

MINISTRY PAPER NO.: _____

**PERFORMANCE OF THE FAIR TRADING COMMISSION FOR
2001/2002 AND FOCUS FOR 2002/2003 FINANCIAL YEAR**

1.0 Purpose of Ministry Paper

This Ministry Paper is intended to provide highlights of the performance of the Fair Trading Commission (FTC) during the 2001/2002 Financial Year and also to outline the main focus for the 2002/2003 Financial Year.

2.0 Role and Function

The FTC was established in 1993 to administer the Fair Competition Act (FCA). The FCA provides for the maintenance and encouragement of competition in the conduct of trade, business and in the supply of services in Jamaica. Competition leads to optimal allocation of scarce resources while ensuring that the highest quality goods and services are offered for sale at the lowest prices. It also ensures that the greatest incentives exist for product innovation and development. The work of the FTC is critical to the achievement of these objectives.

3.0 Priority Programmes and Targets

For the Financial Year 2001/2002 the Commission set the following programmes as its main priorities:

- Investigate complaints and seek amicable resolutions where possible. Obtain fees through the use of Consent Agreements, to assist in offsetting costs.
- Initiate legal action for those complaints for which out of Court settlements are not forthcoming and conclude legal matters before the courts.
- Closely monitor furniture, appliance, computer and motor vehicle sectors.
- Prepare and disseminate advisories, opinions and guidelines. Develop and execute media campaigns and organize seminars, workshops and meetings.
- Meet with business entities, trade groups and educational institutions. Educate the private sector (manufacturers and distributors) on the requirements of the FCA and the need to provide adequate information on products and services offered for sale, thereby reducing breaches of the Act.
- Continue to enforce provisions of the FCA as they relate to the Telecommunications Industry.
- Undertake studies to determine the state of competition within specific industrial sectors. e.g. food and petroleum industries and the financial sector. Undertake review of Authorization Requests from Commodity Boards and other business entities.

- Participate in, and organize appropriate forums for policy makers within the Government. Hold meetings with various associations, educational institutions and other Government Agencies and Technical Advisors within the Public Sector.
- Participate in discussions with FTAA Negotiating Group on Competition Policy (NGCP).
- Participate in the CARICOM Inter-Governmental Task Force (IGTF) meetings on the finalization of Protocol VIII relating to the Rules of Competition.
- Provide technical support in the development of the CARICOM Protocol IX on Disputes Resolution.

4.0 Highlights of Performance/Achievements

4.1 Cases Investigated

Over the period April 01, 2001 to March 31, 2002 a total of 826 cases were investigated by the Commission with 273 being completed (See Table 1 for details of cases investigated and completed).

Following the trend of previous periods, the figures reveal that cases of alleged Misleading Advertising accounted for the majority of matters investigated by the FTC, comprising almost 70% of all cases dealt with. The majority of Misleading Advertising cases were against Used Car dealers, Furniture/Appliance retailers and Computer retailers who use marketing promotions that attract, but sometimes mislead consumers.

Cases deemed 'Not covered by the FCA' formed the second most prevalent category of investigations, accounting for approximately 17% of the cases investigated.

In comparison to the above categories, each of the other types of cases represented a relatively small percentage of the matters examined. For example, Requests for Opinion represented fewer than 4% of the full complement of cases, while Abuse of Dominant Position accounted for approximately 2%.

The category termed 'Other Offences against Competition' represented 3% of investigations pursued during the period while the category Sale Above Advertised Price comprised approximately 1%.

All other categories fell below 1%. Requests for Information accounted for 0.5%, Applications for Authorization for 0.5%, while Market Restriction cases accounted for 0.4% of matters investigated.

There were no cases of Double Ticketing or Tied Selling during the period, as merchants appeared to have recognized the requirements of the FCA with respect to these offences.

4.2 Resolution Rates

Overall, the Commission successfully completed approximately 33% of its cases investigated during the period. The reduced resolution rate is a result of the increased number of cases received and investigated during this period. The number of cases received has increased by 101% from 275 received in last period to 553 cases in this period.

(Figure 1 indicates the increase in number of cases received, categorized by breaches).

Misleading Advertising, which accounted for the majority of cases that the FTC investigated during the present period, showed a very low resolution rate of 23%. As stated previously, this is due to the increase in the number of cases received in the current period. The number of cases received in this category increased by 169%.

