PREPARED STATEMENT OF

THE FEDERAL TRADE COMMISSION

on

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

Before the

SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

Washington, D.C.

February 4, 2010

I. Introduction

Chairman Rockefeller, Ranking Member Hutchison, and members of the Committee, I am Jon Leibowitz, Chairman of the Federal Trade Commission ("FTC" or "Commission"). I appreciate the opportunity to appear before you today,[1] and the Commission thanks this Committee for its interest in preserving and strengthening the ability of the FTC to aid consumers in financial stress during these difficult economic times.

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

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

---

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

II. The FTC's Authority over Financial Services

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

The Commission also has law enforcement and, in some cases, regulatory powers under a number of consumer protection statutes that specifically relate to financial services, including the Truth in Lending Act ("TILA"),[5] the Home Ownership and Equity Protection Act ("HOEPA"),[6]

---

[2] 15 U.S.C. § 45(a).

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

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

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

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

the Consumer Leasing Act ("CLA"),[7] the Fair Debt Collection Practices Act ("FDCPA"),[8] the Fair Credit Reporting Act ("FCRA"),[9] the Equal Credit Opportunity Act ("ECOA"),[10] the Credit Repair Organizations Act ("CROA"),[11] the Electronic Funds Transfer Act ("EFTA"),[12] and the privacy provisions of the Gramm-Leach-Bliley Act ("GLB Act").[13] These statutes, like the FTC Act, do not give the FTC jurisdiction over banks.[14]

---

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

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

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

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

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

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

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

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

III. FTC Activities to Protect Consumers in Financial Distress

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

A. Law Enforcement

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

---

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

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

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

---

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

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

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

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

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

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

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

---

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

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

[21] *See, e.g.*, *FTC v. JPM Accelerated Services Inc.*, No. 09-CV-2021(M.D. Fla. filed Dec. 11, 2009); *FTC v. Economic Relief Technologies, LLC*, No. 09-CV-3347 (N.D. Ga. filed Dec. 8, 2009); *FTC v. 2145183 Ontario Inc.*, No. 09-CV-7423 (N.D. Ill. filed Dec. 8, 2009); *FTC v. Edge Solutions, Inc. of New York*, No. CV-07-4087-JG-AKT (E.D.N.Y. Aug. 7, 2008) (stipulated

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

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

5. *Debt collection.* Unpaid debt has reached unprecedented levels; as a result, the number and amount of debts pursued by third-party debt collectors and debt buyers[24] has skyrocketed. The Commission has maintained an aggressive program to enforce Section 5 of the FTC Act and the Fair Debt Collection Practices Act against collectors who deceive, harass, or abuse consumers.[25]

---

order and judgment for permanent injunction). In addition, as described below, the Commission is engaged in a rulemaking to amend its Telemarketing Sales Rule to cover debt relief services.

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

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

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

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

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

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

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

LDW-AKT (E.D.N.Y. July 2, 2009) (consent decree).

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

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

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

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

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

B. Rulemaking

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

- On June 1, 2009, pursuant to the Omnibus Appropriations Act of 2009 (as clarified by the Credit CARD Act of 2009)[30] the Commission commenced rulemaking proceedings on unfair or deceptive mortgage-related practices:[31]
  - This week, the Commission issued a notice of proposed rulemaking, seeking public comment on a proposed rule covering loan modification, foreclosure rescue, and other mortgage assistance relief services. The rule would ban providers from collecting fees prior to delivering the promised results, prohibit

---

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

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

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

misrepresentations in the marketing of these services, and require certain affirmative disclosures about the nature and terms of the service.

- The Commission anticipates publishing a second notice of proposed rulemaking in the near future addressing mortgage advertising practices, followed by a third proposed rulemaking addressing mortgage servicing.

- On August 19, 2009, the Commission published in the *Federal Register* proposed amendments to the Telemarketing Sales Rule ("TSR")[32] designed to curb deception and abuse by providers of for-profit debt relief services.[33] The amended rule proposed by the Commission would, among other things, prohibit debt relief service providers from charging consumers a fee until they have delivered the promised results. The Commission staff is considering the public comments the agency received in response to the proposed rule and has begun drafting a final rule.

- The Commission, in conjunction with the federal bank agencies, also has promulgated rules to protect the privacy of consumers' sensitive information, including financial and credit report information, under the GLB Act and the FACT Act amendments to the Fair Credit Reporting Act.[34]

---

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

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

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

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

C. Consumer Education

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

D. Research and Policy Development

Another means by which the FTC helps protect consumers of financial services is through its role in conducting consumer research and developing and advocating for pro-consumer policies. For example, in recent years, the Commission has taken the lead in developing and testing consumer disclosures in several financial contexts. In 2007, for example, the Commission released a staff report on a study conducted by the agency's Bureau of

