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THE FEDERAL TRADE COMMISSION'S COMMITMENT TO ON-LINE CONSUMER PROTECTION

by ROSCOE B. STAREK, III† & LYNDA M. ROZELL‡

I. INTRODUCTION

The Federal Trade Commission ("FTC") is committed to vigorous enforcement of its consumer protection statutes in the on-line environment.¹ Commerce on the Internet has required the Commission to learn a whole new vocabulary (such as "spamming," meaning the sending of multiple, unsolicited e-mail messages) and has inspired a host of metaphors. Some have called the Internet the "Wild Web" to evoke the American "Wild West" of the 1800's—a place where order was imposed by self-appointed vigilantes. One organization seeking U.S. government regulation of on-line advertising to children has referred to the Internet as a "Web of Deception."

In fact, neither characterization is correct. The Internet *is* regulated: many of the laws that apply to commerce generally apply to commerce on the Internet. The Internet may provide enhanced opportunities for fraudulent marketers to prey on consumers, because of the ease with which it may be used to contact consumers and its relative anonymity. Yet it has the potential to provide significant benefits to consumers by offering them easy access to information, services, and products. The challenge for regulators is to limit practices that distort and impede informed consumer choice without making the Internet so cumbersome or expensive to use that its commercial benefits are never fully

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1. This article is adapted from a speech delivered by Commissioner Starek on January 23, 1997, before the Fifth Internet Executive Conference in Saint Paul de Vence, France. The views we express here are our own and do not necessarily reflect those of the FTC or any other Commissioner.

realized. Regulation often can thwart innovation, and the government should resist the temptation to overregulate the Internet. Effective consumer protection requires not only government enforcement but also private self-regulatory initiatives and the combined efforts of government, business, and consumer groups to equip consumers with the tools to protect themselves.²

II. THE FEDERAL TRADE COMMISSION'S ENFORCEMENT OF CONSUMER PROTECTION LAWS

Before we explore the FTC's role in regulation of the Internet, let us start with a description of what the Commission is and how it operates. The Federal Trade Commission is the only U.S. agency at the national level with a broad consumer protection law enforcement mandate. Section 5 of the Federal Trade Commission Act ("FTC Act") prohibits unfair or deceptive acts or practices in or affecting commerce.³ An unfair practice is one that causes or is likely to cause substantial injury to consumers, where that injury is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits of the practice.⁴ Unfair practices include, for example, the debiting of consumer bank accounts without authorization.⁵

2. See generally FTC, *Anticipating the 21st Century: Consumer Protection Policy in the New High-Tech, Global Marketplace, Volume II* (last modified Nov. 6, 1996) <<http://www.ftc.gov/opp/global/report/global2.htm>> [hereinafter *Consumer Protection Policy*].

3. Federal Trade Commission Act § 5(a), 15 U.S.C. § 45(a) (1994). The Commission also enforces a variety of antitrust laws as part of its mission to maintain competition. *Id.* Section 5 of the FTC Act prohibits unfair methods of competition. *Id.* The Act thus allows the Commission to address practices that violate the Sherman Act, 15 U.S.C. §§ 1—7 (1994), or the Clayton Act, 15 U.S.C. §§ 12—27 (1994). In addition, the Commission directly enforces the provisions of the Clayton Act, including the Robinson-Patman Price Discrimination Act Amendments, 15 U.S.C. §§ 13—13b, 21a (1994).

4. The Commission set forth this standard in an Unfairness Policy Statement issued in 1980. Letter from the Federal Trade Commission to Hon. Wendell Ford and Hon. John Danforth, Senate Committee on Commerce, Science and Transportation (Dec. 17, 1980) 104 F.T.C. 1070 (1984). In 1994 Congress amended the FTC Act to specify that an unfair act or practice causes or is likely to cause substantial injury to consumers that is not reasonably avoidable and is not outweighed by countervailing benefits to consumers or competition. Federal Trade Commission Act Amendments of 1994, Pub. L. No. 103-312, § 9, 108 Stat. 1691, 1695 (codified as amended at 15 U.S.C. § 45(n) (1994)). The amendment barred the Commission from relying on public policy considerations as the primary basis for an unfairness determination. *Id.* See generally Neil W. Averitt, *The Meaning of "Unfair Acts or Practices" in Section 5 of the Federal Trade Commission Act*, 70 GEO. L.J. 225 (1981) (discussing the basis and development of the Commission's unfairness doctrine).

5. See, e.g., *In re Taleigh Corp.*, No. C-3587 (FTC June 16, 1995) (final order) (ordering the respondents to cease and desist from charging a consumer's credit card account or debiting a consumer's checking account in an amount in excess of the amount affirmatively authorized by the consumer). Last year the Commission obtained two litigated preliminary injunction orders in which courts found it likely that the FTC would establish that unau-

A representation, omission, or practice is deceptive if it is likely to mislead consumers acting reasonably under the circumstances and if it is "material," that is, likely to affect consumers' conduct or decisions regarding the product or service at issue.⁶ A representation or claim made in an advertisement may be express or implied.⁷ An advertiser is responsible for all material claims that consumers take from the advertisement, not just the claims that the advertiser intended to make.⁸ For

thorized bank debits, credit card charges, or billings were unfair. *FTC v. Diversified Marketing Service Corp.*, Civ. 96-0388M (W.D. Okla. May 24, 1996); *FTC v. Windward Marketing, Ltd.*, 1:96-CV-615-FMH (N.D. Ga. Apr. 18, 1996). See also *FTC v. Amkraut*, No. 97-0354RSWL (BQRx) (C.D. Cal. Jan. 23, 1997), available in *FTC, FTC v. David L. Amkraut—Stipulated Final Judgment* (last modified Jan. 27, 1997) <<http://www.ftc.gov/os/9701/amkrautc.htm>> (settling allegations of deceptive and unfair practices in connection with the defendant's provision of green card lottery services). The complaint in *Amkraut* alleged two unfair practices: (1) submission of multiple entries in the State Department's green card lottery on behalf of consumers whose applications were then disqualified under State Department rules, and (2) failure timely to forward to lottery winners the materials necessary for them to apply for visas. *Id.* The order enjoined various misrepresentations and the defendant's knowing failure to comply with State Department regulations, practices, or procedures for green card lottery entries or visa applications, including the submission of multiple entries to the green card lottery on behalf of consumers who purchase defendant's green card lottery services. *Id.*

6. *Kraft, Inc. v. FTC*, 970 F.2d 311, 314 (7th Cir. 1992). The elements of deception are discussed in detail in the Commission's Deception Policy Statement. Letter from the Federal Trade Commission to Hon. John D. Dingell, House Committee on Energy and Commerce (Oct. 14, 1983), 103 F.T.C. 174 (1984) [hereinafter *Deception Statement*]. In determining whether an advertisement is deceptive, the Commission examines the overall net impression created by the advertisement and engages in a three-part inquiry: identification of the claims conveyed in the advertisement; determination of whether the claims are likely to mislead a consumer acting reasonably under the circumstances; and assessment of whether the claims are material. *In re Stouffer Foods Corp.*, 1994 FTC LEXIS 196, at *9-12 (Sept. 26, 1994); *Kraft*, 970 F.2d at 314. The Commission considers the effect of representations or practices targeted to a particular audience on reasonable members of that group. *Deception Statement, supra* at 175.

7. See *Stouffer*, 1994 FTC LEXIS 196, at *9 n.5 (explaining that "[e]xpress claims expressly state the representation at issue, while implied claims, which encompass all claims that are not express, can range from those that are virtually synonymous with express claims to very subtle language where only relatively few consumers discern that particular claim"). The Commission "may rely on its own reasoned analysis to determine what claims, including implied ones, are conveyed in a challenged advertisement, so long as those claims are reasonably clear from the face of the advertisement." *Kraft*, 970 F.2d at 319. For other implied claims, the Commission requires extrinsic evidence of consumer understanding, such as consumer testimony, expert opinion, copy tests, or surveys. *Deception Statement, supra* note 6, at 176 n.8. Even in cases in which a claim appears clear from the face of the advertisement, the Commission will carefully consider any extrinsic evidence of consumer understanding brought forward by staff or a proposed respondent. See *Stouffer*, 1994 FTC LEXIS 196, at *10-11, *28-30 (discussing how the Commission evaluates the quality and reliability of extrinsic evidence).