There were high resolution rates in Not Covered by the FCA (NA), Requests for Information and Requests for Opinion. Cases were expeditiously processed in order to direct Complainants to the right avenues through which they could obtain assistance and provided our expertise advice in various matters of concern. Of the cases investigated, some 61% of these NA cases, 50% of Requests for Information cases and 63% of Requests for Opinion cases were resolved during the period under review.

4.3 Major Cases Investigated

The Commission pursued a number of matters in the Courts during the 2001/2002 Financial Year and continued to enforce provisions of the FCA specifically as they relate to the Telecommunications Industry. The Commission filed suit against Shell Company (Jamaica) Limited, Pyramid Roofing Systems, Airtight Security Limited and SBH Holdings Limited and Forest Hills Venture Limited. All but the Shell matter have already been determined by the Courts.

4.3.1 Out-of-Court Settlements

Challenger Transport Company Limited

The Informant lodged a complaint with the Commission alleging that on July 6, 1999 he purchased a Chevrolet Joy motor car which was represented by the Respondent to be a 1999 model. On the car being valued, it was revealed that it was in fact a 1998 model and not a 1999 model.

Following an investigation by the Commission and a meeting held on July 27, 2001 with the Respondent and a representative from the manufacturers of the motor vehicle, the Respondent admitted that the motor car, though sold as a 1999 model, was in fact a 1998 one and that its conduct amounted to a breach of Section 37 of the FCA.

A Consent Agreement was negotiated between the FTC and Challenger Transport Company in October 2001, whereby Challenger agreed to Pay to the Informant, within 30 days of the date of the Agreement the sum of Forty Thousand Dollars (\$40,000.00) representing the difference between the cost of 1998 and 1999 models, together with compound interest at the rate of 20% per annum from the date of purchase to the actual date of payment; and also to pay the Commission's costs in the sum of Sixty Thousand Dollars (\$60,000.00).

Institute of Management Sciences (IMS)

The Informants alleged that in reliance on an advertisement issued by IMS they enrolled in a Hotel and Hospitality Management Course which was being conducted by the said IMS. At the relevant orientation on March 24, 1999, a staff member informed the students that the Course was accredited and transferable to both local and overseas colleges,

which was in accordance with the information contained in the advertisement. After commencing the course on March 30, 1999 the Informants discovered that the course was not accredited to the University of Technology, or any of the colleges in the U.S. as was claimed.

The Commission investigated and concluded that the Respondent's conduct in the matters complained of, amounted to breach of Section 37 (1)(a) and (c) of the FCA. The parties are executing an agreement to indicate that the Respondent has (a) amended the advertisement to reflect clearly what it means by validation and accreditation versus registration; (b) has issued an apology to the Informants; and (c) has paid to the Commission the sum of Twenty Five Thousand Dollars (\$25,000.00) being costs incurred.

4.3.2 Court Matters

FTC v. Pyramid Roofing Systems

The FTC received a complaint against Pyramid Roofing Systems. The Informant alleged that, pursuant to an advertisement in the yellow pages of the 1997 – 1998 telephone directory, she contracted the Respondent to install a new roof on her house, but the job was badly done. The result was a number of leaks and a generally poor appearance of the roof.

An Originating Motion was filed in the Supreme Court by the FTC seeking a declaration that the Respondent had breached Section 37 of the Fair Competition Act. On June 12, 2001 the matter was heard by

the Court, which granted the Declaration and made an Order that the Respondent pay the sum of \$700,000.00 to the Crown.

FTC v SBH Holdings Limited & Forest Hills Joint Venture Limited

The Informants alleged that they purchased townhouses from the Respondent developers after reading pamphlets and brochures promising, among other facilities, a swimming pool, tennis court and a clubhouse. The facilities promised were not provided.

The matter was heard before the Honourable Mr. Justice James on September 27–28, 2001. Judgement was reserved.

FTC v. Airtight Security Limited

The FTC alleged breach of Section 37 of the Fair Competition Act (FCA) by the Respondent as it failed to honour the warranty given on electronic gates. The Informants, the proprietors of a town house complex, had paid the Respondent over Five Hundred Thousand Dollars (\$500,000.00) to install and maintain the gates.

