THE PROPOSED CONSUMER FINANCIAL PROTECTION AGENCY: IMPLICATIONS FOR CONSUMERS AND THE FTC

HEARING

BEFORE THE

SUBCOMMITTEE ON COMMERCE, TRADE, AND CONSUMER PROTECTION

OF THE

COMMITTEE ON ENERGY AND COMMERCE

HOUSE OF REPRESENTATIVES

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WITNESSES

THE PROPOSED CONSUMER FINANCIAL PROTECTION AGENCY: IMPLICATIONS FOR CONSUMERS AND THE FTC

WEDNESDAY, JULY 8, 2009

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COMMERCE, TRADE,
AND CONSUMER PROTECTION,
COMMITTEE ON ENERGY AND COMMERCE,
Washington, DC.

The Subcommittee met, pursuant to call, at 10:10 a.m., in Room 2123 of the Rayburn House Office Building, Hon. Bobby L. Rush [Chairman of the Subcommittee] presiding.

Members present: Representatives Rush, Schakowsky, Sarbanes, Sutton, Green, Gonzalez, Butterfield, Barrow, Matsui, Castor, Space, DeGette, Dingell, Waxman (ex officio), Radanovich, Stearns, Whitfield, Pitts, Terry, Gingrey, Scalise and Barton (ex officio).

Staff present: Anna Laitin, Professional Staff; Will Casey, Special Assistant; Michelle Ash, Chief Counsel; Timothy Robinson, Counsel; Marc Groman, Counsel; Stephanie Bazell, Intern; Caren Auchman, Communications Associate; Bruce Wolp, Senior Adviser; Phil Barnett, Staff Director; Jeff Wease, Deputy Information Officer; Earley Green, Chief Clerk; Brian McCullough, Senior Professional Staff; Shannon Weinberg, Counsel; Will Carty, Professional Staff; and Sam Costello, Legislative Assistant.

OPENING STATEMENT OF HON. BOBBY L. RUSH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

Mr. RUSH. The Subcommittee on Commerce, Trade and Consumer Protection will now come to order.

The purpose of today's hearing is to hear witnesses on the subject of the proposed Consumer Financial Protection Agency, implications for consumers and the FTC. I certainly want to welcome all the witnesses, Mr. Barr and Chairman Leibowitz. The Chair recognizes himself for 5 minutes for the purposes of an opening statement.

I would like to thank all my colleagues and all the witnesses who diligently worked to prepare testimony over the Fourth of July holiday so that today's hearing would be as meaningful as possible as we commence our examination of the Administration's proposal to create a new Consumer Financial Protection Agency. My view on the matter is fairly straightforward. I believe that the FTC should remain intact as it is currently constituted and that this committee and subcommittee should continue to oversee and authorize the FTC.

The Commission, which was established in 1914 during our Nation's Progressive Era, was designed to be a regulatory agency with disinterested expertise to ensure compensation and to promote free enterprise. That mission and those prescient concerns are as vital today as they were almost a century ago. The Commission operates best as a lone eagle. From high above, the agency can survey the marketplace and swoop down on predators that deceive unsuspecting and misinformed consumers. The higher and farther away that the FTC is from other agencies and the entities that it regulates, the better it is at spotting unfair commercial and trading practices and at isolating those practices that cast the longest shadows. Similarly, by staying at a distance, the agency can keep would-be credit captors at bay while staying on course to achieve its critical mission of protecting consumers.

Looking at all reliable indicators, the commission has performed commendably for a small and scrappy staff and abridged powers, working alone with a five-person bipartisan commission, possibly 1,100 dedicated employees spread out across three bureaus: Bureau of Competition, Consumer Protection and Economics. Although its expertise is deep and broad, the FTC's statutory tools under the FTC Act consist of an antiquated and cumbersome of rulemaking under the Magnuson-Moss Act paired with anemic litigation authority. These two may be successful at landing glancing blows but they fail to pack a full punch of detergents that businesses will respect and consumers deserve. Currently at the FTC's disposal are its expertise and its agency crafted instruments of research, policy and study development, consumer compliant and education, competition, legal analysis and economics. While the FTC does well, it has done without power relative to its sister agencies, and what it hasn't done particularly well is in the process of being fixed.

Just a few weeks ago, our subcommittee worked intently to mark up H.R. 2309, the Credit and Debt Protection Act, which directs the FTC to adopt rules using APA rulemaking authority that would address rampant unfair and deceptive practices in the area of payday lending, automobile financing, mortgage and foreclosure rescue and debt settlement. Our subcommittee's objective in passing H.R. 2309 was to confer more authority upon the FTC and to equip it with sufficient resources so that it could adopt rules faster in the areas of credit and debt through APA rulemaking procedures and bring enforcement action through the threat of civil penalties. Our committee had worked devotedly in the past more than a few times with members from the Financial Service Committee to bolster the FTC's shortcomings, hold out the FTC's best practices for banking agencies to emulate and protecting consumers and to improve the ability of bank regulatory agencies to protect consumers by ensuring unfair and deceptive rules under the FTC Act. I have witnessed the respective chairs of the Committees on Energy and Commerce and Financial Services jointly introduce H.R. 3525 to tackle some of these challenges.

Further, I offered a further amendment to H.R. 3526, which was introduced by the chair of the Financial Services Committee in the 110th Congress to require that a GAO report investigating federal banking and credit union regulations and the perpetuation of unfair and deceptive acts and practices by depository institutions. Importantly, this push and pull between our respective committees has pressured providers of financial services and products including banks and depository institutions to balance the allure of profits and determination of safety and soundness against the needs of consumers. This collaborative working relationship between committees has produced good and sustainable consumer protection bills to safeguard consumers of financial services and of consumer credit products and is a vital example of the independent agencies that would be affected by the Administration's proposal as it will allow each of them to maintain their independence and respective biases and expertise when addressing serious problems that cut across sectors and affect market supplies and consumers.

I want to thank the witnesses for being here today, for taking the time out from their busy schedules to participate in this hearing. With that, I yield back the balance of my time.

[The prepared statement of Mr. Rush follows:]

The Honorable Bobby L. Rush
Chairman
Subcommittee on Commerce, Trade & Consumer Protection
"The Proposed Consumer Financial Protection Agency: Implications for Consumers and the FTC"
July 9, 2009

Good morning. I would like to thank all my colleagues and the witnesses who diligently worked to prepare testimony over the July 4th holiday weekend so that today's hearing would be as meaningful as possible as we commence our examination of the Administration's proposal to create a new Consumer Financial Protection Agency.

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The Commission operates best as a lone hawk. From high above, the agency can survey the marketplace and swoop down on predators that deceive unsuspecting and misinformed consumers. The higher and farther away that the FTC is from other agencies and the entities it regulates, the better it is at spotting unfair commercial and trading practices, and at isolating those practices that cast the longest shadows. Similarly, by staying at a distance, the agency can keep would-be captors at bay, while staying on course to achieve its critical mission of protecting consumers.

Looking at all reliable indicators, the Commission has performed commendably with a small and scrappy staff and abridged powers. Working along with a five-person, bi-partisan Commission, are approximately 1100 dedicated employees spread out across three bureaus (Competition, Consumer Protection and Economics). Although its expertise is deep and broad, the FTC's statutory tools under the FTC Act consist of an antiquated and cumbersome form of rulemaking under the Magnusson-Moss Act paired with anemic litigation authority. These tools may be successful at landing glancing blows but they fail to pack the full punch of deterrence that businesses will respect and consumers deserve.

Currently at the FTC's disposal are its expertise and its agency-crafted instruments of research, public policy & study development, consumer complaint & education, competition, legal analyses, and economics. What the FTC does well it has done WITHOUT peer relative to its sister agencies. And, what it hasn't done particularly well is well in the process of being fixed.

Just a few weeks ago, our subcommittee worked intently to mark up HR 2309, the Credit and Debt Protection Act, which directs the FTC to adopt rules using APA rulemaking authority that would address rampant, unfair and deceptive acts and practices in the areas of payday lending, automotive finance, mortgage and foreclosure rescue, and debt settlement.

Our subcommittee's objective in passing HR 2309 was to confer more authority upon the FTC and equip it with sufficient resources so that it could adopt rules faster in the areas of credit and debt through APA rulemaking proceedings, and bring enforcement actions carrying the threat of civil penalties.

Our Committee has also worked devotedly in the past – more than a few times with members from the Financial Services Committee -- to bolster the FTC's shortcomings, hold out the FTC's best practices for banking agencies to emulate in protecting consumers, and improve the ability of bank regulatory agencies to protect consumers by issuing unfair and deceptive rules under the FTC Act.

I have witnessed the respective Chairs of the Committees on Energy and Commerce and Financial Services jointly introduce H.R. 3525 to tackle some of these challenges. Further, I offered a friendly amendment to H.R. 3526, which was introduced by the Chair of the Financial Services Committee in the 110th Congress, to require a GAO report investigating federal banking and credit union regulations and the perpetration of unfair and deceptive acts and practices by the depository institutions.

Importantly, this "push and pull" between our respective committees has pressured the providers of financial services and products, including banks and depository institutions, to balance the allure of profits and determinations of "safety and soundness" against the needs of consumers.

This collaborative working relationship between committees has produced good and sensible consumer protection bills to safeguard consumers of financial services and consumer credit products. It is a viable example for the independent agencies that would be affected by the Administration's proposal to follow as it would allow each of them to maintain their independent and respective biases, experience, and expertise when addressing serious problems that cut across industry sectors and affect market suppliers and consumers.

I thank the witnesses for being here today and I look forward to their testimony. With that, I yield back the balance of my time.

Mr. RUSH. The Chair now recognizes the gentleman from California, the ranking member, Mr. Radanovich for 5 minutes for the purposes of an opening statement.

OPENING STATEMENT OF HON. GEORGE RADANOVICH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. RADANOVICH. Thank you, Mr. Chairman, good morning. I appreciate your calling today's hearing on this important topic.

Whenever something goes wrong in this country, Washington proposes a solution regardless of whether the situation calls for one. However well-intentioned our actions, they rarely work out because they are often undertaken as a knee-jerk response. We have seen many unintended consequence of rush to legislation in recent history, for example, the Sarbanes-Oxley Act. At best, we have seen marginal improvements in the markets diverting billions of dollars toward new compliance costs to the detriment of many small- and medium-sized businesses. In another example, last Congress we enacted a law in response to lead paint on toys. The paint violated an existing standard but what was a compliance problem rather than a deficient standard problem led to numerous costly new mandates that put many small- and medium-sized businesses out of business because the cost was too high without any corresponding increase in safety.

This is not to say that weaknesses in our financial system don't exist; they obviously and clearly do. The failure of so many financial institutions and the ongoing problem of foreclosures on mortgages some borrowers never should have taken out are evidence of that, and if the bailout of banks and financial firms really were necessary to save the financial system, something clearly needs to be done to address the systematic risk.

Additionally, fraud and deception by both lenders and borrowers in the mortgage market ran rampant. The FBI reported an increase in fraud by more than 400 percent since 2005. Few people question anything was wrong in the market until home prices started plummeting and borrowers began defaulting. If uniformity in the enforcement of existing laws can address these problems, I would support that. Apart from the lack of systemic risk regulation to prevent future financial collapses required in the taxpayer bailout, I am still trying to understand what holes exist in the FTC's consumer protection authority and to what extent the government contributed to the crisis with its intervention in housing policy. I am far from convinced that the market problems require the creation of a new federal regulator as contemplated by the Administration's proposal.

Fannie Mae and Freddie Mac are under government control in part because they did exactly what Congress and the government wanted: extend home ownership to as many people as possible under the watch of the federal regulators. Fannie and Freddie along with the federal housing agencies and programs were encouraged to extend credit, and when they did, their shareholders played the price for failing. To accomplish the policy goal of extending home ownership to as many people as possible, changes in lending standards had to occur. The lowering of lending standards meant more borrowers qualified for loans they couldn't afford. My point is that laws on the books didn't stop people from taking out risky mortgages, either in spite of or because of rapidly increasing home prices, nor has it stopped regulators and law enforcement from prosecuting those who we now know committed fraud and broke the law.

While many experts believe that the banking regulators performed their duties inadequately, I will leave that to the Financial Services Committee to decide. But with regard to the FTC, it seems to me that we are throwing out the baby with the bathwater by stripping the authority over consumer protection for financial products and services from the one agency that has performed well. If we agree we need legislation, we should take the approach of legislating with a scalpel rather than with a bulldozer.

With that said, I have two primary concerns with this proposal. First, it creates a new federal entity with an enormous scope of authority. The proposal grants sweeping authority to a new agency over financial products that would cover every sector of the economy. As I understand it, the draft legislation would touch everyone from a certified public accountant to a realtor and subject them to a new tax to fund the agency.

Second, I am concerned about transferring functions from the FTC to a new agency without any evidence that it is necessary or that it will be as effective as a regulator as the FTC is. By removing the FTC's authority, we could lose the FTC's unique expertise in balancing consumer protection and competition.

Finally, the legislation contains several new broad authorities for the FTC regarding rulemaking authority and civil penalty authority. I have previously disagreed with these and do not need to repeat them at this time. However, I do have some questions of the witnesses regarding these provisions and I will ask them when they are appropriate.

I want to welcome the members to the panel as well and yield back, Mr. Chairman.

Mr. RUSH. The Chair thanks the gentleman. The chairman of the full committee is recognized for purposes of opening statement for 5 minutes.

OPENING STATEMENT OF HON. HENRY A. WAXMAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. WAXMAN. Thank you very much. I want to thank you, Mr. Chairman, for holding this important hearing.

Last year, as chairman of the House Oversight Committee, I held several hearings examining the causes of the financial crisis. Those hearings revealed a government regulatory structure that was unwilling and unable to meet the complexities of the modern economy. We found regulatory agencies that had fully abdicated their authority over banks and had done little or nothing to curb abusive practices like predatory lending. The prevailing attitude was that the market always knew best. Federal regulators became enablers rather than enforcers.

The Obama Administration has developed an ambitious plan to address these failures and to strengthen accountability and oversight in the financial sector. Today's hearing will take a close look at one piece of that plan, the proposal to create a single agency responsible for protecting consumers of financial products. A new approach is clearly warranted. The banking agencies have shown themselves to be unwilling to put the interests of consumers ahead of the profit interests of the banks they regulate and the structure and division of responsibilities among these agencies has led to a regulatory race to the bottom. The Federal Trade Commission has taken steps to protect consumers but its jurisdiction is limited and it has been hampered by a slow and burdensome rulemaking process.

I am pleased that this subcommittee is holding today's hearing and examining the Administration's proposal carefully. There are two areas of which attention and focus from this committee are particularly needed. First, the new agency must be structured to avoid the failures of the past. It only makes sense to create a new agency if that new agency will become a strong, authoritative voice for consumers. And second, we must ensure that the Federal Trade Commission is strengthened, not weakened, by any changes. Unlike the banking agencies, FTC has consumer protection as its core mission.

In recent months, FTC has taken great strides to protect consumers of financial products, bringing enforcement actions against fraudulent debt settlement companies and writing new rules governing mortgages. The Administration's proposal would give most of the FTC's authority over financial practices and some of FTC's authority over privacy to the new agency. At the same time, the Administration proposes improving FTC's rulemaking authority and enforcement capabilities. It is not clear what impact these proposals would have on FTC or its ability to perform its consumer protection mission. As we build a new structure for protecting consumers of financial products, it is our responsibility to ensure that we do not weaken the agency currently responsible for consumer protections in this and many other areas.

Once again, I thank Chairman Rush for holding this hearing. I welcome our witnesses to the committee and look forward to their testimony.

Mr. RUSH. The Chair thanks the chairman of the full committee, and now the Chair recognizes the gentleman from Florida, Mr. Stearns, for 2 minutes for the purposes of opening statement.

OPENING STATEMENT OF HON. CLIFF STEARNS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA

Mr. STEARNS. Good morning, and thank you, Mr. Chairman.

This is a very important hearing. It is important for us as members of this subcommittee, and Mr. Chairman, in terms of our jurisdiction and what the implications are for jurisdiction in the future. The Administration's newly proposed CFPA, or the Consumer Financial Protection Agency, is relevant. It is an idea that a lot of us have mixed reactions. It has implications for our subcommittee. Although this is only one component of the Administration's broad-reaching financial regulatory reform proposal, it certainly is an important part of that overall program and it needs detailed examination.

We must carefully consider the long-term effects that this will have on the Federal Trade Commission, the consumers it is charged with protecting and on industry. Currently, the Federal Trade Commission has broad authority to protect consumers from unfair and deceptive practices in the credit and debt areas, and the FTC has notably been an effective and reliable agency in terms of consumer protection. We have seen it in this subcommittee. However, this new agency, the CFPA, proposal strips the Federal Trade Commission of virtually all of its consumer protection authorities pertaining to financial practices and even some of its privacy protection authority. So, Mr. Chairman, I think that has to be a concern.

The proposal compensates for this shifting of authority by granting the Federal Trade Commission streamlined Administrative Procedures Act, APA, rulemaking authority and the ability to seek civil penalties against unfair and deceptive practices. But this is a term of which there is no clear definition as well as making it unlawful to "aid and abet" in deceptive acts. So due to the shifting of power and the potential economic consequences of businesses, we must ensure that effective stakeholders have a voice at the table but ultimately we need to be sure that the CFPA, the new agency, will be an agency designed to do what is in the best interests of the consumers and not what is in the best interest of the bureaucrats who run it.

One other concern I would have, Mr. Chairman, with the APA is it has 180 days for consideration. Is this sufficient time under the Magnuson-Moss Act rulemaking requirements included a public hearing and so, Mr. Chairman, perhaps as this bill moves along we might want to include some kind of public hearing as well as this 180 days of consideration.

With that, I yield back the balance of my time.

Mr. RUSH. The Chair thanks the gentleman. The Chair now recognizes the gentleman from Michigan, the chairman emeritus of the full committee, my friend, Mr. John Dingell, for 5 minutes for opening statement.

OPENING STATEMENT OF HON. JOHN D. DINGELL, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

Mr. DINGELL. Mr. Chairman, I thank you, and I commend you for this hearing. It is a very important one. It follows on a series of events which began with a raid on this committee by other committees and by the banking industry and by repeal of Glass-Steagall, which removed all the penalties and prohibitions against many of the illegal activities which brought us to the current lowest state in which we find ourselves financially and economically. At the Treasury Department, there was an office still in being called the Controller of the Currency, who pushed to totally deregulate banks and to unlearn the lessons which we learned during the Depression and to permit the abuses which the Pecora Commission found to be a problem, things which brought about the 1929 crash, and lo and behold, the failure to learn those lessons or to preserve the protections which the Congress and the President in the 1930s put into place led to the economic collapse which occurred in the United States in the last calendar year and this calendar year.

So the questions that we will be concerned with are going to be, are consumers protected, is the Federal Trade Commission able to continue doing the work that it does to protect consumers, and this committee is going to concern ourselves this morning with these issues and means by which to ensure improved consumer protections continue to exist with regard to financial products and services and to see to it that the Federal Trade Commission is able to carry out the responsibilities which in a rather contemptible fashion were disregarded by the SEC and also by the Controller of the Currency.

Now, we need to know if our concerns here and the pause which it gives us occurs in part because of a transfer of existing authority from the Federal Trade Commission to a newly minted Consumer Financial Protection Agency, an agency whose behavior we don't know but an agency which is going to probably be composed of many of the goodhearted people who have brought us to this curious and unfortunate state of events. I will be truthful: I have significant concerns about these plans and I will be intending to engage today's witnesses in a frankly discussion about their merits. The Administration, which has no fault in the events of the deregulation and the collapse of the American economy last year, envisions consolidating all consumer protection functions related to financial products including rulemaking, supervision, examination and enforcement under the aegis of the new CFPA, which would receive sole rulemaking enforcement authority over consumer financial protection statutes such as the Truth in Lending Act. At first glance, this strikes me as a dejure and possible unwarranted reassignment of FTC's consumer protection authorities in the financial services area. I will be looking to see whether this is so and whether in fact is a good thing or can be justified by the Administration.

While a comparatively small agency, it is to be observed that FTC has some superb work in protecting consumers, and in this the country would benefit not from a diminished mandate to that agency but rather to additional statutory authority, personnel and funding. Consequently, I have more than a modest degree of skepticism regarding the Administration's proposal. In brief, I wish for our witnesses to elucidate upon several matters associated with the CFPA proposal.

First, if CFPA were mandated under law, what authorities would be left to FTC and why would that occur. Second, what latitude would FTC have in enforcing consumer protection statutes as they relate to financial services, and what consumer protection statutes would be denigrated or dissipated under this proposal. Third, how would one characterize the level of interagency cooperation in the drafting of the Administration's proposal. Financially, if CFPA receives its proposed mandate, what will become of this committee's jurisdiction over consumer protection as designated under rule 10 of the House of Representatives? I will welcome the witnesses' responses to these and other questions in order to properly establish an adequate record for additional action by the Congress if such is deemed necessary.

I would ask at this time that I have unanimous consent to keep the record open to submit a list of questions to the witnesses today and to have those responses and the questions inserted into the record.

I want to commend you, Mr. Chairman, for your courtesy and foresight in this hearing. I would conclude by a personal note in welcoming Dr. Stephen Calkins, associate vice president for academic personnel and professor of law at Wayne State University in my home State of Michigan. His testimony has been invaluable to my understanding of this matter and I look forward to his participation in the continuing debate on consumer financial protection, and I note, Mr. Chairman, that my wife is a member of the Board of Governors of that great institution, which gives me a particularly warm feeling about it, and again, Mr. Chairman, I urge you and my colleagues to be most diligent, most cautious, most careful and most dutifully suspicious of the events that we inquire into today. Thank you.

Mr. RUSH. The Chair thanks the chairman emeritus. The Chair wants to put before the committee the UC request, and hearing no objection, so ordered, the UC request by the chairman emeritus. And the Chair also wants to take a moment of personal privilege to celebrate the chairman emeritus's birthday and to wish him a happy birthday, so we want you to know that we all wish you a very happy birthday and many, many more.

Mr. DINGELL. Mr. Chairman, I thank you for your kind observations. At 83, a fellow is a little more careful about celebrating his birthdays. The good news is, I am celebrating my 83rd birthday. The bad news is that I am 83. I thank you, Mr. Chairman, for your courtesy and I thank my friends for their kindness and their courtesy.

Mr. RUSH. Thank you. The Chair now recognizes the gentleman from Kentucky, Mr. Whitfield, for 2 minutes for opening statement. Excuse me. I didn't see Mr. Barton there. He just walked in? OK. Mr. Barton is recognized.

Mr. BARTON. Well, you can go to Mr. Whitfield. He was here before me. I am fine with going to Ed and then come back to me after the next——

Mr. RUSH. You all worked that out then. OK. Mr. Whitfield.

OPENING STATEMENT OF HON. ED WHITFIELD, A REPRESENTATIVE IN CONGRESS FROM THE COMMONWEALTH OF KENTUCKY

Mr. WHITFIELD. We are all very polite today so thank you very much.

Mr. Chairman, I want to thank you also for holding yet another important hearing examining the ongoing financial crisis and ways we can help our constituents get through these difficult times and mitigate future problems. Secretary Geithner said that this new Consumer Financial Protection Agency would have only one mission, and that is, to protect consumers. It is also my understanding that this proposal would eliminate the consumers protections at the FDIC, the Federal Reserve Board, the Controller of the Currency, and the impact on the FTC, perhaps we should explore expanding the authority of the FTC.

Another problem that concerns me about the proposed legislation is that there is no federal preemption of any State law that is more stringent than the federal law, and anyone that has gone through a mortgage process and when they hand you the 45 pages of documents, you are going to find yourself getting more documents if you have these conflicting State laws on these consumer issues, and I think that is a real concern as well.

But the problem that I have most of it, how much will this cost? Every day we pick up another article in a newspaper, growing national debt may be next economic crisis. Unless we demonstrate a strong commitment to fiscal sustainability in the longer term, we will have neither financial stability nor healthy economic growth. Interest payments on the debt alone last year were $452 billion. This year it is expected to be $470 billion, the largest federal spending category after Medicare, Medicaid, Social Security and defense. Another article today, economist declares train wreck because out-of-control federal budget deficits. The economist talks about the real question is, how much damage will greater indebtedness do to economic growth and government's credit worthiness. Those things may transcend what limited additional protection consumers get from this legislation. So I think we need to move cautiously, find out how much costs are we talking about here and what will the benefits be. Thank you, Mr. Chairman.

Mr. RUSH. The Chair thanks the gentleman. The Chair now recognizes the vice chair of the subcommittee, my friend from Illinois, Congresswoman Schakowsky, for 2 minutes.

OPENING STATEMENT OF HON. JANICE D. SCHAKOWSKY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

Ms. SCHAKOWSKY. Thank you very much, Mr. Chairman.

I just came from a roundtable on women's financial literacy, clearly an important issue, but what we have found is how daunting the environment has been for anyone who even is pretty literate in financial issues. We have seen the systematic production and marketing and sales of countless financial products including mortgages that were extremely risky, even downright dangerous for borrowers, and often it was pretty hard to figure out what was what. For years bank and non-bank lenders operated with too little oversight by government regulators, and when regulation was taking place there was little focus on whether the financial products and services sold were safe for consumers.

The Federal Trade Commission, and I am so glad its chairman is here today, is essentially the only agency with a mandate to prioritize consumer safety and protect Americans from unfair or deceptive practices, and I commend Chairman Leibowitz for his renewed commitment to consumers' rights in the areas of credit and debt. However, as has been mentioned, the FTC's jurisdiction is limited to non-bank activities. The agency has been hampered for decades by cumbersome rulemaking authority and in recent years its actions were limited by the previous Administration's general contempt for oversight of the private sector.

Overall, current regulations aren't sufficient and they aren't working. We can't maintain a system which neglects consumer protection for the bulk of the financial service industry. Americans deserve access to honest information that will help them make educated decisions on mortgages, credit cards and bank accounts. Dangerous financial products should be kept off the markets and advertisers must be held accountable for their claims. We have to move forward with these goals, and I look forward to hearing today's testimony on how a consumer financial protection agency might achieve them.

Thank you, and I yield back.

Mr. RUSH. The Chair thanks the gentlelady. The Chair now recognizes the ranking member for the full committee, the humble and honorable Mr. Barton from Texas, for 5 minutes.

OPENING STATEMENT OF HON. JOE BARTON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Mr. BARTON. Well, thank you, Mr. Chairman. Before I give my opening statement, let me amplify what you said about the chairman emeritus, Mr. Dingell. Some people get 1 year of experience and that is it. In his case, you could say that would be 1 year 83 times. But in Mr. Dingell's case, each year he adds it to the base where it compounds and amplifies by orders of magnitude. I think you can honestly say that our friend and chairman emeritus is the most influential Member of Congress in our lifetime and it is such a privilege to have him on our committee and it is really fun when he is on my side. It is not so much when he is not on my side, but even then I learn from him. So the heartiest congratulations from the minority to a true gentleman of the House, the conveyor and the protector of institutional viability for this body. We wish you many, many more.

With regards to this hearing, Mr. Chairman, I would bring the members' attention to today's Wall Street editorial op-ed piece about the particular agency. It is entitled, "Let us treat borrowers like adults." It calls into question whether there needs to be a super consumer financial products protection agency which the legislation we are looking at today would empower. We accept the intention as being honorable but people like myself have extremely strong reservations about the implementation of such an agency. What would the legislation actually accomplish that some federal agency isn't already attempting to do? We would like to know what is gone so wrong with our existing protection agencies that we deem it necessary to create another brand-new agency.

I am a bit taken back by the breadth of the proposed coverage. This legislation, of course, relates a great deal to banking and other financial institutions over which this committee unfortunately has no jurisdiction, at least not now. One never knows about the future. But it reaches beyond that. It could reach accountants, auditors, gift cards, all other types of institutions and entrepreneurial activities. It doesn't fall strictly within our jurisdiction because it applies to banks but it is still of concern. There seems to me to be an exception that swallows the preemption rule. According to the proposal, if I understand it correctly, State consumer laws of general application and those State laws enacted pursuant to federal law intended to, and I quote, "exceed or supplement federal law" will now apply to any national bank. The Harvard professor who is credited with inspiring this all-inclusive consumer financial protection agency described the need for it in her article, "Unsafe at any Rate." Professor Warren wrote that we need this agency in order to reverse industry practices that make it difficult for consumers to understand what they are getting in a financial product world, for example, 30 pages of contract terms for a simple credit card or 50 lines of convoluted and excessive text to explain all required disclosures. I understand that. I just cosigned for my stepdaughter's new condo in Austin, Texas, and it took an hour of signing various documents, some of which were documents I signed certifying that I just signed the previous document. So I understand the need for simplicity and the need for perhaps a review of some of the existing documents that we are asked to sign but I am not sure that this agency gets there.

This bill would assume that businesses and their customers are eager to pay more for such protection, maybe even a lot more, because there are no limits on the burdens to either. There are all kinds of reports this new agency could mandate, regular and special requests, but there are no limits to how often the agency could require those reports, and there is no mandate to consider the burden placed on the businesses to produce these reports. The preemption provisions really convey no preemption at all. In one paragraph, the proposal mandates all State laws are preempted but only to the extent that they conflict. In the next, the legislation permits a State law to supersede federal law if the new agency determines the State law is more protective. That seems to be almost in direct opposition to the prior paragraph. What if a company is compliant with the federal law, but while the agency hasn't yet determined whether a state law is more protective, the attorney general believes it is and brings action against the business for a violation, is that company liable for its violations of State law without any notice? This would seem to exacerbate the decisions but rather by making certain that the products themselves don't become the source of the trouble.

I see my time is about to expire, Mr. Chairman. I have another page and a half of written commentary. Simply put me down as extremely doubtful about the positive impact of this legislation. I think we would be better served on this committee and your subcommittee to go in and reform existing authority, clarify the differences between existing regulatory agencies, and if there is something that has really fallen through the cracks, try to figure out one of the existing agencies like the FTC and see if we couldn't give them explicit authority in that area that needs reinforcing.

With that, Mr. Chairman, I yield back.

Mr. RUSH. The gentleman from Texas, Mr. Green, for 2 minutes for opening statement.

OPENING STATEMENT OF HON. GENE GREEN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Mr. GREEN. Mr. Chairman, thank you for holding this timely hearing to examine the Administration's proposal to create a new agency that would consolidate and be responsible for consumer protection with regard to financial products and services. After the events of last year, there should be no doubt that Congress needs to act to further protect consumers with regard to financial regulation.

This subcommittee has already taken steps to address this by moving forward legislation, H.R. 2309, the Consumer Credit and Debt Protection Act, to give the Federal Trade Commission additional powers to better address consumer credit and debt issues. It was widely agreed in the hearings that the legislation with the added authority H.R. 2309 would provide the FTC, it should take a broader and more effective role in consumer financial protection.

With regard to the new tools this proposal would give the FTC, the Administration has addressed many of the problems that have hamstrung the Commission from taking steps to implement additional financial consumer protections equally with regard to the FTC rulemaking process. Magnuson-Moss procedures are lengthy and cumbersome and can prevent the FTC from taking action on widespread problems in a timely and efficient manner, so I strongly support the provision in the Administration proposal to grant the Commission authority to conduct rulemaking under the Administrative Procedures Act. The proposal also follows 2309 granting the FTC authority to seek civil penalties for any violations of section 5 of the FTC Act which would provide a great deterrent to would-be actors.

The portions of the proposal I am less certain about, however, would move nearly all the FTC's consumer protection authority for financial practices to the newly created Consumer Financial Protection Agency. I do not disagree that additional law enforcement is a good thing for the consumers. My main concern is, we are adding a new enforcement regime that is siphoning off authority from our Nation's primary consumer protection agency when that agency is more than capable of doing the job given the necessary tools and funding. Many of the consumer protection functions the new agency would be responsible for would be moved from other agencies and departments that do not have consumer protection as their primary function. However, this is not the case with the FTC.

I look forward to hearing from our witnesses on why the Administration believes the FTC should not continue these roles, and again, Mr. Chairman, I thank you for the timeliness of the hearing. I look forward to exploring with regard to this bill and look forward to the best paths to protect consumers.

Mr. RUSH. The Chair thanks the gentleman. Mr. Pitts is recognized for 2 minutes for the purposes of opening statement.

OPENING STATEMENT OF HON. JOSEPH R. PITTS, A REPRESENTATIVE IN CONGRESS FROM THE COMMONWEALTH OF PENNSYLVANIA

Mr. PITTS. Thank you, Mr. Chairman. Thank you for holding this important hearing on the Administration's proposal to create a new agency responsible for consumer protection.

I think we all agree that we need strong consumer protection measures. The recent housing and credit crisis our country has faced makes this abundantly clear. We must do this prudently, though, avoiding the mistakes of the past. It seems, however, the proposal we have before us creates yet another divided system of regulation, making room for gaps in oversight. We saw the effects of divided regulation at Fannie Mae and Freddie Mac where two regulators meant less regulation, not more.

The proposed new agency would also have the authority to set prices rather than allowing costs to be determined by consumers in the marketplace. Everything from ATM fees, check overdraft fees and late payment fees for credit cards would fall under the purview of this new agency. Instead of adding layers of bureaucracy to financial regulation and intervening in the marketplace, things we have tried in the past, we should work to bring transparency and consumer choice to our markets.

Consumer financial protection is a worthy goal. Unfortunately, increasing the layers of bureaucracy in the financial industry has not protected consumers in the past and I see no reason why it will this time around. Again, we all desire effective and efficient enforcement of consumer protection laws. It is my hope that this committee moves forward in a wise and careful manner with increased transparency and consumer choice as their primary goals.

I look forward to hearing from our distinguished witnesses. Thank you, and I yield back.

Mr. RUSH. The Chair now recognizes the gentleman from Texas, Mr. Gonzalez, for 2 minutes for the purposes of opening statement.

Mr. GONZALEZ. I will waive opening.

Mr. RUSH. The Chair now recognizes the gentlelady from California, Ms. Matsui, for 2 minutes.

OPENING STATEMENT OF HON. DORIS O. MATSUI, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mrs. MATSUI. Thank you, Mr. Chairman, and thank you for calling today's hearing. I applaud your leadership in addressing this important issue. I would also like to thank the witnesses for joining us today.

In today's economic recession, many families in home district of Sacramento are struggling to make ends meet. I have heard countless stories of people struggling to keep their homes, their jobs and their way of life. California and in particular my constituents in Sacramento have been greatly impacted by the economic crisis. Many of my constituents were and continue to be victims of predatory home loan lending, unfair credit card practices, payday loans and other forms of unscrupulous business practices.

Just recently, the President signed into law credit card reform legislation to regulate unfair credit card practices. The ink is hardly dry. The companies are already trying to find ways to arbitrarily raise credit card interest rates and fees on consumers. Struggling homeowners are also seeking assistance to keep their homes but continue to be tricked into contacting scam artists who just so happen to be the same crowd that initially steered homeowners into subprime loans. This is also occurring as job losses mount, foreclosures continue to rise and Americans are increasingly turning to other forms of credit to make ends meet. It is clear that consumers are not being properly protected from unfair and deceptive financial practices. When is enough enough?

The President's proposal to create a new financial consumer protection agency could be the answer that American consumers are seeking but it must be done in a thoughtful way to ensure consumers are protected from fraudulent activity. We must make sure any new agency has real authority and just as much bite as it has bark. Consumers need to feel protected and have confidence in our financial system. Right now it is clear that they do not.

I thank you, Mr. Chairman, for holding this important hearing today and I look forward to working with you and the committee on this issue moving forward. I yield back the balance of my time.

Mr. RUSH. The Chair thanks the gentlelady. The Chair now recognizes the gentleman from Nebraska, Mr. Terry, for 2 minutes.

Mr. TERRY. Thank you, Mr. Chairman. I will try to be quick.

I think the fundamental premise of this bill is that the FTC, the entity in charge of protecting consumers, has evidently been an abysmal failure. I don't agree with that premise. I think the issue should be, how do we make sure that the FTC is properly empowered to protect consumers and that should be what we are working for as opposed to stripping away whatever jurisdiction they have over protecting consumers and creating some monolithic new government agency in replace of what already exists.

So I am very skeptical of this process or this bill and I look forward to hearing from our witnesses so we can determine if FTC is capable of doing what they have been doing and whether or not this bill is even necessary. So I yield back.

Mr. RUSH. The Chair recognizes the gentlelady from Ohio, Ms. Sutton, for 2 minutes.

OPENING STATEMENT OF HON. BETTY SUTTON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OHIO

Ms. SUTTON. Thank you, Chairman Rush, and thank you for holding today's very important hearing on the newly proposed Consumer Financial Protection Agency.

As Elizabeth Warren aptly stated in describing the need for an agency like this, "It is impossible to buy a toaster that has a one in five chance of bursting into flames and burning down your house but it is possible to refinance an existing home with a mortgage that has the same one in five chance of putting the family out on the street, and the mortgage won't even carry a disclosure of that fact to the homeowner." Unfortunately, many people in my district who were preyed upon by so many unscrupulous companies, people know this all too well.

The well-known and tragic case of one of my constituents, Addie Polk, is a shocking example of a financial product that not only caused someone to almost be homeless but caused someone to attempt to take their own life. At the age of 86, Ms. Polk was given a new 30-year mortgage on a house she already owned and for an amount greater than the value of her house. Let me say that again. At the age of 86, Ms. Polk was given a new 30-year mortgage on a house she already owned and for an amount greater than the value of her house. Less than 4 years later, Ms. Polk, probably of no surprise to the person who sold the mortgage to her, began to have trouble making her payments and her house fell into foreclosure. Feeling trapped and without options, Ms. Polk shot herself rather than lose the house she lived in for 40 years. No one ever should be in Ms. Polk's position. Now is our chance in honor of Ms.

Polk and countless other Americans who have found themselves the unfortunate owners of financial products with indecipherable terms, smoke-and-mirror-like provisions and gotcha fees to truly support strong consumer protection.

I look forward to hearing from the panel about how we make sure we provide the needed protection, and I yield back.

Mr. RUSH. The Chair thanks the gentlelady. The Chair now recognizes the gentleman from Georgia, Dr. Gingrey, for 2 minutes.

Mr. GINGREY. Mr. Chairman, I thank you, and I thank you for calling the hearing and welcome back Jon Leibowitz and Honorable Barr, the assistant secretary of financial institutions.

I associate my remarks really with what the gentleman from Nebraska on our side just said, Mr. Terry. Here we are creating a whole new federal government bureaucracy when we have one already that is doing a heck of a job as it certainly seems to me and I think most members on this panel. So the question becomes, you know, why, to use a medical expression, throw the baby out with the bathwater if the FTC is doing the right and proper job and the right and proper oversight and all of a sudden we come in and spend more federal dollars, as the gentleman from Kentucky was talking about earlier, by creating a whole new federal bureaucracy. So again, I am happy to hear from the witnesses and maybe they can explain that. Hopefully they will explain that.

But I think this is something that we need to look at very, very carefully as we just continue to create one more or consider creating one more government bureaucracy at a time when we are running billions of dollars of deficit year after year after year. And with that, Mr. Chairman, I will yield back.

Mr. RUSH. The Chair recognizes the gentlelady from Florida, Ms. Castor, for 2 minutes.

OPENING STATEMENT OF HON. KATHY CASTOR, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA

Ms. CASTOR. Thank you, Chairman Rush, for calling this critically important hearing on the Obama Administration's proposal for a Consumer Financial Protection Agency.

Last Congress, in the wake of widespread concerns about toxic lead in paint on children's toys and other toxic consumer products, this subcommittee originated legislation to reorganize and strength the Consumer Product Safety Commission, and last year as the economy plunged, there were some analogous terms being used to describe some of the mortgage and investment products. We heard about toxic assets, poisoning banks balance sheets and toxic mortgage products, leaving millions of our neighbors facing foreclosure.

Predatory lenders wreaked havoc on my community and the subsequent significant decline in property values has affected millions of folks in my home State, and unfortunately consumers could not count on State oversight of these mortgage brokers. In my home State, they just turned a blind eye and I recommend the Miami Herald expose that documented how many convicted felons entered into the subprime mortgage loan marketing business.

So this financial crisis has taught us that in order to maintain a healthy economy, effective regulation must focus on protecting consumers from abusive, deceptive and unfair lending practices.

The FTC has the enforcement authority to go after only non-depository lending institutions that deal unfairly with their borrowers but the abuses that led to the financial crisis spread deep into the banking system. So in light of the need for more-effective regulation of all lending institutions, depository and non-depository, the Obama Administration has rightly proposed a reorganization, and I think all of us can agree that regulation of financial institutions must be improved to better protect consumers. However, we must be aware not only of the impact of granting authority to a new Consumer Financial Protection Agency but also the consequences to consumers of the changes that have been proposed to the FTC. The Administration's proposal would reshape the FTC by shifting authority over consumer credit but also by streamlining its rulemaking process and allowing it to assess civil penalties on bad actors.

So I look forward to your testimony on what this new FTC might look like and how its ability to achieve its mandate of consumer protection will be affected. I yield back.

Mr. RUSH. The Chair now recognizes the gentleman from Louisiana, Mr. Scalise, for 2 minutes.

OPENING STATEMENT OF HON. STEVE SCALISE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF LOUISIANA

Mr. SCALISE. Thank you, Mr. Chairman. I want to thank you and the ranking member for having this hearing.

The Administration is proposing yet another new federal agency with vague, sweeping authority. We all know there have been bad actors in our financial system that took advantage of consumers and contributed to the current economic crisis. Unfortunately, many of the problems that brought on today's financial crisis are not even being addressed in this bill. The proposed legislation does not address the real bad actors in our financial systems, Fannie Mae and Freddie Mac and other institutions that engaged in subprime lending and relaxing their standards to encourage more people to take out loans they could not afford. Those warning signs were brought before Congress for years and yet many of the same people in this Administration and in the leadership in this Congress are the same people who opposed the very reforms that would have prevented this financial crisis from happening in the first place.

This proposed new agency represents yet another step in the federal government trying to run all aspects of our lives. The government is running banks and car companies with disastrous results. The so-called stimulus bill, which spent $787 billion of money we don't have, is now being recognized even by this Administration as a failure that didn't create any jobs that were promised. There are even some in this Administration floating the reckless idea of yet another massive spending bill since the last one didn't work. Scores of experts predict that this Administration's cap-and-trade energy tax will cost us millions of jobs while increasing electricity rates on all American families. We are debating a bill that proposes a government takeover of health care, which has been tried and failed in other countries to the point that sick people with the means in those countries come here to get their health care because government-run health care leads to rationing everywhere it has been tried. Now we have this bill to create a consumer czar. Enough is enough. Let us fix the problems that exist and make reforms to federal agencies that are causing these problems rather than adding yet another layer of government bureaucracy that simply covers up the root causes of the problem while punishing those who play by the rules.

I look forward to hearing the comments from today's panel and would like to hear how the Administration's plan impacts the FTC. In his testimony, Chairman Leibowitz speaks to the successes the FTC has had in protecting consumers in financial matters, which begs the question why we need a new agency with all these sweeping new powers and spends more money that we don't have. I yield back.

Mr. RUSH. The Chair now recognizes the gentlelady from Colorado, Ms. DeGette.

Ms. DEGETTE. I will waive opening.

Mr. RUSH. The Chair thanks the gentlelady. The Chair recognizes the gentleman from Ohio, Mr. Space, for 2 minutes.

Mr. SPACE. I will waive.

Mr. RUSH. The Chair thanks the gentleman. The Chair recognizes now the gentleman from North Carolina, Mr. Butterfield, for 2 minutes.

OPENING STATEMENT OF HON. G.K. BUTTERFIELD, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NORTH CAROLINA

Mr. BUTTERFIELD. Thank you, Chairman Rush, for holding this very important hearing and I especially want to thank the witnesses for their testimony today.

Mr. Chairman, I hope this hearing will provide an opportunity for the subcommittee to address some concerns that we have about the proposed agency, particularly the loss of jurisdiction on the part of the Federal Trade Commission. Now, my colleagues are right, Mr. Chairman, there are many actors to blame for the current state of our economy. Unscrupulous subprime mortgage lenders and speculators and the like have all contributed to the financial meltdown. Of deep concern and rightfully so is the regulatory patchwork of federal agencies charged with regulating all aspects of financial institutions. For example, depository institutions such as banks and credit unions are overseen by many different agencies. Conversely, all non-depository institutions are overseen by one agency, and that is the FTC. The FTC has done a good job, and I think we can agree all on that, at regulating these players and I am concerned that reducing FTC oversight as part of the creation of the Consumer Financial Protection Agency may do more harm than good. While I am pleased that the Administration's proposal seeks to strengthen the FTC's rulemaking and enforcement abilities in areas unrelated to financial products, I believe that it is extremely important that the FTC maintain strong non-depository institution oversight.

The Administration's proposed agency would seek to achieve four important objectives aimed at bolstering consumer confidence in financial institutions and transactions, and these objectives include ensuring consumer education and understanding of these financial products, better protecting consumers from unfair and deceptive practices and discrimination, ensuring consumer financial services operate fairly, making certain that underserved communities like my district have increased access to financial services. These are excellent objectives and I strongly support the goals of the proposed agencies but I want to be certain that the creation of a new regulatory agency will not place undue and unnecessary strains and burdens on existing federal regulatory framework that may still be capable of meeting those same goals and objectives.

And so, Mr. Chairman, this hearing today is vitally important. I look forward to hearing the testimony of the witnesses and I thank you for the time.

Mr. RUSH. The Chair thanks the gentleman. The Chair sees no other members who have opening statements.

Now it is my pleasure to introduce panel one. This is a two-panel hearing, and panel one consists of the Hon. Michael Barr, who is the assistant secretary for financial institutions at the Department of Treasury. We want to welcome Mr. Barr back to this committee once again. And also joining him at the witness table is one who is very familiar to this subcommittee, the Hon. Jon Leibowitz, who is the chairman of the Federal Trade Commission, and Chairman Leibowitz, we certainly welcome you back again to this subcommittee. It is the practice of this subcommittee to swear in the witnesses, so I would like each of you to stand and raise your right hand.

[Witnesses sworn.]

Mr. RUSH. Let the record reflect that the witnesses have answered in the affirmative. Now we want to recognize beginning with Mr. Barr the witnesses for an opening statement. You have 5 minutes or thereabouts for your opening statement.

TESTIMONY OF HON. MICHAEL BARR, ASSISTANT SECRETARY FOR FINANCIAL INSTITUTIONS, DEPARTMENT OF THE TREASURY; AND HON. JON LEIBOWITZ, CHAIRMAN, FEDERAL TRADE COMMISSION

TESTIMONY OF MICHAEL BARR

Mr. BARR. Thank you, Mr. Chairman, and thank you, Ranking Member Radanovich for providing me with this opportunity to testify about President Obama's proposal to establish a new strong financial regulatory agency charged with just one job: looking out for consumers across the financial services landscape.

As Secretary Geithner has said, protecting consumers is important in its own right, and also central to safeguarding our financial system as a whole. We must restore honesty and integrity to our financial system. That is why President Obama personally feels so strongly about creating this new Consumer Financial Protection Agency.

I understand the committee's concerns that have been expressed today with respect to boundary issues, jurisdictional issues and the role of the FTC. I think as we work together on those issues, it is important to keep in mind the central goal we all share: having one agency for one marketplace with one mission, protecting consumers. The new agency will have the authority and the resources it needs to set consistently high standards for banks and non-bank financial providers alike, to put an end to regulatory arbitrage, to put an end to unregulated corners of our financial system that inevitably weaken standards across the board. This agency will be accountable for its mission yet independent. It will have a wide range of tools to promote transparency, simplicity and fairness. It will act in a balanced manner, considering costs as well as benefits, in a way that products consumers from abuse while ensuring their access to innovative, responsible financial services. It will be able to reduce regulatory burden while helping consumers, for example, by creating one simple mortgage disclosure form for all consumers to use. It will not set prices for any service.

