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Looking Forward: Merger and Other Policy Initiatives at the FTC[2]

I. INTRODUCTION

Thank you, Jan and Rich, and good morning. It is a pleasure to return to the Fall Forum, this time in a new role. Prior to the November 2 election, several folks wrote about what changes in antitrust enforcement and policy we might have expected had President Bush been defeated. In no piece that I read were major changes predicted, regardless of the election's outcome. That is because, as Jan McDavid said in her essay in the GLOBAL COMPETITION REVIEW, today's antitrust policy "was built on a broad consensus from prior Republican and Democratic administrations that has bipartisan support, shared to a large degree by both academics and the business community, which recognize the importance of well-grounded

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[1] The views expressed in this speech are my own. They do not necessarily represent the views of the Federal Trade Commission or any other individual Commissioner.

[2] I am grateful to Alden F. Abbott, Elizabeth J. Callison, Theodore A. Gebhard, and Sara Y. Razi for their contributions to this speech.

antitrust enforcement in keeping markets open, and see antitrust as an alternative to regulation."[3] That is not to say that all is perfect in the world of antitrust, and that we should sit back and turn on cruise control. Rather, given the broad consensus on the basics of antitrust enforcement, shifts in enforcement priorities generally should reflect shifts in consumer needs and market trends.

I arrived at the FTC during an interesting time of self-assessment, as we celebrated the agency's 90th anniversary by exploring its history, its successes, and its failures. At the same time, the Antitrust Modernization Commission is focusing all who work in antitrust on changes that could or should be made to improve enforcement. It is healthy to learn from the past and look toward the long-term future, but for now, I have been working to identify where the FTC's services currently are most needed. This morning, I will identify for you a few initiatives that the FTC will undertake in the coming months.

The downturn in merger activity since 2000 permitted the FTC, under the able leadership of my predecessor, Timothy Muris, to focus more resources in other important areas such as nonmerger investigations, advocacy, and policy research and development. I intend to continue devoting resources to these important endeavors (although a resource challenge may arise when the inevitable next merger wave hits). This morning, I will devote significant time to discussing merger-related initiatives. But, you should not take that as a signal of any de-emphasis on nonmerger enforcement or any other endeavor. I only have 30 minutes!

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[3] Janet McDavid, *What a Kerry Victory Means for Antitrust Law*, GLOBAL COMPETITION REV. (Oct. 30, 2004), *available at* http://www.globalcompetitionreview.com/news/news_item.cfm?item_id=2007.

II. MERGERS

Even in the absence of a merger wave, reviewing mergers remains a core function, as statutory obligations require. It should come as no surprise, then, that all aspects of merger review – that is, the substantive analysis, the review process itself, and the coordination with states and foreign authorities – will be high on the Commission's agenda under my leadership.

Merger activity does appear to be on the rise once again. The number of Hart-Scott-Rodino ("HSR") filings in fiscal year 2004 increased 42% from the prior year, going from 968 to 1377. Also, commentary in the business press suggests that, because many companies today are finding themselves particularly "cash-rich, " merger and acquisition activity can be expected to rise.[4] Indeed, several high-profile mergers recently were announced.

A. THE HORIZONTAL MERGER GUIDELINES COMMENTARY

As many of you know, last February the FTC and the DOJ jointly sponsored a three-day Merger Enforcement Workshop. The principal purpose of the workshop was to assess the practical efficacy of the 1992 Guidelines in light of twelve years of experience. Although relatively minor adjustments were made in 1997, no major changes to the analytical framework have been made since adoption of the 1992 Guidelines. The workshop provided an opportunity for agency officials to hear from leading antitrust practitioners and economists who have written and thought carefully about merger policy and the Guidelines' analytical framework. All sections of the Guidelines were discussed and critiqued with a focus on whether the analytical

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[4] *See, e.g., To the Victor the Problems*, FIN. TIMES BUS. LIMITED INVESTMENT ADVISOR, Oct. 11, 2004; Bill Deener, *With Firms Holding More Cash and Feeling the Need to Grow, Acquisitions Are On the Rise*, THE DALLAS MORNING NEWS, Oct. 14, 2004, at 1D.

