

**Prepared Statement of the  
Federal Trade Commission**

**Before the  
Committee on Commerce, Science, and Transportation  
United States Senate**

**Washington, D.C.  
April 8, 2008**

## I. Introduction

Chairman Dorgan, Vice-Chairman Stevens, and members of the Committee, the Federal Trade Commission (“Commission” or “FTC”) is pleased to appear before you today to testify about the FTC’s work to protect consumers and promote competition,<sup>1</sup> and S. \_\_\_\_\_, a bill to reauthorize the Commission. We look forward to continuing to work with you to further the interests of American consumers.

The FTC is the only federal agency with both consumer protection and competition jurisdiction in broad sectors of the economy.<sup>2</sup> The agency enforces laws that prohibit anticompetitive mergers and acquisitions and business practices that are harmful to consumers because they are anticompetitive, deceptive, or unfair. The FTC also promotes informed consumer choice and understanding of the competitive process.

The FTC has pursued a vigorous and effective law enforcement program in a dynamic marketplace that is increasingly global and characterized by changing technologies. Through the efforts of a dedicated, professional staff, the FTC continues to handle a growing workload. This testimony highlights some of the FTC’s accomplishments since the last FTC reauthorization hearing and provides some comments on the proposed “Federal Trade Commission

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<sup>1</sup>The written statement represents the views of the Federal Trade Commission. Our oral presentations and responses to questions are our own and do not necessarily reflect the views of the Commission or any other Commissioner.

<sup>2</sup>The FTC has broad law enforcement responsibilities under the Federal Trade Commission Act, 15 U.S.C. § 41 *et seq.* With certain exceptions, the statute provides the agency with jurisdiction over nearly every economic sector. Certain entities, such as depository institutions and common carriers, as well as the business of insurance, are wholly or partly exempt from FTC jurisdiction. In addition to the FTC Act, the agency has enforcement responsibilities under more than 50 other statutes and more than 30 rules governing specific industries and practices.

Reauthorization Act of 2008.”<sup>3</sup> We thank you for your proposed legislation, which is designed to ensure that the FTC can effectively confront the challenges of the 21<sup>st</sup> century.

## **II. FTC Accomplishments**

The Commission testified on FTC reauthorization in September 2007.<sup>4</sup> That testimony summarized recent FTC accomplishments in such areas as data security and identity theft, energy, real estate, technology, health, financial practices, telemarketing fraud and Do Not Call enforcement.

Since September, the Commission has continued to be active on competition and consumer protection issues. In the competition area, we highlight a few recent enforcement developments. First, in the health care area, the Commission filed a case in February 2008, charging that Cephalon, a pharmaceutical manufacturer, engaged in illegal conduct to prevent competition for its branded drug, Provigil,<sup>5</sup> by paying four competing firms to refrain from selling generic versions of the drug until 2012.<sup>6</sup> The Commission’s complaint alleges that Cephalon’s conduct constituted an abuse of monopoly power that is unlawful under Section 5 of

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<sup>3</sup>This testimony does not address very recent changes to the bill, particularly new sections 10 through 12, which were just made available to us. The Commission is examining these new provisions and how they intersect with other proposed provisions and indeed, the FTC Act as a whole. We look forward to working with you on these new provisions.

<sup>4</sup>*See Prepared Statement of the Federal Trade Commission Before the Subcommittee on Interstate Commerce, Trade, and Tourism Committee on Commerce, Science and Transportation, United States Senate* (Sept. 12, 2007), available at <http://www.ftc.gov/os/testimony/070912reauthorizationtestimony.pdf>.

<sup>5</sup>Provigil is used to treat excessive sleepiness in patients with sleep apnea, narcolepsy, and shift-work sleep disorder.

<sup>6</sup>*Federal Trade Commission v. Cephalon, Inc.*, No.: 1:08-cv-00244 (D.D.C. filed Feb. 13, 2008), available at <http://www.ftc.gov/os/caselist/0610182/080213complaint.pdf>.

the FTC Act. We have several other exclusion payment (“pay-for-delay settlement”) investigations ongoing.

Second, in the energy area, in January 2008, the parties abandoned Equitable Resources’ proposed acquisition of the Peoples Natural Gas Company, a subsidiary of Dominion Resources, as an FTC challenge to the acquisition was on appeal.<sup>7</sup> Although the federal district court in Pittsburgh denied the FTC’s motion for a preliminary injunction and dismissed the complaint last year on state action grounds, in June 2007, the Third Circuit took the rare step of granting the Commission’s motion for an injunction pending appeal. In February 2008, the Third Circuit granted a motion by the Commission to vacate the district court’s ruling that had dismissed the complaint.<sup>8</sup> The Commission is continuing to examine and address a wide range of issues in the energy markets, including its new authority regarding manipulation of wholesale crude oil, gasoline, or petroleum distillate markets.

Finally, in January 2008, the U.S. Court of Appeals for the Fifth Circuit upheld a Commission order requiring Chicago Bridge & Iron Co., N.V. and its United States subsidiary (CB&I) to divest assets acquired from Pitt-Des Moines, Inc. used in the business of designing, engineering, and building field-erected cryogenic storage tanks.<sup>9</sup> In its 2005 order, the Commission had ruled that CB&I’s acquisition of these assets in 2001, during a pending FTC

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<sup>7</sup>*See Federal Trade Commission v. Equitable Resources, Inc.*, No. 07-2499 (3<sup>rd</sup> Cir. 2008), available at <http://www.ftc.gov/os/caselist/0610140/080204ftcmovacateequitabledecision.pdf>.

<sup>8</sup>*See id.* (order granted Feb. 5, 2008), available at <http://www.ftc.gov/os/caselist/0610140/080303order.pdf>.

