

Testimony of Timothy J. Muris Chairman of the Federal Trade Commission

**Before the Subcommittee on Commerce, Trade and Consumer Protection
of the House Energy and Commerce Committee**

Wednesday, November 7, 2001

Mr. Chairman and Members of the Subcommittee, I am Timothy J. Muris, Chairman of the Federal Trade Commission. I am pleased to appear before you today on behalf of the Commission to discuss our law enforcement and programmatic priorities.⁽¹⁾

The FTC is the only federal agency with both consumer protection and competition jurisdiction in broad sectors of the economy.⁽²⁾ We enforce laws that prohibit business practices that are anticompetitive, deceptive, or unfair to consumers, as well as promote informed consumer choice and public understanding of the competitive process. The work of the FTC is critical in protecting and strengthening free and open markets in the United States.

The FTC's record is impressive. The agency has fulfilled its mission of protecting American consumers by pursuing an aggressive law enforcement program during rapid changes in the marketplace - the past decade saw the largest merger wave in history, the rapid growth of technology, and the increasing globalization of the economy. Through the efforts of a dedicated and professional staff, the FTC has shouldered an increasing workload despite only modest increases in resources. We also have benefitted greatly from the leadership of my predecessor, Robert Pitofsky.

The guiding word at the FTC will be "continuity." The agency aggressively will pursue law enforcement initiatives, launch consumer and business education campaigns, and organize forums to study and understand the changing marketplace, just as it has done for several years. We will continue to address competition and consumer protection issues in the evolving economy with the same expertise and commitment as before.

Our competition mission will continue to reflect the following widely shared consensus: (1) the purpose of antitrust is to protect consumers; (2) the mainstays of antitrust enforcement are horizontal cases - cases involving the business relations and activities of competitors; (3) in light of recent judicial decisions and economic learning, appropriate monopolization and vertical cases are an important part of the antitrust agenda; and (4) case selection should be determined by the impact on consumers, guided by sound economic and legal analysis, and made with careful attention to the facts. The FTC is primarily a law enforcement agency, and we will continue aggressive enforcement of the antitrust laws within the

The FTC will continue to address significant law enforcement and policy issues throughout the economy, devoting the major portion of its resources to those areas in which the agency can provide the greatest benefits to consumers. I will highlight five areas today:

- Technology and Intellectual Property
- Health Care
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- **Internet investigation training** - FTC-conducted training for more than 2000 individual law enforcement staff, including representatives of 20 countries, 30 states, and 22 federal agencies. This training will continue.
- **Toll free number** - The FTC's toll-free hotline, 1-877-FTC-HELP. The hotline will receive additional resources to accept more consumer complaints and help us to identify trends in consumer fraud. Complaints received through the hotline are entered into Consumer Sentinel and made available to law enforcement agencies across the country.
- **Intellectual property.** In past decades, our economy has become more knowledge-based; for some companies, patent portfolios represent far more valuable assets than manufacturing or other physical facilities. Thus, an increasing number of the FTC's competition matters require the application of antitrust law to conduct relating to intellectual property. Both antitrust and intellectual property law share the common purposes of promoting innovation and enhancing consumer welfare. On occasion, however, there have been tensions in how to manage the intersection between the doctrines, as well as questions about how best to spur innovation through competition and intellectual property law and policy. These issues may well merit broader and more in-depth study. In addition, we continue to pursue investigations involving intellectual property.

An example of our objectives in this area is to ensure that patent holders do not improperly withhold critical information from industry standard-setting groups to delay the creation of a standard or raise the price of admission to its use. In *Dell Computer*,⁽⁶⁾ the FTC considered the issue of the capture of a standard-setting body by a holder of intellectual property rights that were critical to the standard ultimately selected by that body. Dell, a member of a standard-setting association, allegedly had influenced the choice of an industry standard for computer graphics performance without disclosing that its own

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equivalent.⁽⁹⁾ Such agreements may unreasonably delay the entry of generic drug competition, potentially costing consumers hundreds of millions of dollars annually.