framework of the Guidelines adequately serves the dual purposes of (1) leading the agencies to the right enforcement decisions when evaluating proposed mergers, and (2) providing the antitrust bar and the business community with reasonably clear guidance from which to assess the antitrust risks of proposed mergers and acquisitions.[5]

What was the principal take-away from the workshop? Without question, the Guidelines framework is now deeply embedded in mainstream thinking about what essential factors must be considered in sound merger analysis and how those factors should be considered. Indeed, the workshop revealed an overwhelming consensus on the part of the participants that the analytical framework set out in the Guidelines, on the whole, does a good job in yielding the right policy results in individual cases, and that no major revamping of the Guidelines is needed or desired. This assessment is a strong endorsement of the current thrust of enforcement policy under the Guidelines.

What the workshop also revealed, however, was that further explication of how the Guidelines are applied in practice would be useful. The FTC has taken some steps toward greater transparency through its release of merger data, most recently on August 31. In the months since the workshop, the FTC's attorneys and economists have reviewed the workshop transcript and the submitted papers, and we are continuing to absorb the constructive comments. I am pleased to tell you today that, from this effort, the FTC, together with the Antitrust Division, intends to produce a Commentary on the Guidelines – a kind of guide to the

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[5] More information about the workshop, including the transcript of the proceedings and the papers submitted by the participants and others, can be found at http://www.ftc.gov/bc/mergerenforce/index.html.

Guidelines.

A Commentary on the Guidelines, informed by the experience of the last twelve years, should bring greater transparency to the agencies' merger analysis and greater certainty to businesses and merger practitioners. We expect the Commentary to cover each major area of the Guidelines and to explain more fully how the Guidelines are applied in practice. We expect the Commentary will seek to clarify how the agencies apply individual provisions of the Guidelines in an integrated manner to answer the key question before us: Is the merger under review likely substantially to lessen competition?

Through "integrated analysis," questions of market definition, concentration, anticompetitive effects, entry, efficiencies, and other Guidelines' factors are not analyzed in a vacuum, or in a piece-meal fashion. Instead, each of these variables is considered in the context of the others. Instead of approaching the Guidelines' analysis simply as a linear step-by step progression through each issue, both the agencies and the private bar, when counseling businesses, must conceptualize those sections as making up an integrated whole. For example, rightly understood, efficiencies and entry analysis are integral parts of the competitive effects analysis. In this regard, it is somewhat inaccurate to think of an "efficiency defense," for example. That suggests that efficiencies are a defense against otherwise adverse competitive effects. Instead, within an integrated analysis, efficiencies should be properly considered as one of the determinants of competitive effects. Using our Commentary to explicate this integrated approach to merger analysis will, I hope, enhance the quality of communications between the government and merging parties during the merger review process.

We are, of course, just at the beginning stages of preparing the Commentary, and thus, the particulars of the final product are still to be determined. Undoubtedly, some of you will ask me why we do not just revise the Horizontal Merger Guidelines. We see a broad consensus that the Guidelines are sound not only in their overall analytical framework, but also in their practical usefulness to the private bar and business community and in their facility to guide the agencies to correct policy decisions. Significantly, courts look to the Guidelines framework in making merger decisions. Thus, the Commentary is not an effort to back away from the fundamental thrust of the Horizontal Merger Guidelines, but rather is an effort to explain how the Guidelines are applied in practice.

It is premature for me to announce a date when the Guidelines' Commentary will issue, as we are just beginning the task. As a broad target, however, my hope is that the Commentary will be published sometime during 2005. I hope and trust that our Guidelines' Commentary will substantially raise the quality of merger enforcement, as it improves the nature of merger case-specific communications between enforcers and the antitrust bar.

B. MERGER REMEDIES

The view persists that the two antitrust agencies approach the issue of merger remedies differently. Having now held senior positions at both the DOJ and FTC, however, I believe that most differences between the agencies are largely overblown and in the past, and that both agencies today strive for flexibility, above all, in crafting merger remedies in particular transactions.

