IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

STATE OF MINNESOTA, by its Attorney General, Mike Hatch,	)	
Plaintiff,	)	
v.	)	**No. 01-CV-48 ADM/AJB**
FLEET MORTGAGE CORPORATION,	)	
Defendant.	)	

MEMORANDUM OF LAW OF AMICUS CURIAE
THE FEDERAL TRADE COMMISSION

INTEREST OF AMICUS CURIAE

The Federal Trade Commission ("FTC" or "Commission") is the federal agency with principal responsibility for the protection of consumers from unfair and deceptive trade practices. Under the Federal Trade Commission Act, 15 U.S.C. §§ 41 *et seq*., the FTC is broadly empowered to prevent such unfair and deceptive acts in or affecting commerce, by "persons, partnerships, or corporations," except for certain expressly excluded entities, including "banks." 15 U.S.C. § 45(a)(2). The FTC also has principal responsibility for protecting the consuming public from telemarketing fraud, by promulgating regulations and taking enforcement actions under the Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. §§ 6101 *et seq.* — although, in light of the widespread nature of telemarketing abuse and the need for additional enforcement resources, Congress also gave overlapping enforcement authority to the States. 15 U.S.C. § 6103.

In the present case, this Court is called upon to resolve complex and important issues regarding the authority of various government agencies to take regulatory and enforcement action with respect to

telemarketing activities undertaken by a corporation that does not itself constitute a "bank," but claims the right to be treated as a "bank," for all purposes, by virtue of its status as a subsidiary of a bank. The question presented entails the analysis of several interrelated federal statutes, including the FTC Act, the Telemarketing Act, and the recently-enacted Gramm-Leach-Bliley Act, in which Congress sought to bring clarity to previously disputed jurisdictional issues regarding bank affiliates. Because the present motion to dismiss directly addresses the FTC's jurisdiction — and prompted in large part by its abiding concern for the vigorous enforcement of consumer protection laws — the FTC submits this brief as *amicus curiae*.

ARGUMENT

I. THE PLAIN LANGUAGE OF THE PERTINENT STATUTES, AS RECENTLY CLARIFIED BY CONGRESS, SUPPORTS THE STATE'S AUTHORITY TO BRING THIS ACTION.

1. As all parties before the Court have acknowledged, the established "starting point" for statutory analysis is the "plain language" of the operative provisions. *See, e.g., United States v. McAllister*, 225 F.3d 982, 986 (8th Cir.2000); *Board of Governors of the Federal Reserve System v. Dimension Financial Corp.*, 474 U.S. 361, 373-74 (1986). In the present case, even plain language analysis requires a number of steps, in light of the need to read the pertinent language contextually. In the end, however, one finds that Congress has indeed spoken plainly, and that its most recent pronouncement, in particular, has provided an unambiguous answer.

The State has brought this action against defendant Fleet Mortgage Corporation ("FMC") under § 6103 of the Telemarketing Act, which provides for actions by the States whenever a person has engaged in a pattern or practice of telemarketing that "violates any rule of the Commission" under the Act. 15 U.S.C. § 6103. The Commission has promulgated regulations to implement the Act, in its Telemarketing

Sales Rule ("TSR"), 16 C.F.R. Part 310. The application of both the TSR and the Telemarketing Act itself is limited, however, by 15 U.S.C. § 6105(a), which provides that "no activity which is outside the jurisdiction of [the FTC] Act shall be affected by this chapter." In other words, the TSR applies — and the State may maintain this action — only if the activity in question is within the normal scope of the FTC's authority under the FTC Act.

The scope of the Commission's jurisdiction under the FTC Act is defined by 15 U.S.C. § 45 (a)(2), which provides a number of exceptions to the Commission's broad authority to address unfair or deceptive acts in or affecting commerce. The exception at issue here is, as the parties have all recognized, entity-based — *i.e.*, "banks," like "savings and loan institutions," are excluded from FTC jurisdiction. The FTC Act further defines "banks" by reference to a listing of certain distinct types of legal entities. *See* 15 U.S.C. §§ 44 (final paragraph), 57a(f)(2). That list includes:

> national banks
> banks operating under the code of law for the District of Columbia
> Federal branches of foreign banks
> member banks of the Federal Reserve System
> branches and agencies of foreign banks
> commercial lending companies owned or controlled by foreign banks
> banks insured by the Federal Deposit Insurance Corporation
> insured State branches of foreign banks

15 U.S.C. § 57a(f)(2). "National banks," while not expressly defined, are extensively addressed in Chapter 2 of Title 12 of the United States Code, which provides for the formation and chartering of entities organized to do business as banks under the aegis of the Office of the Comptroller of the Currency. *See* 12 U.S.C. §§ 21-27.