The second issue involves unilateral conduct by branded manufacturers designed to forestall competition. For example, some branded manufacturers list additional patents in the FDA's "Orange Book," often shortly before their original patents expire, which sets the stage for launching patent infringement suits against generic drug firms poised to enter the market. Under Hatch-Waxman, such litigation triggers an automatic 30-month stay on FDA approval of the generic drug. If the listings do not meet statutory and regulatory requirements, their inclusion in the Orange Book may constitute unlawful restraints on competition.

To uncover whether strategies such as these are isolated examples or represent patterns of anticompetitive conduct, the Commission has undertaken a study, as requested by Representative Henry Waxman, to provide a more complete picture of how generic competition has developed under the Hatch-Waxman Act. The Commission has issued nearly 100 orders to innovator and generic drug companies to obtain documents related to the issues identified through investigations and to identify any other anticompetitive strategies that may exploit certain Hatch-Waxman provisions. The facts obtained through this study may provide a basis for policy recommendations in this area.

Health care fraud. Fraud in the health care sector poses a direct and immediate threat of both economic and physical injury to consumers.⁽¹⁰⁾ To fight health care fraud, the FTC launched "Operation Cure.All," a comprehensive consumer and business education and law enforcement initiative targeting deceptive and misleading Internet promotion of products and services as cures or treatments for serious diseases. Just this summer, the FTC filed eight cases as part of Operation Cure.All, targeting companies that market a variety of devices, herbal products, and other dietary supplements to treat or cure cancer, arthritis, Alzheimer's, diabetes, and many other diseases.⁽¹¹⁾

Although aggressive law enforcement is crucial, education may be the best consumer protection by preventing deception in the first place. As part of a comprehensive consumer education program, we recently partnered with the FDA to announce a new publication, *Miracle Health Claims: Add a Dose of Skepticism*, which provides detailed information on spotting and avoiding health care fraud. Another brochure, *Who Cares: Sources of Information About Health Care Products and Services*, published jointly with the National Association of Attorneys General, informs consumers about information for arthritis cures, alternative medicine, and other health issues, and where to file complaints about health care fraud. To alert older audiences about health fraud issues, the FTC works with other federal agencies, such as the Department of Health and Human Services' Administration on Aging, and with private groups, such as the AARP.

We will continue to use the Internet and other media to distribute our consumer education messages. Our Web site, www.ftc.gov, provides links to reliable health information, including www.healthfinder.gov, developed by the Department of Health and Human Services. In a little over one year, the FTC's Web-based consumer education material dealing with health issues has received nearly 80,000 hits.

To educate the unwary, the FTC also maintains three "teaser" Web sites - "Arthriticure," "Virility Plus," and "Nordicalite" - accessed using common search engines and designed to mimic fraudulent health care sites. When consumers attempt to order the bogus products, however, they are warned that if the promotions had been real, they would have been scammed. Most important, the site provides consumers with tips on how to identify Web sites that are most likely scams and directs them to sources of reliable information. In the last two years, the three teaser sites have received over 20,000 hits.

One specific type of health-related product - dietary supplements - will continue to receive special attention.⁽¹²⁾ False or deceptive claims in the advertising for these products are especially rampant. Because total sales from such products were \$15 billion in 1999 and are increasing annually by about 10 percent,⁽¹³⁾ targeting deceptive claims for dietary supplements is an important use of FTC resources.

Privacy

Many consumers are deeply concerned about the privacy of their personal information, both online and offline. Although privacy concerns have been heightened by the rapid development of the Internet, they are by no means limited to the cyberworld. Consumers can be harmed as much by the thief who steals credit card information from a mailbox or dumpster as by the one who steals that information from a Web site. Of course, the nature of Internet technology may raise its own special set of issues.

A majority of the Commission does not support online privacy legislation at this time,⁽¹⁴⁾ but there is no doubt that consumer privacy is an issue that will continue to be studied and debated both at the FTC and in Congress. The Committee on Energy and Commerce, and particularly the Subcommittee on Commerce, Trade, and Consumer Protection, have made significant contributions to the discussion of these issues. The Commission looks forward to continuing to work with the Committee and Subcommittee on these issues.