The federal government has failed to date in its most basic regulatory responsibility, utterly failed to protect consumers. The deep financial crisis that we are still in, let me emphasize, that we are still in today, revealed the alarming failure of our existing regime to protect responsible consumers and to keep the playing field level for responsible providers. Instead of leadership and accountability, we have had a fragmented system of regulation designed for failure. Bank and non-bank financial service providers compete vigorously in the same consumer markets but are subject to two different and uncoordinated federal regimes, one based on examination and supervision, the other on after-the-fact investigation and enforcement.

Less-responsible actors are willing to gamble that the FTC and the States lack the resources to detect and investigate them. This puts enormous pressure too on banks, thrifts and credit unions to lower their standards to compete and on their regulators to let them, and no financial provider should be forced to choose between keeping market share and treating consumers fairly. This is precisely what happened in the mortgage market. Independent mortgage companies peddled risky mortgages in misleading ways to borrowers who could not handle them. To compete, banks and thrifts and their affiliates relaxed their standards on underwriting and sales and their regulators were slow to act. The consequences for homeowners were devastating and our economy is still paying the price.

Fragmented regulation facilitated abusive credit cards. Tricks and traps enabled banks to advertise selectively low annual percentage rates to grab market share and boost income. Other banks could not compete if they offered fair credit cards through transparent pricing and consumers ended up with retroactive rate hikes and unfair terms. The list goes on and on. Credit unions and community banks with straightforward credit products struggled to compete with less-scrupulous providers who appeared to offer a good deal and then pulled a switch on the consumer.

Our federal agencies do not currently have the mission, structures and authority suited to effective consumer protection in consumer financial markets. The FTC has no jurisdiction over banks and it does not have supervisory and examination authority to detect and prevent problems before they spread throughout the market.

Mr. Chairman, I see that I will be significantly over my time. Could I take several additional minutes?

Mr. RUSH. Yes, you are so approved.

Mr. BARR. Thank you.

Mr. RUSH. You are on the "thereabouts" part of your testimony.

Mr. BARR. Thank you.

Bank regulators have supervisory powers over banks but their primary mission is to ensure that banks are safe and sound and not to protect consumer. Consumer protection supervision is never going to share the front seat with safety and soundness. Tinkering with the consumer protection mandates or authorities of our existing agencies cannot solve these structural problems. We need a structural solution. We need one agency for one marketplace with one mission: to protect consumers of financial products and services and the authority to achieve that mission. That is the agency we are proposing to create.

The CFPA will have the sole mission of protecting consumers. It will write rules, supervise institutions, examine them and lead enforcement efforts for the whole marketplace. The implications for our proposal for consumer protection and competition are enormous. The proposal will bring higher and more consistent standards, stronger, faster responses to problems, the end of regulatory arbitrage, a level playing field for all providers, and more-efficient regulation. Our proposal gives the agency the power to strengthen mortgage regulation across all lenders and brokers. It can strengthen disclosure, make it easier for consumers to choose simple products, prevent lenders from paying yield spread premiums that pay brokers more if they deliver loans with higher rates than consumers qualify for. The agency would implement credit card protections and update these protections as markets change, and it would set high national standards for licensing, bonding, monitoring of all non-bank financial service providers.

Let me say the FTC is a good agency. The chairman and I are good friends. Our legislation does not affect the jurisdiction of the FTC over the vast array of non-financial markets and actually strengthens its ability to police those markets. To increase the FTC's ability to protect consumers, we propose that the FTC be able to adopt rules to prohibit unfair or deceptive acts or practices with standard notice and common rulemaking, to obtain civil penalties when companies act in an unfair or deceptive way and to pursue those who substantially aid and abet providers that commit unfair or deceptive practices.

The Administration also supports increased resources for the FTC so that consumers can be better protected across all markets. As for financial markets, the FTC would continue to have authority under the FTC Act to pursue financial fraud without delay including on foreclosure rescue and loan modification scams. The FTC will retain authority for writing rules under the Telemarketing Sales Act and concurrent responsibility for enforcing them over financial products and services, and the FTC would retain primary authority in the area of data security for non-bank entities. In addition, the FTC would have backstop authority to enforce the same consumer credit statutes that it can enforce today. Under that authority, the FTC, or frankly, a bank regulator, could if it becomes aware of a possible law violation refer to the new agency, and if the new agency doesn't act, take action itself. That same referral requirement will apply to the bank regulators, and it is designed to ensure a consistent federal approach to interpreting and enforcing our consumer protection statutes.

Finally, let me just say this. It is time to put consumer protection responsibility in an agency with a focused mission and comprehensive jurisdiction over all financial services providers, banks and non-banks alike. It is time for a level playing field for all financial services providers. It is time for an agency that consumers and their elected representatives can hold fully accountable and responsible for consumer protection in all financial sectors, and it is also long past time for a stronger FTC. The President's legislation fulfills these needs.

Thank you for this opportunity to discuss the proposal, the additional time you have graciously given me, and I will be happy to answer any questions at the conclusion of our opening statements.

[The prepared statement of Mr. Barr follows:]

Assistant Secretary Michael Barr

House Committee on Energy and Commerce

Subcommittee on Commerce, Trade, and Consumer Protection

July 8, 2009

Thank you, Chairman Rush and Ranking Member Radanovich, for providing me with this opportunity to testify about the Administration's proposal to establish a new, strong financial regulatory agency charged with just one job: looking out for consumers across the financial services landscape. Last week, the Administration sent legislative language to Congress to create the new agency, and in the coming weeks, we will continue to transmit legislation to implement other core proposals to strengthen regulation of financial institutions and markets and lay the foundation for a safer, more stable financial system.

As Secretary Geithner has said, protecting consumers is important in its own right and also central to safeguarding the system as a whole. We must restore honesty and integrity to our financial system, in order to restore trust and confidence. A key step to doing so is to establish clear federal accountability for protecting consumers and the authority necessary to carry out the job.

That is why the President is proposing the Consumer Financial Protection Agency.

We will have one agency for one marketplace with one mission – to protect consumers. It will have the authority and resources it needs to set consistently high standards and a level playing field across the financial services sector—for banks and non-bank financial services providers alike. Its market-wide jurisdiction will put an end to regulatory arbitrage and unregulated corners that inevitably weaken standards across the board. Structures and mechanisms in our legislation will ensure the agency remains accountable for its mission, yet independent. The Agency could choose from a wide range of tools to promote transparency, simplicity, and fairness. The breadth and diversity of these tools will enable it to adopt the most effective and proportionate, and least costly, approach to any problem. It will have the tools and resources to maintain expertise, and the incentives to act in a balanced manner that protects consumers from abuse while ensuring their access to innovative, responsible financial services. At the same time, the Federal Trade Commission would retain key powers and gain new ones, including streamlined rulemaking procedures and heightened penalties for violations.

The Current System for Consumer Financial Protection Regulation is Fundamentally Flawed

A dedicated consumer protection agency for financial services is the only effective response to inherent weaknesses in our existing oversight regime. The financial crisis revealed the alarming failure of this regime to protect responsible consumers – and keep the playing field level for responsible providers. The federal government has failed in its most basic regulatory responsibility: to protect consumers. And no provider should be forced to choose between keeping market share and treating consumers fairly. The states do their best with limited resources but they look to the federal government for leadership, and there is no federal agency with the structure and authority to lead.

Instead of leadership and accountability, there is a fragmented system of regulation designed for failure. Bank and non-bank financial service providers often compete vigorously in the same consumer markets but are subject to two different and uncoordinated federal regimes – one based on examinations and supervision, the other based on after-the-fact investigations and enforcement actions. The lack of federal supervision of non-bank providers is an open invitation to the less responsible actors that seek darker corners to ply their dubious practices. These actors are willing to gamble that the FTC and state agencies lack the resources to detect and investigate them. This puts enormous pressure on banks, thrifts, and credit unions to lower their standards to compete – and on their regulators to let them. Fragmentation of the supervision of banks and thrifts only makes this problem worse: a banking institution can choose the least restrictive among several different supervisory agencies. Despite best intentions, "regulatory arbitrage" inevitably weakens protections for consumers and feeds bad practices.

This is precisely what happened in the mortgage market. Independent mortgage companies and brokers grew apace with little oversight. They peddled subprime and exotic mortgages – such as "option ARMs" with exploding payments and rising loan balances – in misleading ways to consumers least able to handle their complex terms and hidden, costly features. The FTC and the states took enforcement actions, but their resources were no match for rapid market growth, and they could not set rules of the road for the whole industry or supervise institutions to prevent bad practices from spreading. To compete over time, banks and thrifts and their affiliates came to offer the same risky products as their less regulated competitors and relaxed their standards for underwriting and sales. Lenders of all types paid their mortgage brokers and loan officers more to bring in riskier and higher-priced loans, with predictable results. Bank regulators were slow to recognize these problems, and even slower to act. The consequences for homeowners were devastating, and our economy is still paying the price.

Our system allowed this to take place even entirely within the highly-regulated, closely-supervised world of banks and thrifts. Take credit cards. Some banks found they could boost fee and interest income with complex and opaque terms and features that most consumers would not notice or understand. These tricks enabled banks to advertise seductively low annual percentage rates and grab market share. Other banks found they could not compete if they offered fair credit cards with more transparent pricing. So consumers got retroactive rate hikes, rate hikes without notice, and low-rate balance transfer offers that trapped them in high-rate purchase balances. A major culprit, once again, was fragmented regulation: one agency held the pen on regulations, another supervised most of the major card issuers. Each looked to the other to act, and neither acted until public outrage reached a crescendo.

The list goes on. A wide range of credit products are offered—from payday loans to pawn shops, to auto loans and car title loans, many from large national chains—with little supervision or enforcement. Closely regulated credit unions and community banks with straightforward credit products struggle to compete with less scrupulous providers who appear to offer a good deal and then pull a switch on the consumer. For instance, overdraft policies are a form of credit but are not disclosed or regulated as such.

The problem with our system is not just the gaps and overlaps between regulators. Our federal agencies do not have missions, structures, and authorities suited to effective consumer protection in financial markets. The FTC has a broad mission to protect consumers in all markets, of which the financial services market is just one; and it has no jurisdiction over banks. The agency has brought important cases against some of the worst financial abusers, but these cases often take a long time and the damage is already done. The agency does not have the supervisory and examination authority or expertise needed to detect and prevent problems before they spread throughout the market.

Bank regulators have supervisory powers over banks, but their primary mission is to ensure banks are safe and sound, not to protect consumers. Consumer supervision does not fit comfortably within these agencies, and it will never share the front seat with safety and soundness. Too often, consumer compliance supervision focused on "checking boxes" – is the annual percentage rate on this loan calculated as prescribed? Is it displayed with a large enough type size? That often meant missing the forest for the trees.

It was thought that supervising the banks for their effective management of "reputation risk" and "litigation risk" – aspects of a safe and sound institution -- would ensure the banks treated their customers fairly. It didn't. It did not prevent our major banks and thrifts from retroactively raising rates on credit cards as a matter of policy, or from selling exploding mortgages to unwitting consumers as a business expansion plan. Managing a bank's reputation and litigation risk does not and cannot protect consumers because this approach judges a bank's conduct toward consumers by its effect on the bank, not its effect on consumers.

We Need One Agency for One Marketplace with One Mission – to Protect Consumers – and the Authority to Achieve It

Tinkering with the consumer protection mandates or authorities of our existing agencies cannot solve the fundamental problem that they are organizationally ill-designed to protect consumers, and too fragmented to maintain high and consistent standards across the consumer financial marketplace. There is only one solution that can work. We need one agency for one marketplace with one mission – to protect consumers of financial products and services – and the authority to achieve that mission. A new agency with a focused mission, comprehensive jurisdiction, and broad authorities is also the only way to ensure consumers and providers high and consistent standards and a level playing field across the whole marketplace without regard to the form of a product – or the type of its provider.

That is the agency we are proposing to create. The CFPA will have the sole mission of protecting consumers; it will be the agency that sees the world through their eyes. It will write regulations, supervise institutions and providers for compliance, and lead enforcement efforts – for the whole marketplace. The implications of our proposal for consumer protection and fair competition are enormous. It will bring higher and more consistent standards; stronger, faster responses to problems; the end of regulatory arbitrage; a more level playing field for all providers; and more efficient regulation.

Let me start with rule writing. The CFPA will be able to write rules for all consumer financial services and products and anyone who provides these products. It will assume existing statutory authorities – such as the Truth in Lending Act and Equal Credit Opportunity Act. New authorities we propose – to require transparent disclosure, promote simple choices, and ensure fair terms and conditions and fair dealing – will enable the agency to fill gaps as markets change and to provide strong and consistent regulation across all types of consumer financial service providers.

For example, our proposal gives the CFPA the power to strengthen mortgage regulation by requiring lenders and brokers to clearly disclose major product risks, and offer simple, transparent products if they decide to offer exotic, complex products. The CFPA will also be able to impose duties on salespeople and mortgage brokers to offer appropriate loans and meet a duty of best execution, and prevent lenders from paying "yield spread premiums" that pay brokers more if they deliver loans with higher rates than consumers qualify for. Lenders and consumers would finally have an integrated mortgage disclosure: the CFPA will continue the work of the Federal Reserve and the Department of Housing and Urban Development to create and maintain a single, federal mortgage disclosure.

Comprehensive rule writing authority would improve other markets, too. For example, the CFPA could adopt consistent regulations for short-term loans – establishing disclosure requirements and banning unfair practices – whether these loans come in the form of bank overdraft protection plans or payday loans or car title loans from non-bank providers. The agency also could adopt standards for licensing and monitoring check cashers and pawn brokers.

Combining these robust rule writing authorities with supervision and enforcement authorities in one agency will ensure faster and more effective rules. For example, the CFPA will both implement the new Credit CARD Act of 2009 – to ban retroactive rate hikes and rate hikes without notice – and will supervise the credit card banks for compliance. So the agency will have a feedback loop from the examiners of the banks to the staff who write the regulations, allowing staff to determine quickly how well the regulations are working in practice and whether they need to be tightened or adjusted. That feedback loop is broken today because rule writing and supervision are divided between two agencies. Consolidated supervisory authority would also allow faster action on mortgages to prevent irresponsible practices that undermine responsible lenders. It took the federal banking agencies two years to reach final consensus on supervisory guidance on option ARMs and subprime mortgages after evidence of declining underwriting standards emerged publicly. A single agency could act within months and save many more consumers and communities from significant harm.

Our proposal for comprehensive jurisdiction will also make regulatory arbitrage a thing of the past. Providers will not have a choice of regulators. So, by definition, they will not be able to choose a less restrictive regulator. The CFPA will not have to fear losing "market share" because our legislation gives it authority over the whole market. Ending arbitrage will prevent the vicious cycles that weaken standards across the market.

Consolidating consumer protection in an agency with comprehensive jurisdiction will also protect consumers no matter with whom they do business, and level the playing field for all institutions and providers. Consumers do not care what legal form their service provider takes; nor should they. A short-term loan can be made by a bank, a bank affiliate, a finance company, or a payday lender. The CFPA could apply to non-bank providers the tools of supervision that regulators now apply to banks – including setting compliance standards, conducting compliance examinations, reviewing files, obtaining data, issuing supervisory guidance and entering into consent decrees or formal orders. The CFPA would have the ability to send examiners into the large, fast-growing independent mortgage companies that caused most of the damage during the mortgage boom to review loan files and interview salespeople. With these tools, the Agency would be able to identify problems before they spread, stop them before they cause serious injury, and relieve pressures on responsible providers to lower their standards.

The CFPA is not a new layer of regulation; it will consolidate existing regulators and authorities. This will bring efficiencies for industry. It will have a clear address for concerns about regulatory burden, and it can expect speedier responses to legitimate claims of unwarranted burdens. Moreover, responsible industry actors will worry less about unfair competition from irresponsible actors, since all providers will be under this agency's jurisdiction.

Of course, even with a strong supervisory and enforcement staff, no agency can oversee tens of thousands of financial service providers on its own. The FTC and the states will continue to play critical roles. The FTC will retain authority to investigate and prosecute financial-related frauds under its FTC Act authority to prevent unfair or deceptive practices. The states will continue to license and bond non-bank service providers, with authority for the CFPA to set strong new federal standards and directly and forcefully to act, by sending in supervisors and examiners when risks are warranted. The CFPA will be able to coordinate closely with the FTC and the states to share information and shore up weaknesses.

The CFPA Will be Held Accountable While Remaining Independent

The public deserves accountability for consumer protection, and creating the CFPA will, finally, give them that accountability. Consumers and their elected representatives will have a place to bring their consumer protection concerns, and one agency to hold accountable for results. Clear accountability will, therefore, produce better results.

Our legislation contains specific measures to help ensure better regulation and prevent agency inertia or backsliding. The CFPA will maintain a unit to analyze consumer complaints across the full range of providers – banks and non-banks – and markets. Its analysis will be published annually. The agency also will maintain a research unit to track changes in markets, products, and consumer behavior and assess risks to consumers – and their understanding of these risks. The agency will give particular consideration to monitoring fast-growing providers and products – such as independent mortgage companies and subprime loans during the housing boom – where risks are often higher. The CFPA will publish significant findings of these monitoring activities at least once each year, and report annually to Congress on its regulatory, enforcement, and supervisory activities.

Accountability must be balanced with independence. The agency will have a stable funding stream in the form of appropriations and fee assessments akin to those regulators impose today. Stable funding is a necessary, but not sufficient, ingredient for true independence. Sustained independence also depends on expertise and respect. The agency will be able to hire a top notch and diversified staff. Our legislation would provide the agency's attorneys, economists, finance experts, examiners, and other professionals the same salaries on average as professionals of the banking agencies. The agency would absorb the banking agencies' teams of consumer compliance examiners, and hire and train new examiners for non-bank providers.

The CFPA Will Be Effective Because it will be Expert, and its Actions Will be Balanced and Proportionate

We are proposing the CFPA be given broad authorities. Our legislation is designed to ensure the agency uses these authorities effectively and with expertise, balance, and proportion – qualities that will ensure the agency remains effective and independent.

Deep and sophisticated understanding. Our legislation assures the CFPA will have the deep understanding of consumers, providers, and products it will need to write rules that are effective, balanced, and proportional. As mentioned above, a research unit, consumer surveys and testing, complaint tracking and compliance examiners will help ensure that the CFPA is up-to-date with developments in the market. As they do today, examiners for the largest and most complex institutions, whether banks or non-banks, will reside on-site so they fully understand products and operations. These mechanisms will provide the agency critical information to craft effective, tailored regulations that do not impose unnecessary costs, and to determine when regulations should be expanded, modified, or eliminated.

Balanced regulations. When it adopts and reviews regulations, the agency will be required to balance a range of competing objectives. Its four-fold mission includes (1) protecting consumers from abusive or unfair practices; (2) ensuring that they have the information they need to make responsible choices; (3) ensuring markets are efficient and have ample room for innovation, and (4) promoting access to financial services. The CFPA will have to balance these potentially competing goals. Our legislation also explicitly requires the CFPA to consider the costs, not just the benefits, of regulations to consumers and financial institutions – including any potential reduction in consumers' access to financial services. Moreover, the agency will be able to adopt appropriate exemptions from its rules for providers or products where necessary to fulfill the four objectives. Once it adopts a major regulation, the agency will have to review it within five years to make sure it remains consistent with these objectives

Flexible approaches and tailored solutions. Comprehensive authority over the whole market will give the agency a range of options for setting standards so it can choose the most effective, least-cost option. When flexibility is at a premium, the agency can issue supervisory guidance and use examination reports and other techniques to foster change. Today, supervisory guidance usually must be agreed to by four or more federal agencies and fifty states, which causes considerable delays and dilutes effectiveness. One agency for one market will make guidance a much more effective tool than it is today. When a stricter approach is appropriate, the agency can adopt regulations and impose penalties for violations.

Moreover, diverse rule writing authorities will ensure the agency can tailor its regulations to the underlying problem with the least cost to consumers and institutions. The agency will have ample authority to harness the benefits of market discipline by improving the quality of, and access to, information in the marketplace. For example, it will have authority for principles-based, non-technical standards to ensure marketing materials and sales pitches are reasonable and include clear disclosure of product risks in balance with advertised benefits. We have included authority for the agency to permit providers to pilot new disclosure approaches. The agency will also be able to adopt new, more concrete disclosures that highlight for consumers the consequences of their decisions – akin to the minimum payment warning on credit card periodic statements under the Credit CARD Act of 2009. Consumers, themselves, will be able to access their financial information in a usable, electronic format so they can conduct their own assessments of decisions they have made or are planning to make. Increasing the quality and accessibility of product information will make it easier for consumers and providers alike to understand the marketplace and make better choices.

The agency will also be able to encourage providers to offer simple products to help comparison shopping. For example, providers that offer exotic, complex, and riskier products would need to offer at least one standard, simple, less risky product. In the mortgage market, a lender or broker that peddles mortgages with potentially exploding monthly payments, hidden fees and prepayment penalties, and growing loan balances – such as the "pay option ARMs" of recent years – might also be required to offer consumers 30-year, fixed-rate mortgages or ARMs with straightforward terms. The point is to make it easier for consumers to choose simpler products, which should limit the need for costlier restrictions on terms and practices.

The agency will also have the ability to align incentives, which can sometimes be more effective than outlawing particular terms or practices and chasing down the inevitable circumventions. It will have authority to impose duties on frontline salespeople and middle men and regulate the form, manner, or timing – but not amount – of their compensation as needed to promote fair dealing. If they give financial advice and consumers reasonably rely on it, the agency will be able to ensure their advice meets a minimum standard of care. The agency will also be able to ensure salespeople and middle men are not paid more to take advantage of consumers' trust or inexperience. For example, the agency might decide to prohibit mortgage lenders from paying salespeople or brokers higher bonuses for delivering loans with higher interest rates than borrowers qualify for, with hidden costly fees, since this creates a perverse incentive to mislead consumers into taking out costlier loans.

With a broad range of supervisory and regulatory tools, the agency will be able to choose the most effective, least costly solution for each problem. Let me give you an example of how this might work. In response to the strong protections of the Credit CARD Act of 2009, credit card issuers will substantially change their terms and practices. New terms or practices may raise new questions of fairness. If that happens, the CFPA will be able to proceed deliberately and in stages. For example, it could begin by asking card issuers to produce evidence that consumers understand the new terms or practices and can avoid the risks they pose. If this evidence seems inadequate, the agency could conduct its own testing with consumers. If this testing showed widespread lack of consumer understanding, the agency could consider a range of options, from improving disclosure to providing stronger incentives to offer simpler products to further restricting unfair terms and practices.

Respect for safety and soundness. When it uses these authorities, the CFPA will respect the safety-and-soundness imperatives of bank regulation. When conflicts do arise, structures for compromise will facilitate resolution. A safety and soundness regulator will have one of five board seats, and the agency must consult with safety and soundness regulators before adopting rules. In addition, the CFPA can work with the banking agencies to ensure bank consumer compliance examiners are trained to understand safety and soundness, as they are today.

In short, the comprehensive authority we propose will not increase regulatory burden or lead to unreasonable regulations. It will do the opposite. It will ensure the agency has a deep understanding of products and providers. And it will enable the agency to choose from among a wide range of tools and authorities to find the most effective, least-cost solution. This will save consumers – and financial service providers – significant costs over the long term.

Our Legislation Will Respect and Strengthen the Core Functions of the Federal Trade Commission

Our legislation does not affect the jurisdiction of the FTC over the vast array of non-financial markets and actually strengthens its ability to police those markets. To increase the FTC's ability to protect consumers, we propose that the FTC be able to (1) adopt rules to prohibit unfair or deceptive acts or practices with standard notice-and-comment rulemaking; (2) obtain civil penalties when companies use unfair or deceptive practices; and (3) pursue those who substantially aid and abet providers that commit unfair or deceptive practices. The Administration also supports increased resources in the 2010 President's Budget for the FTC so that consumers can be better protected across all markets.

As for financial markets, the FTC will continue to have authority under the FTC Act to pursue financial fraud without delay, including foreclosure rescue and loan modification scams. The FTC would simply be required to consult and coordinate with – but not refer these cases to – the CFPA. The CFPA would also have authority under the proposed legislation to pursue fraud and deceptive practices by financial service providers. The consultation requirement ensures there will be coordination, much like the coordination that occurs informally between the states and the FTC today in pursuing fraud. The FTC will also retain authority for writing rules under the Telemarketing Sales Act and concurrent responsibility for enforcing them over financial products and services.

The CFPA will have substantial authority over mortgages under other statutes, so it will assume the rulemaking authority recently granted to the FTC over mortgage loans. This assures consumers and providers a consistent and consolidated approach to regulating mortgages throughout the whole life of the loan, from sale and origination to payoff, modification, or foreclosure.

With respect to rules or statutes other than the FTC Act, the FTC will have "backstop" authority to enforce the same consumer credit statutes that it can enforce now. Under that authority, if the FTC – or a bank regulator – becomes aware of a possible law violation of those statutes, it may send a written recommendation that the CFPA take action, stating its concerns, and proceed itself on the matter after 120 days if the CFPA does not take action. The Administration is proposing to apply the same referral requirement to the bank regulators. This requirement will help ensure a consistent federal approach to interpreting and enforcing consumer protection statutes such as the Truth in Lending Act, while leaving the FTC and the banking agencies the ability to act if the CFPA does not. The approach is flexible enough to permit the agencies to agree to practical arrangements for referrals and appropriate use of the FTC's backstop authority.

The FTC would retain primary authority in the area of data security for nonbank entities. It would continue its current role of enforcing, as to nonbank financial service providers, Section 5 of the FTC Act as it applies to data security practices and its Safeguards Rule, which implements Section 501(b) of the Gramm-Leach- Bliley Act.[1] Consistent with the CFPA's exclusive authority over consumer disclosure in other areas, however, the CFPA would have primary authority under the "front end" privacy provisions of GLBA (e.g. privacy notice and related provisions) for all financial institutions (banks and nonbanks), and as well as its own authority under the proposed legislation that parallels Section 5 of the FTC Act.

Conclusion

Our proposal will ensure the financial regulator community includes one agency with the single mission of protecting consumers. It is time to put consumer protection responsibility in an agency with a focused mission and comprehensive jurisdiction over all financial services providers, banks and non-banks. It is time for a level playing field for financial services competition based on strong rules, not based on exploiting consumer confusion. It is time for an agency that consumers – and their elected representatives – can hold fully accountable. And it is

[1] Because of its relationship to data security, the FTC would also retain its rulemaking and enforcement authority for the Red Flags Rule under Section 615(e) and the Disposal Rule under Section 628 of the FCRA. The remainder of rulemaking and enforcement authority under the FCRA would transfer to the CFPA.

long past time for a stronger FTC. The Administration's legislation fulfills these needs. Thank you for this opportunity to discuss our proposal, and I will be happy to answer any questions.

Mr. TERRY. Mr. Chairman, I would like to make a unanimous consent request that the gentleman from the FTC have 9 minutes.

Mr. RUSH. The chairman of the FTC will take whatever time he may consume.

TESTIMONY OF JON LEIBOWITZ

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

Chairman Rush, Ranking Member Radanovich, Vice Chair Schakowsky, members of the subcommittee, I appreciate the opportunity to be here to discuss consumer protection regulatory reform including President Obama's far-reaching proposal to enhance consumer protection through the creation of a new Consumer Financial Protection Agency, the CFPA.

As all of us in this room know and as many of you on the panel articulated and as Mr. Barr also effectively articulated, the need for reform has become as painfully clear as the distress the consumers are now experiencing in these difficult economic times from a failure of regulation. All of us on the Commission support the President's goal of elevating consumer protection, although some of us have different views as to the best means to that end.

For my part, this initiative, which enhances the resources and authority for the FTC and which creates the CFPA, is clearly preferable to the status quo. In any case, the Commission will continue to vigorously protect consumers of financial services while this proposal is under discussion and while the CFPA if it is enacted is ramping up. Beyond that, we look forward to working collaboratively with the new agency.

In the last 5 years, we have brought more than 100 financial consumer protection cases and have recovered nearly half a billion dollars in the last decade for consumers. Since I last testified before this subcommittee in late March, we have continued aggressively pursuing financial predators, bringing 14 new cases in this area. In fact, today we are announcing distribution of an additional $8 million in consumer redress checks to Americans who were deceived by deceptive mortgage origination fees, and on June 1st, using the new APA rulemaking authority that you gave us in the omnibus appropriations bill, we began a rulemaking addressing mortgage modification and foreclosure rescue scams which have become, as all of you know, all too common recently, and also addressing the entire mortgage lifecycle, advertising, origination, appraisals and servicing. Simply put, this work will help ensure that consumers aren't ripped off by bogus mortgages or false advertising.

Mr. Chairman, President Obama emphasized the importance of giving the FTC tools and increased resources, the ones that we need to stop practices that harm consumers and violate the law. First, the proposal grows our agency, giving us the staff that we need to do the job that you all want us to do. Currently we have just over 1,100 FTEs. That is down from about the 1,800 FTEs we had in the late 1970s and early 1980s, despite a considerable growth in the U.S. population, and in our own responsibilities including enforcing canned spam, Do Not Call, COPPA, the Children's Online Privacy Protection Act, Gramm-Leach-Bliley and other statutes. Second, the proposal provides the FTC with APA notice and comment rulemaking which is used by virtually every other agency in the federal government. It would strengthen the Commission's ability to address widespread problems more quickly. Third, the proposal authorizes the FTC to obtain civil penalties for violations of section 5 of the FTC Act. This new power we believe would help deter would-be violations and help protect consumers more effectively. I think something like 47 State attorneys general have fining authority. And by the way, fining authority was originally proposed by Casper Weinberger when he was chairman of the Federal Trade Commission under President Nixon in the early 1970s. Finally, the proposal authorizes the FTC to go after those who aid and abet others who violate the law.

We would also urge Congress as you consider this legislation to give both the FTC and the CFPA the ability to bring civil penalty actions on our own, which would put both of us on equal footing with other consumer protection agencies like the SEC and the CFTC and not make us as we do currently have to wait for the Justice Department to clear our going forward.

Now, we expect that as with any bold and complex new initiative clarifications will be worked out as the legislative process moves forward, but from my perspective, the President's goal of streamlining the overall system for protecting consumers from financial abuse is more than commendable, and eliminating the balkanization of consumer protection oversight over non-banks and banks, as Mr. Barr has alluded to, is laudable and very, very critical.

We do have some concerns, however, about the draft legislation or the legislation as it was initially drafted, although I am optimistic that we can work these out as the legislative process moves forward. So for example, the proposal states that the FTC would have backstop authority but the draft legislation imposes a review period that could require us to wait 120 days before filing certain cases. We also believe it would be helpful to make definitions of the proposal's terms such as credit and financial activity clearer, and let me tell you why with an example. So suppose the FTC finds a telemarketer making illegal robo calls to millions of consumers on the Do Not Call Registry urging them to purchase something like advanced fee credit cards which are, I wouldn't say per se illegal but almost always, let us say often illegal, and suppose that a payment processor participated in the fraud. It is critical that we be able to bring action against all of the malefactors expeditiously but it is unclear under this draft whether we would have the jurisdiction over the telemarketer offering the financial products or the payment processor, and if so, whether the 120-day waiting period would come into play. Now, we have made much progress with Treasury on several of these boundary issues and we are continuing to make progress but getting this right and allowing us to put an immediate halt to harmful practices is crucially important.

Having said that, with this committee involving in writing any legislation, I am confident that this very, very important initiative will be considered, discussed, clarified and refined with all open issues resolved in favor of American consumers. We understand, of course, that under this proposal rulemaking authority and primary enforcement responsibility for financial products and services would go to the new agency but we will continue to aggressively enforce these laws as a cop on the beat where necessary as well as each and every other consumer protection law within our jurisdiction. We look forward to working with the Administration and Congress to reach a plan that best protects American consumers, and I thank you for your time.

[The prepared statement of Mr. Leibowitz follows:]

PREPARED STATEMENT OF

THE FEDERAL TRADE COMMISSION

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
UNITED STATES HOUSE OF REPRESENTATIVES

Washington, D.C.
July 8, 2009

I. Introduction

Chairman Rush, Ranking Member Radanovich, and members of the Subcommittee, I am Jon Leibowitz, Chairman of the Federal Trade Commission ("FTC" or "Commission").[1] I appreciate the opportunity to appear before you today to discuss consumer protection regulatory reform, including President Obama's far-reaching proposal to enhance protection for consumers of financial products and services through the creation of a new Consumer Financial Protection Agency ("CFPA").[2] The Commission agrees with the fundamental objective of the proposal: to improve the effectiveness of the current governmental system for protecting consumers of financial services. The Commission also appreciates the proposal's recognition of the FTC's role as the nation's consumer protection agency, and agrees that the agency's ability to protect consumers would be enhanced by the additional resources and authority recommended by the Administration. In this testimony, the Commission will provide a brief overview of its authority and activities with respect to financial services, a description of its priorities in this time of economic distress, and some preliminary comments on the impact on the Commission of the Administration's proposed Consumer Financial Protection Agency Act of 2009.

Obviously, as with any new proposal, some lines may need to be redrawn and some

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[1] The views expressed in this statement represent the views of the Commission. Commissioner Kovacic dissents from Parts IV.C and IV.D of the testimony for reasons explained in notes 25 and 30. Commissioner Rosch did not participate in the vote because he does not endorse the proposal to establish a new consumer protection agency. My oral presentation and responses to any questions are my own and do not necessarily reflect the views of the Commission or any other Commissioner.

[2] *See* Proposed Consumer Financial Protection Agency Act of 2009 ("Proposed CFPA Act") (June 29, 2009); U.S. Department of Treasury, Financial Regulatory Reform – A New Foundation: Rebuilding Financial Supervision and Regulation (June 2009) ("Financial Regulatory Reform Proposal"), *available at* www.financialstability.gov/docs/regs/FinalReport_web.pdf.

issues fleshed out, but we expect that any ambiguity in the proposal will be worked out in the legislative process. We discuss these issues in section V of our testimony. We look forward to working with Congress as this complex legislation is considered to ensure that consumers are best protected.

II. The FTC's Authority over Financial Services

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,[3] and any rules that the Commission[4] issues to implement the FTC Act.[5] Section 5, however, exempts banks, savings and loan institutions, and certain credit unions from the Commission's jurisdiction. Thus, the Commission's jurisdiction reaches only non-bank entities, such as non-bank mortgage companies, mortgage brokers, and finance companies. The Commission supports taking steps to rationalize the jurisdiction over consumer protection of financial products and services.

The Commission also has responsibilities under other consumer protection statutes covering financial services, including the Truth in Lending Act ("TILA"), Consumer Leasing Act ("CLA"), Equal Credit Opportunity Act ("ECOA"), Electronic Funds Transfer Act ("EFTA"), Fair Debt Collection Practices Act ("FDCPA"), Credit Repair Organizations Act ("CROA"), Gramm-Leach Bliley Act ("GLB Act"), and Fair Credit Reporting Act ("FCRA").

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[3] 15 U.S.C. § 45(a).

[4] Under the FTC Act, the Federal Reserve Board ("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] The FTC has issued two rules under the FTC Act covering unfair and deceptive acts and practices specifically related to financial services. *See* Holder in Due Course Rule, 16 C.F.R. pt. 433; Credit Practices Rule, 16 C.F.R. pt. 444.

These statutes impose the same jurisdictional restrictions as the FTC Act; the Commission's enforcement authority is limited to non-bank institutions.[6]

III. FTC Activities to Protect Consumers of Financial Services

Within the parameters of its authority, the Commission protects consumers at every stage of the credit life-cycle: from the unfair or deceptive practices of brokers, lenders, and others who advertise and offer credit; to the unlawful conduct of creditors and mortgage servicers who collect payments from consumers; to the violations of debt collectors, credit repair companies, debt relief firms, and mortgage loan modification and foreclosure scam artists, who prey on consumers who are delinquent or in default on their debts. In its consumer protection work, the Commission uses four primary tools: law enforcement, rulemaking, consumer education, and research and policy development.

A. Law Enforcement

The FTC is primarily a law enforcement agency. In recent months, the Commission has focused heavily on cases against those who seek to prey on consumers in financial distress, such as opportunistic scam artists who offer purported mortgage loan modification and foreclosure rescue services, debt relief services, credit repair, and advance fee loans. The Commission can act quickly to stop such unlawful conduct through injunctive relief and can obtain monetary

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[6] Most of these statutes grant rulemaking authority; in most cases to the FRB. The FTC has rulemaking authority for 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. The FTC recently issued a report recommending that Congress grant it rulemaking authority under the FDCPA. *See* Federal Trade Commission, *Collecting Consumer Debts: The Challenges of Change, A Workshop Report* (Feb. 2009) ("Collecting Consumer Debts"), *available at* www.ftc.gov/bcp/workshops/debtcollection/dcwr.pdf. Generally, the FTC can enforce rules promulgated by the Federal Reserve Board under the consumer financial statutes as to entities within its jurisdiction.

relief, including consumer redress and disgorgement of ill-gotten gains.[7]

With the current high levels of mortgage delinquencies and foreclosures, the FTC has stepped up its efforts to protect consumers from mortgage modification and foreclosure rescue scams. In many of these schemes, the firms promise that, in exchange for an up-front fee, they will obtain a loan modification or prevent foreclosure, but in fact do little or nothing. Some of the firms use copycat names or look-alike websites to falsely suggest that they are affiliated with a nonprofit or government program.[8] In a little over a year, the FTC has brought 15 cases targeting these types of mortgage frauds[9] and is engaged in additional non-public investigations of others who offer similar services. In the last ten years, the commission has obtained nearly half a billion dollars in redress for consumers of financial services. In the last five years, the Commission has filed over 100 actions against providers of financial services, with 14 of these actions being filed since we testified in March before this Subcommittee.

Consumers facing credit card and other debts they cannot afford often turn to providers of debt settlement or other types of debt relief services. Many of these are legitimate, nonprofit counselors who provide a genuine benefit to consumers. All too often, however, fraudsters falsely promise that they can renegotiate, reduce, or even eliminate debt. The FTC has brought a

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[7] 15 U.S.C. § 57b.

[8] *See, e.g., FTC v. Thomas Ryan*, Civil No. 1:09-00535 (HHK) (D.D.C. filed March 25, 2009.

[9] *See, e.g., FTC v. Freedom Foreclosure Prevention Svcs., LLC*, No. CV-09-1167-PHX-FJM (D. Ariz. filed June 1, 2009); *FTC v. Data Medical Capital, Inc.*, No. SA-CV99-1266AHS (C.D. Cal. filed May 27, 2009); *FTC v. Dinamica Financiera LLC*, No. CV09-3554MMM (C.D. Cal. filed May 19, 2009); *FTC v. Cantkier*, No. CV-09-894 (D.D.C. filed May 14, 2009).

number of lawsuits against for-profit debt relief companies.[10] In some of these cases, the company allegedly deceived consumers into paying large up-front fees for services that were never provided, falsely promised consumers that not paying their creditors would not hurt their credit ratings, or falsely promised that purchasing services from the companies would stop debt collectors from calling.[11]

Two other types of financial services fraud that increase in times of economic hardship are credit repair and advance fee loan scams. With the economic downturn and corresponding increases in consumer delinquencies, defaults, and bankruptcies, many consumers are facing the prospect of damaged credit ratings, making it even more difficult for them to obtain credit, insurance, or employment, or to rent a home. Fraudulent "credit repair" companies falsely promise, in exchange for a fee, to remove negative but accurate information from consumers' credit reports. In the last five years, the FTC has brought more than 17 cases against such companies. 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.[12]

Similarly, when consumers find it difficult to obtain credit from legitimate sources, they

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[10] *See, e.g.*, *FTC v. Edge Solutions, Inc. of New York*, No. CV-07-4087-JG-AKT (E.D.N.Y. Aug. 7, 2008) (stipulated order and judgment for permanent injunction).

[11] The FTC recently filed an action with similar allegations against a provider of debt relief services, and the court granted the agency's motion for a temporary restraining order and asset freeze against the defendants. *FTC v. MCS Programs, LLC*, No. 09-CV-5380 (W.D. Wash. 2009) (complaint filed). *See* Press Release, FTC Cracks Down on Scammers Trying to Take Advantage of the Economic Downturn: New Public Education Video Helps Consumers Steer Clear of Business Opportunity Fraud (July 1, 2009), *available at* www.ftc.gov/opa/2009/07/shortchange.shtm.

[12] *See* Press Release, Federal Trade Commission, FTC's Operation "Clean Sweep" Targets "Credit Repair" Companies (Oct. 23, 2008), *available at* www.ftc.gov/opa/2008/10/cleansweep.htm.

are susceptible to pitches from those who promise to find credit (*e.g.*, credit cards or unsecured loans) for them. In the last five years, the FTC has brought more than 15 cases against marketers who promised credit in exchange for the payment of an advance fee, but failed to deliver the credit as promised.[13]

B. Rulemaking

The Commission recently has increased its use of rulemaking to protect consumers of financial services. In March of this year, through the Omnibus Appropriations Act of 2009,[14] Congress gave the Commission the authority to promulgate rules "with respect to mortgage loans" using Administrative Procedure Act (APA) "notice and comment" rulemaking procedures. On June 1, 2009, the Commission used this authority, as clarified by the Credit CARD Act of 2009,[15] to commence a two-part rulemaking proceeding on mortgage loans.[16] One part of the rulemaking concerns practices occurring throughout the life cycle of a mortgage loan, including mortgage advertising, origination, appraisal, and servicing activities.[17] The other is

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[13] The FTC's Telemarketing Sales Rule ("TSR") prohibits telemarketers from requesting or receiving payment of any advance fee for credit, if they have represented a high likelihood of success in obtaining or arranging the extension of credit. 16 C.F.R. § 310.4(a)(4).

[14] Omnibus Appropriations Act of 2009, Pub. L. No. 111-8, § 626, 123 Stat. 524 (Mar. 11, 2009).

[15] Credit CARD Act of 2009, Pub. L. No. 111-24, § 511(a)(1)&(2), 123 Stat. 1734 (May 22, 2009).

[16] 74 Fed. Reg. 26,118 (June 1, 2009); 74 Fed. Reg. 26,130 (June 1, 2009).

[17] The Commission has played a leading role in taking law enforcement action against mortgage servicers who engage in unfair or deceptive acts and practices. For example, in *FTC v. EMC Mortgage Corp.*, the complaint alleged that the defendants: (1) misrepresented the amounts consumers owed; (2) assessed and collected unauthorized fees; and (3) misrepresented that they had a reasonable basis to substantiate their representations about consumers' mortgage loan debts. The complaint further alleged the defendants made harassing collection calls; falsely represented the character, amount, or legal status of consumers' debts; and used false

related to mortgage modification and foreclosure rescue services, a current focus of FTC law enforcement activity, as discussed above.

The Commission also has promulgated rules to protect consumers of financial services under the GLB Act and the FACT Act amendments to the Fair Credit Reporting Act. For example, 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.[18] These entities are most commonly providers of financial services. These rules and guidelines will make the furnished information more accurate and will enhance consumers' ability to dispute inaccurate information. In addition, the FTC and several other federal agencies have issued rules under the GLB Act to require financial institutions to disclose their privacy practices to consumers and to safeguard their customers' personally identifiable information. The agencies will shortly be issuing a consumer-friendly model privacy notice that financial institutions can use to provide privacy notices to their customers.

C. Consumer Education

Complementing its rulemaking and law enforcement activities, the Commission educates consumers to help them manage their financial resources, avoid fraud, 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

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representations and deceptive means to collect on mortgage loans. *FTC v. EMC Mortgage Corp.*, No. 4:08-cv-338 (E.D. Tex. Sept. 9, 2008).

[18] 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).

suite of mortgage-related resources for homeowners in distress, which are featured on a new web page at www.ftc.gov/MoneyMatters. Consumer groups and nonprofit organizations are distributing FTC materials directly to homeowners, while some mortgage servicers are communicating the information on their websites, with their billing statements, and on the telephone. This month, the FTC will work 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.

D. Research and Policy Development

Markets for financial services are complex and dynamic. To remain an effective protector of and advocate for consumers of financial services, the FTC continually increases its knowledge of evolving practices and modifies its approaches as needed.

Among other priorities, in its policy work relating to financial services, the Commission has taken the lead in developing and testing disclosures (especially mortgage disclosures). In 2007, the FTC's Bureau of Economics published a seminal report concluding, based on extensive consumer research and testing, that current mortgage disclosure requirements are ineffective and should be revised and that a new FTC prototype disclosure was more effective than the disclosures used in the industry pursuant to current law.[19]

In addition to conducting empirical research, the Commission engages in other efforts to

[19] See Federal Trade Commission, Bureau of Economics Staff Report, *Improving Consumer Mortgage Disclosures: An Empirical Assessment of Current and Prototype Disclosure Forms* (June 2007), *available at* www.ftc.gov/os/2007/06/P025505mortgagedisclosurereport.pdf. Following up on this report, in 2008 the FTC's Bureau of Economics convened a conference to review empirical research on consumer use and understanding of financial disclosures. *See* Federal Trade Commission, "May 15, 2008 Mortgage Disclosure Conference," *available at* www.ftc.gov/opa/2008/05/mortgage.shtm.

identify and promote effective financial services policies. For example, in February 2009, the FTC issued a report recommending changes in the law to reform and modernize the debt collection regulatory system.[20] In addition, in September 2008, the Commission held a public workshop to examine consumer protection problems related to debt relief services and consider the most effective public policy responses to these problems.

IV. Enhanced FTC Consumer Protection Tools

The Administration's proposal recognizes the value of the FTC's consumer protection efforts and includes recommendations that would give the FTC enhanced tools to make the agency even more effective. As President Obama noted at his announcement of a proposed CFPA, "There 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."

A. Resources

The proposal broadly calls for the FTC to be given "the tools and human, financial, and technical resources it needs to do its job effectively by substantially increasing its capacity to protect consumers in all areas of commerce that remain under its authority."[21] The FTC agrees that more resources would enable it to address the broad range of current and future consumer

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[20] Collecting Consumer Debts, *supra* n. 6. Following up on issues raised in the report, the FTC and the Searle Center on Law, Regulation, and Economic Growth at Northwestern University School of Law also will hold a roundtable in August 2009 to consider debt collection litigation and arbitration issues.

[21] Financial Regulatory Reform Proposal, *supra* n. 2, at 63.

protection issues more effectively.[22]

B. Aiding and Abetting Authority

The proposal authorizes the Commission to take action against those who assist others in engaging in unfair or deceptive acts or practices. Specifically, the proposal would allow the FTC to bring an action against one who "knowingly or recklessly ...provide[s] substantial assistance to another."[23] Effective law enforcement often requires reaching not only those who engage in unfair or deceptive practices, but also those who support and enable them to violate the law. Having such authority would make the FTC much more effective as a law enforcement agency.[24]

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[22] *See* Prepared Statement of the Federal Trade Commission 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* www.ftc.gov/os/2009/03/P064814financialservices.pdf.

[23] Proposed CFPA Act, *supra* n. 2, § 1101(c).

[24] *See* Prepared Statement of the Federal Trade Commission 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* www.ftc.gov/os/testimony/P034101reauth.pdf.

C. APA Rulemaking Authority[25]

In addition, the proposal streamlines and expedites the FTC's rulemaking process. Earlier this year, the Commission recommended before this Subcommittee that the FTC be given the authority to use APA notice and comment procedures to promulgate rules addressing unfair and deceptive practices related to financial services,[26] because the existing rulemaking procedures in Section 18 of the FTC Act are cumbersome and time-consuming. Subsequently, Chairman Rush proposed, and this Subcommittee approved, the Consumer Credit and Debt Protection Act ("CCDPA"), which would grant that power to the Commission.[27] The Commission appreciates the Chairman's and the Subcommittee's efforts to provide the Commission with the tools it needs.

