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Administrative Practice and Institutional Renewal: Lessons from the Federal Trade Commission[2]

The first few months at the helm of a federal administrative agency provide an intense education. The sensation recalls an episode from Ronald Spector's history of naval warfare in the 20th century.[3] Early in the 1940s, as the Allies strained to defend convoys from U-boat attacks in the Atlantic, many naval officers faced new challenges of unimaginable difficulty. As Professor Spector tells it, a relatively junior captain of a corvette was struggling unsuccessfully to maintain proper station in a convoy. A senior officer on another escort signaled the wayward corvette, "What are you doing!" From the corvette came the reply, "Learning a lot."

After a career immersed in antitrust law, in private practice, and public service, I have been learning a lot in two months at the Federal Trade Commission (FTC). There is a lot to learn. Consider a single, rough benchmark. I cannot offer a rigorous proof for the proposition,

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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 FTC General Counsel William Kovacic and FTC Acting Director of the Office of Policy Planning Maureen Ohlhausen for their contributions to this speech.

[3] RONALD H. SPECTOR, AT WAR AT SEA 230 (2001).

but I am willing to wager that no federal administrative agency has inspired a larger body of scholarship. It is the rare member of this Section who has not used the FTC's experience to study the substance or process of administrative regulation.

I had the good fortune to come to the FTC shortly before the late September celebration of the 90th Anniversary of the signing of the FTC Act. Current Commission members and employees – joined by FTC alumni, practitioners, and scholars – marked this anniversary with a two-day symposium examining the agency's history, its failures, and its triumphs. Even the most casual student of the FTC and its past would have been struck by the atmosphere of the celebration – the pride in recent successes and the satisfaction in overcoming past shortcomings, both wisely tempered by a keen commitment to improve to meet the inevitable new challenges.

This morning I want to use the occasion of the recent Symposium and the reflection it prompted to discuss the lessons that experience has taught about the ingredients of good administrative practice. The FTC transformed itself from an object of ridicule in the late 1960s to a place of respect among public institutions (not to mention a place of heroism among members of the public whose dinners no longer are interrupted by irritating telemarketing calls). The transformation bears most directly on the formulation of competition and consumer protection policy, but I suggest that it offers lessons for the administrative process generally.

Prologue

The literature on the first half-century of the FTC presents a narrative of many failures interrupted by some intervals of accomplishment. Critical commentary reached a peak in the late

1960s. In 1969, President Nixon, spurred by a scathing report by Nader's Raiders,[4] asked the American Bar Association ("ABA") to appraise the FTC's performance. The Nader Report said, "Misguided leadership is the malignant cancer that has already assumed control of the Commission, that has been silently destroying it, and that has spread its contagion on the growing crisis of the American consumer."[5] With greater reserve, the President said the Commission "may have failed to discharge [its] obligations satisfactorily."[6]

The ABA assembled a 16-member, blue-ribbon panel. Fifteen members of the panel, which, led by Miles Kirkpatrick, came to be known as the Kirkpatrick Commission, joined in a report that was quite critical of the FTC and made strong recommendations for fundamental change. Richard Posner, as you know now a judge on the United States Court of Appeals for the Seventh Circuit, served on the Kirkpartick Commission and was the 16th member, who did not join in the report's recommendations. Said Judge Posner at the time:

> My colleagues of the majority, while fully conscious of the Commission's deficient performance of more than 50 years, maintain a resolute air of optimism. With better leadership and better staff, with greater appropriations, with a renewed sense of dedication, and with wise direction from committees such as these, the Commission, in their view, can still be redeemed for socially productive activities. I am not so sanguine.[7]

The FTC Off Track

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[4] Edward F. Cox, Robert C. Fellmuth & John E. Schulz, *The Consumer and the Federal Trade Commission: a critique of the consumer protection record of the FTC* (1969).

[5] *Id.* at 130.

[6] Letter from President Richard Nixon to William T. Gossett, President of the American Bar Association, April 18, 1969 (*reprinted in Report* of the ABA Commission to Study the Federal Trade Commission, Sept. 15, 1969).

[7] Commission to Study the FTC, American Bar Association, *Report of the Commission to Study the Federal Trade Commission* (Sept. 15, 1969).