Last month, the DOJ released its "Antitrust Division Guide to Merger Remedies," which

is intended to provide the business community, antitrust bar, and economists with an understanding of the Division's analytical framework for crafting and implementing relief in merger cases.[6] I commend Assistant Attorney General Hew Pate and his staff for enhancing the transparency of the Division's decision-making in merger remedies. I have asked FTC staff to review the DOJ's Guide carefully and to assess whether any of our practices or policies in fashioning relief in merger cases, in fact, differ significantly from those of the Division. We intend to explore more fully any identified differences. We also will take the opportunity to determine whether the FTC's publicly available merger remedy guidance[7] should be updated.

Two types of remedy provisions are often cited as illustrating the differences between the agencies: "crown jewel" provisions and "fix-it-first" offers. The DOJ's Guide states a willingness to accept fix-it-first offers from parties, but notes that crown jewel provisions are strongly disfavored. The FTC has no formal fix-it-first policy – preferring instead to have an order binding the parties – and the FTC is willing to consider crown jewels.[8]

In practice, though, I think that this supposed difference between the agencies is overblown. Very few of the Division's recent merger cases have been resolved by fix-it-first remedies, and very few of the FTC's recent merger cases have been resolved with crown jewels

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[6] *See* Antitrust Division Policy Guide to Merger Remedies (Oct. 2004), *available at* http://www.usdoj.gov/atr/public/guidelines/205108.htm.

[7] *See* Statement of the Federal Trade Commission's Bureau of Competition on Negotiating Merger Remedies, *available at* http://www.ftc.gov/bc/bestpractices/bestpractices030401.htm; Frequently Asked Questions About Merger Consent Order Provisions, *available at* http://www.ftc.gov/bc/mergerfaq.htm.

[8] *Id.*

provisions. Thus, when we look at what the FTC and the Division have done in recent merger cases – as opposed to some commentators' perceptions – I do not think that the facts support a conclusion that parties in remedy negotiations are, in any significant way, advantaged or disadvantaged, depending on the agency reviewing their proposed transaction.

What is most important is that remedies analysis in merger cases be as fact-driven as the overarching competitive analysis. Differences from case to case can most easily be understood by examining the underlying nature of the markets and industries involved. For example, on August 9, 2004, the FTC announced a consent agreement that would allow Cephalon Inc.'s $515 million acquisition of Cima Labs, Inc., provided that Cephalon would grant a license and transfer all of the technological know-how for the breakthrough cancer pain ("BTCP") drug Actiq to Barr Laboratories, Inc., a leading generic drug manufacturer.[9] In past cases, creation of a generic competitor would have been insufficient to solve the anticompetitive problems raised by a merger of two branded pharmaceutical competitors. In this case, however, the facts showed that an important anticompetitive effect of the merger would have been the defeat of generic competition. The Commission believed that the transfer required by the consent would significantly expedite the entry of a generic BTCP product, thereby providing consumers with a substantially lower-priced BTCP alternative and lowering the average price of BTCP medication.[10] Although one dissenting Commissioner and some former FTC staff thought this

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[9] *See* FTC Press Release, *With Conditions, FTC Allows Cephalon's Purchase of CIMA, Protecting Competition for Breakthrough Cancer Pain Drugs* (Aug. 9, 2004), *available at* http://www.ftc.gov/opa/2004/08/cimacephalon.htm.

[10] *See* Statement of the Federal Trade Commission, *Cephalon, Inc./Cima Labs Inc*., File No. 041-0025 (Aug. 9, 2004), *available at*

remedy was unwise and signaled a negative trend, I favor such efforts to fashion an appropriate remedy to the specific facts of the case at hand.

Both the FTC and the Division have had extensive experience with particular industries, such as oil and gas, petrochemicals, banking, pharmaceuticals, grocery retailing, trash hauling, and radio broadcasting, to name just a few. What "works" as a remedy in grocery retailing – full divestiture of all of one firm's assets within a metropolitan geographic market – may be unworkable in an industry such as petrochemicals, where the participants frequently operate joint ventures within the plants of other firms and rely extensively upon supply agreements, pipeline easements, and the like. Similarly, a divestiture in the pharmaceuticals industry will usually require the approval of the FDA, a process that will impose delay in ultimate achievement and will thus necessitate an interim supply agreement. A "clean" divestiture, therefore, may not be practical in such industries.