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[25] 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 Federal Trade Commission Act, the notice and comment procedures of the Administrative Procedure Act. 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 would be willing to consider whether all the procedures currently required to issue, repeal, or amend these rules are necessary.

[26] *See* Prepared Statement of the Federal Trade Commission 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 ("FTC Role Testimony"), *available at* www.ftc.gov/os/2009/03/P064814consumercreditdebt.pdf.

[27] *See* The Consumer Credit and Debt Protection Act, H.R. 2309, 111th Cong. § 2 (2009); Prepared Statement of the Federal Trade Commission on H.R. 2309, the Consumer Credit and Debt Protection Act before the House Committee on Energy and Commerce Subcommittee on Commerce, Trade, and Consumer Protection, May 12, 2009, available at www.ftc.gov/2009/05/P064814debtproact.pdf.

The Administration's proposal would give the FTC APA rulemaking authority under the FTC Act.[28] In such a rulemaking, the Commission will consider the views of stakeholders and the likely effects of a proposed rule on consumers and competition.[29] Giving the Commission APA rulemaking authority would strengthen its ability to address widespread problems more quickly.

D. Enforcement Remedies[30]

The proposal also gives the FTC enhanced law enforcement remedies. The Commission recently recommended before this Subcommittee that the FTC be given civil penalty authority for rules it promulgates addressing unfair and deceptive practices related to financial services.[31]

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[28] Proposed CFPA Act, *supra* n. 2, § 1101(d); Financial Regulatory Reform Proposal, *supra* n. 2, at 63.

[29] As demonstrated by the FTC's recent commencement of the mortgage lending rulemaking discussed above, the agency would use such authority to move quickly to address pressing consumer protection problems.

[30] 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, particularly in matters, like data security breaches, malware, and pretexting, where existing remedies are likely to be inadequate. *See* FTC Reauthorization Testimony, *supra* n. 24, at 10-12.

[31] *See* FTC Role Testimony, *supra* n. 25.

As noted above, the Subcommittee approved the CCDPA,[32] which would grant that authority to the Commission. Again, the Commission appreciates the Subcommittee's efforts.

The Administration's proposal would give the FTC civil penalty authority for any violations of Section 5 of the FTC Act.[33] The Commission believes that this new power would increase deterrence of would-be violators and help protect consumers more effectively,[34] particularly in areas such as data security and spyware.[35]

Although the proposal does not include a provision to give the FTC independent litigating authority when it seeks civil penalties, the FTC has previously testified[36] about the benefits of being able to file cases in its own name rather than first presenting them to the Department of Justice ("DOJ") so that it can decide whether to file an action.[37] This authority

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32 *See supra* note 26.

33 Proposed CFPA Act, *supra* n. 2, § 1101(b); Financial Regulatory Reform Proposal, *supra* n. 2, at 63.

34 The Commission has supported this position at times in the past. On February 4, 1970, FTC Chairman Caspar Wainberger testified before Congress on behalf of the Commission in favor of allowing the FTC to assess civil penalties administratively against respondents who knowingly committed consumer protection violations. *See Hearings on H.R. 14931 and Related Bills before the Subcomm. on Commerce and Finance of the H. Comm. on Interstate and Foreign Commerce*, 91st Cong. 53, 54 (1970) (statement of FTC Chairman Caspar Weinberger). The Senate passed legislation to permit the FTC to seek civil penalties for such violations in federal court proceedings, but the provision was dropped in conference.

35 *See* FTC Reauthorization Testimony, *supra* n. 24.

36 *See id.*

37 Currently, if DOJ declines to file the case in the name of the United States or otherwise fails to act within 45 days on a referral from the FTC, the Commission may file the case in its own name. This process requires extra time and delay, even under the best of circumstances. Moreover, 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, the use of personnel at two agencies inevitably creates delay and inefficiencies. This is particularly true in cases where the FTC is simply referring to DOJ a civil

would allow the Commission – the agency with the greatest expertise in enforcing the FTC Act – to bring cases more efficiently while retaining the option of referring appropriate matters to the DOJ. The Commission therefore believes that the FTC Act should be amended to expand the agency's independent litigating authority to allow the FTC to bring actions for civil penalties in federal court "in its own name by any of its attorneys," without mandating that DOJ have the option to litigate on the FTC's behalf, as is currently required.

V. Future of the FTC and Consumer Protection in Financial Services

The Administration's proposal would fundamentally reform the way in which the government helps protect consumers of financial services. The proposal and related recently-released proposed legislative language are comprehensive and complex. The Commission is carefully evaluating the proposal, including its implications for the FTC's consumer protection mission. This section is not intended to serve as a comprehensive analysis of how the proposal would affect the Commission, but rather comments on a few of the provisions.

Under the proposal, the CFPA would have "consolidated authority over the closely related functions of writing rules, supervising and examining institutions' compliance, and administratively enforcing violations"[38] of a number of laws relating to financial services. In addition, the CFPA would "play a leading role in efforts to educate consumers about financial matters" as well as "streamline existing financial literacy and education initiatives

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penalty settlement to be filed in federal court.

[38] Financial Regulatory Reform Proposal, *supra* n. 2, at 56.

government-wide."[39] The CFPA's responsibilities further would include research and policy development, including undertaking an empirically-based reform of mortgage disclosure requirements.[40]

Many of the rulemaking, enforcement, education, and research functions of the CFPA are functions that the FTC currently performs with respect to entities under its jurisdiction. The proposal is designed to consolidate these responsibilities – which currently are divided amongst a number of different agencies, depending on the nature of the financial institution – within a single regulatory body.[41]

The Administration's proposal would provide the CFPA with exclusive authority to issue rules respecting financial consumer products and services. To the extent the FTC currently has rulemaking authority respecting financial consumer products and services, this approach would supersede that authority. Thus, all of the FTC's existing authority to promulgate financial services-related rules under the FTC Act, the Omnibus Appropriations Act of 2009 (with respect to mortgage loans), the privacy provisions of the GLB Act, and certain provisions of the FCRA would be transferred to the CFPA.[42]

Under the Administration's proposal, the FTC would apparently retain a law enforcement role in the financial services area. The CFPA would have primary authority to enforce the

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39 *Id.* at 62.

40 *See id.* at 62-63.

41 *See id.* at 56.

42 *See* Financial Regulatory Reform Proposal, *supra* n. 2, at 58-59, 63. The proposal also would give the CFPA the sole authority to promulgate rules to implement the TILA, CLA, ECOA, EFTA, and FDCPA – authority that the FTC currently lacks.

consumer protection laws covering financial services that are currently enforced by the FTC. The FTC would retain back-up authority, however.[43]

In beginning to assess the implications of the Administration's proposal, the Commission has identified some key issues that warrant consideration, discussion, clarification, and refinement. First, the Commission notes that many of the definitions of key terms (such as "credit" and "financial activity") in the proposal appear to be very broad. To the extent these definitions dictate which FTC functions would be transferred to the CFPA, their breadth could limit the ability of the FTC to protect consumers outside the context of traditional financial services.[44]

Second, the FTC also is reviewing the proposal to determine whether the structure of law enforcement cooperation is as efficient as it could be. For instance, section 1022(e) requires the FTC to refer an enforcement recommendation to the CFPA and wait up to 120 days for the CFPA to determine whether to bring its own enforcement action, before the FTC can proceed. The FTC is evaluating the practical effects on our law enforcement efforts of waiting up to 120 days for a CFPA determination. For example, such a delay may raise concerns in cases involving fraud, where time is of the essence. In addition, the Commission is evaluating the

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43 *See* Financial Regulatory Reform Proposal, *supra* n. 2, at 63.

44 For example, the definition of "financial activity" includes companies, such as financial data processors, that may work in tandem with fraudulent telemarketers. *See* Proposed CFPA Act, *supra* n. 2, § 1002(18). If the FTC finds that a telemarketer making illegal and pervasive robocalls to consumers on the Do Not Call Registry has hired a firm to assist it in processing payments, it is critical that, when the FTC brings an action against the telemarketer, it is also able to proceed against the processor. Do Not Call enforcement could be significantly hampered if, every time the FTC wants to investigate or bring an action against a telemarketer even of nonfinancial products or services, it needs to go through the coordination process with the CFPA.

relation of the referral provision to section 1101(a), which allows the two agencies to develop an appropriate system of coordinated enforcement.

The Commission believes that the goal of improving the overall regulatory, supervisory, and enforcement system for protecting consumers of financial services is a worthy one. It will be critical, however, that the agency or agencies charged with financial consumer protection act vigorously and effectively to protect consumers. In particular, if legislation creating an agency such as the CFPA is enacted, care must be taken to ensure that such consumers are protected during the establishment, transition, and early phases of the new agency. The Commission will continue to review the proposal with that consideration in mind, and will express its views as necessary to ensure that consumers are treated fairly and honestly when they purchase financial products or services. The Commission is committed to working with the Congress in the coming days on these and other issues to ensure that consumers of financial services have the best protection possible.

VI. Conclusion

The FTC appreciates the opportunity to update the Subcommittee on its activities and offer preliminary comments on the Administration's proposal for financial services reform. The Commission looks forward to working with the Subcommittee on legislation to implement the proposal to ensure that it provides appropriate protection for consumers of financial services. While the new proposal for financial regulatory reform is being considered, the Commission will continue to vigorously enforce consumer protection laws under its current authority and will welcome any new authority it receives should the CCDPA be enacted.

Mr. RUSH. The Chair thanks the gentleman, the chairman of the FTC, and the Chair now recognizes himself for 5 minutes for the purposes of questioning the witnesses.

With the continuation of the financial crisis, we see more and more scam artists preying on desperate consumers seeking to reduce their debts and to keep their homes out of foreclosure or from selling their homes at a loss, and I am concerned about this proposal in that this new agency would not do enough in the short term because we all know that it takes some time for a new agency to rev up, to get going and get running. Another option that the Administration might have considered is proposing that the FTC take on this essential role. By increasing its staff and authority, it is conceivable that FTC could be taking on these issues within weeks or months rather than years. Mr. Barr, did the Administration consider other options other than creating a new agency?

Mr. BARR. Yes, Mr. Rush. Let me just say, Mr. Chairman, that with respect to the transition issues, our view is that the FTC should act aggressively as it is doing now under the chairman's leadership to continue to enforce the law, be a cop on the beat, be quite aggressive in this area, and we are at the same time that we are pushing to create the new agency pushing on all the existing agencies working closely with them to do everything we can under existing authority. So I don't think there is any sense that anybody thinks we should slow down, rather, quite the opposite.

With respect to other options, the Administration considered a wide range of options with respect to consumer protection, and our basic view was that the existing system was fundamentally broken and we needed a quite large, significant change to create one agency whose sole job was protecting consumers across the financial services marketplace. I think that the chairman is deeply aware of the ways in which consumers have been abused and neglected for quite a long time and the existing structure is just inadequate to meet the needs. So our strong view, the President's personally strong view was that we needed a new financial agency with that core mission that was strong and could achieve the goals that I think the chairman articulated so eloquently in the opening remarks.

Mr. RUSH. Chairman Leibowitz, during this interregnum between this bill becoming law and this new creation actually taking place, that is going to put a lot more pressure on the FTC. Do you have the requisite resources and personnel? How will the FTC function during this interregnum?

Mr. LEIBOWITZ. I would say that during the sort of interregnum period if the legislation is enacted, we are going to work very closely with the new agency. I think the period for transfer is somewhere between 6 and 24 months, depending on how quickly they are ready to ramp up. We are going to continue to bring cases, and I think that was always the notion. I do think that going forward, you know, we could use more resources, and we talked about this before in hearings, and I do think that even after the agency is created, assuming it is, that it would be useful for us to have concurrent enforcement authority so that if we are going after—you know, the bad guys don't always act in silos, as Mr. Barr knows, as all of you know. You know, sometimes they are violating the Do Not

Call rule and they are violating reg Z or reg E which would go over to the new agency, and so I think it is important going forward that when there is ongoing consumer harm that we are able to sort of jump over the kind of legislative, the new legislative fence to help consumers and not have to wait potentially 120 days. I think we are working through a lot of these issues, making a lot of progress between our staffs and ourselves.

Mr. RUSH. The Chair sees that his time is up. The Chair now recognizes the ranking member for 5 minutes.

Mr. RADANOVICH. Thanks, Mr. Chairman, and welcome, gentlemen, to the panel. I am pleased to see you here today.

Mr. Leibowitz, welcome back to the committee. I know you have been here a number of times already and probably will be more in the future. I have to think you are doing a bit of a dance because you stand to lose some jurisdiction in the FTC, and it seems to me that you are getting, at least under the proposal, getting more money and authority to do less, and I want to know what your reaction to that statement is, given the fact that the FTC has dual jurisdiction, and that is, two missions to ensure competition but also consumer protection.

Mr. LEIBOWITZ. Well, Mr. Radanovich, let me just start by saying I hope that familiarity is not breeding contempt here.

Mr. RADANOVICH. Not at all.

Mr. LEIBOWITZ. Look, you know, if you read through our written testimony, you can sort of see it is a complex matrix within the Commission about what we support and what we don't. I do think from our perspective if you create this—from my perspective, if you create this new agency and you also give us more resources and authority, from the perspective of consumers they will be getting a better deal because we will be able—we will continue to have a backstop authority with respect to financial matters and we are going to be able to concentrate and just do more for consumers. As you know, because we have talked about this, we spent a lot of time leveraging——

Mr. RADANOVICH. But if I may, you are losing jurisdiction.

Mr. LEIBOWITZ. We would be losing jurisdiction and——

Mr. RADANOVICH. How does that loss of jurisdiction deal with your two missions of ensuring competition and providing consumer protection?

Mr. LEIBOWITZ. Well, I would say on the competition side, we wouldn't be losing jurisdiction. We would still retain that jurisdiction. On the consumer protection side, we would be losing jurisdiction to this new agency but this new agency would be another cop on the beat protecting consumers, and then—and we would also be losing personnel, and we have already lost a few personnel, I would say, to the new agency...

Mr. RADANOVICH. But it does seem to me like you are getting more money and authority to do less.

Mr. LEIBOWITZ. Well, we will do more. I mean, we really will. It is not a question from our perspective of moving to a government— I mean, our guys work extremely hard. They have been commended by OPM for always scoring high on sort of effectiveness and quality of work, and we will just do more in the areas where we have— while retaining backup authority, if the proposal goes through, we will do more in the other areas of consumer protection and there is plenty to do.

Mr. RADANOVICH. Thank you.

Mr. Barr, welcome to the subcommittee. You know, in Russia during the height of communism, it was often talked about the fact that there was not a lot of food on the shelves, and when you go into stores you might be able to get a loaf of bread, but if you wanted sourdough, you probably had to have the standard loaf, if you wanted rolls, you got a loaf of bread, if you wanted something else, you got a loaf of bread. Tell me how—explain to me how you are not doing the same thing in the credit markets in the name of consumer protection.

Mr. BARR. Thank you very much for that terrific question. I was smiling as you were describing the example because I spent some time in Poland had the same experience where you go to the store and there is nothing there and you can actually literally go hungry. This agency has nothing to do with that, literally nothing to do with that. The new agency——

Mr. RADANOVICH. Tell me how you are not doing that though in the credit markets, because that is a question I would like answered.

Mr. BARR. The new agency is in no way pursuing that kind of command and control model. It is in no way pursuing price setting. It is in no way saying you can't offer certain kinds of products. The new agency under the legislation——

Mr. RADANOVICH. And I understand the reason for looking at this because we have all experienced this financial crisis but doesn't this end up providing consumers with less choice and driving up the cost of credit for consumers?

Mr. BARR. With respect, sir, our strong view is that it does not. It continues to provide for financial innovation. Consumers can get access to whatever products and services providers want to offer. Our basic approach is to improve disclosure, reduce regulatory burden, for example, by merging authorities so you can have one simple mortgage form at the time of disclosure, improve——

Mr. RADANOVICH. But weren't there existing authorities that have and could and should deal with the current crisis that we are in? Doesn't the added restrictions and regulations that you are going to be putting on the credit industry will drive up the cost of credit to consumers?

Mr. BARR. I think that the better judgment, sir, again, with respect, is that the current system we have had, the status quo on consumer protection was a dismal failure and I think we have evidence all around us of that, and our view was, both for banks and for non-banks, for consumers and for households, the system failed. If you talk to, and I am sure you do, the community bankers in your community who had to compete against unregulated providers who were sucked into offering products——

Mr. RADANOVICH. Actually competing against large banks for TARP money, but—thank you very much, Mr. Chairman. I yield back.

Mr. RUSH. The Chair now recognizes the gentlelady from Illinois, the vice chair, Ms. Schakowsky.

Ms. SCHAKOWSKY. Thank you. Mr. Barr, could you describe how we potentially would have been in a different situation today had this agency been in existence as the current problems started to unroll?

Mr. BARR. Yes. I think we would have been in, could have been in a fundamentally different situation if we had an agency that could set the rules of the road for everybody to follow, if we had an agency that could say to mortgage brokers, you can't get paid more for offering riskier, higher-priced, more confusing products than a basic product, if we had a rule that said mortgage brokers, you have a duty of care, you have to do best execution for a mortgage so you can't offer the mortgage that is the best deal for the broker, you are supposed to offer a mortgage that is the best deal for the consumer, if we had a duty that said mortgage brokers have to have some skin in the game, they need to be paid over time, securitization trusts have to have skin in the same so that you don't have a system where all the bad mortgages are made up front and eventually sold to the investor at the other end with nobody in the chain having responsibility, nobody having any of their own capital at risk. So we could have had fundamental change. We could have had a fundamentally different situation in which consumers were protected at the front end and the financial system was protected all the way through.

Ms. SCHAKOWSKY. And you are saying without any change in legislation beyond the creation of this agency, that you would have the authorities then under the bill, which I haven't read thoroughly yet, you would be able to have done all those things?

Mr. BARR. Yes. This agency would be granted the authority to do all the things that I just described.

Ms. SCHAKOWSKY. Did you want to comment on that, Mr. Leibowitz?

Mr. LEIBOWITZ. Well, I would just say that one of the things that is critical here is APA rulemaking authority, and of course, under the new proposal, they will be able to do it for non-bank- as well bank-related financial instruments and mortgages. And so in the omnibus you gave us, for which we are very grateful, APA rulemaking for non-bank mortgages and we are going to look at that and we are going to do, I think, a very, very good rule, and Mr. Rush, you have legislation that would expand our jurisdiction a little bit more but it only goes—it is only within the context of non-bank-issued financial instruments. So 20 years ago we did a lot of matters relating to credit cards and all the credit cards are now, virtually every credit card is now issued by a bank. We have no jurisdiction there. So I think that is a critical advantage from the consumer's perspective of what this new agency might do.

Ms. SCHAKOWSKY. And let me just say that while I absolutely in theory think pulling it all together in one place is a good idea, but, you know, we have seen in the startup of the Department of Homeland Security lots of difficulties in pulling it all together and making it all happen. The creation of a director of national intelligence, certainly in that case many of us on the Intelligence Committee see a large bureaucracy itself developing, and have some problems with the coordination that was actually supposed to happen. How can we be assured that this will achieve its goals, achieve it in a timely way and not just be another bureaucracy?

Mr. BARR. Thank you very much. Again, I think that our view is, the agencies that have the authority now should aggressively use those authorities. Those authorities are inadequate to the task. The basic structure of the system was a dismal failure. We need to do this. We need to take this action. The legislation has tight timelines for transition. Treasury has responsibility to make sure that transition happens effectively. You can come see me, you can come see Secretary Geithner. We are responsible for making sure. You can hold us accountable.

Mr. RUSH. The Chair recognizes Mr. Stearns from Florida.

Mr. STEARNS. Thank you, Mr. Chairman. Mr. Chairman, we have had a lot of hearings on privacy here in this committee, and when I was chairman of the committee we had many hearings on privacy, and I think my concern is that if we transfer some of the Federal Trade Commission's privacy work to this new CFPA, particularly in light of all the expertise that you have, and you have been the leading federal agency in the area of consumer privacy for all these years, and including financial privacy as well as identity theft, information security. So with that in mind, what do you feel about this transfer?

Mr. LEIBOWITZ. Well, I guess I would make a couple points, and this committee and you have been leaders in privacy-related issues. You know, we will be transferring over a lot of laws. We hope to keep sort of a backstop authority that is concurrent, and of course, this is the beginning of the legislative process. It is not the end and, you know, I see a lot of agreement on many things within this committee on ways to go forward. The way we read the legislation, it was unclear whether issues like data security, privacy would stay with us. I think Mr. Barr has represented today, the better reading of the proposed statute or the reading of the way the proposed statute will move forward is that we will keep issues like that, and I think that is very, very important.

Mr. STEARNS. So identity theft, you would still keep?

Mr. LEIBOWITZ. I think we would keep identity theft.

Mr. STEARNS. And financial privacy?

Mr. LEIBOWITZ. Financial privacy, I think mostly moves over to the new agency. I mean, again, I think that is to some extent up to you. I think we would keep the safeguards rule under Gramm-Leach-Bliley but a lot of this has to be worked through of course during the transition period. We will keep on doing this and again we will have backstop authority. And I should probably turn this over to Mr. Barr, who is one of the true architects of the plan.

Mr. STEARNS. But what you are saying today is that some of this is still up for negotiation?

Mr. LEIBOWITZ. Yes. These boundary issues, that you have raised the same concerns that we saw when we got the legislation at the end of last week but it seems that it is being resolved on many of these boundary issues in favor of retaining jurisdiction by the existing Commission, and I assume that, you know, as this legislation moves forward, that is what this committee would be most interested in, but let me turn it over to Mr. Barr.

Mr. BARR. Just to add to that, the chairman is correct that with respect to data security issues, identity issues, safeguard red flags, all that would stay at the FTC and the parallel authority for that at the bank agencies but the front-end privacy notices that have to do with disclosure would fit in the new disclosure regime of the new Consumer Financial Protection Agency.

Mr. STEARNS. So let us say Internet privacy, consumer privacy, would that remain with Federal Trade Commission?

Mr. BARR. Again, with respect to the disclosure aspect on the financial side, the disclosure would be unified with the disclosure regime at the new financial agency. All the data security, identity theft and related issues would remain at the FTC and the parallel authorities with respect to banks.

Mr. LEIBOWITZ. But if you are thinking about core issues like spam, spyware, behavioral marketing, we keep all of those. You know, there might be some issues about whether we are going after a malefactor or a group of malefactors and one of them is on the other side of the core new agency's fence, you know, right now there's 120-day waiting period, which we are a little concerned about from the perspective of consumers, but going back to your original point, a variety of issues including sort of the core privacy issues we do we will be keeping and retaining jurisdiction.

Mr. STEARNS. Well, I think, Mr. Barr, what you should realize with all that expertise in the Federal Trade Commission we are starting a new federal agency here. You know, I would think that as many have pointed out on this side, we are worried about a new federal agency, particularly when you have an agency that already has the expertise. I think the bill says that the cost of development of this new agency is such sums as are necessary. Is there any more definitized information you can give on what the cost would be for this new federal agency?

Mr. BARR. I don't at this time have an overall cost estimate for the agency or size estimate for the agency. It is something we are working on. We will work with the appropriate committees on it and with OMB and CBO. We anticipate that the agency will be pulling in staff and resources from the existing agencies and additionally having new resources required. I would be happy to continue to work with you on that question.

Mr. STEARNS. Can you talk about the resources the agencies will need besides—I mean, have you identified any of the resources?

Mr. BARR. We have begun the process of identifying the number of individuals and the other resources the agency would need but we are not at a place now where I could give you even a reasonable estimate of what additional measures beyond the transfer authorities would be required. It is something we are working quite hard on.

Mr. STEARNS. I will just close. Mr. Chairman, you might think as a subcommittee chair since a lot of the expertise for this is already in the Federal Trade Commission and this is a new agency, you might—and particularly in your jurisdiction here, I think we have to move carefully as Mr. Dingell out, developing a brand-new agency. They don't know how much they are going to spend, they don't know what resources they are going to need, and also they are going to be taking on expertise for areas they know nothing about that the Federal Trade Commission has years on, so I just wonder, you as the chairman, you might want to be very careful and cautious about endorsing this new agency without, you know, some more hearings on it and try to get more of the stakeholders here, perhaps more than we have on the witness list here, to try and get into the discussion here. So I thank you, Mr. Chairman.

Mr. RUSH. The Chair thanks the gentleman. The Chair observes that there is a vote going on on the floor. There are three votes. It is the desire of the chairman that we should delay the committee hearing until after the votes are concluded and then return. I am not sure what the witnesses' time commitments are but it would be very important if you return I would say within 15 minutes after the last vote. Then the subcommittee will reconvene.

[Recess.]

Mr. RUSH. The subcommittee will reconvene. The Chair recognizes the fact that there might be members of the subcommittee who did not have an opportunity to ask questions of our witnesses before we recessed. However, I am very cognizant of the witnesses' time and will take this time to go into a second round of questions, and if there are members who come in who have not asked questions in the first round, then the chair will prolong their questioning to 7 minutes.

So with that, the Chair recognizes himself for 2 minutes of additional questions.

In its White Paper describing the proposed regulatory reforms, the Department of Treasury stated clearly that, and I quote, "The FTC shall retain authority for dealing with fraud in the financial marketplace." Despite this assurance, the proposed language appears to weaken FTC's authority in this area. FTC will retain the authority to enforce against unfair and deceptive acts and practices using the FTC Act. However, the FCC could not add any statutory claims such as the Truth in Lending Act or the Equal Credit Opportunity Act to a complaint without first referring the case to the new agency and waiting 120 days for that agency to decide if it wants to take the case. Chairman Leibowitz, let me ask you, how will this change impact the FTC's ability to consume financial problems? Could the FTC consume one part of a case while the other is under consideration or would you expect that it would simply not bother with additional claims? Will the FTC's cases be weakened if they only rely on FTC Act claims?

Mr. LEIBOWITZ. Well, I think, Mr. Chairman, that is an great question, and keeping in mind that we are at the beginning of the legislative process, not near the end of the legislative process, those are questions that this committee will want to think through as the legislation proceeds forward. Last week we brought a bunch of cases which we called Operation Short Change, and it was about scams that were hitting people in economic distress, and a lot of those were basically fraud claims under the FTC Act, but one of them involved the Electronic Funds Transfer Act, I think it is reg E. Now, reg E would go to the new agency, and so this would sort of invoke two parts of your question or two components of your question, one of which is, would we have to wait 120 days to bring this case while there is ongoing harm, and then the second issue is really, what is the nature of our backup authority, and I want to say, Mr. Barr and I have been working through this with our staffs and very, very productively. You know, I worked on the Hill for 13 years and I never wrote a piece for legislation for my bosses then that didn't change as it went forward. And so but I think these are precisely the questions that we worry about at the FTC. We want to make sure, and I know Mr. Barr does too, that this legislation is as effective as it can be for the consumers that all of us represent, and so I think it is important that you——

Mr. RUSH. Well, it seems that the consumers would benefit more if the FTC didn't have to solely rely on the so-called backdrop authority. Do you agree with that?

Mr. LEIBOWITZ. Well, again, I mean, from my perspective, and I will turn the mic over to Mr. Barr in a second but from our perspective, if the backup authority is weak, and, you know, we have backup authority involving the SEC and the CFTC which we use very rarely, only when we need it. But here, a couple of points. One is, as the transition is happening, if this legislation is created, you and certainly even after very good lawyers are transferred and attorneys and jurisdiction, you know, it is going to take a while for this agency, and Mr. Barr knows better than anyone, to ramp up, and I like—I believe that they are going to want us involved using our backup authority, probably more earlier than later. Now, we understand that they will have primary jurisdiction but I think it is very important that the backup authority be robust so that we can sort of help out and also so that when we have these cases that involve malefactors that don't fit into the old or new silos that we can effectively go forward and stop ongoing harm involving consumers.

Mr. RUSH. I have just one question. Earlier you stated that you had lost some personnel. Were the individuals transferred to Treasury?

Mr. LEIBOWITZ. We have one or two people who have gone over.

Mr. RUSH. And what is the purpose of them going over to Treasury? Are they on loan to Treasury or are they reassigned to Treasury?

Mr. LEIBOWITZ. Oh, I think they are on detail.

Mr. RUSH. What is the purpose of them being on detail to Treasury? What are they doing over there?

Mr. LEIBOWITZ. I think they are—well, I will turn that over to Mr. Barr. But I do know that the one person I know who is on detail to Treasury is a fabulous attorney and really cares about consumer protection.

Mr. RUSH. All right. Well, why don't you turn it over to Mr. Barr and let him answer the question. Thank you. Mr. Barr, would you begin your answer with that last question and then you can respond to the other question.

Mr. BARR. Sure, and then I would be happy to address the broader points. We have on our staff a terrific attorney from the FTC who has come over on detail and is going to be a permanent employee of the Treasury Department working on consumer issues. With respect to the broader sets of questions, I would just say first and foremost the chairman and I have been working closely together and are committed to working closely together on these sets of issues. On financial fraud, it is clear from the President's proposal that it would not in any way diminish the FTC's ability to take on financial fraud cases as it is stated in the white paper and in the legislation. The FTC would retain its authority and its duty to bring financial fraud causes without delay.

With respect to coordination, there are many issues that the agencies will want to coordinate on. The 120-day measure is not like the existing authorities that the FTC uses where it is the primary entity doing enforcement. This is a proposal that kicks in if the FTC is doing its work and finds a problem, it can let the new agency know, the consumer agency know about it. It doesn't have to wait as the FTC does today, it doesn't wait until it has gone through its investigation, gone through the whole charging process and gotten it all ready and then refer it to the Justice Department. It is totally unlike that. This a chance for the FTC to let the new agency know about a problem that it sees that has come to its attention. So it is a fundamentally different mechanism. We are committed to being sure that that in no way delays any financial fraud cases.

And with respect to the transition issues again, the FTC and the bank agencies will have large transition issues. We are committed to working those through and, as I mentioned to Representative Schakowsky, Treasury is responsible for ensuring that transition happens smoothly and you can hold us accountable for that.

Mr. RUSH. With that, my time is concluded. Now Mr. Radanovich is recognized.

Mr. RADANOVICH. Thanks, Mr. Chairman, and welcome back.

Mr. Leibowitz, uncertainty is one of the key factors behind the perpetuation of our current economic crisis, and granting a new and unknown regulatory agency with this broad scope of power places a dangerous—could place a dangerous level of uncertainty into the financial markets. Do you think that it might be better to have an experienced regular such as the FTC with a long and trusted history of working with business at the helm with these new powers?

Mr. LEIBOWITZ. Well, as you know, I am very fond of the Federal Trade Commission as you are. I would say this. You know, as you know, I testified here a few months ago that we thought we could do the consumer protection mission involving predatory financial instruments. The proposal that has been developed, though, is one that is broader than that. It has bank examiner components. It has compliance components. So those are not things in our core competency. You know, again, we are a creature of Congress. We are an independent agency, and so we will do whatever you tell us we are going to do, and then beyond that, I just want to come back to my initial point, which is, based on what we have seen in this marketplace and the restrictions that we have operated under, I do think that if these issues are worked through, and I believe they will be, I do think that having this new agency and the FTC both going after unfairness, deception, fraud is considerably preferable to the status automobile accident.

Mr. RADANOVICH. We agree on that. I think the issue is, how you go about it. I will say, though, that meeting with the bankers in my district back home, they are afraid of this, and I think the uncertainty question is a legitimate question, and if it does bring the specter of increased regulatory management over the industry, not that something has to be done in order to correct the mistakes of the last year, but, you know, what is it going to do to the industry's willingness to get out there and unfreeze liquidity like we are all wanting?

Mr. BARR. If I could just add to Chairman Leibowitz's comment on that, I think that a key new factor is, this agency would have all the supervisory and examination authority it needs, not just with respect to banks but also with respect to non-bank competitors of those banks, so I understand that many banks are worried about the scope of the new Consumer Financial Protection Agency. I appreciate those concerns. I think the additional upside for them is that the non-bank competitors will have the same high standard that they need to meet, the same level playing field, the same consistent rules. So they don't have to worry. A community bank and a credit union doesn't have to——

Mr. RADANOVICH. Something tells me that you are just broadening the uncertainty to include the entire financial markets, you are not——

Mr. BARR. No, I think what we are able to do, sir, with respect——

Mr. RADANOVICH. It seems to me the uncertainty is being broadened, not—that doesn't answer the question about uncertainty and the banks are afraid of this kind of legislation.

Mr. BARR. I think what we are able to do is create a high, consistent, clear standard. We are able to reduce regulatory burden in many cases, for example, combining the TEAL and RESPA forms that drive everybody crazy and don't help consumers. We need a single, uniform, simple standard for disclosure that applies——

Mr. RADANOVICH. I suggest that you need to convince the banks because they are the ones that are expressing the real concern. If I may, though, Mr. Barr, I do have a second question, and that is that President Obama has stated that a streamlined system will provide better oversight and will be less costly for regulated institutions but the preemption statutes in the bill create a floor rather than a ceiling for State regulation. Doesn't that mean we are looking at 51 different versions of this thing by giving the preemption statutes to the States and does that not conflict with President Obama's statement that we are looking at a streamlined system?

Mr. BARR. Well, as you know, the States have long played an important role in consumer protection. I think one of the upsides of living in our country is that we have independent States that——

Mr. RADANOVICH. But they have not had preemptive status in this situation before.

Mr. BARR. They have not been able to apply State laws in some context to national banks, but they certainly have been very active in the consumer area across lots of different products and services in the past.

Mr. RADANOVICH. Do you think that could lead to 51 different versions of this——

Mr. BARR. I think we are much more likely to see a high standard at the national level. I think it is very rare if you set a good, high standard at the national level you are going to find it very rare for States to go off in their own way, but sometimes States are right. Sometimes States protect consumers in innovative ways, and our view is, we shouldn't block the States' ability to do what the States think in their judgment is right.

Mr. RADANOVICH. All right. Thank you, Mr. Chairman.

Mr. RUSH. The Chair recognizes Dr. Gingrey for 7 minutes for the purposes of questions.

Mr. GINGREY. Mr. Chairman, thank you for your generosity of time. I am sorry I missed the first round, and I appreciate you letting me ask some questions. And I did want to ask Secretary Barr, in your testimony you indicated that we need only one agency charged with protecting consumers for financial products and services. As one of the principal architects of the Administration's plan and the proposed Consumer Financial Protection Agency, you lay out very broad and sweeping changes that will fundamentally change a number of government agencies of course including the FTC. However, while this is still in the early stages, there are some concerns held by members including me that an overly broad new regulatory agency will have the same effect of hitting a nail with a sledgehammer, and these efforts under the guise of uniformity I feel that there may be some different standards set for industries within this proposed agency. For example, I have heard some suggestion that small banks should be exempt from some or all of the rules written by the proposed agency and the drafted legislation contains exempted authority based on asset size. Is it the Administration's play to apply different consumer protections depending on whether a customer transacts with a small or a large bank, and furthermore, if you intend to carve out smaller institutions, what are the types of rules they would be exempted from and what is the policy reason for carving out these institutions?

Mr. BARR. Thank you very much for that set of questions. I do think that our proposal does involve sweeping change, a sweeping change that in our judgment is essential to protect consumers. Our old system was fundamentally broken and we do need fundamental reform.

With respect to smaller institutions, we don't expect to see, would not expect that small banks and big banks would have different rules of disclosure, but you may see differences in, say, how much examination or supervision there would be. In the bigger institutions as we do today on site there are examiners on site year round. You wouldn't want that for a small bank. So you may see differences like that but not differences in the basic standards affecting consumers. Those would be uniform across the board. So if you walk into a bank or you walk into a credit union, you walk into a big bank or you go to your independent mortgage broker or you go to an independent mortgage company, you get the same simple mortgage disclosure so consumers can understand what they are getting.

Mr. GINGREY. Chairman Leibowitz, as you outlined in your testimony, there will be a number of changes to the FTC as a result of the Consumer Financial Protection Agency it that becomes law. Many responsibilities will be pulled from the current jurisdiction of the FTC and to be given to this new agency. With all of these proposed changes, what then will be the role of the FTC in this new landscape and how much of that new role will be duplicative of this proposed agency? You guys have been doing a good job, you know, we are appreciative of that.

Mr. LEIBOWITZ. And we appreciate, you know, and are heartened by what you said about our agency. I do think we do a good job and we have terrific attorneys who really care about enforcing the mission of the agency and good commissioners who are also committed. You know, we will still have all of our competition, right, our antitrust authority. We will continue to do all the other things we do, whether it is fraud or privacy outside of the financial context or, you know, advertising and marketing practices, and then we will continue to stay involved here, I think especially during the transition period and hopefully beyond with concurrent jurisdiction. You know, look, there are, as we know in this room, as you guys know better than anybody else, there are a lot of bad actors out there who are, you know, trying to rip off American consumers and so, you know, by growing the federal ability to go after these malefactors, you know, that can only help even the playing field. What we do at the FTC and I think we do it really well but it's a sort of triage, right? You know, we look at different cases, potential cases as we are going through an investigation and we say which one can we best leverage, which are the ones that, you know, are the greatest harm to the greatest number of people, which are the ones that might make better, change bad case law, for example, and we are always making decisions based on sort of the lack of resources that we have. We just try to do the best job we can.

Mr. GINGREY. Well, let me reclaim my time just for a second. I did want to ask you one other question. We don't disagree with the need for oversight, but it seems to me that in this current financial crisis that we are in and all of these bad loans and toxic assets and all of that, that the oversight got really heavy after the horse had already left the barn and so that is kind of a concern, and there is always the concern that the oversight becomes too much, so restrictive after the fact that these institutions, particularly your small banks and lending institutions, can't function, and I certainly see this across my district in privately held banks, smaller banks that the oversight should have been steady and consistent and it always should be but yet, you know, when some catastrophe occurs because somebody was not minding the store, then all of a sudden the oversight comes down on these institutions to the point that all of a sudden they go out of business, it hurts the local community. But let me just ask you in the little bit of time I have got left, you mentioned to us what the FTC would be able to continue to do. What percentage of what you currently do is that? Does that represent 50 percent of your current responsibilities, 25 percent? Are you losing more than 50 percent of what you currently are charged to——

Mr. LEIBOWITZ. No, no, no. You know, I think it would be more like in terms of—if I think it through in terms of resources, I will get back to you with a response but I would say it is more like 5 to 10 percent of what we do, and of course, it has been an area, as you know, that we have been concentrating on more and more because it is very important to American consumers, many of whom are suffering from—almost of whom are suffering from some——

Mr. GINGREY. Well, I would appreciate it if you would get back to me.

Mr. Chairman, thank you for your patience and generosity, and thank the witnesses.

Mr. RUSH. Again, the Chair thanks the witnesses for the use of their time. You were very generous to us with your time and we want you to know that you have really contributed significantly to this process and we are better off because you testified today and helped us move along on this new proposal. So we will be in touch with you in the future, and the Chair wants you to know that we will give members 72 hours to ask questions in writing, and if you will respond to them in a reasonable amount of time, the Chair will really appreciate it, so thank you so very much.

The Chair now calls the second panel. The Chair welcomes the second panel to this hearing. The Chair apologizes for the inconveniences that you might have had to endure while we were on the floor voting, and the Chair is very respectful and appreciative of the fact that you have come from far and wide to be here to testify.

I want to introduce our witnesses, and I will begin my left. Ms. Gail Hillebrand is the senior attorney and manager for the Financial Services Campaign for the Consumers Union. Sitting next to her is Mr. Stephen Calkins, Esquire. He is associate vice president for academic personnel and a professor of law at Wayne State University. Next to him is Mr. Prentiss Cox, who is an associate clinical professor of law at the University of Minnesota, and sitting to Mr. Cox is Ms. Rachel E. Barkow, and Ms. Barkow is a professor of law at New York University School of Law. And last but not least, the gentleman with the smile next to her is Mr. Chris Stinebert. Mr. Stinebert is the president and CEO of American Financial Services Association. Again, we want to thank you and welcome you to this committee hearing.

It is the practice of this committee that we swear in the witnesses, so would you please rise and raise your right hand?

[Witnesses sworn.]

Mr. RUSH. Let the record reflect that all the witnesses responded in the affirmative.

Now it is my privilege to recognize you for 5 minutes for an opening statement, so Ms. Hillebrand, we will start with you.

TESTIMONY OF GAIL HILLEBRAND, SENIOR ATTORNEY AND MANAGER, FINANCIAL SERVICES CAMPAIGN, CONSUMERS UNION; STEPHEN CALKINS, ESQ., ASSOCIATE VICE PRESIDENT FOR ACADEMIC PERSONNEL AND PROFESSOR OF LAW, WAYNE STATE UNIVERSITY; PRENTISS COX, ASSOCIATE CLINICAL PROFESSOR OF LAW, UNIVERSITY OF MINNESOTA; RACHEL E. BARKOW, PROFESSOR OF LAW, NEW YORK UNIVERSITY SCHOOL OF LAW; AND CHRIS STINEBERT, PRESIDENT AND CEO, AMERICAN FINANCIAL SERVICES ASSOCIATION

TESTIMONY OF GAIL HILLEBRAND

Ms. HILLEBRAND. Thank you, Chairman Rush, Ranking Member Radanovich and members of the committee, you know Consumers Union as the nonprofit publisher of Consumer Reports but our mission is to inform, protect and empower consumers, and that is the role in which I appear before you today. My written testimony was joined by six national consumer organizations.

Consumer groups want and consumers in the United States need a strong consumer financial protection agency, a robust Federal Trade Commission and a strong role for States in consumer protection in financial services. We believe that those goals are entirely consistent with one another. The goal is a better financial services marketplace and better government in financial services oversight. We have to face it, the current system doesn't work. It is not delivering products or encouraging products that are understandable to consumers who use them or that meet the reasonable expectations created in the sales process. Instead we have gotcha banking. We have multiple regulators by type of providers, even when those providers are competing directly for the very same consumer. We have long delays for regulatory action and we don't have much of open public enforcement except by the FTC. And finally, we have abusive features in products that are squeezing their way through the holes in the existing law and the existing regulatory scheme.

I believe the job of government is to serve the people. We are not here to talk about more government, we are here to talk about better government in financial services oversight. Today our system isn't designed to do the job. It is spread out over six or more agencies with a hodgepodge of rules and statutes, and how much enforcement a provider receives depends in part on who its regulator is. That is just not a system designed to match the realities of today's market. We want to give the federal government a different and new job in the financial services marketplace, and that is to promote a fair as well as an efficient financial services market to watch for the market to prevent harms as they start to develop.

I come from the great State of California, where the option ARM and some of the other products that have gone so terribly sideways were pioneered, and you can only wonder if someone had been watching those markets more closely whether that would have spread around the country.

The mandate of the CFPA is the right mandate. It is to promote transparency, simplicity, fairness with accountability and access, and note I say "promote." It is a different job from what the federal government has had before, and with the CFPA we have the opportunity for an agency who has an obligation to get information, to learn about the market, to watch that market and then to make a conscious decision about what needs to be regulated and what doesn't and which regulatory tools to use and then to apply those tools evenly no matter who is providing the product. With the CFPA, we could get one agency to watch over the market, faster-acting responses, one agency that is responsible to you and to me when things gone wrong, and one place for your constituents to go instead of the alphabet soup they have now of trying to figure out who to complain to and who to get relief from.

The CFPA model is one federal rulemaker but multiple enforcers, and that brings me to the incredibly important continuing role of the FTC. I would like to disclose, Mr. Chairman, I was once a summer law intern at the Bureau of Competition at the FTC, longer ago than could possibly be relevant for today, but I want to disclose that. The FTC keeps its enforcement authority. It keeps its section 5 authority with a simple, regardless of the topic, financial services or not, with a simple consultation that can be at the staff-to-staff level. It keeps its authority with respect to all the statutes it now has with that referral process, and I think it is very important to note that is a refer and wait process but they are not waiting for a yes or no. If the CFPA does not take on a case the FTC thinks needs to be brought, it can still bring that case. The CFPA cannot say no. We have made a recommendation to you in the written testimony that the statute should allow the CFPA to waive that notice or to shorten it by individual case by type or category of case and by agency so that they can work these things out where there is commonly, for example, the telemarketer case with the EFTA claim. And we also are recommending to you that the FTC be given the authority to be a secondary regulator with respect to enforcing the CFPA rules, not writing them but enforcing them.

The FTC does lose jurisdiction to write unfair and deceptive acts and practices rules in financial services but that has not been a role they have been able to use widely in the last couple decades since the credit practice rule which went into effect in the 1980s. They keep all of their enforcement, and of course, it will be made stronger with the aiding and abetting enforcement. We believe this is the only way to put all the competing products under the same set of rules. I have some examples but I will hold them for the Q&A because I am conscious of your time, and I do want to say that I think it is very important what the FTC does right now in the recession. It is very important what the FTC will continue to do after the transfer of authority in those cases where there is overlapping enforcement and it will be extremely important what the FTC does with its additional authority.

There are a lot of things the FTC can do right now to help consumers who are suffering from the recession including cleaning up the problem with credit-reporting errors, the work it is now beginning to do under the new authority you gave it in mortgage modification and foreclosure, debt collection and debt settlement. All those things will remain extremely important. I would be happy to take questions. Thank you.

[The prepared statement of Ms. Hillebrand follows:]

Testimony of

Gail Hillebrand, Consumers Union

This testimony is presented on behalf of Consumers Union and is joined by:

Consumer Action
Consumer Federation of America
National Association of Consumer Advocates
National Consumer Law Center
Public Citizen
U.S. PIRG

Before the Committee on Energy and Commerce
Subcommittee on Commerce, Trade and Consumer Protection
U.S. House of Representatives
The Honorable Bobby L. Rush, Chairman

Hearing: July 8, 2009
The Proposed Consumer Financial Protection Agency: Implications for Consumers and the FTC

Testimony filed July 6, 2009

Thank you, Chairman Rush, Ranking Member Radanovich, and members of the Subcommittee. I am pleased to be able to offer views on the value to U.S. consumers of the proposed Consumer Financial Protection Agency and its intersection with the important ongoing consumer protection role of the Federal Trade Commission. I am testifying today on behalf of Consumers Union, the nonprofit publisher of *Consumer Reports.*[1] This testimony is joined in by

[1] Consumers Union of United States, Inc., publisher of *Consumer Reports* and *Consumer Reports Online,* is a nonprofit membership organization chartered in 1936 to provide consumers with information, education, and counsel about goods, services, health and personal finance. Consumers Union's print and online publications have a combined paid circulation of approximately 8.5 million. These publications regularly carry articles on Consumers Union's own product testing; on health, product safety, financial products and services, and marketplace economics; and on legislative, judicial, and regulatory actions that affect consumer welfare. Consumers Union's income is solely derived from the sale of *Consumer Reports*, its other publications and services, and noncommercial contributions, grants, and fees. Consumers Union's publications and services carry no outside advertising and receive no commercial support. Consumers Union's mission

Consumer Action, the Consumer Federation of America, Public Citizen, the National Association of Consumer Advocates, the National Consumer Law Center (on behalf of its low-income clients), and the U.S. Public Interest Research Group.[2]

Summary

Consumers Union and other consumer groups strongly support the Consumer Financial Protection Agency (CFPA). We also support a robust Federal Trade Commission (FTC). The Administration's proposal effectively provides for both. This testimony covers these points:

- The CFPA is essential because it will address many of the deep structural problems that have been barriers to effective regulation and oversight in the market for financial products and services offered to consumers.

is "to work for a fair, just, and safe marketplace for all consumers and to empower consumers to protect themselves." Our Financial Services Campaign engages with consumers and policymakers to seek strong consumer protection, vigorous law enforcement, and an end to practices that impede capital formation for low and moderate income households.

[2] Consumer Action, founded in 1971, is a San Francisco based nonprofit education and advocacy organization with offices in Los Angeles and Washington, DC.