8. See *Deception Statement, supra* note 6, at 178. (stating "[w]hen a seller's representation conveys more than one meaning to reasonable consumers, one of which is false, the

example, an advertisement containing a claim that a food product is low in cholesterol is likely to imply that the product also is low in fat.⁹

Advertisers must have substantiation for any material claim at the time they make the claim.¹⁰ The substantiation requirement arises from the implied claim that an advertiser has a reasonable basis for statements made in an advertisement.¹¹ What constitutes a reasonable basis for a particular claim can vary, depending upon the nature of the claim, the product, the consequences of a false claim, the benefits of a truthful claim, the cost of developing substantiation for the claim, and the amount of substantiation that experts in the field believe is reasonable.¹² Health and safety claims generally require competent and reliable scientific evidence.¹³ If a marketer represents a particular level of support for the claim, such as "clinical studies prove . . .," the FTC requires at least that level of substantiation.

The Commission's consumer protection law enforcement actions at-

seller is liable for the misleading interpretation"). "A finding of materiality is also a finding that injury is likely to exist because of the representation, sales practice, or marketing technique." *Id.* at 183. Materiality is presumed for express claims, intentional implied claims, and claims that significantly involve health, efficacy, safety, or other areas with which reasonable consumers would be concerned, e.g., those pertaining to a product's purpose or cost. *Id.* at 182-83.

9. *In re Conopco, Inc.*, No. C-3706 (FTC Jan. 23, 1997) (final order), available in FTC, C3706—*In the Matter of Conopco, Inc.—Decision and Order* (last modified Jan. 28, 1997) <<http://www.ftc.gov/os/9701/c3706d&o.htm>> (settling an allegation that a failure adequately to disclose the total fat content of Promise margarine and spread was deceptive in light of the manufacturer's representation that its products have no dietary cholesterol). The order required an affirmative disclosure of the amount of fat per serving in any advertisement or promotional material for certain margarines and spreads that refers to the amount of cholesterol in such products. *Id.*

10. *In re Pfizer, Inc.*, 81 F.T.C. 23, 53-56 (1972) (finding that it is unfair to make an objective claim without having a reasonable basis for the claim). The Commission explained its substantiation requirements and enforcement policy in its 1984 Policy Statement Regarding Advertising Substantiation, appended to *In re Thompson Medical Co., Inc.* 104 F.T.C. 648, 839 (1984) [hereinafter *Substantiation Statement*]. See also *Removatron International Corp.*, 111 F.T.C. 206 (1988), *aff'd* 884 F.2d 1489 (1st Cir. 1989) (finding that respondent lacked a reasonable basis for efficacy claims for a hair removal device).

11. See *Substantiation Statement*, *supra* note 10, at 839.

12. *In re Pfizer*, 81 F.T.C. at 64; *Substantiation Statement*, *supra* note 10, at 840. See, e.g., *In re Thompson Medical Co.*, 104 F.T.C. at 844 (requiring that pain-relief claims for an over-the-counter ointment be substantiated by "at least two adequate and well-controlled, double-blinded clinical studies which conform to acceptable designs and protocols and are conducted by different persons").

13. The Commission interprets competent and reliable scientific evidence to mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area. Such tests or studies need to be conducted and evaluated in an objective manner by qualified persons, using procedures generally accepted in the relevant profession to yield accurate and reliable results.

tempt to prevent future harm to consumers,¹⁴ usually through the issuance of court or Commission orders prohibiting misleading practices.¹⁵ The Commission also may seek redress for consumers or disgorgement of illicitly obtained funds.¹⁶ If a court order is violated, the violators may be subject to civil or criminal contempt actions. Violators of Commission orders or regulations may incur monetary penalties.¹⁷ Before deciding to proceed with an enforcement action, the Commission must determine that it has reason to believe a violation occurred and that an action against the violation would be in the public interest.¹⁸ This determination involves a consideration of the risk that intervention to prevent harmful conduct may deter beneficial conduct.¹⁹

In addition to section 5 of the FTC Act, the Commission enforces a variety of other consumer protection statutes, such as the Fair Credit Reporting Act ("FCRA"),²⁰ that prohibit specific practices and may also provide that violations are to be treated as unfair or deceptive acts or practices under the FTC Act. The Commission also issues and enforces industry-wide Trade Regulation Rules addressing unfair or deceptive practices.²¹ Also, the U.S. Congress occasionally requires the FTC to issue rules addressing specific problems, such as the Telemarketing Sales Rule prohibiting fraudulent and abusive practices in the use of the telephone for marketing.²² Other regulatory tools available to the Commis-

14. See *Charles of the Ritz Distributors Corp. v. FTC*, 143 F.2d 676, 679 (1944) (stating that there is no merit to the distributor's argument that because "no straight-thinking person could believe that its cream would actually rejuvenate, there [was] no deception. . . . That law was not 'made for the protection of experts, but for the public—that vast multitude which includes the ignorant, the unthinking and the credulous'" (quoting *Florence Mfg. v. J.C. Dowd*, 178 F. 73 (2d Cir. 1910)).

15. See 15 U.S.C. § 53(b) (1994) (authorizing the Commission to seek injunctive relief in federal district court).

16. 15 U.S.C. § 57b (1994) (Remedies available "include, but shall not be limited to, . . . the refund of money or return of property").

17. 15 U.S.C. § 45(l) (1994) ("Any person . . . who violates an order of the Commission after it has been final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty . . ."); 15 U.S.C. § 45(m) (1994) ("The Commission may commence a civil action to recover a civil penalty . . . against any person . . . [who] violates any rule under this chapter respecting unfair or deceptive acts or practices.").

18. See 15 U.S.C. § 45 (b); *FTC v. Standard Oil Co. of California*, 449 U.S. 232, 241 (1980) (explaining that the "reason to believe" finding is "a threshold determination that further inquiry is warranted and that a complaint should initiate proceedings").

19. See generally Roscoe B. Starek, III, "Prosecutorial Discretion and Antitrust Enforcement Priorities," presented before the Common Ground Conference, Chicago, IL (Nov. 19, 1993).

20. Fair Credit Reporting Act, 15 U.S.C. §§ 1681—1681u (1994). The FCRA has significantly been amended by the Consumer Credit Reporting Reform Act of 1996 effective October 1, 1997.

21. See, e.g., Used Motor Vehicle Trade Regulation Rule, 16 C.F.R. § 455 (1997).

22. Telemarketing Sales Rule, 16 C.F.R. § 310 (1997).

sion include formal or informal guidance—through the issuance of industry-wide Guides, enforcement policy statements, or advisory opinions—on how to comply with section 5.²³

III. APPLICABILITY TO ON-LINE COMMERCE

The broad mandate of section 5 of the FTC Act extends to on-line commerce. As discussed below, the FTC has brought a number of cases enforcing section 5 against alleged on-line violations.

Many of the rules and other statutes enforced by the Commission also cover on-line commerce. Some of those most likely to be encountered in on-line commercial transactions are the FTC's Mail or Telephone Order Merchandise Rule, the Fair Credit Billing Act, and the Electronic Fund Transfer Act.

The Mail or Telephone Order Merchandise Rule²⁴ applies not only to goods ordered by mail or telephone but also to goods ordered by fax or computer. This Rule requires a company that advertises such goods to ship an order either within the time stated in its advertising or, if no time is stated, within thirty days.²⁵ If the company cannot ship in time, it must obtain the consumer's consent to the delay or promptly refund any money the consumer has paid for the unshipped merchandise.²⁶ The Commission recently settled alleged violations of this Rule by a major toy manufacturer in the sale of its collectible Barbie dolls. The manufacturer agreed to pay a substantial civil penalty and to abide by the Rule.²⁷

The FTC also enforces the Fair Credit Billing Act ("FCBA") against non-bank lenders and other lenders not specifically under the jurisdiction of other federal agencies.²⁸ This statute gives consumers considerable protections for open-end credit accounts. These protections apply to any payments made by a credit card or charge card, including those made in on-line transactions.²⁹ Consumers can write to creditors to inform them of billing errors, including unauthorized use of the account or charges for goods and services that were not provided. The consumer's

23. See, e.g., Guides for the Use of Environmental Marketing Claims, 16 C.F.R. § 260; Enforcement Policy Statement on Food Advertising, 59 Fed. Reg. 28,388 (1994); Nebraska Gasohol Committee, 116 F.T.C. 1522 (1993) (overruling an informal staff opinion and expressing the Commission's view that gasohol is covered by the definition of "automotive gasoline" in Title II of the Petroleum Marketing Practices Act and the Commission's Octane Rule).