Because the FTC (and the Division) have such long-time experience in certain major industries, we have developed approaches to remedies that rely upon that experience and that recognize the particular structural differences that mergers in those industries present. These differences among industries may be the primary explanation for any variation in approach to remedy crafting, be it "fix-it-first," "up front buyer," the use of monitors, and the inclusion of crown jewel provisions. Such differences from industry to industry, rather than any fundamental difference in analytical approach to remedies, may best explain why it may appear that the FTC has had a "preference" for certain kinds of provisions as compared to the Division.

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http://www.ftc.gov/os/caselist/0410025/040809ftcstmt0410025.pdf.

Nevertheless, I do think that formalizing procedural consistency between the agencies is a worthwhile goal. We will, therefore, work closely with the Antitrust Division to see whether there is a need to bring our agencies into even greater conformity, and if so, how it can be done.

In addition to this collaboration with the DOJ, the FTC currently is considering a practice of informally reviewing all merger consent orders six to twelve months after they become effective to see how well they are working to restore competition. Such a practice will help us better understand what kinds of provisions are most and least effective and continually improve the process of fashioning merger remedies.

C. MERGER PROCESS REFORM

As many of you know, I have long pushed for improvements in merger review procedures, both as a government enforcer and private practitioner.[11] It should come as no surprise, then, that one of my priorities will be to lend renewed vigor to merger process reform.

In 2000, the agency announced a series of new procedures and initiatives to improve the handling of Second Requests issued by its Bureau of Competition during HSR premerger review.[12] In 2002, the Bureau held a series of public workshops around the country on possible improvements in the merger investigation process. In December 2003, the Bureau announced a

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[11] *See, e.g.*, Deborah Platt Majoras, *Antitrust Going Global in the 21st Century* (Oct. 17, 2002), *available at* http://www.usdoj.gov/atr/public/speeches/200418.htm; Deborah Platt Majoras, *Merger Enforcement at the Antitrust Division* (Sept. 27, 2002), *available at* http://www.usdoj.gov/atr/public/speeches/200285.htm; Joe Sims & Deborah P. Herman, *The Effect of Twenty Years of Hart-Scott-Rodino on Merger Practice: A Case Study in the Law of Unintended Consequences Applied to Antitrust Legislation*, 65 ANTITRUST L. J. 865 (1997).

[12] *See* FTC Press Release, *FTC Announces Changes to 'Second Request' Review During Premerger Review* (Apr. 5, 2000), *available at* http://www.ftc.gov/opa/2000/04/hsrinits.htm.

new set of Guidelines for Merger Investigations,[13] which incorporated the staff's learning from the workshops. The measures included a host of reforms – prompt release of investigational hearing transcripts to testifying witnesses, simplification of second request responses, more information about the standards used in evaluating second request compliance, and easier submission of electronic materials. Although these measures undoubtedly helped to streamline the merger review process and improve the efficiency and speed of FTC investigations, while reducing the burden on the parties, I am not yet satisfied.

As we learned in the Merger Enforcement Workshop, the Second Request process still needs work. If we are not sufficiently disciplined and rigorous in collecting and dissecting information during the merger review process, then we are not spending the taxpayer's dollar appropriately. Similarly, if firms are not appropriately cooperative and responsive during this process, then they are wasting the shareholder's dollar. Either way, consumers lose. We at the FTC will internally review the progress that has been made, determine what has and has not worked well, and outline specific measures for improvement.

Four projects already are underway. First, we are continuing to work internally and with the Antitrust Division to determine the most effective methods for identifying responsive materials stored in various types of electronic formats. Second, we are working to improve our ability to receive and review electronic productions. Third, we are working on a model letter that would modify the standard Second Request instructions to permit, and provide

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[13] Statement of the Federal Trade Commission's Bureau of Competition on Guidelines for Merger Investigations, *available at* http://www.ftc.gov/os/2002/12/bcguidelines021211.htm.

specifications for, electronic production. Fourth, we are working to produce, and hope to release in the near future, an updated model Second Request, along with annotations that we hope will provide useful information to parties and practitioners. Other efforts likely will follow as we continue to review our current practices. As these and other projects proceed, I join Bureau management in encouraging staff to be flexible and to tailor Second Requests as closely as possible to the specific competitive concerns motivating the requests.

