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FINANCIAL SERVICES AND PRODUCTS: THE ROLE OF THE FEDERAL TRADE COMMISSION IN PROTECTING CONSUMERS

HEARING

BEFORE THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION UNITED STATES SENATE

ONE HUNDRED ELEVENTH CONGRESS

SECOND SESSION

FEBRUARY 4, 2010

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ONE HUNDRED ELEVENTH CONGRESS

SECOND SESSION

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FINANCIAL SERVICES AND PRODUCTS: THE ROLE OF THE FEDERAL TRADE COMMISSION IN PROTECTING CONSUMERS

THURSDAY, FEBRUARY 4, 2010

U.S. SENATE,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
Washington, DC.

The Committee met, pursuant to notice, at 2:28 p.m. in room SR–253, Russell Senate Office Building, Hon. John D. Rockefeller IV, Chairman of the Committee, presiding.

OPENING STATEMENT OF HON. JOHN D. ROCKEFELLER IV, U.S. SENATOR FROM WEST VIRGINIA

The CHAIRMAN. Ladies and Gentlemen, this hearing will come to order. I should say at the beginning that I will give my statement and then Mr. Leibowitz gives his at which point there will be two votes. So the masses gathered here on the dias will disappear.

[Laughter.]

The CHAIRMAN. For a brief period of time then we'll be right back to have questions and answers or question and answers whatever/ however it works out to be.

Mr. LEIBOWITZ. Mr. Chairman, I'll stay.

The CHAIRMAN. OK. Today American consumers are hurting. Many have lost their jobs. Foreclosures are up and in tough economic times family budgets get very, very tight. And in the midst of all this pain, unscrupulous business practices continue to target consumers directly when they can least afford it.

It's difficult for the average consumer to know who to trust. And we need to change that. I've actually got to the point in watching television when somebody is peddling a product and then I start out with a sense I don't trust this. Is there something behind this?

It's true. I mean the experience of what we've done here in the Commerce Committee just makes me very skeptical about the way people present their wares. So we are doing everything we can to weather these storms. People are beginning to find work. And Congress is fighting to create more jobs. So we'll see how that turns out.

I believe we cannot forget how we got here. Many of the enormous economic problems we face today are a direct result of weak consumer protections in the financial sector. President Obama has proposed creating a new agency to better regulate the financial sector and better protect consumers. And today's hearing is our chance

to look closely at the Federal Trade Commission, in particular, and its role as top cop on the beat.

In fact, this hearing will be a little bit different than usual because there is really a chance for our witness to describe what he's doing, what he's thinking of doing and talk about it. It's not so much a, you know, beat you over the head or you beat us over the head. That's not the style of this. Trying to find out what your plans are.

So we've got to identify the enforcement and the oversight tools that the FTC needs to most effectively protect consumers in our complicated world. I firmly believe the FTC must remain a cornerstone of our consumer protection system. And will do everything in my power to make sure that remains the case.

For too long deceptive financial products, criminal investigation schemes and a reckless faith in the industry's ability to regulate itself, a mantra for some, have significantly undermined our economy. The world of financial products is extraordinarily complex and getting more so every day. Consumers are overwhelmed by countless choices indecipherable fine print and grand and glorious claims. And as more and more of these products are created beyond the domain of local banks our current regulatory structure simply cannot oversee them.

And so therefore, too often, financial regulators overlook financial products, outside of traditional banks and ordinary Americans have paid the price. This is where the FTC can and should play a leading role. Over the last 5 years the agency has brought more than 100 cases to protect consumers from abuse of financial practices. I'd be interested in hearing about those. These cases have run the gamut from routine settlements with fly by night, payday, loan operators to resource intensive litigation with major mortgage servicing companies.

The common thread that runs through each investigation is an unwavering focus that, from our point of view, is an unwavering focus on the American consumer. Now even as our government responds and adapts to the frequently changing realities of our tremendously difficult modern economy, we can never lose that focus, never forget who comes first. As any consumer activities continue to surge and this has stunned me, just what's happened in this Committee, what's come upon this Committee, what people offer up for various segments of, you know, evil practices and deceptive practices.

I don't like to think of America that way. And so that's one of the reasons that we're here and you're there, Mr. Leibowitz. So the Federal Trade Commission's acts, long standing, general prohibition against "unfair or deceptive acts or practices" has become the bedrock of consumer protection laws in the United States. Now it is time to shore up that foundation.

I want to close by saying that when I took over this Committee, just one year ago, I vowed to make this Committee focus more on protecting the consumer. We have lots and lots and lots of work that we have to do in many, many fields. But it was, I thought, time to crack down a bit and we have.

We have investigated a number of scams from online merchants who share their customer's credit card information without first re-

ceiving real consent, to insurance companies putting profits before people. We went through that at some length. For all the companies out there looking to rip off the hard working people of this country, I say to them that this Committee is only getting started in its effort to safeguard the people from these misleading practices. We will not stop until consumer protection is the cornerstone of our thriving economy as I know it can and should be.

Finally, I want to recognize the importance of quickly confirming Julie Brill and Edith Ramirez, both of whom I met with, it seems like to me, a long, long time ago, the President's recent nominees to join Chairman Leibowitz as Commissioners of the FTC so they can get to work.

Thank you, Chairman Leibowitz, for your work to make the FTC the strong agency consumers need. We need to hear from you how we can better equip the FTC to protect the American people. And I look forward to your testimony.

I note the presence of the Senator from Nebraska, who appears to be the only Republican here. So, you are Kay Bailey Hutchison. Do you have a statement you'd like to make?

Senator JOHANNS. No, I'll take a pass. I walked in. It was just you and I and I wondered, Mr. Chairman, whether we had succeeded in chasing all of our colleagues away or something.

The CHAIRMAN. It's possible.

[Laughter.]

The CHAIRMAN. It is possible.

Senator JOHANNS. So much of what you said I agree with and I won't take the time of the Committee for the statement. I know we've got a vote coming up here. So maybe——

The CHAIRMAN. No, no, no, no. That's not for 25 minutes.

Senator JOHANNS. 25 minutes. Well, we'll—I'm more than content to let the witness proceed.

The CHAIRMAN. What about Mr. Begich over here? He's looking—he's so far down I can barely see him.

[Laughter.]

Senator BEGICH. You know I'm lucky they promoted me from there to here, so I'm——

The CHAIRMAN. So that is true. You're sort of coming into my focus here.

Senator BEGICH. I want you to know my 40-page speech I will not give. And I will sit back and relax.

The CHAIRMAN. And you won't give it to the Committee to have to record somewhere either?

Senator BEGICH. No, because my staff hasn't seen it. I wrote it myself.

[Laughter.]

The CHAIRMAN. Ah, ok.

Senator BEGICH. Please know, Mr. Chairman, all the staff laughed at that in nervousness.

[Laughter.]

The CHAIRMAN. Alright. Mr. Chairman?

STATEMENT OF HON. JON LEIBOWITZ, CHAIRMAN, FEDERAL TRADE COMMISSION

Mr. LEIBOWITZ. Thank you, Chairman Rockefeller, Senator Johanns, Senator Begich and I also, by the way, put my 23-page written statement into the record.

I'm Jon Leibowitz, Chairman of the Federal Trade Commission. And with discussions of financial regulatory reform ongoing let me thank you for inviting me to testify about the FTC's work in protecting consumers, including consumers of financial services, and urge you to ensure that the Commission can continue doing this critical work. Let me also thank you for mentioning the nominations of Julie Brill and Edith Ramirez. We certainly appreciate the Committee for moving their nominations rapidly. And we hope to have confirmation soon.

I'll first discuss our highest consumer protection priority and that's targeting financial frauds that take the last dollar out of the pockets of ordinary Americans.

Then I'll offer our views on how financial regulatory reform, done properly, could strengthen our ability to pursue those who take advantage of the hardest hit Americans.

But before getting into those details let me emphasize one fact. Although many Federal agencies have some authority over different aspects of the financial services industry, the FTC is the only agency whose sole objective is to protect consumers. The Commission has a long bipartisan history of accomplishing this objective. And in fact in the last decade, as you alluded to, Mr. Chairman, we have recovered nearly a half billion dollars for consumers who lost their money to financial frauds.

Mr. Chairman, as these types of scams have proliferated during the current economic downturn, we have stepped up our efforts to stop them. With the State Attorneys General, we've brought sweeps of hundreds of cases to shut down unscrupulous businesses that offer fraudulent mortgage modification and foreclosure rescue services, fake jobs, or phony access to Federal stimulus money. And in this poster you can see a picture of President Obama and Vice President Biden offering stimulus money, I believe in this case they claimed on one of their websites that you could use the money for things like education, paying off a mortgage and leisure travel. And so, you know, there are a lot of scammers out there.

All told in the last year the FTC——

The CHAIRMAN. I'm looking at it and the way it's set up it kind of looks like the President has done a $15 billion scam. And I want you to clear that up very promptly.

Mr. LEIBOWITZ. No, I don't—you can disagree with his policies. I happen to support them. But I don't believe that the President is involved in this issue.

The CHAIRMAN. It's juxtaposition.

Mr. LEIBOWITZ. It's just an unfortunate juxtaposition designed to rip off consumers. So in the last year, the FTC has brought 40 cases against 200 defendants engaged in fraud targeting financially distressed consumers. But I want to point out that our efforts aren't just about abstract statistics. They're also about helping real people with real problems.

So let me just give you a couple of examples.

Jaime L. lives in California. And last year Jaime was facing foreclosure on his home. He paid $3,000 to a company that told him they could get his loan modified. In fact, they told him not to pay his mortgage company while they reworked the mortgage.

After months passed with no action, he contacted the company which assured him, assured him, that his modification would be completed by the following week. But that same day, the bank repossessed his home, telling Jaime that it had tried to reach the modification company but had never received a response. In other words, the company took Jaime's money, but did nothing for him or his family.

In fact and sadly, the day after Thanksgiving, Jaime and his family were evicted from their home. The FTC sued the company. And the case is currently in litigation.

Another victim is Angela B. from New Hampshire, who is disabled and lives on a fixed income because she needed help paying off her mortgage. She visited a website that advertised, falsely, free government grants. She agreed to pay $1.99 to receive a CD with instructions about how to obtain those grants. What she wasn't told was that she was being enrolled in a negative option plan and charged a recurring fee of 95 dollars. The Commission shut down that operation, which targeted Angela B. and so many other Americans.

The Commission's law enforcement isn't limited to stopping boiler room type frauds. We also prosecute nationally known companies that engage in unfair, deceptive practices. For example, the Commission recently obtained a $28 million settlement from the subprime mortgage servicer, EMC, a subsidiary of Bear Stearns, for hiding fees from consumers. Just last fall, we finished mailing out redress checks to 86,000 Americans.

And tomorrow—in a case we won against a bottom-feeding debt collector, one who is now in jail, because we referred the case over to the Justice Department—we're going to start to mail out $25,000—I'm sorry, 25,000 more redress checks to Americans. And we obtained a $114 million settlement from a subprime credit card marketer named CompuCredit, again for charging hidden fees, in this instance to poor, mostly minority consumers.

Now in addition to our law enforcement and with critical leadership from you, Chairman Rockefeller, and of course from you, Senator Dorgan, the Commission has stepped up our use of rulemaking to stop unfair and deceptive financial practices. Today, we announced a proposed rule that would ban advance fees by mortgage modification and foreclosure rescue companies. As we've seen in our law enforcement actions far too often, consumers pay thousands of dollars in advance for these services, but they get nothing in return.

The proposed rule would prohibit misrepresentations as well and require that providers disclose critical information to consumers. Our rulemaking efforts will continue. We plan to issue proposed rules in the near future covering mortgage advertising and servicing, two areas where we've also seen problematic practices.

The Commission has also developed a wide variety of creative education materials to help consumers avoid financial scams. I

think examples are on your desks. And you can see the poster for our DVD, "Real People, Real Stories."

Demand for these materials is very, very high. We've literally distributed hundreds of thousands of copies to consumers through neighborhood organizations, through HUD, through consumer groups and through state attorneys general. Mr. Chairman, the FTC has done a lot to protect consumers, yet we acknowledge that we can and that we should do more.

In his proposal for the Consumer Financial Protection Agency, President Obama emphasized giving us the consumer protection tools and resources we need. As all of you know, the FTC is a relatively small agency with a very, very broad mission. Our workforce today is about 1,100 people. That is 700 fewer than it was 30 years ago even though our responsibilities have grown dramatically during this period, as has the American population. I think it's gone up from about 205 million in 1979 to—about 230 million in 1979 to about 305 million today.

And in this context there are additional tools as you alluded to Senator Rockefeller, that would allow us to be more effective with fewer personnel.

One is the authority to seek civil penalties against those who engage in unfair or deceptive acts or practices. That's an idea that was originally espoused by Caspar Weinberger when he was Chairman of the Commission in the early 1970s.

Another is the ability to promulgate rules using the same notice and comment procedures that virtually all other agencies use. Right now we are under something called the Magnuson-Moss Rule rulemaking approach, which is a kind of medieval form of rulemaking. It can take eight to 10 years to do a rule. And clear authority to prosecute those who knowingly aid or albeit violations.

Finally I just want to say a few words about financial services reform and proposals to establish a Consumer Financial Protection Agency. The Commission supports, I think, the fundamental objective of elevating protection for consumers of financial services. And I support the CFPA as a means to accomplish that goal while some of my colleagues would prefer other approaches. Nonetheless, we all agree that if such an agency is created, the FTC needs to remain an active and effective cop on the beat in both financial and non-financial matters.

To my mind, at least, the bill that was passed by the House late last year would both give us critical new tools and preserve our ability to help consumers. So we look forward to working with this committee as legislation moves ahead. Please be assured though, that whether or not Congress passes financial reform that includes the CFPA, we at the FTC will continue our work to protect financially distressed consumers.

Thank you so much.

[The prepared statement of Mr. Leibowitz follows:]

PREPARED STATEMENT OF HON. JON LEIBOWITZ, CHAIRMAN, FEDERAL TRADE COMMISSION

I. Introduction

Chairman Rockefeller, Ranking Member Hutchison, and members of the Committee, I am Jon Leibowitz, Chairman of the Federal Trade Commission ("FTC" or

"Commission"). I appreciate the opportunity to appear before you today,[1] and the Commission thanks this Committee for its interest in preserving and strengthening the ability of the FTC to aid consumers in financial stress during these difficult economic times.

This testimony first describes the FTC's law enforcement, rulemaking, and consumer education efforts. These efforts have helped protect millions of consumers of financial products and services from unscrupulous businesses that engage in unfair, deceptive, and other unlawful practices. Although the FTC has long played an active role in prosecuting financial fraud and deception, the agency has stepped up its efforts in recent months in response to the economic downturn. For example, in 2009 alone, the FTC and the states, working in close coordination, brought more than 200 cases against firms that peddled phony mortgage modification and foreclosure rescue scams.

The testimony next explains the rationale for granting the Commission appropriate resources and remedial tools to enable it to be even more effective in protecting consumers. Finally, the testimony provides the Commission's perspective on recent proposals to create a new consumer financial protection agency as part of a broader reform of the financial services regulatory system.

II. The FTC's Authority over Financial Services

Although many Federal agencies have authority over different aspects of the financial services industry, the FTC is the only such agency whose sole objective is to protect consumers. The Commission can bring law enforcement actions to enforce Section 5 of the FTC Act, which prohibits unfair or deceptive acts or practices in or affecting commerce.[2] The agency also can bring law enforcement actions to enforce rules that the Commission issues[3] to implement the FTC Act.[4] The FTC Act, however, exempts banks, savings and loan institutions, and Federal credit unions from the Commission's jurisdiction. Thus, the Commission's authority encompasses the conduct of non-bank entities, such as non-bank mortgage companies, mortgage brokers, creditors, and debt collectors.

The Commission also has law enforcement and, in some cases, regulatory powers under a number of consumer protection statutes that specifically relate to financial services, including the Truth in Lending Act ("TILA"),[5] the Home Ownership and Equity Protection Act ("HOEPA"),[6] the Consumer Leasing Act ("CLA"),[7] the Fair Debt Collection Practices Act ("FDCPA"),[8] the Fair Credit Reporting Act ("FCRA"),[9] the Equal Credit Opportunity Act ("ECOA"),[10] the Credit Repair Organizations Act

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[1] Except as noted, the views expressed in this statement represent the views of the Commission. My oral presentation and responses to questions are my own and do not necessarily reflect the views of the Commission or any individual Commissioner. Commissioner Kovacic dissents from portions of the testimony as explained in notes 45 and 47. Commissioners Kovacic, Harbour, and Rosch offer separate views in note 54.

[2] & 15 U.S.C. § 45(a).

[3] The Commission issued the Credit Practices Rule in 1984, to restrict the use of certain remedies in consumer credit contracts. 16 C.F.R. Part 444. In 1975, the Commission issued the Holder in Due Course Rule, 16 C.F.R. Part 433. This Rule preserves the ability of consumers to raise claims and defenses against purchasers of consumer credit contracts.

[4] In addition, under the FTC Act, the Board of Governors of the Federal Reserve ("FRB"), Office of Thrift Supervision, and National Credit Union Administration have the authority to promulgate rules prohibiting unfair or deceptive practices engaged in by banks, thrifts, and Federal credit unions, respectively. See 15 U.S.C. § 57a(f).

[5] 15 U.S.C. §§ 1601–1666j (mandates disclosures and other requirements in connection with consumer credit transactions).

[6] 15 U.S.C. § 1639 (provides additional protections for consumers entering into certain high-cost mortgage loans).

[7] 15 U.S.C. §§ 1667–1667f (requires disclosures, limits balloon payments, and regulates advertising in connection with consumer lease transactions).

[8] 15 U.S.C. §§ 1692–1692p (prohibits abusive, deceptive, and unfair debt collection practices by third-party debt collectors).

[9] 15 U.S.C. §§ 1681–1681x (imposes standards for consumer reporting agencies, information furnishers, and consumer report users). The Fair and Accurate Credit Transactions Act of 2003 amended the FCRA, primarily establishing rights and obligations relating to identity theft. Pub. L. No. 108–159, 117 Stat. 1952 (2003).

[10] 15 U.S.C. §§ 1691–1691f (prohibits creditor practices that discriminate on the basis of race, religion, national origin, sex, marital status, age, receipt of public assistance, and the exercise of certain legal rights).

("CROA"),[11] the Electronic Funds Transfer Act ("EFTA"),[12] and the privacy provisions of the Gramm-Leach-Bliley Act ("GLB Act").[13] These statutes, like the FTC Act, do not give the FTC jurisdiction over banks.[14]

III. FTC Activities to Protect Consumers in Financial Distress

The Commission has a long history of protecting consumers at every stage of their relationship with financial services companies. As the economic downturn has taken hold, fraudulent schemes exploiting consumers in financial distress have proliferated. Accordingly, the Commission has stepped up its efforts to stop these frauds and protect vulnerable consumers, using its four primary tools: law enforcement, rulemaking, consumer education, and research and policy development.

A. Law Enforcement

The FTC is primarily a law enforcement agency, and it has used its authority proactively to protect financially distressed consumers. In many of these cases, the Commission has used its powers to seek temporary restraining orders, asset freeze orders, and other immediate relief to stop financial scams in their tracks and preserve money for ultimate return to consumers. Even prior to the economic downturn, the Commission acted aggressively to stop financial fraud and assist consumer victims. For example, the agency brought a series of cases against a number of the Nation's largest subprime mortgage lenders and servicers challenging a variety of unfair and deceptive practices.[15] Over the past 5 years, the FTC has filed over 100 actions against providers of financial services, and in the past 10 years, the Commission has obtained nearly half a billion dollars in redress for consumers of financial services.

Most recently, the Commission's highest priority has become targeting frauds that prey on consumers made vulnerable by the economic crisis. For example, the FTC launched an aggressive, coordinated enforcement initiative to shut down mortgage loan modification and foreclosure rescue scams perpetrated on homeowners having difficulty making their mortgage payments. Heavily advertised in mainstream media and on the Internet, these schemes purport to assist consumers in avoiding foreclosure or renegotiating mortgage terms with their lenders or servicers. Typically, the fraudsters promise that, in exchange for an up-front fee in the thousands of dollars, they will obtain a loan modification or prevent foreclosure; in fact, they do little but collect their fee. Taking advantage of the widespread publicity about government mortgage assistance programs, such as the Making Home Affordable program, many of these firms use copycat names or look-alike websites to falsely suggest that they are affiliated with those programs.[16] In some instances, the businesses impersonate private, nonprofit programs or claim to be affiliated with the consumer's lender or servicer.[17]

In the past 9 months, the FTC has brought 17 cases (against more than 90 defendants) targeting foreclosure rescue and mortgage modification frauds,[18] with other matters under active investigation. In addition, the Commission has leveraged

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[11] 15 U.S.C. §§ 1679–1679j (mandates disclosures and other requirements in connection with credit repair organizations, including a prohibition against charging fees until services are completed).

[12] 15 U.S.C. §§ 1693–1693r (establishes the rights and responsibilities of institutions and consumers in connection with electronic fund transfer services).

[13] 15 U.S.C. §§ 6801–6809 (requires financial institutions to provide annual privacy notices; provides consumers the means to opt out from having certain information shared with nonaffiliated third parties; and safeguards customers' personally identifiable financial information).

[14] Most of these statutes grant rulemaking authority to one or more of the agencies with enforcement responsibility under the statutes. The FTC has rulemaking authority for certain financial services under the FTC Act, for certain specified purposes under the FCRA and GLB Act, and with respect to mortgage loans under the Omnibus Appropriations Act of 2009, as amended.

[15] *See, e.g.,* FTC v. *Associates First Capital Corporation,* No. 1:01-CV–00606-JTC (N.D. Ga. 2002) ($215 million returned to deceived consumers); *see also, e.g.,* FTC v. *EMC Mortgage Corp.,* No. 4:08-cv–338 (E.D. Tex. Sept. 9, 2008) ($28 million in redress to 86,000 consumers); U.S. v. Fairbanks Capital Corp., No. 03–12219 DPW (Nov. 12, 2003) ($40 million in consumer redress), *judgment modified in U.S.* v. *Select Portfolio Servicing,* No. 03–12219–DPW (D. Mass. 2007) (stipulated judgment).

[16] Recent FTC cases have targeted fraudulent programs such as "bailout.hud-gov.us" and "bailout.dohgov.us." *See, e.g., FTC* v. *Thomas Ryan,* Civil No. 1:09–00535 (HHK) (D.D.C. filed March 25, 2009).

[17] *See, e.g., FTC* v. *New Hope Property LLC,* No. 1:09-cv–01203-JBS-JS (D.N.J. filed Mar. 17, 2009); *FTC* v. *Hope Now Modifications, LLC,* No. 1:09-cv–01204-JBS-JS (D.N.J. filed Mar. 17, 2009); *FTC* v. *Kirkland Young, LLC,* No. 09–23507 (S.D. Fla. filed Nov. 18, 2009); *FTC* v. *Loss Mitigation Servs., Inc.,* No. SACV–09–800 DOC(ANX) (C.D. Cal. filed July 13, 2009).

[18] A full list of these law enforcement actions is attached to this testimony as Appendix A.

its resources by partnering with numerous state and Federal law enforcement agencies, especially state attorneys general that have brought cases under their own statutes. In two nationwide sweeps during the Summer and Fall of 2009, "Operation Stolen Hope" and "Operation Loan Lies," the Commission joined with many states and other Federal agencies to collectively file more than 200 lawsuits against loan modification and foreclosure rescue providers.[19]

The Commission has targeted a variety of other deceptive and fraudulent schemes aimed at consumers in financial distress, including the following:

1. *Mortgage servicing.* In September 2008, the FTC settled charges that EMC Mortgage Corporation and its parent, The Bear Stearns Companies, LLC, violated Section 5 of the FTC Act and the FDCPA in servicing mortgage loans, including debts that were in default when EMC obtained them.[20] The EMC settlement required the defendants to pay $28 million in consumer redress, and the Commission has sent checks to more than 86,000 consumers. The settlement also barred the defendants from future law violations and required EMC to establish a comprehensive data integrity program.

2. *Debt relief services.* As consumers struggle to make payments on their credit cards and other unsecured debt, they are vulnerable to the claims of purveyors of deceptive debt settlement, debt negotiation, and other for-profit debt relief services. These heavily-advertised services promise to renegotiate debt terms with consumers' creditors to reduce their debt, often by specific, substantial amounts. Over the past several years, the Commission has brought 19 lawsuits against for-profit debt relief companies, including five in the past year, halting deceptive practices and returning money to consumers.[21]

3. *Credit repair.* Consumers who are late or in default on their debt payments may suffer serious harm to their credit ratings, making it all the more difficult for them to obtain credit, insurance, employment, or housing in the future. Many credit repair outfits misrepresent their ability to remove negative but accurate information from consumers' credit reports in violation of Section 5 of the FTC Act and the Credit Repair Organizations Act. In the last 5 years, the FTC has taken action in 17 cases to stop fraudulent credit repair scams, many of these in partnership with state law enforcers.[22]

4. *Economic stimulus scams.* Over the last year, the Commission has also focused its efforts on responding to new scams that try to capitalize on the economic downturn by falsely promising grants ostensibly associated with the U.S. Government to consumers facing financial hardship.[23]

5. *Debt collection*. Unpaid debt has reached unprecedented levels; as a result, the number and amount of debts pursued by third-party debt collectors and debt buyers[24] has skyrocketed. The Commission has maintained an aggressive

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[19] FTC, Press Release, *Federal and State Agencies Target Mortgage Relief Scams* (Nov. 24, 2009) (announcing 118 actions by 26 Federal and state agencies), available at *http://www.ftc.gov/opa/2009/11/stolenhope.shtm*; FTC, Press Release, *Federal and State Agencies Target Mortgage Foreclosure Rescue and Loan Modification Scams* (July 15, 2009) (announcing operation involving 189 actions by 25 Federal and state agencies), available at *http://www.ftc.gov/opa/2009/07/loanlies.shtm*.

[20] *FTC* v. *EMC Mortgage Corp.*, No. 4:08–cv–338 (E.D. Tex. Sept. 9, 2008).