24. The Mail or Telephone Order Merchandise Rule, 16 C.F.R. § 435 (1997).

25. 16 C.F.R. § 435.1(a)(1).

26. 16 C.F.R. § 435.1(b)(1).

27. U.S. v. Mattel, Inc. Civ. Action No. CV96-8983ER(CTx) (C.D. Cal. filed Dec. 23, 1996). See FTC, *Mattel to Pay Penalty for Violating Federal Rule* (last modified Dec. 23, 1996) <<http://www.ftc.gov/WWW/opa/9612/mattel.htm>>.

28. Fair Credit Billing Act, 15 U.S.C. §§ 1666—1666j (1994).

29. 15 U.S.C. § 1602(f) (defining who is a "creditor" for purposes of the FCBA).

written notice to the creditor of the billing error triggers the protections of the FCBA if the notice is received within sixty days after the first bill containing the error was mailed.³⁰ The creditor must conduct a reasonable investigation and either correct the mistake or explain why the bill is correct. Meanwhile, the consumer may withhold payment of the amount in question until the dispute is resolved, and the creditor cannot take any action to collect the amount, threaten to damage a consumer's credit rating, or report the consumer as delinquent to a credit bureau or anyone else.³¹ Creditors that violate the FCBA also may be sued by consumers for individual damages.³²

On-line transactions also need to comply with the applicable provisions of the Electronic Fund Transfer Act ("EFTA") and its implementing Regulation E.³³ The FTC's jurisdiction under the EFTA is similar to its jurisdiction under the FCBA: it enforces the Act against non-banks and other entities not specifically subject to the jurisdiction of other federal regulators.³⁴ The EFTA and Regulation E apply to most electronic fund transfers by an entity—whether a bank or not—that either holds a consumer's asset account or agrees to provide a consumer with electronic fund transfer services and gives the consumer a code or other way to begin an electronic transfer from the consumer's account.³⁵ Thus, companies that provide on-line banking services or any other on-line payment method that involves direct deposits to or withdrawals from a consumer's account need to comply with the EFTA and Regulation E.

Regulation E provides methods for correcting errors and resolving disputes.³⁶ It also requires providers to give consumers extensive disclosures about their rights.³⁷ Failure to make certain disclosures means that the consumer cannot be held liable by the provider for an unauthorized electronic transfer from the consumer's account.³⁸ Even when the disclosures are provided, consumer liability for unauthorized use is limited to as little as \$50 or as much as \$500, depending upon specified con-

30. 15 U.S.C. § 1666(a).

31. 15 U.S.C. § 1666a.

32. 15 U.S.C. § 1666i.

33. Electronic Fund Transfer Act, 15 U.S.C. §§ 1693—1693r (1994); Electronic Fund Transfers (Regulation E), 12 C.F.R. § 205 (1997).

34. 15 U.S.C. § 1693o(c).

35. 15 U.S.C. § 1693a (definitions); 12 C.F.R. § 205.2(i) (definition of "financial institution"); 12 C.F.R. § 205.3 (coverage of Regulation E).

36. 15 U.S.C. § 1693f; 12 C.F.R. § 205.11.

37. 12 C.F.R. § 205.7 (initial disclosures); 12 C.F.R. § 205.8 (change-in-terms and error resolution notices). *See also* 12 C.F.R. § 205.15(d) (modified disclosure requirements for certain government agencies); 12 C.F.R. § 205.14(b)(1). (requiring providers not holding a consumer's account to make disclosures within the purview of relationship with the consumer).

38. 12 C.F.R. § 205.6(a).

ditions.³⁹ Some providers also must give consumers a documentary record of their electronic fund transfers, both at the time of each transfer and in periodic account statements.⁴⁰

Under certain circumstances, even non-financial institutions that receive payment via electronic fund transfer may have to comply with the EFTA and Regulation E.⁴¹ For example, a person who will be paid by a recurring electronic fund transfer may need to obtain the consumer's written authorization in advance and may need to notify the consumer in advance if the amount of a particular transfer will vary from the pre-authorized amount or range of amounts.⁴² Companies involved in recurring on-line payment methods would be well advised to determine their responsibilities under the EFTA and Regulation E.

The Commission just accepted consent agreements for public comment against three major on-line service providers settling allegations that the companies violated the EFTA and Regulation E by failing to obtain written authorization in advance for electronic debits of consumers' bank accounts and by failing to provide prior written notice of transfers varying in amount from previous transfers.⁴³ As on-line payment methods become more common, enforcement of the EFTA may well increase.

IV. LAW ENFORCEMENT ACTIONS INVOLVING ON-LINE MARKETING

Commission enforcement actions involving on-line commerce allege violations of section 5 of the FTC Act and primarily address fraudulent

39. 12 C.F.R. § 205.6(b).

40. 12 C.F.R. § 205.9. *See also* 12 C.F.R. § 205.14(b)(1) (exception for provision of periodic statement by provider not holding consumer's account); 12 C.F.R. § 205.15(c) (allowing government agency to use alternative to periodic statement).

41. 15 U.S.C. § 1693e (preauthorized transfer); 12 C.F.R. § 205.3(a) (stating that sections dealing with preauthorized transfers (205.10 (b), (d)), compulsory use (205.10(e)), and record retention (205.13) apply to "any person").

42. 15 U.S.C. § 1693e; 12 C.F.R. § 205.10(b), (d).

43. *See In re America Online, Inc.*, No. 952-3331 (FTC May 1, 1997) (consent agreement placed on the public record), available in FTC, *In the Matter of America Online, Inc.—Consent Agreement Package* (last modified May 1, 1997) <<http://www.ftc.gov/os/9705/amer-onli.htm>>; *In re CompuServe, Inc.*, No. 962-3096 (FTC May 1, 1997) (consent agreement placed on the public record), available in FTC, *In the Matter of CompuServe, Inc.—Consent Agreement Package* (last modified May 1, 1997) <<http://www.ftc.gov/os/9705/com-puser.htm>>; *In re Prodigy Services Corp.*, No. 952-3332 (FTC May 1, 1997) (consent agreement placed on the public record), available in FTC, *In the Matter of Prodigy Services Corporation—Consent Agreement Package* (last modified May 1, 1997) <<http://www.ftc.gov/os/9705/prodigy.htm>>. *See generally* FTC, *America Online, CompuServe and Prodigy Settle FTC Charges Over "Free" Trial Offers, Billing Practices* (last modified May 5, 1997) <<http://www.ftc.gov/opa/9705/online.htm>> (describing the allegations against each on-line service company and the consent agreements each entered into with the FTC).

on-line marketing. So far, these have targeted credit repair schemes, business opportunities, pyramid scams, and deceptive billing practices.

The Commission's first Internet case, filed in September of 1994, involved a classic credit repair scam.⁴⁴ The defendant ran advertisements on America Online, offering a credit repair kit. He falsely represented that purchasers of his kit could legally establish a new credit history. The FTC filed an ex parte complaint, charging the defendant with violations of section 5. The court entered an order granting temporary relief and freezing the defendant's assets. Two months later, the court entered a consent decree that prohibits the defendant from making misrepresentations concerning credit repair programs and requires him to pay consumer redress.⁴⁵

The Commission soon followed that success by applying a technique that it increasingly has relied on in the past few years: a sweep. A sweep is a highly publicized group of enforcement actions that attack the same types of law violations, such as fraudulent prize promotions or advance fee loan scams. The Commission generally coordinates its sweeps with states, other federal agencies, and, in some instances, foreign law enforcement authorities.⁴⁶ This approach makes efficient use of information that is shared among different law enforcement authorities. It results in greater publicity for law enforcement actions that, in turn, increases consumer awareness of fraud and deters fraudulent marketers.