Anyone who has worked with me in the past few years knows that I am as tough on parties who choose the uncooperative road as I am on staff. I will work to improve the process, but it "takes two to tango." And if, for example, parties continue to move successfully to bar our discovery efforts in litigation on the ground that we "had our discovery" during the Second Request process, we will have no choice but to adapt accordingly. I welcome all thoughts as we work through this dilemma.

Finally, let me mention one last process-related reform. In 2003, the Bureau of Competition formed a trial litigation unit to enhance the Bureau's training and development of staff trial and litigation skills. I am committed to continuing to review and enhance the Commission's litigation capabilities and to focus on important issues, such as the proper use of customer testimony in our court cases, that have arisen in connection with a number of recent judicial decisions, including the Commission's preliminary injunction loss in the *Arch Coal* case, as well as the Division's loss in *Oracle*.

D. COOPERATION IN MERGER REVIEW

Of course, we enforce the antitrust laws together with an even larger web of enforcers,

here and around the world. Cooperating with foreign competition agencies and promoting convergence toward best practices, both on a bilateral and multilateral basis, will continue to be key components of the FTC's enforcement program under my leadership. In addition, with antitrust regimes continuing to spread around the globe, the FTC will continue to devote significant resources to assisting new agencies as they strive to formulate and implement sound competition policy. The focus on so-called international issues that has captured the attention of the business community and the bar for the past several years is no fad. For enforcers, dealing with competition issues on a global basis is an imperative. This should be regarded as good news for the private sector, which benefits from cooperation between U.S. and foreign competition authorities to promote sound antitrust policy and enforcement.

It is equally critical to the integrity of antitrust enforcement and, most importantly, to the public we serve, that we work cooperatively with the state attorneys general to ensure as often as possible that our enforcement efforts are complementary and not conflicting. To this end, the federal-state cooperation working group that NAAG convened in 2002 continues to confer monthly, sharing ideas and experiences related to our joint efforts, with the goal of learning from past investigations to enhance future cooperation. Significantly, our discussions on such issues as protecting the confidentiality of shared materials, facilitating electronic discovery, and more seamless negotiation of remedies have contributed to continued effective cooperation in merger and nonmerger matters alike.

III. POLICY R&D

The FTC will continue to complement its enforcement authority through the use of

hearings, workshops, research projects, reports, studies, advocacy filings, and amicus briefs. Because work on several upcoming policy-related initiatives is underway, I will briefly preview them for you.

A. WORKSHOPS

1. Patent Reform Workshops

Along with the National Academy of Sciences ("NAS") and the American Intellectual Property Law Association ("AIPLA"), the FTC will co-sponsor four town meetings on patent reform in 2005. Since the FTC issued its report on competition and patent law in October 2003, there have been three noteworthy developments relating to it.[14] First, the NAS issued a report advocating several patent reforms similar to those recommended by the FTC, as well as additional patent reforms.[15] Second, patent law organizations such as the AIPLA have issued reports reacting favorably to several of the FTC's proposed reforms.[16] And finally, Congressmen Boucher and Berman introduced a bill, H.R. 5299, that would implement versions of two of the proposed reforms – a new post-grant opposition system and certain limitations on liability for willful infringement – recommended by the FTC, NAS, and AIPLA.

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[14] FTC REPORT, TO PROMOTE INNOVATION: THE PROPER BALANCE OF COMPETITION AND PATENT LAW AND POLICIES (Oct. 2003), *available at* http://www.ftc.gov/os/2003/innovationrpt.pdf.

[15] NATIONAL RESEARCH COUNCIL, A PATENT SYSTEM FOR THE 21ST CENTURY, *available at* http://www.nap.edu/html/patentsystem/0309089107.pdf.

[16] *See, e.g.,* AIPLA, *AIPLA Response to the National Academies Report entitled "A Patent System for the 21st Century*" (Oct. 2003), *available at* http://www.aipla.org/Content/ContentGroups/Issues_and_Advocacy/Comments2/Patent_and_Trademark_Office/2004/NAS092304.pdf.