The FTC currently enforces a number of laws that address consumers' privacy.⁽¹⁵⁾ The Commission intends to increase substantially the resources dedicated to privacy protection. Our initiatives in this area attempt to reduce the serious consequences that can result from the misuse of personal information and fall into three major categories: vigorous enforcement of existing laws, additional rulemaking, and continued consumer and business education.⁽¹⁶⁾

Law enforcement. The FTC intends to increase its law enforcement efforts in the following areas:

- Challenging "pretexting," the practice of fraudulently obtaining personal financial information, often by calling banks under the pretense of being a customer.⁽¹⁷⁾
- Enforcing privacy promises, focusing on cases involving sensitive information, transfers of information as part of a bankruptcy proceeding, and the failure of companies to meet commitments made under the Safe Harbor Program to comply with the European Commission's Directive on Data Protection.⁽¹⁸⁾
- Enforcing the Children's Online Privacy Protection Act, which prohibits the collection of personally identifiable information from children under 13 without verifiable parental consent.

a free trial, or billing consumers for products or services that they did not purchase.⁽²³⁾

- Completing the current rulemaking on safeguarding consumers' financial information pursuant to the Gramm-Leach-Bliley Act.⁽²⁴⁾

Consumer and business education and outreach. The agency will continue to conduct workshops and other educational activities:

- Training law enforcement officials of a number of agencies to use the ID Theft database assembled by the FTC to spot trends that will help them prosecute those who engage in ID theft.⁽²⁵⁾
- Promoting the FTC's toll-free number, 1-877-FTC-HELP, so that consumers know where to report privacy-related complaints.
- Hosting an interagency workshop on privacy notices required under Gramm-Leach-Bliley⁽²⁶⁾ to assess the impact of the notices, identify successful privacy notices, discuss strategies for communication of complex information, and encourage industry "best practices" and consumer and business education.
- Continuing to explore and monitor the privacy implications of new and emerging technologies through workshops, reports, and other public meetings.
- Joining with several companies and privacy organizations to develop a universal fraud complaint form that victims of identity theft can submit to each creditor involved. This form will help victims recoup their losses and restore their legitimate credit records more quickly.

Energy

As are health care and privacy, energy is of critical concern to consumers. The energy sector accounts for a significant portion of the nation's total economic output, and is a vital input to virtually all sectors of the economy. The FTC has long experience with energy issues. We have investigated a number of oil mergers in recent years and have brought cases where appropriate. For example, in Exxon/Mobil,⁽²⁷⁾ BP/ARCO,⁽²⁸⁾ and Chevron/Texaco,⁽²⁹⁾ the FTC required large divestitures of oil fields, refineries, pipelines, and gas stations to ensure that the combined companies would not gain market power at any level in the petroleum industry. We will continue to investigate thoroughly any activities that may raise competition issues.

The Commission recently announced a series of comprehensive

determine which reforms appear to have worked best in introducing competitive forces into the retail sale of electricity. The report concludes that, although the transition to competition is incomplete, the properly designed restructuring of this industry on the state level ultimately will result in benefits to consumers.⁽³⁰⁾

The agency also focuses on energy issues that have a direct bearing on consumers' wallets. We have brought law enforcement actions challenging deceptive energy savings claims for various products.⁽³¹⁾ We also educate consumers on energy issues by issuing alerts and other materials on topics such as saving at the gas pump, purported gas-saving products, and seasonal home heating and cooling tips. For example, the June 2001 consumer alert with gas-saving tips, How to Be Penny Wise, Not Pump Fuelish, has been well-received. We will update our Web site with a special "Energy and the Environment" page for easy reference of the relevant FTC rules, reports, and consumer and business education materials.

Mergers

The FTC's careful evaluation of mergers will continue.⁽³²⁾

wholly or partially exempt from FTC jurisdiction, as is the business of insurance. In addition to the FTC Act, the FTC has enforcement responsibilities under more than 40 statutes

3. See *FTC v. Zuccarini*, No. 01-CV-4854 (E.D. Pa. filed Sept. 25, 2001)

4. This scam involved registering Internet domain names that are misspellings or transpositions of legitimate popular domain names to lure surfers onto a Web site that they never intended to visit. Once taken to the defendant's sites, consumers were "mousetrapped," making it difficult to exit. Mousetrapping involves the use of a special programming code at the site that obstructs surfers' ability to close their browser or return to the previous page. Clicks on "close" or "back" buttons only cause new unwanted windows to open. The defendant's sites also contained a "stealth" feature, hidden under the task bar, making it invisible to consumers. Its sole function was to act as a timer, periodically launching additional pages of advertisements, without any action by consumers. Thus, even as consumers struggled to escape the defendant's multi-window mousetrapping scheme, they were barraged with even more windows of unwanted images.