The Commission's Operation NetScam sweep targeted nine companies that made false or unsubstantiated claims about a variety of products and services marketed on the Internet or on-line services.⁴⁷ The result was eight negotiated consent orders and one action in federal district court that settled after six months of litigation. Four of these cases involved credit repair programs that, for an advance fee, falsely promised to remove accurate and up-to-date information from consumers' credit reports.⁴⁸ The orders prohibit these and related misrepresenta-

44. *FTC v. Corzine*, CIV-S-94-1446 (E.D. Cal. filed Sept. 12, 1994).

45. *FTC v. Corzine*, CIV-S-94-1446 (E.D. Cal. Nov. 21, 1994).

46. Project Loan Shark, for example, targeted 45 corporations and individuals that guaranteed to provide or find loans for victims who paid an advance fee. *FTC, Crackdown on U.S. & Canadian Loan Boiler Rooms: FTC, States Net 13 Scams Pitching Loans That Never Arrive* (last modified June 12, 1996) <<http://www.ftc.gov/WWW/opa/9606/aflrls.htm>>. States filed eight cases and the FTC filed five cases alleging Rule violations, thanks to cooperation among the Commission, 15 states, and Canadian law enforcement authorities. *Id.* The Canadian province of British Columbia simultaneously initiated enforcement proceedings under its laws against the Canadians involved in one of the scams. *Id.*

47. *FTC, FTC Tackles Fraud on the Information Superhighway; Charges Nine On-line Scammers* (last modified Mar. 16, 1996) <<http://www.ftc.gov/WWW/opa/9603/netsc.htm>>.

48. *In re Lyle R. Larson*, No. C-3672 (FTC June 12, 1996) (final order), available in *FTC, Commission Actions: June, 1996* (last modified Nov. 6, 1996) <<http://www.ftc.gov/os/>

tions about methods of removing adverse information from a credit report and the legality of credit repair products. Three of the sweep cases involved misrepresentations about the earnings of business opportunities, ranging from the sale of a publishing and printing home business to a service for locating persons owed money by the federal government.⁴⁹ In these cases, the Commission's consent orders require the respondents to stop making misrepresentations concerning the earnings potential of any business opportunities. Some of the orders also require that claims about past, present, or future earnings or income be supported by competent and reliable evidence. Another target of the sweep falsely claimed to locate "free" cash grants for fee-paying customers.⁵⁰ The order prohibits misrepresentations about the number of persons approved for grants and about services or assistance for obtaining grants, loans, or other financial products or services.

Finally, the Internet sweep also netted defendants who offered computer memory chips for sale by posting advertisements in a Usenet newsgroup.⁵¹ The defendants received money from consumers who ordered the chips, but almost never shipped any product or returned the money.⁵² The FTC filed an *ex parte* complaint, charging defendants with violations of section 5 and the Commission's Mail or Telephone Order Merchandise Rule.⁵³ On the same day, the court entered an order grant-

9606/index.htm>; *In re* Rick A. Rahim, No. C-3671 (FTC June 12, 1996) (final order), available in FTC, *Commission Actions: June, 1996, supra*; *In re* Martha Clark, No. C-3667 (FTC June 10, 1996) (final order), available in FTC, *Commission Actions: June, 1996, supra*; *In re* Bryan Coryat, No. C-3666 (FTC June 10, 1996) (final order), available in FTC, *Commission Actions: June, 1996, supra*.

49. *In re* Robert Serviss, No. C-3669 (FTC June 12, 1996) (final order), available in FTC, *Commission Actions: June, 1996, supra* note 48; *In re* Sherman G. Smith, No. C-3668 (FTC June 12, 1996) (final order), available in FTC, *Commission Actions: June, 1996, supra* note 48; *In re* Timothy R. Bean, No. C-3665 (FTC June 10, 1996) (final order), available in FTC, *Commission Actions: June, 1996, supra* note 48.

50. *In re* Randolph D. Albertson, No. C-3670 (FTC June 12, 1996) (final order), available in FTC, *Commission Actions: June, 1996, supra* note 48.

51. *FTC v. Brandzel*, 96 C. 1440 (N.D. Ill. filed Mar. 13, 1996). See also *FTC, Internet Advertiser Settles FTC Charges: Agency's On-line Fraud Enforcement Continues* (last modified Sep. 25, 1996) <<http://www.ftc.gov/WWW/opa/9609/telemed.htm>> [hereinafter *U.S. Telemedia*].

52. *U.S. Telemedia*, *supra* note 51. Consumers who responded to the advertisement were told that they would have to make advance payments by cashiers check or money order before receiving shipment of their order. *Id.*

53. *U.S. Telemedia*, *supra* note 51. The FTC specifically charged U.S. Telemedia and its principal officer, Robert Brandzel, with failing to deliver merchandise in a timely manner and failing to provide refunds to consumers who did not receive the chips they ordered, or did not get them in a timely manner. *Id.* The Commission's Mail or Telephone Order Merchandise Rule requires merchandise to be sent within thirty days or within the time period advertised by the seller. 16 C.F.R. § 435.

ing temporary relief and freezing the defendants' assets.⁵⁴ The case settled about six months later with a court order that prohibits misrepresentations about when the defendants will deliver ordered items and about any fact material to a consumer's decision to purchase goods and services from the defendants.⁵⁵ The settlement also requires the defendants to abide by the Commission's Mail Order Rule and to pay \$5,500 for consumer redress.⁵⁶

Following Operation NetScam, the Commission brought another federal court action against a credit repair firm that had posted an advertisement in thousands of Usenet newsgroups.⁵⁷ A settlement resulted in the entry of an order that enjoins the defendants from misrepresenting various aspects of their credit repair services, and requires them to make affirmative disclosures to consumers about fair credit laws and the limitations of credit repair services.⁵⁸ The defendants were also required to pay \$17,500 for consumer redress.

The largest Internet case that the Commission has brought to date involves Fortuna Alliance, a pyramid investment scheme marketed through a site on the World Wide Web ("Web").⁵⁹ The defendants represented that consumers who invested \$250 would receive an income of \$5,000 per month. In addition, they encouraged investors to set up their Web sites to propagate the scheme, and provided them with advice and promotional materials to help them do so. A number of consumers actually set up such sites. In fact, this was a high-tech version of a classic Ponzi scheme, with guaranteed losses for the great majority of investors. As in all pyramid schemes, the promised income stream depends on the continued recruitment of new investors. Whenever membership stops growing, the pyramid will collapse.

In May 1996, the FTC filed an ex parte complaint, charging defendants with violations of section 5. The next day, the court issued an order

54. *U.S. Telemedia*, *supra* note 51; *FTC v. Brandzel*, 96 C. 1440 (N.D. Ill. filed Mar. 13, 1996).

55. *FTC v. Brandzel*, 96 C. 1440 (N.D. Ill. Sept. 10, 1996).

56. *FTC v. Brandzel*, 96 C. 1440 (N.D. Ill. Sept. 10, 1996). In addition, Brandzel must notify the FTC before establishing any World Wide Web site. *Id.*

57. *FTC v. Consumer Credit Advocates*, 96 Civ. 1990 (S.D.N.Y. filed Mar. 19, 1996). See also *FTC, Internet Marketers of Credit Repair Program to Pay \$17,500 in Redress Under Settlement With the FTC* (last modified Mar. 21, 1996) <<http://www.ftc.gov/WWW/opa/9603/consum.htm>> [hereinafter *Deceptive Credit Repair*].

58. *Deceptive Credit Repair*, *supra* note 57. The settlement also prohibits defendants from taking measures to collect any debts from their current and former credit repair clients. *Id.*

59. *FTC v. Fortuna Alliance, L.L.C.*, Civ. No. C96-799M (W.D. Wash. filed May 23, 1996). See also *FTC, Internet Pyramid Operators, Fortuna Alliance, Could Return Over \$5 Million to Consumers*. (last modified Feb. 24, 1997) <<http://www.ftc.gov/WWW/opa/9702/fortuna4.htm>>.

temporarily freezing the defendants' assets, appointing a receiver to manage the company, and requiring defendants to repatriate company funds that were transferred to overseas accounts. The court later extended this relief and then held several defendants in contempt for failure to comply with the requirement to repatriate assets. When the funds still were not repatriated, the court issued civil arrest warrants against three of the individual defendants, ordering that they be arrested and jailed until they either complied with the repatriation order or proved that they were unable to repatriate any foreign funds.