[21] *See, e.g.,* FTC v. *JPM Accelerated Services Inc.*, No. 09-CV–2021(M.D. Fla. filed Dec. 11, 2009); *FTC* v. *Economic Relief Technologies, LLC*, No. 09-CV–3347 (N.D. Ga. filed Dec. 8, 2009); *FTC* v. *2145183 Ontario Inc.*, No. 09-CV–7423 (N.D. Ill. filed Dec. 8, 2009); *FTC* v. *Edge Solutions, Inc. of New York,* No. CV–07–4087-JG-AKT (E.D.N.Y. Aug. 7, 2008) (stipulated order and judgment for permanent injunction). In addition, as described below, the Commission is engaged in a rulemaking to amend its Telemarketing Sales Rule to cover debt relief services.

[22] For example, in October 2008, the Commission coordinated a law enforcement sweep that included ten FTC actions and 26 state actions against credit repair operations. See FTC, Press Release, *FTC's Operation "Clean Sweep" Targets "Credit Repair" Companies* (Oct. 23, 2008), available at *http://www.ftc.gov/opa/2008/10/cleansweep.htm*.

[23] *See, e.g.,* FTC, Press Release, *At FTC's Request, Court Halts Deceptive Claims for Free Government Grants* (Aug. 20, 2009), available at *http://www.ftc.gov/opa/2009/08/grantconnect.shtm*; FTC, Press Release, FTC, *Three States Charge Scammers with Falsely Promising "Guaranteed" $25, 000 Government Grants as Part of the Economic Stimulus Package* (July 23, 2009), available at *http://www.ftc.gov/opa/2009/07/gwi.shtm*; FTC, Press Release, *FTC Cracks Down on Scammers Trying to Take Advantage of the Economic Downturn* (July 1, 2009), available at *http://www.ftc.gov/opa/2009/07/shortchange.shtm*.

[24] Debt buyers purchase unpaid debt from creditors or debt collectors, typically for pennies on the dollar, and collect it on their own behalf. Debt buyers, like debt collectors who collect debt on behalf of creditors, are subject to the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692–1692p.

program to enforce Section 5 of the FTC Act and the Fair Debt Collection Practices Act against collectors who deceive, harass, or abuse consumers.[25]

6. *Advance fee loans.* Consumers unable to qualify for credit from traditional sources may turn to marketers of advance fee credit cards or loans. In the last 5 years, the FTC pursued 19 cases against marketers who promised credit in exchange for the payment of an advance fee, but failed to deliver the credit as promised.[26]

7. *Payday lending.* Cash-strapped consumers may also look to payday loans for financial assistance. Payday loans are high-cost short term loans, usually repaid by a check post-dated to correspond to the consumer's next paycheck. The Commission recently has brought a number of cases against payday lenders for failing to disclose key loan terms and other law violations.[27]

8. *Credit card marketing.* In December 2008, the FTC settled a case with a subprime credit card marketer, CompuCredit, for making deceptive representations to consumers while marketing subprime credit cards to sub-prime borrowers. CompuCredit allegedly misrepresented the amount of credit that would be available immediately to consumers, failed to disclose up-front fees, and failed to disclose that certain purchases could reduce a consumer's credit limit. Under the settlement, CompuCredit must pay redress to injured consumers and it is estimated that the redress program will result in more than $114 million in credits to consumer accounts. [28]

9. *Other scams targeting the financially distressed.* In recent months, the Commission has filed lawsuits against a variety of other operations for preying on consumers suffering financial hardship, including those offering fake get-rich-quick schemes, work-at-home offers, and job hunting aids.[29]

In sum, the Commission believes its extensive law enforcement efforts have stopped numerous fraudulent operations from preying on consumers hard hit by the economic crisis.

B. Rulemaking

To complement its law enforcement, the Commission, with critical assistance from this committee, has stepped up its use of rulemaking in the financial area. Such rules enhance both compliance with the laws and the Commission's ability to prosecute wrongdoers, for example, by specifying violative practices and enabling the agency to obtain civil penalties from violators. The FTC's recent rulemaking proceedings include the following:

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[25] *See, e.g.,* U.S. v. *Academy Collection Service, Inc.*, No.: 2:08-cv–01576-KJD-GWF (D. Nev. Jan. 7, 2010) (consent decree); *U.S.* v. *Oxford Collection Agency, Inc.*, No.: 2:09-cv–02467-LDW-AKT (E.D.N.Y. July 2, 2009) (consent decree).

[26] *See, e.g., FTC* v. *Group One Networks, Inc.*, No. 09-CV–00352 (M.D. Fla. filed Mar. 3, 2009); *FTC* v. *Integrity Financial Enterprises, LLC*, No.: 8:08-cv–914-T–27 MSS (M.D. Fla. Dec. 10, 2008) (stipulated judgment and order); *FTC* v. *Financial Advisors & Associates Inc.,* No.: 8:08-cv–00907-T–26 TBM (M.D. Fla. Sept. 22, 2008) (stipulated judgment and order). The FTC's Telemarketing Sales Rule ("TSR") prohibits telemarketers from requesting or receiving payment of any advance fee for credit, when they have represented a high likelihood of success in obtaining or arranging the extension of credit. 16 C.F.R. § 310.4(a)(4).

[27] *See, e.g.,* FTC, Press Release, *Internet Payday Lenders Will Pay $1 Million to Settle FTC and Nevada Charges; FTC Had Challenged Defendants' Illegal Lending and Collection Tactics* (Sept. 21, 2009), available at *http://www.ftc.gov/opa/2009/09/cash.shtm*; FTC, Press Release, *Payday Loan Lead Generators Settle FTC Charges* (June 24, 2008), available at *http://www.ftc.gov/opa/2008/06/wegiveloans.shtm*; FTC, Press Release, *FTC Charges Three Internet Payday Lenders with Not Disclosing Required APR Information in Ads* (Feb. 27, 2008), available at *http://www.ftc.gov/opa/2008/02/amercash.shtm*.

[28] *FTC* v. *CompuCredit Corp.*, No. 1:08-CV–1976-BBM-RGV (N.D. Ga. 2008) (settled in December 2008). The Commission worked closely on this case with the Federal Deposit Insurance Corporation, which brought a parallel action challenging this deceptive conduct.

[29] *See, e.g.,* FTC, Press Release, *Court Jails Promoter of Work-At-Home Scam; Envelope- Stuffing Scheme Deceived Spanish-Speaking Consumers* (Dec. 23, 2009), available at *http://www.ftc.gov/opa/2009/12/intermarketing.shtm*; FTC, Press Release, *FTC Cracks Down on Scammers Trying to Take Advantage of the Economic Downturn* (July 1, 2009), available at *http://www.ftc.gov/opa/2009/07/shortchange.shtm*.

- On June 1, 2009, pursuant to the Omnibus Appropriations Act of 2009 (as clarified by the Credit CARD Act of 2009)[30] the Commission commenced rulemaking proceedings on unfair or deceptive mortgage-related practices:[31]
  - This week, the Commission issued a notice of proposed rulemaking, seeking public comment on a proposed rule covering loan modification, foreclosure rescue, and other mortgage assistance relief services. The rule would ban providers from collecting fees prior to delivering the promised results, prohibit misrepresentations in the marketing of these services, and require certain affirmative disclosures about the nature and terms of the service.
  - The Commission anticipates publishing a second notice of proposed rulemaking in the near future addressing mortgage advertising practices, followed by a third proposed rulemaking addressing mortgage servicing.
- On August 19, 2009, the Commission published in the *Federal Register* proposed amendments to the Telemarketing Sales Rule ("TSR")[32] designed to curb deception and abuse by providers of for-profit debt relief services.[33] The amended rule proposed by the Commission would, among other things, prohibit debt relief service providers from charging consumers a fee until they have delivered the promised results. The Commission staff is considering the public comments the agency received in response to the proposed rule and has begun drafting a final rule.
- The Commission, in conjunction with the Federal bank agencies, also has promulgated rules to protect the privacy of consumers' sensitive information, including financial and credit report information, under the GLB Act and the FACT Act amendments to the Fair Credit Reporting Act.[34]

By setting clear standards and making violations easier to prove, the Commission believes that these rules will result in significantly greater protections for consumers of financial services.

C. Consumer Education

The FTC complements its rulemaking and law enforcement actions with consumer education. The Commission has conducted numerous education campaigns designed to help consumers manage their financial resources, avoid deceptive and unfair practices, and be aware of emerging scams. For example, the FTC recently has undertaken a major consumer education initiative related to mortgage loan modification and foreclosure rescue scams, including the release of a suite of mortgage-related resources for homeowners. These resources are featured on a new web page, *www.ftc.gov/MoneyMatters*. The FTC encourages wide circulation of this information: consumer groups and nonprofit organizations distribute FTC materials directly to homeowners, while some mortgage servicers are communicating the information on their websites, with their billing statements, and on the telephone.[35]

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[30] Omnibus Appropriations Act of 2009, Pub. L. No. 111–8, § 626, 123 Stat. 524 (Mar. 11, 2009); Credit CARD Act of 2009, Pub. L. No. 111–24, § 511(a)(1)&(2), 123 Stat. 1734 (May 22, 2009). Chairman Rockefeller and Senator Dorgan played key roles in obtaining this new rulemaking authority for the FTC.

[31] 74 Fed. Reg. 26,118 (June 1, 2009); 74 Fed. Reg. 26,130 (June 1, 2009).

[32] *See* 16 C.F.R. Part 310.1.

[33] *TSR; Notice of Proposed Rulemaking; Announcement of Public Forum*, 74 Fed. Reg. 41988 (Aug. 19, 2009). Commission staff hosted a public forum on the proposed rule on November 4, 2009, which included participants representing the debt relief industry, consumer groups, state law enforcement, and other interested parties. See *http://www.ftc.gov/bcp/rulemaking/tsr/tsr-debtrelief/index.shtm*.

[34] In addition, the Commission and the Federal banking agencies recently announced rules and guidelines expanding the obligations of the entities that furnish information to consumer reporting agencies to provide accurate information. *See Procedures To Enhance the Accuracy and Integrity of Information Furnished to Consumer Reporting Agencies Under Section 312 of the Fair and Accurate Credit Transactions Act; Final Rule; Guidelines for Furnishers of Information to Consumer Reporting Agencies; Proposed Rule,* 74 Fed. Reg. 31,484 (July 1, 2009). Consumers with inaccuracies in their credit reports may be denied credit or other benefits, or be forced to pay a higher rate. In addition, the FTC and several other Federal agencies recently issued a consumer-friendly model notice that financial institutions can use to disclose their privacy practices to their customers, as required by the GLB Act. *See* FTC, Press Release, *Federal Regulators Issue Final Model Privacy Notice Form* (Nov. 17, 2009), available at *http://www.ftc.gov/opa/2009/11/glb.shtm.*

[35] In addition, the FTC has worked with community organizations, state attorneys general, and other partners to distribute copies of a new video featuring the stories of real people who are working with legitimate housing counselors to save their homes. The video is available at *http://ftc.gov/multimedia/video/credit/mortgage/hope-now.shtm*.

D. Research and Policy Development

Another means by which the FTC helps protect consumers of financial services is through its role in conducting consumer research and developing and advocating for pro-consumer policies. For example, in recent years, the Commission has taken the lead in developing and testing consumer disclosures in several financial contexts. In 2007, for example, the Commission released a staff report on a study conducted by the agency's Bureau of Economics on the effectiveness of mortgage disclosures.[36] The study examined how consumers search for mortgages, how well they understand cost disclosures and the terms of their own loans, and whether better disclosures could help them shop for mortgage loans and avoid deceptive lending practices. The study found that mortgage disclosure forms in current use fail to convey key mortgage costs and terms to many consumers, and that more effective disclosures can be created to help consumers make better-informed decisions.[37]

The Commission also has engaged in efforts to identify and promote effective consumer protection policies with respect to debt collection. In 2009, for example, FTC staff conducted a series of public roundtables across the United States on the consumer protection issues raised by debt collection litigation and arbitration practices.[38] The roundtables followed a 2009 Commission report[39] recommending changes in the FDCPA to reform and modernize the debt collection regulatory system. Other recent FTC research and policy development initiatives in the financial area include a public workshop to examine consumer protection problems related to debt relief services and a two-day forum, and associated staff report, on developing better methods for deterring and preventing fraud.[40]

IV. Enhancing the FTC's Ability to Protect Consumers

Although the FTC has substantially increased its consumer protection efforts in response to the current economic crisis, the Commission understands that much more could, and should, be done. Appropriate resources and certain new enforcement and regulatory tools would significantly enhance the FTC's ability to anticipate and respond effectively to the proliferation of financial fraud.

Indeed, in announcing his proposal last summer to establish a new Consumer Financial Protection Agency, President Obama explained that "[t]here are other agencies, like the Federal Trade Commission, charged with protecting consumers, and we must ensure that those agencies have the resources and the state-of-the-art tools to stop unfair and deceptive practices as well."[41] The financial services regulatory reform bill passed by the House of Representatives late last year includes additional authority that would enable the Commission to more effectively protect consumers.

A. Resources

The FTC is a relatively small agency with a very broad consumer protection and competition mission, ranging from operation of the Do Not Call registry, to challenging unfair or deceptive marketing and advertising, to enforcement of the consumer financial protection statutes with respect to most businesses in the United States, to challenging anti-competitive conduct that would harm consumers. As the economic downturn has continued, the Commission has implemented efficiencies

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[36] *See, e.g.,* FTC, Bureau of Economics Staff Report, *Improving Consumer Mortgage Disclosures: An Empirical Assessment of Current and Prototype Disclosure Forms* (June 2007), available at *http://www.ftc.gov/os/2007/06/P025505mortgagedisclosurereport.pdf*.

[37] The FTC also is carrying out a series of studies of the accuracy of credit reports, pursuant to the FACT Act. *See* FTC, Press Release, *FTC Issues Third Interim Report to Congress on Results of Studies Required by FACT Act* (Dec. 23, 2008), available at *http://www.ftc.gov/opa/2008/12/factareport.shtm*.

[38] *See* FTC Roundtable, *Debt Collection: Protecting Consumers* (Dec. 4, 2009), available at *http://www.ftc.gov/bcp/workshops/debtcollectround/index.shtm*.

[39] In this report, the Commission also recommended that Congress grant it rulemaking authority under the FDCPA. *See* FTC, *Collecting Consumer Debts: The Challenges of Change* (Feb. 2009), available at *http://www.ftc.gov/bcp/workshops/debtcollection/dcwr.pdf*. Additionally, last month, the Commission ordered nine of the Nation's largest debt buyers to turn over information about their practices in buying and collecting consumer debt, which the agency intends to use for a study of the debt-buying industry and how it might be contributing to problematic debt collection practices. *See* FTC, Press Release, *FTC Orders Buyers of Consumer Debt to Submit Information for Study of Debt Buying Industry* (Jan. 5, 2010), available at *http://www.ftc.gov/opa/2010/01/sci.shtm*.

[40] *See* FTC, *Consumer Protection and the Debt Settlement Industry* (Sept 25, 2008), available at *http://www.ftc.gov/bcp/workshops/debtsettlement/index.shtm*; FTC, Press Release, *FTC Issues Staff Report on Agency's Fraud Forum* (Dec. 29, 2009), available at *http://www.ftc.gov/opa/2009/12/fraud.shtm*.

[41] White House, Office of the Press Secretary, *Remarks by the President on 21st Century Financial Regulatory Reform* (June 17, 2009), available at *http://www.whitehouse.gov/the press office/Remarks-of-the-President-on-Regulatory-Reform/*.

that enable it to "do more with less;" at the same time, the agency has shifted more of its consumer protection resources to protecting consumers of financial services, while continuing to carry out its myriad other obligations. The FTC understands budgetary constraints, but assures both the Congress and the Administration that any funds the FTC receives will be used to respond more effectively to the broad range of current and future consumer protection issues and, specifically, to better protect consumers from financial-related fraud.[42]

B. Aiding and Abetting Authority

Many individuals and small companies engaged in unlawful practices rely on the support and assistance of other, usually larger, companies. This support and assistance often is instrumental to the success of the scams and allows them to be perpetrated on a much broader scale than would otherwise be possible. Having the ability to prosecute those who make fraud possible by assisting others is a key component of an effective enforcement program. Therefore, the Commission encourages Congress to clarify the law[43] and provide explicit authority for the FTC to take law enforcement action against those who provide substantial assistance to another while knowing, or consciously avoiding knowing, that the person is engaged in unfair or deceptive practices in violation of Section 5 of the FTC Act.[44]

C. APA Rulemaking Authority[45]

Effective consumer protection requires that the Commission not only be able to enforce existing statutes and rules, but that it be able to promulgate in a timely and efficient manner additional rules to respond to conduct in the marketplace that may harm consumers. The current rulemaking procedures prescribed by Section 18 of the FTC Act (often referred to as "Magnuson-Moss" rulemaking) are complex, cumbersome, and time-consuming, resulting in rulemaking proceedings lasting many years. The procedural requirements for Magnuson-Moss rules are far more burdensome than the Administrative Procedures Act ("APA") notice and comment procedures that most other Federal agencies are authorized to use. The Commission recently recommended that Congress amend Section 18 to authorize the FTC to use

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[42] *See* Prepared Statement of the FTC on Leveraging FTC Resources to Protect Consumers of Financial Services and Promote Competition before the House Committee on Appropriations Subcommittee on Financial Services and General Government (Mar. 31, 2009), available at *http://www.ftc.gov/os/2009/03/P064814financialservices.pdf.*

[43] Until the 1994 Supreme Court decision in *Central Bank of Denver* v. *First Interstate Bank of Denver*, 511 U.S. 164 (1994), which held that the Securities and Exchange Commission ("SEC") did not have aiding and abetting authority under the Exchange Act, it was understood that there was an implied cause of action under Section 5 of the FTC Act for aiding and abetting unfair or deceptive acts and practices. Although in many circumstances the Commission is able to allege that providing knowing assistance to others in violating the law meets the standard for unfairness under Section 5, *see, e.g., FTC* v. *InterBill, Ltd.,* No. 06-cv–01644-JCM-PAL (D. Nev. filed Jan. 8, 2007); *FTC* v. *Your Money Access, LLC*, No. 07–5174 (E.D. Pa. filed Dec. 11, 2007), it would be useful for Congress to amend the FTC Act to include an express cause of action under Section 5 for aiding and abetting unfair or deceptive acts or practices. Such a change would be comparable to Congress's restoration of the SEC's aiding and abetting authority shortly after *Central Bank of Denver. See* 15 U.S.C. § 78(t)(e). Having such authority clarified would make the FTC a much more effective law enforcement agency, as demonstrated by the agency's use of the aiding and abetting authority in the TSR to strike at those who help telemarketers defraud consumers. See Telemarketing and Consumer Fraud Prevention Act, 15 U.S.C. §§ 6101–6108 (as amended); TSR, 16 C.F.R. Part 310.

[44] *See* Prepared Statement of the FTC on the Commission's Work to Protect Consumers and to Promote Competition, and on a Bill to Reauthorize the Commission before the Senate Committee on Commerce, Science, and Transportation (Apr. 8, 2008) ("FTC Reauthorization Testimony"), available at *http://www.ftc.gov/os/testimony/P034101reauth.pdf.* H.R. 4173 would grant this authority.

[45] Commissioner Kovacic dissents from the Commission's endorsement of authority to use, for promulgating all rules respecting unfair or deceptive acts or practices under the FTC Act, the notice and comment procedures of the Administrative Procedures Act ("APA"). While other agencies have the authority to issue significant rules following notice and comment procedures, the Commission's rulemaking authority is unique in its range of subject matter (unfair or deceptive acts or practices) and sectors (reaching across the economy, except for specific, albeit significant, carve-outs). Except where Congress has given the Commission a more focused mandate to address particular problems, beyond the FTC Act's broad prohibition of unfair or deceptive acts or practices, Commissioner Kovacic believes it prudent to retain procedures beyond those encompassed in the APA. However, he supports sector-specific APA rulemaking to promulgate rules that set forth unfair or deceptive acts or practices relating to all financial services. Further, he would be willing to consider more generally whether all the procedures currently required to issue, repeal, or amend rules issued under the FTC Act are necessary.

APA rulemaking procedures to address consumer protection issues.[46] The Commission believes that such an amendment would significantly enhance the agency's ability to stop financial fraud.

D. Civil Penalty[47] *and Independent Litigating Authority*

For consumer protection law enforcement to serve as an effective deterrent of unlawful behavior, the agency must have tough and effective remedies that can be imposed quickly and without undue burden. Two remedial powers that the FTC currently lacks—the authority to seek civil penalties for violations of the FTC Act and the authority to prosecute civil penalty cases in Federal court in its own name—would make the agency's law enforcement more effective.

Although the Commission can seek a wide range of equitable remedies in Federal court, including consumer redress and disgorgement of ill-gotten gains, in most circumstances it lacks the authority to obtain civil penalties against violators of the FTC Act.[48] The Commission believes that broad civil penalty authority for FTC Act violations would enable the agency to more effectively deter financial and other types of fraud, as well as other unfair or deceptive practices, especially in those cases in which obtaining consumer redress or disgorgement is impossible or impractical.[49] Indeed, as far back as 1970, then FTC Chairman Caspar Weinberger advocated allowing the FTC to assess civil penalties administratively against respondents who knowingly committed consumer protection violations.[50]

Under current law, the Commission must refer to the Department of Justice ("DOJ") all cases in which it seeks civil penalties or involving scammers who harm American consumers from abroad. The DOJ then has 45 days to decide whether to file the case in its own name or return it to the Commission. The Commission has previously testified about the benefits for effective law enforcement of being able to file and litigate civil penalty cases in its own name—as it now does when seeking other remedies.[51] This authority would allow the Commission—the agency with the

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[46] *See* Prepared Statement of the FTC on Consumer Credit and Debt: The Role of the Federal Trade Commission in Protecting the Public before the House Committee on Energy and Commerce Subcommittee on Commerce, Trade, and Consumer Protection (Mar. 24, 2009), available at *http://www.ftc.gov/os/2009/03/P064814consumercreditdebt.pdf*. Congress has provided APA rulemaking when it has mandated or permitted the FTC to promulgate some specific rules. *See e.g., T1Omnibus Appropriations Act of 2009, Pub. L. No. 111–8,* § 626, 123 Stat. 524 (Mar. 11, 2009); Credit CARD Act of 2009, Pub. L. No. 111–24, § 511(a)(1) & (2), 123 Stat. 1734 (May 22, 2009); FCRA, 15 U.S.C. §§ 1681–1681x; GLB Act, 15 U.S.C. §§ 6801- 6809; FCRA Free Credit Report Rule, 16 C.F.R. Part 610; GLB Privacy Rule, 16 C.F.R. Part 313; GLB Safeguards Rule, 16 C.F.R. Part 314.

[47] Commissioner Kovacic dissents from the Commission's endorsement of across-the-board civil penalty authority. The existing consequences attendant to a finding that an act or practice is unfair or deceptive under the FTC Act include an administrative order (whose violation would then subject the respondent to civil penalties) or a court-issued injunction (which can contain such equitable remedies as redress and disgorgement). In his view, these are generally appropriate remedies, and they are consistent with the goal of developing FTC law to develop new doctrine and to reach new and emerging problems. The routine availability of civil penalties, even if subject to a scienter requirement, would in his view risk constraining the development of doctrine, much as judicial concerns about the availability of private litigation with mandatory treble damages appear to be constraining the development of antitrust doctrine. *See, e.g., Bell Atlantic Corp.* v. *Twombly,* 550 U.S. 544, 558–59 (2007). Commissioner Kovacic would prefer that Congress grant more targeted authority to seek civil penalties, perhaps including civil penalty authority where financial services are involved, and particularly including civil penalty authority in matters where existing remedies are likely to be inadequate. See FTC Reauthorization Testimony, *supra* note 44.

[48] Generally speaking, the Commission now can seek civil penalties only in four types of cases: knowing violations of FTC rules, violations of certain statutes (such as the FCRA or FDCPA), violations of a prior order against the defendant, and knowing violations of prior Commission findings that a specific practice is unfair or deceptive. *See* 15 U.S.C. §§ 45 (m)(1)(A), (l), and 45(m)(1)(B).

[49] Such cases would include those in which measuring consumer injury or wrongful profits is difficult; this is often true, for example, in cases involving spyware installation or data breaches.

[50] *See Hearings on H.R. 14931 and Related Bills before the Subcomm. on Commerce and Finance of the H. Comm. on Interstate and Foreign Commerce*, 91 st Cong. 53, 54 (1970) (statement of FTC Chairman Caspar Weinberger); *Hearings on S. 2246, S. 3092, and S. 3201 Before the Consumer Subcomm. of the S. Comm. on Commerce,* 91st Cong. 9 (1970) (Letter from Caspar W. Weinberger, Chairman, Federal Trade Commission) (forwarding copy of House testimony). In 1973, the Senate passed S. 356, which authorized civil penalties for any unfair or deceptive act or practice in violation of FTC Act Section (5)(a)(1) that was committed with actual or objective Knowledge. Earl W. Kintner, the Legislative History of the Federal Antitrust Laws and Related Statutes 5236–37 (1983) (reprint of S. 356 as passed by the Senate).

[51] *See, e.g.*, Prepared Statement of the FTC on Proposed Consumer Financial Protection Agency: Implications for Consumers and the Federal Trade Commission, before the House Committee on Energy and Commerce Subcommittee on Commerce, Trade and Consumer Protection (July

greatest expertise in enforcing the FTC Act—to bring cases more quickly and efficiently.[52] The Securities and Exchange Commission and Commodity Futures Trading Commission already have independent litigating authority to bring civil penalty cases without referring cases to the DOJ. This authority is critical to our efforts to fight fraud.

V. Reform of Consumer Financial Protection

On June 17, 2009, President Obama announced his proposal to create a Consumer Financial Protection Agency ("CFPA") as part of a broader reform of the Nation's financial regulatory system. On December 11, 2009, the House passed H.R. 4173,[53] Title IV of which would establish the CFPA with broad powers to protect consumers with respect to financial activities. It would transfer many of the consumer protection functions currently performed by the Federal banking agencies to the new agency. With respect to the FTC, Title IV would transfer to the CFPA the FTC's rulemaking authority under certain enumerated statutes with respect to businesses engaged in financial activities. Title IV also would retain the FTC's authority under the FTC Act and its enforcement authority under the enumerated statutes, concurrently and in coordination with the CFPA.