For present purposes, two aspects of these FTC Act provisions are particularly salient. First, while § 57a(f)(2) provides a comprehensive list of entities considered to be "banks," that list does *not* include

affiliates of banks, whether parents, subsidiaries, or sister corporations. Second, none of these provisions indicates that the FTC *lacks* jurisdiction over a particular entity simply because OCC or one of the other federal banking agencies *has* jurisdiction over it. That is, the exception is *not* drafted to exclude, for example, "entities subject to supervision by a banking agency," "entities subject to the banking laws," or the like.[1] The courts have frequently recognized the propriety of overlapping jurisdiction, and have repeatedly rejected arguments that the FTC may not proceed against unfair or deceptive trade practices simply because another federal agency has concurrent authority over the same activities. *See, e.g., Thompson Medical Co. v. FTC*, 791 F.2d 189, 182 (D.C. Cir. 1986); *Amrep Corp. v. FTC*, 768 F.2d 1171, 1176 (10th Cir. 1985); *FTC v. Texaco, Inc.,* 555 F.2d 862, 881 (D.C. Cir. 1977).

A straightforward application of the language of the FTC Act indicates that — even apart from the clarifying language of the Gramm-Leach-Bliley Act discussed below — FMC falls outside the statutory "bank" exclusion. FMC does not claim to *be* a national bank, or any of the other entities listed in 15 U.S.C. § 57a(f)(2). Rather, it is simply *owned by* a national bank, and is therefore subject to regulation by OCC. Neither of these circumstances satisfies the language of the FTC Act, and FMC therefore falls outside the language of the exception.

2. In its brief as *amicus*, OCC refers to Section 8 of the Federal Deposit Insurance Act, 12 U.S.C. § 1818, as a source of enforcement authority over banks and bank subsidiaries. OCC Br. 4-5. That section indeed provides the federal banking agencies, including OCC, with broad authority to take

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[1] This contrasts with other exceptions in the same FTC Act provision that are conditioned on the existence of another agency's authority under other statutory schemes — *e.g.*, that for "persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act * * * ."

enforcement actions against covered financial institutions. Of particular relevance here is that section's cease-and-desist authority, which provides, in relevant part:

> If, in the opinion of the appropriate Federal banking agency, any insured depository institution * * * is engaging or has engaged * * * in an unsafe or unsound practice * * * or is violating or has violated * * * a law, rule, or regulation, * * * the agency may issue * * * a notice of charges in respect thereof.

12 U.S.C. § 1818(b)(1). "Depository institution" is defined in Section 3 of the same Act as including a "bank," which in turn includes a "national bank." 12 U.S.C. §§ 1813(a)(1), 1818(c)(1). Under § 1818, OCC has broad authority to take action against banks violating any "law," and it has taken the position that it may, among other things, enforce the FTC Act's proscription of "unfair or deceptive acts or practices," 15 U.S.C. § 45(a)(1).[2] OCC also asserts that its supervisory authority over national banks extends to their subsidiaries. OCC Br 1. The FTC has no occasion to question OCC's interpretation of the breadth of its own authority under a statute under which it operates. Nevertheless, none of the provisions cited above expressly defines "bank" as automatically including separately incorporated subsidiaries.[3] Subsidiaries are legally separate entities from their parents.[4] In any event, regardless of how these sections are viewed for purposes of ascertaining the extent of OCC's authority, such a view could not control the correct inter-

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[2] This is possible because the FTC Act's substantive proscription of "unfair or deceptive acts or practices" is set forth in a separate subsection, 15 U.S.C. § 45(a)(1), which is not subject to the jurisdictional limitations discussed above, such as that for "banks." Those limitations are contained in § 45(a)(2), which relates to the regulatory and enforcement authority of the Commission.

[3] Indeed, several provisions of these and other sections of the banking law refer expressly to "a bank or a subsidiary of a bank," *e.g.*, 12 U.S.C. §§ 1818(b)(3), 1818(b)(9).

[4] *See, e.g.,* Department of the Treasury News Release, "Subsidiaries v. Affiliates," 1998 WL 240802 (May 12, 1998): "Under a fundamental, longstanding and uniform rule of corporate law, a parent corporation is not liable for the obligations of a separately incorporated subsidiary in excess of its investment in that subsidiary; in other words, the parent is treated like any other shareholder in a corporation."

pretation of the term "bank" under the FTC Act, an entirely separate statute with different focus and purpose.

Even more important, contrary to OCC's assertion, we know of no language in § 1818, or elsewhere, specifying that the authority it confers on OCC is "exclusive." The courts have consistently recognized that the conferral of authority on one federal agency does not, in the absence of a clear congressional directive, oust other agencies of parallel authority under other statutory schemes. *See Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976); *Sterling Drug, Inc. v. FTC*, 1973-2 Trade Cas. (CCH) ¶ 95,779, at 95,781 (S.D.N.Y. 1973) (EPA labeling jurisdiction over disinfectant did not out FTC of jurisdiction over disease prevention claim made in advertising).