We believe it likely that Congress will discuss patent reform in the next session. To help lay the groundwork for this discussion, we have structured our patent reform workshops as town meetings. To encourage broad participation from businesses, independent inventors, patent practitioners, and others, we will hold the town meetings in three different locations – San Jose, Chicago, and Boston – in February and March, 2005. We will conclude with a program in Washington, D.C., in June. We will shortly announce details on the FTC's website, and registration for the town meetings will be available at the AIPLA website.

2. Peer-to-Peer ("P2P") File-Sharing Workshop

Continuing the Commission's efforts to assess the impact of new and significant technologies on consumers and businesses, the FTC will host a public workshop entitled "Peer-to-Peer File-Sharing Technology: Consumer Protection and Competition Issues."[17] The workshop, scheduled for December 15 and 16, 2004, will provide participants with an opportunity to learn how P2P file-sharing works and to discuss current and future applications of the technology. It will also address the risks to consumers related to file-sharing activities, as well as self-regulatory initiatives, technological efforts, and legislative proposals. Competition issues such as the models for distributing music and the impact of file-sharing on copyright holders will also be discussed.

[17] More information about the file-sharing workshop may be found at http://www.ftc.gov/bcp/workshops/filesharing/index.htm.

3. GAO Workshop

Last May, the GAO released a report that sought to analyze how eight petroleum industry mergers or joint ventures consummated during the mid- to late-1990s affected gasoline prices. The GAO reported that six of the eight transactions it examined caused gasoline prices to rise, while the other two caused prices to fall. Then FTC Chairman Muris immediately responded that the GAO report contained major methodological mistakes that made its quantitative analyses wholly unreliable.[18] As you probably know, the GAO report became an issue for me during my confirmation proceedings this summer, and some have called for a change in the way the FTC reviews petroleum mergers.

Given the disagreement between the GAO and FTC on the appropriate methods for reviewing petroleum mergers, I have committed to convene a public forum to air these differences of view, inviting independent experts to review the GAO study, the FTC's criticisms of it, and GAO's responses to the FTC. I believe such an expert assessment is essential before making a determination regarding what impact, if any, the GAO report should have on the FTC's future review of petroleum mergers.

IV. ADVOCACY

In addition to our active policy R&D program, we are doing more on the competition and consumer advocacy front to protect consumers from unintended regulatory effects. While amicus briefs are publicly available to you, you may not be aware of all of the other types of

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[18] *See* FTC Press Release, *Statement of Federal Trade Commission Chairman Timothy J. Muris on the GAO Study on 1990s Oil Mergers and Concentration Released Today* (May 27, 2004), *available at* http://www.ftc.gov/opa/2004/05/gaostatement.htm.

advocacy we conduct. Recently, one CFTC Commissioner relied on the FTC's advocacy work in his decision to approve the United States Futures Exchange's application to open a futures trading market in the U.S.[19] In addition, the FTC recently commented on a California bill that was intended to increase cost transparency between pharmacy benefit managers and their health plan clients, provide more information with respect to certain drug substitutions, and ensure that any realized cost savings are passed on to consumers. The FTC staff found that the reverse was more likely true – that is, that the bill would more likely increase the cost of pharmaceuticals and health insurance premiums and reduce the availability of insurance coverage for pharmaceuticals. Governor Schwarzenegger cited the FTC comment in declining to sign the bill.[20] The Commission has an important role to play in providing a voice for consumers and competition in the halls of government at all levels, and we will continue to seek out opportunities to advocate on behalf of consumers.

V. CONSUMER PROTECTION

Having previously been part of this audience myself, I know that most of you are primarily focused on antitrust, rather than on consumer protection issues. But, as Elaine Kolish, one of our managers recently said when she introduced me, I confirm that inside every antitrust lawyer is a consumer protection lawyer waiting to get out. Thus, I would be remiss if I neglected to highlight some of the agenda items on the consumer protection side. After all, the FTC's twin

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[19] *See* Statement of CFTC Commissioner Lukken (Feb. 4, 2004), *available at* www.cftc.gov/opa/press04/opausferemarks.htm.

[20] *See* Governor's Veto Message for the PBM Disclosure Bill, *available at* http://www.healthlawyers.org/hlw/issues/041001/Terminator_1960_veto.pdf.

missions of competition and consumer protection serve a common aim: enhancing consumer welfare.