The Commission supports the fundamental objective of improving the effectiveness of the current governmental system for consumer financial protection. However this is accomplished, whether through the creation of a new agency or otherwise,[54] the Commission believes that at a minimum, Congress should ensure that the FTC's authority and ability to protect consumers is neither eroded nor made unclear. The Commission has a unique combination of institutional capabilities and has achieved an excellent record of law enforcement, rulemaking, research, and consumer education in the financial services field. It should remain an active and effective consumer protection agency with respect to both financial and nonfinancial products and services.

VI. Conclusion

The FTC appreciates the opportunity to update the Committee on its actions to help consumers who are suffering economically and offer thoughts on the possible impact of financial services regulatory reform legislation on the Commission's consumer protection work. With sufficient resources and authority, the FTC would be even more successful in protecting consumers of financial products and services. The FTC looks forward to working with the Committee on financial services regulatory reform.

APPENDIX A—LIST OF FTC LAW ENFORCEMENT ACTIONS AGAINST LOAN MODIFICATION AND FORECLOSURE RESCUE ENTITIES IN 2008–2009

FTC v. *First Universal Lending, LLC,* No. 09–CV–82322 (S.D. Fla. filed Nov. 24, 2009)

8, 2009), available at *http://www.ftc.gov/os/2009/07/090708Acfpatestimony.pdf*; FTC Reauthorization Testimony, *supra* note 44.

[52] Even under the best of circumstances, the referral process results in a significant delay in bringing the case. It is also less efficient; under current practice, once DOJ accepts a referral, the FTC normally assigns one or more of its staff attorneys, at DOJ's request, to assist in litigating the case. Despite excellent relations and coordination between the two agencies, this leads to a duplication of effort and inefficiency. And for some cases, like illegal robocall cases, this means that the FTC must make a difficult choice: file a case quickly to stop ongoing harm but give up the possibility of civil penalties; or seek civil penalties but wait weeks for the DOJ to prepare a case, allowing the misconduct to continue and more consumers to be harmed.

[53] More specifically, H.R. 3126 was incorporated into H.R. 4173 and passed by the House on that date.

[54] Commissioner Kovacic and Commissioner Rosch recommend, perhaps as an alternative to creating a new agency to perform the Federal banking agencies' current consumer protection functions, that the Committee consider a model by which consumer protection with respect to banks and other depository institutions would be enhanced by providing the Commission with a role in protecting consumers of depository institutions. Such expansion of the Commission's consumer protection role would require a concomitant increase in the Commission's resources to ensure the continuing excellence of its enforcement record. *See generally* William E. Kovacic, *The Consumer Financial Protection Agency and the Hazards of Regulatory Restructuring,* Lombard Street (Sept. 14, 2009), available at *http://www.ftc.gov/speeches/kovacic/090914hazzrdsrestructuring.pdf*.

Commissioner Harbour takes no position on whether the current regulatory environment justifies the creation of a new consumer financial protection agency. If a new agency is established, Commissioner Harbour feels strongly that, at a minimum, the FTC should retain its current jurisdiction. Given the FTC's core expertise in consumer protection enforcement in financial services, Commissioner Harbour believes that it is important that the FTC continue to represent the interests of consumers.

FTC v. *Truman Foreclosure Assistance, LLC,* No. 09–23543 (S.D. Fla. filed Nov. 23, 2009)
FTC v. *Debt Advocacy Ctr, LLC*, No. 1:09CV2712 (N.D. Ohio filed Nov. 19, 2009)
FTC v. *Kirkland Young, LLC*, No. 09–23507 (S.D. Fla. filed Nov. 18, 2009)
FTC v. *1st Guaranty Mortgage Corp.*, No. 09-DV–61846 (S.D. Fla. filed Nov. 17, 2009)
FTC v. *Washington Data Resources, Inc.*, No. 8:09–cv–02309-SDM–TBM (M.D. Fla. filed Nov. 12, 2009)
FTC v. *Federal Housing Modification Dep't*, No. 09–CV–01753 (D.D.C. filed Sept. 16, 2009)
FTC v. *Infinity Group Servs.*, No. SACV09–00977 DOC (MLGx) (C.D. Cal. filed Aug. 26, 2009)
FTC v. *Loan Modification Shop, Inc.*, No. 3:09–cv–00798 (JAP) (D.N.J., amended complaint filed Aug. 4, 2009)
FTC v. *Apply2Save, Inc.,* No. 2:09–cv–00345–EJL–CWD (D. Idaho filed July 14, 2009)
FTC v. *Loss Mitigation Servs., Inc.,* No. SACV09–800 DOC(ANX) (C.D. Cal. filed July 13, 2009)
FTC v. *Sean Cantkier,* No. 1:09–cv–00894 (D.D.C., amended complaint filed July 10, 2009)
FTC v. *LucasLawCenter "Inc. ",* No. SACV–09–770 DOC(ANX) (C.D. Cal. filed July 7, 2009)
FTC v. *US Foreclosure Relief Corp.*, No. SACVF09–768 JVS(MGX) (C.D. Cal. filed July 7, 2009)
FTC v. *Freedom Foreclosure Prevention Specialists, LLC*, No. 2:09–cv–01167–FJM (D. Ariz. filed June 1, 2009)
FTC v. *Data Medical Capital, Inc.,* No. SA–CV–99–1266 AHS (Eex) (C.D. Cal., contempt application filed May 27, 2009)
FTC v. *Dinamica Financiera LLC*, No. 09–CV–03554 CAS PJWx (C.D. Cal. filed May 19, 2009)
FTC v. *Federal Loan Modification Law Ctr.,* LLP, No. SACV09–401 CJC (MLGx) (C.D. Cal. filed Apr. 3, 2009)
FTC v. *http://bailout.hud-gov.us*, No. 1:09–00535 (HHK) (D.D.C. filed Mar. 25, 2009)
FTC v. *Home Assure, LLC*, No. 8:09–CV–00547-T–23T-Sm (M.D. Fla. filed Mar. 24, 2009)
FTC v. *New Hope Property LLC,* No. 1:09–cv–01203–JBS-JS (D.N.J. filed Mar. 17, 2009)
FTC v. *Hope Now Modifications, LLC*, No. 1:09–cv–01204–JBS–JS (D.N.J. filed Mar. 17, 2009)
FTC v. *National Foreclosure Relief, Inc.,* No. SACV09–117 DOC (MLGx) (C.D. Cal. filed Feb. 2, 2009)
FTC v. *United Home Savers, LLP*, No. 8:08–cv–01735–VMC–TBM (M.D. Fla. filed Sept. 3, 2008)
FTC v. *Foreclosure Solutions, LLC,* No. 1:08–cv–01075 (N.D. Ohio filed Apr. 28, 2008)
FTC v. *Mortgage Foreclosure Solutions, Inc.*, No. 8:08–cv–388–T–23EAJ (M.D. Fla. filed Feb. 26, 2008)
FTC v. *Nat'l Hometeam Solutions, Inc.*, No. 4:08–cv–067 (E.D. Tex. filed Feb. 26, 2008)
FTC v. *Safe Harbour Foundation of Florida, Inc.*, No. 08–C–1185 (N.D. Ill. filed Feb. 27, 2008).

The CHAIRMAN. Thank you very much. It happens that the votes are going to start at 2:45. So it's now 2:45, so they haven't started.

So why don't I call on myself to ask the first question. And that's simply going to be for you to explain something which you just referred to. And that is, I think, what at least we want to do, some of us, is to allow you to be able to use the Administrative Procedures Act. And please don't count me as being totally familiar with those instead of the Magnuson-Moss Act to promulgate rules under the FTC Act.

Can you please explain? You referred to it as being 13th Century which is a definite characterization. I'd just like to know a little bit more about that.

Mr. LEIBOWITZ. The Magnuson-Moss Act. Under the Magnuson-Moss Act, when we do a rulemaking rules, can take literally 8 to 10 years. Entities that are opposed to the rules can ask for a sort of regulatory time out. They can ask for referees.

As a result it's essentially a—it's almost an insurance that when we want to move nimbly or agilely on an issue of some importance, and again, where there's some opposition. And many rules that we try to do have some opposition. It's almost impossible to do that.

And so our hope is that as legislation moves forward we get a clearer standard that is closer to or like the APA standard which is notice and comment rules. When we do those notice and comment rules, by the way, we take them very seriously. And we try to use—and we try to do them very judiciously.

So for example, in the Omnibus Appropriations Act, Mr. Chairman, you and Senator Dorgan put a provision in that gave us authority to do APA rulemaking, specifically, for mortgages. And we have just announced the first prong of our mortgage modification rule. That's the ban on advanced fees. But it has taken us pretty close to a year to do that.

So we're pretty thorough when we do these rules. We're pretty bipartisan. We're very bipartisan. But we do believe that if we have easier rulemaking we could move more nimbly on behalf of consumers.

The CHAIRMAN. The vote has started. Can I just say that it's occurred to me just going through this material that most everything takes a long time?

Mr. LEIBOWITZ. That's right.

The CHAIRMAN. I mean I was reading 10 years, 15 years. Is this the Department of Justice? Is this the nature of America or what?

Mr. LEIBOWITZ. Well, I would say when you're making—when you're doing a rulemaking, I don't know that it always takes 10 or 15 years. But you want to do it right. Now ten or 15 years, it seems to me, is an excessive amount of time.

In a year, 18 months, we can pretty much take comments from all the stakeholders; move forward where it's appropriate to do a rule. Of course, you can't solve every problem with a Federal Trade Commission rule, nor would we intend to. And try to move forward on behalf of consumers.

So we think that with a little help from Congress, we can compact that timeframe. And we can continue to do good work. And set broad standards that make it easier to bring cases and easier for some companies that want to do the right thing not to feel like they're at a competitive disadvantage.

The CHAIRMAN. Alright. Thank you.

Mr. LEIBOWITZ. Thank you.

The CHAIRMAN. Senator Dorgan, would you Chair this? And a couple of us could go down and vote. The order of appearance is there.

Senator Johanns, you'd be the first person to ask a question. So if you want to ask a question, here's your time. Right now.

STATEMENT OF HON. MIKE JOHANNS,
U.S. SENATOR FROM NEBRASKA

Senator JOHANNS. I will keep this fairly short. But tell me the policy reason, originally, for why the FTC must use Magnuson-Moss instead of APA?

Mr. LEIBOWITZ. Well I think that's a really good question. And I'm not saying reasonable people can't disagree about this. Tim Muris, who was a terrific Chairman, the first Chairman under President Bush, believes that we shouldn't have APA rulemaking broadly. So does one of the Commissioners, who I respect enormously.

But I think the original intent was that because we had broader—the original intent was that we were supposed to have very, very broad jurisdiction and limited remedies and since we covered so much of the waterfront of the economy that you wanted to place some restrictions on us. Now just by way of background, we have

jurisdiction over unfair methods of competition which is actually broader than the antitrust laws, but having said that, I would make two points.

One is that distinction has broken down over the years because we have been given APA rulemaking authority in many contexts, whether it's CAN–SPAM or whether it's Do Not Call or whether it's Children's Online Privacy Protection Act.

And then two is in the economy we live in now and in the society we live in now, we need to move, I think, much faster than we did 95 years ago.

And so that's why, on behalf of consumers, and so again, I think if you entrust us with the responsibility for being able to have APA rulemaking authority, I think we'll use it pretty judiciously.

And the only other point I want to make is in the 1970s, particularly, because I know the 1970s history of our agency, when we were perceived to be doing things that Congress did not like. Congress understood exactly how to take away some of our jurisdiction. It wasn't in the rulemaking capacity.

And so, I think if you give us this authority we'll have to use it very prudently because if we don't use it prudently and appropriately, we know it's not going to be there much longer.

Senator JOHANNS. One thing I might ask and this would be just my last comment here. As you know the consumer piece of the proposed legislation is, the object of a big policy debate and how best to do it.

Mr. LEIBOWITZ. Sure.

Senator JOHANNS. And I think it's a fair policy debate, personally. But one thing I would be very interested in is what you would like to do to help consumers, you know, maybe just a list of items that you can't do today or you feel you can't do today, that might aid us on this committee in trying to figure out next steps.

Mr. LEIBOWITZ. Alright. So that's a great—I mean, I'd like to get back to you with an answer.

Senator JOHANNS. Yes.

Mr. LEIBOWITZ. I can give you a very short answer now, if you want.

Senator JOHANNS. Yes.

Mr. LEIBOWITZ. So one thing we'd like to be able to do is have fining authority. You'd have to go to court to ask for it. Most state attorneys general, Senator Pryor knows, have this kind of authority because much of what we do is go after people who are engaging in fraud.

We're bringing the case. It could be the Justice Department that brings it. It could be a state agency that's bringing it. But it's fraud. And although not everyone we go after has money at the end because we can get restitution for consumers or disgorged profits. But it is critical, I think, if we want to have a really strong deterrent to be able to propose fines if we bring a case.

In terms of APA rulemaking, if you ask me what rules would we do, I could think of one that we would have done faster which is the mortgage rulemaking to which we're indebted to Senator Dorgan. I think we would have done that faster because we have had some discussions among commissioners about whether we could do rulemaking. We decided well, it's not APA rulemaking. It would

take 10 years to do. It's not worth doing. Let's wait for Congress to do something.

Maybe something I think we would consider and sometimes we would use is an advanced notice or notice of inquiry. I think we would consider doing a negative option rule because there are so many consumers who are being ripped off in small amounts, but in the aggregate, it's a huge amount of money on negative options. And then I'd say we'd really want to think and, you know, think for a while if we got this authority about what we wanted to do and what we wouldn't want to do because again, I tend to believe, I suspect you do to, you can't solve every problem by regulation. And you don't want to.

Senator JOHANNS. No and yet as you were talking about the mortgage scams that are out there. It just so happens that probably every Senator could talk about this. It just so happens I have a friend, who needed money, had some equity in the house and you know what happened. And it's just a mess. I mean, it's just a mess.

It's hard for us to figure out how to help. So it would be helpful if you'd give that some thought. Appreciate the answer you gave today. But give it some thought. Maybe supply the Committee with some additional thoughts.

Mr. LEIBOWITZ. Happy to do that, Senator.

[The information referred to follows:]

Although the Commission has a number of effective tools for stopping bad actors, certain holes in our authority make it more difficult—unnecessarily, in my opinion—to carry out our mission. The following four enhancements to the agency's authority would help substantially to fill those holes.

- *APA Rulemaking*: Because the Commission may not use the ordinary Administrative Procedures Act ("APA") notice-and-comment rulemaking procedures that most of our sister agencies use, the Commission must do one of two things to promulgate a rule: either obtain from Congress a specific grant of APA rulemaking authority for a particular issue or use the cumbersome and time-consuming Magnuson-Moss procedures. In my view, either option is an inefficient and uncertain process for addressing serious problems in a timely fashion, especially those that can arise from emerging technologies or new marketing practices. The Commission needs APA-style rulemaking authority to be able to issue rules, when needed, in a reasonable time and with a reasonable expenditure of resources.
- *Civil Penalty Authority*: The FTC currently lacks the authority to seek civil penalties for violations of the FTC Act itself. Although the Commission currently may seek penalties—through DOJ—in certain specified situations (*e.g.*, for a defendant's violations of an existing enforcement order or of certain FTC rules), the ability to seek civil penalties for knowing violations of the FTC Act itself would give the agency an important tool for deterring unfair or deceptive practices. This is especially important for cases in which obtaining equitable remedies such as consumer restitution, rescission, or disgorgement is impossible or impractical—because, for example, victims cannot be identified or consumer injury and wrongful profits cannot be quantified.
- *Aiding and Abetting*: The absence, outside of the telemarketing context, of explicit authority to hold liable those who aid and abet law violators hampers the Commission's ability to take action against entities that do not themselves deceive consumers, but supply knowing and substantial support to those who do. In many cases, the aiders and abettors, by providing essential services that the primary fraudsters could not efficiently provide themselves, allow frauds to occur on a much broader scale than would otherwise be possible.
- *Independent Litigating Authority for Civil Penalty Actions*: It is anomalous that while the FTC is authorized to try its own cases for a wide swath of remedies, including consumer redress and disgorgement, it may not do so when seeking penalties. Instead, the agency must refer cases to DOJ, wait up to 45 days for DOJ to determine whether to take a case, and allow DOJ staff time to learn

the case and prepare. This requirement thus entails duplication of efforts and slower enforcement. In addition, it results at times in the agency having to choose between obtaining early injunctive relief (for example, to halt the violative practices and preserve assets for eventual redress) or seeking penalties. Having the authority to litigate civil penalty actions independently would allow cases to be brought more quickly and effectively, without the disadvantages occasioned by the referral obligation.

Senator JOHANNS. OK.
Mr. LEIBOWITZ. Absolutely.
Senator JOHANNS. Thank you.
Senator DORGAN [presiding]. Senator Begich?

STATEMENT OF HON. MARK BEGICH,
U.S. SENATOR FROM ALASKA

Senator BEGICH. Mr. Chairman, I'll be very brief, just kind of a general question. These folks that you are able to collect fines from, that you haven't processed, that you've gotten restitution from. If I turned on your page and went to the front page of it, is there a list of these companies and individuals that own or are a part of these companies that is in a way that I can easily access it?

Mr. LEIBOWITZ. You mean as sort of a black list essentially?

Senator BEGICH. Yes. I'll tell you an example because I belong to a group, it's Angie's List, which is a list of subcontractors. I'm a member. And they put in there, here's the people, don't do business with them.

Do you do that?

Mr. LEIBOWITZ. Well, when we have a settlement or when we bring a case it goes up on our website.

Senator BEGICH. I know. But it's never legal.

Mr. LEIBOWITZ. No, no, no. And I—let me go back and let us think about that. It's a really—it's an interesting idea.

You know, I'd have to talk to the other Commissioners about it. I think there's also the sort of notion on the other side, as I'm sure you know, that once you've paid your debt to society . . . But I also think consumers deserve notice and we're about notice in almost every context.

Senator BEGICH. That's right. Because that record will always be in the court files. So all I'm saying is make the list.

Mr. LEIBOWITZ. Yes.

Senator BEGICH. If you're going to do business, because I'll tell you one thing that changes businesses habits is when they're suddenly publicly noticed, not through a legal fine that most consumers will never go to the courthouse, but if they're going to the FTC because you've got some good educational materials here which I think are fantastic.

Mr. LEIBOWITZ. Yes, and let me tell you and just in a different context we used the same approach when we were starting to bring spyware cases and nuisance adware cases, the kind of adware that pops up on your computer.

Senator BEGICH. Right, right.

Mr. LEIBOWITZ. You know, and you can't figure out how to uninstall it. We started going around talking about it and I thought, this is wonderful that we were going to publish the names of companies that whether knowingly or not knowingly paid the money that went to a company that went to an affiliate that went

to another affiliate that ended up with someone being paid to put spyware in your computer. And that was very, very helpful in cleaning up that problem.

Senator BEGICH. Could you get back to at least me and maybe the Committee just so——

Mr. LEIBOWITZ. Sure.

[The information referred to follows:]

You asked whether there is a list on the FTC's website of all the companies and individuals against whom the Commission has taken action that consumers could utilize in deciding with whom to do business. First, consumers can pull up on the website our extensive alphabetical list of all FTC cases since 1996. A second, and easier, way for consumers to locate relevant information is to search for the name of any company with which they are considering doing business. For example, if a consumer was considering hiring Hope Now Modifications to do a loan modification, he or she could quite easily put the phrase "Hope Now" into our search function at *www.ftc.gov*, and the first link that appears is a press release titled "Court Halts Bogus Mortgage Loan Modification Operations." We are considering additional ways to post the names of defendants in FTC actions.

I would caution, however, against the description of our case list as a blacklist. Most FTC cases are settled, with no admission of liability on the part of the defendant and no formal finding of wrongdoing by the Commission or a court. Also, there are legitimate companies that the FTC has charged with violating the law in some respect, but that subsequently change their business practices to comply with the law.

The best strategy to warn consumers about bad actors is through consumer education about bad business practices. That is why the FTC's multi-media consumer education campaigns give consumers the tools and information they need so that they can independently assess each company's marketing practices, spot red flags, and stop before paying a bad actor for any promised service that may not be provided.

Senator BEGICH.—What your thought is? I just know when I was mayor we put the list of the people who owed money. And it was such an amazing thing when we not only did a press. It crashed the system because people were interested if they were on it, but they also wanted to see if anyone they knew was on it.

Mr. LEIBOWITZ. Well we've upgraded our computer system just recently.

Senator BEGICH. OK. It's good to know that. Well I would be very interested as I've cut my time short only because of votes, but I would be very interested in this. I think it gets people to focus.

Mr. LEIBOWITZ. Yes, sir.

Senator BEGICH. And it helps consumers. But just some feedback, that would be great.

Mr. LEIBOWITZ. We will do that. I'll go back and talk to my colleagues.

Senator BEGICH. Great. Thanks.

Mr. LEIBOWITZ. Thank you.

STATEMENT OF HON. BYRON DORGAN, U.S. SENATOR FROM NORTH DAKOTA

Senator DORGAN. Chairman Leibowitz, we're going to have to recess in a few minutes. But let me say first of all that your announcement today is an enormous breath of fresh air. When I put the provision in the Appropriations bill that gives you the authority to direct you to take action on mortgage, it only gives you the authority to truncate that rulemaking process some.

I'll tell you in the conference, trying to get this through conference, there were people having an epileptic seizure fighting like the devil to try to drop this provision. And we saved it. But, you know, this provision is a provision I put in because I wanted you to do exactly what you're doing and that is find the bad guys and take action.

And I think what has happened in this country is unbelievable. There is unbelievable bottom feeding by greedy people who have gotten by with it for far too long. And it's also interesting to me today to see your agency taking action.

I mean, I call some of these regulatory agencies the grateful dead, grateful that they get paid and dead from the neck up because they don't do a thing. And we've watched that for years and years and years. And you have decided to finally take some action in an area that desperately needs it. People have been fleeced for years and years and years now in these areas. So thanks for the work.

Now let me just ask a quick question because I don't want to miss this vote. But my understanding is that probably up to 80 percent of these mortgage relief groups are non-profits. Is that right? Non-profit status, so called non-profits?

Mr. LEIBOWITZ. Not in mortgage——

Senator DORGAN. Which doesn't mean very much.

Mr. LEIBOWITZ. Not in mortgage modification.

Senator DORGAN. OK.

Mr. LEIBOWITZ. Probably debt modification.

Senator DORGAN. Debt modification.

Mr. LEIBOWITZ. And there's a—I don't know the percentage that that may well be right. And it's certainly high. Yes, it's certainly high.

Go ahead, Senator.

Senator DORGAN. Well——

Mr. LEIBOWITZ. It could be half. And it could be more.

Senator DORGAN. You're right, probably debt relief. Obviously they are advertising, marketing aggressively, enrolling consumers into plans and so on. So it's a—I mean, non-profit status in those circumstances doesn't mean much to be in many cases. Some cases it probably does.

But you work with many other Federal agencies I know in coordination on these issues. Can you describe your relationship with other agencies? I know there are some turf issues out there, but——

Mr. LEIBOWITZ. We're generally good. We're not perfect, but we're generally good at trying not to have too many turf issues in trying to work cooperatively. We play well with others I think is our reputation.

And so for example, we're consulting on our mortgage modification rules and our mortgage rules both formally and informally with the Fed and with the banking agencies on the issue. By the way, on the issue of the rulemaking, we're keeping an open mind. We have a proposed rule. We're taking comments for 45 days that would prohibit advance fees.

What I was struck by was that almost no one disagreed with this approach. And in fact I think even the American Bankers Associa-

tion, I'll go back and check this and get back to you, called for a ban on advance fees.

[The information referred to follows:]

The American Bankers Association ("ABA") submitted a comment that was supportive of the proposed Mortgage Assistance Relief Services rule. On review of the record, however, it appears that the ABA did not expressly state a position with respect to a ban on advanced fees. The only concern raised by the ABA was that "the rules [the FTC] promulgates must be drawn so that they do not restrict the legitimate loss mitigation efforts of financial institutions and their affiliated mortgage servicers."

The following commenters expressly supported the ban on advanced fees: American Financial Services Association; California Reinvestment Coalition; Consumer Mortgage Coalition; Chase Home Finance, LLC; Housing Policy Counsel; Massachusetts Office of the Attorney General; National Association of Attorneys General; National Consumer Law Center; National Council of La Raza; New York City Department of Consumer Affairs; Office of the Minnesota Attorney General; Ohio Attorney General; and Sargent Shriver National Center on Poverty Law.

Mr. LEIBOWITZ. And that's comforting to us because you know, you want to be—you want to make sure that you bring stakeholders along and keep them company as we do it.

Senator DORGAN. It's probably important to say there are some legitimate people.

Mr. LEIBOWITZ. Sure.

Senator DORGAN. And interests that are doing good work for some vulnerable folks out there.

Mr. LEIBOWITZ. Oh, of course.

Senator DORGAN. There are a lot of people that are preying on vulnerable folks and end up fleecing them. And so let me just say Senator Rockefeller, as you know, has had this committee investigating deceptive online charges and so on. I really appreciate what the Chairman has done.

He's hired some folks that have the capability. Honest investigations. And I think that's very, very important. And as we look at E-commerce as a growing area for potential consumer harm and some of that exists. The question for us is what tools does the FTC need to be able to combat online fraud?

What I would like you to do if you would, would be submit to this committee the kinds of tools you think are necessary. We'll determine what we think we can provide.

Mr. LEIBOWITZ. Of course.

[The information referred to follows:]

Since the emergence of the Internet as a channel of commerce, the Commission has conducted a vigorous and aggressive law enforcement program against online scams. The Commission shares your concern about the abundant and novel opportunities E-commerce presents for fraud. The Commission has targeted a broad spectrum of bad actors that use the Internet to victimize consumers. It has brought scores of cases against Internet scams, including on-line pyramid schemes, bogus "government grant" schemes, employment scams, and rogue Internet service providers whose primary activity was to provide an Internet portal for overseas fraud operators, pornographers, and identity thieves. Using both Section 5 and the CAN–SPAM Act, the FTC has pursued numerous deceptive spammers. This developing sector of the Nation's economy remains a high priority for the Commission in its enforcement and consumer and business education efforts.