The matter was heard before the Honourable Mr. Justice James on September 28, 2001. The Respondent did not appear nor was it represented. James J found that the Respondent was in breach of the FCA, and imposed a fine of One Hundred Thousand Dollars (\$100,000.00).

FTC v Shell Company (Jamaica) Limited

The Informants alleged that the Respondent entered into a Distributorship Agreement the terms of which are anti-competitive and

which therefore contravenes certain provisions of the Fair Competition Act.

An Originating Motion was filed in the Supreme Court on September 20, 2001 against the Respondent. The matter came up for hearing on December 6, 2001 and was adjourned sine die for the Respondent to file Affidavits in reply. The matter will be relisted.

4.4 Public Education Programmes and Media Campaigns

The FTC continued to inform and educate the public on issues related to competition law and policy. During the 2001/2002 Financial Year the Commission issued guidelines and opinions in respect of (a) Mustang Ltd. for motor vehicle inspection services; (b) the National Quality Infrastructure Programme; (c) the purchase of Used Cars; (d) Pyramid Schemes; (e) purchasing shop worn items; (e) mobile telephone service addressing instruments' compatibility with either the C&WJ or Digicel network; (f) merchants' refund policy; (g) British Caribbean Insurance Company's proposed motor vehicle emergency program; (h) concession agreement for the privatisation of the railway service and; (i) the Sangster International Airport. The Commission also met with various associations and companies. These include the National Housing Trust, Courts Jamaica Limited, Red Stripe Limited and the Importers & Distributors Association. Other avenues for public education activities took the form of press conferences, releases and advisories, television and radio interviews, seminars or workshops and addresses given by the Executive Director to service clubs and tertiary institutions.

On September 24, 2001 the Commission presented its second lecture in the "Shirley Playfair Lecture Series". The Lecture was presented by Mrs. Beatriz Boza, immediate past president of the National Institute for the Defence of Competition and the Protection of Intellectual Property (INDECOPI), the Peruvian Competition Agency. Mrs. Boza presented a paper entitled "The role of a Competition Agency in a small developing nation".

The Commission also held its first Consumer Awareness Day and Merchants' Seminar. The Consumer Awareness Day was held on June 30, 2001. Information booths at Mall Plaza, 20 Constant Spring Road and the Springs Shopping Centre, 15 Constant Spring Road, Kingston 10 provided a large cross section of the public with valuable information on the Commission and its work. The Staff interacted with the public, fielded questions and received comments on the Commission's function. Complaints were accepted on the spot.

The seminar for Merchants was held on November 7, 2001 at the Petroleum Corporation of Jamaica auditorium. The focus was on consumer related matters and topics covered included the Role and Function of the FTC, Misleading Advertising, Sale at Bargain Price, Sale above Advertised Price and Refund Policy. The seminar was attended by members of the business community and the general public and ended with a spirited question and answer session.

The Executive Director, Senior Economist and Complaints Officers all spoke on radio talk shows like Nationwide, The Breakfast Club, Hotline,

Straight Talk, The People's Business and Risky Business. A wide-ranging number of issues was discussed during the year. The Executive Director also appeared on Love Television and on the Jamaica Information Service's programme *Think Tank*.

The December 2001 issue of the Commission's annual Newsletter was published and circulated to various interest groups.

4.5 Economic Studies

The FTC completed its investigations into the Coconut Industry Board (CIB) and the Cocoa Industry Board. The investigations sought to determine if the statutory powers and activities of the Boards contravene the FCA. The objectives of the investigations were twofold: (a) to assess if the powers and activities of the Board are in any way anti-competitive under sections 17(1) and 20(1); and if so (b) to carry out an analysis in accordance with §17(4) and 20(2). The investigation into the Coconut Industry Board revealed that although the Board has exclusive rights to the copra market, there is no resulting anti-competitive effect. The investigation into the Cocoa Industry Board found no evidence of abuse of dominance in relation to prices paid by the CIB to growers neither did it find any evidence of any other forms of abuse of dominance, such as the creation of barriers to entry for potential entrants to the market or the leveraging of dominance in one market to gain an advantage in another market.