Protecting consumers from domestic and international fraud remains a primary focus of the FTC. According to our recent fraud survey, nearly 25 million adults in the United States – that is over 11% of the adult population – were victims of consumer fraud during a recent 12-month period.[21] And that figure did not even include identity theft. In 2003, nearly 10 million people – that is 4.6% of adults – were victims of identity theft.[22] Fraud that crosses international borders also is a growing problem. Our battle against fraud will continue in earnest.

Protecting consumers' privacy also dominates a large portion of the Commission's consumer protection mission. We continue to focus on probably one of the most popular government programs – the National Do Not Call Registry. The U.S. Supreme Court recently refused to hear the last legal challenge to the Registry.[23] As of this week, consumers have registered 65.9 million telephone numbers. The telemarketing industry has shown exceptional compliance with the Registry, and it has been highly successful in protecting consumers' privacy. A recent survey showed that 92% of those who signed up report receiving fewer telemarketing calls, and 25% of those registered say they have received no telemarketing calls

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[21] *See* CONSUMER FRAUD IN THE UNITED STATES: AN FTC SURVEY (Aug. 2004), *available at* http://www.ftc.gov/reports/consumerfraud/040805confraudrpt.pdf.

[22] *See* FEDERAL TRADE COMMISSION – IDENTITY THEFT SURVEY REPORT (Sept. 2003), *available at* http://www.ftc.gov/os/2003/09/synovatereport.pdf.

[23] *Mainstream Marketing Services v. FTC*, No. 03-1429 (10th Cir. Feb. 17, 2004), *cert. denied*, 125 S. Ct. 47 (2004).

since signing up.[24] While we appreciate the high rate of compliance, we are taking a hard look at the top violators and already have brought several law enforcement actions. Assuring compliance with the Registry remains a high priority for the Commission.

In addition to empowering consumers to stop unwanted telemarketing, the Commission also has applied its uniquely varied policy tools to protect consumers' privacy from online threats. For example, in dealing with the intractable issue of spam, we have brought nearly 65 spam-related cases against roughly 165 individuals and firms. We also have worked to educate consumers and businesses about the risks that spam poses to online commerce and communication. And we have worked to lead spam policy development and research by acting as a catalyst for marketplace solutions. Just last week, the Commission, along with the Department of Commerce's National Institute of Standards and Technology, held a two-day Authentication Summit.[25] The event, which was "Standing Room Only" at 8:30 in the morning, explored and promoted the wide-scale adoption of domain level authentication systems. Authentication systems verify the actual sender of email messages, thereby making filtering and law enforcement more effective. The Summit convened an impressive array of technologists to explore the nuts and bolts of various proposed authentication systems and to determine the necessary steps to achieve their rapid deployment.

The FTC also is working to fight the growing problem of computer spyware. In addition

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[24] *See* FTC Press Release, *Compliance with Do Not Call Registry Exceptional* (Feb. 13, 2004), *available at* http://www.ftc.gov/opa/2004/02/dncstats0204.htm (citing Harris Interactive® survey).

[25] *See* http://www.ftc.gov/bcp/workshops/e-authentication/index.htm for agenda, panelist biographies, and other detailed information regarding the Authentication Summit.

to educating consumers and businesses about the problem, we held a workshop on the issue this fall, and last month brought our first case against some disseminators of spyware. In that law enforcement action, we challenged spyware that changed consumers' home pages, changed their search engines, and triggered a barrage of pop-up ads. According to our complaint, the spyware also installed additional software, including spyware that can track a consumer's computer use. As a result of the spyware and other software the defendants installed, many computers malfunctioned, slowed down, or crashed, causing consumers to lose data stored on their computers. Then, after having created these serious problems for consumers, the defendants offer to sell them a solution – for $30. We charged that these practices were unfair and violated the FTC Act.[26] A district court has granted our request for a temporary restraining order.

VI. CONCLUSION

I thank the ABA's Antitrust Section for inviting me to address you this morning, and I look forward to working with all of you on important enforcement and policy matters that come before the Commission. Thank you.

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[26] *See* FTC Press Release, *FTC Cracks Down on Spyware Operation* (Oct. 12, 2004), *available at* http://www.ftc.gov/opa/2004/10/spyware.htm.