The following tools would assist in fighting online fraud:

- *APA Rulemaking*: Because the Commission may not use the ordinary Administrative Procedures Act ("APA") notice-and-comment rulemaking procedures that most of our sister agencies use, the Commission must do one of two things to promulgate a rule: either obtain from Congress a specific grant of APA rule-

making authority for a particular issue or use the cumbersome and time-consuming Magnuson-Moss procedures. In my view, either option is an inefficient and uncertain process for addressing serious problems in a timely fashion, especially those that can arise from emerging technologies or new marketing practices. The Commission needs APA-style rulemaking authority to be able to issue rules, when needed, in a reasonable time and with a reasonable expenditure of resources.

- *Civil Penalty Authority*: The FTC currently lacks the authority to seek civil penalties for violations of the FTC Act itself. Although the Commission currently may seek penalties—through DOJ—in certain specified situations (*e.g.,* for a defendant's violations of an existing enforcement order or of certain FTC rules), the ability to seek civil penalties for knowing violations of the FTC Act itself would give the agency an important tool for deterring unfair or deceptive practices. This is especially important for cases in which obtaining equitable remedies such as consumer restitution, rescission, or disgorgement is impossible or impractical—because, for example, victims cannot be identified or consumer injury and wrongful profits cannot be quantified.
- *Aiding and Abetting*: The absence, outside of the telemarketing context, of explicit authority to hold liable those who aid and abet law violators hampers the Commission's ability to take action against entities that do not themselves deceive consumers, but supply knowing and substantial support to those who do. In many cases, the aiders and abettors, by providing essential services that the primary fraudsters could not efficiently provide themselves, allow frauds to occur on a much broader scale than would otherwise be possible. Online scams often have multiple players playing discrete roles—*e.g.,* advertisers, affiliate networks, affiliates, and search consultants—most of whom have no direct contact or dealings with the victims of the scam, but without whom the fraud could not happen. Aiding and abetting authority would enable the Commission to reach key players in these schemes who provide knowing and substantial assistance.
- *Independent Litigating Authority for Civil Penalty Actions*: It is anomalous that while the FTC is authorized to try its own cases for a wide swath of remedies, including consumer redress and disgorgement, it may not do so when seeking penalties. Instead, the agency must refer cases to DOJ, wait up to 45 days for DOJ to determine whether to take a case, and allow DOJ staff time to learn the case and prepare. This requirement thus entails duplication of efforts and slower enforcement. In addition, it results at times in the agency having to choose between obtaining early injunctive relief (for example, to halt the violative practices and preserve assets for eventual redress) or seeking penalties. Having the authority to litigate civil penalty actions independently would allow cases to be brought more quickly and effectively, without the disadvantages occasioned by the referral obligation.

Senator DORGAN. But I think all of us on this committee want the Federal Trade Commission to be active and aggressive on behalf of consumers. We're not interested in smothering people with regulations and all these. But we're interested in finding the bad people out there and making sure they are exposed.

You mentioned a moment ago, I think, was it a $28 million settlement?

Mr. LEIBOWITZ. Yes.

Senator DORGAN. And tell me the company involved?

Mr. LEIBOWITZ. The company involved was EMC. It's a subsidiary of Bear Stearns. Although in fairness to Bear Stearns, it bought the company, I think, after our investigation started.

We alleged that they hid fees to consumers and late fees and other fees. And consumers didn't know about paying them. And then they were hit with multiple fees for not paying the fees they hadn't seen.

We got a settlement for, I think 28,000 consumers. Now they each got about $350. But, you know, for a middle class family, that's meaningful.

And again, you know, we believed, the company may still dispute this. I don't know if they do. But we believe they were ripped off. Because there were these embedded fees no one knew about and then they were compounded. And that's exactly what you don't want businesses to do.

Senator DORGAN. Let me just say that I don't know Bear Stearns. I mean, I know the name of the company and the reputation, but if Bear Stearns buys a company I assume they do due diligence in who they're buying.

Mr. LEIBOWITZ. Sure.

Senator DORGAN. And what the business practices are. And that's exactly what Senator Begich was talking about. I think people ought to have someplace where they can go and see who has been doing what. Who are the good actors and who are the bad actors out there?

So, I encourage you to look into the recommendation and suggestion by Senator Begich.

Mr. LEIBOWITZ. We'll do that.

Senator DORGAN. I'm going to have to go vote. We're going to—the Committee will be standing in recess. This vote will be about ending now and the second vote will occur immediately.

So I think within 20 minutes the Committee will reconvene. The Committee is now in recess.

[Recess.]

The CHAIRMAN [presiding]. I apologize for the delay. There were two votes concerning confirmation. And I'll say no more.

Let me ask you about your authority over financial products and services. In these very bad times it's obviously crucial that we're all doing everything we can to protect consumers who are struggling financially. It's particularly important that the FTC continue with aggressively enforcing laws within its jurisdiction to protect consumers.

I mentioned within its jurisdiction part. I want you to explain that as you now see it. Since you became Chairman how has the FTC increased its enforcement activities, if you have, if you are able to? If there are others who are competing to try and take it from you? I want to know that and in the area, particularly, of financial practices and services.

And also what else has the Commission done to make sure that consumers are protected during this economic downturn and beyond? In a sense what I really want you to talk about is what you want to do, what you can do, what you would like to do that you can't do, what you'd like to do that maybe you could do?

Mr. LEIBOWITZ. Right. And what we're doing now that we don't want to be taken away from us.

The CHAIRMAN. That could be part of the question.

Mr. LEIBOWITZ. So let me just talk. I'll talk about each of those.

So first, in terms of helping consumers who are victims of predatory financial instruments, we had been pretty good, I think, over the last few years about focusing on this. But, consumers are suffering, as we all know. And you know, if you're a victim of the economic downturn, we want to ensure that you're not also the victim of some scammer.

So we have done—we've ratcheted up the level of activity in this area. We dedicated more attorneys. We've brought in the last, I think 10 months alone, about 40 cases involving 200 defendants.

And then we partner with state attorneys general which is critical because we're all under resourced. They are. We are. But when you work together you can be more effective. And you can also get the word out.

So you do a press conference in Los Angeles—some of the worst malefactors in this area are actually based in Orange County. And you know, it's alerting consumers. And that's part of what we want to do.

In terms of—and so we're going to keep on making this a major, major focus because predators, con artists, they go where the money is, right? I mean, the money now is on things like mortgage modification scams and credit card settlement scams. And so it's really important that we continue activity in this area.

To make us more effective, we believe that things like APA rulemaking authority which you gave us for this specific purpose, but which we could use more broadly.

The CHAIRMAN. How?

Mr. LEIBOWITZ. Judiciously. How? Well, I would say this.

If we had APA rulemaking authority 2 years ago we probably would have, I believe, hindsight is always 20/20. But I believe we would have done a mortgage foreclosure rescue scam rule, like we've done now, sooner. And I think that would have been helpful to consumers.

And then it just gives us the agility when the next problem——

The CHAIRMAN. Right.

Mr. LEIBOWITZ. —for consumers comes up to move quickly.

The CHAIRMAN. Right. And let me just put pressure on this point.

Mr. LEIBOWITZ. Definitely.

The CHAIRMAN. Because you're underfunded. That's always going to be. When I said my opening statement that you'd brought 100 cases I was saying to myself as I was saying that, is that a lot of cases or is that very few cases?

And so what I want to know is when you do work with an attorney general in Orange County or wherever, or where you enter, make your presence felt, it can either be known to a discreet audience which are those parties which are affected.

Mr. LEIBOWITZ. Right.

The CHAIRMAN. And those who were working on it on both sides or it can have a larger effect. And what I want, of course, is to have a larger effect. But I don't know if that works in the real world. And I'm not a lawyer.

Mr. LEIBOWITZ. Well, I mean, here's how it does. And this is why rulemaking can be a critical tool in our arsenal. Because if you make it clear that here is the standard and you cannot fall below it, then I think a lot of companies that—and most companies are legitimate. But a lot of companies in the areas where we're seeing rip- offs of consumers will say, ok, we're not going to go below the standards that the FTC set. And they certainly won't feel like they're being dragged down by their competitors who are engaging in clearly unfair and deceptive acts or practices.

The other thing is when you do a rule oftentimes our rules, and including the proposed ban on advanced fees, also has provisions that require clear disclosure. Now that's an area you've looked at in the negative option context, right, where consumers just don't know that these fees are embedded in their credit card bills. And so if you can force things like disclosure, you have a much wider effect because you educate consumers at the point of sale.

The CHAIRMAN. But you can't make writing larger if it's literally small print.

Mr. LEIBOWITZ. Well, I would say if we pass a rule that says your disclosure has to be, as we—your disclosure has to be this large in this font. It can't be in a smaller font, a minute font compared to what your advertising is or your teaser rate of 1 percent mortgage for 15 years which we know is virtually, almost mathematically impossible. Yes, we can tell them you can't do that.

And then if we see someone doing that, it's very easy to go to court to stop them. Assuming we can find them which usually we can. And so that's the kind of thing that our staff will consider doing.

And then the other thing, of course, is we work with the stakeholders here, right? We work with industry to try to craft rules that aren't too burdensome on companies, but also protect consumers. And so rulemaking can be very, very helpful.

The other thing I would say, and again, this is a—this was Caspar Weinberger's idea when he was the FTC Chairman. But I think it's a great one, is to have fining authority for violations. If we want to have real deterrent effect and if all we can do is disgorge profits then a company gets two shots, two bites at the apple.

So, if we can say we're not only, to those companies that have money, we're not only going to get disgorgement for consumers, we're also going to ask for a fine from the court. I think that that gives us better leverage to protect consumers. And it's also a potential sanction that businesses will be aware of before they engage in questionable behavior.

The CHAIRMAN. So that Senator Wicker, who is Ranking, can both make a statement if he wants and ask questions, I want to finish on this particular point because we're on it. And that's the so called rulemaking or reforms. There are proposals and at least—to make four significant changes in your act.

One, it's rulemaking under the Administration—no, one there's a proposal to change the FTC's rulemaking authority to make it easier for the FTC to adopt rules prohibiting unfair, deceptive acts or practices. Do you think that reform is necessary? If so, how will it help consumers?

Mr. LEIBOWITZ. Yes, I think it will be very, very helpful. I think——

The CHAIRMAN. Tell me why it will help and why it will help what you have.

Mr. LEIBOWITZ. It will help because under the Magnuson-Moss Act it sometimes takes us 8 to 10 years to do a rule.

The CHAIRMAN. Ah ha.

Mr. LEIBOWITZ. By the time, you know, you fit—if it's a contested rule and most of—many rules are contested by one entity or another or a group. And so it would be very helpful to be able to do

the rules in a year and a half. Again, it's notice and comment rulemaking.

If you look at the mortgage rules that you and Senator Dorgan secured for us, we're doing a very deliberate, thorough job. We're bringing in stakeholders and so it's not willy-nilly overnight that we change the rule. We really listen to people.

It takes a while. But you don't want rules to take eight to 10 years. That's a glacial amount of time. And in the meanwhile bad guys might be ripping off consumers. So that's why APA rulemaking would be very helpful.

The CHAIRMAN. Alright. Second, the Administration has proposed giving the FTC the authority to seek civil penalties for violations of the FTC Act, its prohibition against unfair and deceptive acts or practices. You don't have that now? How would that change the effect?

Mr. LEIBOWITZ. We have it under a few specific statutes like CAN–SPAM, Children's Online Privacy Protection Act, telemarketing sales or also Do Not Call. What we'd like it for or a majority of the Commission would like it for, is to be able to have a strong deterrent for violations of our bread and butter statute which is a prohibition on unfair or deceptive acts or practices. And the reason it will be helpful, speaking for myself and for a majority of the Commission, the reason it will be helpful is because sometimes you're not deterred if there's not a penalty.

And again, sometimes we're really bringing fraud cases that could be brought criminally. If there's not a penalty, there's not a strong enough deterrent. And so we want that stronger deterrent.

Again, Caspar Weinberger was the original author of this proposal. He testified before this Committee in the early 1970s. It came out of this Committee.

The CHAIRMAN. These are all on the House bill, I think.

Mr. LEIBOWITZ. What?

The CHAIRMAN. These are all in the House bill.

Mr. LEIBOWITZ. And these are in the House bill and it has passed the House. That's exactly right.

The CHAIRMAN. OK, third and Senator Wicker, I'm trying to hurry here. Currently you have to refer civil penalty cases to the Department of Justice.

Mr. LEIBOWITZ. Right.

The CHAIRMAN. Which I generally think of as this giant mall from which you will emerge or not emerge ten or 15 years from now. No, you don't have to comment on that. There is a proposal to give the FTC independent authority to litigate civil penalty cases. Do you think this reform is necessary?

Mr. LEIBOWITZ. Oh, I think this is an absolutely critical reform. I don't believe there are many objections to it. But right now the Justice Department, it doesn't take ten or 15 years, it maybe takes a few months to ramp up to speed.

But if we're going after someone who is say, violating the Do Not Call rule, which is one of those rare instances where we can get fining—where we have fining authority. But there's also ongoing harm because this malefactor is calling people up all the time using predictive dialers, calling tens of thousands of people up a day. We have a choice right now. We can either go to court and shut them

down very quickly, sometimes with a temporary restraining order or we can give it to the Justice Department and wait 6 weeks or 3 months or longer to have them take the case.

Now the FCC already—so we should be able to do both. The FCC has this authority. The CFTC has this authority.

I don't believe anyone opposes it. I think in the past the Justice Department might have. I don't believe they oppose it now. So we're hoping, I think, that there will be unanimity to move forward with independent litigating authority.

The CHAIRMAN. And that too is in the House bill.

Mr. LEIBOWITZ. And that too is in the House bill, that's correct. It passed the House.

The CHAIRMAN. And that will—actually those are, I think I skipped one.

Mr. LEIBOWITZ. You might have—it might have been the aiding and abetting.

The CHAIRMAN. Yes, it is. To give you the authority to bring enforcement actions against entities for aiding and abetting, others who are engaged in unfair and deceptive practices, explain the need for that. That's also in the House bill.

Mr. LEIBOWITZ. And that's also in the House bill. And again, this one has stirred up some small amount of controversy or push back. I sometimes think that the push back comes from the Washington people rather than the companies themselves, but the folks in DC who are in the business of raising concerns about issues here.

First of all, we already have this authority in the telemarketing sales rule. So if someone aids and abets a Do Not Call violation, we can go after those folks. We used to have this authority for everything else up until the 1997 decision called Denver Bank. And then Congress restored this authority for the SEC but not for the FTC.

And the reason we want it is this. A lot of times there's a malefactor, someone who is a bad actor, who is ripping off consumers. But someone like a credit card processor, not a credit card company, but a credit card processor is facilitating it because consumers are charging back 40 percent or 50 percent or more of all the charges. And the credit card processor which makes money on each processing, doesn't do anything about it.

Now if we have aiding and abetting authority, that's the kind of instance in which we would use it. And there are plenty of good credit card processors, but we've certainly seen some bad apples.

The CHAIRMAN. I apologize to my colleagues, but it is interesting the way in certain parts of your jurisdiction you have authorities and in certain parts you don't have authorities and that's all kind of disturbing to me as I try to learn more about it.

I call now on Senator Wicker.

STATEMENT OF HON. ROGER F. WICKER,
U.S. SENATOR FROM MISSISSIPPI

Senator WICKER. Well thank you very much, Mr. Leibowitz and Mr. Chairman.

Well let me ask about the litigation authority. As I understand it there are two things we're talking about.

One is going in and getting an immediate injunctive relief, a TRO.

Mr. LEIBOWITZ. Yes.

Senator WICKER. And you could do that now.

Mr. LEIBOWITZ. We can do that now.

Senator WICKER. And then on the civil penalties and I think you mentioned for example, the Do Not Call rule.

Mr. LEIBOWITZ. Right.

Senator WICKER. As an example. You would like to have independent authority to go in and sue for civil penalties without consulting the Department of Justice.

Mr. LEIBOWITZ. Right, just as the SEC does.

Senator WICKER. OK. But now the Chairman was concerned that the Department of Justice would be this black hole where it would be lost forever. In your testimony you said, that's not true. It's a matter of 6 weeks or so.

Mr. LEIBOWITZ. Well it could be a matter of 6 weeks. It could be a matter of a little bit longer. But the point is and I'm not saying that they don't do a very good job in their Office of Consumer Litigation to try to move our cases.

But having said that, if there's ongoing harm and a company who is flagrantly violating the law, we believe, and this is, the Commission is unanimous on this, we believe we ought to be able to go to court as quickly as we possibly can for a TRO. And then later try to get fines after we litigate the case or settle the case because fines, as you know, are a way in which you can effectively deter people from engaging in law violations.

Senator WICKER. OK. Well it seems to me that, realistically, you are able to do that now. And I thought it was a 45 day window after which DO——

Mr. LEIBOWITZ. That's a great question.

Senator WICKER. OK. Well, let's check on that and take that for the record because I could be corrected also.

But it was my understanding that in order for you to pursue civil damages——

Mr. LEIBOWITZ. Right.

Senator WICKER. —that there was merely a 45 day window after which if DOJ had not acted——

Mr. LEIBOWITZ. Right.

Senator WICKER. —the FTC could go ahead.

Mr. LEIBOWITZ. So that's a great question. And some of this also relates to some of the iterations or versions of the Consumer Financial Protection Act. So there's a 45 day window for them to decide whether to take the case.

Senator WICKER. Right.

Mr. LEIBOWITZ. They invariably do. I think I can count one exception in my 5 years on the Commission. They invariably take the case, but they don't decide for 45 days. Then the process moves forward.

We also, almost invariably, once they take the case, we deploy, we send an FTC person over to the Department of Justice to help them litigate the case because, of course, we know the case. We did the investigation. We've been looking at it for a long time. So it's terribly inefficient.

And one of the things that I think the House corrected in the CFPA legislation was in the original version as introduced it required us to, I think, give the proposed new Consumer Financial Protection Agency 120 days in some circumstances, but I think 120 days advance notice and let them wait.

Senator WICKER. OK.

Mr. LEIBOWITZ. So that was a problem too for us and the House corrected that.

Senator WICKER. OK. I'm still not sure that it's something that egregious that needed to be corrected. But let me get back to the main point.

Mr. LEIBOWITZ. Sure.

Senator WICKER. And I hope the Chairman will indulge me for a moment or two.

The FTC has broad jurisdiction over the economy. And this Magnuson-Moss Act was enacted in an effort to sort of reign in FTC which at the time the Congress felt had become, some people would say, a fourth branch of government. So I will tell you, quite frankly from the outset, I'm concerned about the House passed bill.

And with regard to the rulemaking you want under the Administrative Procedures Act, what that does is take you out from the requirement of proof of substantial evidence in support of the Commission's action. Is that correct?

Mr. LEIBOWITZ. Let me get back to you on that technical definition.

[The information referred to follows:]

Should we be fortunate enough to obtain relief from Magnuson Moss's burdensome procedures, the Commission's fact finding in rulemaking must remain subject to thorough judicial review, and I would be happy to discuss with members of the Committee the appropriate standard of review for FTC rules.

Under the APA, a court can invalidate a rule if it finds that it is arbitrary and capricious. Under Magnuson-Moss, a court can invalidate a rule if it finds that it is not supported by substantial evidence. Some courts have interpreted the standards for review of APA rulemaking and Magnuson-Moss rulemaking similarly. In *Consumers Union of U.S.* v. *FTC*, 801 F.2d 417, 422 (D.C. Cir. 1986), the court (opinion by then-Judge Scalia) held that the FTC Act's "substantial evidence" standard for judicial review of a Magnuson-Moss rule does not call for a more intensive review than the "arbitrary and capricious" standard for notice-and-comment rules under the APA, but rather requires the same degree of evidentiary support; *see also, e.g.,* Eagle Broadcasting Group, Ltd. v. *FCC*, 563 F.3d 543, 551 (D.C. Cir. 2009) (explaining that the "substantial evidence" standard for review of "formal" rulemaking under the APA—the same language adopted by Magnuson-Moss—is the same as the "arbitrary and capricious" standard for notice-and-comment rules). Thus, some have posited that if a rule's factual underpinnings are not supported by substantial evidence, it is arbitrary.

On the other hand, many who were present at the enactment of the Magnuson-Moss Act believe the substantial evidence standard should be higher.

Senator WICKER. OK.

Mr. LEIBOWITZ. I mean you're absolutely right that we have very broad jurisdiction. I mean, so does the Fed, so does the FCC and they're not under Magnuson-Moss. But, and my understanding—and again, when we do a Magnuson-Moss rulemaking it can take an awful long amount of—it can take a terribly long amount of time to do a rulemaking. As a result we don't do a lot of rulemakings.

And when we've done APA rulemaking and you've given us APA rulemaking for certain things like mortgages, as you did in the

Omnibus bill, we're pretty thoughtful. And we're pretty deliberative in the way we move forward.

So I certainly believe reasonable people can disagree when the FTC was created about this issue, and Tim Muris, a terrific Chairman, first Chairman under President Bush and Bill Kovacic, who is one of my colleagues on the Commission now, certainly take the view that you do that because we have broad jurisdiction we should have limited remedies. But I also think——

Senator WICKER. Under the APA the burden would simply be that you not be arbitrary and capricious, that would be the burden. And that concerns me in an agency that is potentially as powerful as the FTC.

I'm intruding on my time. And we have another questioner. But let me ask you this.

Mr. LEIBOWITZ. Sure.

Senator WICKER. This will be my final question, Mr. Chairman. This eight- to ten-year process that it can take to do a rule, I think really what you're saying is you don't even try now to do rules.

Mr. LEIBOWITZ. Sometimes we will.

Senator WICKER. Very rarely.

Mr. LEIBOWITZ. But rarely.

Senator WICKER. I guess there's testimony and comment to analyze, and that takes staff time. What if you put more staff on a rule and still had to show to the American people and to Congress that there's substantial evidence to justify this rule? And what if we gave you a little more personnel to work on that? Wouldn't that speed things along also? And still be satisfied about this burden?

Mr. LEIBOWITZ. We would certainly take more personnel and you know, in 1979 when the population of the United States was 225 million we had 1,800 employees, maybe a little bit more. Now we have just about 1,100 and the population is over 300 million. And we've been—because I think we have been a consistently effective agency, you've made us the lead enforcement agency on COPPA and CAN–SPAM.

So I do worry that—and I appreciate that the quality of our work is being strained by the quantity of demands placed upon us. And I think more personnel would help. But I also think it's partly the amount of personnel who are doing rules. It's also partly that under the Magnuson-Moss Act sometimes if you're in opposition to Magnuson-Moss rule you can call for a time out. You can call for an independent referee.

Now, yes, Congress, I think at that time when Magnuson-Moss was passed wanted to design a cumbersome system. But I also think you ask us to do a lot more now. And I don't think anyone, even the *Wall Street Journal* which had an editorial saying they didn't want to give us most of this authority. They didn't say that about independent litigating authority, by the way.

I think they believe that we're a pretty responsible agency. We're a very bipartisan agency. I'm the only Democrat at the FTC now. We're hoping to get two more Commissioners soon.

But we're pretty thorough. We're pretty deliberative. And I just think for the things that you want us to do in terms of protecting consumers, some relief from Magnuson-Moss and something like APA rulemaking would be very, very helpful.

Senator WICKER. On the record, sir, would you supply us with examples of rules that took too long to make it?

Mr. LEIBOWITZ. Yes, I can.

Senator WICKER. And give us some historic data on the staff devoted to the rulemaking effort.

Mr. LEIBOWITZ. Yes, be glad to do that. Give me a few days to get that information back to you. I think that would—I'd be happy to do that.

[The information referred to follows:]

Three examples of Magnuson-Moss rules that took too long are the Credit Practices Rule and the Used Car Rules, each of which took almost 9 years, and the Funeral Services Rule, which took more than 7 years.

Other rulemakings that did not ultimately result in rules but nonetheless went on for many years include: Mobile Homes (almost 12 years); Hearing Aids (over 10 years); Health Spas (over 10 years); Protein Supplements (almost 9 years); OTC Antacids (over 8½ years); and Food Advertising (over 8 years).

With respect to the number of staff devoted to Magnuson-Moss rulemakings, all of the rulemakings using those procedures to create new rules were conducted more than 25 years ago.[1] Also, all of the rules were initiated prior to the 1980 amendment to the FTC Act requiring an advanced notice of proposed rulemaking and a determination that the practice addressed is prevalent. Staff has gleaned from some of the post-hearing staff reports illustrative staffing information:

- Mobile Homes: At least 13 staff members worked on the post-hearing staff report.
- Used Cars: More than 14 staff members worked on the post-hearing staff report.
- Funeral Industry: At least 16 staff members worked on the post-hearing staff report.

These numbers do not include the Presiding Officer (who was obligated to produce a separate report) or his staff, Bureau of Consumer Protection management reviewers, Office of General Counsel advisors, or the Commissioners' offices. Staff familiar with the rulemaking proceedings inform me that these staffing levels were typical.

The CHAIRMAN. Thank you, Senator. And now former prosecutor, Senator Klobuchar.

STATEMENT OF HON. AMY KLOBUCHAR, U.S. SENATOR FROM MINNESOTA

Senator KLOBUCHAR. Thank you very much.

Thank you, Commissioner Leibowitz for your leadership as Chair. We've worked together on several things. I really appreciated the way the FTC pursued the Ovation case in Minnesota when I brought it to your attention at a hearing about the price jacking up with the drug how quickly the FTC responded and actually brought a lawsuit that's pending right now in Minnesota as far as I know. So thank you for that work.

The subject I wanted to follow up a little bit with what Senator Wicker was talking about. And I would also appreciate those specific examples.

Mr. LEIBOWITZ. I'll send them back to the Committee.

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[1] Eight Magnuson-Moss rules have been amended, also using Magnuson-Moss procedures. Building on existing rules, amendment proceedings involved fewer issues than did the original promulgations, and they were typically more lightly staffed. In these eight instances, interested parties generally did not demand hearings to deliver their oral presentations—although most, if not all, amendment proceedings involved one or more public workshops to develop a full record.

Senator KLOBUCHAR. OK, very good. And is there something in between the APA rulemaking and Magnuson-Moss that would be helpful to you?

Mr. LEIBOWITZ. I am sure there is. And we can think about that. I believe there are in some areas, types of rulemaking where you bring the stakeholders together. And I'm sure there is something between the sort of draconian, medieval Magnuson-Moss Act and the thorough——

Senator KLOBUCHAR. Do you want to comment more on that?