The scheme took in between \$6 million and \$11 million from some 30,000 to 40,000 consumers in 60 countries who paid membership fees ranging from \$250 to \$1,750. The defendants transferred over \$5 million in profits to offshore bank accounts. Most of this money ended in an account at a bank located in Antigua. At the FTC's request, the Department of Justice brought a successful action in an Antiguan court, freezing defendants' Antiguan funds pending resolution of the FTC action.

The case recently settled on terms that make available to investors in the scheme refunds that may total over \$5 million.⁶⁰ The defendants are barred from participating or assisting in the promotion or sale of any chain or pyramid marketing program and from making misrepresentations about the earnings of any marketing or investment program they offer.

In a creative adaptation of the defendants' use of the Internet, the court-appointed receiver removed the promotional materials from Fortuna's Web site, replacing them with a notice of the FTC's action, including a hypertext link to the FTC's Web site where consumers could obtain additional information about the lawsuit. In fact, in several cases involving deceptive advertising on Web sites, the Commission has sought similar relief that takes advantage of the ease with which information can be disseminated on the Internet.⁶¹

60. *Fortuna Alliance*, Civ. No. C96-799M (W.D. Wash. Feb. 24, 1997). See also FTC, *Internet Pyramid Operators, Fortuna Alliance, Could Return Over \$5 Million to Consumers*, *supra* note 59.

61. See, e.g., *FTC v. Infinity Multimedia, Inc.*, No. 96-6671-CIV-Gonzalez (S.D. Fla. filed June 24, 1996); *FTC v. The Mentor Network, Inc.*, No. SACV96-1104 LHM (EEEx) (C.D. Cal. filed Nov. 5, 1996); *FTC v. Audiotex Connection Inc.*, CV-97-0726 (E.D.N.Y. filed Feb. 13 1997), available in *FTC, FTC v. Audiotex Connection, Inc., et al.* (last modified Feb. 29, 1997). <<http://www.ftc.gov/WWW/os/9702/audiotex.htm>>. *Infinity Multimedia* resulted in an order freezing assets and halting sales of pre-packaged small businesses by firms that allegedly used false earnings claims and phony references or "shills" to induce consumers to pay thousands of dollars for distributorships. *FTC, CD-ROM Display Rack Franchisers to Pay Redress Under Settlement of FTC Fraud Charges* (last modified Sept. 24, 1996) <<http://www.ftc.gov/WWW/opa/9609/infini3.htm>>.

The Commission continues to pursue pyramid schemes on the Internet. Two cases included in another Commission sweep—Operation Missed Fortune—involved pyramid investments that purported to turn over some of the fees paid by investors to charities.⁶² The Commission obtained court orders shutting down the pyramids and freezing the defendants' assets pending resolution of the ongoing litigation.

A few months ago, the Commission staff and other law enforcement agencies participated in Internet Pyramid Surf Day,⁶³ a joint effort to identify similar law violations. The ease with which consumers can surf the Web also allows law enforcers to seek out potentially deceptive on-line advertisements. Commission staff regularly monitor the Internet and on-line services, and some investigations have come about as the result of on-line solicitations received or found by Commission staff. The Internet Pyramid Surf Day campaign identified more than 500 Web sites that may be operating illegal pyramid schemes, lotteries, or chain letters. Commission staff sent e-mail messages to the site operators warning them of possible law violations and will follow up if problems continue. A similar effort targeting phony business opportunity scams was announced on April 24, 1997, by the FTC and the North American Securities Administrators Association.⁶⁴

Another recent Internet case involves a scam that was accomplished by on-line technology. In February, the Commission obtained a court order temporarily shutting down a scam that enticed consumers to download a program to view the defendants' "adult entertainment" Web sites that—without the consumers' knowledge—disconnected their computers from their own local Internet service providers and reconnected

62. See *FTC v. The Mentor Network, Inc.*, No. SACV96-1104 LHM (EEx)(C.D. Cal. filed Nov. 5, 1996); *FTC v. Global Assistance Network for Charities*, Civ. No. 96-02494 PHX RCD (D. Ariz. filed Nov. 5, 1996). *Mentor Network* recently settled on terms that require the defendants to pay \$75,000 for consumer redress and prohibit them from operation of any chain or pyramid scheme. *FTC v. The Mentor Network, Inc.*, No. SACV96-1104 LHM (EEx) (C.D. Cal. Mar. 25, 1997). See also *FTC, Internet Pyramid Scheme Marketers to Pay \$75,000 in Redress under Settlement with FTC* (last modified Mar. 18, 1997) <<http://www.ftc.gov/opa/9703/mentor2.htm>>. In April 1997, the court entered a consent decree in *Global Assistance* that, among other things, prohibits misrepresentations in the sale of any good or service and bans defendants from selling or offering for sale memberships or participation rights in any multi-level marketing, investment, or charitable donation program. *FTC v. Global Assistance Network for Charities*, Civ. No. 96-02494 PHX RCD (D. Ariz. Apr. 24, 1997). See also *FTC, Internet Pyramid Operators Settle FTC Charges: Get-Rich-Quick Charity Scheme Shut Down* (last modified May 12, 1997) <<http://www.ftc.gov/opa/9705/ganc.htm>>.

63. *FTC, Federal-State Surfing Catches a Wave of Potential Internet Scams; Over 500 Pyramid Operations Put on Notice* (last modified Dec. 16, 1996) <<http://www.ftc.gov/WWW/opa/9612/surf.htm>>.

64. See *FTC, FTC, State Securities Regulators Target Business Opportunity Fraud on the Internet* (last modified Apr. 24, 1997) <<http://www.ftc.gov/WWW/opa/9704/bizop.htm>>.

the computers to a phone number in Moldova.⁶⁵ The program turned off consumers' modem speakers, preventing them from detecting the rerouting of their connection.⁶⁶ Even after consumers who downloaded this program left the defendants' Web sites, their computers remained connected to the international long distance number until the consumers turned off their computers.⁶⁷ The defendants failed to disclose that consumers would be billed for an international long distance call to Moldova or that they had to turn off their computers to end the call.⁶⁸ The FTC later obtained a stipulated preliminary injunction prohibiting the allegedly fraudulent practices and requiring the defendants to place \$1 million of their assets in an escrow account pending a resolution of the litigation.

In addition to cases attacking scams that primarily relied on the use of on-line commerce, the Commission is now seeing more cases in which the Internet was simply one of several media used for advertising. For example, last year the Commission issued a consent order against a retail marketer and its president, settling allegations that they marketed a variety of consumer products in violation of section 5.⁶⁹ For the most part, they advertised these products through traditional channels—radio and print advertisements and a mail-order catalog—but they also maintained a Web site.

Finally, the Commission recently announced that it had accepted for comment consent agreements against America Online, Inc. ("AOL"), CompuServe, Inc., and Prodigy Services Corp. settling allegations that these companies violated section 5 by misrepresenting and failing adequately to disclose the terms of free trial offers of their on-line services.⁷⁰

65. *Audiotex Connection*, No. CV-97-0726 (E.D.N.Y. filed Feb. 13, 1997). *See also* FTC, *FTC Says Internet Scam Re-Routes "Surfers" to International Telephone Lines* (last modified Feb. 24, 1997) <<http://www.ftc.gov/opa/9702/audiotex.htm>>.

66. *Internet Scam Re-Routes "Surfers," supra* note 65.

67. *Internet Scam Re-Routes "Surfers," supra* note 65.

68. *Internet Scam Re-Routes "Surfers," supra* note 65.