<sup>9</sup>*Federal Trade Commission v. Chicago Bridge & Iron Co.*, No. 05-60192 (5<sup>th</sup> Cir. 2008) available at <http://www.ftc.gov/os/adjpro/d9300/080125opinion.pdf>.

investigation, would likely result in a substantial lessening of competition or tend to create a monopoly in four markets for industrial storage tanks in the United States, in violation of Section 7 of the Clayton Act and Section 5 of the FTC Act. The court endorsed the Commission's findings, based on an extensive review of many years of bidding data, that the merged firms controlled over 70 percent of the market, and that new entry was unlikely given the high entry barriers based on the incumbents' reputation and control of skilled crews.<sup>10</sup>

In the consumer protection area, we highlight five key FTC initiatives since the September reauthorization testimony. First, the Commission is grateful for Congress' swift legislative action to make participation in the Do Not Call Registry permanent so that consumers will continue to enjoy its benefits without having to re-register. In November 2007, the Commission announced six new settlements and one new federal court action against companies that violated the Do Not Call provisions of the Telemarketing Sales Rule. The six settlements resulted in \$7.7 million dollars in civil penalties for Do Not Call violations.<sup>11</sup>

Second, in the privacy and data security area, the Commission announced five new data security cases;<sup>12</sup> released a new online, interactive tutorial to educate businesses on sound data

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<sup>10</sup>The Commission continues to appeal its case against Whole Foods Market, Inc.'s acquisition of its chief rival, Wild Oats Markets, Inc., on the grounds that the district court failed to apply the proper legal standard that governs preliminary injunction applications by the Commission in Section 7 cases. The Court of Appeals for the District of Columbia Circuit will hear oral arguments on this case on April 23, 2008.

<sup>11</sup>See Press Release, "FTC Announces Law Enforcement Crackdown On Do Not Call Violators," Nov. 7, 2007, available at <http://www.ftc.gov/opa/2007/11/dncpress.shtm>.

<sup>12</sup>*United States v. American United Mortgage Company*, No: 07C 7064 (N.D. Ill. filed Dec. 17, 2007), available at <http://www.ftc.gov/opa/2007/12/aumort.shtm>; *In the Matter of Life is Good, Inc.*, File No. 072-3046, available at <http://www.ftc.gov/os/caselist/0723046/index.sht>; *In the Matter of Goal Financial, LLC.*, File No. 072-3013, available at

security practices;<sup>13</sup> and hosted workshops on the private sector use of Social Security numbers<sup>14</sup> and behavioral advertising.<sup>15</sup> Following the workshop on behavioral advertising, the Commission staff released a set of proposed principles to guide the development of self-regulation in this area and is seeking comment on these principles.<sup>16</sup>

Third, in the area of financial practices, the Commission sent over 200 warning letters to mortgage advertisers and the media outlets that carried their advertisements for home mortgages. These letters stated that the mortgage advertisements identified may be deceptive in violation of Section 5 of the FTC Act or may violate the Truth In Lending Act. The Commission currently is conducting several investigations of mortgage advertisers and subprime lenders and will continue to monitor claims made in mortgage advertising. The Commission also announced three cases targeting mortgage foreclosure rescue scams,<sup>17</sup> and three settlements against “payday lenders”

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<http://www.ftc.gov/os/caselist/0723013/080304agreement.pdf>; *In the Matter of TJX*, File No. 072-3055, available at <http://www.ftc.gov/os/caselist/0723055/index.shtml>; *In the Matter of Reed Elsevier, Inc. and Seisint, Inc.*, File No. 052-3094, available at <http://www.ftc.gov/os/caselist/0523094/index.shtml>.

<sup>13</sup> See [www.ftc.gov/infosecurity](http://www.ftc.gov/infosecurity).

<sup>14</sup> See <http://www.ftc.gov/bcp/workshops/ssn/index.shtml>.

<sup>15</sup> See <http://www.ftc.gov/bcp/workshops/ehavioral/index.shtml>.

<sup>16</sup> See Press Release, “FTC Staff Proposes Online Behavioral Advertising Privacy Principles,” December 20, 2007, available at <http://www.ftc.gov/opa/2007/12/principles.shtml>.

<sup>17</sup> *FTC v. Safe Harbour Foundation*, No. 08 C 1185 (N.D. Ill., filed Feb. 25, 2008), available at <http://www.ftc.gov/os/caselist/0823028/index.shtml>; *FTC v. Mortgage Foreclosure Solutions, Inc.*, (M.D. Fla., filed Feb. 26, 2008) available at <http://www.ftc.gov/os/caselist/0823021/index.shtml>; *FTC v. National Hometeam Solutions, Inc.*, (E.D. Tex., filed Feb. 26, 2008), available at <http://www.ftc.gov/os/caselist/0823076/index.shtml>.

who failed to provide consumers with annual percentage rate information, as required by law.<sup>18</sup> Fourth, as part of a review of its environmental marketing guidelines, also known as the Green Guides,<sup>19</sup> the Commission is holding a series of public workshops on a number of emerging green marketing topics. The first such workshop took place on January 8, 2008, and addressed carbon offsets and renewable energy certificates. The second workshop, on green packaging, will take place on April 30, 2008. Finally, this fall, the Commission used its US SAFE WEB Act authority to cooperate with foreign partners in two key matters; one involved a Canadian-based bogus lottery and prize-promotion scam,<sup>20</sup> and the other involved an international spam enterprise.<sup>21</sup> Since passage of the Act in 2006 and the promulgation of rules in May 2007, the SAFE WEB Act has enhanced the FTC's ability to cooperate with foreign law enforcement authorities on consumer protection enforcement matters that cross international borders.

### **III. Reauthorization Legislation**

The remainder of this testimony addresses S. \_\_\_\_\_, the proposed "Federal Trade Commission Reauthorization Act of 2008." The Commission provides its views on the

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<sup>18</sup>*In the Matter of CashPro*, No. 072-3203 (February 2008); *In the Matter of American Cash Market, Inc.*, No. 072-3210 (Feb. 2008); *In the Matter of Anderson Payday Loans*, No. 072-3212 (Feb. 2008), available at <http://www.ftc.gov/opa/2008/02/amercash.shtm>.