What prompted Judge Posner's skepticism? He was no stranger to the FTC, having served as Adviser to FTC Commissioner Philip Elman from 1963 to1965. His view arose from experience with the serious weaknesses that the Kirkpatrick Report found throughout the FTC - poor leadership, lack of direction, aimless enforcement, and squandered resources. Even the majority of the Kirkpatrick Commission, while somewhat more optimistic than now-Judge Posner, made their series of recommendations to address those weaknesses only with a significant caveat: if the agency did not change fundamentally, and soon, it should be abolished. The Kirkpatrick Report resulted in a mandate for significant reform and reorganization of the agency.

Miles Kirkpatrick subsequently became chairman of the FTC and instituted many of the organizational and enforcement philosophy changes advocated by the Kirkpatrick Report.[8] Although the Commission took many reforms under Kirkpatrick's chairmanship, some problems, not surprisingly, took longer to solve. As you know, the FTC is charged with the protection of

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[8] In addressing the FTC's failure to carry out an effective and meaningful antitrust agenda, the Report prescribed that the Commission use its unique history and institutional advantages - those not available to the Department of Justice Antitrust Division - to advance competition policy and enforcement. More specifically, the Report recommended that the agency: (i) use its institutional tools to make competition policy - doing research, publishing studies, bringing cases, and making use of the intersection of competition policy and consumer protection authority; (ii) formulate national competition policy by using the administrative process to adjudicate cases; and (iii) make policy involving "unsettled" areas of the law.

To address failures in its consumer protection mission, the Report prescribed vigorous law enforcement and a national role in developing consumer protection policy. The Report recommended that the agency: (i) focus enforcement on serious consumer problems, especially fraud; (ii) mount a more effective campaign against deceptive advertising; (iii) strengthen its remedies and reduce delays; (iv) provide industry guidance and incentives for compliance and self-regulation; (v) undertake studies, issue reports, and make legislative recommendations directed at pressing consumer issues; (vi) work with state and local consumer protection agencies; and (vii) make consumer education part of the agency's mission.

consumers through two, related bodies of law, antitrust and consumer protection. During the late 1960s and into the 1970s, the FTC at times tried to carry out its mandate through imposition of rigid, structural rules and tests. The polyester leisure suit was not the only bad idea that flourished in that decade!

On the antitrust side, the agency pursued an aggressive strategy of reducing the market positions of dominant firms and deconcentrating industries, basing enforcement policy on simple market concentration numbers and giving short shrift to the idea that lower costs might explain the superior profitability of large firms.[9] As those familiar with antitrust know, the theories used in the 1970s to attack concentration became discredited. This change occurred not through reassessment by enforcement agencies, but rather through defeats suffered in the federal courts, as the courts absorbed and applied the new antitrust thinking based on economic principles.

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[9]This deconcentration agenda was based upon economic theories that found a strong positive relationship between concentration and profitability. One highly influential scholarly work in this period was Carl Kaysen's and Donald Turner's *Antitrust Policy: An Economic and Legal Analysis*, which appeared in 1959. Kaysen and Turner wrote that "The principal defect of present antitrust law is its inability to cope with market power created by jointly acting oligopolists." *Id.* at 110. They urged Congress to adopt new legislation compelling the deconcentration of various sectors of the economy. *Id.* at 110-19, 261-66. In 1969, a blue ribbon presidential task force headed by Dean Phil Neal of the University of Chicago recommended deconcentration variants of the Kaysen and Turner proposals. *See White House Task Force Report on Antitrust Policy, reprinted in* 2 ANTITRUST L. & ECON. REV. 11, 14-15, 65-76 (1968-69). It also drew heavily from studies indicating that a deconcentration program was unlikely to sacrifice significant scale economies or other efficiencies. *See* William E. Kovacic, *Failed Expectations: The Troubled Past and Uncertain Future of the Sherman Act as a Tool for Deconcentration*, 74 IOWA L. REV. 1105, 1136 (1989), *citing* Leonard Weiss, *The Concentration - Profits Relationship and Antitrust*, *in* INDUSTRIAL CONCENTRATION: THE NEW LEARNING 184-272 (1974). *See also* F. SCHERER ET AL., THE ECONOMICS OF MULTI-PLANT OPERATIONS: AN INTERNATIONAL COMPARISONS STUDY (1975); Roger Sherman & Robert Tollison, *Public Policy Toward Oligopoly: Dissolution and Scale Economies*, 4 ANTITRUST L. & ECON. REV. 77, 78 (Summer 1971). The Commission undertook numerous industry-wide cases, such as the breakfast cereals case, petroleum industry litigation, and a huge investigation of the automobile industry, that reflected this simple market concentration doctrine.