The Commission also concluded investigations into three (3) allegations of Predatory Pricing, against (a) Telstar Cable Limited, (b) Tank Weld

Metals Limited and (c) Super Plus Food Store. (a) It was found that the special offer extended by Telstar was not a case of predation but is considered to be a form of *healthy* competition which forces its competitors to come up with better deals which ultimately benefit the consumer and such behavior should therefore be encouraged, not prohibited. (b) In the allegation against Tank Weld Metals Limited, it was found that although Tank Weld was found to be dominant in the wholesale nail market in Jamaica, there was no evidence of predatory behavior. (c) A study of the promotions carried out by Super Plus Food Store indicated that it did not meet the criteria of predatory pricing as it was neither in place for a prolonged period nor did it cover a sufficiently wide range of the product lines relevant to the market. The staff of the FTC therefore did not consider that it had the potential to inflict real damage to the competitive process.

4.5.1 Major on-going investigations

Currently, investigations are being conducted into the Beer, Lottery, Telecommunications and Health Insurance sectors.

5.0 Participation in the development of Trade Policies

During the Financial Year 2001/2002, the FTC was invited to become a part of the Jamaica Trade and Adjustment Team (JTAT) because of our role in influencing trade policy. JTAT was established under the Ministry of Foreign Affairs & Foreign Trade and comprises the Minister of Foreign Trade and representatives from the public and private sectors, the Regional Negotiating Machinery/CARICOM, civil society and Local Government. The Commission has already contributed to

the discussions by presenting a paper highlighting the difference between traditional approaches to Trade Policy and a new Trade Policy, as dictated by the "rapidly changing global environment". By way of oral response presented at a Seminar, the FTC (a) underscored the need to have the economy focus on value added products in preference to primary products; (b) questioned the implications of Jamaica's attempts to secure concessions in the global market when concessions are on the way out; and (c) expressed the view that every care should be taken to ensure that when multi-nationals come into Jamaica they are brought in line with competition policy, rather than being exempt.

The FTC continues to attend JTAT meetings and to contribute to the discussions on Jamaica's new Trade Policy.

6.0 Legislation/Regulations

Legislative amendments to the Fair Competition Act, dated August 21, 2001 were passed to, among other things:

1. Widen the definition of "documents" to accord with the current definition under the Evidence Act.
2. Extend the reach of "tied selling" to include services.
3. Remove the element of intention from the provision dealing with Sale at a Bargain Price.
4. Bring under the Resident Magistrate's Court jurisdiction, such offences as:
 - obstructing, preventing or impeding an investigation;
 - destruction or altering of any document, record or thing required to be produced;

- giving false or misleading information to the Commission;
- Failing to attend and give evidence before the Commission.

Generally, fines for these offences were set at a maximum of \$500,000.00 and term of imprisonment was reduced from a maximum of five years to a maximum of one year. Whereas the Senate required that Regulations be established to support section 40 which deals with "Sale at a Bargain Price", the Commission prepared drafting instructions and submitted same to the Ministry of Industry, Commerce and Technology (MICT) in December 2001.

In an effort to dullen the effect of the Court of Appeal ruling in the Jamaica Stock Exchange v Fair Trading Commission case; and to allow the Commission to function with some modicum of effectiveness, certain adjustments to the Fair Competition (Notices and Procedures) Regulations, 2000 were considered. Drafting instructions were submitted to the MICT in July of 2001. A first draft was passed to the Commission in November 2001 for its perusal and comments. Comments and queries were communicated to the MICT in December 2001 and a response was received in January 2001.

In the meantime however, the need for defined guidelines in the conduct of investigations has become critical. The process of amending the Notices and Procedures Regulations is currently being slowed as the Commission formulates guidelines, which will be incorporated into the amendments now being undertaken.

It is recognized that the Fair Competition Act will have to be thoroughly overhauled and amended in the very near future. In the absence of such an overhaul, the Commission's work will continue to be severely hampered.

7.0 Budgetary Allocation

For the Financial Year 2001/2002, the Commission was allocated \$31.5M by the Ministry of Industry Commerce and Technology. This represented a shortfall of \$6.1M from our Budgetary Request of \$37.6M and resulted in a restructuring of planned programmes. The Commission's Recurrent Expenditure totaled \$31.4M for the year, well above the actual amount of \$28.5M that was allocated by the MICT.

8.0 Comments and Remarks

The Commission's ability to fulfill its mandate depends to a very large measure, on its Budget Allocation. The allocation was insufficient and this severely hampered the Commission's ability to carry through programmes aimed at informing the public and monitoring the conduct of businesses.