3. In 1999, Congress acted to resolve any lingering uncertainty in this area, addressing the very question before this Court expressly and precisely. As part of the Gramm-Leach-Bliley Act, Pub. L. No. 106-102, 113 Stat. 1338 (1999), Congress enacted the following provision:

> (a) CLARIFICATION OF FEDERAL TRADE COMMISSION JURISDICTION. Any person that directly or indirectly controls, is controlled directly or indirectly by, or is directly or indirectly under common control with, any bank or savings association (as such terms are defined in section 3 of the Federal Deposit Insurance Act) and is not itself a bank or savings association shall not be deemed to be a bank or savings association for purposes of any provisions applied by the Federal Trade Commission under the Federal Trade Commission Act.

Pub. L. No. 106-102, § 133(a), 113 Stat. 1383. Whatever may have been debatable about the pre-existing statutory language, it is difficult to imagine language that could have provided clearer guidance than this for the present case. The first clause carefully makes clear that the provision ensuring FTC authority applies to all three types of bank affiliates: parents, subsidiaries, and sister corporations. FMC readily acknowledges that it is "controlled by" a bank. The second clause makes clear that the provision applies

to any such affiliate that "is not itself a bank." Congress did *not*, for example, phrase the exclusion in terms of whether an affiliate that "is owned by a bank," or "engages in activities permitted for a bank" or "is regulated as if it were a bank." Instead, it provided expressly that an affiliate is covered by this provision unless it is "itself a bank." FMC does not and cannot argue that it is "itself a bank." Accordingly, Section 133(a) unambiguously provides that a subsidiary such as FMC "shall not be deemed to be a bank" for purposes of applying the FTC Act.

Both FMC and OCC insist that, even conducting a "plain language" analysis, one must look at an enactment as a whole. FMC Reply Br. 3-6; OCC Br. 4-5. We entirely agree with this fundamental principle of statutory construction. *See, e.g., Harmon Industries, Inc. v. Browner*, 191 F.3d 894, 899 (8th Cir. 1999). We see no conflict, however, between the plain meaning of Section 133(a) and the provision of Section 133(b) on which FMC relies. That section provides:

> SAVINGS PROVISION. No provision of this section shall be construed as restricting the authority of any Federal banking agency (as defined in section 3 of the Federal Deposit Insurance Act) under any Federal banking law, including section 8 of the Federal Deposit Insurance Act.

As discussed above, OCC has interpreted 12 U.S.C. § 1818 as affording it enforcement authority over subsidiaries of banks, and the FTC does not dispute that conclusion. But recognizing concurrent FTC authority over subsidiaries and other affiliates, as Section 133(a) dictates, does not in any way diminish the scope of the OCC's and other banking agencies' authority. OCC's arguments regarding the ostensible loss of "exclusivity of authority" (OCC Br. 5) have two serious flaws. First, OCC points to no language in 12 U.S.C. § 1818 (or elsewhere) providing for such exclusivity, and we are aware of none. Second, even if there were a basis for a claim of exclusive authority on OCC's part, the plain language of Section 133(b) does not guarantee such exclusivity or preclude concurrent FTC authority; it is a simple savings

clause that ensures that OCC's *own* authority affirmatively to act will not be cut back. This is entirely consistent with a literal application of Section 133(a), and the two sections pose no conflict that can render their clear terms ambiguous.

Furthermore, a fuller consideration of the context of the GLB Act should take into account its other provisions, such as Section 505, 15 U.S.C. § 6805, which allocates enforcement responsibility for the Act's consumer privacy protections among a number of federal agencies. OCC, for example, is given authority to enforce the privacy provisions as to "national banks, Federal branches and Federal agencies of foreign banks, *and any subsidiary of such entities* * * * ." 15 U.S.C. § 6805(a)(1)(A) (emphasis added). This section shows that, within the GLB Act itself, Congress paid close attention to the existence of subsidiary corporations, took care in allocating enforcement authority with respect to them, and crafted precise language to do so, which should be applied as Congress wrote it. The clear terms of Section 133(a) of that same enactment — which expressly guarantee the FTC's jurisdiction over a corporation (like FMC) that is controlled by a bank, but "is not itself a bank" — plainly answer the question at hand, and mandate that FMC's motion to dismiss the State's claims under the Telemarketing Act be denied.