Getting one's butt kicked provides a powerful incentive for change! A prime example of this is the decision in *Berkey Photo,*[10] in which the court clarified that a firm that lawfully acquired a dominant market position does not violate the Sherman Act simply by reaping the benefits of its size. This position in *Berkey* and other judicial decisions was reinforced by economic research indicating that deconcentration might actually raise prices and lower quality because many firms gained larger market share through lower costs or higher quality, rather than through practices that harmed consumers.

On the consumer protection side, Chairman Kirkpatrick led a revitalization. In the late 1970s, this effort veered off track. Encouraged by court opinions that appeared to confirm its sweeping authority to redesign whole industries based on stopping "unfair" practices, the Commission used newly obtained rulemaking authority to launch a spate of rulemakings. Many of the proposed rules used vague legal theories that often lacked empirical basis, sometimes seemed to be based entirely upon the Commissioners' idiosyncratic views, and disregarded the ultimate costs to consumers. The FTC's unfocused but ambitious rulemaking agenda outraged many in business and Congress, and some industries sought exemption from FTC jurisdiction entirely.

The FTC Renaissance

[10] *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 276 (2d Cir. 1979) (stating "[a] large firm does not violate § 2 simply by reaping the competitive rewards attributable to its efficient size, nor does an integrated business offend the Sherman Act whenever one of its departments benefits from association with a division possessing a monopoly in its own market. So long as we allow a firm to compete in several fields, we must expect it to seek the competitive advantages of its broad-based activity – more efficient production, greater ability to develop complementary products, reduced transaction costs, and so forth.").

Given this history, you may wonder what we had to celebrate on the FTC's 90th Anniversary. How did we get from the dark days of failure and frustration to the FTC that I joined two months ago with its effective competition and consumer protection programs?

I suggest three fundamental improvements. First, the Commission clarified its mission in both the competition and consumer protection agendas and accordingly deployed its resources to stop the most egregious consumer harm. Second, the Commission began to use its unique capabilities to better understand the marketplace and the efficacy of its actions. And, finally, the Commission began to cooperate with other agencies to more effectively advance its goals.

Antitrust Reform

On the antitrust enforcement front, the FTC clarified its mission when it adapted to the fundamental change in antitrust theory that began in the mid-1970s and accelerated in the 1980s. During that time, the academy, the courts, and finally the enforcement agencies reached widespread agreement that the purpose of antitrust is to protect consumers, that economic analysis should guide case selection, and that horizontal cases, both mergers and agreements among competitors, are the mainstays of enforcement.[11] Through improved theoretical understanding and painful practical experience, antitrust now finally regards enhancing

[11] One of the first changes on the antitrust front was that the Commission de-emphasized Robinson-Patman Act enforcement in response to the criticism of its program by the Kirkpatrick Report of the FTC's Robinson-Patman Act program. This programmatic adjustment, which dropped the number of Robinson-Patman Act matters to an average of two per year by the end of the 1970s, produced a lasting change. Commission to Study the FTC, American Bar Association, *Report of the Commission to Study the Federal Trade Commission* 67-68 (Sept. 15, 1969) (recommending that the FTC "initiate a study and appraisal of the compatibility of the Robinson-Patman Act and its current interpretations to the attainment of antitrust objectives" and, during this appraisal, limit the agency's enforcement of the Act to "instances in which injury to competition is clear").

consumer welfare as its single unifying goal, and it relies on sound economics, both theoretical and empirical. Accordingly, the FTC and the Department of Justice expanded horizontal restraints enforcement, including DOJ prosecution of criminal cases. With some variation in the number of prosecutions after 1980, horizontal cases became the centerpiece of nonmerger federal government enforcement. New and enduring focal points of civil enforcement activity included the professions and their trade associations.[12]

In addition to substantive improvements, the FTC began making better use of the tools unique to its functioning as an administrative agency. The Kirkpatrick Report had concluded that administrative litigation, which had ebbed and flowed over time, offered an opportunity for the Commission to fulfill the expert role Congress intended. In the early and mid-1980s, the FTC proceeded with a number of administrative litigation cases that had a significant impact on antitrust law.[13] That trend continued particularly during the tenure of my predecessor, Professor Timothy J. Muris, and we currently have seven antitrust cases pending in administrative litigation against such companies as Rambus Incorporated, Union Oil Company of California

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[12] Pivotal developments in this progression included cases initiated in the 1970s by the DOJ and the FTC, respectively, against the National Society of Professional Engineers and the American Medical Association. *See National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679 (1978); *American Med. Ass'n v. FTC*, 638 F.2d 443 (2d Cir. 1980), *aff'd per curiam by an equally divided Court*, 455 U.S. 676 (1982).