<sup>19</sup> See Press Release, "FTC Reviews Environmental Marketing Guides, Announces Public Meetings," Nov. 26, 2007, available at <http://www.ftc.gov/opa/2007/11/enviro.shtm>.

<sup>20</sup> See Press Release, "Court Halts Bogus Check Scam Targeting 'Lottery Winners;' Money Transfers Used to Defraud Consumers," Nov. 19, 2007, available at <http://www.ftc.gov/opa/2007/11/cashcorner.shtm>.

<sup>21</sup> See Press Release, "FTC Stops International Spamming Enterprise that Sold Bogus Hoodia and Human Growth Hormone Pills," Oct. 10, 2007, available at <http://www.ftc.gov/opa/2007/10/hoodia.shtm>.

individual sections of the proposed bill below.

**A. Section 2: Authorization of Appropriations**

The Commission supports efforts to increase the agency's resources to meet its anticipated needs. For the past several years, the Commission has sought an increase in funds. We are grateful to Congress for increasing our funding over time.

The Commission's staff has worked hard over the past several years to fulfill its mandate, address new and emerging problems in the marketplace, enforce newly enacted laws, and complete the tasks Congress has entrusted us to address. In the last few years, Congress has passed a variety of significant new laws 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 Children's Online Privacy Protection Act, the Gramm-Leach-Bliley Act, and the US SAFE WEB Act.

Yet it is uncertain whether agency resources have grown apace with our enforcement obligations. To meet its growing challenges, the Commission anticipates needing additional resources, which might include, among other things, more staff, money to hire experts and consultants, additional office space, and improved infrastructure. The Commission understands the draft bill would authorize an additional \$20 million for technology funding for 2009 through 2015, over and above the reauthorization amount set forth in Section 2(a) of the bill. We thank the Committee for specifically recognizing the Commission's needs for funding to improve its technology. We also appreciate the seven-year plan for resources which, if appropriated, would allow us to plan for the years ahead.



**B. Section 3 and Section 5. Independent Litigating Authority and Civil Penalties for Violation of the Federal Trade Commission Act**

Sections 3 and 5 of the proposed FTC reauthorization bill address two substantially intertwined aspects of the Commission’s litigation: the availability of civil penalties in court actions, and independent agency litigating authority. This section of the Commission’s testimony first provides an overview of the Commission’s current authority to obtain monetary remedies, including civil penalties. Second, it discusses the proposed extension of the Commission’s civil penalty authority. Third, it addresses the bill’s proposal regarding independent litigating authority to obtain civil penalties. Fourth, it discusses Commission litigation before the Supreme Court.

**1. Overview of Commission’s Authority to Obtain Monetary Remedies**

Although the Commission has authority to seek civil penalties in some instances,<sup>22</sup> for many violations – including violations of Section 5 of the FTC Act that involve fraudulent conduct – the Commission currently lacks general authority to seek civil penalties.<sup>23</sup> In the past year, the Commission has sought civil penalties in approximately 22% of the consumer protection cases it has brought; it has had the option of seeking civil penalties in approximately

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<sup>22</sup>Primarily, the FTC can seek civil penalties against any entity that knowingly violates a trade regulation rule promulgated by the FTC or that violates a pre-existing final FTC order to which it is subject. Moreover, recognizing the importance of civil penalties, Congress has specifically authorized the FTC to seek civil penalties for violations of certain statutes, e.g., the CAN-SPAM Act, 15 U.S.C. § 7701 et seq.

<sup>23</sup>It is unclear whether the proposed reauthorization language in the earlier draft of the bill is intended to provide civil penalty authority for consumer protection cases only or for both competition and consumer protection cases. Although civil penalty authority in competition cases might provide a similar deterrent effect, the discussion in Sections 1 and 2 is limited to civil penalty authority in consumer protection cases.

21% of additional consumer protection cases.<sup>24</sup>

The Commission can seek other types of monetary relief, including consumer redress and other equitable remedies such as disgorgement of ill-gotten gains, from defendants, under Section 13(b) or under Section 19(b) of the FTC Act in certain circumstances, by filing federal district court actions in its own name, without referral to DOJ.<sup>25</sup> The Commission has often used Section 13(b) of the FTC Act, particularly, to obtain restitution for consumers in consumer protection cases. In the past decade, the Commission has brought over 600 consumer protection law enforcement actions using Section 13(b) under the FTC Act, through which courts have ordered approximately \$3 billion in redress for injured consumers.

## **2. Additional Civil Penalty Authority**

Section 5 of S. \_\_\_\_ would give the Commission authority to seek civil penalties for knowing violations of Section 5 of the FTC Act. As explained above, currently the FTC has authority to seek restitution on behalf of consumers and disgorgement of ill-gotten gains, but can

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<sup>24</sup>Generally, as discussed below, the Commission cannot bring civil penalty cases in its own right without first presenting them to the Department of Justice (“DOJ”) to bring on behalf of the Commission. Almost invariably, DOJ accepts the referral, but if it were to decline, in most instances, the Commission could bring the action in its own name. With one exception, the Commission cannot assess civil penalties in administrative proceedings. The exception is set forth in a provision of the Energy Policy and Conservation Act (“EPCA”), 42 U.S.C. § 6303(a). This provision (as adjusted pursuant to the Debt Collection Improvement Act of 1996, see FTC Rules of Practice, 16 C.F.R. § § 1.97, 1.98) authorizes the Commission to assess administratively a civil penalty of not more than \$110 for each violation of the Appliance Labeling Rule.