5. The other countries participating in this project are Australia, Canada, Denmark, Finland, Hungary, Japan, Mexico, New Zealand, Norway, South Korea, Sweden, Switzerland, and the United Kingdom.

6. *Dell Computer Co.*, C-3658 (May 20, 1996) (consent order).

7. See Federal Food, Drug, and Cosmetics Act, 21 U.S.C. § 301 et seq. The Hatch-Waxman amendments were contained in the Drug Price Competition and Patent Restoration Act of 1984, Pub. L. No. 98-417, 98 Stat. 1585 (codified at 15 U.S.C. §§ 68b, 68c, 70b; 21 U.S.C. §§ 301 note, 355, 360cc; 28 U.S.C. § 2201; 35 U.S.C. §§ 156, 271, 282 (1984)).

8. *Abbott Laboratories*, No. C-3945 (May 22, 2000), and *Geneva Pharmaceuticals, Inc.*, No. C-3946 (May 22, 2000) (consent orders).

9. See also *Hoechst Marion Roussel, Inc.*, No. C-9293 (May 8, 2000) (consent order). The Commission has also issued a complaint against Schering-Plough and two producers of generic drugs challenging their settlement agreements resolving patent litigation involving the drug K-Dur. *Schering-Plough*, No. 9297 (complaint issued April 2, 2001). Because the case is currently in administrative litigation, we cannot comment further.

10. Combating health fraud has been a longstanding priority of the Commission. Since 1998, the Commission has brought 80 cases involving health and safety claims in advertising.

11. See *Panda Herbal Int'l, Inc.*, No. C-4018 (Aug. 8, 2001) (consent order) (St. John's Wort and Herb Veil 8 marketed as treatment for HIV/AIDS and skin cancer, respectively); *ForMor, Inc.*, No. C-4021 (Aug. 8, 2001) (consent order) (St. John's Wort marketed as treatment for HIV/AIDS; colloidal silver and shark cartilage marketed as treatments for cancer, arthritis, and other diseases); *MaxCell Bioscience, Inc.*, No. C-4017 (Aug. 8, 2001) (consent order) (multi-ingredient product containing DHEA marketed to reverse aging and prevent age-related diseases); *Michael Forrest d/b/a Jaguar Enterprises of Santa Ana*, No. C-4020 (Aug. 8, 2001) (consent order) (miracle herbs and black box, magnetic pulser, and Beck-Rife units marketed as treatments for cancer and arthritis); *Robert C. Spencer d/b/a Aaron Company*, No. C-4019 (Aug. 8, 2001) (consent order) (colloidal silver marketed as treatment for cancer and many other diseases); *FTC v. Western Dietary Products Co. (Skookum)*, No. C01-0818R (W.D. Wash., filed June 6, 2001) (herbal cure packages and "zappers" marketed as treatments for cancer); *FTC v. Western Botanicals, Inc.*, No. S-01-1332 DFL GGH (E.D. Cal., July 25, 2001) (Stipulated Permanent Injunction) (comfrey products); *FTC v. Christopher Enterprises, Inc.*, 2:01CV-0505 ST (C.D. Utah, stipulated preliminary injunction entered July 6, 2001) (comfrey products).

12. In 2001, the Commission has brought 14 cases challenging advertising claims made for dietary supplements. During the period from 1998 through 2000, the Commission brought 46 such cases

13. *Nutrition Business Journal*, Volume IV, No.6 "Industry Overview 1999" at 3.

14. Commissioners Anthony and Thompson continue to support legislation as recommended by the Commission last year. See Statement of Commissioner Sheila Anthony on the Commission's Privacy Agenda (Oct. 4, 2001); Privacy Online: Fair Information Practices in the Electronic Marketplace: A Federal Trade Commission Report to Congress (May 2000) (Commissioner Orson Swindle, Dissenting, and Commissioner Thomas B. Leary, Concurring in Part and Dissenting in Part).