Mr. LEIBOWITZ. No, no, no. I just—I want to use objective criteria. I don't want to get too—I don't want to be subjective about my views on Magnuson-Moss or the Commission's, the majority of the Commission's views on Magnuson-Moss.

But I'm sure there are ways to modify Magnuson-Moss rulemaking to make it more useable for the Commission while ensuring that the rulemaking is thorough. But I'd also say if you look at the APA rulemakings we've done because you specifically gave them to us in some instances, we're pretty thorough in the—when we do it that way as well.

Senator KLOBUCHAR. Very good.

In your testimony you stated that should we decide to change our current system of consumer financial protection the FTC's authority and ability to protect consumers should not be eroded or made unclear. Do you see specific threats on these fronts from any of the current proposals from Congress?

Mr. LEIBOWITZ. Well I would say that the—and I think that the Commission believes that the legislation as it passed, the CFPA, as it passed the House did a very good job in ensuring that we can still protect consumers. Essentially while it took away our rulemaking authority for, which is Magnuson-Moss rulemaking, for financial services, it would leave us with the authority to bring cases.

And the other area where we were very concerned was the area—was the notion that we would have to wait, as we have to do with the Justice Department, 120 days depending on which duration for the new agency if it's created, to decide whether to take a case. And of course, if there's ongoing harm like, you know if there was a bad actor engaging in financial fraud but doing it by robo calls, we wouldn't want to have to wait that long. I think that the version as passed by the House as moved has made a lot of progress in minimizing those concerns, from the Commission's perspective.

Senator KLOBUCHAR. Thank you.

As a former prosecutor, as Senator Rockefeller mentioned, I understand the benefit of being able to reach not only the direct perpetrators, but also those bad actors that support and enable others to violate the law. I recognize that absent direct statutory authority to go after these aiders and abettors, the FTC has developed alternative assistance legal theories to reach secondary actors. Can you discuss the success and shortcomings of these alternatives theories and the first question? Second, how would specific statutory authority improve the FTC's law enforcement in this area?

Mr. LEIBOWITZ. Well, I would say the specific statutes or let me answer your second question first. The specific statutory authority

makes it clear that we can do this. And really all it does is restore the authority that we had before the Denver Bank case. And make it consistent with the authority we have under the Telemarketing Sales Rule. Senator Rockefeller mentioned the crazy quilt patchwork of laws that we're under.

And so we have tried alternative theories. And sometimes they are successful. I think we had a payment processing case in which we won in district court and was appealled last year.

But there are people, there are entities that are aiding and abetting fraud or aiding and abetting unfair and deceptive acts or practices. And we protect a bunch of consumers by going after those folks. And I don't understand why there has been some amount of opposition to this because, you know, we're in the business of protecting consumers. And we're in the business of trying to bring actions against people who are ripping off Americans.

And so I think clarifying the standard would be much better and much more useful to us and much more useful to consumers basically.

Senator KLOBUCHAR. Thank you.

The CHAIRMAN. Go ahead.

Senator KLOBUCHAR. I have to go back to another hearing. But I want to thank you for letting me ask questions.

The CHAIRMAN. Of course because of your interest.

Senator KLOBUCHAR. Thank you. I'll await the answers about the specific examples instead of going——

Mr. LEIBOWITZ. That would be great. And we'll also give you specific examples on alternative theories that we've used.

[The information referred to follows:]

There are instances in which the Commission can allege that those who assist scammers have violated section 5 of the FTC Act. For example, the Commission is able to take action against those who knowingly assist telemarketing scammers. In the Telemarketing and Consumer Fraud and Abuse Prevention Act, Congress gave the Commission explicit aiding and abetting authority with respect to telemarketing. This authority has proven very useful in prosecuting numerous bad actors, but it does not allow the Commission to reach those who knowingly assist scammers defrauding consumers over the Internet or through the mail or other means that do not involve telemarketing.

In some instances, the facts permit the Commission to allege that the assistor provided the scammer with the "means and instrumentalities" of the fraud scheme. Under the "means and instrumentalities" theory, a person or entity that places in the hands of another a means of consummating a fraud has directly violated the FTC Act. This occurs, for instance, when the assistor provides the scammer with counterfeit products to be sold as genuine goods. The means and instrumentalities theory is, however, generally limited to instances in which the fraud assistor has provided an inherently deceptive thing that is then used to deceive consumers.

In other instances, the facts permit the Commission to allege that the assistor engaged in "unfair" conduct by assisting the scammer. An act or practice is "unfair" if it is proven to: (1) cause substantial injury to consumers, (2) that they cannot reasonably avoid themselves, and (3) is not outweighed by countervailing benefits to consumers or competition. In a case that is currently on appeal, the Commission alleged that the defendant's payment processing business made unauthorized debits to consumers' bank accounts on behalf of a scammer. While we believe that it is appropriate in this instance, the use of the Commission's unfairness authority in this fashion does not have the long jurisprudential history associated with the concept of aiding and abetting and involves proving the unfairness elements described above rather than focusing on the assistor's relationship with and knowledge of the fraudster's activities.

Furthermore, in some instances, facts permit the Commission to allege that an entity is part of a common enterprise with the scammer. A common enterprise exists where factors such as commingling of assets, common ownership, shared locations,

and other considerations demonstrate that apparently independent companies are part of the same enterprise. It is not necessary or even typical, however, for assistors to be so closely affiliated with scam perpetrators.

Senator KLOBUCHAR. OK, very good. Thank you.

The CHAIRMAN. OK. That's the first time in the history of the Commerce Committee that a Chairman's ever been turned down for another question.

[Laughter.]

The CHAIRMAN. I was just handed a note. Thank you, Senator Klobuchar, very much.

I was just handed a note which interests me. It says even at the height of the FTC's resources/staffing, 1975 to 1985 basically, it still took 10 years to pass consumer protection rules like the ones on credit practices. Can you explain that to me because I'm really having a hard time between the sort of 45 days things that he's talking about and what——

Mr. LEIBOWITZ. Alright. We do many things and we try to act holistically, but think of them as different buckets. When we want to bring a civil penalty case, this is the 45 days, in those few instances Children's Online Privacy Protection Act, Telemarketing Sales Rule, Do Not Call, CAN–SPAM, we must go to the Justice Department.

The Justice Department then has 45 days to decide whether to take our case. In most instances they take 45 days. And in virtually every instance they then take the case. So we have to wait. There's a lag time.

And even though they do a good job, it's not 10 or 15 years. They do a good job of trying to move forward on our cases. There's a lag time.

Now when we're confronting ongoing harm to consumers, like someone who is spamming consumers or someone who is violating the do not call rule and calling up a bunch of consumers or making robo calls, we want to be able to do both. And we think we should because we want to stop ongoing harm. And we want to try to get fines against folks who are deliberately violating the law.

Now the ten years for rulemaking is when we have to use Magnuson-Moss. Magnuson-Moss—so rulemaking is different than fining. And when we use Magnuson-Moss it sometimes, I'd say two things.

As Senator Wicker mentioned, sometimes we know it's going to take so long to do a Magnuson-Moss rule that we just don't do it. And we had talked a lot about mortgage modification scams among Commissioners, we had actually brought the Fed in for two meetings and had two Commission meetings to talk about what we could do in this area in late 2008, early 2009. And we knew that we could not do a rulemaking here.

So we just hoped that Congress would do something for us. Fortunately you and Senator Dorgan did.

When we do do rulemakings and again we've done only a few Magnuson-Moss rules since I've come to the Commission. And I've been there 5 years. Mostly they had started before I got there. It takes a really long time.

And you know, when there's opposition and again, I hate to sound like a broken record, but when you're doing a tough rule

sometimes there is opposition. Sometimes businesses have entrenched business practices which may not be beneficial to consumers. Then, you know, it is just very hard to enact a rule.

And so, you know, as you pointed out we deal with a kind of a crazy quilt patchwork of statutory authority. We try to do the best we can. But as we think through and again not, this is as we think through how we can be more effective, how we can be more effective with fewer employees than we had.

One of the ways we can do that, Mr. Chairman, is to have this expanded authority. And we don't take it lightly. And we, you know, when we do do this notice and comment APA rulemaking it's not on a whim. It's not a notice and comment for 15 days and then we're done.

We do workshops. We meet with stakeholders. We take submissions. We read the submissions. We incorporate thinking because we know we're not perfect here. We learn about industries. And then we do our rulemakings.

And so we are not perfect but we believe we can be more effective this way. And even, I should say, even one of my colleagues, Bill Kovacic, the former Chairman, now a Commissioner, believes that it's appropriate to have APA rulemaking and civil penalty authority on a case by case basis. So it's not as if anyone thinks we're going to try to change the world with this rulemaking.

We're going to be very deliberative. We're going to be very thoughtful if we're fortunate enough to get it.

The CHAIRMAN. Alright. Let me switch to a final set of questions. In comes the President and he suggests the creation of something called the Consumer Financial Protection Agency, CFPA. And that is obviously a good idea. I think it's better to have two cops on the beat than one.

Mr. LEIBOWITZ. Right.

The CHAIRMAN. But it also raises potential conflicts, misinterpretations of jurisdiction, so to speak. So if the CFPA is created how do you envision the two of you working together?

And then more than that, the Administration proposal gives the FTC backstop authority, whatever that means, to enforce various important consumer protection laws currently enforced by the FTC including the Truth in Lending Act, the Fair Debt Collection Practices Act and the Fair Credit Reporting Act. Does it make sense for the FTC to have something called backstop enforcement authority for those "enumerated consumer laws?" Why don't you?

Mr. LEIBOWITZ. It's a great question. And I would say——

The CHAIRMAN. I don't know what enumerated consumer laws are. I guess it's a variety.

Mr. LEIBOWITZ. —who would be each of the—it would be specific laws that we enforce beyond Justice.

The CHAIRMAN. But again, picking and choosing.

Mr. LEIBOWITZ. Right.

The CHAIRMAN. Here you can, there you can't.

Mr. LEIBOWITZ. So, in some iterations, particularly the earlier draft proffered by the Administration—and this is in the context of I support the creation of a Consumer Financial Protection Agency—I agree with you. It's better to have two cops on the beat, particularly in a critical area where state agencies and this agency,

are picking and choosing which cases to bring because we don't have enough—we can't put enough—we can put a lot of people on, in this area during financial practices cases but, and predatory financial interest cases, we'll never have enough.

But we were very concerned about what we would call boundary issues which is would we have to wait?

Would they take away jurisdiction where we're doing a pretty good job?

Would the new agency—would we have to wait, as we do with the Justice Department, you know, a certain amount of time for them to determine whether they wanted to take a case while there was ongoing harm?

How do we handle these boundary issues?

I think the way the House and my colleagues—I believe, agree with this—the way the House passed the Consumer Financial Protection Agency it allowed us to retain our jurisdiction for the most part and allowed the new agency to have overlapping jurisdiction. And the way we would work through that, I think, is the same way we do with the Justice Department. We'll pick and choose in the—context, we will take some cases. They will take other cases. And we would work through a manner in which it's most efficient.

But I agree with you it's better to have two cops on the beat. We are hopeful that as the Senate moves forward and under your leadership and the leadership of this Committee, we can solve the boundary issues or the enumerated statute issues sort of consistent with the way the House did.

The CHAIRMAN. OK. Well, let me——

Mr. LEIBOWITZ. Sure.

The CHAIRMAN. I mean what I really want to say is in the minds of those that have created this new agency do they trump you? And let me just before you answer, I want you to answer that. But some of the CFPA's proposal would require the FTC to give substantial advance notice.

Mr. LEIBOWITZ. Right.

The CHAIRMAN. To the CFPA, before bringing in enforcement action under its backstop authority, again that word. Other proposals shorten or eliminate the advanced notice requirement which I guess is more flexible. Again, I'm confused by sort of——

Mr. LEIBOWITZ. We believe——

The CHAIRMAN. —are you equal partners or are you not?

Mr. LEIBOWITZ. Let me just say I like to think that we will be equal partners if that agency is created. And I certainly hope it's created. I like to think that the way the House resolved this issue is a good template for the way perhaps that the Senate will and ultimately conference committee.

In that instead of having the FTC giving substantial advance notice to the new agency, each agency would essentially let the other agency know under symmetrical terms that we're in the process of investigating this entity or these companies. And so we would be talking all the time.

And we wouldn't have an overlap of two agencies going after the same entity. But we would be co-equals. And I think that's an important component of the way our agency and really the way both agencies can most effectively serve consumers.

The CHAIRMAN. Well, let me ask it another way. In your judgment, unbiased, why were they created?

Mr. LEIBOWITZ. Why was?

The CHAIRMAN. CFPA.

Mr. LEIBOWITZ. Well I think it was created because there—you know as we saw the economic downturn. And we saw a lot of the reasons for it. I think there is a real sense that we want to make sure it doesn't happen again.

And there is a concern by some, I don't know whether it's accurate or not, that, particularly with respect to the banking agencies they weren't doing a good enough job to protect consumers. In part because the banking agencies care primarily about making sure the economy is healthy to the extent they can, safety and soundness of banks. And so consumer protection was sort of an orphan stepchild in the banking agencies.

And also because on the banking side, you know, there are several different agencies, banking agencies, the Fed, OCC, that have a piece of this. And then we have jurisdiction over banks. And then we have jurisdiction over non-bank financial instruments.

So I think there's a—it is clear that there is a balkanization of jurisdiction as the law is now. And so I think the proposal is done for all the best reasons which is really to make sure that you, that someone focuses entirely on consumer protection in the financial sector. And I applaud the President for his leadership there.

But I do think the way to make it—but I also believe there's a—what is the adage? If it's not broke, don't fix it. And so, you know, from our perspective as an agency, I think we do, not a perfect, but a pretty good job in this area. I think if we get this expanded authority we'll be able to do even more.

The President in his 2011 budget gave us a substantial increase which we will use. And it sounds like Senator Wicker also wants to give us a substantial increase in personnel which we will use to bring more cases. And so I think the—in particularly in the financial services area, but not only in the financial services area—I think the goal of the House is to make this new agency effective but keep the FTC as an effective agency as well.

The CHAIRMAN. Yes, because the House gave you the full enforcement authority under financial products and services.

Mr. LEIBOWITZ. That's correct.

The CHAIRMAN. Yes.

Mr. LEIBOWITZ. That's correct.

The CHAIRMAN. Well, let's watch this closely. And we will. It's interesting that, I'm just ruminating here, but how little people out across the country and up until this year, that included certainly myself, are aware number one of what is being done to them in HDTV or just regular TV or in all kinds of other scams that can be done in so many ways. And it never really makes the headlines very much.

And so they are innocent, sometimes. We're going to be dealing shortly with a WellPoint issue which is very, very interesting, how they sort of always ended up as the vendor although nobody ever asked that they be the vendor. And yet then beyond the complexity of being tricked or not being handled fairly the agencies which are/reside in the Federal Government maybe in state governments to

whatever extent that they're effective on this, how interstitial they are and how complicated they are in how the rules of authority and the so called backstop authority which I'll probably dream about tonight because it just haunts me.

I have no idea what it means. It sounds to me like it's a put down. You're saying no. We're equal partners.

Mr. LEIBOWITZ. No, no, no. Let me clarify that.

The CHAIRMAN. Yes.

Mr. LEIBOWITZ. I think the backstop authority was problematic. I think it was modified as the House passed it. Well, hopefully you won't have to dream about backstop authority because the way the legislation comes out we'll have co-equal authority.

The CHAIRMAN. But I won't know that.

Mr. LEIBOWITZ. It won't become a term of our—what?

The CHAIRMAN. I won't know that tonight so I may.

Mr. LEIBOWITZ. You won't know that tonight, that's right.

The CHAIRMAN. In any event it's incredibly important what you do. And this whole subject, for those of us who are non-lawyers, and I think for all should come much more to the front because as we're now in an era in this country where we're really concentrating on huge issues like health care, the economy, jobs programs, financial restructuring, all the rest of it. And so there's a real chance for these people to keep operating in the bliss of darkness because all the space is being taken up by so called large national problems which indeed they are. But it makes agencies like yours so much more important.

So with that I thank you very much.

Mr. LEIBOWITZ. Thank you.

The CHAIRMAN. I apologize for the various delays. And I hope we can get your two colleagues.

Mr. LEIBOWITZ. Thank you so much, Mr. Chairman.

The CHAIRMAN. Done. Thank you. Hearing is adjourned.

[Whereupon, at 3:57 p.m. the hearing was adjourned.]

A P P E N D I X

PREPARED STATEMENT OF HON. KAY BAILEY HUTCHISON,
U.S. SENATOR FROM TEXAS

Thank you for holding today's hearing. The Federal Trade Commission (FTC) is an important agency charged with protecting consumers from unfair and deceptive trade practices.

The actions of the FTC have become even more critical during this economic downturn. Too many vulnerable consumers have been preyed upon by entities seeking to profit from fraudulent activities masquerading as offers to assist them with debt and credit issues.

The FTC has worked to provide consumer education and to use its enforcement authority to compel those engaged in fraud to halt their activity. I commend Chairman Leibowitz and his fellow commissioners for their vigilance during these difficult times.

I do appreciate that Chairman Leibowitz would like for Congress to provide the FTC with expanded authority in a number of areas including streamlined rulemaking authority and the ability to take action against individuals and businesses for aiding and abetting fraud and deceptive practices.

However, I believe we should proceed with extreme caution to ensure we do not provide an agency with an already extremely broad mission with authority that is more expansive than necessary.

In the past, Congress has granted the agency streamlined rulemaking authority and other enhanced enforcement tools in very narrow areas to address particularly pervasive fraud and consumer harm, rather than enacting these changes across the agency's entire jurisdiction.

Proceeding in this manner has helped to ensure that the FTC, with its extraordinarily broad jurisdiction, is taking the time to consider all of the potential ramifications of new regulations in areas where it may have limited experience or technical capacity while at the same time allowing the agency to act quickly where there is a need.

That said, I am concerned about other efforts underway, including the Consumer Financial Protection Agency legislation, that would remove aspects of the FTC's current authority and give them to a new agency that does not have the experience that the FTC does.

Creating a new regulator rather than refining the authority of an experienced consumer protection agency does not make sense to me. I think it is important that the FTC retain its existing authority and continue to pursue bad actors in the areas under its jurisdiction.

Mr. Chairman, I look forward to the discussion and debate on FTC authority that we will have, and to working with you in the months ahead to provide additional resources for the FTC and sensible changes to its enforcement and consumer protection authority.

Thank you again for holding this hearing.

February 22, 2010

MICHAEL C. DILLON
Manchester, NH

Senator JAY ROCKEFELLER,
Chairman,
Commerce, Science, and Transportation Committee,
Washington, DC.

Re: Financial Services and Products: The Role of the Federal Trade Commission in Protecting Consumers

Dear Mr. Chairman:

While I fully applaud and support your commitment and that of the Committee to the strengthening of consumer protection issues, as a consumer directly affected by the actions of the Federal Trade Commission and after watching the Committee proceedings and FTC Chairman Jon Leibowitz's testimony before the Committee on Feb. 4, 2010, I feel it necessary to bring several concerns to your attention.

To assist in placing my views in perspective, I am one of the original 281,100 victims of Fairbanks Capital Corp. n/k/a Select Portfolio Servicing Inc. as certified by the Federal Trade Commission for *USA/Curry* v. *Fairbanks*.[1] I opted out of that action as I felt that it simply did not provide adequate protection or relief for me. In 2006, I decided to make my situation with Fairbanks/SPS[2] publicly known via the Internet and have since heard from many other Fairbanks/SPS victims who also either opted out, knowingly opted in or never received notification of the class action settlement. Those who never received notification of the settlement were automatically opted in to the settlement by default thereby giving up any and all legal rights to either defend themselves against or seek restitution for any action committed against them by Fairbanks/SPS during the proscribed period of time covered by the settlement agreement.

The Federal Trade Commission protects American "consumers" as opposed to the American "consumer." The number of Fairbanks/SPS victims that have contacted the FTC both pre- and post *USA/Curry* v. *Fairbanks* settlement literally begging for help to halt potentially fraudulent foreclosure actions at the hands of the company is, to my mind, both heartbreaking and staggering. I say this because I had virtually the same experience that each and every one of them must have had when I was first starting down the road of looking for assistance to help stop what a NH Superior Court ruled a fraudulent foreclosure.[3] Upon finally arriving on the FTC's doorstep, borrowers, including myself, were informed that the FTC "does not take action on behalf of individual consumers."

Apparently, judging from information I have obtained through a FOIA request, the FTC and associated Federal agencies and entities had been "investigating" then Fairbanks Capital Corp. beginning in 1999. And yet, it took another 4 years to bring only civil action against the mortgage servicer. I note this specifically because it also appears, again via FOIA obtained information, that a criminal investigation was quashed as part of the civil settlement. And for those 4 years of "investigation" and each year subsequent to the *USA/Curry* settlement, homeowners have been losing their homes to allegedly fraudulent foreclosures initiated by Fairbanks/SPS. This continues to this day, despite the Federal Trade Commission re-visiting and modifying the terms of the *USA/Curry* v. *Fairbanks* settlement in 2007—at the request of Fairbanks/SPS.

I strongly suspect that the Federal Trade Commission had in it's possession at the time of the settlement of *USA/Curry*, enough evidence, including testimony of kickbacks, to actually close the corporation permanently. I also have in my possession a letter from FTC Inspector General John Seeba in response to an inquiry sent to his office by NH Senator Jeanne Shaheen on my behalf in which Inspector Seeba states that *"The settlement negotiated between the FTC and Fairbanks Capital Corp. was appropriate given the under-capitalization condition of Fairbanks Capital at the time."* Other affidavits and declarations produced as part of the *USA/Curry* v. *Fairbanks* litigation appears to support the Inspector's opinion.

There are several issues regarding this sentiment that have concerned me for some time. The vast majority of the settlement funds recovered by the FTC were guaranteed by either Fairbanks then majority or minority shareholders. The PMI Group guaranteed $35 million of the settlement funds and Financial Security Assurance another $10 million. Ignoring for a moment, that for a corporation at one time

[1] *See http://www.ftc.gov/fairbanks.*
[2] *See http://www.getdshirtz.com.*
[3] *See http://www.getdshirtz.com/orderonthemerits.html.*

pulling in at minimum $100 million per month, a $55 million "fine" is nothing more than the cost of doing business, with guarantees of $45 million from it's parent corps., Fairbanks only had to relinquish $10 million of it's own money. And of the entire $55 million, it is still unknown what amount, if any was covered by any insurance policies that Fairbanks and/or it's parent corps. may have had in place for just such a scenario.

Separately, but directly related, approximately 6 months after the settlement of *USA/Curry* v. *Fairbanks* it became publicly known that Credit Suisse First Boston intended to purchase Fairbanks Capital Corp, known as of July 1, 2004 as Select Portfolio Servicing Inc., and on August 12, 2005 it was announced that CSFB agreed to purchase 100 percent of outstanding stock of SPS Holding Corp. for approximately $144 million. Upon the finalization of that purchase, SPS obtained upwards of $6 Billion in servicing portfolios. That said, and given the fact that the FTC modified the terms of the settlement in 2007, the FTC could have easily sought additional restitution, or at the very least made specific provisions in the original settlement to recover additional restitution for the victims should Fairbanks/SPS "recover" financially, but this obviously was not done.

To this day, through my website and other Internet venues, I hear from both old and new victims of Fairbanks/SPS. Some complain of identical issues that were supposedly settled in 2004, some bring new issues to my attention including issues surrounding loan modifications. Through the FOIA information, I have learned that at least one victim did not receive their 2004 settlement check until sometime in 2008. Fortunately or unfortunately, the overall settlement amount of the check was not enough to affect her life in any major manner either positively or negatively because if the $40 million specifically available to the roughly 272,000 victims who were not foreclosed upon was equally distributed across the class each class member would have received approximately $147.00 each.

I would also like to note, Mr. Chairman, that in 2003, separate from any FTC action, a West Virginia court felt it necessary to issue a temporary injunction for the entire state of West Virginia in order to protect homeowners of the state from the unscrupulous and fraudulent actions being perpetrated by then Fairbanks Capital Corp. Regardless of any past civil action, this corporation is still harming the American consumer to a large degree, the FTC continues to receive complaints about the corporation, and no further civil or, more appropriately, criminal action appears to be forthcoming.

Federal Trade Commission Chairman Leibowitz made it a point to specifically cite *FTC* v. *EMC Mortgage and Bear Stearns*[4] in both his oral and written testimony. It was apparent, by his oral testimony, that Chairman Leibowitz was not wholly familiar with the history of EMC Mortgage as he stated, at roughly 47 minutes into the hearing, that Bear Stearns purchased EMC Mortgage after the FTC's investigation began." In fact, EMC Mortgage has been a subsidiary of the Bear Stearns Corporation since 1990[5] when David M. Lehman, a senior managing director of Bear Stearns founded EMC to service loans procured from the Resolution Trust Corporation and served as EMC's Chief Executive Officer.[6] That notwithstanding, the charges brought in *FTC* v. *EMC/Bear* are virtually identical to those brought by the FTC in *USA/Curry* v. *Fairbanks*. *FTC*. v. *EMC/Bear* was settled in September 2008, nearly 4 years after the settlement of *USA/Curry* v. *Fairbanks* but, as apparent by the necessity for the FTC to bring this action, the mortgage servicing industry did not learn any lessons despite *USA/Curry* and its' "Best Practices" guidelines being heralded as a supposed harbinger for the entire servicing industry.

Interestingly enough, I had placed a telephone call to the FTC several days before the EMC settlement was made public simply to inquire about the terms of the settlement. I received a return call from Lucy Morris' office informing me the FTC had settled with EMC for $28 Million. I then asked how many victims the FTC had certified for the action and was told that they had not yet certified a class but expected that there would be "tens of thousands" of victims involved. I immediately asked how it was possible to determine a settlement amount in a class action when it was not yet possible to determine how many victims a corporation had negatively affected and was simply given "I don't know." for an answer. Eventually, it was disclosed that 86,000 EMC victims were included in that action, although how many actually opted in to the action I do not know.