[13] These cases include *FTC v. Ticor Title Insurance*, 504 U.S. 621, 633 (1992) (active supervision prong of state action doctrine requires actual, affirmative, ongoing involvement by the state, as opposed to mere passive acquiescence in private anticompetitive conduct); *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 431-32 (1990) (a strike by criminal defense lawyers conducted to obtain higher compensation from the government was a naked price fixing agreement, not a political boycott), and *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 460-61 (1986) (direct evidence of anticompetitive effects obviated the need to conduct a formal analysis of market power).

(Unocal), and Chicago Bridge & Iron Co.[14] To make administrative litigation an effective tool, however, process improvements also were necessary. Historically, administrative litigation proceeded very slowly. Procedural amendments to Part III practice during the late 1970s, mid-1980s, and most recently the mid-1990s, however, resulted in rule changes designed to expedite the administrative trial and decision-making process.[15]

In addition to litigation, a far-sighted feature of Congress' institutional design is that it also gave the FTC flexible tools to develop competition policy by doing research, holding hearings and workshops, and publishing studies. The Commission has increasingly used this capability during the last ten years. In the area of health care, for example, the FTC and the Department of Justice recently held 27 days of joint hearings to examine the state of the health care marketplace and the role of competition, antitrust, and consumer protection in satisfying

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[14] *Evanston Northwestern Healthcare Corp. and ENH Med. Group, Inc.*, Dkt. No. 9315 (2004); *North Texas Specialty Physicians*, Dkt. No. 9312 (2003); *South Carolina State Bd. of Dentistry*, Dkt. No. 9311 (2003); *Kentucky Household Goods Carriers Ass'n, Inc.*, Dkt. No. 9309 (2003); *Union Oil Co.*, Dkt. No. 9305 (2003); *Rambus Inc.*, Dkt. No. 9302 (2002); *Chicago Bridge & Iron Co.*, Dkt. No. 9300 (2001).

[15] The 1996 rule changes established fairly rigorous time frames for Part 3 adjudication. In cases where the Commission issues an administrative complaint, the Administrative Law Judge is required, except in extraordinary circumstances, to file his Initial Decision within one year from filing of the complaint. Additionally, the rule changes allowed for respondents to select a "fast track" schedule in appropriate cases (generally cases in which the agency seeks a preliminary injunction in a federal district court). In "fast track" proceedings, the Commission would issue a final order and opinion within 13 months after the latest of three triggering events (issuance of an administrative complaint, entry of a preliminary injunction by a federal district court, or the date on which the respondent elects the "fast track"). This deadline may be amended in only two circumstances: when the final order contains material or information intended for *in camera* treatment (thus obliging advance notice of intent to disclose) or when the Commission determines that adherence to the 13-month deadline would result in a miscarriage of justice due to circumstances unforeseen at the time of respondents election of the fast track. FTC Rules of Practice, 16 C.F.R. §3.11A, and 3.51(a).

Americans' demand for high-quality, cost-effective health care. This past July, the FTC and DOJ issued a Health Care Report, based on the hearings, which examines the current role of competition in health care, how it can be enhanced to increase consumer welfare, and how antitrust enforcement can and should work to protect existing and potential competition in the health care arena.[16]

Of course, an agency cannot always solve by itself the problems it identifies through research and study. The information and expertise it develops, however, can add important knowledge in the search for solutions, not only for the FTC, but for other law enforcement and policy-making bodies as well. Recently, FTC staff filed a public comment concerning a California bill that was intended to increase cost transparency in transactions between pharmacy benefits 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. Using the knowledge and insight it gained in preparing the Health Care Report, FTC staff found that the bill actually was more likely to increase the cost of pharmaceuticals, increase health insurance premiums, and reduce the availability of insurance coverage for pharmaceuticals. Governor Schwarzenegger declined to sign the bill, citing the FTC study showing that enactment of the legislation would limit competition and increase the cost of prescription drugs.

