

Prepared Statement of The Federal Trade Commission

Before the
Subcommittee on
Commerce, Trade and Consumer Protection
of the
Committee on Energy and Commerce
United States House of Representatives

Washington, D.C.

June 11, 2003

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

I. Introduction

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

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

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

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

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

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

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

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

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

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

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

Improved technological tools will be an essential part of any solution as well. A great deal of spam is virtually untraceable, and an increasing amount crosses international boundaries. Panelists estimated that from 50 percent to 90 percent of e-mail is untraceable, either because it contains falsified routing information or because it comes through open relays or open proxies.⁽²⁴⁾

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

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

C. Deceptive Lending Practices

As highlighted above, the FTC has been aggressive in its fight against deceptive lending practices. Unscrupulous lenders can deceive consumers about loan terms, rates, and fees, and the resulting injury can be severe - including the loss of a home. Over the last year, the FTC has obtained settlements for nearly \$300 million in consumer redress for deceptive lending practices and other related law violations. The FTC has settled cases against Associates First Capital Corporation (now owned by Citigroup)⁽²⁷⁾ for alleged deceptive sales of credit insurance and alleged violations of the Equal Credit Opportunity Act⁽²⁸⁾ and the Fair Credit Reporting Act,⁽²⁹⁾ against First Alliance Mortgage⁽³⁰⁾ for alleged deceptive loan terms and origination fees; -0.00Tpagainear4 211.087

offshore defendants, offshore evidence, or offshore assets also has increased. In 2002, the FTC brought approximately 22 law enforcement actions involving cross-border fraud.

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

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

Developing OECD guidelines on cross-border fraud. Commissioner Mozelle Thompson of the FTC chairs the OECD Committee on Consumer Policy and leads the U.S. delegation to the Committee, which is developing guidelines for international cooperation concerning cross-border fraud. The FTC is working with its foreign counterparts, and soon expects to finalize these guidelines.

Strengthening bilateral and multilateral relationships. The FTC already has bilateral consumer protection cooperation agreements with agencies in Australia, Canada, and the U.K., and is working to strengthen these relationships and develop new ones. The FTC also participates in a network of consumer protection enforcement officials from more than 30 countries. E. E. b.re,13(n of)2(t)2(h)13(e-F)2(T)1haeadstid(n)13(g)]TJ -0.28.853 25.627 o3()133(f)-d(10

2. Spanish-Speaking Consumers. In FY 2002, the FTC instituted a Hispanic Outreach Program, which resulted in hiring a

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

To enhance the Gasoline Price Monitoring Project, the FTC has recently asked each state Attorney General to forward to the FTC's attention consumer complaints they receive about gasoline prices. The staff will incorporate these complaints into its ongoing analysis of gasoline prices around the country, using the complaints to help locate

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

IV. Legislative Recommendations

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

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

The FTC Act exemption has proven to be a barrier to effective consumer protection, both in common carriage and in

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

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

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

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

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

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

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

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

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

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

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

Other legislative proposals would enhance the FTC's ability to track deceptive spammers. First, we request that the ECPA be clarified to allow the FTC to obtain complaints received by an ISP regarding a subscriber. Frequently, spam recipients complain first to their ISPs, and access to the information in t

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

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

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

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

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

In addition to the TCFAPA amendments, the possible criminalization of false header and routing information should be explored. There is some debate over whether the wire fraud statute covers fraud in the sending of e-mail communications. The FTC staff is discussing this issue with criminal authorities to determine whether a specific statute that criminalized this conduct would

clear up any statutory confusion or encourage spam prosecutions. At this time, the FTC has no recommendations on whether changes in the criminal code are necessary or appropriate.⁽⁷⁸⁾ Admittedly, we recognize that these legal

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

Endnotes:

1. This written statement represents the views of the Federal Trade Commission. My oral presentation and responses to questions are my own and do not necessarily reflect the views of the Commission or any other Commissioner.
2. In 2003, Consumer Sentinel was named one of the top 25 E-Government programs by the Industry Advisory Council and the Federal Chief Information Officer Council.
3. The FTC works with various federal and state law enforcement agencies, as well as Canadian, Mexican, and other international authorities. See, e.g., FTC Press Release, *State, Federal Law Enforcers Launch Sting on Business Opportunity, Work-at-Home Scams* (June 20, 2002), available at <<http://www.ftc.gov/opa.2002/06/bizopswe.htm>>. See also FTC Press Release, *FTC, States Give "No Credit" to Finance Related Scams in Latest Joint Law Enforcement Sweep* (Sept. 5, 2002), available at <<http://www.ftc.gov/opa/2002/09/opnocredit.htm>>.
4. This figure represents the amount of redress that has been ordered by the courts in more than 65 orders from April 2002 to May 2003. The figure does not represent the actual amount of money that has been or will be collected pursuant to those orders.
5. *FTC v. Access Resource Services, Inc.*, Civ. Action No. 02-60226-CIV Gold/Simonton (S.D. Fla. Nov. 4, 2002).
6. *FTC v. SkyBiz.com, Inc.*, Civ. Action No. 01-CV-396-EA (M) (N.D. Okla. Jan. 28, 2003).
7. *FTC v. Mitchell Gold*, Civ. Action No. SAcv 98-968 DOC (Rzx) (C.D. Cal. Mar. 7, 2003).
8. Since the FTC first published the booklet in February 2002, the FTC has distributed more than 1.2 million paper

16. Unsolicited commercial e-mail ("UCE" or "spam") is any commercial e-mail message that is sent - typically in bulk - to consumers without the consumers' prior request or consent.

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

32. 15 U.S.C. §§ 1601-1667f,

48. The proposed order includes a provision prohibiting BMS from triggering a 30-month stay for any BMS product based on any patent BMS lists in the Orange Book after the filing of an application to market a generic drug.

49. *Biovail Corp.*, Dkt. No. C-4060 (Oct. 2, 2002).

50. *Biovail Corp. and Elan Corp.*, Dkt. No. C-4057 (Aug. 15, 2002).