Regardless, once again, even assuming that all 86,000 opted in and restitution was distributed equally across the class, a whopping $325.58 would have been returned to each of the 86,000. Most of these victims most likely suffered far greater

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[4] *See http://www.ftc.gov/opa/2008/09/emc.shtm.*
[5] *See http://www.encyclopedia.com/doc/1G1–46692811.html.*
[6] *See http://www.linkedin.com/pub/david-m-lehman/10/287/4a.*

financial damage than that restitution amount simply from any credit reporting executed by EMC let alone any other financial, emotional, physical or psychological damage almost certainly incurred. I am aware of one former Fairbanks/SPS victim whose note was supposedly sold to EMC Mortgage after the homeowner entered into a settlement agreement with Fairbanks/SPS to halt a fraudulent foreclosure initiated by Fairbanks/SPS. EMC Mortgage is currently attempting to foreclose on just the mortgage, as opposed to the note, as EMC cannot produce the original note. EMC is also contending that Fairbanks/SPS never had the servicing rights to the victim's note despite the victim having proof of payment to and monthly statements from Fairbanks/SPS going back approximately 10 years.

Obviously, the necessity for the Federal Trade Commission to bring a virtually identical case against a second mortgage servicer within 5 years of their "largest action against a mortgage servicer" (*USA/Curry*) demonstrates that the civil penalties levied against Fairbanks/SPS in *USA/Curry* v. *Fairbanks* simply were not enough of a deterrent for other mortgage servicers in the industry to abide by state and Federal laws and the terms of individual mortgage agreements. Which brings me to yet another point that Chairman Leibowitz chose to make.

At approximately 84 minutes into the hearing, Chairman Leibowitz stated that *"Sometimes we're bringing fraud cases that could be brought criminally. If there is not a penalty there is not a strong enough deterrent."* I am in possession of evidence that shows that a criminal investigation into Fairbanks/SPS' actions was being conducted at least as far back as 2003. Unfortunately, as part of the civil settlement, the criminal investigation was terminated despite ever mounting evidence of potentially criminal wrongdoing by the company. In my own case, I can demonstrate instances of mail and wire fraud, fraudulent documents being filed at my county registry of deeds and, if given access to knowledgeable individuals, quite possibly evidence of tax, insurance and securities fraud among other charges. To date, I have found no state or Federal agency or authority willing to even examine my evidence to make a determination of any kind of fraudulent action despite being awarded a civil injunction in 2005 and contempt order in 2006 against Fairbanks/SPS quashing a fraudulent foreclosure.

Many Mortgage Servicing Fraud victims and their attorneys have repeatedly attempted to bring racketeering charges against mortgage servicers. To the best of my knowledge, none have been successful to date despite having mountains of evidence showing that each entity involved in each case had knowledge—or should have had knowledge—of the actions complained about in virtually every civil action brought. I have personally spoken and/or communicated with FBI, Secret Service, USDOJ, U.S. Postal Inspection, the NH Banking Dept., NH Attorney General, Office of Comptroller of Currency, Office of Thrift Supervision, SIGTARP, HUD-OIG, FinCen, FCIC, COP and the Federal Trade Commission. I am currently awaiting a response from the Financial Fraud Task Force but have been waiting for that response for several months and am not at all optimistic.

The bottom line, Mr. Chairman, is that there are, unfortunately, more than enough legitimate foreclosures taking place across the United States to allow even a single property owner anywhere in the country to suffer a fraudulent or manufactured foreclosure at the hands of unscrupulous and greedy mortgage servicers. As if Fairbanks/SPS and EMC victims have not already been insulted enough, as of today Fairbanks/SPS has received more than $900 million and EMC Mortgage more than $1.2 Billion through the HAMP program respectively for loan modifications. As of the January 2010 Making Home Affordable Report,[7] Fairbanks/SPS estimates that 62,041 60+ day delinquent borrowers were eligible for at least a trial loan modification. To date, only 6,761 modifications have been made permanent by Fairbanks/SPS. According to the same January report, no accurate figures are available for EMC Mortgage because EMC is reported as part of J.P Morgan Chase's figures. So how are these two corporations using nearly $2 Billion of American taxpayer money to help homeowners? When will any state or Federal law enforcement or regulatory entity step up and actually protect the American homeowner?

Mortgage Servicing Fraud is an extremely serious issue that can and does affect literally anyone with a mortgage, especially if that mortgage note has been securitized. Mr. Chairman, if you or any members of this Committee or any of your family members have mortgaged properties you could fall victim to this fraudulent scheme just as easily as any other homeowner in the country. Mortgage Servicing Fraud does not appear to discriminate. Unfortunately, as recent history has demonstrated, civil penalties simply are not enough of an incentive for mortgage servicers to operate within the boundaries of state and Federal law. The Federal Bu-

[7] *See http://www.financialstability.gov/docs/press/January percent20Report percent20FINAL percent2002 percent2016 percent2010.pdf.*

reau of Investigation's 2008 Mortgage Fraud Report "Year In Review" [8] projects that for Fiscal Year 2009, Suspicious Activity Reports (SARs) will exceed 70,000. That is more than 70,000 reported incidents of mortgage fraud being committed against loan originators. When is mortgage fraud and mortgage servicing fraud committed against the borrower going to be taken seriously by state and Federal agencies?

Mr. Chairman, it is well beyond the time for criminal investigations to begin and charges to be brought against any servicer refusing to deal with homeowners fairly and properly. You stated, in your opening for this hearing, "When I took over this Committee a year ago, I vowed to make this Committee protect the consumer." I would ask nothing more of you and the Committee than to continue to make good on that vow. Please take a hard look at Mortgage Servicing Fraud, how it devastates the American homeowner, the far-reaching effects that it has on the mortgage, insurance and securities industries, the overall economy of the United States and what state and Federal law enforcement regulators and legislators can finally do to protect the American homeowner, both civilly and criminally, from fraudulent foreclosures once and for all. Because while the Federal Trade Commission is now familiar with and can describe what Mortgage Servicing Fraud can entail, [9] after settling civil actions against two national mortgage servicers within 4 years, involving a collective 367,100 victims and recovering $83 million in restitution, civil actions and the Federal Trade Commission are obviously not enough of an incentive for mortgage servicers to operate within the parameters of state and Federal law.

I thank you for your time and attention, Mr. Chairman, and I would be more than happy to answer any questions that you and/or the Committee may have to the best of my ability. Please do not hesitate to contact me.

Sincerely,

MICHAEL C. DILLON

Cc: SIG-TARP
Chris Schloesser
Brandy Messer

ADDITIONAL PREPARED STATEMENT OF HON. JON LEIBOWITZ

A number of questions raised by the Committee touch upon the differences between the Magnuson-Moss and Administrative Procedures Act ("APA") rulemaking processes. Before I address the Committee's specific questions, I would like to provide an overview of those two processes.

Magnuson-Moss Rulemaking: There are numerous steps that must be taken to issue a rule under Magnuson-Moss procedures, including the following:

- prepare an Advance Notice of Proposed Rulemaking ("ANPR") describing the area of inquiry under consideration, the objectives the FTC seeks to achieve, and possible regulatory alternatives under consideration;
- submit the ANPR to House and Senate oversight committees;
- publish the ANPR in the Federal Register for public comment;
- receive public comments on the ANPR for 30 days or longer;
- analyze comments received in response to the ANPR;
- determine that the acts or practices at issue appear to be widespread and prevalent;
- prepare an initial Notice of Proposed Rulemaking ("NPR") that: (a) summarizes and addresses the comments, (b) sets forth specific proposed rule text, (c) explains the legal and factual basis for the proposed rule provisions, (d) includes, if applicable, an initial analysis under the Regulatory Flexibility Act ("Reg Flex") based on the anticipated effects of the rule on small entities and an analysis under the Paperwork Reduction Act ("PRA") of any disclosure, reporting, or recordkeeping requirements the rule would impose, and (e) sets forth a preliminary Regulatory Analysis of anticipated effects of the rule, both positive and negative;
- submit the NPR to House and Senate oversight committees 30 days before publishing it;
- publish the NPR in the *Federal Register* for public comment;
- receive public comments on the NPR, usually for 60 days or more;

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[8] *See http://www.fbi.gov/publications/fraud/mortgage_fraud08.htm.*

[9] *See* "Mortgage Servicing: Making Sure Your Payments Count", *http://www.ftc.gov/bcp/edu/pubs/consumer/homes/rea10.shtm.*

- provide an opportunity for a public oral hearing before a presiding officer,[1] and if any member of the public requests such hearing:
  - appoint a presiding officer;
  - designate disputed issues of fact to be addressed at the hearing;
  - decide petitions to designate fact issues as disputed for the hearing;
  - accord to (potentially numerous) interested persons rights to examine, rebut, and cross-examine witnesses;
  - determine which among those persons have similar interests;
  - allow each group of persons with similar interests to choose a representative;
  - appoint a representative if the group cannot choose one;
  - decide appeals from determinations on which persons have similar interests;
  - prepare and publish a second NPR addressing all these issues;
  - hold the hearings;
  - make complete transcripts of all testimony and cross-examinations available to the public;
- analyze the record amassed, and prepare a staff report that summarizes and analyzes the record and sets forth the final rule text recommended for adoption by the Commission;
- if hearings have been held, the Presiding Officer must prepare a report with his or her summary and analysis of the record amassed and recommendations as to adoption of final rule provisions;
- publish a Federal Register notice seeking comments on the staff report and on the Presiding Officer's report, if any;
- receive public comments for 60 days or more;
- obtain OMB approval for any disclosure, reporting, or recordkeeping requirement;
- prepare a Final Rule and Statement of Basis and Purpose that sets forth a summary and analysis of the record, sets forth the text of the recommended final rule, explains that the practices addressed by the recommended final rule are prevalent, explains the legal and evidentiary basis for each provision, includes a Final Regulatory Analysis, includes a Final Reg Flex, if applicable, and sets forth an effective date;
- publish the Final Rule and Statement of Basis and Purpose in the Federal Register;
- submit a notification to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act ("SBREFA"), initiating a period during which Congress can invalidate the rule by legislation.
- issue compliance guides if required under SBREFA.[2]

Magnuson-Moss rulemaking has frequently taken eight or more years. (*See* table page 13, *infra*).

APA Rulemaking: Although APA rulemaking is certainly less laborious and time-consuming than the cumbersome and complex Magnuson-Moss procedures, it still mandates a set of rigorous procedures that are designed to ensure that interested parties have early notice of the proceeding and ample opportunity to have their views considered, as well as to create a comprehensive record for judicial review.

Specifically, APA rulemaking must proceed through the following steps:

- The rulemaking agency must prepare and publish in the Federal Register an NPR that: (a) sets forth either the terms or substance of the proposed rule or a description of the subjects and issues involved;"[3] (b) explains the legal and factual basis for the proposed rule provisions; and (c) includes, if applicable, a Reg Flex analysis based on the anticipated effects of the rule on small entities, and an analysis under the PRA of any disclosure, reporting, or recordkeeping

[1] In some instances, the FTC has conducted public workshops for interested parties and the public at large to discuss those issues arising from the written comments about which there are varying or conflicting points of view. This does not substitute for providing the hearing opportunity described with its attendant requirements. However, in some less controversial matters interested persons participating in such a workshop have not sought the oral hearing available under the statute.

[2] SBREFA requires compliance guides for small businesses for certain rules; the FTC typically issues compliance guides, for both small and large businesses, for other rules as well.

[3] As a matter of practice, the NPRs issued by the FTC routinely propose actual rule text.

requirements the rule would impose. In addition, the proposed legislation would retain the current FTC Act requirement that, for rules under the Act, the NPR also must set forth a preliminary Regulatory Analysis of anticipated effects of the rule, both positive and negative.

- The agency then must accept public comments on the NPR for a period of 30 days or more.
- The agency must also obtain OMB approval of any disclosure, reporting, or recordkeeping requirements in the rule.
- After considering the comments, the agency then must prepare and publish in the Federal Register a Statement of Basis and Purpose, setting forth the final rule provisions and "a concise general statement of their basis and purpose." This statement provides a summary and analysis of the record; an explanation of the legal and evidentiary basis for the rule provisions adopted; a final Reg Flex Analysis, if applicable; and an effective date for the rule. Also, under the current FTC Act requirement that would be retained by the proposed legislation, the Statement of Basis and Purpose of rules must set forth a final Regulatory Analysis.
- Subsequently, the agency submits a notification to Congress pursuant to the SBREFA, initiating a period during which Congress can invalidate the rule by legislation. The agency also commonly issues compliance guides.
- The final rule can be challenged in Federal court and will be set aside if the court determines that the Commission's findings are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

The FTC has often implemented additional procedural safeguards and opportunities for public input when Congress has given it APA authority in specific areas.

- First, in many instances, the Commission has published an ANPR, providing even earlier notice of the proceeding and opportunity to comment. *See, e.g., http://www.ftc.gov/opa/2009/05/decepmortgage.shtm* (ANPR issued by the Commission initiating its mortgage practices rulemakings). Although they increase the time it takes to promulgate the ultimate rule, ANPRs have proven useful in situations where the Commission lacks sufficient experience or knowledge in a particular area to formulate a proposed rule.
- Second, in some cases, the FTC has held public workshops during the course of the rulemaking proceeding, enriching the record and providing additional opportunities for those who might be affected by the rule to express their views, provide data, and address the assertions of other participants. *See, e.g., http://www.ftc.gov/opa/2009/08/tsrforum.shtm* (announcing public forum to discuss proposed debt relief amendments to the Commission's Telemarketing Sales Rule.)
- Third, to further ensure that its decisions are fully informed, the Commission often has conducted informal, but extensive, outreach to affected parties. For example, the FTC participated in or conducted a number of rulemakings as required by the FACT Act. For most of these rules, the FTC (with its sister agencies in some cases) solicited data and opinions in addition to the formal request for comments, and often on multiple occasions, from industry groups, legal practitioners, consumer advocates, and others.
- Fourth, the Commission has an ongoing program of reviewing all of its rules periodically, seeking public comment on them, and revising or repealing them as appropriate.

In sum, the legal requirements of the APA, enhanced where appropriate by these additional FTC practices, accomplish the same goals as the more cumbersome and time consuming Magnuson-Moss procedures, without those procedures' built-in time lags and myriad opportunities to slow down a proceeding.

Finally, there have been substantial changes in the regulatory picture since Congress originally enacted FTC-specific rulemaking procedures in the Magnuson-Moss Act; these changes would provide further assurance that FTC rulemaking under the APA would be carefully tailored to minimize unnecessary burdens, especially on small businesses. These changes include:

- further refinements in the deception and unfairness standards, including the Commission's policy statement defining "deceptive" acts and practices and a statutory definition of "unfair" practices added as Section 5(n) of the FTC Act;
- the preliminary and final Regulatory Analyses for FTC Act rules;
- the preliminary and, where appropriate, final Reg Flex analyses;

- the public comment and OMB review of relevant provisions under the PRA; and
- the SBREFA provisions for notice to Congress and opportunity for it to invalidate a rule.

Standard for review: The standard of review for a rule developed using either procedure is the same. In *Consumers Union of U.S.* v. *FTC*, 801 F.2d 417, 422 (D.C. Cir. 1986), the court (opinion by then-Judge Scalia) held that the FTC Act's "substantial evidence" standard for judicial review of a Magnuson-Moss rule does not call for a more intensive review than the "arbitrary and capricious" standard for notice-and-comment rules under the APA, but rather requires the same degree of evidentiary support. That view stands today; *see, e.g., Eagle Broadcasting Group, Ltd.* v. *FCC,* 563 F.3d 543, 551 (D.C. Cir. 2009) (explaining that the "substantial evidence" standard for review of "formal" rulemaking under the APA—the same language adopted by Magnuson-Moss—is the same as the "arbitrary and capricious" standard for notice-and-comment rules). If a rule's factual underpinnings are not supported by substantial evidence, it is arbitrary.

RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. BYRON DORGAN TO HON. JON LEIBOWITZ

Question . In the FTC bill I introduced last Congress, we added 501(c)(3) non-profit entities to the FTC's jurisdiction. I know the FTC issued a proposed rule last summer to address the sale of debt relief services. I understand that eighty-eight percent of the debt relief industry, which advertises, markets, sells and enrolls consumers into Debt Management Plans (DMPs), consists of non-profit providers. These entities generate millions of dollars in fees from consumers by selling debt relief services. As we consider FTC Reauthorization in the context of financial reform, do you believe the FTC Act should be updated so that the FTC has the appropriate authority to regulate nonprofit entities, like those that offer debt relief services?

Answer. Currently, the FTC lacks jurisdiction under the FTC Act over entities that do not carry on business for their own profit or that of their members. The Commission can, however, reach "sham" non-profits, such as shell non-profit corporations that funnel profits to their owner, officers, or others or for-profit entities falsely claiming to be affiliated with charitable organizations. Further, the Commission has jurisdiction over organizations such as trade associations that engage in activities that "provide [ ] substantial economic benefit to its for-profit members," for example, by providing advice and other arrangements on insurance and business matters or engaging in lobbying activities. The Commission also has jurisdiction over non-profits under certain consumer financial statutes, such as the Truth in Lending Act and the Equal Credit Opportunity Act.

In April 2008, the Commission testified in support of legislation to extend its jurisdiction to certain non-profit entities, and I continue to agree with that position. In health care, an area in which the Commission takes the lead to maintain competition, the agency's inability to reach conduct of various non-profit entities has prevented the Commission from stopping anticompetitive conduct of non-profits engaged in business. Also, many major data security breaches have involved nonprofit entities outside of the Commission's jurisdiction; Commission authority in such circumstances may be valuable.

With respect to the debt relief industry, as you note, there are both for-profit and non-profit entities. Consistent with the FTC's current jurisdiction, the proposed amendments to the TSR for the debt relief industry would not cover true non-profits. Should Congress grant the Commission authority over non-profits, we would certainly want to consider whether the TSR amendment should cover those entities as well.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. CLAIRE MCCASKILL TO HON. JON LEIBOWITZ

Question 1. One financial product that I have raised repeated concerns about is the reverse mortgage. As you know, a reverse mortgage is secured with a senior's home. The lender extends a lump sum or monthly payment to the borrower (who must be over 62). The loan must be repaid when the borrower moves or dies, usually from the proceeds of selling the house. I have concerns about the program because the Federal Government insures these loans and is on the hook for any losses. But I am also concerned about the way they are being marketed and sold to seniors. There are advertisements that imply a government endorsement of the product for all seniors. Sometimes they imply that a reverse mortgage is an entitlement like So-

cial Security or Medicare. Reverse mortgages are expensive, with big upfront fees and interest costs that can dwarf the amount the borrower receives over the life of the loan. Despite legislation Congress enacted in 2008 that prevent reverse mortgage lenders from cross-selling other insurance or financial products along with reverse mortgages, there are reports that insurance agents and financial advisors are now selling reverse mortgages. The FTC has a very helpful page on its website that explains reverse mortgages to seniors.

Under the 2009 Omnibus bill, the FTC has been granted Administrative Procedures Act (APA) authority to issue rules regarding addressing unfair or deceptive acts or practices by mortgage lenders. Are you planning to address reverse mortgages? What is the FTC doing to crack down on aggressive marketing practices? How has it pursued financial advisors who peddle these products inappropriately?

Answer. The FTC shares your concern about possible unfair or deceptive practices in the promotion and sale of reverse mortgages, and the risk these practices pose for elderly consumers. Reverse mortgages are complex financial products with high fees. A reverse mortgage entails a lien on an elderly consumer's home, frequently the consumer's most valuable asset. Some elderly consumers may not understand these complex products and the fees associated with them, or may be deceived by claims lenders make about them. Accordingly, the FTC has taken a number of steps to protect consumers from unfair or deceptive reverse mortgage practices.

First, pursuant to the Omnibus Appropriations Act of 2009, as clarified by the Credit Card Accountability Responsibility and Disclosure Act of 2009, the Commission in June 2009 issued an Advance Notice of Proposed Rulemaking ("ANPR") focusing on unfair and deceptive mortgage practices. The ANPR specifically sought comment on possible unlawful practices in the promotion and sale of reverse mortgages. The FTC hopes to publish a Notice of Proposed Rulemaking ("NPR") in this proceeding in the near future.

Second, the FTC continues to monitor the reverse mortgage market, as well as consumer complaints received by our Consumer Response Center. The Commission is prepared to initiate law enforcement actions in appropriate cases where reverse mortgage lenders are engaged in unfair or deceptive practices or are violating the Truth-in-Lending Act. In particular, the agency on an ongoing basis scrutinizes reverse mortgage advertising for deceptive claims about the terms and consequences of the loans, as well as the lender's purported affiliation with government agencies or programs. It should be noted, however, that many lenders that offer reverse mortgages, including banks, thrifts, and Federal credit unions, are outside the Commission's authority.

Third, the FTC has spearheaded Federal-state efforts to coordinate and cooperate on reverse mortgage issues. In the fall of 2008, the Commission organized the Federal-State Reverse Mortgage Law Enforcement Working Group to strengthen the ability of law enforcers to take rapid, effective, and coordinated action against instances of reverse mortgage fraud. The Working Group, which meets on a regular basis, is comprised of over one hundred representatives from 40 states, the District of Columbia, and Puerto Rico, as well as several other Federal agencies, including the Department of Housing and Urban Development ("HUD") and the Department of Justice ("DOJ").

Fourth, the Commission has provided assistance to Federal and state agencies in developing and implementing standards of appropriate conduct for providers of reverse mortgages. In late 2009, the Federal Financial Institutions Examination Council ("FFIEC")[1] published proposed guidance on reverse mortgages, covering, among other topics, the importance of avoiding deceptive claims. Earlier this month, the FTC staff filed a comment with FFIEC supporting its efforts to prevent deception and assist consumers in making better-informed decisions about reverse mortgages.

Fifth, as you mention, the Commission is reaching out to elderly consumers to educate them about the risks and benefits of reverse mortgages. The Commission's most recent brochure, "Reverse Mortgages: Get the Facts Before Cashing in on Your Home's Equity," is available at *http://www.ftc.gov/bcp/edu/pubs/consumer/homes/rea13.shtm*. The FTC also has a new pamphlet for reverse mortgage housing counselors on how to spot and report potentially deceptive claims or other unlawful conduct. The pamphlet can be accessed at *http://www.ftc.gov/bcp/edu/pubs/business/alerts/alt158.shtm*. The Commission has distributed this pamphlet throughout HUD's network of housing counselors.

Finally, your question refers to reports that insurance agents and financial advisors are selling reverse mortgages, even though Congress enacted legislation in 2008

[1] FFIEC is comprised of the Federal bank regulatory agencies, the National Credit Union Administration, and three associations of state supervisors of financial institutions.

prohibiting those who sell reverse mortgages from cross-selling insurance or other financial products. The Housing and Economic Recovery Act of 2008 ("HERA") prohibits cross-selling insurance and other financial products in connection with reverse mortgages offered under the Home Equity Conversion Mortgage program, administered by HUD. HUD, rather than the FTC, enforces HERA's prohibition on cross-selling.

Question 2(a). As you know, there are conflicting viewpoints about whether Congress should expand APA rulemaking authority to the FTC, which would grant the Commission civil penalty authority and other expanded tools. One of my chief concerns in addressing consumer protections, whether it be in financial services or elsewhere, is finding the most efficient ways to do so with little or no overlap between competing agencies and in a manner where agency authority is properly utilized. In addition, I have some concerns about whether the FTC would be able to take on expanded authority given the staff reductions that have occurred over the years. What do you feel are the most effective tools and practices that the FTC currently has to address bad actors? What do you feel is working?

Answer. The FTC has a number of effective consumer protection tools. Most notably, the Commission can file and litigate cases against those who engage in practices that are unfair or deceptive, or violate other statutes or rules enforced by the FTC. In addition, the Commission's education and outreach programs help empower consumers with information and tools they can use to avoid scams, and help achieve compliance by providing guidance to businesses about their obligations under the law.

Under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), the Commission is empowered to file and litigate actions in Federal district court whenever a defendant "is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission" including rules under those laws. These laws include the FTC Act, which prohibits unfair or deceptive practices. The Commission can seek temporary restraining orders and other types of preliminary relief to halt ongoing violations and preserve the status quo pending a full adjudication of the case (including freezing a defendant's assets in appropriate cases). Remedies available to the FTC in such actions include monetary redress for consumers who incurred injury as a result of a defendant's violations, as well as other equitable remedies such as rescission of victims' contracts and disgorgement of defendants' ill-gotten gains. In the past decade, the Commission has brought over 600 consumer protection law enforcement actions using Section 13(b), most of which sought consumer redress; through these cases, courts have ordered approximately $3 billion in redress for injured consumers.[2]

The Commission's authority to issue rules using APA procedures under a number of specific laws, such as the telemarketing law, has itself been a crucial tool for clearly identifying and halting a variety of harmful practices, providing standards and clarity for businesses, the agency, and the courts.[3] The Commission's authority to issue APA rules relating to home mortgages under the Omnibus Appropriations Act of 2009, such as with respect to third-party mortgage assistance relief providers, has the potential to be such a powerful tool for consumers.

In addition, the FTC's consumer education efforts have been highly successful in reaching consumers with the information and advice they need to recognize and avoid fraud. Among many other examples, in response to the recent economic downturn, the FTC developed several outreach initiatives to help people manage their financial resources and spot traditional and emerging scams. We share our consumer education materials with a multitude of Federal, state, and local government agencies, and frequently partner with private and nonprofit organizations to increase the "reach" of our educational efforts.

The FTC's robust business education efforts are very helpful in fostering compliance with the various laws the Commission enforces. These efforts, which come in

[2] The Commission also has, of course, authority to conduct administrative adjudications, and uses it for consumer protection matters particularly where it believes its own expert determination is important to help develop and clarify the law. However, given the availability of monetary redress remedies and penalties only through a court action, the Commission more commonly brings its consumer protection actions in court.

[3] Since the promulgation in 1996 of the Telemarketing Sales Rule ("TSR"), which for the past several years has included the National Do Not Call Registry, the Commission has filed 271 telemarketing cases aimed at halting various telemarketing frauds, including the unauthorized debiting of consumers' financial accounts, as well as the deceptive marketing of such goods and services as fraudulent work-at-home opportunities; advance-fee credit cards; phony government grants, and sweepstakes and prize promotions. Many of these cases have targeted not only fraudulent telemarketers, but also the third-parties that assist them, as specifically authorized by the TSR.

many different forms and are disseminated through many types of media, provide practical, straightforward, and often industry-specific information and guidance.