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[16] FTC & DOJ REPORT, IMPROVING HEALTH CARE: A DOSE OF COMPETITION (July 2004), *available at* <http://www.ftc.gov/reports/healthcare/040723healthcarerpt.pdf>.

Consumer Protection Reform

On the consumer protection side, the Commission began a major effort to refocus its resources on stopping fraud and/or other practices that caused the most harm to consumers. [17] Thus, in the early 1980s, the FTC made securing redress for victims of fraud one of its principal priorities. Fortunately, the legal tools for such a program already existed. In 1973, Congress had amended the FTC Act to empower the Commission to file lawsuits in federal district court seeking strong preliminary and permanent injunctive relief – including redress.[18] Before the shift to the federal court forum, most of the Commission's consumer protection work used an administrative adjudicative process that gave targets many opportunities for delay. Federal district court cases proved much more effective, enabling the Commission to bring fraudulent schemes to an immediate halt, to sue the targets quickly 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 its inception, this program has proved an effective tool not only to

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[17] These efforts included restatements of the Commission's basis consumer protection authority to focus more closely on consumer injury. *See* Letter from the FTC to Hon. Wendell Ford and Hon. John Danforth, Committee on Commerce, Science and Transportation, U.S. 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); Deception Policy Statement, *appended to Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 168-170 (1984).

[18] Under the "second proviso" of the new § 13(b), "in proper cases the Commission may seek, and after proper proof, the court may 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."

obtain court orders halting fraudulent schemes, but also to obtain consumer redress and other potent equitable remedies. The fraud program has grown in importance and success and matured into the flagship of the Commission's consumer protection program.

Despite the impressive success of the Commission's fraud program, fraud continued to evolve. What a scam artist needed a staffed boiler room with a phone bank to accomplish in the early 1980s, he or she can accomplish alone with one computer today. To keep pace with changes in the industry, the FTC has fully utilized its research and development tools to gather data and explore new technologies. As with antitrust, the Commission now uses its ability to conduct studies and gather market information to focus its consumer protection enforcement efforts.

For example, in August, the FTC released a study entitled, *Consumer Fraud in the United States: An FTC Survey*. The study found that a staggering 11% of adults in the United States had been victims of fraud within the preceding year. Among its findings, the Survey found that Hispanics and other minorities are roughly twice as likely as non-Hispanic whites to be victims of consumer fraud, whether they speak Spanish or not. So, we used this information to establish the Commission's recently-announced Hispanic Law Enforcement and Outreach Initiative to address the growing problem of deceptive advertising aimed at Spanish-speaking consumers. The Initiative, which included a two-day workshop with the Department of Justice's Office for Victims of Crime, encompasses traditional law enforcement actions and consumer outreach.[19] In the past year, the Commission has announced 15 law enforcement actions targeting fraud against

[19] *See* http://www.ftc.gov/bcp/workshops/hispanic/index.htm for a summary of the workshop's proceedings.

Hispanic consumers.[20]

In another form of research, earlier this year FTC staff held a day-long workshop on spyware to explore how to define spyware and differentiate it from benign programs, how spyware is distributed, the adverse effects of spyware, such as privacy and security concerns, and possible public and private responses to spyware.[21] The information we gathered in this workshop then formed the basis for the Commission's testimony on proposed spyware legislation[22] and ultimately helped us bring our first spyware case this month.[23] We also have held recent workshops on radio frequency identification[24] and class actions[25] and, later this year, will convene workshops on e-mail authentication[26] and peer-to-peer file-sharing technology.[27]

Weight loss advertising is another area where the Commission uses its law enforcement, outreach, and research capabilities to obtain effective remedies for consumers and to educate

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[20] The cases attacked schemes ranging from advance fee loan credit cards, weight loss products, green card lottery scams, and work-at-home schemes. For a list of the cases, see http://www.ftc.gov/opa/2004/10/heritagemonthsweep.htm, http://www.ftc.gov/opa/2004/04/hispanicsweep2.htm and http://www.ftc.gov/opa/2004/04/hispanic_oldcases.htm.

[21] *See* http://www.ftc.gov/bcp/workshops/spyware/index.htm.

[22] *See* http://www.ftc.gov/opa/2004/04/spywaretest.htm.

