) improve our ability to gather information from various sources, including the private sector, financial regulators, and foreign law enforcement agencies; (2) clarify our authority to take action in cross-border cases; (3) expand our ability to use foreign counsel to pursue assets offshore; (4) obtain authority to conduct staff exchanges; and (5) provide financial support for certain joint projects. See *also supra* note 115.

133. See Thomas B. Leary, Commissioner, FTC, *The Significance of Variety in Antitrust Analysis* (May 18, 2000) (essay based on speech delivered at the Steptoe & Johnson 2000 Antitrust Conference), *available at* <http://www.ftc.gov/speeches/leary/atjva>.

134. Comments of the Staff of the Federal Trade Commission, Intervenor, before the Connecticut Board of Examiners for Opticians (Mar. 27, 2002), *available at* <http://www.ftc.gov/be/v020007.htm>.

135. Memorandum of Law of *Amicus Curiae* Federal Trade Commission, *Powers v. Harris*, Case No. CIV-01-445-F (W.D. Okla. Sept. 5, 2002), *available at* <http://www.ftc.gov/os/2002/09/okamicus.pdf>.

136. Letter from Charles A. James and Timothy J. Muris to the Ethics Committee of the North Carolina Bar Re: North Carolina Bar Opinions Restricting Involvement of Non-Attorneys in Real Estate Closings and Refinancing Transactions (Dec. 14, 2001) *available at* <http://www.ftc.gov/be/VO20006.htm>.

137. See Federal Trade Commission and Department of Justice Comments to the State Bar of Georgia on Potential Unlicensed Practice of Law Opinion Regarding Real Estate Closing Activity (Mar. 20, 2003), *available at* <http://www.ftc.gov/be/v030007.l> Federal Trade Commission and Department of Justice Comments to the Rhode Island House of Representatives on Proposed H. 5936 and H. 5639: Proposed Restrictions on Competition From Non-Attorneys (Mar. 28, 2003), *available at* <http://www.ftc.gov/be/v020013.htm>.

138. Letter from the FTC and the Department of Justice, Comments on the American Bar Association's Proposed Model Define the Practice of Law (Dec. 20, 2002), *available at* <http://www.ftc.gov/opa/2002/12/lettertoaba.htm>.

139. American Bar Association, Task Force on the Model Definition of the Practice of Law, *Report to the House of Delegates* (2002), *available at* http://www.abanet.org/cpr/model-def/taskforce_rpt_429.pdf.

140. See Timothy J. Muris, Chairman, FTC, *Looking Forward: The Federal Trade Commission and the Future Development of Competition Policy*, Milton Handler Annual Antitrust Review (Dec. 10, 2002), *available at* <http://www.ftc.gov/speeches/muris/handler.htm>.

141. For a recent definitive treatment of the FTC's establishment, see Marc Winerman, *The Origins of the FTC: Concentration Cooperation, Control, and Competition*, 71 Antitrust L.J. (2003) (forthcoming).

142. Notice of Public Workshop and Opportunity to Comment, 67 Fed. Reg. 48,472 (Jul. 24, 2002). The workshop agenda, the participants' written statements, and public submissions are available at <http://www.ftc.gov/opp/e-commerce/anticompetitive/index.htm>.

143. Alan E. Wiseman & Jerry Ellig, *How Many Bottles Make a Case Against Prohibition? Online Wine and Virginia's Direct Sales Ban* (Mar. 2003), *available at* <http://www.ftc.gov/be/workpapers/wp258.pdf>.

144. FTC Staff Report, Possible Anticompetitive Barriers to E-Commerce: Wine (July 2003), *available at* <http://www.ftc.gov/os/2003/07/winereport2.pdf>.

145. See, e.g., Information Policy Institute, *The Fair Credit Reporting Act: Access, Efficiency & Opportunity - The Economic Importance of Fair Credit Reauthorization* (June 2003) [hereinafter *IPI Report*] which was submitted to the workshop and discussed by the workshop participants. See also Fred H. Cate, Robert E. Litan, Michael Staten, Peter Wallison, *Financial Privacy, Consumer Prosperity, and the Public Good: Maintaining the Balance* (2003) (workshop submission), *available at* <http://www.ftc.gov/bcp/workshops/inflows/statements/cate01.pdf>.

146. *IPI Report* at 9.

147. Prepared Statement of the Federal Trade Commission on The Fair Credit Reporting Act before the Senate Committee on Banking, Housing, and Urban Affairs (July 10, 2003), *available at* <http://www.ftc.gov/os/2003/07/fcrasenate.htm>.