69. Although the Commission voted unanimously to accept all three consent agreements for comment, Commissioner Starek dissented with respect to the consumer education remedy in the proposed order against AOL. In his view, the remedy is "too broad to be reasonably related to AOL's alleged law violations" or, if it were sought in litigation rather than achieved through settlement, to pass First Amendment scrutiny. He concluded that "[e]ven if a respondent waives its First Amendment rights in a consent agreement, the Commission — as a government agency acting in the public interest — should not compel speech through negotiation that it has no colorable chance of obtaining in litigation." *See* Statement of Commissioner Roscoe B. Starek, III, Concurring in Part and Dissenting in Part in *America Online, Inc.*, No. 952-3331 (FTC May 1, 1997), available in FTC, *Statement of Comm. Roscoe B. Starek, III—America Online, Inc.* (last modified May 1, 1997) <<http://www.ftc.gov/os/9705/starekaol.htm>>.

70. *In re Zygon International, Inc.*, No. C-3686 (FTC Sept. 24, 1996) (final order), available in FTC, *FTC Decision and Order—Docket No. C-3686—Zygon International, Inc.* (last

AOL also allegedly violated section 5 of the FTC Act by misrepresenting and failing adequately to disclose its practice of adding a fifteen second surcharge to each on-line session and by misrepresenting the terms of its checking account debiting program. As discussed above, all three companies were alleged to have violated the EFTA and Regulation E in connection with consumers' authorization of electronic payments. The challenged misrepresentations and failures to disclose occurred during the on-line registration process and in advertising in a variety of media.

The proposed orders would prohibit misrepresentations about the terms or conditions of trial offers for on-line services. In addition, the proposed order against AOL would prohibit misrepresentations of billing practices and the terms of any electronic fund transfer program it uses. The companies all would be required to comply with the EFTA and Regulation E provisions they allegedly violated.

The proposed Commission orders are the first to address how to make clear and prominent disclosures on-line. First, they would prohibit representations that an on-line service is "free" unless the respondents disclose clearly and prominently any obligation to cancel or take other affirmative action to avoid charges. For representations made in instructional materials, the disclosure must be in a type size and in a location sufficiently noticeable so that an ordinary consumer could notice, read, and comprehend the disclosure. For claims made in other media, including an interactive network, the companies must use a statement directing consumers to a location where the full required disclosures will be available. The characteristics of the required statement vary slightly according to whether it is made in audio, video, or print, but in any medium it must be noticeable and comprehensible to an ordinary consumer.

Second, the proposed orders also would require the companies to disclose clearly and prominently during the registration process the terms of all mandatory financial obligations consumers will incur, including any membership or usage fees, and any obligation to cancel or to take other action to avoid charges. The companies must provide at least one reasonable means for consumers to cancel their membership. AOL additionally is required to disclose during registration the manner in which fees or charges are assessed and calculated. AOL may satisfy this requirement by disclosing that additional charges might apply, informa-

modified Nov. 6, 1996) <<http://www.ftc.gov/os/9609/c3686d&o.htm>>. Zygon International, Inc., a Redmond, Washington based company that marketed the "Learning Machine" and other similar products, agreed to pay up to \$195,000 in refunds. *Id.* The "Learning Machine," and other Zygon products, purported to aid users to accelerate learning, lose weight, quit smoking, increase I.Q., learn foreign languages, and improve vision, as well as other sensational claims. *Id.* See also FTC, *Marketer of "Learning Machine" to Give Refunds Under Settlement with FTC Over Unsubstantiated Claims* (last modified Apr. 5, 1996) <<http://www.ftc.gov/WWW/opa/9604/zygon.htm>>.

tion about assessing and calculating fees or charges can be found on-line, and the exact location where this information can be found.

All of the registration disclosures must be of a size and shade and appear for a length of time sufficient for an ordinary consumer to notice, read, and comprehend them. Moreover, the disclosures must "not be avoidable" by consumers. This standard leaves the companies with some flexibility. For example, it could be satisfied by placing the disclosures on a screen or screens that consumers must access during the registration process.

The proposed order against AOL also would require AOL to establish a year-long consumer education program about the use of electronic payment systems. This comprehensive program would entail the preparation and distribution of at least 50,000 brochures, the posting of information on the Internet, and the creation of a reference to such information on AOL's on-line service. The order would require the program to include information about various types of electronic payment systems and how to use them; obligations of consumers, merchants, and financial institutions using such systems; ways for consumers to attempt to prevent the fraudulent use of these systems; various legal protections for consumers using them; and organizations, including law enforcement agencies, to contact for further information.⁷¹ As the Commission continues to explore all avenues to protect consumers from deception, it would not be surprising to see similar consumer education remedies in matters involving on-line commerce.

Although most of the Commission's on-line commerce cases have been directed at egregious forms of fraud, FTC enforcement of section 5 and other statutes obviously is relevant to the on-line activities of legitimate businesses. To the extent that consumers lack confidence in on-line commerce because of fraud or other deceptive or unfair practices, they may be less willing to participate in on-line transactions. In addition, as some of the FTC's most recent on-line cases demonstrate, the FTC will take action against non-fraudulent violations of the laws enforced by the agency. Thus, any business that markets on-line, or plans to do so, has interests in ensuring that its on-line marketing complies with those laws.

V. NON-REGULATORY METHODS OF PROTECTING CONSUMERS IN ON-LINE COMMERCE

The FTC also relies on non-regulatory methods of protecting consumers. The Commission's Office of Public Affairs works hard to publicize the Commission's law enforcement actions in conjunction with

71. See *supra* note 43.

consumer and business education campaigns. Consumers often can be their own best protectors, when armed with accurate and sufficient information. Similarly, responsible businesses often find it advantageous to take steps both to build consumer confidence in their industries and to protect consumers from being lured away by deceptive practices. The easy and inexpensive accessibility of the Internet is particularly attractive to individuals and small companies that are new to the advertising arena and may be unfamiliar with the general requirements of advertising law. Educating this group as to the appropriate rules could go a long way toward curtailing deceptive advertising on the Internet.

The Commission's Office of Consumer and Business Education, sometimes in cooperation with private businesses or consumer organizations, produces publications targeted at particular consumer problems and compliance requirements. Many of these publications are available on the Commission's home page.⁷² Consumers who have computers with audio capability can even hear a sample deceptive telemarketing sales pitch. The Commission's home page—and the home pages of organizations like the Council of Better Business Bureaus ("BBBs")⁷³ and the National Fraud Information Center of the National Consumers League⁷⁴—alert on-line consumers to the latest scams and provide a simple and direct way to for them to complain about possible law violations.

The FTC traditionally has distributed its consumer information brochures to key information sources throughout the United States, including state and local government offices, national consumer and business organizations, BBBs, and universities. Placing news releases and consumer information brochures on-line now spreads the word even further, alerts consumers to the latest scams, and encourages people doing business on-line to avoid deceptive practices.

In March 1997, the Commission's Web site received more than one million "hits." Some of these came from foreign countries: Australia, Canada, and Japan are the most frequent source of foreign visitors, and the Netherlands, the United Kingdom, and Germany provide the most regular European visitors.

The use of Internet technology to help consumers protect themselves and to encourage compliance by businesses, although not a panacea, is promising. For example, the Council of BBBs recently began an innovative on-line seal of approval program funded by major corporate sponsors. This umbrella organization represents local BBBs, which are

72. *Federal Trade Commission Home Page* (last modified Apr. 22, 1997) <<http://www.ftc.gov>>.

73. *The Better Business Bureau Web Server for U.S. and Canada* (last modified Apr. 21, 1997) <<http://www.bbb.org>>.

74. *National Fraud Information Center* (last modified Apr. 15, 1997) <<http://www.fraud.org>>.

private organizations of businesses that promote ethical business practices through voluntary self-regulation and consumer and business education. With help from a BBB, consumers often can satisfactorily resolve their complaints against companies that may have deceived them. Under the "BBBOnLine" seal of approval program, companies that agree to abide by BBB truth-in-advertising standards and dispute resolution procedures to protect consumers may use the authorized and encrypted "BBBOnLine" seal in their on-line advertising.⁷⁵ If a consumer, a competitor, or the BBB challenges the truth or accuracy of an on-line claim, BBBOnLine participants are required to cooperate with a formal advertising review process administered by the Council of BBB's National Advertising Division ("NAD").⁷⁶

NAD resolves complaints from competitors or consumers about allegedly false or misleading claims about products or services. Last year, it began monitoring postings on Internet newsgroups and on-line services. It already has issued several decisions concerning on-line advertising.⁷⁷ When an advertiser refuses to stop making claims that NAD finds deceptive or refuses to give NAD information, NAD refers the case to the FTC. In response to NAD's findings, almost all advertisers agree to modify or delete offending claims.