The Consumer Federation of America is a nonprofit association of over 280 pro-consumer groups, with a combined membership of 50 million people. CFA was founded in 1968 to advance consumers' interests through advocacy and education.

The National Association of Consumer Advocates is a nonprofit 501(c) (3) organization founded in 1994. NACA's mission is to provide legal assistance and education to victims of consumer abuse. NACA, through educational programs and outreach initiatives protects consumers, particularly low income consumers, from fraudulent, abusive and predatory business practices. NACA also trains and mentors a national network of over 1400 attorneys in representing consumers' rights.

The National Consumer Law Center, Inc. is a non-profit corporation, founded in 1969, specializing in low-income consumer issues, with an emphasis on consumer credit. On a daily basis, NCLC provides legal and technical consulting and assistance on consumer law issues to legal services, government, and private attorneys representing low-income consumers across the country. NCLC publishes and regularly updates a series of sixteen practice treatises and annual supplements on consumer credit laws, including Truth In Lending, Cost of Credit, Consumer Banking and Payments Law, Foreclosures, and Consumer Bankruptcy Law and Practice, as well as bimonthly newsletters on a range of topics related to consumer credit issues and low-income consumers. NCLC's attorneys have been closely involved with the enactment of the all federal laws affecting consumer credit since the 1970s, and regularly provide comprehensive comments to the federal agencies on the regulations under these laws.

Public Citizen is a national nonprofit membership organization that has advanced consumer rights in administrative agencies, the courts, and the Congress, for thirty-eight years.

The U.S. Public Interest Research Group serves as the federation of and federal advocacy office for the state PIRGs, which are non-profit, non-partisan public interest advocacy groups that take on powerful interests on behalf of their members.

- The Administration's proposal draws sensible lines between the jurisdiction to be transferred to the CFPA and to be retained by the FTC.
- The Administration's proposal will promote law enforcement in four ways, and could be further strengthened.
- The proposal would eliminate a longstanding barrier to the effectiveness of the FTC's use of its authority to develop rules defining and limiting unfair or deceptive practices.
- As with any complex change, there are some important transition issues.
- The FTC's work to promote consumer protection in financial services in the period before the transfer of authority for rulemaking authority will be extremely important.
- The FTC also will continue to have important work to do after the creation of the CFPA in the many issue areas under its jurisdiction that are not being transferred.

I. The CFPA will meet a critical public need for stronger and more effective consumer protection in financial services

Strong, effective, preventative consumer protection is essential to protect individuals, family budgets, and the U.S. economy. The current crisis illustrates the high costs of a failure to provide effective consumer protection. The complex financial instruments that sparked the financial crisis were based on home loans that were poorly underwritten, unsuitable to the borrower, were arranged by persons not bound to act in the best interest of the borrower and who lacked a sufficient stake in the success of the borrower, or contained terms so complex that many individual homeowners had little opportunity to fully understand the nature or magnitude of the risks of these loans. While the crisis was magnified by highly leveraged, largely unregulated financial instruments and inadequate risk management, it began with a failure of consumer protection. The resulting crisis of confidence led to reduced credibility for the U.S. financial system, gridlocked credit markets, loss of equity for homeowners who accepted nonprime mortgages and for their neighbors who did not, empty houses, declining neighborhoods and reduced property tax revenue.

The existing regulatory structure for financial products and services doesn't work. It utterly failed in mortgages. As Government Accountability Office has stated, the "fragmented U.S. regulatory structure contributed to failures by the existing regulators to adequately protect consumers and ensure financial stability," and "efforts by regulators to respond to the increased risks associated with new mortgage products were sometimes slowed in part because of the need for five federal regulators to coordinate their response."[3]

The problems go beyond mortgages. Consumer problems with credit card practices reached very widely into the broad base of cardholders before the three federal agencies with the relevant power jointly proposed rules against unfair or deceptive credit card practices in May of 2008, and ultimately Congress stepped in to pass a strong new law. By the time that the new credit card law becomes effective, three and a half years will have passed since the Government Accountability Office released its study revealing deep consumer problems with credit card terms and practices,[4] and a much longer time since consumer groups first started identifying and warning against the types of practices that eventually were made illegal. Three years is a long time for a family budget to pay the price of unfair practices.

These delays may be attributable in part to the inherent inefficiency of the current federal regulatory structure and in part to the regulatory culture of some of the federal banking

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[3] Government Accountability Office, *Financial Regulation: A Framework for Crafting and Assessing Proposals to Modernize the Outdated U.S. Financial Regulatory System,* January 2009, GAO 09-216, p. 15, available at: http://www.gao.gov/new.items/d09314t.pdf.

[4] Government Accountability Office, *Credit Cards: Increased Complexity in Rates and Fees Heightens Need for More Effective Disclosures to Consumers*, September 2006, GAO 06-929, available at: http://www.gao.gov/new.items/d06929.pdf.

regulators. In other testimony, consumer groups have described problems with respect to the federal banking regulators (not the FTC) including: regulated entities being able to choose their federal banking regulator by changing the type of federal banking charter; a regulatory culture in the banking regulatory agencies which often favors private rather than public enforcement tools; and consumer protection taking a back seat to other responsibilities.[5] Preemption of state consumer protection laws also played a part in allowing abuses to grow to the point where they demanded national attention.

The CFPA will remedy inherent flaws in the current system. Currently, oversight is divided by type of entity even when the entities offer competing products. Under many consumer statutes, the Federal Reserve Board writes the rules but the FTC or one of five federal banking agencies will enforce those rules. Consumer financial products which compete directly against one another may be covered by different laws and thus provide different rights and obligations to the consumer and to the provider. New products are emerging every day, and no agency has the job of evaluating whether or how existing laws and rules should be changed to address emerging financial products. Congress can eliminate these weaknesses and inefficiencies in the federal government by creating a single federal Consumer Financial Protection Agency with exclusive authority in all areas except enforcement. This is what the Administration has proposed.

[5] Regulatory Restructuring: Enhancing Consumer Financial Products Regulation, Before the H. Comm. on Financial Services (2009), testimony of Travis B. Plunkett and Edmund Mierzwinski, on behalf of ACORN, Americans for Fairness in Lending, Center for Digital Democracy, Consumer Action, Consumer Federation of America, Consumers Union, Demos, National Association of Consumer Advocates, National Consumer Law Center (on behalf of its low-income clients), National Fair Housing Alliance, National People's Action, Public Citizen, U.S. PIRG, p. 7-8, available at: http://www.defendyourdollars.org/pdf/reg-restructure-testimony-0609.pdf; Modernizing Bank Supervision and Regulation, Before the S. Comm. on Banking, Housing & Urban Affairs (2009) testimony of Gail Hillebrand, Financial Services Campaign Manager, Consumers Union, p. 4-6, available at: http://www.defendyourdollars.org/pdf/Sen-Bank-Test-032409.pdf.

The CFPA will eliminate barriers in the current regulatory structure and thus promote more effective federal oversight in the market for financial products. Consumer protection will be a top priority. Charter choice won't mean regulator choice. The CFPA will be able to gather the information it needs to make fair and balanced choices based on actual market information. The CFPA will have the power not only to write and enforce rules under specific existing consumer protection statutes, but also to predict and prevent harm to consumers from new practices and to fill gaps in current protections.

The CFPA's mandate, as described in Section 1021 of the Administration's proposal, will be to promote transparency, simplicity, fairness, accountability, and access in the market for consumer financial products and services. The CFPA is to exercise its authority for the purposes of ensuring that:

- consumers have understandable and usable information to make their own responsible decisions about consumer financial products or services;
- consumers are protected from abuse and fairness deception and discrimination; (this will extend to terms, features, and marketing practices, no matter what kind of company provides the financial product);
- markets for consumer financial products or services operate fairly and efficiently with ample room for sustainable growth and innovation; and
- traditionally underserved consumers and communities have access to financial services.[6]

The CFPA proposal is well designed to create an agency that can do this job. The proposal gives the CFPA authorities including to examine, request information, and engage in research, which are essential to see what is going on in the market for financial products and services. This information should provide a knowledge base to make sound choices about

[6] Proposed bill language, section 1021, *see also* section 1033 on sales practices.

whether and how to intervene; an ability facilitate true informed consumer choice and both the ability and the responsibility to identify emerging practices, products, and product features that are particularly likely to harm or deceive consumers. This is a big job. Putting it in one place, rather than scattering parts of it among a variety of federal agencies depending on the nature of the product provider strongly increases the likelihood of consistent, coherent, and effective rules.

II. The allocation of responsibilities to the Consumer Financial Protection Agency is sensible

The Administration's proposal calls for the CFPA to assume many duties and powers essential to consumer protection in financial products and services which are currently in the hands of other agencies. Lines must be drawn to ensure that each agency's role is clear. While line drawing is always difficult, it has been well executed in the Administration's plan. It satisfies these principles.

A. Competing products should have the same federal rules and the same federal regulator

The CFPA will have responsibility for all financial products, with exceptions for non-credit related insurance products and for SEC and CFTC regulated activities.[7] This scope of coverage is essential because products and services that the financial services industry sees as distinct products and services increasingly compete directly with one another for a consumer's business. For example, prepaid payment cards compete with bank accounts, especially for the 40 million American households that are unbanked or underbanked.[8] However, the provider's

[7] Insurance has traditionally been regulated by the states, in some cases with specific oversight of rate setting. The proposed bill language also exempts persons regulated by the SEC or CFTC, with the definition of a person so regulated limited to when that person is acting in its regulated capacity. Proposed bill language, sections 1022(f)(2)&(3) and 1002(27)&(28).

[8] Center for Financial Services Innovation, The CFSI Underbanked Consumer Study Fact Sheet, Jun. 2008, available at: http://www.cfsinnovation.com/research-paper-detail.php?article_id=330366. Though the prepaid

choice of how to hold the funds affects whether or not the basic protections of the Electronic Fund Transfer Act apply to consumers who do their banking using prepaid cards. Even consumers who have bank accounts are offered competing payment methods with fundamentally differing legal rights and obligations. A consumer who just wants to buy something online may choose between using a credit card, debit card, a prepaid card, or a pay later credit service. Soon that consumer might also choose to use a cell phone to make a charge against any one of those method payments or against the cell phone bill directly. Of those five different methods to pay for one Internet purchase, only two of them have clear protections against the obligation to pay an unauthorized charge. The legal standards were developed on a product by product basis, and simply do not recognize the increasing interchangeability of these methods for individual consumers.[9]

Because the CFPA will have jurisdiction over all of the different types of products, all of the providers, and all of the relevant statutes and rules, it will be in a position to determine whether emerging issues need to be addressed. If so, the CFPA will be able to select among or combine the approaches of: enhanced disclosure or education; creation of a standard product offering to be offered alongside more complex products; examination, compliance activities, and enforcement of existing law; updates to existing regulations; and recommendations to Congress for amendments to existing statutes.

B. Products and services that are most closely tied to credit experience should all be overseen by the same federal entity

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industry is growing and is developing into a shadow banking system, it is significantly underregulated. Plunkett and Mierzwinski, *supra* note 5, at p. 14-15.

[9] For a discussion of the holes in current consumer law with respect to various payment methods, see: G. Hillebrand, *Before the Grand Rethinking*, 83 Chicago-Kent L. Rev. No. 2, 769 (2008), available at: http://www.consumersunion.org/pdf/WhereisMyMoney08.pdf.

A consumer experiences taking a loan as a single transaction, even though legally it involves multiple statutes. A consumer may want the answer to a simple question: "Am I getting the best loan I can qualify for?" The answer may depend on compliance by the lender or broker with the Truth in Lending Act and the Equal Credit Opportunity Act. It may be affected by closing costs to which the Real Estate Settlement Procedures Act applies. It may be influenced by sales practices that the CFPA can address under its rulemaking power in Section 1033 of the bill proposal. Or, the answer may depend on the accuracy, integrity, and completeness of information provided to or maintained by a consumer reporting agency. This is the reason to migrate most Fair Credit Reporting Act (FCRA) jurisdiction to the CFPA.[10] It also makes sense to place jurisdiction under the Fair Debt Collection Practices Act with the same agency that will have jurisdiction with respect to the marketing, underwriting, and other elements of the underlying credit arrangement.

C. To the maximum extent possible, all of the elements of a transaction that touch the consumer or that affect the consumer's experience should be under the same federal oversight body

This principle is similar to the one just discussed. An additional benefit of the CFPA is that a consumer who unhappy with his or her bank or nonbank financial services provider should have one place to go within the federal government, whether the reason for that unhappiness is the loan application experience, dissatisfaction with underwriting that is grounded in the contents of the credit report, a debt collection practice, or an incomprehensible GLBA privacy notice.

[10] While there are uses and economic impacts of consumer reports and credit scores which go beyond credit, it would involve too much duplication to move only the portion of FCRA related to financial services and not oversight with respect to furnish the furnishing of information to the very same file a very same people if the file is to be used for different FCRA purpose, such as an employment check.

D. Fast changing financial practices must be under a regulator with sufficient authority for information collection, gap filling rulemaking power, examination, compliance, and enforcement

New and evolving financial practices must be regulated by an agency that has sufficient authority to fill in the gaps where current regulation falls short. The CFPA is designed to do that. This Subcommittee has already heard testimony by experts who noted the inability of the FTC to provide any meaningful hindrance to the structured financing of predatory home mortgage loans which significantly contributed to the current foreclosure crisis.[11] This is not a reflection on the desire, ability, or level of engagement of the FTC, but instead flows from restrictions on the FTC's use of its unfair or deceptive acts and practices rulemaking power and on the limits of the FTC's jurisdiction to only a subset of mortgage originators.[12] The CFPA will not face those hurdles. Instead, the CFPA will have a strong set of enforcement and analytical tools to identify, prevent, and address financial practices that are dangerous to consumers and perhaps even to the economy as a whole.

E. The choice to leave financial service provider data security issues with the FTC makes sense

It appears that the Administration made a sensible and practical choice in leaving with the current agencies the rules implementing the FCRA's requirement for "red flag" regulations, the FCRA disposal rule, and the substantive obligations to safeguard personal information under section 501 of the Gramm Leach Bliley Act (GLBA). GLBA safeguards and the red flag requirements should have similar effects on consumers if they are fully and well implemented. That effect should be to reduce the amount of sensitive personal information which is

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[11] Hearing on Consumer Credit and Debt: The Role of the Federal Trade Commission in Protecting the Public Before the Subcomm. on Commerce, Trade and Consumer Protection, Comm. on Energy and Commerce (2009), testimony of Christopher L. Peterson, Professor of Law, University of Utah, p. 3.

[12] *Id.*

unprotected (GLBA); and to detect when such information is misused, such as to commit identity theft, with the detection supporting future prevention (red flags rule). Similarly the FCRA disposal rule has a purpose quite similar to the safeguards rule. Proper disposal of records containing sensitive personal information should prevent the spillage of this data. It makes sense to keep this collection of items together. Then, the question is whether to keep them together at the FTC, or to move them together to the CFPA.

The FTC has a deep expertise in data security issues and in consumer privacy issues which may arise within or outside the context of financial services. Sensitive data may be held both by providers of financial products and services, and by many other types of entities, including employers. In this context, the choice not to move this collection of issues makes sense.

III. The CFPA will lead to more enforcement of consumer protection laws, and enforcement could be further strengthened

Law enforcement is good for the public and it also is good for honest competitors. The Administration's proposal wisely does not eliminate any current enforcement powers of other federal agencies. The CFPA proposal enhances law enforcement in four ways. First, the CFPA itself can enforce rules and statutes. Second, the FTC retains its full Section Five enforcement authority, subject only to a requirement for staff level consultation and coordination. Third, the proposal preserves the other existing enforcement authority of the FTC (as well as that of the federal banking regulators), subject only to a "first refusal" type referral to the CFPA. Fourth, the proposal clearly permits state regulators and state Attorneys General to enforce CFPA rules and state consumer protections in financial products and services - regardless of the nature of the entity which provides those services. State enforcement can have special value in identifying harmful practices that develop first in one region or in a subset of an industry. Early state enforcement can protect good competitors from the pressure to adopt abusive but profitable practices used by their competitors. It can stop harmful practices before they spread nationwide. State enforcement also adds significant enforcement resources by persons who may have close ties to the local communities where the consumers who are victims of a law violation reside.

The FTC's continued power to bring cases within its existing jurisdiction is valuable, but the proposal would be stronger if it also permitted the FTC to enforce the CFPA rules, perhaps by making a violation of a CFPA rule constitute a violation of the FTC Act. With this change, consumers would be protected by having more potential enforcers. More cops on the beat for both existing law and for the CFPA rules would mean more room for honest competitors who don't break the rules to win customers. Further, power to enforce CFPA rules could provide an important back up at times when the CFPA's attention might be taken up with some of its non-enforcement responsibilities.

The proposal is missing an important element to promote robust enforcement of consumer protections. That is the ability of consumers to seek redress for violations committed against them. Adding a requirement that wrongdoers be accountable to the individuals they harm would further strengthen the enforcement of the laws and rules to promote consumer protection in the financial services marketplace. Private enforcement can police the market, catch emerging problems early when they first affect individuals, and ensure that underserved groups receive the benefits of the substantive rules even if those groups face barriers in communicating their problems to a government agency. The ability to seek redress in the courts is also a fundamental element of a just society. Private enforcement is the norm under most federal consumer protection financial statutes, and it has been a good complement to public enforcement many consumer protection statutes that will be consolidated under the CFPA.[13] The proposal would be strengthened by adding a private right of action with respect to the CFPA rules.

Finally, there are two technical issues in the enforcement section. First, the backstop enforcement authority for the FTC and other current agencies would be improved by adding a provision to make it clear that the CFPA can waive or shorten the 120 day referral period detailed in section 1022(e)(3) for a single case, a category of cases, or a category of cases to be brought by a particular agency. Second, there appears to be a drafting error in the subsection on civil money penalties. The introductory language in section 1055(c)(1) clearly intends to make civil penalties available for all types of violations, but none of the tiers expressly include ordinary violations of the rules or statutes outside of circumstances of special levels of intent, section 1036, or alternative products. This could be added to tier one by changing its reference to "any violation of a final order or condition imposed by the Agency" to also include "any rule or enumerated consumer law." Alternatively, it could be addressed by adding a reference to these rules and laws to the initial portion of tier two.

IV. The proposed change in jurisdiction is not a reflection on the performance of the FTC

To reach a sensible regulatory structure, jurisdiction must be moved from the current agencies which hold it whether or not each of those agencies has done a good job with its existing authority and resources. Restructuring to create a CFPA is not designed to punish any existing agency, but rather to create one federal agency with the authority, powers, and breadth of jurisdiction necessary to do the job in consumer protection with respect to financial products and services. The current economic downturn, and the mortgage and credit crisis that

[13] Plunkett and Mierzwinski, *supra* note 5, at p. 24.

contributed to it, has illustrated the magnitude of that job. Thus, the migration of jurisdiction should not be seen as a judgment on the dedication, value or effectiveness of the FTC. Indeed, despite limits on its resources and authority, which are discussed below, the FTC has been more aggressive in the use of enforcement to promote consumer protection than federal banking regulators such as the Office of Comptroller of the Currency or the Office of Thrift Supervision.[14]

V. The Administration's bill proposal includes important improvements to the FTC Act

The Administration's proposal provides for a key improvement to the FTC's ability to protect the public. Title XI will eliminate the cumbersome extra procedures imposed by Section 57a(b) of the FTC Act that now hinder the FTC's ability to engage in effective rulemaking on unfair or deceptive acts and practices (UDAP). Notice and comment will still be required. This reform would simply place the FTC's unfair and deceptive acts and practices rule-making authority on a procedural par with other agencies. This Subcommittee has already considered a similar change with respect to rules concerning consumer credit and debit, which is included in HR 2309.

It has been decades since the FTC has used the UDAP rulemaking authority to promulgate a major rule against unfair financial practices. Kathleen Keest from the Center for Responsible Lending described the decade-long process when the FTC used this authority to promulgate the Credit Practices Rule – from 1975 introduction to the end of all legal challenges in 1986. She noted that cumbersome procedural requirements have forced the FTC to choose

[14] Peterson, *supra* note 11, at p. 8. Some examples of the FTC's recent enforcement results, from its Annual Report, include a settlement agreement that resulted in $114 million in credits and refunds to consumers with respect to allegations of deceptive marketing of subprime credit cards, and an action against a debt consolidation company for entering into contracts with consumers in states the company was not authorized to do business. *The FTC in 2009: Federal Trade Commission Annual Report*, Federal Trade Commission, March 2009, p. 3, available at: http://www.ftc.gov/os/2009/03/2009ftcrptsv.pdf.

case by case enforcement rather than rulemaking that could otherwise be more effective. As Ms. Keest put it before this Subcommittee in May:

> With limited resources to deploy over a vast array of issues and players – literally thousands of players – and faced with a rapidly evolving and growing marketplace, it is not a rational choice for an agency that also has law enforcement responsibilities to commit to that kind of a long march into a blind tunnel.[15]

The improvement in the FTC's UDAP rulemaking procedure will give the FTC the flexibility to choose between case by case enforcement and rulemaking that can apply to all players using a particular practice in those areas for which it retains jurisdiction. The measure also provides an additional improvement by adding a provision to make it unlawful to knowingly or recklessly provide substantial assistance to someone who is violating the FTC Act.

VI. Transition issues

The CFPA will need more enforcement staff than the number that will be transferred from other agencies, given the widely documented inability of those agencies' collective efforts to keep up with the market through law enforcement.[16] In addition, the FTC may need to retain some enforcement staff now working on financial services matters in order to exercise its back up authority, which, as discussed elsewhere in this testimony, will be of particular importance in the early years of the CFPA.

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[15] The Consumer Credit and Debt Protection Act: Hearing on H.R.2309, Before the Subcomm. on Commerce, Trade and Consumer Protection, Comm. on Energy and Commerce (2009), testimony of Kathleen E. Keest, Center for Responsible Lending, Consumer Federation of America, and the National Consumer Law Center (on behalf of its low-income clients), p. 2, available at: http://energycommerce.house.gov/Press_111/20090512/testimony_keest.pdf.

[16] In this Subcommittee, others have testified that the FTC needs more resources to effectively police the large national market in so many areas. Peterson, supra note 11, p. 3; *see also*, Plunkett and Mierzwinski, *supra* note 5, p. 10-20, discussing errors and omissions of the federal bank regulatory agencies.

The timing of the movement of staff may need to be more closely aligned with the timing of the transfer of responsibilities for the enumerated statutes. The Administration's proposal calls, in section 1062(a)(1), for a transfer of the functions from other agencies on a designated transfer date. However, the effective date for each employee to be transferred is not later than 90 days after the transfer date, per section 1064(b)(1). This raises the question of how the CFPA will fulfill its new functions during the first 90 days before all of the necessary employees are transferred. These two dates may need to be aligned, while still providing advance notice to employees of a change in their job assignment.

The transfer of personnel raises another practical concern. Section 1064 requires that the CFPA and each of the federal regulators from which it is to receive employees shall "determine the number of employees" that are "necessary to perform or support the consumer financial protection functions... that are transferred to the agency." It further provides that CFPA and each affected agency shall jointly identify the employees of that affected agency who will be transferred. This is a good system for a perfect world. However, might work better if it were also to include a referee or other clear process to reach a binding result if the CFPA and another agency not supervised by the Treasury Department cannot agree on the number or identity of the employees to be transferred.

Once the complex transfer process is completed, the resulting agency should be much less complex for the public to access, approach, and be served by than the current matrix of federal agencies.

VII. The FTC's actions on financial services issues before the transfer date will have a significant impact on the initial success of the CFPA

The CFPA will assume jurisdiction of issue areas transferred from other agencies on a designated date which could be from 180 days to 18 months (or 24 months if the need is documented to Congress). Thus the FTC could maintain all of its current responsibilities in financial products and services for as long as two more years after enactment of the statute. Recessions seem to bring out financial frauds, or perhaps it is that consumers and their families can't afford to lose money to fraudsters during a recession. In either case, every dollar lost to financial fraud is a dollar not spent at the local grocery store or local retailer; a dollar not spent on family needs ranging from housing to shoes for the kids; or a dollar not saved to pay for future college tuition or retirement.

The FTC's work today; the FTC's work in the up to two year period before the new agency receives transferred jurisdiction; and the FTC's enforcement activities, particularly in the first two to five years after the start of the new agency, all are critically important to the protection of the economic health of American families. The CFPA will have many important responsibilities to address concurrently, and will face all of the normal challenges of agency start up and the meshing of staffs who have worked under differing regulatory cultures. The more work that the FTC does now under its existing authority, and the more work the FTC performs using the improvements to its existing authority as soon as the proposal is enacted, the better shape these issues will be in at the time of the transfer.

The FTC's current work in financial products and services and the work it will do in the time between enactment of the CFPA legislation and the transfer of functions will create a strong foundation for the future work of the CFPA. In addition, for a period of time after the transfer of functions, the FTC's power to bring both Section Five cases with consultation and other cases after referral will be a particularly important because the enforcement functions and processes of the new agency will be being structured, tested, and tweaked during part of that time.

Appendix One describes in some detail issue areas within consumer financial products and services where action by the FTC could contribute to cleaning up old and new problems before the transfer of functions to the CFPA. For example, the FTC has important work to do now in addressing the credit reporting system, unfair debt collection practices, and the empty promises in debt settlement services. Consumers still experience problems with the conduct of the three major consumer reporting agencies (CRAs) -- Equifax, Experian, and TransUnion. The FTC could take immediate action to address inaccurate information from furnishers, mismatched information in files, and a completely broken system for investigating consumer disputes.[17]

VIII. U.S. consumers will continue to need a strong, well-funded, fast acting FTC after the creation of the CFPA

The FTC will remain an important actor in consumer protection. For example, the used-car rule affects the economic well-being of any family who buys a used car to go to work. The Gramm Leach Bliley Act safeguards requirement affects whether individuals suffer a sudden, disruptive, temporary loss of funds from a bank account because sensitive personal information has been stolen from any one of a wide variety of sources and used to impersonate that consumer. When there has been a data breach, businesses large and small, as well as individuals, turn to the FTC for information. The FTC will retain all of these important roles, and it can do

[17] *Automated Injustice: How a Mechanized Dispute System Frustrates Consumers Seeking to Fix Errors in their Credit Reports*, National Consumer Law Center, Jan. 2009, available at: http://www.nclc.org/issues/credit_reporting/content/automated_injustice.pdf.

more for consumers in these and other areas. Appendix Two provides a few examples of some of the work the FTC can undertake to protect consumers within its post-CFPA jurisdiction.

Conclusion

With the CFPA, U.S. consumers will finally have an agency with strong authority and a clear responsibility to identify and fill the gaps in consumer financial oversight before those gaps harm the public. A strong FTC with broad enforcement authority will further protect consumers, law-abiding competitors, and the financial services marketplace.

A consumer from the District of Columbia emailed Consumers Union on July 1 to say that he had just written to Congress asking for passage of the Consumer Financial Protection Agency. He said: "It's time to give some protection to the consumer and his wallet...." A consumer from Missouri emailed Consumers Union on July 2 to say that he planned to write a letter to his Senator in support of the CFPA. He summarized his personal views about the CFPA: "Let's all play fair and we can all benefit." The ultimate goal of the CFPA is to create and sustain that fair marketplace. Consumers Union and other consumer groups are pleased to support it.

Appendix One: Activities in financial products and services where FTC action would benefit consumers (partial list)

The FTC should act now on these issues, up to the limits of its resources and current authority, in order to create a strong base from which the CFPA can move forward in areas in which jurisdiction is to be transferred.

Fair Credit Reporting- With respect to the credit reporting system, the FTC should:

- Take enforcement action against the CRAs' persistent noncompliance with the FCRA dispute and investigation requirements. The CRAs must be required to conduct meaningful investigations, not just turn dispute letters into 2 digit codes, and not permit a boilerplate response by the furnisher to be the end of the inquiry.

- Require CRAs to send to the furnisher all documents submitted by the consumer in an FCRA dispute pursuant to the FCRA's requirement that "all relevant information" be forwarded.

- Require CRAs and furnishers to promulgate technical specifications for the Metro 2 reporting format that allow CRAs to track transferred accounts, prevent duplicate accounts, and prevent reinsertion by furnishers of deleted incorrect items.

- Require the CRAs to use the full identifying information of consumers when matching information to a file, including all nine digits of the consumer's Social Security number.

- Require CRAs to provide a copy of the same report they issued a creditor when the consumer subsequently requests a copy of his/her credit report after an adverse action. The same obligation should be imposed with respect to the sale of credit scores.

- Take more enforcement actions against non-bank furnishers, especially against debt collectors who re-age information and lack documentation to support their reporting.

- Take action against the use of "mortgage trigger lists" (lists of consumers who recently applied for mortgages sent to competing brokers) for FCRA violations such as the CRAs' lax standards in screening brokers, failure to provide true "firm offers of credit," and illegal mortgage broker acquisition of full credit reports in addition to a list of names.

Debt Collection - The FTC should undertake a vigorous enforcement program against debt collection abuses, such as:

- Prohibit debt collectors who pursue debts in court or in arbitration without evidence of the essential facts of the debt, or without holding any license required by state law. The FTC must require that no collection activity can commence without proof of indebtedness by the consumer, date of the debt, identity of the original creditor, itemization of all fees, charges and payments, and itemization of all post-default charges and credits.

- Stop debt collectors' attempts to collect on time-barred debts, deceptive settlement agreements, putting old debt on new credit cards, and cross-debt collection by refund anticipation lenders.

- Restrict debt collectors from accessing a consumer's financial account. At a minimum, there should be a requirement for express, informed, written permission.

Debt settlement companies - The FTC's own workshop showed that these services often don't benefit the consumers who pay for them. HR 2309 would direct the FTC to consider issuing regulations in the area of debt settlement. The FTC should ban the charging of advance fees in debt settlement and cap fees based solely on a low percentage of the amount by which the debt is actually and permanently reduced below the amount owed when the debt settlement contract was first signed.

Foreclosure rescue scams and mortgage issues – The FTC's current and future work in these two areas is needed now more than ever.

Ban remotely created checks - The FTC could determine that the use of this method to access the consumer's checking account has outlived any usefulness it might have once had. A consumer who wants to make a just-in-time payment can choose to authorize an electronic debit. The remotely created check, which is an oral authorization for a check, remains as a vehicle to open consumer's checking accounts to fraud.

Appendix Two: Examples of some of the work the FTC can undertake to protect consumers within its post-CFPA jurisdiction (partial list)

Used car sales

- The FTC should step up enforcement of the Used Car Rule, especially regarding rebuilt wrecks, laundered lemons, and "certified" vehicles where the warranties are represented as being in effect, but in fact are partially or entirely void.

- The FTC should enforce the Used Car Rule regarding compliance with the Spanish language version.

- The FTC must do more to protect members of the armed forces and their families from auto-related scams, particularly auto sales and service practices.

Data protection and ID theft - In the area of fighting identity theft, the FTC could be more effective in informing consumers of the ability that they now have in every state[1] to place a security freeze on access to their consumer reports – essentially stopping access for purposes of opening new accounts until the consumer requests that such access to be given. The information about the security freeze remains appears in the FTC's online consumer advice for people who have already been victims of identity theft,[2] but not on its advice page for people who have just been told that their sensitive personal information has been stolen or breached.[3] The security freeze is still entirely absent the FTC's printed Deter Detect and Defend flyer,[4] which is widely used or copied by businesses and other entities when they have a security breach.

Vigorous enforcement of the GLBA obligation to safeguard sensitive personal information and the more recent "red flags" rule is also important to ensure that businesses don't

[1] Consumers have this right in 46 states by statute, and in other states under a voluntary industry program. See http://www.defendyourdollars.org/topic/privacy/security_freeze/.

[2] http://www.ftc.gov/bcp/edu/microsites/idtheft/consumers/defend.html.

[3] http://www.ftc.gov/bcp/edu/microsites/idtheft/consumers/compromised.html.

[4] http://www.ftc.gov/bcp/edu/pubs/consumer/idtheft/idt01.shtm.

make it easy for identity thieves – and those who sell data to them – to obtain or to use sensitive personal information. The FTC could further curb identity theft by reducing the widespread availability of consumers' information by undertaking activities to limit the collection, sharing, use, and sale the collection of social security numbers.

Credit Repair – Consumers need more vigorous enforcement of the Credit Repair and Organizations Act.

Truth in broadband advertising - Consumers should be able to choose providers based on truthful information detailing speed and quality of service. Most consumers are not well informed about their broadband offerings and are unaware of (a) the true speed they can expect to experience on an average basis and (b) whether their particular provider will block or prioritize particular kinds of Internet traffic. The FTC should require broadband access providers to disclose, in simple and non-technical terms, their broadband access and usage terms including:

- actual levels of bandwidth (throughput),
- the amount of latency (delay)
- any limitations on consumers ability to access services and content of their choice
- the extent to which certain content and services get preferential delivery.

The FTC should bring enforcement actions against those broadband providers who do not disclose or who misrepresent the features of their service.

Online Behavioral Marketing - More must be done to protect consumer privacy. Consumers are being asked to pay a heavier and heavier price in order to take advantage of the full range of goods and services offered through the Internet, as marketers, researchers, data-mining companies and even service and content providers create profiles of personally identifiable information based on consumer behavior. Internet service providers, content providers and vendors must take greater responsibility in considering the collateral impact their behavioral tracking models have on consumers.

The FTC should:

- investigate the online marketplace in light of new developments in the data mining field;
- expose marketing practices that compromise user privacy;
- issue the necessary injunctions to halt current practices that abuse consumers; and
- adopt policy principles outlining what can be considered technology neutral Fair Information Practices.

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Mr. RUSH. Thank you very much.

Mr. Calkins, you are recognized for 5 minutes.

TESTIMONY OF STEPHEN CALKINS

Mr. CALKINS. Thank you. Chairman Rush, Ranking Member Radanovich, members of the subcommittee, thank you for inviting me here to testify about this important matter.

The proposed legislation would effect sweeping changes in the Federal Trade Commission. The key to the bill is in the definitions and they are written extremely broadly. Applying those definitions and working your way through the bill, you find that the bill would transfer out of the Federal Trade Commission much of the work that the Federal Trade Commission now does, giving those responsibilities to the new agency and giving it the exclusive authority to prescribe role and issue guidance with respect to much of what the Bureau of Consumer Protection does.

If you take the FTC's most recent annual report for 2009 and turn to consumer protection and start reading what they have done, subprime credit, mortgage servicing, foreclosure rescue, fair lending, mortgage advertising, debt collection, payday lending, Operation Clean Sweep, Operation Telephony, the Sumtasia marketing case, payment systems, the Naovi case, Nationwide Connections case, global marketing case and so on and so forth, prepaid phone calls, on matter after matter after matter of what they have been doing, I read the bill as saying that all of that would be transferred to the new agency. In short, we would have major change. Indeed, if you read the bill carefully you would find that even some of the antitrust responsibility of the Commission would be transferred. I assume that is a mistake but that is how it is currently written.

Now, why have this sweeping change in what the Federal Trade Commission does? It might make sense if the Federal Trade Commission was a bad agency that was doing bad work, but as you all have spoken so eloquently this morning, the Federal Trade Commission is a good agency that has been doing good work. It has a unique bipartisan structure. It combines consumer protection and competition to bring the best from both perspectives to bear on problems and it has been doing important work for consumers including in the world of credit for a very, very long time. Transferring responsibility from the Federal Trade Commission to another agency obviously creates some pretty significant risks, and my recommendation to you is to proceed with great caution, to weigh those risks to decide whether they are really worth running and certainly if they are to work very hard to try to minimize those risks because the bill as written would make major changes and you need to be very careful to make sure that all of this makes sense.

Thanks very much, and I am happy to answer questions when the time comes.

[The prepared statement of Mr. Calkins follows:]

Prepared Statement of

Stephen Calkins
Associate Vice President for Academic Personnel and Professor of Law
Wayne State University

Before the

Committee on Energy and Commerce
Subcommittee on Commerce, Trade, and Consumer Protection
United State House of Representatives
Washington, D.C.

at a hearing on

The Proposed Consumer Financial Protection Agency:
Implications For Consumers And The FTC

July 8, 2009

I. Introduction

Chairman Rush, Ranking Member Radanovich, and Members of the Committee: I am Stephen Calkins, Associate Vice President for Academic Personnel and Professor of Law at Wayne State University and a former General Counsel of the Federal Trade Commission.[1] I appreciate the opportunity to appear before you today to share some observations in connection with the important subject you are addressing.

I do not pretend to be an expert in bank regulation. Nor, for that matter, am I taking a position for or against the bill you are considering. Rather I appear before you to make three points:

- The Federal Trade Commission ("FTC" or "Commission") is an extraordinary agency with unique attributes and a unique role, and, although by no means perfect, it has performed its mission well. Many of the consumer protection laws that now protect consumers reflect work done by the agency in the consumer financial services area.
- The proposed Consumer Protection Agency Act of 2009 would fundamentally change the functioning of the agency, both with respect to protection of consumers in the financial services market and more generally.
- Before imposing these restrictions on the Commission's authority, Congress should consider carefully whether the gains outweigh the harms and whether those gains could be achieved without causing such extensive harm.

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[1] I am appearing solely in my personal capacity, and do not represent or speak for Wayne State University, the Federal Trade Commission, or any other entity or individual. Since the proposed new legislation on which I am testifying has only just been released, this statement necessarily represents only my initial views.

II. The Federal Trade Commission

The Federal Trade Commission is a tiny agency, as federal agencies go, with only 1100 employees. Yet it has a very special role. It is the one agency charged with protecting consumers, and it has performed that assignment admirably.

The FTC has special strengths. It is bi-partisan, with no more than three Commissioners coming from one party. It combines law enforcement with research and reporting, hearings and workshops, advocacy and amicus briefs, and consumer and business education and outreach. A unique strength of the FTC is the combining two functions—competition enforcement and consumer protection—within a single agency.[2] This improves both functions, by bringing a consumer emphasis to competition enforcement and economic rigor to consumer protection.

The Commission has a long history of important contributions in the area of credit and financial products, even though it has had to operate with only limited jurisdiction (banks and insurance are excluded). The FTC played an important role in supporting passage of early consumer credit protection statutes and in prosecuting a multitude of financial frauds. The FTC in the 1970's issued a rule outlawing the use of the so-called "holder-in-due-course" doctrine in consumer credit contracts, and its investigations and cases provided the foundation for credit-protection laws such as the Equal Credit Opportunity Act, portions of the Fair Credit Billing Act, and the Fair Debt Collection Practices Act. More recently, it stepped up and became the leading consumer privacy

[2] *More Than Law Enforcement: The FTC's Many Tools—A Conversation with Tim Muris and Bob Pitofsky*, 72 Antitrust L.J. 773, 776-81 (2005); Thomas B. Leary, *Competition Law and Consumer Protection Law: Two Wings of the Same House*, 72 Antitrust L.J. 1147 (2005); Report of the American Bar Association Section of Antitrust Law, Special Committee on the role of the Federal Trade Commission, 58 Antitrust L.J. 43 (1989).

protection law enforcement agency and used its array of powers to become a leading data security protection agency. Although some have said it could have moved faster and done more, it responded to another need by bringing a series of major predatory lending cases. I have followed the agency's work in both the consumer protection and competition fields for many years and believe that, while constrained by limited resources, the FTC is an agency that time and again has taken innovative actions to protect consumers, including with respect to financial services.

III. The Consumer Protection Agency Act of 2009 Would Fundamentally Change the FTC's Role

In a way, the FTC should feel complimented, since the new agency is in part modeled closely after the FTC. Like the FTC, it would have a governing board of five members, although one slot is reserved for the Director of the National Bank Supervisor. (It is unfortunate that the agency departs from the FTC model to allow all five Board members to be from the same party. A strength of the FTC is the bi-partisanship and continuity that comes from shared leadership.)[3] Like the FTC, it would have a broad array of powers—adjudication, rulemaking, litigation, etc.—and it would have some powers the FTC has long wanted. It is noteworthy that the Agency would be specifically given some of the authority that is the hallmark of the FTC, such as research and reporting, consumer education, and "collecting and tracking information on

[3] A few other small points: It is wise to use five-year terms (rather than the FTC's seven-year terms) so there can be both change and continuity. But the bill should clarify that although Board Members serve five year terms, the President may change at any time which Board Member serves as Director of the Agency. Compare Section 1012(c)(1) ("An appointed Board member, including the Director of the Agency, shall serve for a term of 5 years."). And it would be unfortunate to call both the chief executive of the agency and the reserved Board Member "Director," since that is likely to invite confusion.

consumer" complaints." Section 1014(c)(3). The Agency would be entrusted with the same "unfairness" and "deception" authority that the FTC has administered since 1938 when the Wheeler-Lea Act amended the FTC Act. Section 1031. (Indeed, one can foresee warring interpretations of those terms once two federal agencies are in the business of regularly defining and applying them. Would Agency decisions be precedent for the Commission, and vice versa?) All that would be missing would be the Commission's bi-partisanship and its critically important competition authority, which are so important to the FTC's success.

The new agency would not only have many of the FTC's powers, it also would replace the FTC in a broad part of the FTC's consumer protection mission. "All consumer financial protection functions of the Federal Trade Commission are transferred to the Agency." Section 1061(a)(5)(A). The new agency would have all of the FTC's "powers and duties . . . relating to consumer financial protection functions." Section 1061(a)(5)(B).

The extent of this transfer can be understood only by working through the definitions. "Consumer financial protection functions" are defined incredibly broadly to include "research, rulemaking, issuance of orders and guidance, supervision, examination, and enforcement activities, powers, and duties relating to the provision of consumer financial products or services . . . ." Section 1061(d). "Consumer financial product or service" is defined as "any financial product or service to be used by a consumer primarily for personal, family, or household purposes." Section 1002(8). "Financial product of service" is defined as "any product or service that, directly or indirectly, results from or is related to engaging in 1 or more financial activities." Section

1002(19). And "financial activities" includes a list seemingly of every imaginable activity that relates to money or finance—and, for good measure, adds "any other activity that the Agency defines, by rule, as a financial activity for the purposes of this title" with the sole exception of insurance. Section 1002(18).

Note the cumulative effect of the inclusive: the FTC has to transfer all functions "relating to the provision of consumer financial products or services," and a "financial product or service" is one that, "directly or indirectly, results from or is related to engaging" in a (broadly defined) financial activity. As written, this would call for transferring significant parts of the Commission's Bureau of Competition and Bureau of Economics. *See, e.g., FTC v. Ticor Title Insurance Co.,* 504 U.S. 621 (1992) (joint setting of title insurance rates as an unfair method of competition). Nor is this an issue as to which there is a simple "fix" by, for instance, transferring only functions related to the Commission's "unfair and deceptive acts and practices" authority, since the Commission has used both this authority and its competition authority in the same case, see *Negotiated Data Solutions LLC* (2008), and of course it conducts research on a wide variety of issues.

The breadth of authority given to the new Agency is illustrated by Section 1053. The Agency is authorized to enforce compliance with, among other things, any "Federal law that the Agency is authorized to enforce . . . and any regulations or order prescribed thereunder, unless such Federal law specifically limits the Agency from conducting a hearing or adjudication proceeding . . . ." Since the Agency would be given "all powers and duties" vested in the Federal Trade Commission "relating to consumer financial protection functions," Section 1061(a)(5), the Agency could enforce the entire FTC Act and all regulations and orders issued thereunder. The only limit would be the very expansive "relating to consumer financial protection functions" wording, and the Agency is allowed to define for itself what is included therein. See Section 1002(18)(0).

Even if one considers only the FTC's Bureau of Consumer protection, the bill calls for a substantial transfer. I have heard that up to 30% of the Bureau of Consumer Protection's lawyers work on financial practices. My own view is that a 30% figure could understate the extent to which consumer protection enforcement would be shifted out of the FTC.

One of the dramatic contemplated changes to the Commission's historic role concerns advice and guidance. The Commission was established by Congress in part to advise business on proper practices. Over the years, the Commission has been in the forefront of writing reports, holding hearings, writing rules and guidelines, filing amicus briefs, giving speeches, and on and on. Much of that would be prohibited by the new law. If the new Agency can "issue regulations or guidance" to assure compliance with any enumerated consumer law or "the laws for which authorities were transferred . . ., and any regulations thereunder," then the new agency "shall have the *exclusive authority* to prescribe rules, issue guidance, conduct examinations, require reports, or issue exemptions with regard to any person subject to that law." Section 1022(d) (emphasis added). This would seem to prohibit issuance even of antitrust and economics related guidance with respect to the FTC Act. Even with respect to consumer protection, it would seem to prohibit many if not most of the Commission's efforts to do studies, hold workshops, issue reports, and give guidance.

I have heard it suggested that the new legislation would move authority for specific consumer statutes but not for Section 5 of the FTC Act. Although there is conflicting language in the proposed bill, I do not read the current version of the bill this way. If all power and authority (and resources) are transferred, what can be left behind? Section 1101 states that in an investigation or proceeding "in which it appears to the Commission that an unfair or deceptive act or practice is being committed in connection with the marketing, sale, provision or delivery of a consumer financial product or service, the Commission shall consult and coordinate" with the Agency "as the agencies deem to be appropriate." But how likely is it that the FTC, once there is a transfer of functions, would be in a position to bring a case? Would it make sense to investigate only part of the issues posed, for instance, by deceptive automobile commercials? Even if the FTC preserved authority to enforce Section 5, what would be the point of doing so if the FTC could not conduct studies or issue reports or give advice? It would not longer be the FTC that was enforcing Section 5, but a very different agency.

To gain a better sense of the impact of this legislation on the FTC, I reviewed the FTC's most recent annual report: The FTC in 2009 (March 2009). The FTC's consumer protection law enforcement activities include topic after topic that apparently would be transferred to the new agency: subprime credit, mortgage servicing, foreclosure rescue, fair lending, mortgage advertising, debt collection,[4] payday lending, credit repair operations, advance fee loans or credit cards, magazine subscriptions

[4] For instance, the FTC would have to transfer authority related to "collection of debt related to any consumer financial product or service," but since the latter includes any service indirectly related to collecting a debt related to any consumer financial product or service, the circle would likely continue until there is little work related to debt collection that the FTC would not have to transfer.

(defined as credit transactions, Section 1002(10); *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356 (1973)), tax refunds, free gift cards (Section 1002(10)(L)), payment systems (see Section 1002(10)(K) ("money transmitting")), credit card processing (see Section 1002(10)(J) ("financial data processing"), debt consolidation, phishing, and, to some extent, data security and privacy. See Annual Report at 45-59. Reported hearings and workshops focused on phishing, debt settlement, protecting personal information, RFID, mortgages, the mobile marketplace, and fraud. *Id.* at 66-67. A majority of these presumably would be transferred. Also to be transferred would be a majority of the items listed under consumer protection "Advocacy Letters, Comments, and *Amicus* briefs" and "Congressional testimony." *Id.* at 67-71. The list of what authority would *not* be transferred is considerably shorter than the list of what *would* be.

Here is how the FTC wrapped up its Annual Report by "Looking Ahead":

> On the consumer protection side, the Commission will continue to protect cash-strapped consumers from unfair and deceptive credit schemes and ensure they get the information they need to make informed decisions about the use of credit in this challenging economy. Addressing the full life cycle of financial services transactions affecting consumers, the Commission will work to protect consumers in the areas of subprime credit, payday lending, fair lending, mortgage advertising and servicing, and debt collection and settlement. It will also continue its empirical work on how consumers absorb financial information and how they perceive disclosures associated with routine financial transactions, so consumers can be armed with understandable information with which to protect themselves. As the nation considers how it can control the impact of its consumption on the environment, the Commission will be at the forefront of ensuring that consumers are getting truthful information about how products affect the environment.

Id. at 95. If this bill is passed, only that final sentence about the environment would remain in full effect.