[23] *FTC v. Seismic Entertainment Prods., Inc.*, No. 1:04-cv-00377-JD (D. N.H. complaint filed Oct. 6, 2004). *See* http://www.ftc.gov/opa/2004/10/spyware.htm.

[24] *See* http://www.ftc.gov/bcp/workshops/rfid/index.htm.

[25] *See* http://www.ftc.gov/bcp/workshops/classaction/index.htm.

[26] The press release and Federal Register Notice announcing the summit is available at http://www.ftc.gov/opa/2004/09/emailauth.htm.

[27] The press release and Federal Register Notice announcing the workshop is available at http://www.ftc.gov/opa/2004/10/p2p.htm.

consumers, businesses, and the media about how to prevent fraud. A scourge on Americans trying to lose weight, false and unsubstantiated advertisements for products that promise effortless weight loss are widespread. Since 1990, the FTC has brought over 110 cases against marketers of weight-loss products, with final judgments ordering $65 million in consumer redress. Through workshops and reports, the Commission has identified seven common scientifically infeasible weight-loss claims and initiated a program to encourage the media to initiate a voluntary program to screen out facially false weight-loss ads.[28] The Commission also continues to work with the weight-loss industry to develop more effective self-regulatory mechanisms.

As the channels of fraud have proliferated alongside the channels of lawful commerce, we have strived to make anti-fraud efforts more effective by coordinating with other enforcement agencies. The FTC's Consumer Response Center (CRC) provides a central facility to record and respond to consumer complaints and inquiries. The existing telemarketing fraud complaint database, in operation since the early 1990s, has been upgraded and revamped into *Consumer Sentinel*, a system linking law enforcers through a secure Internet web site. Hundreds of law enforcement agencies at the state, federal, and local levels have joined the system, gaining access to the complaint database and adding their own complaint data to it. *Consumer Sentinel* has strengthened the fraud program by improving the staff's ability to spot emerging trends, to identify bad actors more quickly, and to locate potential witnesses to support the Commission's cases.

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[28] The central part of this campaign is a media reference guide, entitled *RED FLAG Bogus Weight Loss Claims*, available at http://www.ftc.gov/bcp/conline/edcams/redflag/index.html.

The *Consumer Sentinel* database also helps us target our consumer education more effectively. Although law enforcement is very effective, in the end, education may be the best consumer protection. Of course, we try to ensure that all law enforcement actions have a consumer education component. Our national announcements on enforcement actions are perfect vehicles for getting the media to promote prevention messages and to boost awareness among the nation's consumers. Our staff leverages resources by partnering with other federal agencies, advocacy organizations, and industry groups to disseminate consistent prevention messages in the most efficient and creative ways. And it seems to be working: more people are calling, writing, and logging on to our Web sites to get information and report their experiences.[29]

Some of the consumer fraud in today's marketplace is really criminal conduct that is difficult to deter with civil sanctions. For this reason, we are making it a priority to develop relationships with criminal law enforcement authorities at all levels to encourage the prosecution of the worst actors. Since 1996, the staff has assisted criminal authorities in at least 165 matters. To build on our existing partnerships, we established a Criminal Liaison Unit (CLU) in December 2003. Our cooperative efforts with – and assistance from – state attorneys general, the U.S. Department of Justice, the F.B.I., the U.S. Postal Inspection Service, and others are critical to the success of our enforcement initiatives.

In an era of seamless global communications by phone and the Internet, consumer

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[29] In addition to *Consumer Sentinel*, we also have a database to which consumers forward their unwanted spam. We call this database the "refrigerator" and we may be the only organization that actually asks for your spam. We use spam to help shape our law enforcement investigations and to observe trends. Currently, we receive approximately 300,000 spam messages a day.

protection has also become a global issue. Not surprisingly, an increasing number of complaints collected in the *Consumer Sentinel* complaint database involve international transactions and, in the past several years, there has been a corresponding increase in FTC prosecutions involving foreign defendants or foreign consumers. For the Internet, of course, national boundaries simply do not exist. We have had to acknowledge that we face difficult jurisdictional challenges in the battle against cross-border fraud and deception. Consequently, we have urged that Congress pass the International Consumer Protection Act (ICPA).[30] When passed, ICPA will improve our ability to share information with our counterparts in other countries and conduct investigations when requested by a foreign counterpart investigating fraud.[31] The Senate passed its version of ICPA in September, and we are working with Hill staff to try to get the bill passed before Congress adjourns.

