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<sup>1</sup> 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.

<sup>2</sup> 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.

RONALD H. SPECTOR, ANAL

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 90<sup>th</sup> 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).

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Edward F. Cox, Robert C. Fellmuth & John E. Schulz,

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<sup>8</sup> 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 disputes.

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<sup>9</sup> 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

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<sup>10</sup> *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 whe







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<sup>14</sup> *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. 93

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

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<sup>17</sup> These efforts included restatements of the Commission's basis consumer protection authority to focus more closely on consumer injury. *See* Letter from th

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

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<sup>19</sup> See <http://www.ftc.gov/bcp/workshops/hispanic/index.htm> for a summary of the workshop's proceedings.

Hispanic consumers.<sup>20</sup>

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.<sup>21</sup> The information we gathered in this workshop then formed the basis for the Commission's testimony on proposed spyware legislation<sup>22</sup> and ultimately helped us bring our first spyware case this month.<sup>23</sup> We also have held recent workshops on radio frequency identification<sup>24</sup> and class actions<sup>25</sup> and, later this year, will convene workshops on e-mail authentication<sup>26</sup> and peer-to-peer file-sharing technology.<sup>27</sup>

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<sup>20</sup> 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/heritagemothsweep.htm>, <http://www.ftc.gov/opa/2004/04/hispanicsweep2.htm> and [http://www.ftc.gov/opa/2004/04/hispanic\\_oldcases.htm](http://www.ftc.gov/opa/2004/04/hispanic_oldcases.htm).

<sup>21</sup> See <http://www.ftc.gov/bcp/workshops/spyware/index.htm>.

<sup>22</sup> See <http://www.ftc.gov/opa/2004/04/spywaretest.htm>.

<sup>23</sup> *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>.

<sup>24</sup> See <http://www.ftc.gov/bcp/workshops/rfid/index.htm>.

<sup>25</sup> See <http://www.ftc.gov/bcp/workshops/classaction/index.htm>.

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

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

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<sup>28</sup> 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/online/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, wewa

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<sup>29</sup> 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.

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<sup>30</sup> *See* S. 1234, 108<sup>th</sup> Cong. (2004), H.R. 3143, 108<sup>th</sup> Cong. (2004), and H.R. 4996, 108<sup>th</sup>





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<sup>32</sup> The 1989 Report noted that a few “tensions arise from overlapping responsibilities of the FTC, other federa

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.