The bill would preserve "backstop enforcement authority." Section 1061(b). Under this provision, the Commission could "recommend in writing . . . that the Agency initiate an enforcement proceeding," and if the Agency does not do so within 120 days, the Commission "may initiate an enforcement proceeding . . . ." Section 1022(e)(3). I am reasonably confident that this authority would be rarely used.

There are several reasons for this. First, the legislation clearly contemplates a sweeping transfer of responsibility. What this appears to mean is that agency staff working in financial services also would be transferred. Once the FTC loses the talented staff who are expert on these issues, it is unlikely that it will be in a position to develop many cases.

Although the Commission could recruit and train new staff, it is unlikely to do so. For one thing, it appears to be the point of this legislation (at least in part) to get the FTC out of this business. It does not appear consistent with the spirit of this legislation for the FTC to be investing resources in developing cases.

Inter-agency dynamics also counsel against an active FTC role. Why would good staff work to develop cases only to turn them over to another agency? Staff like to bring cases, not position *other* staff to bring them. Also, these are often cases in which timing is urgent, because wrongdoers are harming consumers and absconding with assets. Why incur unnecessary delay?

The 120-day provision is patterned, to some extent, on the current process by which the FTC can refer civil penalty matters to the Department of Justice. 15. U.S.C. § 56(a)(1) (45-day notice before commencing an action; if Attorney General fails to commence an action the FTC may). Only rarely does this result in the FTC proceeding on its own. ABA Antitrust Section, Consumer Protection Law Developments 268 n.319 (2009). More fundamentally, one can observe that the FTC relies far more heavily on its consumer redress and disgorgement authority (where it can proceed alone) than on civil penalty authority requiring review by DOJ. Although the new bill uses slightly different wording that the DOJ civil penalty authority (it refers to recommending an enforcement action rather than commencing one), this is not a big enough change to make a difference.

Indeed, the new backstopping authority would function very differently from the existing civil penalty referral provision. Today the Commission can collect complaints, hold workshops, conduct hearings, give advice, and file amicus briefs, and then, where appropriate, ask DOJ to file a civil penalty action. Tomorrow, would staff work on a transferred function without any of the panoply of agency tools that are one of the hallmarks of the FTC? My guess is that this "backstop" authority is really intended to be just that. Should the day come that the new Agency, with leadership all from a single party, abandons the field, the FTC theoretically could step in. Unfortunately, the FTC would lack the resources and expertise to perform this role with any kind of speed, and it could not use its normal array of tools. My guess is that the vision of an effective "backstop" is likely more theoretical than real.

IV. Conclusion

As noted in my beginning, I am not here to support or oppose the proposed legislation. Obviously it was written by bright people to address some serious issues. There is some appeal to the suggestion to prefer activity-based regulation to entity-based regulation. No one who has bought a house and experienced the mortgage disclosure process involved therein (which the FTC does not control) can think that the current system of mortgage disclosure has worked well. And of course we have been through some very tough economic times. If this bill represents the only way to address these issues, there is much to be said for it.

Although I cannot quantify the benefits of this legislation, I can observe that it appears likely to cause an important agency that is working well to lose a substantial part of its staff, its authority, and its mission. The unique FTC blending of bi-partisan expertise and competition and consumer protection would no longer be brought to bear on an important part of the economy. Much of what the Commission has been doing it would no longer do.[5] The bill would interfere with the FTC's work in consumer protection not just with respect to financial services, read narrowly, but also more generally, since the heart of many frauds is abuse of the underlying payment system.

It is difficult to balance the benefits and costs of the proposed legislation. I do urge caution and care and examination of alternatives. (It is interesting, for instance, that the bill would fully preserve the authority of the Department of Justice, the SEC, and the CFTC.) Legislation as sweeping as this should not to be enacted in haste.

[5] Should this bill pass, the FTC's responsibilities would shrink, which makes this an appropriate time to ask whether any artificial limiting of the agency's jurisdiction should be removed. One obvious candidate is telecommunications: in the deregulated modern world, there is no reason why the FTC Act should not apply to telecommunications firms just as it applies to most businesses.

Mr. RUSH. Thank you.

Mr. Cox, you are recognized for 5 minutes.

TESTIMONY OF PRENTISS COX

Mr. COX. Thank you, Mr. Chairman and Ranking Member Radanovich.

Abuses of consumer finance products were a disaster for millions of consumers before anyone recognized them because we had a financial crisis, a disaster. We heard previous testimony about someone committing suicide. I have sat with people whose families committed suicide after I worked with them who had heart attacks from the stress. Millions of people experienced this.

Our federal regulatory system did not respond to this. It was dominated completely by the thinking and needs of the lenders and sellers and not by what was happening on the ground. It is often said that no one could have seen this. The people who were working with the victims of subprime lending and were talking to people who reflected the experience of those people as well as the others who were subject to the abuses of consumer finance products absolutely knew what was going on and were screaming at the top of our lungs. No one was listening. It was predictable and it was preventable.

The Consumer Financial Protection Agency as proposed offers the first hope in generations, certainly in my adult lifetime working on these issues, for an agency with sufficient power and focus on consumer protection issues to seriously address these problems. It gets it right in terms of its model. It sets up a unified rulemaking process. It is not about whether the FTC was good or bad. It is about the fragmentation of authority and the lack of perspective and a unified rulemaker. It gets it right and setting the floor and allowing innovation where innovation should occur, which is in the state regulatory system, and it couples that with an open enforcement system. It allows the enforcement of those clear, unified rules to occur in multiple places, and there are two reasons you want that. The first is that you compare the proper enforcement agency with the problem at hand. If you have got a problem that just occurs in Indiana, the Indiana attorney general is the right place to do it. It simply won't get taken care of if you allow a federal agency. Conversely, if the Indiana attorney general turns up a problem that appears to be nationwide, that can highlight the need for the agency. Secondly, agencies like the FTC and state attorneys general often will bring violations of rules ancillary—which is what Chairman Leibowitz was saying—ancillary to other investigations because these things don't come up in little neat silos. So an open public enforcement model, which is what this bill has, by allowing the Federal Trade Commission and other federal agencies to enforce the rules and state attorneys general to enforce the rules enhances enforcement.

I will make two quick comments, one about the details of the enforcement mechanisms and the other about the rulemaking investigative authority. The open enforcement mechanisms in the bill are excellent; however, I agree completely with Chairman Leibowitz that the 120 days' restriction on the FTC is way too cumbersome. It needs to be streamlined and made more efficient. Secondly, and this is, I think, a very important point in the bill as currently constructed—the FTC is given the authority to enforce extant federal consumer credit laws but not the regulations passed by the CFPA. The CFPA regulations over time will become much more important than the extant consumer credit regulations. It is really critical that the FTC get the authority to enforce the regulations that are passed by the CFPA.

There is also a consulting power in there, a requirement, and that is correct and I hope that on an informal basis the agency takes account of the fact that the FTC, which enforces UDAP, unfair and deceptive acts and practices laws, gains a particular type of experience and understanding that is vital to setting those rules.

Secondly, state AGs have authority but mechanisms for remedies need to be clarified because right now the section 1055 powers—it is unclear whether those are bootstrapped into the AG enforcement.

Finally, in its rulemaking authority, the new CFPA desperately needs detailed and express and clear investigatory powers. Otherwise the data that is brought to bear in what the rules are will be data held by the industry that the CFPA simply doesn't have access to, so it is critical that the CFPA have that investigative power so that they can get the rules right the first time.

I really appreciate the opportunity to be at this historic hearing and wish the Congress great luck in making this project work.

[The prepared statement of Mr. Cox follows:]

Testimony of Prentiss Cox
Associate Professor, University of Minnesota Law School

Before the United States House of Representatives
Committee On Energy and Commerce

"The Proposed Consumer Financial Protection Agency:
Implications for Consumers and the FTC"
July 8, 2009

I am very grateful to have the privilege of testifying at this hearing on the historic proposal to create a Consumer Financial Protection Agency ("CFPA"). The sale of needlessly complex and abusive consumer credit products was a disaster for millions of Americans long before these problems were recognized as a primary cause of the financial crisis. While countless families experienced loss and too often financial ruin from ill-suited consumer finance products, our nation's regulatory system was thoroughly dominated by the thinking and needs of lenders and sellers of these products. The establishment of the CFPA would mark a turning point in returning the needs of American families to a central position in our consumer finance regulatory system.

Prior to joining the University of Minnesota Law School faculty in 2005, I had the opportunity to work for many years as an Assistant Attorney General and Manager of Consumer Enforcement in the Minnesota Attorney General's Office. I was a lead attorney starting in 1998 in a consumer fraud suit against First Alliance Mortgage Company, which was one of the early purveyors of abusive subprime mortgage loans. I later was in the national leadership in cases brought by state attorneys general against subprime lenders Household, Inc. and Ameriquest Mortgage Company. In addition to subprime mortgage lending matters, I have investigated and litigated numerous public enforcement actions for violations of deceptive trade practice laws against credit card issuers, debt collectors, telemarketers, foreclosure rescue scam companies, auto finance sellers and other entities engaged in consumer finance.

I also have participated in the drafting of legislation and rules governing consumer finance products. In 2007, I worked with Minnesota legislators who passed the toughest anti-predatory lending in the nation. Among other state legislation on consumer finance matters, in 2004 I assisted the Minnesota Legislature in enacting a law to regulate foreclosure rescue scams. That regulatory scheme has become a national model enacted in 18 other states.

I have worked closely with dedicated staff in several divisions of the Federal Trade Commission ("FTC"). Several of the cases that I brought for consumer fraud or violations of credit reporting or mortgage lending laws were done in cooperation or consultation with the FTC. Conversely, I occasionally assisted the FTC in cases brought under its authority. In *State of Minnesota v. Fleet Mortgage Corporation*, I was the lead attorney in a case brought by the Minnesota Attorney General under the federal Telemarketing Sales Rule ("TSR") against a telemarketer and its partner national bank subsidiary alleging deceptive sales of membership clubs to homeowners. Thanks in part to an amicus brief filed by the FTC, we prevailed in the case and obtained a ruling of first impression on the authority of the FTC over non-bank operating subsidiaries of national banks.[1] After pursuing the *Fleet* case and similar matters, I worked with talented FTC staff in the promulgation of the "preacquired account telemarketing" rules adopted as amendments to the TSR.

The proposed CFPA is a unique opportunity for dramatically improving the lives of American families. I will focus my testimony on matters most relevant to my experience working on consumer protection in the sale of finance products. First, the open public enforcement model preserving FTC enforcement powers and extending enforcement powers to state attorneys general will improve the long-term effectiveness of the CFPA in protecting consumers, but these new statutory powers should be sharpened. Second, the investigative powers of the CFPA during the rule-making process should be strengthened. Third, CFPA should not be required to make determinations on state law preemption and the restrictions on the use of preemption by federal bank regulators to prevent state level consumer protection legislation and enforcement should be clarified.

[1] *State of Minnesota v. Fleet Mortgage Corp.*, 158 F.Supp.2d 962 and 181 F.Supp.2d 995 (D. Minn. 2001). This case included allegations that Fleet's internal surveys of its customer service representatives found repeated statements that Fleet's charges to its mortgage customers were "unethical," "a scam," "a fraud," that Fleet customers were "being slammed" and the like. Nonetheless, the Office of the Comptroller of the Currency took no known action against Fleet, and instead filed an amicus brief in the case in support of Fleet's motion to dismiss the Minnesota Attorney General's case.

I. The Open Public Enforcement Model In The Act Will Be Effective, But State Enforcement Powers Should Be Clarified.

Enforcement of consumer protection laws and rule-making for consumer protection are different activities that require different models to be effective. Unified rule-making authority in an agency dedicated to consumer protection goals presents an extraordinary opportunity to reform the consumer finance system to ensure products and sales practices that meet minimum standards of fairness for consumers. Public enforcement, on the other hand, is best accomplished in an open model; a system that allows multiple public entities the opportunity to gauge compliance.

A. The Act Properly Creates An Open Enforcement System.

The Act opens enforcement both within the federal system and between federal and state public agencies. The Act preserves the authority of the FTC and other federal regulators to bring enforcement actions against marketplace actors within the jurisdiction of these agencies. The FTC retains its authority to pursue violations of existing federal consumer credit laws, such as the Electronic Funds Transfer Act (section 1078), the Equal Credit Opportunity Act (section 1079), the Fair Credit Reporting Act (section 1082), the Fair Debt Collection Practices Act (section 1083) and the Truth in Lending Act (see section 1092). This enforcement authority is subject to a referral requirement and wait period in section 1022(e). The FTC also is required to "consult and coordinate" with the CFPA when the FTC brings UDAP actions involving consumer financial products or services. These referral and consultation requirements, and the joint enforcement authority of the FTC and other federal agencies, are discussed in subsection B below.

The Act also makes two important changes to the federal and state balance in enforcing consumer credit protection laws. Section 1042 of the Act provides authority to state attorneys general to enforce federal consumer credit laws. Sections 1044 and 1047 are a welcome reversal of overreaching regulations and interpretations by federal banking regulators that attempted to stop state attorneys general from enforcing non-preempted state laws against federally chartered financial institutions. These provisions are discussed in subsection C below.[2]

The open public enforcement system adopted in the Act has multiple advantages. Open public enforcement is a form of a regulatory marketplace that creates competition for more consumer protection rather than a race to the bottom. Regulators faced with competing enforcement agencies would have a much greater incentive to pay attention to consumer complaints of unfair or misleading conduct, as they know that a different public entity might bring an action against the same seller or financial institution. This is particularly true because public entities with enforcement authority often go through cycles of different levels of commitment and different philosophic approaches to the missions of the agency.

Awareness of competing regulators will help avoid the problem of agency capture that clearly plagued the financial regulatory system over the last decade or more. Federal banking regulators too often used their claimed exclusive authority to protect the interests of their regulated entities rather than the interests of the consumer. Their enforcement record on these issues was abysmal.[3] More subtlety, financial regulators came to the see the world through the lens of the seller rather than through the experience of American families using consumer finance products. The Federal Reserve Board was the single agency with the authority to set standards protecting homeowners in origination of mortgages, but it became hard to distinguish during the last decade between the rhetoric of the lenders and the published analyses of the Federal Reserve Board and its Governors in its use (or nonuse) of this authority.

Open public enforcement also allows the resources and the focus of different public enforcement agencies to be matched with the type of enforcement problem.

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[2] Sections 1041, 1043, 1045-1046 and 1048 attempt to return a proper balance to the preemption of substantive state consumer protection laws. These provisions are discussed in section III of this testimony.

[3] *See, e.g., Amanda Quester and Kathleen Keest, Looking Ahead After Watters v. Wachovia Bank: Challenges for the Lower Courts, Congress and the Comptroller of the Currency, 27 Review of Banking and Financial Law 187, 199 (2008).*

A state attorney general may have an incentive to attack violations of laws that occur only in its locality, while the CFPA likely would not have the resources to focus on problems that are not national in scope. A federal regulator may be able to remedy violations that are discovered when investigating problems unrelated to compliance with CFPA regulations. Allowing multiple regulators with varying foci to enforce violations can be more efficient.

Banks and other regulated entities will no doubt object to having the possibility of multiple public agencies enforce consumer protection laws. One can anticipate dire predictions about the excessive quantity of enforcement action and inconsistent enforcement standards. These concerns are not valid based on past or anticipated conduct of public enforcement agencies. The resources available to public entities have never been sufficient to ensure compliance by all actors with all such laws. Every public enforcement agency has to discard valid possible enforcement actions to focus on the highest priority cases. It would be instructive to compare the total public dollars spent on enforcing consumer protection laws in the sale of consumer finance products with the dollars spent by the financial services industry just to lobby federal and state legislative and administrative bodies to shape the laws that will be enforced.

The threat of inconsistent enforcement agendas of public entities is meritless for two reasons. First, the Act gives the ultimate authority to interpret consumer credit laws and regulations, and decide on how those rules are enforced, to the CFPA. The CFPA can and presumably will create uniformity in enforcement. Second, it is a positive development rather than an onerous burden if there are some discrepancies in enforcement priorities or interpretation not immediately rectified by the CFPA, for the reasons stated above. Enforcement is an area in which regulatory competition creates benefits. Indeed, the recent experience of the meltdown in nonprime mortgage lending is attributable in part to insufficient public enforcement efforts undermined substantially by regulators claiming monopolistic enforcement authority.

As with the grant of rule-making authority, the Act gets the essential concepts right in the area of public enforcement. The following two subsections offer suggestions for improving the details of the enforcement system proposed in the Act.

B. The Intra-Federal System Of Referrals for Enforcement Should Be Streamlined And The Scope Of This Parallel Enforcement Broadened, But The Consultation Requirement For the FTC Is Proper.

The statutory authority for enforcement by multiple federal agencies under existing consumer credit law are preserved in subtitle H of the Act but made subject to section 1022 of the Act. Section 1022(e) provides that the CFPA has primary enforcement authority over these laws, but that federal agencies now authorized to enforce these laws can make a written referral to the CFPA of a possible enforcement matter. These federal agencies have "backstop enforcement authority" to bring the enforcement action if the CFPA "does not, before the end of the 120-day period beginning on the date on which the Agency receives a recommendation…, initiate an enforcement proceeding."

This enforcement authority should be streamlined. First, the Act should be clarified to state that the 120 day period is a maximum time and the CFPA can authorize an enforcement action by another federal agency at anytime during that period. Second, the referral period could be shortened, perhaps to 30 days, with authority for the CFPA to stretch out the review to 120 days if it determines it needs more time. Many of the cases brought by other federal agencies will include claims for violation of federal consumer credit laws that are ancillary to other violations. The FTC often files actions alleging section 5 UDAP violations that will include alleged violations of federal consumer credit laws. A required 120 day period could result in disincentives for the FTC or other federal agencies to include such alleged violations.

The scope of the enforcement authority for the FTC and other federal agencies to initiate "backstop" enforcement actions also should be broadened. The same rationale that applies to preserving the authority of these entities to bring claims under existing federal consumer credit laws applies to enforcement of new rules promulgated by the CFPA. The FTC could efficiently bring such claims in cases with UDAP or other alleged violations rather than splitting this type of matter into two cases, or having the CFPA enforcement action foregone because of the costs of bringing a separate matter. The CFPA rules likely will become more important than existing consumer credit rules over time, so this additional authority is worth serious consideration. As with the existing federal consumer credit laws, the CFPA would have the authority to take control of the proposed action if it determined that was appropriate in the circumstances.

The FTC also faces a proposed new requirement in section 1101 in Title XI that it "consult and coordinate" with the CFPA when the FTC brings an UDAP action related to consumer financial products. Whether mandated by statute or not, this type of consultation makes sense not just for its seemingly intended purpose (to allow the CFPA to create uniformity in the regulation of consumer finance projects), but also because it may help inform the actions of the CFPA. A critical lesson to be learned from the debacle in mortgage lending is the early warning function of UDAP enforcement. The only public agencies that consistently brought enforcement actions and raised the alarm about abuses in nonprime lending were a small group of state attorneys general and state financial regulators who approached the problem from the perspective of UDAP enforcement. This group of state entities brought cases against First Alliance Mortgage Company, Household, Inc., and Ameriquest Mortgage-- each of which was the largest and/or arguably most egregious subprime mortgage lender in succession from 1998 through 2005. The allegations in these cases track almost precisely the history of practices that should have been better regulated during the last ten years.

Public enforcers of UDAP laws often ask different types of questions than rule-making regulators, who typically see enforcement primarily as a matter of rule compliance. Effective UDAP enforcement requires attention to the stories of individuals in distress, and to constructing of patterns from volumes of consumer complaints and the reflected experience of consumers by those who work closely with individual users of consumer products. UDAP enforcement also is accompanied by a bias in favor of believing consumers whose experience is not necessarily consistent with the written documents that memorialize the transaction. While UDAP problems are not a sufficient basis alone for constructing regulatory policy, UDAP enforcement offers critical insight into emerging problems in any industry, including consumer finance. The FTC should forcefully bring this experience and perspective to the construction of regulations by the CFPA.

C. State Enforcement Powers Are An Important Part Of An Open Enforcement Scheme, But State Enforcement Rights Should Be Clarified.

The Act commendably opens the enforcement of CFPA regulations to the large number of state attorneys general who will be capable of bringing enforcement actions. State entities were the most active in bringing cases to remedy the abuses of subprime mortgage lending, and this additional authority will help the attorneys general achieve their consumer protection objective while also improving compliance with CFPA regulations. The Act also takes the long overdue step of reigning in the absurdly broad assertion of "visitorial" powers by federal banking regulators as a means of protecting their regulated entities from active state consumer protection enforcers.

1. State Power to Enforce Federal Consumer Finance Laws

Section 1042(a)(2) further develops an open public enforcement system by preserving the right of state attorneys general to bring actions where currently allowed under federal consumer credit laws. Section 1402(a)(1) extends these enforcement rights of state attorneys general to new CFPA regulations. The Act contains a well-considered and balanced consultation requirement in section 1042(b) prior to a state attorney general exercising this authority.

As noted above, consumer law public enforcement actions often arise in contexts that make it practical for certain types of public entities to bring enforcement actions where other public entities could not do so. State attorneys general will be able to enforce CFPA regulations in local matters where the limited size and scope of the violations would make the action less viable for the CFPA. State attorneys general, similar to the FTC, may find it practical to enforce CFPA regulations ancillary to UDAP actions. As with the FTC, these cases would be less likely to be initiated by the CFPA.

Conversely, state attorney general actions would benefit the CFPA by identifying enforcement problems and areas for possible new regulation. State attorneys general generally are much nimbler, and much smaller, than their federal counterparts. State attorneys general often are able to sort through consumer complaints, or consult with loan counselors and nonprofit agencies that reflect consumer experiences, much more quickly than larger federal agencies with multiple decision-making layers.

A change to the Act would help clarify these parallel state enforcement powers. Section 1042(a)(1) of the Act provides that state attorneys general can obtain "monetary or equitable relief for violation of any provisions of this title or regulations adopted thereunder." This provision does not specify the available remedies; in contrast, section 1055(a) sets forth eight specific remedies available in CFPA enforcement actions, and also details the limits and considerations in assessing civil penalties. Section 1042(a) could be read as incorporating these specific remedies, but the Act should be clarified to make clear that intent.

2. Clarification of Federal Banking Regulator Visitorial Power

The Act also addresses the problem of bank regulators overreaching in their interpretation of "visitorial" powers in order to restrict state actions. Visitorial powers of a bank supervisor generally include the right to examine the operations of a supervised financial institution. The Office of Comptroller of the Currency ("OCC") promulgated regulations under its visitorial powers that purported to deny the authority of the state attorneys general to investigate and enforce even non-preempted state laws against national banks. The United States Supreme Court recently overturned the OCC rule prohibiting a state from enforcing its own applicable laws in court, calling the OCC's position a "bizarre" interpretation of its authority.[4] The Court deferred to the OCC and left in place the OCC rule prohibiting a state from using its pre-suit investigative powers as to a national bank.

Sections 1044 and 1047 restore the power of states to investigate and enforce violations of law by federally chartered financial institutions. The Act requires that state attorneys general consult with banking regulators prior to sending pre-suit investigative demands to a federally chartered financial institution and prior to filing an action to enforce state law. Such consultation makes some sense when the state attorney general is sending a pre-suit investigative demand because this action is related to the traditional domain of banking regulators. Forcing the state

[4] Cuomo v. Clearing House Assn. L.L.C., et. al., No. 08-453 (U.S.S.Ct. June 29, 2009) at 7.

attorneys general to consult prior to filing an enforcement action, however, limits their authority in light of the recent Supreme Court ruling. Federal banking regulators have shown consistent hostility to state attorney general enforcement of state UDAP and other consumer protection laws. There is no reason to force a new requirement of mandatory consultation by a state attorney general in this circumstance.

II. The CFPA Must Have Strong Investigative Powers For Effective Rule-Making.

The Act's proposed division of authority between the CFPA and the existing regulatory agencies makes sense. The standards for issuing consumer finance products should not depend on the charter or licensing status of the seller. And the regulatory requirements for the sale of core consumer finance products should be the function of a single regulator with authority to harmonize the requirements of different federal statutes and rules as they relate to a single product. The incoherent set of forms issued by multiple agencies with authority over residential mortgage origination confuses homeowners and imposes unnecessary costs on lenders. It even provides room for mischief by sellers of credit that use the confusing regulatory requirements to mislead homeowners. Centralization of rule-making authority for federal consumer finance laws in the CFPA, combined with the new rule-making powers of the CFPA and a focus on the needs of consumers in the promulgation of those rules, is the right approach.

The FTC retains its core function as the primary federal enforcement agency against unfair and deceptive practices ("UDAP"). Some areas related to consumer financial services are more closely tied to UDAP enforcement, and, appropriately, the Act preserves FTC jurisdiction in these areas. The authority related to foreclosure rescue scams and debt settlement rule-making, for instance, should and do remain with the FTC.

The subject and particulars of rule-making will be informed by the experience and interests of other regulators, industry and advocates. One of the problems with the current regulatory structure is that functional regulators had a clear focus on the needs of the industry they regulated rather than the more diffused but critical needs of the public that used consumer financial products. When consumers complained in droves about the abusive terms and sales practices with consumer finance products, federal regulators simply were not listening. It is encouraging that the structure of the CFPA emphasizes the actual use of financial products by consumers as the touchstone for regulation, as exemplified by the responsibilities assigned to the research, community and consumer complaint units envisioned in section 1014(c).

But it is critical that the CFPA also have access to a wide range of data from the issuers of products to understand the characteristics of consumer finance products that are actually sold. If the CFPA does not have access to data held by account issuers, only the industry will have detailed information to dispense in influencing the shape of debate.

For example, consider the problem of regulating overdraft or over-limit charges on asset and credit accounts. The CFPA may want to consider this problem across various forms of consumer financial products. It may want to consider limits on the use of overdraft fees and apply those limits to some or all of the financial products it regulates. The design of this regulation will require the CFPA to inquire into a series of questions about these charges, such as the following: What are the features and amounts of overdraft charges on different products? What are the actual costs to the account issuers for overdrafts? How and why have account issuers varied these charges over time? What are the policies and actual practices of account issuers in applying these charges? Do consumers with certain types of accounts or certain characteristics pay a disproportionate amount for these charges? There is no substitute for an agency having access to the actual data of the account issuers on these and a host of related question to obtain a nuanced understanding of how overdraft charges really work in practice. And there is no better time to obtain this understanding than before the CFPA promulgates a rule on the matter.

It is even more important for the CFPA to have this type of investigative authority during rule-making because it does not have the benefit of regularly obtaining such data through examinations it controls. Federal banking authorities conduct regular exams and have wide-ranging visitorial powers that the CFPA would not possess.[5]

Sections 1022 through 1024 of the Consumer Financial Protection Agency Act of 2009 ("the Act") contain general references to examination and information

[5] Section 1022(c) of the Act authorizes the CFPA to obtain examination reports conducted by the banking regulators and other federal agencies. But the CFPA cannot control the content of those exams.

gathering powers of the CFPA. By contrast, the CFPA's pre-complaint investigative authority in section 1052(b) is rich in specificity but applies only to information relevant to a violation of the laws enforced by the CFPA.

Section 1022(c) refers to examination authority mostly in the context of "compliance." Section 1022(c)(2)(B), however, provides that the CFPA may require reports on "matters related to the provision of consumer financial products or services including the servicing or maintenance of accounts or extensions of credit." It is unclear if this authority was intended to extend to the type of comprehensive data collection that would inform the CFPA prior to or during the rule-making process. Section 1023(a)(1) authorizes the CFPA to "gather and compile information," but it is not clear if this authorizes the CFPA to issue mandatory commands for data, and if so from whom and under what conditions. Section 1023(a)(2) clearly authorizes the CFPA to require the filing by "persons" of "annual or special reports, or answers in writing to specific questions," although the exact scope of this power is not specified. Section 1024 provides more robust investigate authority for the CFPA, but this power is limited to the Agency's duty to "monitor for risks to consumers in the provision of consumer financial products or service, including developments in markets for such products or services." Section 1024(a)(3) and (a)(4) suggest this authority is primarily for report generating functions.[6]

Taken as a whole, this authority will allow the CFPA to obtain useful information to consider in making rules that shape consumer financial products. The current language in the legislation, however, does not provide the CFPA with unambiguous authority to obtain detailed data about the products it will regulate prior to writing the rules for those products. The current legislation likely does not put the CFPA on a level field of knowledge with the industry it will be created to supervise.

[6] Section 1039 also prohibits a covered person from refusing to provide information to the Agency, "as required by this title."

The Act should provide the CFPA with the type of specific investigative authority that it is provided in section 1052(b) when bringing enforcement actions. At minimum, the CFPA should have the right to obtain the type of data in the computer systems of sellers and account issuers that would be readily available and easy to screen for the exclusion of private financial information.

III. The Act's Provisions Related to Preemption of State Law Should Be Amended.

The Act appears to remedy the misuse of federal preemption that has occurred in the last decade. States play an important role in highlighting consumer problems unaddressed by federal regulation and testing solutions to these problems. On the other hand, there are benefits to consumers and sellers when there is some degree of uniformity in product choices. The Act takes the best approach to this problem to benefit consumers—a uniform federal regulatory floor that allows greater state consumer protections.

Nonetheless, the devilish details in the Act's preemption language hide some avoidable implementation problems. First, the general preemption standard for CFPA actions will require rather than simply permit the new agency to make state preemption determinations. Second, the language overturning the misuse of preemption by federal bank regulators needs clarification.

A. The CFPA Should Not Be Burdened With Mandatory Preemption Exemption Determinations.

The Act preserves from preemption state laws that are not inconsistent with the CFPA rules, authority and actions. The Act expressly provides that states laws are not inconsistent and thus not preempted if they provide greater consumer protection than the CFPA regulatory scheme. This formulation is familiar from existing federal consumer protection laws, such as in the Electronic Funds Transfer Act, 15 U.S.C. § 1693q.

The Act provides that a state law is not preempted "if the protection such statute, regulation, order, or interpretation affords consumers is greater than the protection provided under this title, as determined by the Agency." The final clause of this phrase adds a requirement that is unlike current federal consumer protection law preemption standards, which generally allow the primary regulator to make determinations permissively. This language suggests that a state law is preempted until the Agency makes a ruling, which would cause two inter-related problems.

First, consumers would not be afforded the intended benefit of the state law until the CFPA is able to make a preemption determination. This will be the case even if the superiority of the state law protection for the consumer is obvious. Thus, if the state law limits prepayment penalties to 1% of the outstanding balance on a certain credit product while the CFPA does not limit such charges, the state law clearly provides greater protection for the consumer. The current language in the Act might deprive consumers in that state of the benefit of the greater protection until the CFPA makes such a determination.

The second problem should now be obvious—if consumers must wait until the CFPA makes a determination to be afforded the possible greater protection under state law, the CFPA could be flooded with preemption requests as to every action it takes. The new agency's resources might be better directed to other endeavors, especially given the expertise of courts in making decisions on such matters. To the extent the CFPA is concerned with the uniformity of such interpretations, the Act should be amended to allow the CFPA to make such determinations on its own initiative or when it deems appropriate in response to requests from interested parties.

B. The Restriction on National Bank Preemption Authority Should Be Clarified.

The Act takes the long overdue step of beginning to reign in the misuse of preemption by federal banking regulators. Preemption of state consumer protection laws by federal banking laws is a complex subject. The Act takes on several parts, but not all, of this problem. I will very briefly highlight one important concern with the specific language used to define the scope of state laws that would be implicated in the Act's attempt to restore the proper federal and state balance to consumer protection.

Sections 1043 amends the National Bank Act so that, with exception, "State consumer laws of general application, including any law relating to unfair or deceptive acts or practices, any consumer fraud law and repossession, foreclosure, and collection law, shall apply to any national bank."[7] This language creates ambiguity because "laws of general application" is not a well-defined term that imparts clear meaning to the courts. Specifically, it is not certain whether this definition will mean that state laws related to consumer finance products, such as the many state anti-predatory lending laws, will apply to national banks. If a state imposes a duty on every residential mortgage lender to act in the best interests of the borrower when originating a mortgage loan, will this standard be applied to loans made by national banks and their operating subsidiaries? Under current law, the OCC has forcefully protected its regulated entities from having to comply with such requirements applicable to state-licensed lenders. The Act should be clarified to definitely answer this question in favor of a level playing field that requires national banks to meet the same standards as state lenders within a given state.

CONCLUSION

The needs of the average American have been ignored for too many years when federal regulators and large financial institutions shaped the types of consumer finance products that would be sold, often aggressively sold, to homeowners and other consumers. Throughout the ongoing foreclosure and financial crisis, struggling homeowners have taken a back seat to the needs of the lenders who created and profited from the consumer finance products that caused the problems. The proposed CFPA is the first attempt in decades to make meaningful changes in our regulatory system to help the majority of people who use consumer finance products. I trust that you will enact legislation to create a strong and effective new agency with a singular focus on consumer protection. I hope that you will consider the clarifications to the Act offered in this testimony.

[7] Section 1048 makes identical changes applicable to federal savings associations.

Mr. RUSH. Thank you very much.
Ms. Barkow.

TESTIMONY OF RACHEL E. BARKOW

Ms. BARKOW. Thank you, Mr. Chairman, Ranking Member Radanovich and members of the subcommittee. Thank you for inviting me to testify before you today. I am honored to have the opportunity to discuss this piece of legislation.

The linchpin of the Consumer Financial Protection Agency Act is of course the agency it creates, so whether this Act will succeed or fail in its mission to protect consumers will depend entirely on whether the agency it creates will succeed or fail. I therefore analyzed the structure and powers of the proposed CFPA to determine if it has been designed in the most effective way to achieve its stated statutory mission. I take no position on the merits of that mission or whether there is a need for a new agency to regulate this field. Rather, my focus is on whether the CFPA has been designed as effectively as it can be to achieve that mission. In that regard, I would like to make six brief suggestions and observations about the design of the CFPA and this legislation.

My first recommendation and the most important is to add a provision to this Act that would limit the CFPA board's membership to no more than three members of the same political party. Unlike virtually all other legislation that governs multi-member independent regulatory agencies including the FTC, the SEC and the Consumer Products Safety Commission, the CFPA Act as it is currently written does not require political balance among the agency's membership. There is a wealth of empirical studies that are demonstrating that a group comprised solely of ideologically like-minded people tends towards extreme decision making. Without a provision in the CFPA Act requiring partisan balance, the CFPA is likely to change positions from one extreme to another with each new presidential administration. This is unhealthy for the regulation of any market and certainly the consumer financial products market. A political balance requirement can serve as a stabilizing force. In addition, a political balance requirement can lead to dissenting opinions, which is valuable for alerting Congress and the public if the agency goes in an extreme direction one way or the other.

Second, I suggest amending the Act's requirement that the CFPA consult with all federal banking agencies and any other relevant agency before passing rules to make sure those rules will be consistent with the prudential market or systemic objectives of the agencies being consulted. Because this consultation requirement sweeps so broadly covering every conceivable agency regulating-related field and anything of any importance to those agencies, this process is likely to dramatically delay the promulgation of CFPA rules. This is precisely the kind of requirement that aids industry participants in tying of agency rules for years. So unless Congress is of the view that the delay in legal uncertainty is outweighed by the benefits of this provision, I suggest making clear that consultation is at the discretion of the CFPA and not subject to judicial review.

Third, I advise modifying the statute of limitations provision in the Act to begin running from the time the CFPA discovers a violation, not from the time a violation has occurred. Because violations by sophisticated business interests are not discovered for years in many cases, this provision is—as it is currently written—might hamper the CFPA in its enforcement efforts.

Fourth, I recommend including a limitation on the ability of CFPA board members to practice before the CFPA for a period of time after their service on the board is expired. This kind of restriction would limit the negative effects that are often caused by having a revolving door between agencies and the industries that they regulate.

Fifth, I just would like to highlight a protection in the Act that I think is going to be critical to achieving the Act's law enforcement objectives, and that is section 1042 of the Act which allows the state attorneys general to enforce provisions. The state AGs have demonstrated in many areas that they can be effective law enforcement partners, and I think this is particularly true in the area of consumer protection where agency capture is a significant risk.

Finally, I would like to alert the subcommittee's attention to the fact that it is unclear from this Act as it is currently written whether the CFPA will be subject to Presidential directives and oversight including review by the Office of Information and Regulatory Affairs, known as OIRA. There is language in the Act that suggests this is actually going to be an executive agency and will be subject to this kind of oversight. Congress may intend for the CFPA to be part of the President's oversight process but if not, the Act would need to be rewritten to make clear that the CFPA is an independent regulatory agency for purposes of OIRA review. I take no position on whether or not the agency should be subject to this type of review but because it is a fundamental question, I note for you that it is currently unclear in the legislation.

Thank you again for allowing me to testify and share my thoughts on this proposed legislation, and I would be happy to answer questions when we are all done speaking.

[The prepared statement of Ms. Barkow follows:]

Statement of Rachel E. Barkow
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The Proposed Consumer Financial Protection Agency:
Implications for Consumers and the FTC
Before the House Subcommittee on Commerce, Trade, and Consumer Protection
July 8, 2009

Mr. Chairman and Members of the Subcommittee: Thank you for inviting me to testify before you regarding the Consumer Financial Protection Agency Act of 2009 (CFPA Act or Act). It is an honor to appear before you to discuss this landmark legislation.

At the center of the Act is the creation of an agency charged with protecting and informing consumers in the increasingly complicated world of financial services and products. The Act itself gives few substantive standards for financial products and services. Instead, it leaves it to the Consumer Financial Protection Agency (CFPA) to set benchmarks for this field. Thus, whether the Act will succeed or fail in its mission "to promote transparency, simplicity, fairness, accountability, and access in the market for consumer financial products or services" will depend entirely on whether the agency it creates succeeds or fails.

My testimony therefore explores the structure and powers of the proposed CFPA to determine if it has been designed in the most effective way to achieve its stated statutory mission. I take no position on the merits of that mission or whether there is a need for a new agency to regulate this field. Rather, my focus is on whether the CFPA has been designed as effectively as it can be to achieve the goals of the legislation.

After reviewing the Act in light of the experience of other agencies charged with protecting consumer interests, I have five recommendations and a note of caution. To briefly summarize, they are as follows (listed in the approximate order of importance):

First, I recommend including a provision that would limit the CFPA's membership to no more than three members of the same political party. Unlike virtually all other legislation that governs multi-member independent agencies, including the Federal Trade Commission (FTC), Securities and Exchange Commission (SEC), and Consumer Products Safety Commission (CPSC), the CFPA Act does not require a political balance among the agency's membership. The absence of such a provision in the CFPA Act could lead to a politically-polarized agency that dramatically changes positions from one extreme to another with each new presidential administration. This is unhealthy for the regulation of any market, and there is no apparent justification for the Act's current design of the CFPA.

Second, although the CFPA has elements that are designed to prevent capture by the industry actors the agency will be regulating, there is room for improvement. Specifically, I propose taking a close look at the Act's consultation requirement. This mandate will inevitably cause delays and legal challenges to the CFPA's regulations, so unless Congress is of the view that these costs are outweighed by the benefits of coordination, I recommend modifying this provision to make clear that consultation is at the discretion of the CFPA and not subject to judicial review.

Third, I advise modifying the statute of limitations provision in the Act to begin running from the time the CFPA discovers a violation, not from the time a violation has occurred.

Fourth, I suggest including a limitation on the ability of CFPA Board members to practice before the CFPA for a period of time after their terms of service on the Board have expired. This restriction would limit the negative effects caused by the revolving door between agencies and the industries they regulate.

Fifth, I recommend giving the CFPA's research unit a mandate to analyze and report on the suppliers of financial services and products and on the regulations imposed on those suppliers by other regulators.

Finally, my last major point is to raise the issue of the relationship between the CFPA and the President. It is unclear from the Act as it is currently written whether the CFPA will be subject to presidential directives and oversight, including review by the Office of Information and Regulatory Affairs (OIRA) in the President's Office of Management and Budget (OMB). I take no position on whether or not the agency should be subject to this type of review. Rather, I highlight the lack of clarity and discuss the implications of having the CFPA be treated like other executive agencies for purposes of presidential oversight.

My statement will proceed in three parts. First, I will offer some lessons from other efforts to create agencies with mandates to protect consumer interests. Many of these agencies fall short in their efforts to protect consumers because they become captured by the industries they are charged with regulating. The experience of these agencies therefore offers some valuable insights in thinking about how to structure the CFPA. Second, and with these lessons in mind, I will turn to the proposed CFPA Act to highlight how the Act could be improved to maximize the CFPA's effectiveness. Third and finally, I will address the question of the CFPA's independence. Although there is language in the Act aiming to make the CFPA an independent agency, it departs from the traditional independent regulatory agency model in several respects that, as currently written, give the President considerable power over the agency's operation.

I. Lessons from Other Agencies: The Threat of Capture

In evaluating the CFPA, it is helpful to look at the experience of other agencies that have been charged with promulgating rules, bringing enforcement actions, and reporting to Congress in an effort to protect consumers. On many occasions agencies with such mandates have stalled in their efforts to regulate because the industries they have been charged with regulating have been far more powerful and well-financed than the consumer interests they have been charged with protecting. This is the well-known phenomenon of agency capture, and it is important to consider some of the causes so that the pitfalls of capture can be avoided or at least limited through agency design.

One sees a familiar story repeat itself when one looks at the history of the many agencies charged with protecting consumers. Even if an agency has a promising beginning of "vigorous and independent regulation," it "often becomes closely identified with and dependent upon the industry it is charged with regulating."[1] Thus, as a leading administrative law scholar has observed, "[i]t has become widely accepted, not only by public interest lawyers, but by academic critics, legislators, judges, and even by some agency members, that the comparative overrepresentation of regulated or client interests in the process of agency decision results in a persistent policy bias in favor of these interests."[2] This is true across many industries, including financial services.[3]

This bias may not be intended – on the contrary, the goal may well be to avoid it at all costs – but several dynamics push in favor of giving regulated interests disproportionate influence with the agency charged with policing them.

First, regulated industries are wealthy and well-organized, especially when compared to consumers. Industry groups are well positioned to monitor agencies closely and challenge any and all agency decisions that will negatively affect them.[4] All else being equal, agencies would prefer not to become mired in legal challenges, so they may seek to work with, rather than against, these organized interests. Although there are some important and influential groups representing consumer interests that may also threaten litigation, these interest groups do not have the funding or resources of industries. Thus, they often cannot monitor and challenge all the potentially negative rules and orders from an agency or marshal the same resources as industry representatives when they do bring a

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[1] Thomas W. Merrill, *Capture Theory and the Courts: 1967-1983*, 72 CHI.-KENT L. REV. 1039, 1060 (1997) (citing the work of MARVER H. BERNSTEIN, REGULATING BUSINESS BY INDEPENDENT COMMISSION 79-94 (1955)).

[2] *See* Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1713(1975).

[3] Raj Date, Regulator Unbound: Solving an Old Problem at a New Regulatory Agency 2-5 (July 2, 2009), *available at* http://www.cambridgewinter.org/Cambridge_Winter/Regulator_Unbound_files/regulator%20 unbound%20070209.pdf.

[4] Mark Seidenfeld, *Bending the Rules: Flexible Regulation and Constraints on Agency Discretion*, 51 ADMIN. L. REV. 429, 464 (1999).

challenge.[5] As a result, agencies tend to be less likely to worry about satisfying consumer groups than the more powerful regulated industries.

The experience of the CPSC illustrates this phenomenon. The CPSC was created in 1972 to "protect the public against unreasonable risks of injury associated with consumer products."[6] At the time it was established, the CPSC was charged with enforcing statutes that were then administered by other agencies and given new powers as well.[7] The CPSC was heralded as the "most powerful Federal regulatory agency ever created."[8] But it soon became apparent that the CPSC was unable to fulfill its statutory mandate. The major reason is that the CPSC has been chronically underfunded and understaffed relative to its mandate.[9] As a result, the CPSC has been no match for the industry participants it is charged with regulating.

Product manufacturers have used their resource advantage to capitalize on various procedural rules in the Consumer Product Safety Act (CPSA). For instance, Section 7 of the CPSA created what was known as the offeror process, which required the CPSC to solicit and use people from outside the agency to draft its safety standards. The CPSC would put out a notice in the Federal Register describing the need for some standard and inviting people to propose a standard or to offer to develop a standard. After the offeror submitted its proposal, the CPSC could adopt or revise it and then had to seek comments on the resulting standard. In theory, offerors could be consumer groups, standard-setting organizations, other agencies, or industry groups. In reality, the process was dominated by industry. Because submitting a proposal was resource-intensive, consumer groups and standards organizations found the process too burdensome; the process was "affordable only to industry groups with an economic stake in the outcome."[10] Industry representatives did not just dominate the drafting stage, they often controlled the outcomes. Industry representatives brought successful challenges to most of the CPSC's rules in court.[11] Ultimately, Congress viewed the offeror process as a failure and abolished it.

Section 10 of the CPSA, which was designed to give consumers a greater say with the agency, suffered a similar fate. Section 10 established a process whereby interested persons could petition the agency to issue rules and the CPSC would have to respond to those requests with reasons and face de novo judicial review. This framework was enacted with the intent to allow the public to "overturn bureaucratic inertia."[12] In fact,

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[5] Seidenfeld, *supra* note 4, at 464 ("A regulated entity frequently is a large corporation with resources to appeal agency decisions at every level.").
[6] 15 U.S.C. § 2051(b)(1).
[7] Robert S. Adler, *From "Model Agency" to Basket Case – Can the Consumer Product Safety Commission Be Redeemed?*, 41 ADMIN. L. REV. 61, 63 (1989).
[8] Teresa M. Schwartz, *The Consumer Product Safety Commission: A Flawed Product of the Consumer Decade*, 51 GEO. WASH. L. REV. 32, 43-44 (1982) (quoting Swit, *An Overview of Public Law 92-573*, Proceedings of the Briefing Conference on the Consumer Product Safety Act 7 (1973) (sponsored by the Product Safety Letter, Inc.)).
[9] *See id.* at 44.
[10] *Id.* at 63-64.
[11] *Id.* at 66.
[12] 118 Cong. Rec. 21,854 (1978) (remarks of Sen. Magnuson).

however, the process itself impeded the agency from fulfilling its mandate because the CPSC was overrun with petitions, including from industry participants who had economic incentives to get the agency to pass particular standards. Section 10 was therefore also ultimately revoked in 1981.

The story of the CPSA and the CPSC is thus a cautionary tale of how even well-intended provisions can cut against the ultimate success of a statute. Procedural rights aimed at benefitting consumers and creating better policy can become hijacked by well-financed and well-organized industry representatives.