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

Economics on the effectiveness of mortgage disclosures.[36] The study examined how consumers search for mortgages, how well they understand cost disclosures and the terms of their own loans, and whether better disclosures could help them shop for mortgage loans and avoid deceptive lending practices. The study found that mortgage disclosure forms in current use fail to convey key mortgage costs and terms to many consumers, and that more effective disclosures can be created to help consumers make better-informed decisions.[37]

The Commission also has engaged in efforts to identify and promote effective consumer protection policies with respect to debt collection. In 2009, for example, FTC staff conducted a series of public roundtables across the United States on the consumer protection issues raised by debt collection litigation and arbitration practices.[38] The roundtables followed a 2009 Commission report[39] recommending changes in the FDCPA to reform and modernize the debt

---

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

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

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

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

collection regulatory system. Other recent FTC research and policy development initiatives in the financial area include a public workshop to examine consumer protection problems related to debt relief services and a two-day forum, and associated staff report, on developing better methods for deterring and preventing fraud.[40]

IV. Enhancing the FTC's Ability to Protect Consumers

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

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

---

http://www.ftc.gov/opa/2010/01/sci.shtm.

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

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

year includes additional authority that would enable the Commission to more effectively protect consumers.

A. Resources

The FTC is a relatively small agency with a very broad consumer protection and competition mission, ranging from operation of the Do Not Call registry, to challenging unfair or deceptive marketing and advertising, to enforcement of the consumer financial protection statutes with respect to most businesses in the United States, to challenging anti-competitive conduct that would harm consumers. As the economic downturn has continued, the Commission has implemented efficiencies that enable it to "do more with less;" at the same time, the agency has shifted more of its consumer protection resources to protecting consumers of financial services, while continuing to carry out its myriad other obligations. The FTC understands budgetary constraints, but assures both the Congress and the Administration that any funds the FTC receives will be used to respond more effectively to the broad range of current and future consumer protection issues and, specifically, to better protect consumers from financial-related fraud.[42]

B. Aiding and Abetting Authority

Many individuals and small companies engaged in unlawful practices rely on the support and assistance of other, usually larger, companies. This support and assistance often is instrumental to the success of the scams and allows them to be perpetrated on a much broader

---

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

scale than would otherwise be possible. Having the ability to prosecute those who make fraud possible by assisting others is a key component of an effective enforcement program. Therefore, the Commission encourages Congress to clarify the law[43] and provide explicit authority for the FTC to take law enforcement action against those who provide substantial assistance to another while knowing, or consciously avoiding knowing, that the person is engaged in unfair or deceptive practices in violation of Section 5 of the FTC Act.[44]

---

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

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

C. APA Rulemaking Authority[45]

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

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

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

D. Civil Penalty[47] and Independent Litigating Authority

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

---

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

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

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

Under current law, the Commission must refer to the Department of Justice ("DOJ") all cases in which it seeks civil penalties or involving scammers who harm American consumers from abroad. The DOJ then has 45 days to decide whether to file the case in its own name or

---

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

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

[50] *See Hearings on H.R. 14931 and Related Bills before the Subcomm. on Commerce and Finance of the H. Comm. on Interstate and Foreign Commerce*, 91st Cong. 53, 54 (1970) (statement of FTC Chairman Caspar Weinberger); *Hearings on S. 2246, S. 3092, and S. 3201 Before the Consumer Subcomm. of the S. Comm. on Commerce*, 91st Cong. 9 (1970) (Letter from Caspar W. Weinberger, Chairman, Federal Trade Commission) (forwarding copy of House testimony). In 1973, the Senate passed S. 356, which authorized civil penalties for any unfair or deceptive act or practice in violation of FTC Act Section (5)(a)(1) that was committed with actual or objective knowledge. EARL W. KINTNER, THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 5236-37 (1983) (reprint of S. 356 as passed by the Senate).

return it to the Commission. The Commission has previously testified about the benefits for effective law enforcement of being able to file and litigate civil penalty cases in its own name – as it now does when seeking other remedies.[51] This authority would allow the Commission – the agency with the greatest expertise in enforcing the FTC Act – to bring cases more quickly and efficiently.[52] The Securities and Exchange Commission and Commodity Futures Trading Commission already have independent litigating authority to bring civil penalty cases without referring cases to the DOJ. This authority is critical to our efforts to fight fraud.

V. Reform of Consumer Financial Protection

On June 17, 2009, President Obama announced his proposal to create a Consumer Financial Protection Agency ("CFPA") as part of a broader reform of the nation's financial regulatory system. On December 11, 2009, the House passed H.R. 4173,[53] Title IV of which would establish the CFPA with broad powers to protect consumers with respect to financial

---

[51] *See, e.g.*, Prepared Statement of the FTC on Proposed Consumer Financial Protection Agency: Implications for Consumers and the Federal Trade Commission, before the House Committee on Energy and Commerce Subcommittee on Commerce, Trade and Consumer Protection (July 8, 2009), *available at* http://www.ftc.gov/os/2009/07/090708Acfpatestimony.pdf; FTC Reauthorization Testimony, *supra* note 44.