II. THE LEGISLATIVE HISTORY AND HISTORICAL BACKGROUND OF THE GLB ACT DO NOT WARRANT DEPARTURE FROM ITS PLAIN LANGUAGE.

1. FMC, supported by the OCC as *amicus*, argues that the legislative history of the GLB Act shows that Congress sought merely to preserve the FTC's existing authority in the wake of the GLB Act's expansion of activities by bank affiliates, and that literal application of Section 133(a) would flout that intent by effecting a dramatic expansion of FTC authority. FMC Reply Br. 4-6; OCC Br. 5-7. The essential premise of this argument, of course, is that it was previously clearly settled that OCC had exclusive jurisdiction over subsidiaries of banks, and that the term "bank," as used in the FTC Act, necessarily

included subsidiaries. Contrary to that supposition, however, the FTC — and Congress — had good reason to view the FTC Act's "bank" exclusion applying only to banks themselves, and to believe that the FTC indeed had authority, concurrent with OCC, over bank affiliates including operating subsidiaries. Considerations supporting this view included the treatment of SEC broker-dealer requirements under analogous statutory provisions, a court ruling involving similar issues with respect to thrift subsidiaries, and even communications from OCC itself. These factors continue to buttress the FTC's plain language reading of its authority over bank subsidiaries.

Perhaps the clearest pre-1999 indication of the proper application of non-banking laws to bank operating subsidiaries is found in the treatment of such entities under the securities laws. In the Securities Exchange Act of 1934, Congress gave the Securities and Exchange Commission ("SEC") broad authority over securities "brokers" and "dealers," but in each case specified that such term "does not include a bank." 15 U.S.C. §§ 78c(a)(4), 78c(a)(5). That Act's definition of "bank" strongly resembled the FTC Act's definition, including "a banking institution organized under the laws of the United States," comparable to the FTC Act's "national bank." Although a 1985 SEC attempt to regulate broker-dealer activities by banks themselves was rebuffed as contrary to the plain language of the 1934 Act (*see American Bankers Ass'n v. SEC*, 804 F.2d 739, 742-44 (D. C. Cir. 1986)), the SEC and OCC have long been in agreement that this exclusion of "a bank" *did not* extend to operating subsidiaries of banks. Accordingly, bank operating subsidiaries engaged in securities brokerage or dealing have always been subject to the 1934 Act's registration requirements and have been regulated by the SEC. For example, the SEC has stated, in a letter to the Chairman of a congressional committee, that "subsidiaries and affiliates [of banks] are not covered by the bank exclusion." SEC No-Action Letter, 1993 WL 199082, *6 (May 6, 1993). The

following year, the Comptroller of the Currency noted, in testimony to a congressional committee, that where brokerage activities are conducted "in separate subsidiaries or affiliates of the bank," such "separate entities are regulated by the SEC and the NASD in the same manner as any other non-bank broker." 1994 WL 589457 (F.R.B.), *8 (Mar. 3, 1994); *see also id.* at *12 (referring to coordination with SEC staff in light of overlapping authority).

Thus, OCC has acknowledged that the exclusion of "banks" in the 1934 Act referred only to the banking institutions themselves, and not to operating subsidiaries, with the result of overlapping jurisdiction. The SEC and OCC pronouncements do not indicate that this result is driven by any special characteristic of, or need for accommodation in, the securities context. Rather, it is a straightforward exercise in line-drawing that is guided by the language of the statute and the understanding that subsidiary corporations are separate legal entities from the "banks" that own them. There is no apparent textual difference between the FTC Act and the 1934 Securities Act that would justify a different reading of the FTC Act exemption. Moreover, OCC's acknowledgment of concurrent SEC jurisdiction over bank operating subsidiaries belies any notion that OCC's enforcement authority with respect to such subsidiaries is "exclusive." *Cf.* OCC Br. 4-5.

Furthermore, the only litigated decision to address the FTC's jurisdiction over a subsidiary of a depository institution (there, a savings and loan institution) held that the exclusion from FTC authority applied only to the depository institution itself, and that the FTC had authority over the subsidiary. In *FTC v. Green Tree Acceptance, Inc.*, Civ. No. 4-86-469-K (N.D. Tex. Sept. 30, 1987), the FTC sued a wholly-owned subsidiary of a federal savings and loan institution, for violations of the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691 *et seq.* ("ECOA"), and the Fair Credit Reporting Act, 15 U.S.C.