Agency capture is further exacerbated by the fact that industry groups are also well positioned to contribute to political campaigns and to lobby, which in turn gives them influence with the agency's legislative overseers. For example, Arthur Levitt, the chair of the SEC from 1993-2001, describes the SEC during his tenure as being constantly threatened with budget cuts by the SEC's congressional overseers if it pursued aggressive regulations.[13]

Second, capture is also the result of the well-documented phenomenon of a "revolving door" between agencies and the industries they regulate. While serving on an agency's board, agency heads may also be thinking about their prospects in the private sector when their term at the agency expires. This outlook may make these officials reluctant to impose regulations that an industry views as too aggressive or obtrusive. It may dim an official's job prospects or make that job more difficult if the official has to live with the rules upon leaving the agency.[14]

The effect of the revolving door is often cited as one of the reasons why the SEC has failed to address some pressing problems in the trading industry. For example, although late trading and market timing were widespread and well known, the SEC did not act to regulate the practices and stepped in only after the New York Attorney General (AG) brought an enforcement action under state law. Similarly, it was the New York AG who led the fight to stop investment firm bankers from influencing the reports of firm analysts. Experts on SEC practice have noted that the SEC did not initially address these problems because of a prevailing view among SEC officials that, given the "rapidly revolving door between the SEC and private legal practice," "unless an issue has become high profile, it is best not to rock the boat."[15] The SEC became overpopulated with members who "identified with the market participants they were ostensibly regulating."[16] These pressures may have led the agency to adopt an overly lax view of its enforcement

[13] ARTHUR LEVITT, TAKE ON THE STREET 123, 132 (2002)
[14] JERRY L. MASHAW & DAVID L. HARFST, THE STRUGGLE FOR AUTO SAFETY 16 (1990) (noting that agency officials may take into account "social and business relations and the prospects of further career opportunities in the private sector").
[15] John C. Coffee, Jr., *A Course of Inaction*, LEGAL AFFAIRS 46 (Apr. 2004).
[16] Jonathan R. Macey, *State-Federal Relations Post-Eliot Spitzer*, 70 BROOK. L. REV. 117, 128 (2004).

and regulatory functions, which in turn created a void that was filled by the New York AG's office.[17]

Finally, another key factor that helps to give regulated entities disproportionate influence is their information advantage. For an agency to regulate an industry effectively, it needs to know how the industry works and what it is capable of doing. But that information is often in the exclusive control of the regulated entity.[18]

The factors that push toward agency capture can be minimized in various ways. Although it is not possible to adjust the relative resources of industries and consumers, one way to keep the agency from being overwhelmed by industry challenges is to provide it with the resources it needs to carry out its mandate. Additionally, it is important to ensure that the agency will not face insurmountable procedural obstacles in adopting its rules or be subject to unnecessary challenges regarding the scope of its mandate. Second, the revolving-door phenomenon can be curbed by imposing post-employment restrictions on agency officials. Finally, the agency can be assisted in obtaining information by imposing statutory reporting requirements on regulated entities and giving the agency subpoena power. While there is no perfect or complete solution to agency capture, efforts such as these can mitigate its effects and assist an agency in fulfilling a mandate to protect consumers.

II. Protecting the CFPA from Capture

These lessons serve as a helpful backdrop to analyzing the proposed structure of the CFPA. Although the legislation contains some protections for the agency that will assist it in achieving its statutory mission, there are areas that could be improved.

A. Leveling the Regulatory Playing Field

As noted above, agencies can become hampered in their ability to fulfill their mandates when regulated interests leverage procedural rights under a statute to their advantage. The CFPA Act generally relies on the standard requirements in the Administrative Procedure Act (APA) that apply to most independent and executive agencies. But the Act goes beyond the APA by establishing an additional procedural requirement of consultation before the CFPA can promulgate rules under the Act. That consultation requirement has the potential to bog down the CFPA as it tries to establish regulations for this field.

There is language throughout the Act that requires the CFPA to consult with other agencies before it promulgates rules. For instance, in Sections 1022(b)(2) and

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[17] Rachel E. Barkow, *The Prosecutor as Regulatory Agency*, in PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT (Anthony Barkow & Rachel Barkow, eds., NYU Press forthcoming), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1428934.

[18] Stewart, *supra* note 2, at 1714; Seidenfeld, *supra* note 4, at 464. For a discussion of how industry participants used their information advantage to avoid regulation of credit default swaps and possible remedies to this problem in the context of consumer financial products and services, see Date, *supra* note 3, at 6-9.

1031(d), the CFPA is required to "consult with the Federal banking agencies, or other Federal agencies, as appropriate, regarding [or concerning] the consistency of a proposed rule with prudential, market, or systemic objectives administered by such agencies." In Section 1035(c), the agency is again required to consult with Federal banking and other agencies, as well as with "State authorities."

These provisions are likely to make it difficult for the CFPA to promulgate rules in a timely manner. These provisions apply to a large number of agencies because so many agencies regulate related fields. And when consulting each of these agencies, the CFPA is charged with considering all of the prudential, market, and systemic objectives of these other agencies – that is, anything of any importance to the consulted agency. This consultation process is therefore likely to delay the promulgation of CFPA rules. This is especially so because failing to take these provisions seriously will make any rules that the CFPA does pass vulnerable to innumerable legal challenges on the ground that the CFPA did not adequately consider a competing agency's objectives. This is the kind of sweeping substantive standard that allows industry participants to tie up agency rules for years with challenges.[19]

Congress may wish to keep this language to ensure rigorous consultation and coordination, even if that means slowing down the CFPA's regulatory progress. But if Congress is concerned that this provision will create unnecessary litigation, it could likely achieve substantial coordination without subjecting the CFPA to as many challenges if the language were to make clear that it is left to the CFPA's discretion how and when to consult. For example, the section could be modified to state that the agency shall "consult with the federal banking agencies, or other Federal agencies, as the Agency in its judgment deems appropriate . . ." and further clarify that the consultation requirement is not subject to judicial review. Again, however, whether the Act should be modified along these lines depends on Congress's considered judgment as to the relative importance of coordination.

The need for the current consultation requirement may also depend on whether the CFPA is an executive agency for purposes of presidential oversight, as discussed more fully below in Part III. If it is an executive agency for oversight purposes, then OIRA can serve the coordinating function of the Act's consultation provisions and make sure that the CFPA's rules are consistent with other agencies.[20] In other words, with

[19] Section 1038 imposes a similar consultation requirement. It provides that "the CFPA shall, when prescribing any rule under this section, consult and coordinate with Federal banking agencies and the Federal Trade Commission" to, among other things, "ensure that the rules impose substantially similar requirements on covered persons." This requirement lacks the "as appropriate" language, so it is broader than the other provisions in that it seems to be a prerequisite any time the CFPA seeks to prescribe rules on consumer access to information. On the other hand, this provision is narrower than the other consultation provisions because the CFPA need only consult the banking agencies and the FTC. But to the extent this consultation requirement subjects the CFPA to challenges that it fails adequately to take into account the requirements of the banking agencies or the FTC, it, too, subjects CFPA rules to broad challenges.
[20] U.S. Gov't Accountability Office, Report to the Chairman, Committee on Oversight and Government Reform, House of Representatives, Federal Rulemaking: Improvements Needed to Monitoring and Evaluation of Rules Development as Well as to the Transparency of OMB Regulatory Reviews 8 (April

OIRA review, this provision may be largely duplicative and simply serve to delay and impede CFPA regulations.

There is an additional obstacle the Act puts in front of the CFPA when it seeks to bring an enforcement action. Section 1054(g)(1) sets out the statute of limitations for the Act, and it provides that "no action may be brought under this title more than 3 years after the violation to which an action relates." Because violations by sophisticated business interests are often not discovered for years, this provision may hamper the CFPA in its enforcement efforts because the clock starts running from the time of the violation, not from the time when the agency discovers the violation.

In related areas, Congress has been careful to trigger the running of the statute of limitations to the time of discovery. For example, suits brought for violations of the Right to Financial Privacy Act may be brought "within three years from the date on which the violation occurs or the date of discovery of such violation, whichever is later."[21] Similarly, the Federal Deposit Insurance Corporation is allowed to bring suit to recover an underpaid amount on an assessment "until 3 years after the date of discovery of the false or fraudulent statement."[22] Suits for false statements or the omission of material facts with regard to securities sales and suits for false registration statements may be brought "within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence."[23]

Given the sophistication of the suppliers of consumer financial products and instruments, it would seem that there is even greater reason than in these other contexts to allow suit to begin from the time of discovery of the violation. As with suits regarding false statements regarding securities, a provision can be added to the CFPA Act noting that the clock starts running from the time of discovery or after such discovery should have been made by the exercise of reasonable diligence. This would protect the interests of suppliers in case the agency was unreasonably slow in its pursuit of violations, but would also protect consumers when a violation was, despite all reasonable efforts, not discovered for a period of time after the violation itself.

While the consultation requirement and the current statute of limitations provision seem to cut in favor of regulated entities, the Act has other provisions that work as counterweights to capture. One of these is Section 1042, which allows State attorneys general to enforce provisions of the Act. As noted above, attorneys general have served a checking function when the SEC has failed to police an area of industry abuse. Section 1042 would allow State AGs to serve a similar function in the context of the CFPA Act. If the CFPA is unwilling or unable to address a problem with consumer financial products or services, State AGs can provide additional resources to police the Act.

2009) (noting that OIRA is responsible for making sure that "decisions made by one agency do not conflict with the policies or actions taken or planned by another agency").

[21] 12 U.S.C. § 3416.

[22] 12 U.S.C. § 1817(g)(2)(C).

[23] 15 U.S.C. § 77m.

Moreover, because the CFPA retains the right to intervene in these actions, it can ensure that its views are known if it is concerned that the AG's action may lead to bad policy.[24] The Act thus effectively uses AGs as a check on capture while respecting the expert judgment of the CFPA.

The Act also provides in Section 1041(a)(1) that states may continue to regulate the field of consumer financial products and services, as long as state laws are not inconsistent with the CFPA Act. The Act further specifies in various provisions that state laws are not inconsistent with the CFPA Act if the "protection such statute, regulation, order, or interpretation affords consumers is greater than the protection provided under this title, as determined by the Agency."[25] These provisions are likely to generate controversy and litigation, because whether a state law is more or less protective of consumers will not always be clear and may depend on one's view of regulation in general. Thus, whether a state law is preempted may well depend on the regulatory orientation of the CFPA's Board and whether or not it tends to trust market forces more or less. For example, if a majority of the CFPA's Board is of the view that market forces better protect consumers than do regulations, the agency may seek to preempt state laws that regulate industry more heavily than CFPA regulations that do not go as far. The effect of this provision on capture is therefore contingent on the views of the CFPA Board and how much deference courts give those views. This provision will provide a check on industry bias only to the extent the CFPA is an accurate judge of what is more protective of consumers.

B. Stopping the Revolving Door

There is another way in which Congress can give the CFPA greater immunity from capture, and that is to impose limits on the ability of the CFPA Board members to work for the very industry actors they are charged with regulating.

Congress has imposed such limits in other contexts. For example, legislation creating the Public Company Accounting Oversight Board (PCAOB) charges the PCAOB with "establish[ing] ethics rules and standards of conduct for Board members and staff, including a bar on practice before the Board (and the [SEC], with respect to Board-related matters) for 1 year for former members of the Board, and an appropriate period (not to exceed 1 year) for former staff of the Board."[26] The Federal Board of Governors also imposes post-employment restrictions on its members, making them "ineligible during the time they are in office and for two years thereafter to hold any office, position, or employment in any member bank."[27] Members of the Board of the Farm Credit Administration are also ineligible to work for "any institution of the Farm Credit System" while they are in office and for two years thereafter.[28]

[24] *See* Barkow, *supra* note 17, at 25-27.
[25] *See, e.g.*, Section 1041(a)(2); Section 5136C(c)(2); Section 5136C(d)(2); and Sections 6(c)(2) and (d)(2)(B).
[26] 15 U.S.C. § 7211(g)(3).
[27] 12 U.S.C. § 242. This restriction does "not apply to a member who has served the full term for which he was appointed." *Id.*
[28] 12 U.S.C. § 2242.

The legislation creating the CPSC does not address Board members' post-service employment but it does place restrictions on who can be named a commissioner in the first place. Specifically, it provides that a person cannot hold the office of a commissioner if he or she is "in the employ of, or holding any official relation to, any person engaged in selling or manufacturing consumer products" or owns "stock or bonds of substantial value in a person so engaged" or "is in any other manner pecuniarily interested in such a person."[29] In addition, CPSC commissioners are also barred from "engaging in any other business, vocation, or employment."[30]

The CFPA Act does not presently contain any pre- or post-employment restrictions on its Board members. Because the Act in Section 1012 seeks Board members with relevant experience "related to consumer financial products or services," pre-employment restrictions like those that apply to the CPSC seem unwise. Many of the most qualified people may well be currently employed in the market for consumer financial products or services or own stock in a company because of prior service. It would be feasible, however, to include post-employment restrictions along the lines of those that apply to the PCAOB, the Board of Governors, and the Members of the Farm Credit Administration. The framework that applies to the PCAOB seems particularly well suited to the CFPA because they govern similar industries. Just as it makes sense to try to limit the revolving door between the PCAOB and the accounting industry, so, too, does it make sense to limit the back-and-forth between the CFPA and those who supply financial products and services. The PCAOB legislation also has the advantage of addressing this phenomenon not just at the Board level, but at the staff level as well.

C. Access to Information

The proposed Act is attentive to the value of information to the agency. It gives the CFPA broad access to information, including allowing the agency to seek reports from covered persons (Section 1022(c)(1)), to access to the reports of other regulators (Section 1022(c)(5)), and to subpoena when necessary (Section 1052). One area where there may room for improvement is in Section 1014(c)(1), which creates a specific research unit within the agency. As currently written, the research unit is charged with researching, analyzing, and reporting on the markets for consumer financial products and services, including areas of alternative products with high growth, and on various aspects of consumer awareness and behavior. While this is valuable research, it would be helpful to the CFPA's functioning if the research unit also conducted research on the supply-side of this market. That is, the research unit could also be charged with investigating advertising and marketing practices by financial service and product suppliers. In addition, the research unit could report on the enforcement and regulatory efforts of others federal agencies and the states in addressing financial services and products. This information can assist the CFPA in determining what company practices currently look like and what regulations are feasible.

[29] 15 U.S.C. § 2053(c).
[30] *Id.*

III. The CFPA as Independent v. Executive Agency

The proposed legislation states in Section 1011 that the CFPA will be "an independent agency." At the same time, the Act makes institutional design choices that make the CFPA more political than most multi-member independent regulatory agencies (including some independent agencies whose functions the CFPA is taking over). In addition, the language of the Act is susceptible to an interpretation that gives the President greater control over the CFPA than over other independent regulatory agencies.

A. Politically Balanced Membership

There are typically two attributes that characterize a multi-member independent regulatory agency and distinguish it from an executive agency. First, unlike the heads of executive agencies who can be removed at will by the President, the members of an independent agency serve fixed terms and are removable only for cause. Second, unlike executive agencies, which are most often headed by a single appointee who shares the President's political goals for that agency, almost all multi-member independent regulatory agencies are balanced in their membership so that the view of no one political party dominates.

The CFPA takes over functions relating to consumer financial protection from several traditional independent agencies that have these characteristics. The Federal Deposit Insurance Corporation (FDIC) is a five-member board, and its authorizing statute provides that no more than three members may be of the same political party.[31] The FTC is also governed by a five-member body, and its authorizing statute similarly insists that no more than three of its commissioners can be members of the same political party.[32] The National Credit Union Administration (NCUA) follows this same model. Of the three members of its board, only two may be members of the same party.[33]

Unlike the legislation establishing these independent agencies, the CFPA Act currently lacks any requirement that seeks to balance the politics on the CFPA's five-member Board. As a result, it is not inconceivable – and perhaps to be expected – that a President would appoint only members of his or her political party. Thus, if a President serves two terms, he or she could create a Board entirely composed of members of his or her political party because each Board member's term will have expired over a period of five years. While Senate confirmation may act as a check on this, it is no guarantee of ideological balance or moderation.

The legislation establishing most multi-member independent agencies insists on party balance for good reason. As a wealth of empirical research demonstrates, a group comprised solely of ideologically like-minded people tends toward extreme

[31] 12 U.S.C. § 1812(a)(2).
[32] 15 U.S.C § 41.
[33] 12 U.S.C. § 1752a(b)(1).

decisionmaking.[34] Liberals and conservatives alike become more liberal and conservative, respectively, when they deliberate only with like-minded people. Thus, as Cass Sunstein has observed, "[a]n independent agency that is all Democratic, or all Republican, might polarize toward an extreme position, likely more extreme than that of the median Democrat or Republican, and possibly more extreme than that of any member standing alone."[35] This kind of polarization is unwise for an agency regulating an area as complicated as consumer financial products and services because it could mean wide fluctuations in policy as presidential administrations change. Indeed, dramatic shifts in positions based on political winds were precisely the evil that independent agencies were designed to combat. When the FTC was created, for instance, the Senate Committee Report emphasized the need "for an administrative board . . . which would have precedent and traditions and a continuous policy and would be free from the effect of such changing incumbency."[36]

A multi-member commission that is politically balanced is beneficial for another reason. As noted above, one of the concerns with agencies that regulate powerful, wealthy industries is that those industries tend to dominate the agency's agenda because they have greater resources to monitor what the agency is doing. But when an agency is composed of members of different parties, it has a built-in monitoring system for interests on both sides because that type of body is more likely to produce a dissent if the agency goes too far in one direction.[37] That dissent, in turn, alerts Congress and the public at large that the agency's decision might merit closer scrutiny.

It is possible that the proposed legislation does not follow this template for multi-member independent regulatory agencies because the CFPA is not just taking over functions from traditional multi-member independent agencies. It is also assuming consumer protection functions from two executive agencies – the Comptroller of the Currency and the Office of Thrift Supervision (OTS) – and the Board of Governors. The Board of Governors is unique among most multi-member independent agencies because it does not have a requirement that its membership be politically balanced.[38] But the

[34] *See, e.g.*, David Schkade, Cass R. Sunstein & Reid Hastie, *What Happened on Deliberation Day?*, 95 CAL. L. REV. 915 (2007) (discussing the results of an experiment that shows that liberals and conservatives become more liberal and conservative, respectively, as a result of deliberation amongst like-minded people); Cass R. Sunstein, David Schkade & Lisa Michelle Ellman, *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301 (2004) (discussing data that shows that unified groups of three Democrat-appointed or Republican-appointed judges are far more likely to vote in a "liberal" or "conservative" manner, respectively, than Democrat-appointed or Republican-appointed judges who are part of a divided bench); Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71, 74 (2000) ("In brief, group polarization means that members of a deliberating group predictably move toward a more extreme point in the direction indicated by the members' predeliberation tendencies.").

[35] Sunstein, *supra* note 34, at 103.

[36] 51 Cong. Rec. 10376 (1914).

[37] A recent empirical study of the Federal Communications Commission (FCC), for example, found that partisanship accounts for roughly 75 percent of the FCC's non-unanimous decisions. Daniel E. Ho, *Congressional Agency Control: The Impact of Statutory Partisan Requirements on Regulation* 35 (Feb. 12, 2007), *available at* http://dho.stanford.edu/research/partisan.pdf.

[38] The legislation creating the Board of Governors does state, however, that, in "selecting the members of the Board, not more than one of whom shall be selected from any one Federal Reserve district, the

Board of Governors is unique in other respects as well. Its members serve long terms of 14 years, and they have perhaps the most powerful agency positions in the country because of their authority to set monetary policy. Monetary policy cannot, of course, fluctuate in an extreme manner as administrations change because of the deleterious effect it would have on the economy. It is therefore unsurprising that even without a requirement that the Board be politically balanced, it is one of the most stable agencies in government and the most independent. As for the Comptroller of the Currency and OTS, those two agencies in Treasury are not multi-member bodies, so their design does not speak to political balance. More fundamentally, as with the Board of Governors, there is no reason to believe that these agencies were designed with their consumer protection functions, as opposed to their more central regulatory functions, in mind.

The CFPA, in contrast, has as its sole mission the protection of consumers in the market for financial products and services. It therefore most closely resembles agencies such as the FTC, the SEC, and the CPSC in its goals – and the legislation for all of those multi-member agencies insists on political balance to help achieve more stable policy outcomes over time. For the same reasons that Congress opted for political balance on those agencies, it should do so with respect to the CFPA as well.

B. Executive Oversight

It is unclear from the proposed legislation what the intended relationship is between the CFPA and the President. Although the legislation states in Section 1011 that the agency is to be "independent," it immediately adds that the agency will be "in the executive branch." Coupled with the lack of a provision that seeks party balance, the legislation is at least susceptible to an interpretation that it is creating an agency that, while independent in some respects (specifically, giving Board members some protection from removal from office), it is otherwise a traditional executive agency subject to presidential oversight and direction.

That presidential oversight could include subjecting the CFPA to various executive orders that require executive agencies to conduct cost-benefit analysis of proposed regulations and guidance documents, to explain what market failure a proposed regulation addresses, and to submit that analysis to the President's Office of Information and Regulatory Affairs for review.[39] These orders also require agencies to designate a regulatory policy officer (RPO) to oversee compliance with the requirements of the executive orders, and a recent order insists that the RPO be a presidential appointee. As a recent Government Accountability Office (GAO) report documents, the OIRA regime expands the President's influence over an agency's substantive policies, frequently leading to significant and material modifications in the agency's regulations.[40]

President shall have due regard to a fair representation of the financial, agricultural, industrial, and commercial interests, and geographical divisions of the country." 12 U.S.C. § 241.

[39] Executive Order 12866; Executive Order 13422.

[40] GAO Report, *supra* note 20, at 30 (reviewing 12 rules submitted to OIRA and finding that OIRA review led to significant or material changes for eight of them).

The Executive orders currently exempt independent agencies from their purview, but an independent agency for purposes of the orders is defined by the Paperwork Reduction Act.[41] The current CFPA Act does not propose an amendment to the Paperwork Reduction Act to include the CFPA among the list of independent agencies, so it is certainly possible, perhaps likely, that OIRA could conclude that the CFPA is not an independent agency for purposes of its review process, particularly given that the Act specifies that the CFPA is "in the executive branch."

In this regard, it is noteworthy that the statutes creating the independent regulatory agencies listed in the Paperwork Reduction Act do not use the same "independent agency in the executive branch" language that the CFPA Act does. In contrast, that language has been used to describe executive agencies that are subject to presidential oversight. For example, the Act creating the Social Security Administration (SSA) states that it shall be "an independent agency in the executive branch."[42] The SSA, in turn, has complied with executive orders on regulatory review, including the appointment of a regulatory policy officer.[43] Similarly, the Federal Emergency Management Agency has also been characterized as an "independent agency in the Executive Branch,"[44] though it, too, is subject to presidential oversight.[45]

There is, then, a significant possibility that the CFPA Act will subject the CFPA to oversight by the President, including the extensive review of regulations conducted by OIRA.[46] Congress should therefore determine whether it wants the CFPA to be subject to this kind of presidential oversight.

OIRA review has benefits. It helps the President coordinate policies across the Executive branch, and requiring an agency to submit a cost-benefit analysis of a proposed regulation to OIRA can have potentially positive disciplining effects because OIRA brings a fresh set of eyes to the issue. And, in recent years, OIRA review has been

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[41] Executive Order 12866 §3 (including all agencies within its ambit except those "considered to be independent regulatory agencies, as defined in 44 U.S.C. § 3502(10)"). 44 U.S.C. § 3502 has since been amended so that independent regulatory agencies are now defined in § 3502(5).
[42] 42 U.S.C. § 901.
[43] Agency Regulatory Policy Officers (as of June 19, 2008), *available at* http://georgewbush-whitehouse.archives.gov/omb/inforeg/regpol/agency_reg_policy_officers.pdf.
[44] *See* notes following 15 U.S.C. § 2202 (transfer of functions).
[45] *See, e.g.*, Interim Final Rule, 66 Fed. Reg. 15968 (noting that a FEMA rule has been reviewed by OMB for compliance with 12866).
[46] There is a constitutional question whether OIRA can exercise oversight over an independent agency. *See* Richard L. Revesz & Michael Livermore, Institute for Policy Integrity, New York University School of Law, Memorandum 5 (Feb. 13, 2009) filed in response to Memorandum from the President of January 30, 2009 concerning Regulatory Review, published at 74 Fed. Reg. 5977 (Feb. 3, 2009), *available at* http://www.reginfo.gov/public/jsp/EO/fedRegReview/Revesz_Livermore.pdf; Robert W. Hahn & Cass R. Sunstein, *A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis*, 150 U. PA. L. REV. 1489, 1534-1537 (2002). To the extent the CFPA Act has language distinguishing it from more traditional independent regulatory agencies, however, that constitutional question may be avoided because a court could conclude that this language signifies Congress's intent that presidential oversight, including OIRA oversight, is acceptable.

relatively expeditious, taking less than a month of additional time.[47] Moreover, because the CFPA members are not removable by the President except for cause, OIRA review would give the President some degree of influence over the CFPA's agenda. Thus, to the extent the President represents a national constituency, that view will be represented before the agency.

But there are costs to OIRA oversight as well. The more susceptible an agency is to presidential oversight, the more likely the agency's policies will shift as new administrations take power. Dramatic shifts hinder business planning and create legal uncertainty, which can be damaging to any market, including the one for financial products and services. In addition, OIRA has traditionally had a deregulatory bias. Although many urge OIRA to take a more aggressive role in policing agency inaction as well,[48] OIRA's history is to the contrary. There remains the risk, then, that OIRA review could put pressure on the CFPA to be less ambitious in its regulatory positions. The potential for OIRA to delay the implementation of regulations in the future is also a possibility.

Congress therefore faces the question of whether it would like presidential oversight in the form of OIRA review for the CFPA or whether it would prefer to insulate the CFPA from this type of supervision. If Congress wishes to make clear that the CFPA is not subject to OIRA review and other presidential directives, it should amend 44 U.S.C § 3502(5) to include the CFPA or otherwise provide in the CFPA Act that the CFPA is to be treated as an independent agency for purposes of presidential executive orders governing agency oversight. If Congress wishes to make clear that the CFPA is subject to presidential oversight, it should amend the CFPA to state this more clearly. I take no position on which path Congress should pursue, but simply flag that, as the Act now stands, it is unclear what the relationship between the President and CFPA will be.

IV. Conclusion

Thank you for allowing me to testify and share my thoughts on this critical piece of legislation. I would be happy to answer any questions that you might have.

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[47] *See* OMB Watch, *OIRA's Role in the Obama Administration Examined, available at* http://www.ombwatch.org/node/10115.

[48] *See* Revesz & Livermore, *supra* note 46, at 1-3; Hahn & Sunstein, *supra* note 46, at 1521-1524.

Mr. RUSH. Mr. Stinebert.

TESTIMONY OF CHRIS STINEBERT

Mr. STINEBERT. Thank you, Mr. Chairman, and thank you for this opportunity to speak with you today. I am very glad to hear that this is kind of a first step and hopefully which will be a long process because as many have expressed here today, there are certainly some concerns about this issue and we hope that there will continue to be somewhat of a cautious approach as we go forward.

The American Financial Services Association has been around for almost 100 years and we represent about 30 percent of all consumer credit in the United States with members in the mortgage, credit card, auto and personal installment loans. First and foremost, AFSA supports strong financial consumer protection regulation. Just because we have concerns going forward about the current agency does not mean that the industry and that the association is not committed to strong consumer protection regulation regarding financial services. We believe that consistent enforcement of existing consumer protections laws by government regulators would have greatly lessened the harmful impact that the current crisis has on consumers and certainly our economy. Many AFSA members are regulated primarily at the State level and subject to a patchwork of requirements. We firmly believe that consumer protection should be uniform in every State. Therefore, AFSA supports strong national consumer protection standards that allow the members to meet their consumer protection obligation in an efficient and cost-effective manner.

In addition, strong national consumer protection standards will provide a benefit to consumers only to the extent that they are consistent with sound potential regulation. Consumer protections that threaten the safety and soundness of financial service providers offer really no protection at all. We believe consumers will be better served by a regulatory structure where prudential and consumer protection regulations are housed within a single regulator. Congress tried to separate these two intertwining functions with the GSEs. When it became apparent that this situation was unavoidable, Congress brought the two regulatory functions back under a single regulator and for good reason. We urge Congress to support regulatory structure that does not separate safety and soundness from consumer protection.

The authority proposed to be vested in the new agency is breathtaking in both its scope and its effect. It would cover many entities and persons who have little or no involvement in the activities leading to the current economic crisis. Without any demonstrated need, many unsuspecting persons will be swept into a web of scrutiny and reporting requirements that yield little in the way of consumer protection but much in the way of increased cost for consumers. Attorneys, accountants, consumer reporting agencies, auto dealers, title companies among others will find themselves subject to review with no evidence that they behaved unfairly. Financial service providers will find it increasingly difficult to plan for risk as virtually any practice or product other than prescribed standard plain vanilla products could be labeled as unfair or abusive. Innovation will be discouraged.

Given the vast scope of the proposed agency's authority, its funding needs are also staggering. The proposal seeks to fund the CFPA by assessing fees on persons and entities it regulates while including many that would not expect to be covered currently. There is no doubt that any assessment on financial service products will be passed on eventually to consumers. That direct unavoidable result will be an increase in the cost and availability of credit.

Most AFSA members are regulated by the FTC, which has a proven record of enhancing consumer protection. It has addressed the economic crisis in two ways, first by using the enforcement authority to pursue bad actors in the financial services industry, and second, by setting federal policy through guidance and public comment. Numerous examples are listed in our written testimony.

But in conclusion, AFSA believes that the FTC has done an excellent job in enforcing consumer protection law and is best suited to continue that role going forward. We believe the Administration's goal can be achieved with adjustments to the current regulatory structure and the result will be more efficient, less costly and certainly more effective. To that end, we have two specific suggestions. One, make current and future consumer protection rules apply to all financial services providers. Congress should ensure that all federal consumer protection laws and regulations apply with equal force to all providers of financial services with respect to similar cases of products and services. These laws should include strong national standards that preempt State laws and permit all Americans to enjoy a consistent level of service and access with respect to financial products and services. We have heard again and again today as you have 50 different States that can meet or exceed the current laws that this is not simplification. We are just going to wind up with 51, as you stated, Mr. Chairman, different rules that these people are going to have to follow.

And number two, pursue a regulatory structure that does not separate financial products and services from the viability of the companies that offer them. All prudential agencies should work together to coordinate consumer protection regulation for financial products and services with the goal that regulations be preemptive, consistent and uniform. If we don't have that, we are not going to make any headway. Thank you for your time.

[The prepared statement of Mr. Stinebert follows:]

American Financial Services Association

HOUSE COMMITTEE ON ENERGY AND COMMERCE

Subcommittee on Commerce, Trade, and Consumer Protection

Hearing on:

The Proposed Consumer Financial Protection Agency: Implications For Consumers And The FTC

Wednesday, July 8, 2009

WRITTEN TESTIMONY OF CHRIS STINEBERT

PRESIDENT AND CHIEF EXECUTIVE OFFICER

THE AMERICAN FINANCIAL SERVICES ASSOCIATION

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WRITTEN TESTIMONY OF CHRIS STINEBERT

Thank you, Mr. Chairman, for the opportunity to speak here today.

Founded in 1916, AFSA is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. AFSA members are important sources of credit to the American consumer, providing approximately 30 percent of all consumer credit. AFSA member companies offer or are assigned many types of credit products, including credit cards, retail credit, automobile retail installment contracts, personal installment loans and mortgage loans.

Consumer Protection is an Important Public Goal

AFSA supports consumer protection regulation in the financial services markets. AFSA believes that consistent applicability and enforcement of existing consumer protection laws by government regulators could have lessened some of the harmful effects on consumers in the current economic crisis.

Many AFSA members are regulated primarily at the state level and subject to a patchwork of varying and sometimes inconsistent requirements. This ad-hoc approach to regulation is costly and inefficient, and AFSA supports strong national consumer protection standards that will allow its members to meet their consumer protection obligations in an efficient and cost-effective manner. These standards must limit the ability of the states to impose additional requirements or apply inconsistent enforcement standards. To do otherwise will merely limit access to, and increase the cost of, consumer credit for millions of Americans.

In addition, strong national consumer protection standards will provide a benefit to citizens and our economy only to the extent they are consistent with sound prudential regulation. Consumer protections that threaten the safety and soundness of financial services providers offer no protections at all – such requirements will serve only to limit choice and access and promote conflicts between prudential regulators and the CFPA. The administration's proposed legislation provides no guidance with respect to resolving agency conflicts arising from the certain tension between appropriate consumer protection and institutional safety and continuity.

AFSA supports, and believes consumers will be better served by, a regulatory structure where prudential and consumer protection regulation is housed within a single regulator. Congress tried to separate these two intertwined functions with the GSEs. It quickly became apparent that the situation was unworkable, and Congress brought the two regulatory functions back together in a single regulator. Today, there is no evidence that a separation of prudential and consumer protection regulation will offer better results in the financial services arena – indeed, indications are to the contrary -- and we urge Congress to support a regulatory structure that does not separate financial products and services from the viability of the companies that offer them.

<u>Scope of the Proposed CFPA is too Broad</u>

The authority proposed to be vested in a CFPA is breathtaking in its scope and effect. It would cover many entities and persons that had little or no involvement in activities leading to the current economic crisis, including coffee shops and retailers that offer prepaid cards, as well as small real estate investors and jewelry appraisers. Without any demonstrated need, these and many other unsuspecting persons will be swept into a web of scrutiny and reporting requirements that will yield little in the way of consumer protection and much in the way of increased costs for consumers. Attorneys, accountants, consumer reporting agencies, auto dealers, title companies, and independent financial literacy educators will find themselves subject to review, potential liability and their corresponding costs – with no evidence that they are behaving unfairly.

Indeed, given that the agency would be required only to "consult" with prudential regulators, it is all too likely that the agency would embark on a mission to severely restrict or outlaw sound business and financial practices it perceives as not "consumer-friendly." Financial services providers will find it increasingly difficult to plan for risk, as virtually any practice or product -- other than agency-prescribed "standard, plain vanilla products" -- could be subject to attack as "unfair" to consumers.

AFSA does not oppose consumer protections – it embraces them. AFSA supports rational and considered consumer protection that is regulated and enforced in a manner that allows financial services providers to plan and price for risk, to operate their businesses efficiently and safely, and promote access to a full range of credit products for Americans.

The Cost of the CFPA is Burdensome and Excessive

Given the vast scope of the proposed CFPA's authority, its funding needs will be staggering. The administration's proposal does not suggest moving existing funds from other agencies commensurate with the proposed personnel transfers. The existing agencies will still need funding to step into the CFPA's role at times.

Instead, the proposal seeks to fund the CFPA by assessing fees on the persons and entities it regulates, which, as I indicated earlier, include many that would not expect to be covered. There is no doubt that any assessment on financial services providers will be passed on to consumers. In essence, the Administration is asking Congress to impose a new tax on consumers at a time when they are struggling to stay afloat financially and least able to absorb the additional levy. The result will be an increase in the cost and availability of credit; a cost that could be avoided by making better use of the existing consumer protection framework.

The Federal Agencies Can Provide Adequate Consumer Protection

Most AFSA members are subject to the regulatory jurisdiction of the FTC. The FTC has a proven record of enhancing consumer protection under its current authority. It has addressed the economic crisis in two ways: first, by using its enforcement authority under Section 5 of the FTC Act to pursue bad actors in the financial services industry, and second, by setting federal policy through guidance and public comment. I'll start by providing some examples that fall into the first category.

The FTC successfully negotiated a $40 million settlement with Select Portfolio Services in November 2003 for engaging in unfair and deceptive practices in servicing subprime mortgage loans. The settlement was modified in August 2007 to provide additional protections to borrowers, including mandatory monthly mortgage statements, a five-year prohibition on marketing optional products such as home warranties, and refunds for foreclosure attorney fees for services that were not actually performed. The FTC also entered into a $65 million settlement with First Alliance Mortgage Company for making deceptive subprime mortgage loans. The FTC distributed the $65 million to nearly 20,000 affected borrowers.

The FTC has successfully pursued other subprime mortgage lenders engaged in what the Commission deemed to be inappropriate conduct, including Capital City Mortgage Corporation. 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, the Fair Debt Collection Practices Act (FDCPA), and the FCRA in servicing consumers' mortgage loans, including debts that were in default when EMC obtained them.

In addition to pursuing bad actors in the subprime mortgage industry, the FTC has helped to improve lending practices by issuing guidance and submitting public comments to the federal banking agencies. In June 2007, the FTC released a Staff Report on Improving Consumer Mortgage Disclosures. The FTC has also conducted a study on the effectiveness of mortgage loan disclosures and found that current disclosures do not adequately explain mortgage loan terms and costs to consumers. The FTC provided comments to the federal banking agencies that consumers would benefit from a single disclosure that consolidates the disclosure of important features and costs of a mortgage loan and encouraged them to conduct consumer research to ensure that the proposed disclosures would be effective.

In the area of credit advertising and marketing, the FTC has brought numerous enforcement actions against lenders, brokers and others in violation of the FTC Act or the Truth in Lending Act. In mortgage advertising, for example, the Commission has brought actions against mortgage lenders or brokers for the deceptive marketing of loan costs or other key loan terms, such as the existence of a prepayment penalty or a large balloon payment due at the end of the loan. The Commission settled with three mortgage lenders charged with using ads that touted low interest rates and low monthly payments, but did not adequately disclose that the low rates and payment amounts would increase substantially after a limited period of time.

Moreover, the FTC has used all the tools at its disposal to increase its protection of consumers in the later stages of the credit life-cycle. The FTC has brought enforcement actions against those who engage in unfair or deceptive acts and practices in violation of Section 5 of the FTC Act, as well as against those who violate specific credit statutes, such as the FDCPA and the Credit Repair Organizations Act ("CROA"). The agency has created and distributed extensive consumer education materials about debt collection, debt relief services, credit repair, foreclosure rescue scams, and other financial services topics to assist consumers in financial distress in taking steps to protect themselves. The FTC has conducted cutting-edge empirical research on how to improve mortgage disclosures and engaged in comprehensive policy development activities related to debt collection and debt settlement.

<u>AFSA's View</u>

AFSA believes the FTC has done an excellent job of enforcing consumer protection laws, and is best suited to continue that role going forward. We believe that the country does not need a vast new bureaucracy – the administration's goals can be achieved with adjustments to the current regulatory structure, and the result will be more efficient, less costly and more successful.

To that end, we make the following suggestions to better utilize the existing expertise of the FTC and the federal banking agencies:

1. Make current and future consumer protection rules applicable to all financial services providers.

   Congress should ensure that all federal consumer protection laws and regulations apply with equal force to all providers of financial services with respect to similar classes of products and services. These laws should include strong national standards that preempt state laws and permit all Americans to enjoy a consistent level of service and access with respect to financial products and services, regardless of their location.

2. Pursue a regulatory structure that does not separate financial products and services from the viability of the companies that offer them.

   All prudential agencies should work together to coordinate on consumer protection regulation for financial products and services with the goal that the regulations be preemptive, consistent and uniform.

3. <u>Leave enforcement of rules with existing regulators and give backup enforcement authority to the FTC.</u>

   AFSA supports maintaining the current regulatory structure whereby consumer protection regulatory authority is vested with the prudential regulator. This structure will ensure that consumer protection regulation is enforced in a manner consistent with sound prudential management and that it properly balances consumer protection with safety and soundness concerns. The structure will also assure that national consumer protection standards will enhance the efficiency and quality of enforcement and supervisory activities. The FTC should be granted authority to step in if the prudential regulator fails, or is unable, to address consumer protection concerns in a timely manner.

AFSA believes this approach will make a better use of existing resources and promote greater efficiency and consistency in consumer protection regulation, as well as improve the quality and effectiveness of consumer protection for all Americans. We look forward to working with this Subcommittee in this regard.

Again, Mr. Chairman, I appreciate the opportunity to testify here today and am happy to answer any questions Members may have.

Mr. RUSH. The Chair thanks the witnesses and the Chair now recognizes himself for 5 minutes for questioning.

According to the Administration's proposal, the States will be able to enforce the statutes and rules being transferred to the new agency right away. In contrast, the FTC will be required to provide the CFPA with notice of a proposed action and has been stated earlier wait 120 days for the CFPA to determine if it would take the case before it takes any action. This applies to the very rules and laws currently enforced by the FTC.

Mr. Calkins, in your testimony you suggest that this 4-month delay will prevent the FTC from ever investigating or taking action in these areas. Can you explain and expound upon that, please?

Mr. CALKINS. When I read the bill, I sat and tried to think about what life would be like under the new legislation and the 120-day rule, what would the FTC do, and as I thought about it and I read the bill, I read where the bill says "all consumer financial protection functions of the Federal Trade Commission are transferred to the other agency." So who at the FTC is going to be doing the work to find that there is a violation that they wish to use the 120-day rule to develop. Maybe the FTC will go out and develop new resources to do this. Does that make sense? And I don't think that makes sense because the whole point of the bill, it appears, is to transfer a large part of what the FTC does to this new agency. Let us talk about the 120-day rules. Well, we have experience with the FTC and the Department of Justice where the FTC can ask the Justice Department to bring a civil penalty action for it, 45 days there. The reality is that the FTC, although I am not sure they would admit it, goes out of its way to avoid using that authority. It is a lot more effective and efficient for the Commission to go directly to court, bring an action, take action against a wrongdoer, stop a fraud, stop some harm, get relief and so they use the authority they can use by themselves, and time and again they don't go to the Department of Justice. I think that 120-day authority will be very rarely used in the new world. It is really there in case we have a new agency that is so opposed to enforcing these rules than an FTC might come along and try to develop some sort of alternative world as a backstop, but I think that the world that I see would have the FTC using this authority very, very rarely and I just do not think that is the vision contemplated by the bill as written.

Mr. RUSH. Does any other witness want to chime in here? I am hearing skepticism on the part of the other witnesses. Ms. Barkow, are you skeptical of this backdrop rule?

Ms. BARKOW. It does seem like 120 days would be the equivalent of a lifetime in this kind of an industry where you are talking about the——

Mr. RUSH. Well, if it was 60 days, would that make a real difference?

Ms. BARKOW. Well, that I leave to the FTC to decide but the fact that they are worried about the 120 days I think speaks volumes about the fact that it is probably going to be a significant issue.

Mr. RUSH. Does anyone else want to chime in here on this?

Mr. STINEBERT. Well, I think if you look at some of the discussion that occurred earlier and they were talking about the number of days, but perhaps more importantly look at the actual structure. If they have taken so many of the personnel, the team has been taken from the FTC and is now part of the new agency and yet they are supposed to maintain the backstop or the backup in these areas, but the team is gone, and as Mr. Calkins suggested, all they can do is go out and rehire new experts that are supposed to be the backup. It doesn't sound like a very good system to me.

Mr. RUSH. Ms. Hillebrand?

Ms. HILLEBRAND. Yes. Thank you, Mr. Chairman. Under the one rule writing many enforcers model, we want it to be as easy as possible for the FTC to bring the cases in its existing jurisdiction as well as to enforce the CFPA rules. If the Commission recommends a shorter time period, we would want you to look at that very seriously. We think a waiver process also could help here. The Commission and the CFPA could agree that for this kind of case we don't need to know in advance and for these other cases we need a shorter period.

Mr. RUSH. The Chair's time is concluded. The Chair recognizes the ranking member, Mr. Radanovich.

Mr. RADANOVICH. Thank you, Mr. Chairman.

Mr. Calkins, the proposed legislation defines a covered entity to include those who provide tax planning, financial and other related advisory services or provide educational courses and instruction materials to consumers. PBS often runs such programming on TV for their audiences as do financial cable stations and radio stations. Would these entities be covered persons under the proposed legislation, in your opinion?

Mr. CALKINS. Certainly there is a risk that they would be covered persons. Certainly the Commission would have to think about whether it was required to transfer responsibility for all those and then, very important, even if they are not covered entities today, the new agency has authority to define for itself additional activities that it would have jurisdiction over, and so even if the FTC didn't have to transfer authority today, they might have to transfer authority a year from now when the definitions got changed.

Mr. RADANOVICH. Thank you, Mr. Calkins. I want you to comment on a prior statement about the FTC's bipartisanship in the way it conducts its activities and how that is good. Can you elaborate on that and how the lack of bipartisanship might hinder the CFPA's ability to effectively carry out what is now the FTC's mission?

Mr. CALKINS. Well, the FTC I think has over the years developed credibility with Congress, with the States, with international observers because it operates in a bipartisan way. The commissioners try to work by consensus. They try to take the actions that make the most sense. When somebody wants to go out on a limb and be really wild and crazy to the left or the right, there is someone from the other side to pull them back in. As noted before, Ms. Barkow, when you have people going too far, dissents can be filed, and it succeeds in developing a shared understanding of the sensible way to proceed and then as presidents come and go there exists some continuity and that continuity I think adds credibility to the agency's operations and really has made it into a more effective agency.

Mr. RADANOVICH. All right. Thank you.

Ms. Barkow, would you care to respond to that question as well?

Ms. BARKOW. I agree completely, and I think that the whole idea of an independent regulatory agency which I think is part of the goal in this legislation is to have that kind of consensus generating form of norms that transcend any particular presidential administration so that you don't have the instability that comes with every new presidential administration means sweeping changes one way or the other. You have a stabilizing force in an agency that has membership from both parties. I think it has proven to be effective in other context and it is hard to understand why you would have a multi-member agency here that doesn't have that mix of political views on it. I mean, why not just then have a single-member board.

Mr. RADANOVICH. Thank you very much.

Mr. Stinebert, I want to ask you about uncertainty in the financial markets, this massive shift of responsibility and the creation of a new agency on consumer protection, your bird's eye view on the industry, how it would react to something like this and the level of uncertainty that it might bring into the markets where uncertainty is—we are trying to do everything to avoid uncertainty. Would you comment on that, please?

Mr. STINEBERT. Well, some might argue that this is the perfect time to do something like this. I think it is absolutely the worst time. We are finally starting to see some stability in the financial markets. We are starting to see some recovery. We are starting to see investors come back into the marketplace, which eventually investors have to buy these loans out there. In Europe and the United States, we are starting to see movement back in there. This does introduce a whole level of uncertainty back into the whole arena because people are now going to stand back and wait and see what goes on, whether there is additional liability requirements and regulations on these entities. So yes, I do agree that is going to bring a new level of uncertainty into the marketplace at the worst possible time for that.

Mr. RADANOVICH. Can you describe a scenario where the duplicative regulatory authorities allowed by this Act's weak preemption provision might actually prevent consumers from access to valuable financial services? This is the State preemption issue where you would have 51 different——

Mr. STINEBERT. Right now it is set up as basically a floor or a standard that States will have the ability to exceed. Someone will make a judgment whether what the State is trying to do is meeting or exceeding. I am assuming that would be the new agency. But if a determination is made by them that it exceeds it, of course anything that they would do to exceed would be permitted. So I think you have seen it in many other instances. I will give you the most recent, the new SAFE Act. That was the licensing for residential mortgage originators. You basically have out there in the implementation of that law 50 different standards that everyone is trying to meet and each of them, many of them exceeding the federal guidelines. So people that are regulated at the State level will have to register in multiple States as originators are going to have to follow very, very many different laws.

Mr. RADANOVICH. Thank you very much. Thank you, Mr. Chairman.

Mr. RUSH. The Chair now recognizes the gentleman from Massachusetts, Mr. Sarbanes—Maryland. I am sorry.

Mr. SARBANES. We are trying to get to Massachusetts. We have one Republican left. Thank you, Mr. Chairman. I appreciate the hearing.

Mr. Stinebert, you said this is absolutely the wrong time. What would be a good time?

Mr. STINEBERT. Well, I think when you go back, and there is plenty of history to point fingers at what was the cause of the subprime mortgage crisis and currently economic crisis but I don't think you would get anybody that would predict that whatever is done here today or by Congress that you can control every bubble that is going to occur in the future. Most economists would agree that yes, this bubble is a housing bubble, before it was a tech bubble, before that it was a savings and loan bubble. You cannot have government totally controlling financial markets unless they can totally control potential bubbles, unless you totally stymie innovation and all you have is a plain vanilla standard product out there, and I don't think that is good for the very consumers that we are trying to protect here.

Mr. SARBANES. Yes, I agree with that. I mean, I don't think you can have government totally controlling every single financial dimension in the market. I don't think you can do that. I don't think this tries to do that. I think what this tries to do is provide some oversight and direction and rules of the road so that people stop driving off the road, not only because in the view of Alan Greenspan that causes the drivers to crash and hurt themselves but because they run over hundreds of thousands of innocent bystanders in the process.