15. See, e.g., Federal Trade Commission Act, 15 U.S.C. § 41 et seq. (prohibiting deceptive or unfair acts or practices, including violations of stated privacy policies); Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq. (addressing the accuracy, dissemination, and integrity of consumer reports); Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. § 6101 et seq. (including the Telemarketing Sales Rule, 16 C.F.R. Part 310) (prohibiting telemarketers from calling at odd hours, engaging in harassing patterns of calls, and failing to disclose the identity of the seller and purpose of the call); Children's Online Privacy Protection Act, 15 U.S.C. § 6501 et seq. (prohibiting the collection of personally identifiable information from young children without their parents' consent); Identify Theft and Assumption Deterrence Act of 1998, 18 U.S.C. § 1028 (directing the FTC to collect identity theft complaints, refer them to the appropriate credit bureaus and law enforcement agencies, and provide victim assistance); Gramm-Leach-Bliley Act, 15 U.S.C. § 6081 et seq. (requiring financial institutions to provide notices to consumers and allowing consumers (with some exceptions) to choose whether their financial institutions may share their information with third parties).

16. See Remarks of Chairman Timothy J. Muris, "Protecting Consumers' Privacy: 2002 and Beyond," The Privacy 2001 Conference, Cleveland, Ohio (Oct. 4, 2001).

17. Some examples of recent "pretexting" cases brought by the Commission include: FTC v. Information Search, Inc. and David Kacala, No. AMD-01-1121 (D. Md. preliminary injunction entered May 4, 2001); FTC v. Victor L. Guzzetta d/b/a Smart Data Systems, No. CV-01-2335 (E.D.N.Y. preliminary injunction entered Apr. 19, 2001); FTC v. Paula L. Garrett d/b/a Discreet Data Systems, No. H 01-1255 (S.D. Tex. preliminary injunction entered May 1, 2001).

18. The European Commission's Directive on Data Protection became effective in October 1998, and prohibits the transfer of personal data to non-European Union nations that do not meet the European "adequacy" standard for privacy protection. To bridge different privacy approaches between the U.S. and the EU, and to provide a streamlined means for U.S. organizations to comply with the Directive, the U.S. Department of Commerce, in consultation with the European Commission, developed a "Safe Harbor" framework, which was approved by the EU in July 2000. Companies that self-certify to the Department of Commerce that they comply with the Safe Harbor Principles may be deemed by the EU to provide "adequate" privacy protection under the EU Directive. The FTC will give priority to referrals of non-compliance with safe harbor principles from EU Member States. See Department of Commerce's Safe Harbor Website, www.export.gov/safeharbor.

19. See Children's Online Privacy Protection Act of 1998, 15 U.S.C. § 6501 et seq. The Commission has brought several actions to enforce COPPA and its implementing Rule. See, e.g. United States v. Lisa Frank, Inc., No. 01-1516-A (E.D. Va. filed Oct. 1, 2001) (\$30,000 civil penalty).

20. See Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq.

21. Deceptive spamming is a prime example of high-tech fraud, discussed earlier.

22. See Telemarketing Sales Rule, 16 C.F.R. Part 310.

23.

33. See Remarks of Chairman Timothy J. Muris, "Antitrust Enforcement at the Federal Trade Commission: In a Word – Continuity," before the ABA Antitrust Section Annual Meeting, Chicago, Illinois (Aug. 7, 2001).

34. U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines (1992, revised 1997), reprinted in 4 Trade Reg. Rep. (CCH) ¶¶ 13,104 (1997), available at <http://www.ftc.gov/bc/docs/horizmer.htm>

35. 15 U.S.C. §18a, as amended, Pub. L. No 106-553; 114 Stat. 2762 (Dec. 21, 2000), effective February 1, 2001.

36. MSC Software Corp., No. 9299 (complaint filed Oct. 10, 2001). The complaint filed this month challenges two acquisitions made by a dominant supplier of a popular type of advanced computer-aided engineering software. The complaint alleges that the defendant acquired its only two competitors in transactions that fell below HSR notification thresholds.