§§ 1681 *et seq*. Those consumer credit laws have jurisdictional provisions that carve banks and specified thrift institutions out of the FTC's enforcement authority. The ECOA, for example, assigned to the Federal Home Loan Bank Board authority to enforce the ECOA under specified provisions of statutes governing thrift institutions, "in the case of any institution subject to any of those provisions." 15 U.S.C. § 1691c(a)(2) (1988); *see also* 15 U.S.C. § 1681s(b)(2) (1988) (parallel provisions of the FCRA). The *Green Tree* court recognized that the term "institution" referred not to every entity subject to FHLBB regulatory authority, but to a specific type of legal entity provided for by the pertinent statutes, *i.e.*, an institution that accepted deposits. Slip op. 6. The court further recognized that a wholly-owned subsidiary of such an institution was not *itself* such an "institution," and therefore failed to come within the carve-out for FHLBB jurisdiction. Accordingly, since those statutes provided for FTC jurisdiction except where jurisdiction was "specifically committed" to another agency (15 U.S.C. § 1691c(c)), the court held that there was FTC jurisdiction and denied the motion to dismiss. *Id.*

While the *Green Tree* case involved the subsidiary of a savings and loan institution rather than a national bank, the essential point of the *Green Tree* court's analysis is that language carving out from FTC jurisdiction a specified type of financial institution is most appropriately read as referring to such institution itself, and not to distinct legal entities such as subsidiaries. As the *Green Tree* court itself stated, this logic applies equally to all "depositing institutions such as savings and loans, building and loans and banks" referred to in the FTC Act. *Id.*[5]

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[5] FMC suggests that the *Green Tree* case is distinguishable from the present matter because there the court found that the FHLBB "never had jurisdiction" over the subsidiary. FMC Reply Br. 11-12. Obviously, if the court had viewed the "institution" as including its wholly owned subsidiary, it would have found that the FHLBB *did* have jurisdiction over the subsidiary. That is, the court addressed a precisely parallel issue to the present case: whether a jurisdictional carve-out from FTC authority for a specified (continued...)

In addition to the OCC statements discussed above, acknowledging concurrent SEC jurisdiction over bank subsidiaries that act as brokers and dealers, on at least one occasion, OCC staff expressly recognized the existence of similar concurrent FTC jurisdiction over bank subsidiaries, when such subsidiaries engage in conduct that may violate the FTC Act. In a 1982 letter to the FTC Division of Credit Practices, OCC staff stated, *inter alia*:

> You note that in situations where a company is subject to the concurrent jurisdiction of the FTC and the Comptroller's Office, the FTC practice has been to suspend its investigation of the organization pending an investigation by this Office. Such arrangements have been agreed to specifically in the case of national bank operating subsidiaries.

OCC Trust Interpretive Letter, 1982 WL 170954 (O.C.C.) (July 22, 1982). While OCC presumably no longer adheres to the views stated in this letter, it shows, at the very least, that the FTC has long asserted authority over nonbank subsidiaries of banks, and it belies the notion that the law was plainly settled against such authority.

Accordingly, there was substantial reason to believe, well prior to enactment of the GLB Act, that the FTC had concurrent jurisdiction over bank subsidiaries. Admittedly, the question was not definitively resolved, and, as FMC emphasizes (FMC Reply Br. 10-13), there is a dearth of direct authority on the

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[5](...continued)
entity automatically includes its wholly owned, but separately incorporated, subsidiary. Accordingly, FMC's criticisms of the State's reliance on *Green Tree* are misplaced. While it is indeed "undisputed" that OCC has broad jurisdiction over bank operating subsidiaries by virtue of Section 8 and various provisions of the National Bank Act, 12 U.S.C. §§ 21 *et seq*., that proposition does not at all undermine the *Green Tree* court's approach to the exception language found in the FTC Act and related statutes.

The FHLBB's successor, the Office of Thrift Supervision ("OTS"), has recognized precisely this distinction, in later legal opinions asserting authority to take enforcement action as to ECOA violations by subsidiaries of thrifts. In concluding that it could take such actions, OTS did *not* attempt to shoehorn such subsidiaries into the ECOA definition of "savings associations"; rather it relied on the broad authority granted to it under Section 8 of the Federal Deposit Insurance Act. *See* OTS Memorandum, 1994 OTS LEXIS 33 (June 14, 1994).

issue. This is unsurprising, however, in light of the gradual expansion of the activities of banks and bank affiliates. The State's claims in the present case involve allegations of misconduct in the course of telemarketing of a sort that is far removed from traditional banking services — *i.e.,* membership programs involving items such as discounts for car repair, prescription drugs, and legal services. *See* Complaint, ¶ 9. Although we have no reason to question FMC's authority to engage in such conduct, this is not the sort of activity that banks commonly engaged in until recent years. That the FTC — and States acting under the authority of the Telemarketing Act — have not brought such cases previously is neither remarkable as a matter of fact, nor relevant as a matter of law. *See, e.g., Cooley v. FERC*, 843 F.2d 1464, 1470 (D.C. Cir.), *cert. denied*, 488 U.S. 933 (1988) ("even a prolonged failure to assert an agency power does not destroy it").[6]