Let me switch back to a discussion from a few minutes ago because I think it is very relevant. As attractive as the new agency may be to some, and I am partial to it as it is being described, we still have to get from here to there, and I worry a lot because even if we had in place now the regulatory structure that we thought was necessary, it would have to be in overdrive, I would argue, to be on the lookout against predatory action that is lurking out there. But certainly in a transitional phase, predators have a lot of opportunities to make mischief, and I think the discussion about the 120 days kind of points to some of this anxiety, but I would like anyone who would care to, I would like to hear you respond to the idea of some kind of a special initiative or taskforce or consciousness that during this transition we need to be paying attention to, maybe it is a limited set of activities or potential mischief but there has got to be a special focus on that so that we don't make the transition, say now we have got a good regulatory structure in place, but in the meantime while that happened, a lot more people got hurt, and I say this because there is a lot of money that is flowing right now, taxpayer money, into the financial infrastructure of the country and many of the same players that took advantage of people over the last few years are thinking creatively of ways to take advantage of them again by accessing some of these dollars. So speak to that issue of how we can not be caught napping during the transition. We can start with you, Ms. Hillebrand.

Ms. HILLEBRAND. Thank you. I believe you are asking exactly the right question. There will be a danger period during the transition. There are a couple of things, and I don't have the whole answer. One is the work that the FTC does right now and continues to do up to that date of the transfer of rulemaking so it will be incredibly important. It could be up to 2 years after enactment. If these two titles are enacted together, the FTC will get its rulemaking improvements right away and can get some of these rules that have been kind of backlogged because of the limitations on its power moving into place. That will help certainly to put that policing into place. We do need to be paying attention to the new problems that will be developing. One that worries me in particular is a new form of zombie debt. You know, that is a debt where no one has got the paperwork, someone just has a list saying you owe this money, that might come out of some of these mortgage unsuccessful modifications or post kind of mortgage dispositions. So there are new issues, a lot of old issues. The more we can get the FTC to do now before the transfer, I think the better shape it will be in, but we will have to watch for that, yes.

And the other thing is, there is not going to be enough enforcement resources. Moving people from where they are over from all the different agencies is not going to give us enough enforcement staff to do the whole job for the country. The FTC worked very hard. They said they had 100 cases over 5 years. If you talk to any State AG in the country, they will tell you, 100 cases, we could bring that in my State tomorrow. There is more need than the number of people that are currently in place to do consumer protection enforcement financial services at the federal level.

Mr. SARBANES. Yes, sir.

Mr. COX. I think you need to break your question, which is a great question, in two parts. One part is more scam-like activities, and I think this Congress effectively delegated the FTC, charged to go over foreclosure rescue scams where a lot of mortgage brokers were moving in and loan modification scams and that kind of thing. That kind of activity the existing authority clearly is sufficient to regulate and the additional authorities recently give them help. You break that from more traditional and large-scale sale of products such as mortgages, et cetera, and I think in that area the credit markets are so beaten down that I think that this agency would be up and running effectively to get ahead of the new products that would be——

Mr. SARBANES. OK. That is helpful. Thank you very much.

Mr. RUSH. The Chair will extend to the members additional time for one additional question, and the Chair would recognize himself for one additional question.

I want to get back to this area of concurrent enforcement, and, you know, are there any risks or downsides to consumers or industry with this whole idea of concurrent enforcement between two agencies? Can you predict or look into a crystal ball and tell us what you see in terms of downsides or harm to the industry or to consumers regarding this whole area of concurrent enforcement? Anybody want to jump in? Mr. Stinebert?

Mr. STINEBERT. Well, I will give it a try and go first. One of the whole things that I think the agency being proposed is supposed to do is have single-source responsibility. Then you take enforcement and you break that among current enforcement agencies and then you have a new agency that is supposed to share some type of dual enforcement. It doesn't sound practical to me. We think that enforcement should continue to stay with the existing agencies. Now, to your question, Congressman, about the timing and you mentioned the speed limit and the people watching the people going down the road, I think that—I don't think anybody would deny that the regulations or the speed limits were in place but up until several years ago that perhaps the regulations were in place but the enforcement and the oversight was not. But I think if you look today in all of these agencies whether it be the FTC or the other agencies in Washington, I think everybody has their radar guns out and are certainly looking at consumer protection issues as well as credit and lending issues in general. I don't think there has ever been a focus in this area like there is today, and so to that respect, I think that going back to your question, Mr. Chairman, I think that it is very important, I think most important, that there be continued responsibility between safety and soundness and the viability of those companies and consumer protection, and I think it is unwise to separate those two entirely. We have gone through a good example with the GSEs of trying to do that and finding out why that doesn't work, and it would be very simple if that agency that is just concerned about consumer protection can make everything so safe that is not really good for the companies offering those products or for the consumers themselves. There is always going to be risk in this industry. That defines what it is. And I don't think you an eliminate that entirely.

Mr. RUSH. Ms. Barkow.

Ms. BARKOW. I think it is a really good question and I would say that I think it is not so much of a risk as long as the rules of the game as clear, so as long as you have the one agency that is setting the rules and what it is that companies have to do, the fact that there would be multiple enforcers of those rules is less disconcerting because you have clear standards and everyone would know what they are and you would have essentially this kind of more cops on the beat analogy and so that is why you could have state AGs helping out, you could have the FTC helping out. You would just be getting more manpower. But the rules would be clear. So really the success of it would depend upon what kind of rules end of being produced from this process, and I guess I would just state, that is why it works to have, for example, all the States can police Medicare fraud, for example, and it is not a risk because everybody knows what they are looking for and so it would just be really important for the agency that is created to have clear rules, and if they see an enforcement action that looks like it is not really in the spirit of those rules, the act as it is written, for example, if the state AG brings it, the CFPA could intervene and they could step into that action and make clear that that is a bad interpretation of their rule or it is a bad enforcement action. So I think it is oK to have multiple law enforcers and in fact probably necessary because there just aren't enough resources for all the fraud that is out there.

Mr. RUSH. Ms. Hillebrand.

Ms. HILLEBRAND. Thank you, Mr. Chairman. I had to think for a moment about your question to remember that there already are six concurrent enforcing authorities. It is just that the banking agencies haven't used that open public enforcement model to bring cases with the vigor and approach that the FTC has used. So we already do have concurrent enforcement and the downside has been that many of the agencies other than the FTC that have enforcement authorities also have other obligations that tie them very close to the industry that they regulate. At least with the concurrent enforcement authority with the CFPA and the FTC, we won't have that problem and I think that is a good step forward.

Mr. RUSH. Mr. Calkins.

Mr. CALKINS. Mr. Chairman, I think that concurrent enforcement authority could work if done carefully but I worry that there is too much attention to the FTC as an enforcer. I prepared for this over the weekend when the Web site was down so I was reduced to the documents that I happened already to own. I owned a 2004 annual report that happened to be in my files. I opened it up to consumer protection where the FTC has a good list of the range of activities in which the agency engages and that is part of what makes it a success. Consumer protection policy, one, research and reports; two, hearings and workshops; three, advocacy; four, amicus briefs; five, consumer and business education and outreach. The FTC is not just a cop on the beat. It is an agency that has economists, that does competition, that does consumer protection and uses a whole range of tools to develop expertise, to identify problems and to craft solutions, and if a huge part of what the FTC does as a matter of subject matter is transferred out and if the new agency has the exclusive authority to give guidance in this way, then we have lost a very great deal of what the FTC does and I think that the consumers would be the worse for it.

Mr. RUSH. Mr. Cox.

Mr. COX. Chairman Rush, I think ultimately the industry will make two arguments about he concurrent authority and the problems with it. The first is, it is too much enforcement, but as Ms. Hillebrand said, and as someone who spent years making priority lists, your list is way longer than you will ever get to and the problem with this bubble bursting was not too much enforcement. The second problem which is more subtle or real is an inconsistency in enforcement policy, and Ms. Barkow appropriately says that this rulemaking authority, if it is clear, if the rules are clear enough, certainly will solve the problem, and I would further say that the CFPA is given the sufficient authority to make sure the is happening in a uniform way.

But there is a second response to the inconsistency, which is unlike rulemaking where I agree you want a unified rulemaker, when it comes to enforcement, this is where regulatory competition actually works because you are competing to be a better enforcer as opposed to competing for a race to the bottom so that people will charter with you, which was a serious problem in creating this situation. And when you compete to do better, you are aware that if you don't do it and somebody else enforces your rule in a situation that you might get embarrassed, Madoff, SEC, you know, that when you have competitive enforcement you have a market that essentially forces public entities to be aware of that. That actually works, and when it comes to UDAP authority, I just want to say, it is so important. The state attorneys general, and I am patting myself on the back here because I was part of a small group who did this. We were the only ones out there screaming about and bringing these cases. The FTC was saying it is great because they were going after different actors but did one case where we got half a billion dollars back to people with subprime mortgages followed by another case where there was $300 million and I thought that was too little and I had left by then. I mean, this was a problem that if you were on the ground you saw it. I mean, it was visceral. These people were utterly out of control. The State AGs were able to enforce it because they had a different enforcement agenda. They were sitting at a different place. Regulatory competition works in terms of an open enforcement model.

Mr. RUSH. The Chair now recognizes Mr. Radanovich for one question.

Mr. RADANOVICH. Thanks, Mr. Chairman. I appreciate everybody's testimony but Mr. Cox, what I thought I heard was that we need multiple agencies having to do the same job to make sure that the people are doing their job, and that to me a recipe for wasted spending. But I do want to ask you a question about, I believe it was Ms. Sutton who was here earlier talked about a situation where an 84-year-old woman who owned her place free and clear was duped into a 30-year mortgage. I would like to know whether or not there was family involved putting her up to that and that happened for reasons that wouldn't have anything to do this with this current financial crisis. I happen to represent Stanislaus County in California. It is the epicenter of mortgages, the number one county in the Nation where mortgage defaults and foreclosures have happened. So I have a great appreciation for what is happening here. And you would hear tales about, one in particular, non-English-speaking people that were talked into a home that all they needed to do was come in and sign the papers. Once they got there, they were jammed with points and fees that they knew absolutely nothing about and were put into an uncomfortable situation, signed the mortgage papers, later lost the house. So I am curious to know after we have spent in reaction to this financial crisis anywhere between $800 billion to $1.5 trillion dollars to stimulate the economy. We get a rise in the unemployment rate that was supposed to drop with all that spending. I am a little leery of broad, sweeping reactions to the problems that we are in. So how does something like—and I would offer that to you, Mr. Cox, Mr. Stinebert or anybody else that wants to respond to this thing. How would that help the person—I am not sure about the Sutton case, and I want to know whether the family put her up to that, that poor, unfortunate, elderly person up to that situation. But my situation in Modesto, California, where the non-English-speaking person was jammed into that loan and a shyster put points on there and then they quickly sold the mortgage to somebody else and this guy was washing his hands and he was out of there. How does this broad, sweeping change that you are talking about prevent something like that from happening and at what cost any more so than what is currently on the books to prevent?

Mr. COX. Thank you, Ranking Member Radanovich. I will respond to that by also responding to Mr. Stinebert's earlier comment, that we all agree that the regulation that was there was an enforcement problem. We don't all agree on that, and here is—the problem had two parts to it if you want to break it into its grossest problem. The first part was the type of products that were being sold. They were simply way too high risk, way too complex and way too aggressively sold for average consumers to work through all the problems and understand all the costs and consequences and the context of these mortgages. For instance, held up at the time as the great financial innovation, the payment option ARM, it was sold so aggressively on its benefits but its risks were not clear to the average consumer, to my aunt. You know, it was the kind of thing I could have sold her on if I was an evil person without informing her of the risks. So there is a product regulation problem that existed here. The Fed, if you read the Fed's papers during this time and you put them right next to the industry's papers, you could change the titles and you couldn't tell the difference. There was one type of thinking. That needs to change.

The second problem was a fraud problem. The fraud problem got so far out of control, I have never seen anything like it. You know, if you were talking to the people and you saw this going on, if you talked to the ex-workers in these agencies, et cetera, in these companies that were selling these things, fraud was so rampant in this industry that, you know, that was almost a separate problem from the product regulation problem, and so we also had a lack of enforcement, particularly at the federal level, you know, on fraud but we fundamentally had a product regulation problem. I hope that responds.

Mr. RADANOVICH. Mr. Stinebert.

Mr. STINEBERT. Commenting back to Mr. Cox's earlier discussion about whether we should have multiple regulators is a good thing, I ask you, if you are a business and you have multiple regulators, two and three regulators, is competition really good if you are the regulated entity and the costs that are involved in that. I mean, so the FTC is in your office one week and having your staff gather everything else and the next week, you know, another regulator is in there. I can see where there might be some contention where that is good but you won't have businesses, anyone that operates a business, small profit or a large business having multiple regulators and enforcers coming into your offices is necessarily a good thing because—and all of those costs are eventually passed on to consumers. These do not happen in vacuums. So, yes, there are protections I think that need to be in place and you are absolutely right about that, but I do think you can overdo a process to. We want to have a process that protects consumers but is efficient for everyone involved, that it is efficient for the safety and soundness and the viability of the companies that are being regulated as well as good for the consumers that are buying their products, and I think that that is an important thing.

Mr. RADANOVICH. Thank you, Mr. Chairman.

Mr. RUSH. The Chair recognizes the chairman emeritus, Mr. Dingell.

Mr. DINGELL. Chairman, I thank you for your courtesy.

This question is to Gail Hillebrand and to Professor Calkins. What authority will remain in the FTC to protect the consumers after the Administration's plan has been adopted if it is adopted in its current form?

Ms. HILLEBRAND. Thank you, Chairman Emeritus. The FTC retains all of its authority to bring section 5 enforcement subject only to a staff level of consultation, coordination and discussion——

Mr. DINGELL. But we would lose that authority?

Ms. HILLEBRAND. The FTC retains that authority. I am going to give you a list of things it retains. It retains its section 5 authority. It retains its authority to bring cases under the statutes and rules for the enumerated consumer statutes. That is our alphabet soup: ECOA, EFTA, reg Z and so on. It retains—well, those are the big things that it retains. It also retains its pure fraud authority. I mean, there are financial services and then there are people who tell lies who say sign up with me and give me your Social Security number and your checking account number and you will never see me again. It retains that authority. Those folks are not selling financial services, they are selling lies, and it retains that authority, and we have recommended that it also be given the same kind of backstop authority that it now has currently and would have under this proposal for the existing consumer statutes with respect to enforcement of the CFPA rules. That is not yet in the proposal.

Mr. DINGELL. Now, what would it lose? What would FTC lose? What consumer protection jurisdiction would it lose?

Ms. HILLEBRAND. Yes. The FTC would lose the jurisdiction that has been important but difficult for it to use which is its authority to develop unfair and deceptive acts and practices rules in the financial services area. I am sure you are aware the last time that authority was used was in the credit practices rule, which came into effect in the mid-1980s.

Mr. DINGELL. OK. Now, why should that be taken away from FTC?

Ms. HILLEBRAND. If we were looking at just the FTC, there would be no reason to take it away, but the problem is, we need——

Mr. DINGELL. There is no reason to take it away?

Ms. HILLEBRAND. No, I am not quite finished.

Mr. DINGELL. Let us just go a wee bit further and explain to me why we should give it some of those goodhearted folks who led the fight for the repeat of Glass-Steagall who deregulated banking and financial services and who left us this glorious mess which we now have in the form of probably the biggest depression that this country has had since 1929. Now, why should we do that?

Ms. HILLEBRAND. We need to give the authority to an agency that can make one set of rules that applies to the bank provider and the non-bank provider. If the FTC——

Mr. DINGELL. I have no objection to taking care of the bank regulatory agencies. Let them create them and let them do their thing. But why wouldn't we want the honest men and women at FTC looking over their shoulder and why wouldn't we want them looking over the shoulder of those goodhearted banks and financial folks and MBAs up in New York that created this mess? Now, help me. Why wouldn't we want that?

Ms. HILLEBRAND. We definitely want oversight. We want someone who can look over no matter what kind of——

Mr. DINGELL. Do you like the idea of having the FTC sort of keep an eye on those people?

Ms. HILLEBRAND. We like the idea of having an agency that can look at everybody, not just the non-bank providers, keep an eye, and we think the best way to——

Mr. DINGELL. And what about all the goodhearted banks that are going to be engaging in all kinds of things? They are going to be engaging in real estate, they are going to be engaging in issuing of bonds and securities. They are going to be engaged in all kinds of wonderful activities on derivatives which are really gambling devices. So why shouldn't the FTC retain its continuing and ancient jurisdiction over keeping honest men honest and maybe occasionally catching a rascal? Now, why should we take that away from FTC?

Ms. HILLEBRAND. Mr. Chairman Emeritus, I respectfully suggest——

Mr. DINGELL. You represent consumers. Why shouldn't we just leave FTC as it is and let these other folk go about their nefarious business under the kind of weak-minded regulation that the Treasury has traditionally given to these institutions?

Ms. HILLEBRAND. We are absolutely in favor of——

Mr. DINGELL. I will give you a good reason for that. You are speaking here for the consumers, and I am trying to figure out do you really understand the consumers' needs or are you engaged in perhaps disregarding the consumers because these other folks have done a better job of telling you what a wonderful job they are going to do after they have brought about not one but two depressions?

Ms. HILLEBRAND. I am looking at it from the point of view of the ordinary person who is trying to get a mortgage, and they want to know—I mean, the consumer doesn't think it is——

Mr. DINGELL. No, no, you are giving me a wonderful answer but it is to the wrong question. Answer my question, please.

Ms. HILLEBRAND. The answer is, we think——

Mr. DINGELL. Why should we not keep FTC in its traditional jurisdiction of protecting consumers? When I was a boy, Roosevelt tried to give FTC jurisdiction over the stock market, and you can't imagine the outrage that this generated in New York because they were scared to death of the Federal Trade Commission, which is under the jurisdiction of the committee. We keep them honest. And we find that as soon as the FTC got away from this committee, they all of a sudden became a wholly owned subsidiary of the securities industry and the banking industry. Now, why should we sanctify that by stripping the consumers of the one remaining protection which they have, the FTC, in favor of giving it to a congregation of folks well known to be influenced by some of the worst scoundrels in our society?

Ms. HILLEBRAND. Are you ready for my answer? We believe that we need to put it in one place so that the non-banks aren't saying oh, don't regulate us the banks can still do that. The banks are saying oh, don't regulate us because the other guy can still do it.

Mr. DINGELL. We don't mind having this agency that would be created by the Administration's proposal do that. What we want is to have the FTC there so as to sort of watch over these people and let them know that there are honest men and women watching them so that the rascality is diminished and the consumers are protected. What is wrong with that?

Ms. HILLEBRAND. I think we have the same goal and perhaps a different with respect about how to get there.

Mr. DINGELL. So then are you telling me that you like the idea of having the FTC continue its jurisdiction while these other good-hearted folk go about their nefarious business?

Ms. HILLEBRAND. We have endorsed full retention of FTC enforcement authority but we think——

Mr. DINGELL. We have talked about what FTC is going to lose and you are apparently advocating the losing of it. I am not of a view that maybe we want FTC to lose that jurisdiction and maybe we want FTC to be around to sort of provide a minor dampening of the rascality which is going to continue to occur in the financial services industry. Now, what is your objection to that?

Ms. HILLEBRAND. We believe that you need——

Mr. DINGELL. Dear friend, in just a few words, what is your objection?

Ms. HILLEBRAND. Put the rulemaking in one place so that it is very clear whose job it is, and then you can hold them accountable.

Mr. DINGELL. They arranged that one-stop shopping when they moved this whole thing across the hall, and since then the whole financial services industry of the United States has had to be bailed out to the amount of $700 billion, which was congregated by Mr. Paulson, who came from that industry, and which has done nothing but enriched the same rascals that had caused trouble, and it has not only enriched those rascals but it has given us something new to think about, and that is, it has seen to it that they have had the funds to pay the same scoundrels who made the mess enormous bonuses amounting to as much as $165 million in one instance. Obviously, this is the product of one-stop shopping which I suspect you were telling me you support or maybe you want to tell me now you don't support.

Ms. HILLEBRAND. We are trying to end the ability to shop for your regulator by having one entity write the rules no matter what kind of charter and what kind of provider. That is our position.

Mr. DINGELL. Well, I have to say, I think somebody else wrote your statement but I thank you for your presence, and Mr. Chairman, I thank you for your courage and ability to bring this event about. Thank you.

Mr. RUSH. The Chair thanks the chairman emeritus. The Chair thanks the witnesses. This hearing now stands adjourned. But before we adjourn, I wanted to let you know how grateful we are for you to extend your time with us and spend your time with us.

By unanimous consent, I request that members submit all questions to be sent to the witnesses for the record within seven calendar days and that witnesses will respond promptly to the questions that are submitted to them. Thank you so very much, and safe travel.

[Whereupon, at 2:15 p.m., the subcommittee was adjourned.]

[Material submitted for inclusion in the record follows:]

Statement for the Record
of
Commissioner J. Thomas Rosch
Federal Trade Commission

The Proposed Consumer Financial Protection Agency:
Implications for Consumers and the FTC

Before the Committee on Energy and Commerce
Subcommittee on Commerce, Trade, and Consumer Protection
U.S. House of Representatives
July 8, 2009

I appreciate the opportunity to share my personal opposition to the proposal to create a new consumer financial protection agency. I am a Commissioner of the Federal Trade Commission (FTC), sworn in on January 5, 2006, to a term that expires in September 2012.[1] Although I am a Republican appointee, in the three-and-a-half years of my service as a Commissioner, I have not hesitated to exercise my independence when I believed that it was in the best interests of consumers to do so.[2] I also served as the Director of the FTC's Bureau of Consumer Protection from 1973 to 1975, and in 1989 was a member of the American Bar Association's Special Committee to Study the Role of the FTC. I have nothing to gain or lose politically or personally by opposing the proposal to create a new consumer financial protection agency (CFPA).

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[1] By law, the Commission is an independent regulatory agency. The Commission is headed by five Commissioners, nominated by the President and confirmed by the Senate, each serving a seven-year term. The President chooses one Commissioner to act as Chairman. No more than three Commissioners can be of the same political party. 15 U.S.C. § 41.

The Commission is not an Executive Branch agency. It is instead subject to oversight by a number of Congressional committees. *See Humphrey's Executor v. United States*, 295 U.S. 602, 628 (1935).

[2] I have previously described my own independence. *See* J. Thomas Rosch, *The Redemption of a Republican*, FTC Watch, June 1, 2009, at 4, *available at* http://www.ftc.gov/speeches/rosch/090601redemption.pdf. My career predating my term as a Commissioner is described at http://www.ftc.gov/commissioners/rosch/index.shtml.

I. Summary of Position.

The current system for protecting consumers against deception and unfairness in the financial marketplace is broken. Authority and responsibility to define and prevent deceptive and unfair practices are both diffuse and under-utilized. The current consumer protection regime gives authority and jurisdiction to a host of federal agencies without regard to whether those agencies have the expertise or experience (core competency) to best perform the consumer protection functions assigned to them. As a result, because some agencies have little or no core competency to perform those functions and lack adequate resources to do so, they therefore cannot fairly be (and generally are not) held responsible for their failure to protect consumers adequately.

The proposal to create a brand new Executive Branch agency[3] to protect consumers of financial products and services would replace the current flawed system with an even more fundamentally flawed system. The proposed new agency has no track record in protecting consumers from deceptive and unfair practices in the financial marketplace, and the time, money and other resources necessary to implement the new agency promise to be immense. As proposed, the new agency seemingly would have unlimited jurisdiction, yet the extent to which the new agency would be subject to Congressional oversight is completely unclear. The public is simply asked to buy a pig in a poke. The only thing about which the public can be certain is that creation of this new agency would result in considerable delay in protecting consumers, wasteful and inefficient consumer protection law enforcement, and very substantial (if still

[3] As proposed, the President would appoint all members of the new agency's governing board, but in contrast to the FTC, which limits to three the number of Commissioners from any one political party, all members of the new agency's governing board could come from one political party.

indeterminate) costs to taxpayers.

The current broken system should be replaced instead with a system that assigns exclusive authority and responsibility to perform consumer protection functions to specific agencies based on the core competency of the agency to perform those functions. In the case of the FTC, this would mean that it would assume plenary authority and responsibility for, among other things, defining and requiring the necessary and appropriate consumer disclosures respecting financial products and services. It would also mean assigning to the FTC plenary authority and responsibility for protecting consumers against invasions of their privacy, including protecting them from identity theft and securing their other confidential data. These are functions where the FTC has not only taken the lead, but where other federal agencies have looked to the FTC for guidance. Finally, it would mean that the FTC would be provided with the resources and law enforcement tools to enable it to perform those law enforcement functions by itself. Taking these steps would make it fair to hold the agency responsible for performing those functions in a fashion that protects consumers.

In short, replacing the current balkanized system of financial consumer protection with a brand new Executive Branch agency is very poor public policy. The FTC is an independent agency that has the expertise and experience to protect consumers in the realm of financial products and services, and there is no reason to supplant it.

II. The Current System is Broken.

No one can say that the current balkanized paradigm of consumer protection law enforcement regarding financial products and services is desirable. As matters now stand, for example, at least six different federal agencies are responsible for protecting consumers in the financial marketplace,[4] each having jurisdiction over only a specific segment of the marketplace. For example, the FTC's jurisdiction reaches only to non-bank financial companies, including non-bank mortgage companies, mortgage brokers, and finance companies. Banks, thrifts, and federal credit unions are exempt from the Commission's jurisdiction under the FTC Act but are instead subject to the jurisdiction of other agencies.

Similarly, a host of federal statutes – the Gramm-Leach-Bliley Act, the Truth-in-Lending Act, the Fair Credit Reporting Act, the Home Ownership and Equity Protection Act, the Consumer Leasing Act, the Fair Debt Collection Practices Act, the Fair Credit Reporting Act, the Equal Credit Opportunity Act, the Credit Repair Organizations Act, and the Electronic Funds Transfer Act – distribute to a number of federal agencies various consumer protection responsibilities and obligations respecting only the financial institutions that they regulate.

Thus, the current framework does not accord authority and responsibility based on any agency's core competency to perform that agency's consumer protection function(s). Rather, the current framework gives each federal agency consumer protection authority and responsibility for the specific institutions over which it has jurisdiction in the financial marketplace. As a result, the current framework entrusts some agencies with consumer protection functions even though those agencies have little or no expertise in performing those functions. Other agencies, recognizing their shortcomings, rely on the agency which has demonstrated the highest degree of core competency to perform the functions. For example, a number of agencies in the past have looked to the FTC to determine the disclosures that are necessary and appropriate to protect

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[4] These agencies are the Federal Trade Commission, the Federal Reserve Board, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, and the National Credit Union Administration.

consumers in the financial marketplace.[5]

This patchwork quilt of jurisdiction results in wasteful duplication in performing some consumer protection functions. Law enforcement activities in the credit card industry illustrate this inefficiency. In a federal court complaint filed in June 2008, the FTC alleged that CompuCredit Corporation, a company marketing Visa and MasterCard credit cards to consumers in the subprime credit market, engaged in deceptive conduct in connection with the marketing of credit cards.[6] CompuCredit ultimately settled with the FTC and agreed to reverse fees charged to eligible consumers' accounts, estimated to result in more than $114 million in credits.

However, because CompuCredit also acted on behalf of some entities regulated by the Federal Deposit Insurance Corporation (FDIC), in addition to the FTC action, the FDIC also challenged the same practices, and put CompuCredit under order extracting a civil money penalty of $2.4 million.[7] The need to engage in dual prosecutions relating to the same consumer protection issues was inefficient, time-consuming and a wasteful use of agency resources.

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5 *See, e.g.*, Federal Trade Commission Staff Comment for the Board of Governors of the Federal Reserve Board Regarding Truth in Lending, Proposed Rule (April 2008), *available at* http://www2.ftc.gov/opa/2008/04/frb.shtm; Federal Trade Commission Staff Comment to Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve Board System, *Regarding Proposed Illustrations of Consumer Information for Subprime Mortgage Lending* (November 2007), (comment to the OCC, the Federal Reserve Board, the FDIC, the OTS, and the NCUA), *available at* http://www.ftc.gov/opa/2007/11/mortgage.shtm; Federal Trade Commission Comment Before the Board of Governors of the Federal Reserve System, Docket No. OP-1253: *Unfair and Deceptive Practices in the Mortgage Lending Market, Alternative Mortgage Products, and Informed Consumer Choice in the Mortgage Marketplace* (September 2006), *available at* http://www.ftc.gov/opa/2006/09/fyi0661.shtm.

6 CompuCredit settled with the FTC and agreed to reverse fees charged to eligible consumers' accounts to settle allegations that it violated federal law. It is estimated that the redress program will result in more than $114 million in credits to consumer accounts. *See* Press Release, *available at* http://www.ftc.gov/opa/2008/12/compucredit.shtm.

7 *Id.*

Beyond that, because no one agency is given plenary authority or jurisdiction or the resources to effectively protect consumers, no single agency fairly can be held ultimately accountable for the protection of consumers.[8] Consequently, the current balkanized system may result not only in the inefficient use of agency resources, but also in under-enforcement of existing consumer protection statutes and inadequate protection of consumers. For example, even though the FTC may detect deceptive and unfair practices in the financial marketplace, it can act only within its limited jurisdiction. Thus, despite the FTC's success in challenging the inadequate disclosures made by CompuCredit, the FTC was otherwise constrained from bringing such a case against any depository institutions – such as banks that issue credit cards.

III. The Proposal to Create a New Agency is Fundamentally Flawed.

The creation of a new Executive Branch consumer protection agency will only make matters worse by compounding, rather than mitigating, the enforcement problems that now exist. First and foremost, there is no evidence that this proposed new agency has any core competency in protecting consumers in the financial marketplace. It is entirely untested and without any experience or expertise.

Second, the creation of a brand new Executive Branch agency will come at a great financial cost to consumers. The resources necessary to implement this proposal will be immense, including space requirements, employees, infrastructure, and overhead. I have yet to see proponents of the proposal offer even an estimate of the cost to American taxpayers for this anticipated project. This proposal seems particularly ill-advised in light of the current economic

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[8] *See generally*, Hearing On Improving Consumer Protections In Subprime Lending, Before the Before the Subcommittee On Interstate Commerce, Trade, and Tourism of the Committee On Commerce, Science, and Transportation, United States Senate, April 29, 2008.

situation and the fact that at least one existing federal agency with proven expertise (the FTC) stands ready, willing and able to better perform most of the consumer protection functions that would be given to this new agency. Indeed, it is ironic that a consumer protection proposal should be so anti-consumer; as consumers, we generally demand to know beforehand the costs and benefits of the products we purchase.

Third, it is anticipated that it will take at least eighteen to twenty-four months for this new agency to become operational. This long start-up time will entail considerable burden and delay in protecting consumers in the financial marketplace – consumers that need immediate assistance.

Fourth, the proposal creates an agency with virtually unlimited jurisdiction and uncertain Congressional oversight. The definitions that determine the extent of the new agency's exclusive or primary authority are extremely broad:

- The definition of "financial activity" includes a long list of activities, and then allows the proposed agency to add others to the list by rule.
- Likewise, the definition of "financial product or service" includes any product or service that "directly or indirectly" "results from or is related to" engaging in a financial activity. The payment side of every business of every sort could be so described and thus apparently become the responsibility of the proposed new agency.
- Specifically, because the granting of "credit" is considered a "financial product or service," the proposed new agency would have authority over every transaction that involves payment by means other than cash on the barrel head. That is because "credit" is defined as including, among other things, the right granted by a person to a consumer to "purchase property or services and defer payment therefor."

Fifth, the broad definitions of the new agency's plenary authority would also severely impact the future operations of the FTC. For example, in the proposal, a "covered person" is defined as one who engages "directly or indirectly" in a financial activity in connection with the provision of a consumer financial product or service, or one who provides a material service to or processes a transaction on behalf of such person. That definition would result in the transfer to the new agency all of the consumer protection functions that relate to financial products and services even if tangentially offered by any entity. Such a transfer would not only include a transfer of authority, but a transfer of staff, office space, infrastructure and funding – critical components without which the FTC would be crippled in exercising whatever enforcement authority remains.

Indeed, the exclusive authority of the proposed new agency would extend beyond rulemaking to "guidance, examination, and requiring reports." Such expansive authority would threaten to atrophy the FTC's ability to issue enforcement policy statements, business education materials, consumer education, press releases explaining its cases and other kinds of guidance relating to its retained authority over financial matters.

Similarly, the proposal provides for the collection of financial consumer complaints by the new agency. Yet, for years, the FTC has developed and maintained an extensive database of consumer complaints including complaints about financial products and services, obtained from a myriad of sources and available to all interested law enforcement agencies. That database would inevitably wither.

Finally, and perhaps most strikingly, the proposal does not even appear to authorize the FTC to enforce the new agency's rules (although it does authorize the states to enforce them). To be sure, there is a provision for coordinating enforcement, but it provides that the FTC must refer to the new agency any enforcement matter, then wait up to 120 days for the new agency to bring the case; the FTC can then only bring a case if the new agency declines to do so. At worst, that is a recipe for duplicative and wasteful exercise of the agencies' prosecutorial discretion. At best, it is a recipe for delay. As noted earlier, there is no estimate as to the size or cost of the new agency's staff, but it is likely that it will be created at the expense of the FTC.

This is not just parading horribles. The proposal would of course provide the FTC with "backstop enforcement authority." However, that provision is at best a fig leaf for stripping the agency of its current role as the primary agency responsible for protecting consumers in the financial market.[9]

In sum, the creation of a new Executive Branch consumer protection agency for financial products and services will introduce an even worse situation than now exists. As with the creation of any new federal agency from whole cloth, the proposal guarantees that there will be substantial delay in law enforcement while the new agency is established, in addition to imposing substantial financial costs on the public and sapping the vitality of the FTC as a consumer protection agency.

IV. The Proposal to Create the CFPA Should Be Scrapped in Favor of Entrusting Consumer Protection Authority and Responsibility on the Basis of Core Competency.

Plenary and exclusive authority and responsibility for consumer protection functions in the financial market, as in other markets, should be assigned to that agency which has the highest degree of expertise, experience and core competency to perform those functions.

That agency is not inevitably the FTC. There are certain functions which the FTC is ill-

[9] *See* Prepared Statement of Stephen Calkins On the Proposed Consumer Financial Protection Agency: Implications for Consumers and the FTC, Testimony Before the Committee on Energy and Commerce Subcommittee on Commerce, Trade, and Consumer Protection, United States House of Representatives, July 8, 2009, at 9-10, *available at* http://energycommerce.house.gov/Press_111/20090708/testimony_calkins.pdf.

equipped to perform. For example, the monitoring of the safety and soundness of financial institutions has never been within the FTC's purview and it is strongly arguable that the FTC might not be effective in performing that function. Likewise, the FTC lacks a comparative advantage in terms of the experience and expertise required to determine whether a particular financial product or service should or should not be offered to the public.

On the other hand, the FTC has traditionally exercised particular expertise and experience with respect to, among other things, the fashioning of disclosures that are necessary and appropriate to protect consumers both from a lack of sufficient information to make an informed choice as well as from information overload. The Commission has a long history of conducting empirical tests of the efficacy of disclosures in a wide variety of commercial contexts.[10] The Commission has made the development and testing of disclosures (especially mortgage disclosures) a key priority in its research relating to financial services. Current statutory and regulatory schemes related to financial services include a host of requirements mandating that information be disclosed to consumers. Most recently, the FTC's Bureau of Economics published a seminal research report concluding that the current mortgage disclosure requirements do not work and that alternative disclosures should be considered and tested.[11]

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[10] For example, the FTC staff released a study showing that broker compensation disclosures that the Department of Housing and Urban Development had proposed confused consumers, leading many of them to choose loans that were more expensive. *See* Federal Trade Commission, Bureau of Economics Staff Report, *The Effect of Mortgage Broker Compensation Disclosures on Consumers and Competition: A Controlled Experiment* (February 2004). Another example is seminal empirical research conducted by FTC staff on rent-to-own transactions, including evaluating consumer disclosure requirements. *See* Federal Trade Commission, Bureau of Economics Staff Report, *Survey of Rent-to-Own Customers* (April 2000).

[11] *See* Federal Trade Commission, Bureau of Economics Staff Report, *Improving Consumer Mortgage Disclosures: An Empirical Assessment of Current and Prototype*

In fact, evidencing that core competency, other agencies (including the Federal Reserve Board) have looked to the FTC for guidance in this respect. Furthermore, the FTC has been the dominant force in spearheading efforts to educate consumers about a wide array of important financial issues.[12]

Another function as to which the FTC has been the lead agency has been data security and protection of consumers from identity theft. Because of its experience and expertise regarding consumer expectations, the FTC has exercised primacy in that area. Specific examples include the Commission's efforts to protect privacy and fight identity theft through its law enforcement actions, its leadership on the President's Identity Theft Task Force, and its extensive consumer and business education and outreach activities.[13] This discussion of the FTC's core competencies is illustrative not exhaustive.

Of course, the FTC cannot adequately perform these functions on a plenary and exclusive basis (as it should do) without adequate resources. Thus, the assignment of these functions to the FTC must be accompanied by an adequate addition of staff to perform them, as well as by

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Disclosure Forms (June 2007), *available at* http://www.ftc.gov/os/2007/06/P025505mortgagedisclosurereport.pdf.

[12] For example, the FTC distributes consumer education materials on mortgage servicing, what consumers should do if they are having trouble making mortgage payments, and how consumers can manage their mortgage if their lender closes or files for bankruptcy. *See* http://www.ftc.gov/bcp/edu/pubs/consumer/homes/rea10.shtm; http://www.ftc.gov/bcp/edu/pubs/consumer/homes/rea04.shtm; http://www.ftc.gov/bcp/edu/pubs/consumer/homes/rea12.shtm.

[13] *See generally* Prepared Statement of the Federal Trade Commission On Protecting Consumer Privacy and Combating Identity Theft, Testimony Before the Subcommittee on Crime, Terrorism, and Homeland Security of the Committee on the Judiciary, United States House of Representatives, Dec. 18, 2007, *available at* http://www.ftc.gov/os/testimony/P065404idtheft.pdf.

safeguards against those resources being indirectly attacked by superior wages at other federal agencies.[14]

There is another compelling reason for entrusting certain functions to the FTC on a plenary and exclusive basis rather than to a new agency. Quite apart from its demonstrated superior core competency in performing these functions, the FTC has long maintained a vibrant competition mission. As former FTC Chairman Muris has pointed out, it is imperative to the competition mission that the consumer protection mission inform the competition mission. Otherwise, there is a danger that competition will be distorted by unwise consumer protection initiatives.[15] This cross-fertilization is all the more important today, when "behavioral economists" suggest that consumers are not always rational in their behavior and that the best competition missions are those which are coupled with an expert and experienced consumer protection mission.[16]

V. Conclusion

In short, trading the current flawed balkanized system of consumer protection for a new federal Executive Branch consumer financial protection agency, with all of its fundamental faults, is no way to make sound public policy.

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[14] For example, the Securities and Exchange Commission and the Federal Reserve Board have higher pay scales than comparable pay scales at the FTC. Of course, reducing those pay scales is not the only way to avoid this problem.

[15] *See* Prepared Statement of Timothy Muris On The Economy and Fraud: Protecting Consumers During Downward Economic Times, Testimony Before the Committee on Commerce, Science, and Transportation, United States Senate, July 14, 2009, at 3-4, *available at* http://commerce.senate.gov/public/_files/MurisJuly14Testimony.pdf.

[16] *See* Economics Roundtable, Global Competition Review (March 2009).

HOUSE COMMITTEE ON ENERGY AND COMMERCE
QUESTIONS FOR THE RECORD

United States House of Representatives

Subcommittee on Commerce, Trade, and Consumer Protection

Hearing Entitled "The Proposed Consumer Financial Protection Agency: Implications for Consumers and the FTC"

Treasury Assistant Secretary for Financial Institutions Michael Barr

July 8, 2009

Questions from Congressman Bobby L. Rush

1. In his testimony, FTC Chairman Leibowitz discussed the potential impact that the creation of this new agency could have on FTC's ability to do its job. He noted that many of FTC's cases that have nothing to do with traditional financial products or services often involve the statutes that may be moved to CFPA. As an example, he said that FTC's enforcement against fraudulent telemarketers may implicate financial data processors. Whereas FTC now can enforce against both companies involved in the fraud, if this proposal were to become law, FTC could not pursue on its own authority a case against a data processor. Does the proposal intend to prevent FTC from filing these types of complaints? If not, how would you expect FTC and CFPA to divide the responsibilities?

   The Federal Trade Commission (FTC) plays a critical role in protecting consumers across a wide range of products and services sold in the marketplace. The Consumer Financial Protection Agency (CFPA Act) does not affect the jurisdiction of the FTC over the vast array of non-financial markets, and a related proposal would strengthen the ability of the FTC to regulate and enforce the law in non-financial markets. Our proposal calls for strengthening the FTC's ability to protect consumers in all areas of commerce that remain under its authority by permitting the FTC to: (1) adopt rules to prohibit unfair and deceptive acts and practices with standard notice-and-comment rulemaking; (2) obtain civil penalties when companies use unfair and deceptive practices; and (3) pursue those who substantially aid and abet providers that commit unfair or deceptive practices.

   With respect to consumer financial products and services, we propose that the FTC should retain its authority to pursue financial fraud without delay, including, for example, its authority to pursue claims of unfair and deceptive practices by those selling debt negotiation, advance fee loans, credit repair, and foreclosure rescue or loan modification services. Under the amendments to the FTC Act in our proposal, the FTC would simply be required to consult and coordinate with—but not refer cases to—the Consumer Financial Protection Agency (CFPA).

   With respect to any case against a fraudulent telemarketer and financial data processor, we do not intend to limit the FTC's authority to pursue that type of case. We believe the FTC should be able to enforce the Telemarketing Sales Act and Rule as to any telemarketer or financial data processor liable under that Act. To the extent the telemarketer was selling consumer financial products or services, the CFPA would have concurrent jurisdiction. We would be pleased to provide clarification, if necessary, to ensure that consumers are adequately protected from fraudulent telemarketing of any type of product or service.

   Moreover, to the extent a telemarketer or financial data processor commits unfair or deceptive acts and practices prohibited by section 5 of the FTC Act, the FTC would be able to pursue those claims. Under our proposal, the FTC would be required to consult and coordinate with the CFPA with respect to any FTC Act violation only if the unfair

or deceptive act or practice was being committed "*in connection with the marketing, sale, provision or delivery of* a *consumer financial product or service.*" For any such case involving the telemarketing of a product or service that was not a "consumer financial product or service," the FTC could pursue that case without even consulting the CFPA. If the telemarketer was selling a consumer financial product or service, then the FTC would need to "consult and coordinate" with the CFPA "as the agencies deem to be appropriate" with respect to a claim of unfair or deceptive practices under the FTC Act. This consultation requirement is intended to ensure there will be coordination between the two agencies in these cases involving consumer financial products and services, much like the coordination that occurs informally today between the FTC and the state law enforcement authorities, while allowing enforcement to proceed immediately.

2. According to the Administration's proposal, the states will be able to enforce the statutes and rules being transferred to the new agency immediately. In contrast, FTC would be required to provide CFPA with notice of a proposed action, and wait 120 days for CFPA to determine if it will take the case before it can take any action. This applies to the very rules and laws currently enforced by FTC. Why does the administration's proposal grant the states the authority to bring actions under these statutes and rules without the burden of a four month delay and yet the FTC is subject to this hurdle?

   We believe that reform of the federal regulatory structure for consumer protection for financial products and services requires three elements: mission focus; market-wide coverage; and consolidated authority. The authorities for rulemaking, supervision and enforcement for consumer financial products and services are presently scattered among a number of different federal agencies in addition to the FTC, including the Federal Reserve Board, the Federal Deposit Insurance Corporation (FDIC), the Office of Thrift Supervision (OTS), the Office of the Comptroller of the Currency (OCC), the National Credit Union Administration (NCUA), and the Department of Housing and Urban Development (HUD). The CFPA Act is not designed to establish a new layer of federal authority on top of this presently balkanized federal structure. Rather, the Act is intended to consolidate federal authority over this marketplace to ensure consistent standards and a level playing field across the entire marketplace for consumer financial products and services.

   To further the goal of consolidated authority at the federal level and the application of consistent standards to the bank and non-bank financial product and service providers, the CFPA Act would provide to the new CFPA primary federal enforcement authority over the "enumerated consumer laws" under a referral procedure prescribed by the CFPA Act. The authority that would remain with the FTC and the federal banking agencies is intended to serve as a backup authority only, not concurrent authority. Under that authority, if the FTC or a federal bank regulator becomes aware of a possible law violation of one of those statutes, the agency may send a written recommendation to the CFPA recommending that the CFPA initiate an enforcement

proceeding, stating its concerns. If the CFPA does not take action in 120 days, the referring agency may proceed itself on the matter. This requirement would allow the CFPA sufficient time to review the matter after receiving a recommendation, and the authority to guide consistent application of these statutes across the marketplace for consumer financial products and services. Moreover, the CFPA Act would preserve the authorities of the Department of Justice, including its existing authority to enforce the Equal Credit Opportunity Act.

With respect to state enforcement, we believe it is important for the states to continue their traditional role as the authorities often best able to respond to emerging consumer protection problems that begin appearing at the local level, or that reflect acts or practices that are more local in nature. We believe it would further the overall goal of establishing the CFPA as the single federal authority that would provide leadership at the federal level, working closely with the states, to ensure coverage of the entire local and national consumer financial services marketplace for consumer financial products and services.

3. The Administration's proposal provides for some improvements to the Federal Trade Commission's rulemaking and enforcement authorities. However, the Administration proposes to give some enforcement authorities to the new agency that it will not be giving to FTC. Notably, the new agency would have the authority to litigate its cases independently — FTC does not have this authority. Why should the new agency have this authority and not FTC?

   The CFPA is designed to have a full range of tools to protect consumers in the marketplace for consumer financial products and services. This includes the authority to issue regulations and guidance, obtain data, conduct compliance examinations and investigations, and enforce laws and regulations through either administrative proceedings or by litigating actions in federal courts. This authority, including the independent litigating authority, would provide the CFPA with the same authority held by the federal banking agencies.

   Our proposal also calls for strengthening the FTC's ability to protect consumers in all areas of commerce that remain subject to its jurisdiction by permitting the FTC to: (1) adopt rules to prohibit unfair and deceptive acts and practices with standard notice-and-comment rulemaking; (2) obtain civil penalties when companies use unfair and deceptive practices; and (3) pursue those who substantially aid and abet providers that commit unfair or deceptive practices. We believe that these additional authorities would provide significant new regulatory and enforcement tools to the FTC.

4. According to the Administration's proposal, CFPA would be authorized to enforce against unfair, deceptive, or abusive practices. The FTC Act gives FTC the authority to enforce against unfair or deceptive practices. What value does the word "abusive" add?

The addition of "abusive" to the prohibition of unfair or deceptive acts or practices would permit the CFPA to cover transactions that may be harmful to consumers but do not necessarily fall within the categories of "deception" or "unfairness" under the CFPA. This prohibition against abusive acts or practices is similar to other statutory schemes enacted in consumer protection laws that prohibit practices more broadly than unfair or deceptive practices. For example, the Telemarketing Sales Act authorizes the FTC to prescribe rules prohibiting deceptive or abusive telemarketing acts or practices. 15 U.S.C. 6102. Similarly, the Truth in Lending Act authorizes the Federal Reserve Board to prohibit acts and practices in connection with refinancing mortgage loans that are "associated with abusive practices or that are otherwise not in the interest of the borrower." 15 U.S.C. 1639(l)(2).

5. According to the Administration's proposal, FTC could enforce the FTC Act and would have backstop authority to enforce the statutes and rules being transferred from FTC to the new agency. It would have no authority to enforce rules issued by the new agency. Why shouldn't FTC have the authority to enforce these new rules? If FTC is to be a backstop enforcer, should it not have all possible remedies available to it?