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

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

activities. It would transfer many of the consumer protection functions currently performed by the federal banking agencies to the new agency. With respect to the FTC, Title IV would transfer to the CFPA the FTC's rulemaking authority under certain enumerated statutes with respect to businesses engaged in financial activities. Title IV also would retain the FTC's authority under the FTC Act and its enforcement authority under the enumerated statutes, concurrently and in coordination with the CFPA.

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

---

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

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

should remain an active and effective consumer protection agency with respect to both financial and nonfinancial products and services.

VI. Conclusion

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

Appendix A – List of FTC Law Enforcement Actions Against Loan Modification and Foreclosure Rescue Entities in 2008-2009

- *FTC v. First Universal Lending, LLC*, No. 09-CV-82322 (S.D. Fla. filed Nov. 24, 2009)
- *FTC v. Truman Foreclosure Assistance, LLC*, No. 09-23543 (S.D. Fla. filed Nov. 23, 2009)
- *FTC v. Debt Advocacy Ctr, LLC*, No. 1:09CV2712 (N.D. Ohio filed Nov. 19, 2009)
- *FTC v. Kirkland Young, LLC*, No. 09-23507 (S.D. Fla. filed Nov. 18, 2009)
- *FTC v. 1st Guaranty Mortgage Corp.*, No. 09-DV-61846 (S.D. Fla. filed Nov. 17, 2009)
- *FTC v. Washington Data Resources, Inc.*, No. 8:09-cv-02309-SDM-TBM (M.D. Fla. filed Nov. 12, 2009)
- *FTC v. Federal Housing Modification Dep't*, No. 09-CV-01753 (D.D.C. filed Sept. 16, 2009)
- *FTC v. Infinity Group Servs.*, No. SACV09-00977 DOC (MLGx) (C.D. Cal. filed Aug. 26, 2009)
- *FTC v. Loan Modification Shop, Inc.*, No. 3:09-cv-00798 (JAP) (D.N.J., amended complaint filed Aug. 4, 2009)
- *FTC v. Apply2Save, Inc.*, No. 2:09-cv-00345-EJL-CWD (D. Idaho filed July 14, 2009)
- *FTC v. Loss Mitigation Servs., Inc.*, No. SACV09-800 DOC(ANX) (C.D. Cal. filed July 13, 2009)
- *FTC v. Sean Cantkier*, No. 1:09-cv-00894 (D.D.C., amended complaint filed July 10, 2009)
- *FTC v. LucasLawCenter "Inc."*, No. SACV-09-770 DOC(ANX) (C.D. Cal. filed July 7, 2009)
- *FTC v. US Foreclosure Relief Corp.*, No. SACVF09-768 JVS(MGX) (C.D. Cal. filed July 7, 2009)
- *FTC v. Freedom Foreclosure Prevention Specialists, LLC*, No. 2:09-cv-01167-FJM (D. Ariz. filed June 1, 2009)
- *FTC v. Data Medical Capital, Inc.*, No. SA-CV-99-1266 AHS (Eex) (C.D. Cal., contempt application filed May 27, 2009)
- *FTC v. Dinamica Financiera LLC*, No. 09-CV-03554 CAS PJWx (C.D. Cal. filed May 19, 2009)
- *FTC v. Federal Loan Modification Law Ctr., LLP*, No. SACV09-401 CJC (MLGx) (C.D. Cal. filed Apr. 3, 2009)
- *FTC v. http://bailout.hud-gov.us*, No. 1:09-00535 (HHK) (D.D.C. filed Mar. 25, 2009)
- *FTC v. Home Assure, LLC*, No. 8:09-CV-00547-T-23T-Sm (M.D. Fla. filed Mar. 24, 2009)
- *FTC v. New Hope Property LLC*, No. 1:09-cv-01203-JBS-JS (D.N.J. filed Mar. 17, 2009)
- *FTC v. Hope Now Modifications, LLC*, No. 1:09-cv-01204-JBS-JS (D.N.J. filed Mar. 17, 2009)

- *FTC v. National Foreclosure Relief, Inc.*, No. SACV09-117 DOC (MLGx) (C.D. Cal. filed Feb. 2, 2009)
- *FTC v. United Home Savers, LLP*, No. 8:08-cv-01735-VMC-TBM (M.D. Fla. filed Sept. 3, 2008)
- *FTC v. Foreclosure Solutions, LLC*, No. 1:08-cv-01075 (N.D. Ohio filed Apr. 28, 2008)
- *FTC v. Mortgage Foreclosure Solutions, Inc.*, No. 8:08-cv-388-T-23EAJ (M.D. Fla. filed Feb. 26, 2008)
- *FTC v. Nat'l Hometeam Solutions, Inc.*, No. 4:08-cv-067 (E.D. Tex. filed Feb. 26, 2008)
- *FTC v. Safe Harbour Foundation of Florida, Inc.*, No. 08-C-1185 (N.D. Ill. filed Feb. 27, 2008).