In its submission to this Court, OCC focuses on the FTC Act's division of rulemaking authority, for rules that "define with specificity acts or practices which are unfair or deceptive," as between the FTC and the Federal Reserve Board ("FRB"). OCC Br. 2-3. That rulemaking authority is not directly relevant to the present case, because the Commission's Telemarketing Sales Rule, 16 C.F.R. Part 310, is promulgated under a separate provision of the Telemarketing Act itself. *See* 15 U.S.C. § 6102. Nevertheless, the FRB's extension of its own rule to "subsidiaries" of banks is indeed anomalous, because its rulemaking authority is limited to "banks" (and other types of institutions not relevant here) as defined in the FTC Act. 15 U.S.C. § 57a(f)(1). In promulgating that rule, the FRB did not discuss its reasons for interpreting the FTC Act as it did with respect to bank subsidiaries, but simply asserted such authority. *See*

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[6] For the same reasons, we have no reason to question OCC's authority to enforce the FTC Act's prohibition of unfair and deceptive trade practices with respect to banks, though to our knowledge it had not exercised its authority to do so prior to last year.

50 Fed. Reg. 16695 (1985). While this regulation may well reflect an understanding of the FTC Act by the FRB that is at odds with the FTC's own understanding, it hardly provided a definitive resolution to the issue at hand.[7]

In the years just prior to passage of the GLB Act, the "legal landscape" surrounding the status of bank subsidiaries became "even more scrambled than before." *See* J. Smoot, Bank Operating Subsidiaries: Free at Last or More of the Same?, 46 DePaul L. Rev. 651, 660 (1997). As the State has discussed (Minn. Br. 8-11), OCC's 1996 rules regarding operating subsidiaries emphasized the differences between subsidiaries and banks themselves, and permitted the former to engage in a broader range of activities not permitted for a "bank." The point of such observations is not to cast any doubt on the authority of OCC over operating subsidiaries, nor to question the propriety of the 1996 regulations. *Cf.* FMC Reply Br. 8-9. The developments of that time do, however, plainly undermine any notion that "wholly-owned operating subsidiaries are indistinguishable from their parent national bank." FMC Br. 4. Moreover, the logic of permitting subsidiaries to engage in securities activities not allowed to banks themselves required a reading of the word "association" — as used in the Glass-Steagall Act, 12 U.S.C. § 24 (Seventh) (1994), to refer to banks — that excluded subsidiaries. As a commentator defending the 1996 OCC regulations put it, "[t]he plain meaning of the words of the relevant portions of Title 12 would seem to compel the conclusion

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[7] Any implication that the FTC has acquiesced in the interpretation of the FTC Act now advanced by FMC by failing to object to the FRB rule is ill-founded. In fact, regardless of the propriety of the FRB rule as a formal matter, the FTC had little practical reason for concern. As explained above, the banking agencies (including the FRB and OCC) unquestionably have *enforcement* authority as to unfair and deceptive practices by bank affiliates, regardless of whether they have the authority to promulgate rules under 15 U.S.C. § 57a(f)(1), comparable to FTC rules elaborating upon the statutory standards of unfairness and deception. Accordingly, it is most unlikely that any agency effort to apply the rules in question would have led to a result at odds with the underlying standards of § 45(a)(1), proscribing unfair and deceptive trade practices generally.

that operating subsidiaries should be treated like affiliates, which they in fact are, and not like banks, which they patently are not." Smoot, *supra*, at 709.

2. Although the foregoing discussion shows that a court would have been on firm footing, even prior to the GLB amendments, in concluding that the FTC had authority with respect to operating subsidiaries of banks, this Court need not determine how it would have decided the case in 1998. The real relevance of the foregoing is that, when Congress undertook its effort at financial restructuring in the GLB Act, there were indeed substantial indications that the FTC had jurisdiction over bank operating subsidiaries, concurrent with OCC, although the matter was subject to some uncertainty. Thus, at the congressional hearings preceding passage of the Act, FTC Bureau of Competition Director William Baer expressed concern that "the jurisdiction of the FTC would remain somewhat cloudy if banks, through subsidiaries and affiliates, engage in the sort of activity that we address every day in other sectors of the economy." Financial Services Competitiveness Act of 1997, Hearings Before the Subcomm. on Finance and Hazardous Materials, House Comm. on Commerce, 105th Cong., 1st Sess. (July 1997), FMC Exh. 11, at 122. Mr. Baer specifically made reference to telemarketing as an area of substantial FTC experience. *Id.* He concluded by urging the Committee to consider "clarifying our jurisdiction." *Id.* at 123.