In some cases, we could obtain civil penalties, but we do not because our paramount goal is to return money back to consumers, and defendants do not have enough money to pay consumer redress and civil penalties. In other cases, as described on page 13, we are trading civil penalties for quicker relief.

<sup>25</sup>See 15 U.S.C. § 53(b); *see also* 15 U.S.C. § 57b.

obtain civil penalties only for certain categories of violations.<sup>26</sup>

In bringing consumer protection law enforcement actions, the Commission's paramount goal is to stop unlawful practices and obtain restitution for injured consumers. It achieves this goal primarily by filing actions directly in federal district court under Section 13(b) of the FTC Act. In many consumer protection cases, and most cases involving fraud, the Commission finds that the current equitable remedies of restitution and disgorgement give it the power to reach all of a defendant's available assets. In fact, in many of these cases, defendants do not have enough assets to cover consumer losses, and in such cases, the Commission usually takes the available assets and enters a suspended judgment for the remaining amount of consumer injury.

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

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<sup>26</sup>When the Federal Trade Commission was established in 1914, it did not have the authority to seek civil penalties. Federal Trade Commission Act of 1914, Pub. L. No. 63-203, 38 Stat. 717-24 (1914). In 1938, the Commission was given the authority to seek civil penalties in federal district court through the Attorney General against a party for violations of a Commission order to which that party was subject. Wheeler-Lea Act, Pub. L. No. 75-447, 52 Stat. 114-15 (1938). When the Commission started promulgating rules in the 1960s, it did not have the authority to seek civil penalties for violations of such rules.

On February 4, 1970, the Commission testified before Congress in favor of allowing the FTC to assess civil penalties administratively against respondents who knowingly committed consumer protection violations. *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, 91st Cong. 53, 54 (1970)* (statement of FTC Chairman Caspar Weinberger). The Senate passed legislation to permit the FTC to seek civil penalties for such violations in federal court proceedings, but it was dropped in conference. Ultimately, in 1975, Congress adopted legislation that authorized civil penalties for acts or practices previously determined by the Commission to be unfair or deceptive, through either a rulemaking proceeding or an administrative proceeding, and committed with actual or (for rule violations) constructive knowledge of the determination. *See 15 U.S.C. § 45(m)(1)*.

goal of deterrence, include malware (spyware), data security, and telephone records pretexting.<sup>27</sup>

In these cases, consumers have not simply bought a product or service from the defendants following defendant's misrepresentations, and it is often difficult to calculate consumer losses or connect those losses to the violation for the purpose of determining a restitution amount.

Disgorgement may also be problematic. In data security cases, defendants may not have actually profited from their unlawful acts. For example, in a case arising from a data security breach enabled by lax storage methods, the entity responsible for the weak security may not have profited from its failure to protect the information; rather, the identity thief who stole the information likely profited.<sup>28</sup> In pretexting and spyware cases, the Commission has found that defendants' profits are often slim; thus, disgorgement may be an inadequate deterrent. Also in pretexting and spyware cases, lawful acts and unlawful acts may be intermixed; thus, it may be

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<sup>27</sup>See, e.g., Prepared Statement of the Federal Trade Commission, "Federal Trade Commission Reauthorization," Before the Subcommittee on Interstate Commerce, Trade, and Tourism of the Senate Commerce, Science, and Transportation Committee, 110th Cong., September 12, 2007, *available at* <http://www.ftc.gov/os/testimony/070912reauthorizationtestimony.pdf> ("To enhance consumer protection in cases involving spyware, as well as those involving data security, the Commission continues to support provisions in pending bills that give the FTC civil penalty authority."); Prepared Statement of the Federal Trade Commission, "Federal Trade Commission Reauthorization," Before the Senate Commerce, Science, and Transportation Committee, 110th Cong., April 10, 2007, *available at* <http://www.ftc.gov/os/testimony/P040101FY2008BudgetandOngoingConsumerProtectionandCompetitionProgramsTestimonySenate04102007.pdf> ("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.").

<sup>28</sup> Defendants likely do save some money from not complying with legal mandates. However, the cost savings of not instituting reasonable data security measures are, in many cases, small and not commensurate with the injury that resulted from the failure.

difficult to determine an appropriate disgorgement amount.<sup>29</sup> And in a whole host of cases brought under Section 5, when we are challenging hard-core fraud that could otherwise be prosecuted criminally, we should be able to seek fines against these wrongdoers.

### **3. Independent Litigating Authority for Civil Penalty Actions**

As noted above, before bringing a civil penalty action, the Commission generally must notify the DOJ of the proposed action.<sup>30</sup> If the Department declines to participate in the name of the United States or otherwise fails to act within 45 days on such a referral, the Commission may file the case in its own name.<sup>31</sup> Section 3(1) of the proposed legislation would expand the agency's independent litigating authority to allow the FTC to bring actions for civil penalties in federal court "in its own name by any of its attorneys," without mandating that DOJ have the option to litigate on the FTC's behalf, as is currently required in most cases. Section 3(1) would require the Commission to "notify the Attorney General of any such action" and would permit the Commission to "request the Attorney General on behalf of the Commission to commence, defend, or intervene in any such action." The Commission supports this provision.

Giving the FTC independent litigating authority when it seeks civil penalties would allow the agency with the greatest expertise in the FTC Act to litigate some of its own civil penalty cases, while retaining the option of referring appropriate matters to DOJ. Under current law, agency staff – who have both general expertise in FTC law and specific knowledge of cases they

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<sup>29</sup>Most state statutes provide for civil penalties for certain violations of state consumer protection laws. *See, e.g.*, Ala. Code § 8-19-11; Ark. Code § 4-88-13.

<sup>30</sup>*See supra* note 24. DOJ acts in a timely manner, filing cases on behalf of the Commission and working cooperatively with the Commission and its staff.