The recruitment of two (2) additional Officers for our Technical Staff was again postponed. These are a Legal Officer and an Information Systems Administrator. Over time, as the Commission's work becomes more widely appreciated it has been experiencing a phenomenal increase in its caseload. The number of cases received has risen steadily from **332** in 1999 to **416** in 2001. This has affected our efficiency as reflected in a reduced resolution rate from 67% to 34%

over the same period. The Legal Officer is required to strengthen the efficiency and effectiveness of the Legal Department, thereby improving the resolution rate and reducing the current turn around time for complaints being investigated. The Information Systems Administrator is required to initiate planned technological improvements to the Commission, which include the daily maintenance of the Web Site, the computerization of the Library and devising improvements in the existing Case Management System.

Participation in Free Trade Area of the Americas (FTAA) and CARICOM meetings and in international seminars has been limited by insufficient funding and a lack of development of technical expertise. International seminars are a viable avenue for staff training - experiences of other Competition Agencies are shared and new ideas are discussed. For the 2001/2002 Financial Year the Commission has been unable to send any representatives to FTAA meetings or to international seminars, thereby depriving the Ministry of Foreign Affairs & Foreign Trade of much needed guidance on Competition issues.

There was limited opportunity for Staff training and skills development in Competition matters throughout the year. It is important that the Staff acquire a thorough knowledge of the marketplace, a strong working knowledge of the key industries and experience of how these industries function in other jurisdictions. This is necessary in order that anti-competitive practices can be easily identified and investigated.

Due to the 'newness' of the field of Competition economics in Jamaica, as well as in the Caribbean region, the avenues for 'internal development' have been limited. The ability of the Commission to deal with investigations thoroughly and efficiently has therefore been hampered.

Both Barbados and Trinidad are in the process of instituting Competition Agencies and are seeking assistance from the Fair Trading Commission. The Commission is not satisfactorily equipped to provide technical assistance but it does a limited way, wherever possible. It must be noted that strong Competition Agencies in the major CARICOM markets will provide direct benefits to the region and increased recognition from first world countries.

Notwithstanding the Budgetary Allocation, the Commission tried to maintain its high level of Public Education and advertising campaign and also strengthen its technical capabilities. The activities and programmes during the year were of a high standard and were well received by the target audiences and the Staff performed well against the odds.

9.0 Summary Of Main Programmes For Next Financial Year

For the Financial Year 2002/2003, the Commission has established as its prime targets the following: -

- Resolve complaints received regarding breaches of the FCA in a more timely manner.

- Reduce the incidence of anti-competitive cases in specific sectors by increasing public awareness through Public Education; strengthening the Commission's understanding of the reasons for anti-competitive practices and undertaking studies on anti-competitive activities.
- Influence innovation and encourage improvements in services provided to consumers thereby improving competitiveness among all players in the market. Educate manufacturers and distributors as to the need to provide adequate and relevant information on products and services offered for sale.
- Achieve a wider level of understanding of the FTC and the FCA by consumers, the business community and policy makers within Government thereby improving competitiveness among players in various sectors. Focus on the business community, to educate them on their responsibilities under the FCA, thereby reducing breaches of the Act.
- Influence the Ministry of Foreign Affairs & Foreign Trade as it seeks to determine Jamaica's competition policy, thereby contributing to the formulation of FTAA, CARICOM and WTO Rules in the area of Competition Law and Policy.

Phillip Paulwell
Minister
Ministry of Industry, Commerce & Technology
2002 April 24

Table 1

Cases Investigated and Completed for the period
April 1, 2001 to March 31, 2002

<i>Breach/Investigation</i>	<i>Investigated*</i>	<i>Completed</i>
Abuse of Dominant Position	19	6
Application for Authorization	4	0
Double Ticketing	0	1
Market Restrictions	3	0
Misleading Advertising	575	131
Not covered by the Act	140	86
Request for Information	4	2
Request for Opinion from FTC	46	30
Sale Above Advertised Price	9	5
Other Offences Against Competition	2	12
Tied Selling	0	0
<u>TOTAL</u>	826	273

- *these include cases carried over from previous periods*

Figure 1

NUMBER OF CASES RECEIVED