A certification approach like the BBBOnLine program might easily be adapted to the needs of private companies and trade associations. In fact, in the privacy area, a number of on-line vendors have developed proprietary logos guaranteeing various levels of privacy protections. Companies agree by contract to abide by the applicable privacy rules for the logos they choose to use. Enforcement of this regime depends on private action against the companies that violate the rules to which they have agreed and against unauthorized users of the proprietary logos.

Nonetheless, although voluntary self-regulation may do much to make on-line commerce more attractive to consumers, in any medium there will always be scam artists that flout the law and aggressive marketers that test its boundaries. For these reasons, the FTC is likely to continue to actively enforce consumer protection laws on-line.

75. BBBOnLine Home Page (visited Apr. 22, 1997) <<http://www.bbbonline.org>>.

76. BBBOnLine Program Standards (visited Apr. 22, 1997) <<http://www.bbbonline.org/standard.html>>.

77. *See, e.g.*, Genevieve International, Inc., 26 NAD Case Reports 349 (Jan. 1997) (finding health claims for serpentine herbs unsubstantiated); Tenba Quality Cases, Inc., 26 NAD Case Reports 307 (Nov. 1996) (finding endorsements for computer cases did not reflect current opinions of the authors or were unsupported); Vexco Healthcare, Inc., 26 NAD Case Reports 264 (Oct. 1996) (finding efficacy claims for cold sore ointment not substantiated by marketing study).

VI. COMMISSION EXAMINATION OF ON-LINE COMMERCE

The Commission seeks to learn about developments in on-line commerce and how they may affect its consumer protection and competition missions. Indeed, the Commission has hosted several conferences and participated in several federal government agency working groups on topics such as electronic money and privacy. In the Spring of 1995, the Commission looked at advertising, marketing, electronic payment systems, consumer privacy issues, and industry self-regulation of on-line marketing. This meeting was followed in November 1995 by the FTC's hearings on Consumer Protection Policy in the New High-Tech, Global Marketplace, which focused on rapidly changing technologies, including those used in electronic commerce.⁷⁸ In 1996, the Commission met with business and consumer groups to learn more about the growing problem of identity theft.

In particular, the Commission is actively examining the implications of electronic commerce for consumer privacy. In June 1996, the Commission hosted a public workshop on Consumer Privacy on the Global Information Infrastructure.⁷⁹ The privacy workshop was part of an effort to enhance the Commission's understanding of on-line privacy issues. There are no plans for the Commission to issue privacy guidelines or regulations. Instead, consistent with its usual market-oriented approach, the Commission is looking first to businesses to address privacy issues through voluntary measures, rather than assuming that an expanded government role is necessary.

The staff report on the workshop is intended to assist anyone who is developing policies and mechanisms for protecting consumer privacy on-line.⁸⁰ It summarizes the views of the workshop participants, including on-line service providers, direct marketers, privacy advocates, information industry representatives, consumer groups, trade associations, and academics.

The report states that workshop participants agreed that consumers are concerned about the on-line collection of personal information generally, but particularly so when information is collected from children. Consumer concerns about privacy may cause consumers to limit their use of on-line technologies, and workshop participants agreed that privacy concerns need to be addressed if on-line commerce is to thrive. There also was broad agreement that the elements of effective consumer privacy protection on-line included notice, choice, security, and access.

78. *Consumer Protection Policy*, *supra* note 2.

79. FTC, *Public Workshop on Consumer Privacy on the Global Information Infrastructure* (last modified Jan. 6, 1997) <<http://www.ftc.gov/bcp/conline/pubs/privacy/privacy1.htm>>.

80. *See id.*

Workshop participants concluded that consumers should receive notice of information practices and be able to choose whether and how their personal information is used. They also agreed that security of personal information was essential, but that consumers should have access to their own information. However, when it came to specific ways to accomplish these goals, opinions varied considerably.

The report recommended that the Commission keep abreast of technological and self-regulatory developments that affect privacy protection on-line by convening a follow-up workshop. Not surprisingly, the Commission recently announced that another privacy workshop will be held on June 10-13 and solicited public comment to prepare for that workshop.⁸¹ One session of the workshop will gather information as part of a Commission study of computerized databases addressing questions that arose in Fall 1996 following the highly publicized availability of sensitive information on computerized research services.⁸² The remaining two sessions will gather new information about on-line privacy generally and children's on-line privacy.⁸³ The four-day workshop also will cover the use of unsolicited commercial e-mail.⁸⁴ Commission staff will consider the comments in determining what, if any, further action to recommend to the Commission.⁸⁵

Since it is in the interest of businesses participating in on-line commerce to address consumers' privacy concerns, the market is responding with a variety of solutions. There are numerous private initiatives, and the Commission may learn about others at the next workshop. Technological solutions to privacy concerns can allow for the blocking of sensitive information or for the use of ratings systems that can help consumers identify Internet sites with privacy protections that those consumers prefer. At the FTC privacy workshop, one participant demonstrated how a voluntary privacy ratings system could work using Platform for Internet Content Selection ("PICS").⁸⁶

As noted earlier, several on-line vendors have developed proprietary logos guaranteeing various levels of privacy protection. A number of trade associations in the United States have recently issued voluntary

81. FTC, *FTC: Public Workshop on Consumer Information Privacy* (last modified Mar. 4, 1997) <<http://www.ftc.gov/os/9703/privacy.htm>>.

82. See Carolyn Thompson, *New Lexis-Nexis Service to Stop Revealing Social Security Numbers*, BOSTON GLOBE, June 14, 1996, at 39 (addressing the Lexis-Nexis service that allowed users to view information about individuals who had previously applied for any type of credit).

83. FTC, *FTC: Public Workshop on Consumer Information Privacy*, *supra* note 81.

84. *Id.*

85. *Id.*

86. See *Platform for Internet Content Selection* (last modified Apr. 16, 1997) <<http://www.w3.org/pub/WWW/PICS/>>.

on-line privacy guidelines that may help prevent consumer deception. Other business groups are seeking to develop guidelines to respond to the concerns of their customers about privacy. In addition, the Coalition for Advertising Supported Information and Entertainment, a self-regulatory program of the advertising industry in the United States, has come up with a list of privacy goals for marketing on interactive media. The Children's Advertising Review Unit of the Council of BBBs just issued an updated version of its Self-Regulatory Guidelines for Children's Advertising that addresses on-line marketing to children, including the collection of information about children. Such private initiatives may avert calls for more intrusive government regulation of on-line commerce.

VII. ENFORCEMENT ISSUES RAISED BY THE INTERNET

The nature of on-line commerce raises many interesting questions about the application of section 5. For example, on-line entertainment increasingly constitutes—or at least contains—advertisements. This is not unlike television infomercials (program-length commercials), which are advertisements but may appear to be investigative news or interview programs. The FTC requires infomercials to disclose that they are paid advertisements, and some have suggested that on-line entertainment that is also advertising ought to contain an analogous disclosure to avoid deception.

Section 5 often requires disclosures to avoid misleading consumers. For example, use of consumer testimonials gives rise to a claim that the experience of the persons providing the testimonials is representative, or typical, of the results that consumers can generally expect to achieve. This "typicality" claim needs to be substantiated or, if no substantiation exists, must be qualified by a clear and prominent disclosure of the generally expected results for users of the product or the limited applicability of the endorser's experience to what consumers may generally expect to achieve. Disclosures and qualifiers in general need to be clear and prominent; thus, an asterisk that refers the reader to a fine-print footnote in a print advertisement rarely is sufficient. The Commission looks at the net impression created by an advertisement, and experience indicates that consumers overlook obscure disclosures.