<sup>31</sup>*See supra* note 24.

investigate and recommend for litigation – turn over such cases to the DOJ’s Office of Consumer Litigation (OCL). While the FTC has an excellent working relationship with OCL on these matters, OCL also has responsibility for enforcement matters relating to the Food and Drug Administration, the Consumer Product Safety Commission, and the Department of Transportation’s National Highway Traffic Safety Administration. In contrast, other independent federal agencies are able to maximize the benefits of their own expertise by independently prosecuting administrative or judicial actions for civil penalties. For example, the Securities and Exchange Commission has independent authority to seek judicial civil penalties for any violation of the securities laws<sup>32</sup> or even to assess administrative civil penalties against registered entities.<sup>33</sup> Similarly, the Commodity Futures Trading Commission has independent authority to seek judicial civil penalties or assess administrative civil penalties.<sup>34</sup> Bringing the FTC’s authority more in line with comparable agencies would ensure that civil penalty prosecutions fully benefit from the agency’s expertise.<sup>35</sup>

Moreover, currently, there are instances in which the Commission confronts ongoing and injurious conduct that violates a rule or statute that provides for civil penalties, such as the Telemarketing Sales Rule or the CAN SPAM Act. In such cases, the Commission can bring an action under Section 13(b) to obtain preliminary injunctive relief that halts the ongoing injury to

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<sup>32</sup>15 U.S.C. § 77t.

<sup>33</sup>15 U.S.C. § 78u-2.

<sup>34</sup>7 U.S.C. § 9; 7 U.S.C. § 13a; 7 U.S.C. § 13a-1.

<sup>35</sup>The proposed legislation would not authorize the agency to assess administrative penalties, which would give an agency more discretion to set policies for obtaining penalties than does the ability to seek penalties from a federal district court.

consumers, or it can refer an action seeking civil penalties and other injunctive relief to DOJ. The Commission cannot, however, do both. In those instances where there is a need to bring ongoing deception or other economically-injurious conduct to a swift halt, and where justice requires both full equitable relief and appropriate civil penalties, the Commission should have the option of directly filing an action seeking both equitable and civil penalty relief. The proposed provision would give the Commission this option.

The proposed provision would also increase efficiency. Currently, once the FTC makes a referral, DOJ has 45 days to commence a civil penalty action. This process requires extra time and delay, even under the best of circumstances, and extra paperwork. Moreover, once DOJ accepts a referral, the FTC normally assigns one or more of its own staff attorneys, at DOJ's request, to assist in litigating the case. Despite excellent relations and coordination between staff at DOJ and the FTC, the use of personnel at two agencies inevitably creates delay and inefficiencies. This is particularly true in cases where the FTC is simply referring to DOJ a settlement to be filed.

#### **4. Independent Litigating Authority Before the Supreme Court**

Section 3(2) of the proposed legislation would allow the FTC to represent itself before the Supreme Court in the appeal of any litigation to which the FTC was a party. The Commission supports this provision. Currently, in any matter in which the Commission represented itself in the lower courts, the Commission may request that the Solicitor General of the DOJ petition for certiorari and represent the Commission before the Supreme Court.<sup>36</sup> If the Solicitor General agrees to represent the FTC, under the FTC Act, he may not compromise a Commission position

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<sup>36</sup>15 U.S.C. § 56(a)(3)(A).

or settle the case without Commission consent.<sup>37</sup> If the Solicitor General declines to represent the FTC, the Commission may petition the Court and represent itself.<sup>38</sup> Of course, in any matter the Court may request that the Solicitor General file a brief, or the Solicitor General may file an amicus brief without a Court request.<sup>39</sup>

### **C. Section 4. Specialized Administrative Law Judges.**

Section 4 would assist in providing the FTC with ALJs experienced in handling complex antitrust, trade regulation, and economic issues in adjudications that primarily involve uncharted circumstances or otherwise particularly call upon the agency's expertise. The FTC endorses the Committee's efforts to ensure that the agency's ALJs are equal to the highly complex task they face.

The Commission was created to develop and apply specialized expertise to matters concerning unfair methods of competition, and later unfair or deceptive acts or practices. The Commission may delegate its powers to ALJs (previously hearing examiners) to handle administrative trials, but ALJ findings and conclusions both of fact and law are subject to full Commission review, either on appeal or pursuant to its own decision to review a matter.<sup>40</sup>

The issues raised in antitrust matters in particular, the very substantial body of law in this area, and the nature of economic evidence, are often sufficiently complex to require a person familiar with the law and experienced in handling economic evidence offered in trials. Not every

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<sup>37</sup>15 U.S.C. § 56(a)(3)(B).

<sup>38</sup>15 U.S.C. § 56(a)(3)(A).

<sup>39</sup>Supreme Court Rules of Practice, 28 U.S.C. App. Rule 37.

<sup>40</sup>5 U.S.C. App. Reorganization Plan No. 4 of 1961; 16 C.F.R. § 3.54.



ALJ or aspirant to an ALJ appointment has such experience, and the current process for appointments excludes such experience as a factor in making applicants available to the agency. The ability to hire ALJs with that experience would help the FTC fulfill its role as a specialized, expert agency.

#### **D. Repeal of FTC Act Exemptions**

This section discusses proposed Section 6 and Section 13 of the proposed FTC reauthorization bill, both of which would repeal certain exemptions to the FTC Act. Section 6 would repeal the FTC Act’s exemption for certain non-profit entities, and Section 13 would repeal the common carrier exemption. The Commission generally supports repealing these exemptions. In addition, Congress should examine other exemptions to the FTC Act to more broadly protect consumers and competition and to ensure consistent application of laws across economic sectors.

##### **1. Section 6. Non-Profit Exemption**

Section 6 of the proposed reauthorization legislation would subject charitable, religious, educational and other “section 501(c)(3)” organizations to the FTC Act. Currently, the FTC’s jurisdiction over non-profits is limited. The FTC Act applies to “persons, partnerships, or corporations,”<sup>41</sup> and the Act defines “corporation” as an entity that “is organized to carry on business for its own profit or that of its members.”<sup>42</sup> Under this framework, the agency can reach

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<sup>41</sup>15 U.S.C. § 45(a)(2).