I know that this Section of the ABA is well aware of the challenges that our increasingly interconnected world pose. I understand that the administrative law section, in conjunction with a number of other ABA sections, is undertaking a study of the European Union's administrative law, which will provide important information about the general principles and practices that govern the conduct of the EU's principal administrative functions. I look forward to hearing more about this project as it progresses. Enactment of such legislation is particularly important

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[30] *See* S. 1234, 108th Cong. (2004), H.R. 3143, 108th Cong. (2004), and H.R. 4996, 108th Cong. (2004).

[31] For example, currently, although we are allowed to share certain investigative information with state and local law enforcement agencies, we are statutorily prohibited from sharing such information with our foreign counterparts. This is true even if the FTC and its foreign counterpart are investigating the same company that is defrauding U.S. and foreign consumers. ICPA would allow us to share this information with non-U.S. counterparts in appropriate circumstances.

if

we are to be effective against such borderless consumer protection problems as spam and spyware.

Going Forward: Lessons for the Administrative Process

The FTC's experience provides some guides for good administrative agency practice. First, without a doubt, an agency must put its resources where they will do the most good for the public. For an enforcement agency like the FTC, this means taking action to stop the practices that cause the greatest amount of consumer harm. To identify accurately those practices and resulting harms, the agency must pay attention to changes over time, whether legal, economic, or technological. Only by keeping up to date – gathering information, engaging in scholarship, and monitoring trends – can an agency have the adaptability and flexibility not simply to react to changing conditions but to anticipate and prepare for them. To do this, an agency must use all of the tools available to it to enhance its effectiveness.

In conjunction with a better understanding of external forces, the agency must also strive to improve its understanding of itself. Thus, the agency must study and assess itself, discern the factors that led to success or failure, and thereby improve. Improvements can take many forms, from adapting to new legal and economic thinking, to improving its internal processes, to resisting the temptation to do too much. Outsiders will always assess us and will never be shy about expressing their views; it is better that we beat them to the punch.

Finally, the agency needs to realize that, no matter how hard it works, it often cannot accomplish its goals alone. As the world seems to have grown smaller, an agency's circle of counterparts often grows wider. Thus, an agency must engage in a dialogue with other agencies and policy-making bodies – federal, state, and international – to ensure that its ability to serve

the public is not unduly hampered by structural divisions but instead is enhanced by cooperation among those who share many of the same goals.

Conclusion

Twenty years after the 1969 Report, and coincident with the FTC's 75th anniversary in 1989, the Antitrust Section of the ABA appointed a Special Committee to Study the Role of the Federal Trade Commission. During the twenty years between the 1969 Report and the agency's 75th anniversary, the Commission had implemented many of the Report's recommendations and Congress had enacted some statutes to strengthen the FTC. While a few questions remained about the proper role of the FTC in an ever-changing economy,[32] the fundamental question faced in 1969 was no longer seriously at issue, and the Committee did not generate recommendations for major structural changes. Rather, the Committee concluded that "on balance, the antitrust enforcement efforts of the FTC are a worthwhile complement to those of the [Antitrust] Division," and it voiced strong support for the competition and consumer advocacy program.

The agency I have just joined at its 90th Anniversary is strong, effective, and innovative. In fact, we even had the confidence to invite Judge Posner to be the featured speaker at our celebratory dinner last month. While he recognized that the FTC had transformed itself – and joked about being invited to eat crow with us – he also offered some cautions for the future. We welcome his thoughtful cautions and suggestions and any others. Celebration of what a talented

[32] The 1989 Report noted that a few "tensions arise from overlapping responsibilities of the FTC, other federal agencies, and, increasingly, state governments . . . Congressional ambivalence about the agency's role is symbolized by its repeated failure to authorize the FTC"; and observed that the twin roles of the FTC as prosecutor and judge left some uneasy. Special Committee to Study the Antitrust Role of the Federal Trade Commission, American Bar Association, *Report on the Role of the Federal Trade Commission* 6 (1989).

staff has achieved through hard work is permitted; stuck-in-place, self-satisfaction is not.

The FTC's rebirth came about through a process that demanded the willingness to explore the consequences of past initiatives, the flexibility to comprehend new developments, and a commitment to reach out to other officials and policymakers within our own nation and across jurisdictions. Only through a continued process of education, institutional renewal, and self-assessment will the FTC be ready to overcome the challenges that lie ahead.