Finally, the Commission's authority to conduct workshops, research and studies, often involving its broad consumer protection, competition, and economic expertise, is an essential part of developing appropriate approaches to problems. The information developed through such activities assists in focusing enforcement efforts, identifying successful remedies, and formulating appropriate standards, as well as providing broader knowledge for the business and consumer communities and for policymakers. For example, the Commission staff recently held a series of three public roundtable discussions on the consumer protection problems existing in the system whereby debt collection cases are litigated and arbitrated. The information we obtained in those discussions will be extremely useful in determining law enforcement strategies going forward, and in formulating recommendations on actions that government and the private sector can take to ensure that the litigation and arbitration processes function more fairly for consumers.

Question 2(b). What do you feel is not working?

Answer. Although the Commission has a number of effective tools for stopping bad actors, certain holes in our authority make it more difficult—unnecessarily, in my opinion—to carry out our mission. The following four enhancements to the agency's authority would help substantially to fill those holes.

- *APA Rulemaking*: Because the Commission may not use the ordinary Administrative Procedures Act ("APA") notice-and-comment rulemaking procedures that most of our sister agencies use, the Commission must do one of two things to promulgate a rule: either obtain from Congress a specific grant of APA rulemaking authority for a particular issue or use the cumbersome and time-consuming Magnuson-Moss procedures. In my view, either option is an inefficient and uncertain process for addressing serious problems in a timely fashion, especially those that can arise from emerging technologies or new marketing practices. The Commission needs APA-style rulemaking authority to be able to issue rules, when needed, in a reasonable time and with a reasonable expenditure of resources.
- *Civil Penalty Authority*: The FTC currently lacks the authority to seek civil penalties for violations of the FTC Act itself. Although the Commission currently may seek penalties—through DOJ—in certain specified situations (*e.g.,* for a defendant's violations of an existing enforcement order or of certain FTC rules), the ability to seek civil penalties for knowing violations of the FTC Act itself would give the agency an important tool for deterring unfair or deceptive practices. This is especially important for cases in which obtaining equitable remedies such as consumer restitution, rescission, or disgorgement is impossible or impractical—because, for example, victims cannot be identified or consumer injury and wrongful profits cannot be quantified.
- *Aiding and Abetting*: The absence, outside of the telemarketing context, of explicit authority to hold liable those who aid and abet law violators hampers the Commission's ability to take action against entities that do not themselves deceive consumers, but supply knowing and substantial support to those who do. In many cases, the aiders and abettors, by providing essential services that the primary fraudsters could not efficiently provide themselves, allow frauds to occur on a much broader scale than would otherwise be possible.
- *Independent Litigating Authority for Civil Penalty Actions*: It is anomalous that while the FTC is authorized to try its own cases for a wide swath of remedies, including consumer redress and disgorgement, it may not do so when seeking penalties. Instead, the agency must refer cases to DOJ, wait up to 45 days for DOJ to determine whether to take a case, and allow DOJ staff time to learn the case and prepare. This requirement thus entails duplication of efforts and slower enforcement. In addition, it results at times in the agency having to choose between obtaining early injunctive relief (for example, to halt the violative practices and preserve assets for eventual redress) or seeking penalties. Having the authority to litigate civil penalty actions independently would allow cases to be brought more quickly and effectively, without the disadvantages occasioned by the referral obligation.

Question 2(c). If you had more resources could you issue rules under the current Magnuson-Moss procedures?

Answer. While more staff on a rulemaking may help, most of the built-in time lags involved in Magnuson-Moss rulemaking cannot be eliminated by additional staffing. There are numerous steps that must be taken to issue a rule under Magnuson-Moss procedures:

- prepare an ANPR describing the area of inquiry under consideration, the objectives the FTC seeks to achieve, and possible regulatory alternatives under consideration;
- submit the ANPR to House and Senate oversight committees;
- publish the ANPR in the Federal Register for public comment;
- receive public comments on the ANPR for 30 days or longer;
- analyze comments received in response to the ANPR;
- determine that the acts or practices at issue appear to be widespread and prevalent;
- prepare an initial NPR that: (a) summarizes and addresses the comments, (b) sets forth specific proposed rule text, (c) explains the legal and factual basis for the proposed rule provisions, (d) includes, if applicable, an initial analysis under the Regulatory Flexibility Act ("Reg Flex") based on the anticipated effects of the rule on small entities and an analysis under the Paperwork Reduction Act ("PRA") of any disclosure, reporting, or recordkeeping requirements the rule would impose, and (e) sets forth a preliminary Regulatory Analysis of anticipated effects of the rule, both positive and negative;
- submit the NPR to House and Senate oversight committees 30 days before publishing it;
- publish the NPR in the Federal Register for public comment;
- receive public comments on the NPR, usually for 60 days or more;
- provide an opportunity for a public oral hearing before a presiding officer, and if any member of the public requests such hearing,[4]
  - appoint a presiding officer;
  - designate disputed issues of fact to be addressed at the hearing;
  - decide petitions to designate fact issues as disputed for the hearing;
  - accord to (potentially numerous) interested persons rights to examine, rebut, and cross-examine witnesses;
  - determine which among those persons have similar interests;
  - allow each group of persons with similar interests to choose a representative;
  - appoint a representative if the group cannot choose one;
  - decide appeals from determinations on which persons have similar interests;
  - prepare and publish a second NPR addressing all these issues;
  - hold the hearings;
  - make complete transcripts of all testimony and cross-examinations available to the public;
- analyze the record amassed, and prepare a staff report that summarizes and analyzes the record and sets forth the final rule text recommended for adoption by the Commission;
- if hearings have been held, the Presiding Officer must prepare a report with his or her summary and analysis of the record amassed and recommendations as to adoption of final rule provisions;
- publish a Federal Register notice seeking comments on the staff report and on the Presiding Officer's report, if any;
- receive public comments for 60 days or more;
- obtain OMB approval for any disclosure, reporting, or recordkeeping requirement;
- prepare a Final Rule and Statement of Basis and Purpose that sets forth a summary and analysis of the record, sets forth the text of the recommended final rule, explains that the practices addressed by the recommended final rule are prevalent, explains the legal and evidentiary basis for each provision, includes a Final Regulatory Analysis, includes a Final Reg Flex, if applicable, and sets forth an effective date;

[4] In some instances, the FTC has conducted public workshops for interested parties and the public at large to discuss those issues arising from the written comments about which there are varying or conflicting points of view. This does not substitute for providing the hearing opportunity described with its attendant requirements. However, in some less controversial matters interested persons participating in such a workshop have not sought the oral hearing available under the statute.

- publish the Final Rule and Statement of Basis and Purpose in the *Federal Register*;
- submit a notification to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act ("SBREFA"), initiating a period during which Congress can invalidate the rule by legislation.
- issue compliance guides if required under SBREFA.[5]

Magnuson-Moss rulemaking has frequently taken eight or more years.

Because most of these steps must be taken sequentially in a specified order, even additional resources would not allow the Commission to utilize existing Magnuson-Moss rulemaking authority effectively.

Question 2(d). Or with APA authority?

Answer. APA rulemaking requires significantly fewer resources and less time than Magnuson-Moss rulemaking. Still, the Commission needs more resources. Today, the Commission has only about 1,100 full-time equivalents ("FTEs"). This is considerably fewer than it had at its peak in 1979, when the Commission had nearly 1,800 FTEs. But in the past decades, the demands placed on the agency have continued to grow with the advent of the Internet and e-commerce, and a variety of significant new laws and regulations that the FTC is charged, at least in part, with implementing and enforcing, such as the CAN–SPAM Act, the Fair and Accurate Credit Transactions Act, the Do Not Call provisions of the TSR, the Children's Online Privacy Protection Act, and the Gramm-Leach-Bliley Act ("GLB"). In 1979, when the Commission's FTEs were at their peak, the U.S. population was approximately 225 million. It is now 30 percent greater, and although the agency is always striving to do more with less, the size of the agency has not kept pace with the growth in the population and the sophistication of the marketplace.

Question 3(a). To follow up, what enforcement and regulation of financial services activities currently work best at the FTC?

Answer. As described in the answer to Question 2 above, the Commission has used its existing authority as effectively as possible to protect consumers of financial services. The available tools include law enforcement under the FTC Act and several other financial statutes, consumer and business education, and rulemaking in those instances in which Congress has mandated or authorized the FTC to use APA procedures.

The Commission has a long history of protecting consumers at every stage of their relationship with financial services companies. The FTC is primarily a law enforcement agency, and it has used its authority aggressively to seek temporary restraining orders, asset freeze orders, and other immediate relief to stop financial scams in their tracks and preserve assets, and then to obtain permanent relief and provide redress to victims. Over the past 5 years, the FTC has filed over 100 actions against providers of financial services, and in the past 10 years, the Commission has obtained nearly half a billion dollars in redress for consumers of financial services.

Most recently, the Commission's highest priority has been targeting frauds that prey on consumers made vulnerable by the economic crisis. For example, the FTC launched an aggressive, coordinated enforcement crackdown on mortgage loan modification scams and foreclosure rescue scams perpetrated on homeowners having difficulty making their mortgage payments. The purveyors of these schemes purport to assist consumers in avoiding foreclosure or renegotiating mortgage terms with the consumers' lenders or servicers, but frequently fail to deliver what they promise. In the past year, the FTC has brought 17 cases against more than 90 defendants charging that they were involved in foreclosure rescue and mortgage modification frauds; and we have partnered with state and Federal law enforcement agencies that have brought scores of additional cases under their own statutes. The FTC also is actively targeting other practices that prey on consumers in financial distress, including debt relief services, credit repair, advance fee and subprime credit card scams, payday loans, and abusive debt collection practices.

Commission rulemaking activities, pursuant to specific statutes authorizing APA procedures, have resulted in a number of valuable consumer protection rules relating to financial practices, including a rule under GLB on the safeguarding of sensitive consumer financial data; a number of rules under the Fair Credit Reporting Act that, among other things, provide consumers with greater protections against identity theft and enable them to correct mistakes in their credit reports; and rules of broader scope that apply to both financial and nonfinancial firms, such as the TSR.

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[5] SBREFA requires compliance guides for small businesses for certain rules; the FTC typically issues compliance guides, for both small and large businesses, for other rules as well.

The Commission augments its law enforcement with far-reaching consumer and business education campaigns that help consumers manage their financial resources and avoid fraudulent and deceptive schemes and help businesses comply with the law. For example, the FTC recently has undertaken a major consumer education initiative related to mortgage loan modification and foreclosure rescue scams, including the release of a suite of mortgage-related resources for homeowners. These resources are featured on a new web page, *www.ftc.gov/MoneyMatters.* The FTC encourages wide circulation of this information: consumer groups and nonprofit organizations distribute FTC materials directly to homeowners, while some mortgage servicers are communicating the information on their websites, with billing statements, and over the telephone.

Finally, the Commission's research and policy development work fosters dialogue on important consumer issues and frequently informs and improves the agency's ability to protect consumers through law enforcement and rulemaking. For example, a series of landmark studies conducted by the FTC's Bureau of Economics on mortgage transactions showed that the disclosures that lenders currently are required to make to borrowers about the terms of a loan are generally ineffective and may even be counterproductive. The findings of these studies have not only helped the Commission formulate its enforcement strategies, but also have influenced other Federal agencies in their efforts to make the mortgage origination process more "consumer-friendly."

Question 3(b). Conversely, what types of financial services regulation and enforcement do you struggle with?

Answer. As noted above, the Commission has had a great deal of success in its efforts to stop deceptive and unfair practices in the segments of the financial services industry as to which it has jurisdiction. And, we have worked cooperatively and productively with the Federal bank regulatory agencies, with whom we share jurisdiction in the financial services sector, to achieve consistent approaches to problems arising in both bank and nonbank sectors of the industry.

Certain limitations on our authority have made our job of protecting consumers more difficult, however. First, the lack of APA authority for FTC Act rules has, as a practical matter, made it impossible for the FTC to issue consistent and binding standards for the financial entities over which it has jurisdiction, except in the limited situations where Congress has authorized or mandated specific APA authority. Moreover, the Commission lacks general authority to promulgate rules under some of the financial statutes it enforces, such as the Fair Debt Collection Practices Act and Fair Credit Reporting Act, in some cases despite the fact that the agencies with which the FTC shares enforcement responsibilities do have such authority. Furthermore, the Commission's inability to obtain civil penalties for FTC Act violations, or to bring its own civil penalty cases in those situations where it does have civil penalty authority, makes it more difficult in some cases to protect consumers from ongoing harm or to achieve adequate deterrence. Finally, uncertainties in the Commission's authority to prosecute aiders and abettors of financial fraud or deception can lead to difficulties in some cases in getting to the "root" of a problem.

Question 3(c). Would it be better to have the latter overseen in another agency?

Answer. I do not believe that any of the Commission's current duties for financial services regulation and enforcement would be better overseen by another agency. Indeed, I believe that limiting the Commission's current authority over financial services would result in decreased consumer protection activity in many areas, broad-ranging jurisdictional disputes and litigation, and more complicated and potentially conflicting regulation of marketing practices that span financial and nonfinancial sectors alike. Accordingly, I believe that the Commission should continue to have at least concurrent authority over the financial entities now within its jurisdiction.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. KAY BAILEY HUTCHISON TO HON. JON LEIBOWITZ

Question 1(a). The FTC has current authority to impose penalties on fraudulent or deceptive practices when an entity violates a rule or consent order, yet you are advocating for more expansive authority to impose civil penalties. If granted this new authority, in what specific areas or types of cases would the Commission attempt to collect civil penalties that it currently cannot?

Answer. In many cases involving fraud, the equitable remedies of redress and disgorgement allow the FTC to reach the defendant's assets and thus provide some deterrent effect. In other cases, disgorgement or redress remedies are not practicable. For example, in many privacy-related cases, including those involving malware/spyware, data security, and telephone records pretexting, both the harm to

consumers and the ill-gotten gains received by defendants may be difficult to measure, thus making it difficult or impossible to obtain meaningful redress or disgorgement. Thus, an appropriately large award of civil penalties may be the only effective deterrent for these kinds of misconduct. In still other cases, profits for disgorgement are hard to calculate because lawful and unlawful conduct is mixed.

Question 1(b). Has the FTC approached Congress and asked for authority to collect civil penalties for these specific types of cases?

Answer. Yes, on a number of occasions, including:

- Prepared Statement of the Federal Trade Commission, "Federal Trade Commission Reauthorization," Before the Senate Commerce, Science, and Transportation Committee, 110th Cong., April 8, 2008 ("As the Commission has previously testified, however, in certain categories of cases restitution or disgorgement may not be appropriate or sufficient remedies. These categories of cases, where civil penalties could enable the Commission to better achieve the law enforcement goal of deterrence, include malware (spyware), data security, and telephone records pretexting.")
- Prepared Statement of the Federal Trade Commission, "Federal Trade Commission Reauthorization," Before the Senate Commerce, Science, and Transportation Committee, 110th Cong., April 10, 2007 ("We believe the Commission's ability to protect consumers from unfair or deceptive acts or practices would be substantially improved by legislation, all of which is currently under consideration by Congress, to provide the Commission with civil penalty authority in the areas of data security, telephone pretexting and spyware.")
- Prepared Statement of the Federal Trade Commission, "Data Breaches and Identity Theft," Before the Senate Commerce, Science, and Transportation Committee, 109th Cong., June 16, 2005 ("The FTC also would seek civil penalty authority for its enforcement of these [data security] provisions. A civil penalty is often the most appropriate remedy in cases where consumer redress is impracticable and where it is difficult to compute an ill-gotten gain that should be disgorged from a defendant.")

Question 2(a). The FTC currently has the ability to take enforcement action against entities that aid or abet violations in very narrow circumstances. One of the concerns expressed regarding the possible expansion of this authority to the Commission's entire jurisdiction is confusion about the level of knowledge necessary to support a charge for aiding and abetting. What is the level of knowledge that would have to be met for the aiding/abetting provision to apply? How would the FTC define the following: "substantial assistance," "knowing," and "consciously avoiding?"

Answer. Proposed section 5(o) of the FTC Act would establish liability for an FTC Act violation for anyone who "knowingly or recklessly . . . provide[s] substantial assistance" to another who violates the FTC Act or any other act enforced by the Commission relating to unfair or deceptive acts or practices. This standard derives from similar aiding and abetting authority provided to the SEC under its statute. *See* 15 U.S.C. § 78t(e). The application of the proposed standard requires a careful examination of the facts of each specific case. Over many years, the courts have developed a significant body of case law to address the substantial assistance and state of mind requirements imposed under securities law, and the Commission would anticipate tapping into that case law as guidance for any case that the Commission might bring in the future under its new aiding and abetting authority. Similarly, the Commission would look to its Telemarketing Sales Rule, which prohibits any person from providing "substantial assistance or support" to a seller or telemarketer when the person "knows or consciously avoids knowing" that the seller or telemarketer is violating certain provisions of the rule standards. These standards draw from SEC law and from tort liability.

Question 2(b). You state in your testimony that the FTC is able to work around the Supreme Court decision *Central Bank of Denver* v. *First Interstate Bank of Denver*, to penalize those who provide "knowing assistance" to violators. How does the FTC do this, and why is this ability not sufficient to support the Commission in targeting individuals and entities that provide affirmative assistance to those engaged in fraud and deceptive acts?

Answer. Notwithstanding *Central Bank of Denver*, there are instances in which the Commission can directly or indirectly allege that those who assist scammers have violated section 5 of the FTC Act. For example, the Commission is able to take action against those who knowingly assist telemarketing scammers. In the Telemarketing and Consumer Fraud and Abuse Prevention Act, Congress gave the Commission explicit aiding and abetting authority with respect to telemarketing. This authority has proven very useful in prosecuting numerous bad actors, but it does

not allow the Commission to reach those who knowingly assist scammers defrauding consumers over the Internet or through the mail or other means that do not involve telemarketing.

In some instances, facts permit the Commission to allege that the assistor provided the scammer with the "means and instrumentalities" of the fraud scheme. Under the "means and instrumentalities" theory, a person or entity that places in the hands of another a means of consummating a fraud has directly violated the FTC Act. This occurs, for instance, when the assistor provides the scammer with counterfeit products to be sold as genuine goods. The means and instrumentalities theory is, however, generally limited to instances in which the fraud assistor has provided an inherently deceptive thing that is then used to deceive consumers.

In other instances, facts permit the Commission to allege that the assistor engaged in "unfair" conduct by assisting the scammer. An act or practice is "unfair" if it is proven to: (1) cause substantial injury to consumers, (2) that they cannot reasonably avoid themselves, and (3) is not outweighed by countervailing benefits to consumers or competition. In a case that is currently on appeal by the defendants to the Ninth Circuit, the Commission alleged that the defendant's payment processing business made unauthorized debits to consumers' bank accounts on behalf of a scammer. While we believe that it is appropriate in this instance, the use of the Commission's unfairness authority in this fashion does not have the long jurisprudential history associated with the concept of aiding and abetting and involves proving the unfairness elements described above rather than focusing on the assistor's relationship with and knowledge of the fraudster's activities.

Finally, in some instances, facts permit the Commission to allege that an entity is part of a common enterprise with the scammer. A common enterprise exists where factors such as commingling of assets, common ownership, shared locations, and other considerations, demonstrate that apparently independent companies are part of the same enterprise. It is not necessary or even typical, however, for assistors to be so closely affiliated with scam perpetrators.

Question 2(c). How would industries such as the media be affected by an aiding and abetting provision? Could a newspaper or magazine be held liable if the FTC determined it had run a fraudulent advertisement?

Answer. The purpose of seeking the aiding and abetting provision is not to pursue the media for disseminating deceptive advertising. Proposed section 5(o) of the FTC Act would establish liability for anyone who "knowingly or recklessly . . . provide[s] substantial assistance" to another who violates the FTC Act or any other act enforced by the Commission relating to unfair or deceptive acts or practices. This provision (like other provisions of the FTC Act, *cf.* Section 12 regarding disseminating or causing the dissemination of false advertising relating to food, drugs, devices, cosmetics, or services) could arguably apply to a media outlet such as a newspaper or magazine, depending on the circumstances. The Commission, however, is mindful of First Amendment concerns and has never imposed a general duty upon newspapers, magazines, or other media to screen advertising. Commission staff has worked with members of the media to encourage voluntary media screening of facially deceptive advertisements and published several guidance documents to assist the media. *See, e.g., http://www.ftc.gov/bcp/edu/pubs/business/adv/bus36.shtm.*

Question 2(d). There is a clear distinction between having active knowledge of a fraudulent and misleading advertisement, for example, and choosing to run it anyway and running an advertisement you have no reason to expect is fraudulent or deceptive. Do you believe newspapers, and to an extent Internet sites, have an obligation to investigate the veracity of claims made in advertising that they make available in their papers/sites before publishing them?

Answer. As you say, there is indeed a distinction between a media outlet running an ad that it actively knows to be fraudulent or misleading, and running one that it has no reason to believe is deceptive. Media outlets can play an important role in protecting consumers from deception by preventing the dissemination of fraudulent ads in the first place. However, I do not believe that proposed section 5(o) would impose a general obligation on media outlets to investigate the veracity of claims that they disseminate.

Question 2(e). Would failure to affirmatively investigate and verify claims made in advertising represent "consciously avoiding" knowledge?

Answer. No, section 5(o) would not impose a general duty on media outlets to investigate the veracity of claims that they disseminate. Media outlets, however, can play an important role in protecting consumers from deception by preventing the dissemination of fraudulent ads in the first place.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JOHN ENSIGN TO HON. JON LEIBOWITZ

Question 1(a). Mr. Chairman, in your testimony, you mentioned several ways in which you are asking for Congressional approval to expand the FTC's authority. Specifically, you mentioned replacing the Magnuson-Moss rules process with one using the Administrative Procedures Act (APA); explicit authority to pursue enforcement action against parties that "aided or abetted" a violation of the FTC Act; the authority to collect civil penalties for violations of the FTC Act; and independent litigating authority. Congress chose to place those limits, and others, on the FTC to ensure there are proper checks and balances on the agency's enforcement and rulemaking power, and I am concerned that these new powers would result in an overly burdensome regulatory regime for all industries, financial or otherwise, that fall within the FTC's especially broad consumer protection mandate.

A number of concerns have been raised with respect to the potential over-regulatory impact on our economy by a new Consumer Financial Protection Agency (CFPA), and the corresponding effect it could have on stifling innovation and costing American jobs. These concerns are particularly important to me given that the unemployment rate in Nevada is among the highest in the country. In what ways would the FTC's new powers, as you've proposed, differ from those proposed for the CFPA?

Answer. The powers sought for the FTC also would be granted to the CFPA in both the Administration proposal and H.R. 4173. These powers would enhance the FTC's ability to fulfill its longstanding statutory responsibility to prevent unfair and deceptive commercial practices, and would be exercised within the framework of nearly a hundred years of jurisprudence. Unlike the CFPA, the FTC would *not* be authorized to exercise these powers with respect to "abusive" practices, but would continue to operate within the established, carefully-defined parameters of unfair or deceptive practices.[1] Also, the FTC would not be authorized to exercise these powers within a supervisory/examiner regulatory role such as that anticipated for the CFPA.

Question 1(b). How would your proposals to increase the FTC's powers in similar ways to the CFPA avoid or mitigate these same concerns about the potential negative impact on our economy?

Answer. In answering this question, it is important to provide context about the function and role of the FTC. The FTC is the only Federal agency with jurisdiction over the financial sector whose sole mission is protecting consumers. Moreover, the FTC is unique in its combination of consumer protection and competition missions, informed by its economic expertise. These missions work in tandem to protect consumer sovereignty within our competitive market system. Thus, the Commission has long-standing experience and expertise in weighing the impacts of its enforcement and regulatory actions on our economy, and it would bring that expertise to bear in employing the four enhancements of authority it seeks.

Aiding and abetting: The proposal to grant aiding and abetting authority to the FTC is subject to important constraints. Specifically, aiders and abettors would be liable only if they provided *substantial* assistance to a wrongdoer, and only then if they *actually knew that, or acted with reckless disregard for whether*, the practices they were assisting violated the FTC Act. The proposed provision would give the FTC comparable authority to that long held by the SEC and the Commodity Futures Trading Commission over aiding and abetting of violations.

Civil penalties: The proposed authority to seek civil penalties for violations of the FTC Act also would be constrained. The Commission could obtain such penalties only if it proved to a Federal court that the defendant engaged in unfair or deceptive practices *with actual knowledge or knowledge fairly implied on the basis of objective circumstances* that the conduct violated the law. This is the same standard that the Commission must satisfy currently in bringing an action for civil penalties for violation of an FTC trade regulation rule. In addition, the FTC Act directs a court determining the amount of any such civil penalty

[1] Under Section 5 of the FTC Act, 15 U.S.C. § 45, an act or practice (usually an express or implied representation or omission) is *deceptive* if it is: (1) likely to mislead consumers who are (2) acting reasonably under the circumstances (3) about a material fact. An act or practice is material if it is likely to affect consumers' conduct or decisions with respect to the product or service at issue. FTC Policy Statement on Deception, *appended to Cliffdale Associates, Inc.,* 103 F.T.C. 110, 174 (1984). An act or practice is *unfair* if it causes or is likely to cause injury to consumers that: (1) is substantial; (2) is not outweighed by countervailing benefits to consumers or to competition; and (3) is not reasonably avoidable by consumers themselves. 15 U.S.C. § 45(n).

to take into account the degree of culpability, any history of prior such conduct, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

APA rulemaking authority: It is important at the outset to dispel any misimpression that the APA procedures are in any sense truncated or expedited; in fact, the APA provides for numerous procedural and substantive safeguards and requirements, with ample opportunity for all stakeholders to participate and be heard. (Please see the discussion of APA Rulemaking in my additional statement). Over the last two decades the Commission has promulgated numerous rules using APA procedures pursuant to statutes other than the FTC Act. Finally, it is worth noting that many other Federal agencies have authority to issue under APA procedures rules implementing broadly stated standards that have substantial and widespread effects on major economic sectors, including the SEC, CFTC, Federal Communications Commission and the Federal bank regulatory agencies (three of which may issue APA rules applying the FTC Act's own deception and unfairness standards).

Independent litigating authority: The proposed authority would fill a problematic gap in the FTC's long-held, independent litigating authority. The FTC currently has, and routinely exercises, the power to initiate litigation in the Federal courts in its own name and with its own attorneys to pursue violations of all the laws it is charged with enforcing. The FTC has this power to carry out its most basic and essential consumer protection functions under the FTC Act: to obtain injunctive and other relief, including consumer redress for violations of the FTC Act. The FTC has used this power appropriately and effectively. Only if it seeks civil penalties may the FTC not bring suit independently. Other independent law enforcement agencies, such as the SEC, currently have the power to obtain civil penalties on their own in Federal district court.