<sup>42</sup>15 U.S.C. § 44.

“sham” non-profits, such as shell non-profit corporations that actually operate for profit.<sup>43</sup> It can also reach entities falsely claiming to be affiliated with charitable organizations and entities who affirmatively misrepresent that “donations” collected will go to charity.<sup>44</sup> 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.<sup>45</sup> The Commission also has jurisdiction over most non-profits in several discrete areas, for example, under certain consumer financial statutes, such as the Truth in Lending Act and the Equal Credit Opportunity Act.<sup>46</sup> In addition, the Commission has jurisdiction over non-profit entities for purposes of the Clayton Act,<sup>47</sup> most notably Section 7, which prohibits mergers or acquisitions where “the effect of such acquisition may be

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<sup>43</sup>See, e.g., *FTC v. Gill*, 183 F. Supp. 2d 1171 (C.D. Cal. 2001) (“[W]hile certain nonprofit corporations are exempt from liability for violations of section 5(a)(1) of the FTC Act, the exemption does not apply to sham corporations that are the mere alter ego of the [defendant].”) (citing *Community Blood Bank of Kansas City Area, Inc. v. FTC*, 405 F.2d 1011, 1022 (8th Cir. 1969)); *FTC v. Ameridebt, Inc.*, 343 F.Supp. 2d 451, 460-62 (D. Md. 2004) (denying motion to dismiss where FTC complaint alleged that purported credit counseling organization incorporated as a non-profit entity was a “de facto for-profit organization”).

<sup>44</sup>See, e.g., cases announced as part of “Operation Phoney Philanthropy,” (May 2003), available at <http://www.ftc.gov/opa/2003/05/opp.shtm>.

<sup>45</sup>See, e.g., *California Dental Ass’n v. FTC*, 526 U.S. 756, 759, 765-69 (1999) (holding that FTC Act applies to anticompetitive conduct by non-profit dental association whose activities provide substantial economic benefits to for-profit members); *American Medical Ass’n v. FTC*, 638 F.2d 443, 447-448 (1980)(finding FTC jurisdiction over non-profit medical societies whose activities “serve both the business and non-business interests of their member physicians”).

<sup>46</sup>15 U.S.C. § 1607(c); 15 U.S.C. § 1691c(c).

<sup>47</sup>See *United States v. Rockford Mem. Hosp.*, 898 F.2d 1278, 1280-81 (7<sup>th</sup> Cir. 1990).

substantially to lessen competition, or to tend to create a monopoly.”<sup>48</sup> The current definition of “corporation” in the FTC Act places substantial limits on the Commission’s jurisdiction over non-profit entities. While such organizations pursue many worthy activities that advance important public purposes, on occasion they engage in business activities that harm consumers.

The Commission supports extension of its jurisdiction to certain non-profit entities.<sup>49</sup> In healthcare, an area in which the Commission takes the lead to maintain competition, the agency’s inability to reach conduct by various non-profit entities has prevented the Commission from taking action against potentially anticompetitive conduct of non-profits engaged in business. For example, the Commission generally cannot challenge price-fixing, boycotts, and other anticompetitive conduct by non-profit hospitals. Nearly forty years ago, a Commission order against an association of non-profit hospitals and a non-profit blood bank found to have unlawfully hindered the development of two commercial blood banks was vacated on the ground that the non-profit entities were beyond the FTC’s jurisdiction.<sup>50</sup> In three recent enforcement actions, the Commission alleged that groups of physicians and hospitals had participated in

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<sup>48</sup>15 U.S.C. § 18.

<sup>49</sup>The Commission would be pleased to work with Congressional staff on crafting appropriate language. The Commission notes that, as drafted, Section 6 would reach only those non-profit entities that have tax-exempt status under section 501(c)(3) of the Internal Revenue Code. The Commission would benefit from broadening this provision to cover certain other non-profits, such as Section 501(c)(6) trade associations. The Commission has previously engaged in protracted litigation battles to determine whether such entities are currently covered under the FTC Act. *See, e.g., California Dental Ass’n v. FTC*, 526 U.S. 756, 765-69 (1999) (holding that FTC Act applies to anticompetitive conduct by non-profit dental association whose activities provide substantial economic benefits to for-profit members); *American Medical Ass’n v. FTC*, 638 F.2d 443, 447-448 (1980) (finding FTC jurisdiction over non-profit medical societies whose activities “serve both the business and non-business interests of their member physicians”).

<sup>50</sup>*Community Blood Bank v. FTC*, 405 F.2d 1011 (8<sup>th</sup> Cir. 1969).

unlawful price-fixing arrangements, but sued only the physicians and a for-profit hospital.<sup>51</sup> The health care sector includes a variety of other types of nonprofit entities, such as nonprofit health maintenance organizations (HMOs), health plans, and standard-setting organizations, whose activities can also raise significant competitive concerns.

The proposed legislation would also help increase certainty and reduce litigation costs in this area. Although the FTC has been successful in asserting jurisdiction against “sham” non-profits and against non-profit trade associations, the proposed legislation would help avoid protracted factual inquiries and litigation battles to establish jurisdiction over such entities.<sup>52</sup>

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<sup>51</sup>See *Piedmont Health Alliance*, 138 F.T.C. 675 (2004) (consent order), available at <http://www.ftc.gov/os/adjpro/d9314/index.shtm>; *Tenet Healthcare Corp./Frye Regional Medical Center, Inc.*, 137 F.T.C. 219 (2004) (consent order), available at <http://www.ftc.gov/os/caselist/0210119/0210119tenet.shtm>; *Maine Health Alliance*, 136 F.T.C. 616 (2003) (consent order), available at <http://www.ftc.gov/os/caselist/0210017.shtm>.