On-line advertising poses new versions of what has been called the "asterisk issue." The availability of hypertext links from one Web page to another raises questions about whether adequate disclosures may be made on-line on a separate page.⁸⁷ Is a highlighted link that says "read this before you buy" or "things you need to know" sufficient if full disclosures are provided on a separate page? In some circumstances, might it

87. See *Audiotex Connection*, No. CV-97-0726 (E.D.N.Y. filed Feb. 13, 1997).

be necessary to include disclosures on a screen that the consumer must access before finding out how to purchase an item?⁸⁸

On-line technology also allows marketers to track a consumer's behavior—to see what sites the consumer visits and what products the consumer buys. Registration screens often require visitors to a site to provide information to access the site. Some marketers may deceive consumers about information being collected and how it may subsequently be used.

Another interesting issue is to what extent the practice of commercial "spamming"—sending multiple, unsolicited e-mail messages advertising a product or service to consumers that have no prior relationship with the sender—may be unfair under section 5. Unlike mass mailing in the traditional sense, unsolicited e-mail may impose significant costs on recipients if they must pay for the computer time required to access and read the message. The practice of sending unsolicited e-mail could be akin to transmitting unsolicited advertising by facsimile machines—a practice that is prohibited by statute in the United States.⁸⁹ Commercial spamming may also impose costs on service providers whose networks become clogged with such messages.

Finally, the Internet increases the usual difficulties that law enforcers face in transborder marketing. Fraudulent marketers can set up shop cheaply and easily and can readily communicate with their victims in foreign countries. A marketer in one country might use a service provider in another to put up a home page on which false claims are made about the safety of its product. Consumers around the world can access the page, and the law violations might differ depending upon the country in which the consumer accesses the information.

The transnational nature of a scam—and the relative anonymity of the Internet—may make it very difficult for law enforcers to catch the perpetrators and to compensate the victims. In particular, complicated questions of jurisdiction and choice of law can pose barriers to effective enforcement and to effective compliance by companies that seek to operate within the law.

Although the United States can seek help from and offer help to other governments under existing legal assistance treaties,⁹⁰ additional

88. See *supra* note 43 (requiring that ads for online services contain a statement directing consumers to a location where a full disclosure will be available, and that certain disclosures to be made during final registration process for online service "not be avoidable" by consumers).

89. Telephone Consumer Protection Act, 47 U.S.C. § 227 (1994).

90. Mutual legal assistance treaties are bilateral treaties providing for assistance in cross-border enforcement in criminal matters. See, e.g., Treaty on Mutual Legal Assistance in Criminal Matters, Mar. 18, 1985, U.S.—Can., S. TREATY DOC. 100-14 (1988) (entered into force, Jan. 24, 1990); Treaty on Mutual Legal Assistance, Dec. 9, 1987, U.S.—Mex., S.

cooperation may be appropriate to deal with Internet fraud. Any laws passed in the United States are likely to have international ramifications because of the large volume of U.S. advertising that reaches other countries and because the United States is such a large market for foreign firms.⁹¹

TREATY DOC. 100-13 (1988) (entered into force, May 3, 1991); Treaty on Mutual Assistance in Criminal Matters, May 25, 1973, U.S.—Switz., 27 U.S.T. 2019 (entered into force, Jan. 23, 1977). *See also* Agreement Regarding the Application of Competition and Deceptive Marketing Practices Laws, Aug. 3, 1995, U.S.—Can., 4 Trade Reg. Rep. (CCH) ¶ 13,503 (Sept. 18, 1996) (agreement entered into in August 1995 by the United States and Canada to coordinate enforcement of their competition and deceptive marketing practices laws). This agreement was entered into on behalf of the United States by the FTC and the Department of Justice, and on behalf of Canada by Industry Canada ("IC"). It calls upon the FTC and IC to cooperate in detecting deceptive marketing practices; to inform each other of investigations and proceedings involving cross-border deceptive marketing practices; to share information relating to the enforcement of their laws against deceptive marketing practices; to coordinate their enforcement efforts against such practices; and to study further measures to enhance the scope and effectiveness of cooperation in the enforcement of deceptive marketing practices laws. Pursuant to this agreement, the FTC's Bureau of Consumer Protection and the Marketing Practices Branch of IC's Competition Bureau signed an agreement on September 10, 1996 establishing a U.S.-Canadian Task Force on Cross-Border Deceptive Marketing Practices to coordinate enforcement efforts. *See also* FTC, *Joint FTC-Canadian Task Force to Combat Cross-Border Fraud Established* (last modified Sept. 10, 1996) <<http://www.ftc.gov/opa/9609/us-can.htm>>.

91. A federal court recently found that an Italian publisher's active solicitation of U.S. customers through a Web site on a computer server in Italy to subscribe to view on-line images that infringed plaintiff's trademark rights violated the court's order prohibiting the distribution of such infringing images in the United States. *Playboy Enters., Inc. v. Chuckleberry Publ'g, Inc.*, 939 F. Supp. 1032 (S.D.N.Y. 1996). The court ordered the defendant to stop accepting subscriptions from customers in the United States, but did not require the defendant to stop operating the site. *Id.* at 1040. In a trademark infringement action, however, the same court refused to assert personal jurisdiction over a defendant located in New Jersey who published a web site through an Internet provider in Pennsylvania merely because his Web site was accessible to, and had been visited by, New York computer users. *Hearst Corp. v. Goldberger*, 1997 U.S. Dist. LEXIS 2065, *2 (S.D.N.Y. Feb. 26, 1997) ("Where, as here, defendant has not contracted to sell or actually sold any goods or services to New Yorkers, a finding of personal jurisdiction in New York based on an Internet web site would mean that there would be nationwide (indeed, worldwide) personal jurisdiction over anyone and everyone who establishes an Internet web site."). Other U.S. courts have asserted personal jurisdiction over out-of-state defendants in trademark infringement actions on the basis of the posting of infringing images on Web sites that could be, and were, accessed by residents of the state. *See, e.g., Maritz, Inc. v. Cybergold, Inc.*, 947 F. Supp. 1328 (E.D. Mo. 1996) (advertising on Internet site for defendant's forthcoming marketing service, including invitation to consumers to add their names to defendant's mailing list); *Inset Systems, Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161 (D. Conn. 1996) (advertising on the Internet and by a toll-free number incorporating plaintiff's trademark). *See also Minnesota v. Granite Gate Resorts, No. C6-95-7227* (Minn. Dist. Ct. Dec. 11, 1996) (finding jurisdiction in Minnesota's false advertising and consumer fraud action over out-of-state defendants who posted advertisements on a Web site for gambling services that are illegal in Minnesota) (last modified Jan. 21, 1997) <<http://www.ag.state.mn.us/consumer/news/OnlineScams/ggOrder.html>>.

An ability to assert jurisdiction based on access through the Internet suggests that regulation by many individual nations could stifle the flow of information to consumers through the World Wide Web. Some countries do not permit comparative advertising or advertising to children, both of which are common in the United States. Similarly, some countries do not permit advertising for certain products or certain depictions that are permissible in the United States. As governments begin to regulate the Internet directly or to enforce their existing laws against Internet advertising, businesses may feel pressure to limit their on-line content to that which violates no country's laws.

VIII. CONCLUSION

There are good reasons for governments to be cautious about attempting to regulate the Internet. First, the evolving nature of the Internet makes it essential that governments not impose requirements that will inhibit development of private solutions or new technology. What advertising on the Internet looks like today may bear no relation to how it will look in the future. Second, governments should use the inherent characteristics of the Internet to encourage forms of consumer protection particularly suited to this medium, such as self-regulation and the provision of information to consumers to help them avoid becoming victims of deception.

Consumer education is a vital complement to law enforcement efforts on the Internet. The old saying that "an ounce of prevention is worth a pound of cure" rings especially true here. Also, the ease with which the government or consumer protection groups can post educational materials on the Internet, and the ease with which consumers can access those materials, make consumer education on the Internet particularly cost-effective.

Finally, many existing law enforcement tools can be used successfully in the on-line context, and these should be tried before enforcers seek to address consumer protection issues with more invasive regulation of the Internet. The challenge for the FTC—and one of the many challenges facing businesses that hope to expand on-line commerce and gain consumer acceptance of this medium—is to find ways to prevent deceptive and fraudulent marketing without unduly limiting the benefits of on-line commerce to consumers. A cooperative and multi-faceted approach that relies on consumer education and industry self-regulation, backed up by law enforcement action against the most egregious offenders, should go far to achieve this goal.