Question 2(a). You are proposing a drastic expansion of the FTC's authority. In fact, former FTC Chairman Timothy Muris has said your proposals represent "the most significant expansion of the FTC since its inception." Further, former FTC Chairman Jim Miller has said the proposals are "like putting the FTC on steroids." This is certainly not a small request you are asking of Congress. Given the breadth of your agency's jurisdiction and the significance of the proposed changes, what specifically has the FTC done to get input from businesses that could be impacted by the new authority?

Answer. The FTC maintains a continuous and comprehensive dialogue on matters that affect its stakeholders who might be impacted by FTC actions, including the business community, consumer advocates, the private bar, and sister Federal and state enforcement agencies. The Commission conducts outreach, provides guidance, and seeks input through a variety of informal channels (such as speeches at conferences, business and consumer education, and responses to queries and requests for advice), as well as through more formal processes (such as public comment periods on regulatory proposals and public, FTC-sponsored workshops and forums examining specific consumer protection issues). In addition, although not legally required to do so, the Commission frequently seeks public comment on proposals for enforcement policy statements and other types of nonregulatory guidance it issues.

With respect to the current proposals, FTC officials at every level have communicated with business representatives and other interested parties to hear their views and engage in dialogue. It should be noted that the Commission has recommended iterations of all four proposals in Congressional testimony and elsewhere since at least 2008.

Question 2(b). With a more streamlined approach under APA rulemaking, I worry that the parties affected by the rule would not have a proper opportunity to voice their concerns. Should Congress agree with your proposals, what steps would you take to ensure that does not happen?

Answer. Please see the discussion of APA Rulemaking in my previous statement.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JOHN THUNE TO HON. JON LEIBOWITZ

Question 1. Chairman Leibowitz, in your testimony you mentioned that the FTC would benefit from the ability to use APA-style rulemaking rather than the Magnuson-Moss rulemaking process that it is currently required to use. Is this still a priority for the FTC when the CFPA proposals would take over a significant portion of consumer protection rulemaking?

Answer. Having the ability to issue rules in a reasonable time with a reasonable expenditure of resources would greatly improve the Commission's ability to address common consumer protection problems. New scams continually emerge that exploit technological advances and marketplace developments. For example, in the past year or two, frauds targeting financially-distressed consumers have blossomed, including mortgage rescue fraud, job scams, and phony government grants. The dozens of enforcement actions we have brought are making an impact. Nevertheless, for some types of fraudulent, deceptive or unfair practices, bringing case after case may not be as useful as promulgating a rule, which would allow the Commission to establish clear standards for industry while making enforcement more efficient and effective. The current requirement to use Magnuson-Moss procedures effectively precludes the Commission from issuing such rules.

Furthermore, the CFPA's authority would reach only financial activities and entities. The Commission needs to be able to issue rules in a reasonable time and with a reasonable expenditure of resources—that is, APA-style rulemaking—across the broader spectrum of commercial activities that fall within its jurisdiction, including practices that are not financial activities (such as negative option marketing [1]), practices of any entities that may be specifically excluded from the CFPA's authority (such as the exclusion in the House bill, H.R. 4173, of the practices of retailers and auto dealers), and practices involving both nonfinancial and financial aspects or entities (such as the Commission's Funeral Rule).

Authority to use APA rulemaking rather than the much more cumbersome and time-consuming Magnuson-Moss procedures would enhance the FTC's ability to fulfill its statutory responsibilities more effectively.

Question 2. If the FTC was forced to defer to the CFPA for 120-days before litigating any consumer financial protection cases, how would that affect the FTC's current enforcement efforts? Would this undercut the FTC's ability to quickly respond to certain deceptive practices and fraud in areas currently under its jurisdiction?

Answer. For many FTC cases, particularly those involving fraud, rapid action is often necessary to obtain preliminary relief to stop the practices quickly and limit the harm, as well as to preserve assets for possible return to consumers. Having to wait 120 days for a CFPA decision before filing a case not only would allow the violations to continue an extra 4 months, resulting in additional consumer injury, but could seriously hamper the Commission's ability to obtain preliminary relief, thus weakening our ability to protect consumers in these circumstances. The approach taken in H.R. 4173, essentially providing the FTC with concurrent enforcement authority, would ensure that the Commission's law enforcement efforts to protect consumers remain effective.

Question 3. Do you believe that the CFPA and FTC can concurrently manage consumer protection or do you believe that there will be inherent conflicts with this structure?

Answer. Based on our many years of experience in sharing jurisdiction with numerous other Federal agencies with respect to large portions of the Commission's jurisdiction, I am confident that the FTC, should it have concurrent enforcement authority, would work cooperatively and effectively with the CFPA.

The FTC, for example, has concurrent authority for stopping unfair or deceptive practices with respect to the marketing of foods, drugs, devices, alcoholic beverages, and pesticides (with the Food and Drug Administration; Department of Agriculture; Bureau of Alcohol, Tobacco, and Firearms; and Environmental Protection Agency); the securities industry (with the Securities and Exchange Commission); mail fraud (with the U.S. Postal Inspection Service); mortgage-related activities (with the Department of Housing and Urban Development); certain financial entities (with the Federal bank regulatory agencies); and a host of others. With respect to its antitrust mission, the Commission's authority is almost completely co-extensive with that of the Department of Justice.

In each of these instances, the Commission and its sister agencies have developed effective methods of coordination tailored to the individual circumstances. For example, the concurrent jurisdiction of the FTC and FDA with respect to the marketing of foods, OTC drugs, and devices is handled through a formal Memorandum of Understanding that, among other things, makes the FDA primarily responsible for overseeing product labeling and the FTC primarily responsible for non-label advertising. In some cases, the FTC defers to another agency, such as the SEC, when that agency has specialized expertise relevant to the matter. In other situations, the

[1] "Negative option marketing" refers to a category of commercial transactions in which customers are charged for goods or services if they do not take an affirmative action to reject an offer or cancel an agreement.

Commission and other agencies coordinate through less formal means, including ongoing consultation, as circumstances dictate.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. ROGER F. WICKER TO HON. JON LEIBOWITZ

Question 1. If you were granted APA rulemaking authority today, what rulemaking would you initiate?

Answer. The Commission's record for more than two decades demonstrates that it views rulemaking as a tool to be used very judiciously and only where there are clear indications that other remedial approaches are not effective. The Commission has not made any decisions about any particular rulemaking it would undertake.

One area I think might be appropriate for rulemaking under APA procedures is the use of negative option marketing in Internet sales. Despite the many Commission law enforcement actions targeting schemes that unfairly or deceptively exploit this sales technique, abuses persist. It may be possible to benefit both consumers and industry by developing bright-line standards for how to use this technique fairly and without deception. Such rules should enable consumers to more easily identify and avoid sellers that make unscrupulous use of the technique.

For another, in a 2009 report on debt collection, the Commission recommended that Congress grant it APA rulemaking authority under the Fair Debt Collection Practices Act. I continue to believe that a debt collection rulemaking would be useful.

Question 1(a). If there are any rules you would initiate immediately under APA rulemaking, please include evidence of your rationale for expedited rulemaking, including any action taken against bad actors.

Answer. Let me note initially that notice-and-comment APA rulemaking is the standard government rulemaking procedure, rather than expedited rulemaking.[1] The APA mandates a set of rigorous procedures that are designed to ensure that interested parties have early notice of the proceeding and ample opportunity to have their views considered, as well as to create a comprehensive record to afford thorough judicial review. Please see the discussion of APA Rulemaking in my additional statement.

As noted above, the Commission has not made any decision about what rulemakings it would conduct in the event of the elimination of the cumbersome Magnuson-Moss rulemaking procedures. I would consider discretionary rulemaking only where unfair or deceptive practices cause significant harm to consumers, where setting standards would likely improve industry practices (particularly where law enforcement efforts have not provided adequate guidance or prevented the practices and where malfeasance is common), where remedies could be crafted within the framework of FTC jurisprudence, and where the anticipated burdens are reasonable in light of the anticipated benefits of the rule.

Question 1(b). You discussed a few instances where APA rulemaking authority would have benefited the FTC's ability to protect consumers. Did the FTC request from Congress the specific authority to use expedited rulemaking for these instances?

Answer. Yes. For example, in a 2009 report on debt collection, the Commission recommended that Congress grant it APA rulemaking authority under the Fair Debt Collection Practices Act.

A major problem with needing to seek statutory authority for APA rulemaking for each specific need is that business practices change constantly and quite rapidly in response to technological advances and market innovation. Both consumers and industry members can often benefit from the establishment of standards that can be revised as needed to keep current and effective. If a rule is no longer needed, it can similarly be withdrawn after notice-and-comment under such a flexible regime. This process is more responsive to a dynamic economy than enacting new legislation.

Question 1(c). Please detail any requests the Commission made to Congress for expedited rulemaking on specific rules since 1990.

Answer. When Congress is considering directing the Commission to conduct rulemaking, FTC staff routinely suggest that any statute provide expressly for APA rulemaking authority. Unlike Magnuson-Moss rulemaking, APA rulemaking is an

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[1] Although the APA does provide for expedited rulemaking without notice-and-comment when an agency for good cause finds that such a procedure is "impracticable, unnecessary, or contrary to the public interest," the courts have construed this exception narrowly. The Commission has only engaged in such rulemaking to fix minor errors in a rule or make very non-substantive, technical, or non-discretionary amendments.

efficient and effective means to conduct rulemaking proceedings. Examples of legislation that then provided APA rulemaking authority include:

- Telephone Disclosure and Dispute Resolution Act of 1992
- Telemarketing and Consumer Fraud and Abuse Prevention Act
- The Children's Online Privacy Protection Act
- Fairness to Contact Lens Consumers Act
- Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003
- Omnibus Appropriations Act, 2009

In addition, in a 2009 report on debt collection, the Commission recommended that Congress grant it APA rulemaking authority under the Fair Debt Collection Practices Act.

Question 2. Can you please provide data from the Commission related to the staffing associated with the following stages of rules, for each rule promulgated under your current rulemaking authority:

- staff detailed to assist in the preparation of the advanced notice,
- staff assigned to review comments from the advance notice of proposed rulemaking,
- staff assigned to formulate the determination that unfair or deceptive acts or practices are prevalent,
- staff assigned to draft the notice of proposed rulemaking, and
- staff assigned to draft the staff report required under Commission Rule 1.13.

Answer. All of the trade regulation rulemaking proceedings using the Magnuson-Moss procedures to create new rules were conducted over 25 years ago.[2] Also, all of the rules were initiated prior to the 1980 amendment to the FTC Act requiring an advanced notice of proposed rulemaking and a determination that the practice addressed is prevalent.

The records available do not include information sufficient to respond to the request in full. Staff has gleaned from some of the post-hearing staff reports illustrative staffing information:

- Mobile Homes: At least 13 staff members worked on the post-hearing staff report.
- Used Cars: More than 14 staff members worked on the post-hearing staff report.
- Funeral Industry: At least 16 staff members worked on the post-hearing staff report.

These numbers do not include the Presiding Officer (who was obligated to produce a separate report) or his staff, Bureau management reviewers, Office of General Counsel advisors, or the Commissioners' offices. Staff familiar with the rulemaking proceedings inform me that these staffing levels were typical.

Question 3. Please provide the timing associated with informal hearings held under § 57a(c), by each rule.

Answer. Staff attempted to identify Magnuson-Moss rulemaking proceedings to promulgate new rules that included hearings held under § 57a(c). The table below sets forth those identified, together with the number of days of hearings themselves; the time taken by all of the steps associated with the hearing process, and the length of the proceeding from ANPR or initial NPR until promulgation of a rule or the closing of the proceeding.

Rule	Year Initiated	Number of Hearing Days	Time Associated with Hearing Process*	Length of Rulemaking Proceeding
Vocational Schools	1974	44	2 years, 1 month	4 years, 4 months**
Food Advertising (nutrition)	1974	48	3 years, 1 month	8 years, 1 month**

[2] Eight Magnuson-Moss rules have been amended, also using Magnuson-Moss procedures. Building on existing rules, amendment proceedings involved fewer issues than did the original promulgations and they were typically more lightly staffed. Generally, interested parties did not demand hearings to deliver their oral presentations—although most, if not all, amendment proceedings involved one or more public workshops to develop a full record.

Rule	Year Initiated	Number of Hearing Days	Time Associated with Hearing Process*	Length of Rulemaking Proceeding
Mobile Homes	1975	40	5 years	11 years, 11 months**
Credit Practices	1975	51	5 years	8 years, 10 months
Hearing Aids	1975	58	2 years	10 years, 3 months**
Funeral Services	1975	52	2 years, 4 months	7 years, 1 month
Protein Supplements	1975	26	3 years, 9 months	over 9 years**
Health Spas	1975	30	3 years, 6 months	over 10 years**
OTC Drugs	1975	23	3 years, 4 months	5 years, 5 months**
Ophthalmic Practices	1975	32	1 year, 2 months	2 years, 7 months
Used Cars	1975	35	2 years, 8 months	8 years, 10 months
OTC Antacids	1976	23	3 years, 5 months	8 years, 8 months**
Insulation (R-Value)	1977	17	7 months	1 year, 9 months
Children's Advertising	1978	30***	N/A	3 years, 5 months**
Development/Use of Standards and Certification	1978	57	N/A****	2 years, 2 months**

*The time periods associated with the hearing process start when the Commission either issued an NPR or first extended the initial comment period for comments on hearing-related matters, and end when the Presiding Officer or the staff released a report.
The numerous hearing-related steps include: comment period extensions relating to designating disputed factual issues to be addressed at the hearing or to determination of similar interests of interested persons; designating the disputed issues; grouping interested persons with similar interests; allowing each group to appoint a representative; appointing a representative if a group cannot agree; resolving petitions about disputed issues or representation; preparing and publishing a final NPR or other notice addressing all these issues and scheduling hearings; holding hearings, which include examination and cross-examination by interested persons or their representatives; making transcripts of all testimony and cross-examinations available to the public; digesting, summarizing, and analyzing the record amassed at the hearings; and preparing a staff report and a Presiding Officer report containing those summaries and analyses.
**Closed without promulgating a rule.
***This number represents the first round of hearings, which did not include examination by interested parties. A second round of hearings for examination by interested parties was planned but had not yet taken place when the Commission suspended and then closed the rulemaking proceeding.
****The staff report and the Presiding Officer's report had not been completed when the Magnuson-Moss (unfair or deceptive practices) aspect of the proceeding was closed pursuant to the 1980 amendments to the FTC Act.

Question 4. I understand that several steps associated with the Commission's rulemaking authority are required under the Commission's Rules. Can you please provide the history of adoption of these rules?

Answer. The Commission adopted rules of practice implementing the requirements of the Magnuson-Moss Act shortly after the law was enacted in 1975. The Commission issued further rules in 1980 and 1981 after the passage of the FTC Improvements Act of 1980. There have also been several revisions of discrete provisions in the late 1970s and in 1989 and 1998. Most of the provisions in the rules are required by these laws.

In addition to the statutory requirements, the rules provide that FTC staff shall make recommendations to the Commission in a report on the rulemaking record, and that the public have an opportunity to comment on both the staff report and the Presiding Officer's report. The staff report requirement ensures that the staff's expertise is provided to the Presiding Officer, the Commission, and the public.

Another provision in the Commission's rules not required by the statutes establishes a procedure for oral presentations to the Commission after the close of the hearing record. This procedure is optional and the Commission, in its discretion, may determine that "such presentations would not significantly assist it in its deliberations." The Commission adopted these provisions in 1977 in response to public comments that there should be a procedure for direct access to the Commission.

Question 4(a). Also, can you please detail the process the Commission must initiate to amend these rules?

Answer. The Commission's procedural rules implementing the statutory requirements are rules of agency practice. Under the Administrative Procedure Act, an agency may issue rules of practice and any amendments thereto by publication in the Federal Register; a comment period is not required. See 5 U.S.C. 553(a)(2).

Question 4(b). What steps has the Commission taken to streamline Commission Rules related to the rulemaking process?

Answer. The statutory requirements limit the Commission's ability to streamline the procedural steps in its rules. The statutory provisions allowed some minor streamlining in 1981 that had little effect on burden or time.

Question 5. Would additional resources allow you the opportunity to effectively utilize your existing rulemaking authority? If so, has the FTC made this clear in your recent budget proposals?

Answer. While more staff on a rulemaking may help, most of the built-in time lags involved in Magnuson-Moss rulemaking cannot be eliminated by additional staffing. There are numerous steps that must be taken to issue a rule under Magnuson-Moss procedures. Please see the discussion of Magnuson-Moss Rulemaking on pages 1 to 2, *supra.* Because most of these steps must be taken sequentially in a specified order, even additional resources would not allow the Commission to utilize existing Magnuson-Moss rulemaking authority effectively.

Question 6. Do you believe the evidential hearings and opportunity to cross examine is an unnecessary step in the formal rulemaking process?

Answer. Input from parties impacted by a proposed rulemaking is essential in developing a full record and ensuring fairness and transparency. All FTC rules, whether conducted pursuant to Magnuson-Moss or APA procedures, have been based on comprehensive records developed through open and impartial processes that provided ample opportunities for any interested parties to communicate information or opinions. The creation of such a record both leads to an informed decisional process and is integral to satisfying the courts that the agency fulfilled its responsibilities.

In some cases, it may be useful to supplement the written record by providing an opportunity for stakeholders to transmit their views orally. Doing so may be helpful in resolving difficult or contentious issues that would benefit from having opposing positions discussed and debated in a public setting. That is why the FTC frequently solicits oral input during APA rulemakings, either through workshops or outreach by FTC staff to knowledgeable parties. Indeed, in many of the Congressionally-mandated APA rulemakings, staff has affirmatively reached out to stakeholders who for whatever reason did not avail themselves of the opportunities to provide written comments.

Nevertheless, I do not believe that requiring formal "hearings" with a hearing examiner and cross-examination is generally necessary or beneficial. It is a formal, time-consuming, and rigid proceeding that delays completion of the rulemaking and may not be conducive to the free-flowing discussion that may be what is most useful in a particular case. Less formal mechanisms often are more efficient and helpful.

Question 7. Given the Commission's broad authorities, regulatory action should be limited to only those areas where substantial evidence can support the action. The existing FTC rulemaking authority required proof of substantial evidence in support of the Commission's action, and this requirement is consistent with the heightened burden of substantial evidence proof required under judicial review. Is it your intent that the Commission also adopt the less burdensome arbitrary and capricious standard of review if provided across-the-board APA rulemaking authority?

Answer. The standard for judicial review under the two formulations is the same. Please see the discussion of the standard for review on page 4, supra.

Question 8. Have you consulted with the Department of Justice (DOJ) regarding your desire to litigate independently of them? If so, have they formally supported your proposal?

Answer. There have been informal discussions, but to our knowledge DOJ has taken no position on the issue.

Question 9. The Commission has the authority to seek an injunction immediately, on its own behalf, to stop the bad acts. Also, should the Commission choose to collect civil penalties, the law requires a 45-day window in which the DOJ can decide whether to act on behalf of the FTC. If the DOJ chooses not to, then the FTC can file in its own name. In your testimony you mentioned that you may not be able to pursue the injunction on your own behalf while working with the DOJ to pursue civil penalties. Can you please explain why you are unable to seek an injunction to stop the bad acts immediately, while working through the DOJ process to collect civil penalties?

Answer. The FTC Act does not currently permit the FTC to commence an action to seek preliminary injunctive relief, including a temporary restraining order, if the action will ultimately involve a civil penalty. The FTC may file for injunctive relief for a claim only if it is not seeking any civil penalty for it.

Question 9(a). Can you also provide the following information—the number of times the FTC notified the DOJ of interest in collecting civil penalties over the past decade?

Answer. From FY 2000 through FY 2010 to date, the Commission has notified DOJ of 171 matters in which the Commission wished to obtain civil penalties. This includes both instances in which the Commission staff had negotiated a settlement calling for payment of civil penalties prior to issuance of a complaint, as well as instances in which no settlement was reached but a complaint was approved by the Commission for referral and filing by DOJ in order to obtain civil penalties.

Question 9(b). Of these notifications, how often did the DOJ decide to pursue the action within the 45-day period?

Answer. From FY 2000 through FY 2010 to date, the DOJ decided to file referred complaints approved by the Commission in all but two instances.

Question 9(c). When the DOJ chose not to pursue action, how often did the FTC initiate action?

Answer. In both of the cases when DOJ declined a referred complaint, the FTC initiated action.

Question 9(d). If the DOJ chooses to pursue the action, do they cover the costs related to the action?

Answer. Yes, generally. However, much of the work that underlies a civil penalty action is conducted prior to a referral to DOJ, and then, after a referral, FTC staff often provides substantial litigation support and assistance at the FTC's expense.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. DAVID VITTER TO HON. JON LEIBOWITZ

Question 1. Chairman Leibowitz, your letter to the House Energy and Commerce Committee in October 2009 noted that most people regard your agency as an effective consumer protection agency. I would agree that we should work to ensure that assertion remains true and that any areas in which the commission is currently hindered in protecting consumers should be closely considered. With that mind, I have some questions about current requirements of the FTC under the Magnuson-Moss rulemaking procedures and proposals to change how the FTC functions. Do you believe that public advanced notice of proposed rulemakings, which provide Congressional committees with an appropriate view into the FTC's agenda, do not serve a positive function?

Answer. I believe that ANPRs do serve a useful purpose in some cases. When the agency lacks sufficient law enforcement experience and expertise in the subject matter of the prospective rule, it often makes sense to publish an ANPR, without any proposed rule text, to obtain general input and information about the need for a rule and, if so, what provisions it should include. Thus, with respect to several of the FTC's rules promulgated pursuant to specific Congressional grants of APA authority, the Commission issued ANPRs to commence the proceeding. In other situations, the FTC has convened public workshops or conducted informal outreach in lieu of an ANPR to gain the requisite knowledge and expertise.

Although ANPRs are appropriate and useful in some circumstances, often the Commission already has the experience and expertise it needs to draft a proposed rule. In these cases, proceeding with an ANPR first is unnecessary and duplicative, resulting in what can be a several-month delay in completing the rule. Of course, whether or not it issues an ANPR, the Commission's practice is to ensure that stakeholders have meaningful notice and opportunities to provide information and express their views for consideration, both formally during the comment period on the proposed rule and through other means.

Question 2. Do you believe that providing the text of the proposed rule in notice of proposed rulemaking does not provide value to the public? Doesn't the inclusion of the text of the proposed rule and any alternatives provide the public with an opportunity to prepare for compliance with the new rule, as well as to provide input regarding its potential effects, possible improvements, and other concerns through the process and in public meetings?

Answer. Generally speaking, I think there is great value in providing proposed rule text when publishing an NPR. Indeed, the FTC routinely includes the text of the proposed rule in its NPRs, including for APA rulemakings where it is not required. I would anticipate that we would continue to do so.

Question 3. Particularly in the current economic situation with many businesses struggling to keep their employees employed, should all businesses across the U.S.

be burdened with the cost of specific regulation to prevent unfair or deceptive practices that are not prevalent or that are very rare in the marketplace?

Answer. I cannot imagine a situation in which the Commission would promulgate a rule addressing practices that are very rare, and I do not believe it has ever done so. We recognize the importance of using our rulemaking authority very judiciously, and in a manner that minimizes compliance costs, to tackle persistent and common problems for which individual case enforcement may be ineffective or inefficient. My concern, however, is with the concept of "prevalence," a finding of which is required for Magnuson-Moss rulemaking. The threshold at which a practice becomes "prevalent" is undefined in the statute or, to my knowledge, in any case law. Thus, the Commission is faced with the choice of exhaustively cataloguing the incidence of the challenged practice, at significant cost in time and resources, or building a less exhaustive record and risking that the rule would be overturned if challenged in court.

Question 4. I know we all want to protect consumers effectively. With that in mind, please explain the details of any situations where you feel the FTC has been unable to act effectively because of the current requirements for the FTC's procedures. Please also highlight if you have seen specific types of harm that the FTC has been unable to address under its current authority and procedural requirements.

Answer. There are many instances in which the FTC has been hindered in its ability to protect consumers due to the absence of the four enhancements to the agency's authority that we are seeking.

The inability to promulgate a rule under the FTC Act without complying with the unwieldy and burdensome Magnuson-Moss procedures—procedures that typically lead to 8–10 year proceedings—as a practical matter has resulted in a virtual absence of FTC rulemaking except in specific areas in which Congress has authorized or mandated a rule using APA procedures. Thus, for example, the Commission continues to attack the problem of deceptive negative option marketing on a case-by-case basis, rather than through a rule that would establish common standards and ease our enforcement burden. Moreover, as new forms of illegal practices quickly become common, it is simply not useful to initiate an 8–10 year rulemaking proceeding; by the time the rule would become effective, the illegal practice may have disappeared, only to be replaced by a new one.

The absence of civil penalty authority in cases involving violations of the FTC Act has limited the Commission's ability to establish effective deterrence in certain areas. For example, the FTC has brought numerous cases against companies that failed to undertake reasonable measures to protect consumers' sensitive personal information from possible identity thieves. In these cases, consumer redress generally is not a practicable remedy, because identifying injured consumers and determining their loss is frequently impossible. Similarly, disgorgement of illicit profits may be an unavailable remedy as the defendant may not have profited from its negligence or profits may not be calculable. Similar problems arise in cases involving illegal spyware and malware—the impracticality of obtaining consumer redress or disgorgement, in the absence of civil penalty authority, has weakened the FTC's ability to prevent future violations.

The inability of the Commission to litigate its own civil penalty cases has in some instances limited its effectiveness in stopping ongoing fraud. For example, in cases where effective consumer protection depends on obtaining preliminary relief halting ongoing violations and/or preserving assets for consumers, the Commission may have to forgo seeking civil penalties in order to avoid the delay caused by the 45-day referral period to DOJ.

Finally, the lack of clear "aiding and abetting" authority has forced the Commission in some cases either to forgo prosecution of certain entities, such as credit card processors or billing aggregators, or undertake the complex and uncertain task of proving that the entities' practices meet the "unfairness" standard in Section 5(n) of the FTC Act.

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