<sup>52</sup>The Commission notes that, just as the First Amendment limits the FTC’s ability to address certain practices of for-profit entities, it would also restrict certain FTC action concerning non-profits. For example, in *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781 (1988), the Supreme Court struck down a North Carolina law that required fundraisers engaged in telemarketing on behalf of charities to disclose, during the call, the percentage of charitable contributions actually used for charitable purposes. The Supreme Court held that the for-profit fundraisers, like charities soliciting on their own behalf, were engaging in “fully protected expression” under the First Amendment, and the Court rejected the argument that these activities were less-protected “commercial speech.” *Id.* at 796. The Supreme Court found the law to be an “unduly burdensome” prophylactic rule that violated the First Amendment. *Id.* At 800.

In 2003, the Court held that the First Amendment does allow a state to assert a fraud claim against a charity fundraiser for affirmatively misrepresenting to consumers where their money will go. See *Madigan v. Telemarketing Associates, Inc.*, 538 U.S. 600 (2003). The Court noted, though, that a fraud claim would be dismissed on First Amendment grounds if it were based simply on a fundraiser’s failure to disclose fee arrangements or the percentage of donated funds that were retained by the telefunder. *Id.* At 617.

## 2. Section 13. Common Carrier Exception

Section 13 would strike the telecommunications common carrier exemption from the FTC Act. This exemption bars the agency from reaching certain conduct by telecommunications companies. The Commission has testified in favor of the repeal of the common carrier exemption on several occasions,<sup>53</sup> continues to endorse its repeal, and thanks the Chairman for his continued support in this area.

The FTC Act exempts common carriers subject to the Communications Act from its prohibitions on unfair and deceptive acts or practices and unfair methods of competition.<sup>54</sup> This exemption dates from a period when telecommunications were provided by highly-regulated monopolies. The exemption is now outdated. In the current world, firms are expected to

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<sup>53</sup>See *Prepared Statement of the Federal Trade Commission, Before the Subcommittee on Interstate Commerce, Trade, and Tourism Committee on Commerce, Science and Transportation United States Senate* (Sept. 12, 2007), *available at* <http://www.ftc.gov/os/testimony/070912reauthorizationtestimony.pdf>; *Prepared Statement of the Federal Trade Commission On FTC Jurisdiction Over Broadband Internet Access Services, Before the Committee on the Judiciary, United States Senate* (Jun. 14, 2006), *available at* <http://www.ftc.gov/opa/2006/06/broadband.shtm>; *The Reauthorization of the Federal Trade Commission: Positioning the Commission for the Twenty-First Century: Hearing Before the Subcomm. on Commerce, Trade and Consumer Protection of the H. Comm. on Energy and Commerce, 108th Cong. (2003)* (“*FTC 2003 Reauthorization Hearing*”) (statement of the FTC), *available at* <http://www.ftc.gov/os/2003/06/030611reauthhr.htm>; see also *FTC 2003 Reauthorization Hearing* (statement of Thomas B. Leary, FTC Commissioner), *available at* <http://www.ftc.gov/os/2003/06/030611learyhr.htm>; *FTC Reauthorization Hearing: Before the Subcomm. on Consumer Affairs, Foreign Commerce and Tourism of the S. Comm. on Commerce, Science and Transportation, 107th Cong. (2002)* (statement of Sheila F. Anthony, FTC Commissioner), *available at* <http://www.ftc.gov/os/2002/07/sfareauthtest.htm>.

<sup>54</sup> 15 U.S.C. § 45(a)(2) exempts from the FTC Act “common carriers subject to the Acts to Regulate Commerce.” 15 U.S.C. § 44 defines the “Acts to regulate commerce” as “Subtitle IV of Title 49 (interstate transportation) and the Communications Act of 1934” and all amendments thereto.

compete in providing telecommunications services. Congress and the Federal Communications Commission (“FCC”) have dismantled much of the economic regulatory apparatus formerly applicable to the industry. Removing the exemption from the FTC Act would not alter the jurisdiction of the FCC, but would give the FTC the authority to protect against unfair and deceptive practices by common carriers in the same way that it can protect against unfair and deceptive practices by non-common carriers engaged in the provision of the same services.

Technological advances have blurred the traditional boundaries between telecommunications, entertainment, and high technology.<sup>55</sup> As the telecommunications and Internet industries continue to converge, the common carrier exemption is likely to frustrate the FTC’s ability to stop deceptive and unfair acts and practices and unfair methods of competition with respect to interconnected communications, information, entertainment, and payment services.

The FTC has extensive expertise with advertising, marketing, billing, and collection, areas in which significant problems have emerged in the telecommunications industry. In addition, the FTC has powerful procedural and remedial tools that could be used effectively to address developing problems in the telecommunications industry if the FTC were authorized to reach them.

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<sup>55</sup>See *Letter from the Federal Trade Commission to John Villafranco and Lewis Rose re Sprint Corporation*, <http://www.ftc.gov/os/closings/staff/070808sprintnextelclosingltr.pdf>. (FTC letter closing investigation into non-common carrier activities of Sprint, a traditional provider of common carrier services, related to claims of unlimited Web usage via mobile device).