In response, Congress helpfully provided, in Section 133(a) of the GLB Act, "Clarification of Federal Trade Commission Jurisdiction." As discussed above, the terms of that section are unmistakable, and create no tension with other portions of the statute. FMC and OCC urge that the plain language should be restricted, presumably to the activities of "financial subsidiaries" authorized by the GLB Act. *See* 12 U.S.C. § 24a. But if Congress had intended to effect such a limitation, within the very statute that created and structured the category of financial subsidiary, it could easily have done so. Moreover, the Conference

Report language that FMC relies on, which speaks generally of making clear that certain "kinds of businesses do not fall within the bank or savings association exemption because they are owned by such an entity," is hardly such a clear expression of contrary congressional intent as to overcome unambiguous statutory language. *See* H.R. Conf. Rep. No. 106-434, at 162 (1999), FMC Exh. 10.

Similarly, OCC's suggestions that a plain reading of Section 133(a) would contradict the GLB Act's "major thrust" to "provide a single regulatory agency for different categories of financial services," OCC Br 5, and that the section must apply only to financial subsidiaries, OCC Br. 7, do not provide any basis for rejecting the plain language of the section. OCC's approach would still not eliminate overlapping jurisdiction, because there is no question about the FTC's jurisdiction, concurrent with various other agencies, over financial subsidiaries.

The failures of these objections to the plain language of Section 133(a) make this case the very archetype of the sort in which a court should heed the warnings of the Supreme Court in *Dimension Financial, supra*:

> The "plain purpose" of legislation * * * is determined in the first instance with reference to the plain language of the statute itself. Application of "broad purposes" of legislation at the expense of specific provisions ignores the complexity of the problems Congress is called upon to address and the dynamics of legislative action. Congress may be unanimous in its intent to stamp out some vague social or economic evil; however, because its Members may differ sharply on the means for effectuating that intent, the final language of the legislation may reflect hard-fought compromises.

474 U.S. at 373-74 (citation omitted). In enacting Section 133 of the GLB Act, Members of Congress may or may not have had complete unity of intent, and may have had differing understandings of the state of the law they were "clarifying." In all of this, the one thing that is most clear is the statutory language that was ultimately enacted. This Court should hew closely to that language, which plainly favors the authority

of the FTC — and therefore of the State, in the present case — to maintain claims under the Telemarketing Act.

III. APPLICATION OF THE GLB ACT'S PLAIN TERMS LEADS TO A SENSIBLE RESULT, IN KEEPING WITH CONGRESSIONAL POLICY.

Apart from its reliance on the GLB Act's limited legislative history, FMC criticizes the result that literal application of Section 133(a) would produce as "novel and unworkable." FMC Reply Br. 13-14. FMC has an extraordinarily high standard to meet to prevail on such a theory, for a court is warranted in ignoring the plain language of a congressional enactment only to avoid an "absurd or glaringly unjust" result. *See, e.g.*, *Inter-Modal Rail Employees Ass'n v. Atchison, Topeka & Santa Fe Ry.*, 520 U.S. 510, 516 (1997) (quotation omitted); *Cullum v. Mutual of Omaha Ins. Co.*, 840 F.2d 619, 621-22 (8th Cir. 1988). The issue at hand does not remotely meet that criterion. To the contrary, applying Section 133(a) as written produces an eminently sensible result, consonant with the congressional policies of the banking statutes as well as of the FTC Act.

FMC's principal practical objection to coverage under the Telemarketing Act is that any concurrent jurisdiction of the FTC and OCC would be unduly "disruptive" to its business. FMC Reply Br. 14. There is ample precedent, however, for such overlapping authority. In light of the divergent focuses of various federal statutes, the courts have long recognized the propriety of "overlapping agency jurisdiction under different statutory mandates." *FTC v. Texaco, Inc.*, *supra*; *Thompson Medical Co. v. FTC*, *supra*. Indeed, FMC itself seemingly recognizes the propriety of overlaps, because its arguments are directed solely to certain subsidiaries of national banks; even if FMC's arguments were accepted, there would still be concurrent jurisdiction, by the FTC and OCC or another agency, as to other affiliates — *e.g.,* subsidiaries other than operating subsidiaries, as well as any parent or sister corporation. Within the Tele-

marketing Act itself, moreover, Congress recognized the ability of government agencies to coordinate enforcement efforts under overlapping authority, by its decision to permit both state and federal enforcement.

The degree to which such overlaps engender burdens on affected parties depends upon the particular context, and the manner in which the agencies deal with the overlap. For example, the FTC has recognized that premerger notification under both the Hart-Scott-Rodino Act ("HSR"), 15 U.S.C. § 18a, and special statutes requiring banking agency approval of bank or holding company mergers would be duplicative and unnecessary, since the parallel premerger schemes serve much the same purpose. *See* 65 Fed. Reg. 17880 (2000). Accordingly, the Commission issued guidance to minimize any overlap by treating as exempt from the HSR reporting requirement an acquisition of a bank's operating subsidiaries as part of a bank acquisition that requires banking agency approval. *Id.* at 17883, Example 8. (Such treatment does not apply, however, to a bank's simple acquisition of a traditional operating subsidiary, which does not require banking agency approval, and therefore is subject to HSR reporting requirements. *Id*. at 17882, Example 5.) This straightforward administrative accommodation — by an agency that has broad interpretive authority under that statute, 15 U.S.C. § 18a(d)(2) — comports with its own context, but does not dictate the answer to the question at hand.[8]

In the present context, the two groups of federal statutes involved — the banking statutes on the one hand, and the FTC Act and related enactments such as the Telemarketing Act on the other — serve

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[8] There are, moreover, additional reasons why the FTC's HSR ruling has nothing to do with the issues presented here. The HSR provisions — which are not even part of the FTC Act — differ substantially from Section 5(a)(2) of the FTC Act in that they do not exclude "banks" and other entities as such, but base their exclusions expressly on the requirement for merger approval under other statutes, thus evincing a clear congressional policy of avoiding overlapping reporting. *See* 15 U.S.C. §§ 18a(c)(7), 18a(c)(8).

complementary yet distinct public policies. As reflected in the broad enforcement provision cited by OCC, an important focus in regulation by the banking agencies is ensuring the safety and soundness of banking institutions, which is of vital concern to depositors and to the banking system as a whole. *See, e.g.*, 12 U.S.C. § 1818(b)(1). The Telemarketing Act, like the consumer protection provisions of the FTC Act itself, is targeted more specifically on protecting consumers from "deception and abuse" by businesses using improper means to sell goods or services. *See* 15 U.S.C. § 6101. These legislative schemes both ultimately serve the economic interests of the consuming public, and they certainly impose no conflicting standards on affected businesses. Yet the existence of overlapping authority is reasonable and beneficial, since it leaves the FTC and State consumer protection officials free to focus on consumer fraud issues, while the banking agencies focus on broader issues regarding the safety and soundness of financial institutions. And, to the extent that OCC or another banking agency exercises its power to enforce consumer protection laws against entities within its purview, interested agencies are fully capable of coordinating their efforts so as to avoid either the wasteful use of agency resources, or undue burdens on business.

In this respect, the analogy to the SEC's authority over broker-dealer activities by bank subsidiaries, discussed above, is again highly pertinent. The securities laws, too, have their own focus, which is to maintain a fair and orderly securities market and protect investors. Indeed, FMC acknowledges that it is "logical" to subject a broker-dealer to SEC regulation when the broker-dealer operates within a bank subsidiary. FMC Reply Br. 13. But it fails to explain why it is any less logical to subject a telemarketer to the normal legal remedies applicable to other telemarketers, when that activity takes place within a bank subsidiary. And, although Congress drew a line that precluded SEC authority over broker-dealer

operations of banks themselves (*see American Bankers Ass'n*, *supra*, 804 F.2d at 742-43), OCC has acknowledged the propriety of SEC authority with respect to operating subsidiaries. Congress has drawn the same line with respect to the FTC Act, and the same principle should apply.

The particular factual context of the present case amply demonstrates the reasonableness of recognizing FTC and State jurisdiction. The commercial activities at issue in the present case — the marketing of membership programs such as buyers' clubs and similar services — are precisely the kind of activities that Congress addressed in the Telemarketing Act. We by no means question the proposition that OCC has properly allowed the conduct of such activities by a bank subsidiary, under the rubric of "finder" activities. *See* FMC Br. 12-13. Yet, from the perspective of the consumer, it is telemarketing nonetheless, and poses all of the concerns that prompted passage of the Act. Moreover, neither FMC nor OCC has made any argument that the prosecution of this case by the State will impose any unfair burden on FMC or will have any substantially adverse affect on Fleet Bank.[9] Accepting FMC's arguments, however, will leave consumers without the protections of the Telemarketing Act. While the plain language of the pertinent statutes indicates that Fleet Bank itself is exempt from the Telemarketing Act, and therefore *could have* achieved a similar result by conducting such business directly, it chose to conduct this business through a subsidiary and enjoy whatever business advantages flow from that choice. There is no unfairness in subjecting FMC to the same remedies available against other telemarketers, and no irrationality in Congress's decision to draw the line where it did.

CONCLUSION

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[9] In the normal course, any exposure by Fleet Bank would be limited to its investment in FMC, as is the very nature (and often an important purpose) of using subsidiaries. *See* OCC Interpretive Letter No. 289, 1984 WL 63797 (O.C.C.) (May 15, 1984). This fact is an added reason why the line drawn by Congress in the text of the GLB Act is a reasonable one, that should be applied according to its terms.

For the foregoing reasons, the Court should deny FMC's motion to dismiss the State's claims under the Telemarketing Act.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on this 6th day of September, 2001, I have served copies of the foregoing Memorandum of Law of Amicus Curiae the Federal Trade Commission, by overnight courier, on each of the following:

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