## **E. Section 7. Aiding and Abetting a Violation**

The Commission believes that proposed Section 7, which would give the FTC the ability to challenge practices that aid or abet violations of the FTC Act, could be beneficial to the Commission's consumer protection law enforcement program. Implicit in this proposed provision is an understanding that effective law enforcement often requires reaching not only the direct participants in unfair or deceptive practices, but also those who support and enable the direct participants to violate the law. Since the Supreme Court's ruling in *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164 (1994), however, the Commission's ability to pursue those who assist and facilitate unfair or deceptive acts and practices has been compromised. The Supreme Court's broad reasoning in that case cast doubt on the argument that Section 5 of the FTC Act could reach "aiding and abetting" another person's violation. Although the Commission has developed alternative theories to reach secondary actors, these theories may make liability more difficult to prove than if the FTC had specific statutory authority in this area.<sup>56</sup> Indeed, in some cases, staff has decided not to name potential defendants because the conduct at issue did not fit neatly under one of the alternative "assistance" theories.<sup>57</sup>

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<sup>56</sup>For example, the FTC has used the well-established doctrine that providing the means and instrumentalities by which unfair or deceptive practices occur is itself an unfair or deceptive practice in violation of the FTC Act. *See, e.g., FTC v. Winstead Hosiery Co.*, 258 U.S. 483, 494 (1922).

<sup>57</sup>One statute specifically gives the FTC express authority to pursue aiders and abettors. The Telemarketing and Consumer Fraud and Abuse Prevention Act allowed the Commission to promulgate rules to include within the definition of deceptive telemarketing those who "assist or facilitate" such telemarketing. 15 U.S.C. § 6102(a)(2). The Commission's Telemarketing Sales Rule ("TSR") in turn prohibits providing "substantial assistance or support to any seller or telemarketer when that person knows or consciously avoids knowing that the seller or telemarketer" is engaged in certain practices that violate the Rule. The Commission has included an "assisting and facilitating" allegation in at least 2 dozen cases since the TSR was adopted. *See*,

The need for this authority has become particularly clear in the Internet era. Section 5 of the FTC Act’s broad prohibition on unfair or deceptive acts and practices generally has given the agency ample authority to bring law enforcement action against those who engage in online fraud. Many of the new business models that are emerging on the Internet, however, involve numerous actors with murky and varying roles in complicated channels of distribution. Spyware distributors, for example, often use a complex system of affiliates and sub-affiliates to distribute harmful software to consumers, with each of these entities receiving a financial benefit from their role in its distribution. In addition, some online businesses located abroad who engage in unfair or deceptive acts and practices that harm American consumers rely on support from entities located in the United States. An FTC prosecution of the domestic entity supporting the foreign online business may be the most effective means of preventing harm to American consumers. Making it easier for the Commission to challenge those who provide assistance to others who are violating Section 5 of the FTC Act could help the agency attack the infrastructure that supports Internet fraud, such as in the circumstances described above.<sup>58</sup>

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*e.g.*, *Federal Trade Commission v. Assail, Inc.*, No. W03CA007 (W.D. Tex. final orders entered Jan. 2005); *U.S. v. DirecTV, Inc.*, No. SACV05 1211 (C.D. Cal. final order entered Dec. 2005); *U.S. v. Entrepreneurial Strategies, Ltd.*, No. 2:06-CV-15 (WCO) (N.D. Ga. final order entered Jan. 2006).

<sup>58</sup>The Commission notes that Section 7 is drafted to include aiding and abetting “any provision of the Act or any other Act enforceable by the Commission,” which would include aiding and abetting unfair methods of competition. It is unclear how this is intended to apply to competition cases, or whether application to competition cases is necessary.



**F. Sections 8 and 9. Rulemaking Procedure For Consumer Protection, Subprime Lending, and Nontraditional Mortgage Loans.**

Section 8 of the proposed FTC reauthorization legislation would allow the FTC to conduct rulemaking on any consumer protection issue (other than subprime lending and nontraditional mortgage loans) under the streamlined rulemaking procedures of Section 553 of the Administrative Procedures Act (“APA”) that are generally available to federal agencies. Congress has heretofore authorized the Commission to conduct general rulemaking only under the rigorous, complicated, and time-consuming procedures of Section 18 of the FTC Act. Section 18 includes requirements that the FTC must publish an advance notice of proposed rulemaking and seek public comment before publishing its notice of proposed rulemaking; it must provide an opportunity for a hearing before a presiding officer at which interested persons are accorded certain cross-examination rights; and where there are numerous interested persons, the FTC must determine which have similar interests, have each group of persons with similar interests choose a representative, and make further determinations about representation for those interests in the cross-examination process. These requirements are not ordinarily applicable to other federal agencies for comparable rulemaking.

In addition, over the past 15 years, there have been a number of occasions where Congress has identified specific consumer protection issues requiring legislative and regulatory action. In these specific instances, Congress has given the FTC authority to issue rules using APA rulemaking procedures, and the Commission has supported this approach.

Section 9 would provide for the Commission to conduct rulemaking under the APA with respect to subprime mortgage lending and nontraditional mortgage loans. The Commission

previously has supported proposals to permit all responsible agencies to promulgate consistent and comparable rules in the financial services area.<sup>59</sup> Current differences in rulemaking procedures may result in different regulatory requirements for financial service providers selling the same goods. To avoid the application of inconsistent standards, to improve interagency coordination on rulemakings, and to ensure that any FTC rulemaking does not lag years behind other financial regulators, the FTC believes that it should have the authority to use APA procedures to promulgate rules whenever the banking agencies and National Credit Union Administration commence rulemaking under the FTC Act.

### **Conclusion**

Thank you for giving the Commission the opportunity to provide its views on the proposed FTC reauthorization bill. We are grateful for Congress' confidence in the FTC's ability to protect consumers, and, through our enforcement and education efforts, we will continue to make sure that your confidence is well-placed. We look forward to working with the Committee as the bill moves forward.

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<sup>59</sup>See *Prepared Statement of the Federal Trade Commission*, "Enhancing FTC Consumer Protection in Financial Dealings, with Telemarketers, and on the Internet," Before the Committee on Energy and Commerce Subcommittee on Commerce, Trade, and Consumer Protection (Oct. 23, 2007), available at <http://www.ftc.gov/os/testimony/071023ReDoNotCallRuleEnforcementHouseP034412.pdf>.