   We believe that the structural changes needed in federal regulation of consumer financial products and services include mission focus, market-wide coverage, and consolidation of rulemaking, supervision and enforcement authority. The CFPA Act is not intended to establish a new layer of authority on top of the presently balkanized federal structure. Rather, it is intended to consolidate federal authority over the marketplace for consumer financial products and services to ensure consistent standards and a level playing field. For that reason, the proposal provides the FTC, and the federal banking agencies, backstop authority for the consumer financial protection statutes it now enforces, and provides that the CFPA will enforce its rules at the federal level.

6. The Administration's proposed legislation would require the new agency to establish a central database for consumer complaints about financial products and services. FTC already maintains the federal government's central consumer complaint database which includes complaints about fraud, identity theft, telemarketing, financial and credit issues, and other related topics. Millions of consumers have filed complaints with FTC and these complaints are shared with thousands of local, state, federal, and international law enforcers. Is it the intent of the Administration's proposal that CFPA create a competing consumer complaint database? Do you anticipate that CFPA's database, like the existing FTC database, would be shared broadly?

   Collecting and analyzing consumer complaints will be critical to ensuring that the CFPA can conduct the monitoring, rulemaking, supervision, and enforcement needed to better protect consumers of financial products and services. The CFPA therefore would be required to establish a unit whose functions shall include establishing a central database to collect and track consumer complaints and sharing those

complaints with other federal and state regulators, including the FTC.

Presently, because of the balkanized regulatory structure, consumers do not know who to complain to about a particular financial product or service, so those complaints go not only to the FTC, but also to the OCC, the Federal Reserve Board, the OTS and NCUA, and other agencies. With consolidation under the CFPA Act, there will be one place for consumers to go with their complaints about financial products and services -- regardless of what type of bank or non-bank is the subject of the complaint. This complaint database would complement, not compete with, other resources for complaints filed by consumers, including the FTC's complaint databases. It is intended that the CFPA's complaint database will be shared broadly with other federal and state law enforcement agencies and regulators, including the FTC. We would be pleased to clarify this intention.

7. FTC serves as the Federal government's leading agency in the areas of consumer privacy, data security, and identity theft. This includes financial privacy. Under the administration's proposal, CFPA would assume responsibility for financial privacy once FTC's responsibilities under the Fair Credit Reporting Act and Gramm-LeachBliley Act Privacy Rule are transferred to CFPA. The proposed Act transfers all matters relating to financial privacy to CFPA but leaves information security with FTC. Can you please explain the thinking behind this split of responsibilities? Which agency, CFPA or FTC, would have primary responsibility for matters relating to identity theft?

The FTC would retain its authority to regulate matters relating to data security for commercial entities and non-bank financial institutions alike, including enforcement and rulemaking authority under section 5 of the FTC Act, certain provisions of the Fair Credit Reporting Act ("FCRA"), and section 501(b) of the Gramm-Leach-Bliley Act (GLBA) and the Safeguards Rule promulgated under the GLBA.

Data security matters would appropriately remain with the FTC because implementing security controls to protect personally identifiable information is an issue for all types of businesses, not just financial service providers. In addition, with respect to the banking sector, data security matters typically involve operational issues that are reviewed by the prudential bank regulator; accordingly, the proposed CFPA Act would leave intact the authority of the federal banking agencies to prescribe rules and supervise financial institutions under their jurisdiction with respect to data security matters. With respect to matters relating to identity theft, which are connected to data security issues, the FTC would continue to have primary responsibility, including under the FCRA, and would be able, for example, to continue collecting complaints, educating businesses and consumers, and conducting outreach to law enforcement— independently of the CFPA's actions to regulate the provision of consumer financial products and services.

By contrast, the proposed CFPA Act would transfer to the CFPA responsibility for rulemaking and primary enforcement of the notice and opt-out provisions of the GLBA (but not the data security provisions of section 501 of the GLBA). The proposed CFPA Act calls for these financial privacy issues to transfer to the CFPA because it will have exclusive authority over a wide range of issues involving notices that are provided to consumers in connection with obtaining financial products or services. Accordingly, transferring to the CFPA the authority to administer these parts of the GLBA privacy provisions will facilitate the purpose of consolidating federal authority over notices for consumer financial products and services, including issues relating to disclosures of personally identifiable financial information.

The proposed CFPA Act calls for the CFPA to hold primary authority to regulate under the FCRA because the credit reporting system is the lifeblood of the consumer credit system and has an enormous impact on consumers. Credit report information – and the accuracy of that information – is critical to whether consumers can get approved for credit, insurance, and other transactions, and often what they pay for services. The CFPA would have the full range of supervision, examination and enforcement authorities to oversee these critical businesses.

8. Unlike most multi-member independent agencies, the Board of the Administration's proposed CFPA would not have a mandated balance of political parties. Why did the Administration decide not to include any reference to political party in the requirements for Board membership? Do you have any concerns that a president less committed to consumer protection could place his or her own allies on the Board and weaken the agency? In her testimony to the subcommittee, Professor Rachel Barkow cited empirical research finding that groups comprised solely of ideologically like-minded people tend toward extreme decision-making. According to this research, a board with members all from the same party could polarize to extreme positions, and could have large fluctuations in policy as presidential administrations change. Does this research raise any concerns for you?

   The five-member Board of the CFPA would be comprised of four members appointed by the President for terms of five years, by and with the consent of the Senate and the head of the agency responsible for regulating national banks. The proposal recommends this structure so that the focus on appointing Board members can be on expertise in the consumer financial marketplace, rather than be constrained by party affiliation. The requirement of advice and consent of the Senate will help balance the Board. The five-year terms of the Board members will be staggered, which will help ensure continuity across different administrations. The CFPA Board would be similar in structure to the Federal Reserve Board, whose members serve for staggered terms and are not subject to requirements relating to political affiliation.

9. The Administration's proposed legislation describes CFPA as an "independent agency in the executive branch." It is unclear on whether the agency is intended to be truly independent. Do you intend to have the regulations promulgated by the new agency face

The proposed CFPA will be independent, and we will be pleased to clarify this intent. The presence of the head of the national bank regulator will enhance coordination and supervision of banking institutions and will not compromise the independence of the CFPA.

Questions from Congressman John D. Dingell

1. Section 1053 of the Administration's bill authorizes CFPA to enforce compliance with any "Federal law that the [CFPA] is authorized to enforce [...] and any regulations or order prescribed thereunder, unless such Federal law specifically limits the Agency from conducting a hearing or adjudication proceeding [...]." Since section 1061(a)(5) of the bill gives CFPA "all powers and duties" vested in the Federal Trade Commission (FTC) "relating to consumer financial protection functions," does this mean that CFPA could technically enforce the entire FTC Act and all regulations and orders issued thereunder? Similarly, under the Administration's proposal, what authorities are left with FTC?

   The proposed Consumer Financial Protection Agency Act (CFPA Act) reflects our belief that reform of the federal regulatory structure for consumer protection for financial products and services requires three elements: mission focus; market-wide coverage; and consolidated authority. The authorities for rulemaking, supervision and enforcement for consumer financial products and services are presently scattered among a number of different federal agencies in addition to the Federal Trade Commission (FTC), including the Federal Reserve Board, the Federal Deposit Insurance Corporation (FDIC), the Office of Thrift Supervision (OTS), the Office of the Comptroller of the Currency (OCC), the National Credit Union Administration (NCUA), and the Department of Housing and Urban Development (HUD). The Act is intended to consolidate federal authority over this marketplace to ensure consistent standards and a level playing field. The transfer of certain functions from the FTC under section 1061(a)(5) of the proposed CFPA Act is designed to be consistent with the purpose of consolidating authority, but is specifically limited to the FTC's powers and duties "relating to 'consumer *financial* protection functions.'"

   The Consumer Financial Protection Agency (CFPA) would not have authority under the FTC Act. Instead, the CFPA would have separate authority for "consumer financial protection functions" under the CFPA Act, including authority to enforce the provisions of CFPA Act that prohibit unfair, deceptive or abusive acts or practices. In bringing actions under the CFPA Act for unfair or deceptive acts or practices by covered persons under the CFPA Act, the CFPA could incorporate applicable standards for deception or unfairness established under the FTC Act, but the CFPA would not be enforcing the FTC Act.

   Our proposal recognizes that the FTC plays a critical role in protecting consumers across the full range of products and services sold in the marketplace, and the FTC will continue to have authority, under the FTC Act and other laws, over the vast array of non-financial markets. Moreover, our proposal calls for strengthening the FTC's ability to protect consumers in all areas of commerce that remain under its authority by permitting the FTC to: (1) adopt rules to prohibit unfair and deceptive acts and practices with standard notice-and-comment rulemaking; (2) obtain civil penalties when companies use unfair and deceptive practices; and (3) pursue those who substantially aid and abet providers that commit unfair or deceptive practices.

With respect to financial products and services, FTC would retain its authority to pursue financial fraud without delay, including, for example, its authority to pursue claims of unfair or deceptive acts and practices by those selling debt negotiation, advance fee loans, credit repair, and foreclosure rescue or loan modification scams. Under our proposal, the FTC would simply be required to consult and coordinate with – but not refer cases to – the CFPA for actions brought under Section 5 of the FTC Act involving the marketing, sale, provision or delivery of a consumer financial product or service. We also intend for the FTC to retain authority for writing rules under the Telemarketing Sales Act; the FTC and CFPA would have concurrent authority to enforce the Telemarketing Sales Act and Telemarketing Sales Rule with respect to those telemarketing financial products and services. In addition, the FTC will have backstop authority to enforce the consumer credit statutes it now enforces, including the Truth in Lending Act, Fair Debt Collection Practices Act, Equal Credit Opportunity Act, and Fair Credit Reporting Act.

2. Section 1022(d) of the bill provides that "[...] to the extent that a Federal law authorizes [CFPA] and another Federal agency to issue regulations or guidance, conduct examinations, or require reports under that law for purposes of assuring compliance with this title, any enumerated consumer law, the laws for which authorities were transferred under subtitles F and H, and any regulations thereunder, [CFPA] shall have the exclusive authority to prescribe rules, issue guidance, conduct examinations, require reports, or issue exemptions with regard to any person subject to that law." Do you believe this provision will prohibit FTC from issuing antitrust guidance, for example? Would it not also prohibit FTC's efforts to do studies, hold workshops, issue reports, and give guidance with respect to consumer protection?

   The proposed CFPA Act does not alter or limit the FTC's authority to enforce and administer the antitrust laws. Similarly, the proposed CFPA Act would not prohibit the FTC from continuing its work conducting workshops, issuing reports, and giving guidance with respect to the vast array of markets under its jurisdiction, including with respect to financial fraud.

3. The Administration's bill would preserve a so-called "backstop authority" for the FTC, whereby FTC may initiate an enforcement proceeding if CFPA does not do so after 120 days. Currently, FTC may refer civil penalty matters to the Department of Justice, and if the Attorney General does not commence an action within 45 days of this referral, the FTC may do so. Historically, FTC has initiated very few of these proceedings. Given this analogy between the backstop authority in the Administration's bill and the existing referral process between FTC and DOJ, do you reasonably expect that FTC will take advantage of the backstop authority?

   There is a critical difference between the FTC's referral of a recommended action to the Department of Justice ("DOJ") for an action seeking civil penalties and the procedure to refer matters to the CFPA under the proposed CFPA Act. In the former,

the FTC is *the sole or primary enforcement agency* for the actions it refers to the DOJ under the FTC Act or under administrative enforcement provisions of certain consumer protection statutes, such as actions brought to obtain civil penalties for violations of an FTC Act trade regulation rule. By contrast, the CFPA would be the primary enforcement agency of the CFPA Act, rules promulgated under that Act, and the enumerated consumer protection statutes. Moreover, the CFPA Act would preserve the authorities of the DOJ, including its existing authority to enforce the Equal Credit Opportunity Act.

The proposed CFPA Act is not intended to establish a new layer of authority on top of the presently balkanized federal structure. Rather, the proposed CFPA Act would consolidate federal authority over this marketplace for consumer financial products and services to ensure consistent standards and a level playing field. To further the goal of consolidated authority at the federal lcvcl and thc application of consistent standards to this entire marketplace, the CFPA Act would provide to the new CFPA primary federal enforcement authority over the "enumerated consumer laws" under a referral procedure prescribed by the CFPA Act. The authority that would remain with the FTC and the federal banking agencies is intended to serve as a backup authority only, not concurrent authority. Under that authority, if the FTC—or a federal banking agency—becomes aware of a possible law violation of one of those statutes, that agency may send a written recommendation that the CFPA initiate an enforcement proceeding, stating its concerns, and proceed itself on the matter if the CFPA does not take action in 120 days. This requirement therefore would allow the CFPA sufficient time to review the matter after receiving a recommendation, and the authority to guide consistent application of these statutes across the entire marketplace for consumer financial products and services. Moreover, the proposed CFPA Act would not dictate how the FTC or another Federal agency must act to refer an enforcement matter to the CFPA; as a result, the FTC should be permitted to detcrmine for itself how to refer a matter, including by sending its recommendation to thc CFPA prior to a formal action voted out hy the Commission, such as when the staff of the FTC obtains information that raises concerns about a violatiou of law.

4. Similarly, one assumes that if the Consumer Financial Protection Act is enacted, FTC would lose valuable consumer financial protection staff. Do you believe this will affect FTC's ability to exercise the backstop authority it is given under the Consumer Financial Protection Act?

Because the FTC will maintain its authority to enforce section 5 of the FTC Act, including matters relating to financial fraud, the FTC should have the ability to exercise the backstop authority contemplated under the CFPA Act. For example, as the FTC performs its duties to enforce the FTC Act and other federal consumer protection laws, it would be in a position to alert the CFPA if it became aware of possible violations of these statutes in the course of its investigatory and enforcement work with respect to all activities that remain under the FTC's jurisdiction. This role is consistent with the

resources that would remain at the FTC for its consumer protection work.

5. The Administration's bill appropriates to the Consumer Financial Product Agency "such sums as may be necessary" for its operation. Do you have an estimate of what this amount may be? Further, can you estimate the number of staff the CFPA will employ?

   We do not yet have an estimate of what amount will be necessary to fund the CFPA. We are in the process of gathering information on the resources expended from each of the agencies where funds will be transferred, and estimating the additional resources that will be required for the functions that are not being performed now, including supervision of non-bank financial companies that provide consumer financial products or services.

6. The Administration's proposal would populate the Consumer Financial Protection Agency with five commissioners, but it includes no requirement that a proportion of these commissioners be from different political parties. Do you believe this will weaken CFPA's ability to be bi-partisan and limit any continuity that might arise out of shared leadership? Further, what rationale does the administration have for not requiring commissioners come from different parties?

   The five-member Board of the CFPA would be comprised of four members appointed by the President for terms of five years, by and with the consent of the Senate and the head of the agency responsible for regulating national banks. The proposal recommends this structure so that the focus on appointing Board members can be on expertise in the consumer financial marketplace, rather than be constrained by party affiliation. The requirement of advice and consent of the Senate will help balance the Board. The five-year terms of the Board members will be staggered, which will help ensure continuity across different administrations. The CFPA Board would be similar in structure to the Federal Reserve Board, whose members serve for staggered terms and are not subject to requirements relating to political affiliation.

7. The Administration's proposal establishes the Consumer Financial Protection Agency as an "independent executive agency." As you know, independent agencies and executive agencies differ in that independent agencies, such as FTC, exercise executive functions outside of an executive department. This being the case, I am confused about the designation "independent executive agency" as it applies to the proposed CFPA. Please provide clarification vis-à-vis CFPA's relationship to the executive branch.

   The proposed CFPA will be independent. The CFPA would consist of a five-member Board that would not be part of an executive department. Four of the Board members would be appointed by the President for five-year terms, by and with the consent of the Senate, and subject to removal only for cause. One board member would be the head of the regulatory agency that supervises national banks.

8. How would you characterize the level of engagement from the Department of the Treasury with FTC in drafting the Consumer Financial Protection Agency Act of 2009? Was is, for example, minimal, or was FTC more intimately involved in designing this proposal?

   The Department of the Treasury was responsible for developing the Administration's regulatory reform proposals announced by the Administration on June 17, 2009 in the white paper "Financial Regulatory Reform, A New Foundation: Rebuilding Financial Supervision and Regulation" and for drafting the proposed legislation to implement this proposal. In developing the proposal and the legislation, Treasury staff consulted with all the agencies affected by this proposal, including the FTC, Federal Reserve Board, OCC, OTS, FDIC, NCUA and HUD.

9. In the interim between enactment of the Consumer Financial Protection Agency Act of 2009 and the inception of CFPA, how will the Federal government ensure adequate consumer financial protections? Will, for example, the FTC retain its consumer financial protection authorities during this time?

   The proposal includes provisions for an orderly transition to ensure that consumers are adequately protected between the enactment of the CFPA Act and the creation of the CFPA. In particular, there would be a transfer date designated by the Secretary of the Treasury, in consultation with the heads of the federal banking agencies and the Chairman of the FTC. The transfer date would be no later than 18 months after enactment, unless a later time is designated by the Secretary, and notice of the reasons for a later date is sent to appropriate Congressional committees, but in no case later than 24 months. The FTC would retain its consumer financial protection authorities until the designated transfer date.

10. Rule X of the House of Representatives designates that the Committee on Energy and Commerce shall have jurisdiction over matters related to consumer protection. Should the Consumer Financial Protection Agency Act of 2009 be enacted, do you believe the Committee on Energy and Commerce would have jurisdiction over CFPA, or do you believe this authority would be given exclusively to another committee, for example the Committee on Financial Services?

    The Department of the Treasury has no view on this issue.

11. Similarly, and in view of the Committee on Energy and Commerce's historical jurisdiction over consumer protection matters, did the Administration consult with the Committee on Energy and Commerce while drafting this proposal?

    The Administration had discussions with staff of the Committee on Energy and Commerce with respect to this proposal.

Witness Questions
Commerce, Trade, and Consumer Protection Subcommittee Hearing
Questions for Chairman Jon Leibowitz of the Federal Trade Commission

Questions from Chairman Rush

Q1. In your testimony, you discussed the potential impact that the creation of this new agency could have on FTC's ability to do its job. You noted that many of FTC's cases that have nothing to do with traditional financial products or services often involve those statutes that may be moved to CFPA. As an example, you said that FTC's enforcement against fraudulent telemarketers may implicate financial data processors. Whereas FTC now can enforce against both companies involved in the fraud, if this proposal were to become law, FTC could not pursue on its own authority a case against a data processor. If the proposed legislation become law, what impact would it have on FTC's ability to bring actions against non-financial frauds? Are you concerned that FTC's ability to protect consumers in areas unrelated to traditional financial products and services will be harmed?

A1. Although there may be some areas of the legislative draft that need adjustment to make sure that consumers are well protected, I agree with the fundamental objective of the proposal: to improve the effectiveness of the current governmental system for protecting consumers of financial services.

In our experience, it is often most efficient and effective, in situations such as those described in your question, to act simultaneously against non-financial companies that are engaged in fraud and the providers of financial services who facilitate or assist the fraud. If the FTC were required to refer the case against the facilitator to the CFPA, depending on how the referral is handled, it could result in separate actions brought at separate times against perpetrators that are implicated in the same fraud. I recommend that this provision of the legislation be amended to ensure that the FTC's ability to protect consumers is not hampered.

Q2. According to the Administration's proposal, FTC could enforce the FTC Act and would have backstop authority to enforce the statutes and rules being transferred from FTC to the new agency. Would there be value in having FTC enforce the new agency's rules? If FTC is to be a backstop enforcer, should it not have all possible remedies available to it?

A2. There is great value in having the FTC enforce all financial consumer protection laws and rules, regardless of when or by whom they are promulgated. The FTC is an independent agency with a strong record of success, and can provide the most value if it can concurrently enforce laws and rules that protect consumers of financial products and services. In my view, there are significant benefits to having multiple enforcers in maximizing the overall resources applied to protecting consumers, establishing a healthy competition amongst enforcers, and avoiding "agency capture" by regulated industries. A backstop role could result in less effective protection for consumers.

Regardless of whether the FTC is given concurrent authority with the CFPA or assigned a backstop role, I agree that allowing the FTC to enforce the CFPA's rules would benefit consumers. The FTC has decades of experience in enforcing rules that cover, among others, non-bank financial entities, and I believe that permitting FTC enforcement over such entities would increase the likelihood that violators would be identified and prosecuted. In addition, enabling the FTC to enforce the CFPA rules would often result in more efficient enforcement. Although the FTC might be able to address the violations through enforcement of the FTC Act, where the CFPA has promulgated a rule governing unfair or deceptive practices the FTC could simply enforce the rule without having to prove the underlying unfairness or deception. I would note that, under the Administration's proposal, the states would have authority to enforce the CFPA's rules; not providing this same authority to the FTC, with its vast experience and record of success in this area would be anomalous.

Q3. According to the Administration's proposal, CFPA would be authorized to enforce against unfair, deceptive, or abusive practices. The FTC Act gives FTC the authority to enforce against unfair or deceptive practices. What value does the word "abusive" add? What additional practices, if any, could FTC enforce against if it had this additional authority?

A3. Several consumer protection statutes that the FTC enforces include the term "abusive." The term generally allows the Commission and other enforcement agencies to address wrongful practices that do not fit neatly within the legal definitions of unfairness or deception. For example, in addition to its specific prohibition on debt collector conduct that is "deceptive" or "unfair," the Fair Debt Collection Practices Act also prohibits conduct that is "abusive," specifically declaring as "abusive" the use of obscene, profane, or abusive language. In addition, the Telemarketing and Consumer Fraud and Abuse Act of 1994 directed the Commission to include rule provisions relating to specific "abusive" practices, such as restrictions on the time of day telemarketers may make unsolicited calls to consumers. These statutes shed some light on how the addition of "abusive" to the list of prohibited practices over which the CFPA would have authority might be applied in the financial activities context.

Q4. In your testimony, you request that the FTC Act be amended to give FTC independent litigating authority, thereby enabling FTC to bring actions seeking civil penalties in federal court without the involvement of the Department of Justice. The Administration's proposed legislation grants this authority to CFPA, but not to FTC. The proposed legislation also gives CFPA examination authority over the institutions that it regulates. FTC has not been granted this authority. Would FTC benefit from having examination authority? How could FTC use examination authority to improve consumer protections?

A4. The Commission appreciates the Administration's recognition of the FTC's role as the nation's consumer protection agency, and agrees that the agency's ability to protect consumers would be enhanced by the additional resources and authority recommended by the Administration. As you note, the Commission also believes that it should be granted independent litigating authority in cases in which it seeks civil penalties. This authority would allow the Commission – the agency with the greatest expertise in enforcing the FTC Act – to bring cases more efficiently, while retaining the option of referring appropriate matters to the Department of Justice. I see no legitimate basis why the FTC should not have the same ability to bring cases in its own name as the Securities and Exchange Commission and the Commodity Futures Trading Commission have, and that the CFPA would have under the Administration's proposal.

With respect to the question of examination authority, I believe that, to protect consumers effectively, the federal government must engage in careful and comprehensive oversight of the financial services industry, backed by vigorous law enforcement. Although I believe that more oversight of financial practices is needed, conducting examinations may not be the best means of increasing such scrutiny for most of the types of entities within the FTC's jurisdiction. The FTC has jurisdiction over many thousands of small financial entities, and the examination model may be more useful and practical for larger financial institutions. In any event, the FTC will continue to increase its oversight of the entities within its jurisdiction through vigorous law enforcement.

Q5. FTC serves as the Federal government's leading agency in the areas of consumer privacy, data security and identity theft. This includes financial privacy. Under the Administration's proposal, CFPA would assume responsibility for financial privacy once the FTC's responsibilities under the Fair Credit Reporting Act and Gramm-Leach Bliley Act Privacy Rule are transferred to CFPA. The proposed Act transfers all matters relating to financial privacy to CFPA but leaves information security with FTC. Would this transfer of responsibility under the FCRA and the Gramm-Leach-Bliley Act impact FTC's general consumer privacy program? Are you concerned that the transfer of resources and expertise in the areas of financial privacy would impact FTC's ability to regulate and bring enforcement actions in the area of consumer privacy?

A5. I agree that to date, the FTC has been the leading federal voice on privacy. Among other things, we have brought dozens of enforcement actions against companies that have failed to protect consumer data; conducted workshops and surveys on new and emerging privacy issues; testified before Congress in support of various legislative proposals; disseminated educational materials to consumers and businesses; and called for stronger self-regulatory efforts in areas such as behavioral advertising. Although we hope to continue to provide leadership as we move into the future, the CFPA proposal puts our role in some doubt. In particular, it seems to contemplate that essentially all issues relating to financial privacy (with some minor carve-outs) be transferred to the new agency, with other issues to remain with the FTC. If so, the FTC's role in formulating federal privacy policy would be reduced. Of course, the precise effect on the FTC's program will depend on the scope of the transfer to the new agency.

Q6. Some have suggested that Congress expeditiously pass H.R. 2309 as it considers this proposal. That way, FTC would have the tools it needs to better help consumers now even if these rules eventually migrate to the new agency. Do you support such an effort?

A6. I support the passage of H.R. 2309, the Consumer Credit and Debt Protection Act. This bill would allow the FTC to use streamlined and expeditious APA notice and comment rulemaking procedures, instead of the cumbersome and time-consuming procedures currently required under Section 18 of the FTC Act, to promulgate rules prohibiting or restricting unfair or deceptive acts and practices relating to consumer credit. Even though any rules that the FTC promulgates using this authority may ultimately be transferred to the CFPA, I believe that it is important for the FTC to have this authority as soon as possible so that there is no gap in consumer protection before the CFPA is able to promulgate these types of rules on its own.

__Questions from Representative Dingell__

Q1: Section 1053 of the Administration's bill authorizes CFPA to enforce compliance with any "Federal law that the [CFPA] is authorized to enforce [...] and any regulations or orders prescribed thereunder, unless such Federal law specifically limits the Agency from conducting a hearing or adjudication proceeding [...]." Since section 1061(a)(5) of the bill gives CFPA "all powers and duties" vested in the Federal Trade Commission (FTC) "relating to consumer financial protection functions," does this mean that CFPA could technically enforce the entire FTC Act and all regulations and orders issued thereunder? Similarly, under the Administration's proposal, what authorities are left with FTC?

A1: The Administration's proposed bill creating the CFPA appears to provide the CFPA with the power to enforce the FTC Act, as well as orders and regulations issued pursuant thereto, relating to consumer financial protection.

With regard to the FTC's continuing role, the bill is not entirely clear. As you note, proposed section 1061(a)(5) (in subtitle F) would transfer all of the FTC's "powers and duties ... relating to consumer financial protection functions" to the CFPA. There is a concern that the breadth of the bill's definitions of financial activities, financial products or services, credit, and consumer financial protection functions could be read to apply to a broad swath of commercial transactions involving credit or other kinds of payment arrangements.

Section 1061(b) of the proposal provides that the transfer of consumer financial protection functions would not affect the authority of the FTC to engage in enforcement pursuant to section 1022(e)(3), the "backstop" enforcement provision. Under that provision, the FTC could enforce specific financial consumer protection laws that it now implements (such as the Truth in Lending Act), but only after submitting a matter to the CFPA and waiting up to 120 days for the CFPA to decide whether to bring the action itself. I believe that the FTC should have concurrent authority, because allowing us to put an immediate halt to harmful practices is critical in protecting consumers.

The CFPA apparently would have sole rulemaking power to promulgate rules under the enumerated statutes and promulgate any financial services-related rules under the FTC Act. The FTC apparently would have enforcement authority under the enumerated statutes (subject to a referral requirement) but would not have the authority to enforce CFPA-issued rules.

With respect to the FTC Act and other consumer protection laws not enumerated for transfer, the bill appears to envision that the FTC would continue to exercise some authority over financial services. I believe that the intent of the Administration's proposal is to continue the FTC's authority, while coordinating appropriately with the CFPA where it relates to consumer financial services or products. The bill's proposed amendments to the FTC Act are consistent with that interpretation, but the transfer of functions language should be revised to explicitly state that the FTC would retain such abilities as bringing cases, holding workshops, writing reports, and giving guidance under the FTC Act in areas related to financial activity.

I would be happy to have FTC staff work with the Subcommittee to clarify the legislation in these areas and ensure that the FTC continues to have an effective enforcement role.

Q2: Section 1022(d) of the bill provides that "[...] to the extent that a Federal law authorizes [CFPA] and another Federal agency to issue regulations or guidance, conduct examinations, or require reports under that law for purposes of assuring compliance with this title, any enumerated or consumer law, the laws for which authorities were transferred under subtitles F and H, and any regulations thereunder, [CFPA] shall have the exclusive authority to prescribe rules, issue guidance, conduct examinations, require reports, or issue exemptions with regard to any person subject to that law." Do you believe this provision will prohibit FTC from issuing antitrust guidance, for example? Would it not also prohibit FTC's efforts to do studies, hold workshops, issue reports, and give guidance with respect to consumer protection?

A2: I do not believe that the Administration intended to cover competition law, but one possible reading of the bill would limit the FTC's competition authority as well as its consumer protection authority: the definition in section 1061(d) of "consumer financial protection functions" ("research, rulemaking, issuance of orders or guidance,... relating to the provision of consumer financial products or services") could be read broadly enough to encompass matters of competition in the provision of consumer financial products or services. The drafters may not have intended to include the FTC's competition authority in the provision, and clarifying language would help to correct any misinterpretation.

With respect to the FTC's expertise in consumer protection studies, workshops, reports, and guidance, under the bill, it appears that the FTC would lose those functions with respect to financial consumer protection. While I support having a consistent approach to financial consumer protection, the FTC's deep experience of collecting and analyzing information and assisting consumers and businesses with best practices relating to all kinds of consumer protection should be preserved and fully utilized, and the bill should be amended as necessary to accomplish this goal.

Q3. The Administration's bill would preserve a so-called "backstop authority" for the FTC, whereby FTC may initiate an enforcement proceeding if CFPA does not do so after 120 days. Currently, FTC may refer civil penalty matters to the Department of Justice, and if the Attorney General does not commence an action within 45 days of this referral, the FTC may do so. Historically, FTC has initiated very few of these proceedings. Given this analogy between the backstop authority in the Administration's bill and the existing referral process between FTC and DOJ, do you reasonably expect that FTC will take advantage of the backstop authority?

A3. The FTC generally would use its backstop authority in cases that the CFPA declines to initiate following an FTC referral. This process is similar to the existing statutory scheme for civil penalty actions, whereby the FTC may file the action only if the Department of Justice fails to do so within 45 days of a referral. Historically, the FTC has initiated relatively few civil penalty actions in its own name, because in the vast majority of instances the Department of Justice accepts the referral and files the action itself. We cannot know at this time whether the CFPA would similarly accept most referrals and initiate actions itself, nor how often or under what circumstances the CFPA might decline an FTC referral. In cases involving significant consumer injury, including those involving fraud, any waiting time is problematic, and a requirement that we wait up to four months before bringing any kind of consumer protection case is, in our view, problematic. Thus, the referral period could significantly hamper the effectiveness of backstop enforcement.

Q4. Similarly, one assumes that if the Consumer Financial Protection Act is enacted, FTC would lose valuable consumer financial protection staff. Do you believe this will affect FTC's ability to exercise the backstop authority it is given under the Consumer Financial Protection Act?

A4. Section 1061(a)(5) of the proposed bill, when read in conjunction with 5 U.S.C. § 3503, appears to require that FTC staff engaged in activities "relating to consumer protection financial protection functions" be transferred automatically to the CFPA. Certainly, the transfer of all FTC staff with experience in financial service matters to the CFPA would significantly impair the FTC's ability to serve as a backstop.

Q5: The Administration's bill appropriates to the Consumer Financial Protection Agency "such sums as may be necessary" for its operation. Do you have an estimate of what this amount may be? Further, can you estimate the number of staff the CFPA will employ?

A5: The goal of improving the overall regulatory, supervisory, and enforcement system for protecting consumers of financial services is a worthy one. Under the bill, the CFPA's mission would be broad and considerably more expansive than the FTC's current consumer financial protection activities. The bill would give the CFPA jurisdiction over financial entities such as banks that are not now subject to the FTC Act, and it would give the CFPA duties the FTC does not have, including examining and supervising both currently supervised financial entities such as banks and a very much greater range and number of "covered entities" not currently subject to such examination and supervision. It would be important for the CFPA, if established, to have sufficient resources, in terms of both financial support and personnel, to carry out effectively the functions assigned to it. I defer to the Administration and Congress, however, to determine the necessary staffing and resources.

Q6: The Administration's proposal would populate the Consumer Protection Financial Agency with five commissioners, but it includes no requirement that a proportion of these commissioners be from different political parties. Do you believe this will weaken CFPA's

ability to be bi-partisan and limit any continuity that might arise out of shared leadership? Further, what rationale does the Administration have for not requiring commissioners come from different parties?

A6: Since its founding nearly a century ago, the FTC has functioned by law as a bipartisan agency. I believe this has served the agency well, by enhancing the diversity of views that formulate public policy and by providing greater predictability and stability to agency decision-making. I defer to the Administration to describe its rationale for the proposed approach.

Q7: The Administration's proposal establishes the Consumer Financial Protection Agency as an "independent executive agency." As you know, independent agencies and executive agencies differ in that independent agencies, such as FTC, exercise executive functions outside of an executive department. This being the case, I am confused about the designation "independent executive agency" as it applies to the proposed CFPA. Please provide clarification vis-à-vis CFPA's relationship to the executive branch.

A7: The current version of the CFPA Act is not entirely clear about the nature of the relationship between the CFPA and the President. Four members of the Board would, like FTC Commissioners, be appointed for specified terms and be removable only for inefficiency, neglect of duty, or malfeasance in office. This arrangement would provide a level of independence. The fifth Board member, however, would be the director of the agency that regulates national banks, and while I have not seen the legislation for that agency, the current regulator of national banks, the Office of the Comptroller of the Currency, is part of the Treasury Department. Also, the express designation of the CFPA as "an independent agency in the Executive branch" may indicate an intent that, like some other agencies similarly designated such as the Federal Emergency Management Agency and the Social Security Administration, the CFPA would be subject to Administration policy decisions. In addition, as the FTC's experience has borne out, bi-partisanship is a traditional hallmark of independence; the proposal does not require that for the CFPA, as you note, and the five year term for appointed Board members increases the chance that all members at a given time will be from a single political party. I defer to the Administration to clarify its intention with respect to this issue.

Q8. How would you characterize the level of engagement from the Department of the Treasury with FTC in drafting the Consumer Financial Protection Agency Act of 2009? Was it, for example, minimal, or was FTC more intimately involved in designing this proposal?

A8. The FTC played no role in the drafting of the legislative proposal for the CFPA and transfer of functions, nor did the FTC have access to the proposal before it was sent to Congress. There were brief, informal discussions between FTC and Treasury staff prior to the public unveiling of the Treasury Department's proposal, but those were general discussions that were not tied to any specific legislative proposal.

Q9. In the interim between enactment of the Consumer Financial Protection Agency Act of 2009 and the inception of CFPA, how will the Federal government ensure adequate consumer financial protections? Will, for example, the FTC retain its consumer financial protection authorities during this time?

A9. As I understand the proposed legislation, the FTC would retain its existing authority until the designated transfer date, when the CFPA becomes operational. It is important for the FTC to retain its authority during the interim period to ensure that there is no gap in the protection of consumers, as well as during any subsequent period in which the CFPA is not yet fully operational.

I want to assure you that the FTC is continuing to protect consumers of financial services and, if permitted to do so, will maintain its efforts during any transition period until the CFPA, if it is created, is able to take on front line consumer protection responsibility. The Commission has committed substantial resources for this purpose.

Q10: Rule X of the House of Representatives designates that the Committee on Energy and Commerce shall have jurisdiction over matters related to consumer protection. Should the Consumer Financial Protection Agency Act of 2009 be enacted, do you believe the Committee on Energy and Commerce would have jurisdiction over CFPA, or do you believe this authority would be given exclusively to another committee, for example the Committee on Financial Services?

A10: I believe it is for the House of Representatives to determine what Committee or Committees would exercise jurisdiction and oversight of the CFPA.

<u>Questions from Representative Gonzalez</u>

Q1. Estimates vary, but the financial services industry accounted for nearly one-third of our GDP in recent years. Considering the size of the industry, it is surprising to see the suggestion that we reduce the number of agencies keeping track of such a significant sector of that industry. The proposal wisely encourages the states to monitor financial products alongside the proposed CFPA. Why not similarly increase the number of overseers at the federal level? One of the principal arguments suggested by the testimony is that the FTC may not regulate banks, while the CFPA can. Would it not be wiser to expand FTC's jurisdiction, adding the valuable oversight of FTC's proven investigators, rather than removing their current oversight?

A1. As the Commission testified, it agrees with the fundamental objective of the proposal to improve the effectiveness of the current governmental system for protecting consumers of financial services. The Commission has further asked Congress to increase FTC resources to prosecute financial scams. I believe that the Administration's initiative, which enhances resources and authority for the FTC and which creates the CFPA, would be a step forward, especially if it includes the kinds of revisions discussed in the testimony and these answers.

There are many possible ways to achieve enhanced protection for consumers of financial products and services, including expanding the authority of existing agencies like the FTC, or establishing across-the-board authority in a single agency like the CFPA. Although the FTC does not have experience in the types of supervision and examination activities that are currently conducted by the federal banking agencies (and that would constitute a significant part of the CFPA's responsibilities), the FTC does have extensive experience in enforcing consumer protection standards against the many thousands of non-bank entities in the financial sector. If Congress decides to create the CFPA, I believe that the FTC should have a robust, concurrent role.

Q2. Much was made at the hearing of the fact that the various regulators whose functions would be taken on by the Consumer Financial Protection Agency were unable or unwilling to provide the regulations and oversight of the varied financial products we might desire. There is no sensible argument against that. But the suggestion that this is necessarily proof or a result of a superfluity of regulators does not logically follow from that fact. For the past eight years, the leadership of the Executive Branch embraced a *laissez faire* system that discouraged strict regulation of these financial products. The Bush Administration brought not a single antitrust case during those eight years and, indeed, dismissed pending cases inherited from Clinton Administration. That was not because anticompetitive practices had vanished from American business, and a majority of the Antitrust Division's staff in 2001 were the same staff as in 2000. The change was the wishes of the leadership. Why should we presume that the CFPA would fare any differently? Whether you have one bus or four, if the dispatcher directs the drivers to Cleveland, they won't end up in New York.

A2. I certainly agree that every organization, including government agencies, needs strong and effective leadership to carry out its mandate. Thus, should the CFPA be created, it will be important that its leaders be selected carefully to ensure that consumers of financial services are appropriately protected. Given the President's commitment to creating and funding an agency that elevates the level of protection for consumers of financial services, I am confident that he would select experienced, talented, and motivated leaders for the CFPA.

Q3. The enthusiasm and energy of the regulators of the financial services industry will depend on which President oversees them. This is a fact of our system that we must recognize and accept if we hope to make efficient reform of our regulatory structure. Regulators who wish to regulate are able do so. Our problem has been, instead, regulators who did not believe in regulation. What we might need, instead, is a new set of eyes, wholly non-partisan and completely apolitical, whose sole purpose is to represent the interests of consumers. Such a set of watchdogs could alert existing regulators to problems they might have missed, but they could also alert the Congress, and the public, to problems to which the regulators had failed to respond, allowing the American people to pressure the regulators as appropriate. Would this not support the creation of a board or commission of consumer-representatives, such as, e.g., the Class B and Class C members of the Board of Directors of the NY Federal Reserve Bank are supposed to be?

A3. I agree that we need to elevate the level of protection for consumers of financial services and that hearing from a diverse array of viewpoints, including consumers, improves the quality of the decisions that consumer protection officials make. At the FTC, there are a number of mechanisms to solicit and receive this kind of input and feedback, including public workshops and conferences, outreach to stakeholders, public comment on proposed law enforcement actions and regulatory initiatives, petitions, consumer complaints, and many others. Some of these mechanisms are mandatory, others have been established by the Commission voluntarily. Creating a more formal and permanent mechanism for the CFPA to obtain such input, including the FTC's views based on its extensive consumer protection experience, is an idea that warrants consideration. This is especially important as the FTC would not have a representative on the governing board of the CFPA. At this time, I am not sufficiently knowledgeable about the New York Federal Reserve Bank's approach and experience to recommend that the CFPA replicate it.

Questions from Representative Radanovich

Q1. The FTC has a unique perspective of managing two missions – competition and consumer protection. In your experience, if we limit competition through regulatory burdens, what is the effect on product diversity and price? Does the consumer benefit when competition is stifled? Are consumers squeezed out of the market when there are fewer products that can be tailored to their circumstances?

A1. In general, competition among sellers of products and services leads to lower prices and greater diversity of choices for consumers. Accordingly, government or private sector burdens or restraints on competition can limit consumer choice and/or result in higher prices. On the other hand, restrictions on the sale of products or services in many cases further important public policy objectives, such as consumer health and safety. Therefore, in evaluating the merits of a particular restriction, it is critical to weigh the potential benefits to consumers from that restriction against the potential costs.

Q2. In your written testimony you highlighted some of the recent successes the FTC has had in improving the climate of consumer protection in the financial industry. Given the FTC's long history of consumer protection, and prior knowledge of the field, would it be better for consumers to instead give the FTC the CFPA's proposed authority, as opposed to transferring massive authorities to an entirely untested and inexperienced new agency?

A2. There are many ways to achieve the important goals of elevating consumer protection and establishing a more effective financial regulatory system. The FTC has extensive experience enforcing consumer credit laws and a wide variety of other consumer protection statutes and rules against non-bank providers of financial services and other entities within its jurisdiction, as well as working successfully with other federal and state law enforcers and regulators. Therefore, should the CFPA be created, I believe Congress should allow the FTC to have concurrent authority to enforce the consumer protection statutes and rules that it currently enforces, as well as to give guidance, perform research, hold workshops, and write reports. At the same time, the FTC does not have experience in the types of supervision and examination activities that are at present conducted by the federal banking agencies, among others, and that would constitute a significant part of the CFPA's responsibilities.

Q3. In your testimony you mentioned that the FTC is currently involved in issuing a number of rules and guidelines to make the financial services sector safer for consumers. This includes rules being promulgated regarding mortgages with the new rule-making authority recently granted by Congress. Could this sudden transfer of authority and powers interrupt that work and extend the time that consumers are exposed to unacceptable risks and practices?

A3. The FTC is working as quickly as possible to promulgate new rules regarding mortgage lending practices under the authority recently granted by Congress. The Commission issued two related Advance Notices of Proposed Rulemaking on June 1 of this year and is in the process of reviewing public comments received. While it is important to recognize that developing an effective oversight and enforcement program cannot be done overnight and that the transitional period may be protracted, should the CFPA be established and given exclusive rule making authority in this area, the Commission would do everything in its power to ensure that any transfer does not adversely impact on the protection of consumers.

Q4. Unlike the proposed CFPA, the Federal Trade Commission is required to have bipartisan membership. What benefits does that bipartisan structure provide the FTC, and how might the lack of those benefits prevent the new CFPA from being as effective as the FTC in protecting consumers in the area of financial services?

A4. Since its founding nearly a century ago, the FTC has functioned by law as a bipartisan agency. I believe this has served the agency and the American public well, by enhancing the diversity of views that formulate public policy, and by providing greater predictability and stability to agency decision-making.

Q5. In your testimony you cited numerous actions that the FTC has taken to protect consumers within the realm of consumer finance. It seems that the FTC has been diligent in carrying out its role of consumer protection in this area. Do you believe that the new CFPA will do a better job than the FTC in this area? Please explain.

A5. The FTC acts vigorously to protect consumers from unfair and deceptive practices involving mortgage foreclosure rescue, loan modification, advance fee credit cards, credit repair, and many other financial products and services. The agency's expertise in consumer protection is unparalleled. For example, within the parameters of its authority, the FTC protects consumers at every stage of the credit life-cycle: from the unfair or deceptive practices of brokers, lenders, and others who advertise and offer credit; to the unlawful conduct of creditors and mortgage servicers who collect payments from consumers; to the violations of debt collectors, credit repair companies, debt relief firms, and mortgage loan modification and foreclosure scam artists, who prey on consumers who are delinquent or in default on their debts.

Many of the functions of the CFPA would be the same as those that the FTC currently performs with respect to entities under its jurisdiction, including law enforcement and rule making. As I understand the intent of the bill, the CFPA and FTC would have concurrent authority to enforce the FTC Act with respect to financial activities. The FTC remains ready to work with Congress to clarify the legislative language to better reflect the intent of the bill. Additionally, the CFPA would have primary responsibility for enforcement of other financially-related consumer protection statutes, with the FTC serving a "backstop" role. I believe that rather than having "backstop" authority, the FTC should have concurrent jurisdiction over financially-related consumer protection statutes. The range of entities and practices at issue is so great that having additional effective "cops on the beat" like the FTC to enforce the laws promptly, without a 120-day referral period, would be useful and important. The FTC has a history of working collaboratively with other law enforcement; in the past year alone, we have coordinated with the state attorneys general to bring more than 400 cases relating to financial consumer protection and the economic downturn.

The CFPA also would have a number of additional powers and responsibilities. It would reach a broader range of financial entities than the FTC now reaches, and thus would be able to establish across-the-board standards for consumer protection in those instances where uniform standards are appropriate. It would also take over the task of examining depository institutions regarding consumer protection from the federal banking agencies and would extend it to other entities, including those currently under the FTC's jurisdiction.

Should the CFPA be created, I would hope that it develops into an effective consumer protection agency, but it is difficult to predict whether it ultimately would be more or less effective than the FTC.

Q6. Many rules were broken and much fraud was committed with regard to mortgages. This includes application fraud by borrowers.

- **a. Has the FTC brought any cases against borrowers for lying on their mortgage applications?**
- **b. Is it a violation of the Truth in Lending Act to knowingly provide false information?**
- **c. Has any other Federal or state agency brought action against any consumers for violating Federal lending laws (and were not part of a premeditated scam)? Please explain.**

A6. To respond to your questions:

(a) The FTC has not brought any cases against borrowers for lying on their mortgage applications. The Federal Trade Commission Act and other consumer protection statutes generally are designed to protect consumers from harmful practices by businesses and other for-profit entities.

(b) It is not a violation of the Truth in Lending Act to knowingly provide false information on a loan application, but doing so may be a violation of a federal criminal law that the Department of Justice enforces. *See* 18 U.S.C. § 1001 *et seq.*

(c) Consumers may participate in premeditated lending scams by, for example, acting as "straw" buyers or borrowers (allowing others to use their credit to purchase or obtain a loan for a home they do not intend to use or control). I am not aware of any agency that has taken legal action under federal consumer lending laws against any individual that was not a part of the scam. As noted above, however, there are criminal statutes that apply to fraud by consumers during the lending process. These statutes generally are investigated and enforced by the Department of Housing and Urban Development and the

Department of Justice.

Q7. The FTC developed a simplified disclosure statement which we discussed at the previous hearing in the Subcommittee. The document was much easier for consumers to understand. Wouldn't it be more effective to take the approach of the FTC and institute changes we can mandate quickly rather than spend lengthy time debating and creating a new Federal entity from scratch? What obstacles are preventing the adoption of the model disclosure form that require a legislative solution?

A7. The prototype disclosure statement discussed at the previous hearing was developed by the FTC's Bureau of Economics for an empirical study and published in a staff report. The staff's research suggests that consumers would benefit most from a comprehensive effort to reform federal mortgage disclosures.

Under current law, the Real Estate Settlement Procedures Act requires the Department of Housing and Urban Development to establish a disclosure statement for settlement costs, and the Truth in Lending Act requires the Federal Reserve Board to establish a separate disclosure of certain loan costs. I believe Congress should consider legislation that would consolidate these two disclosures into a single, comprehensive, and comprehensible document, and would authorize the appropriate federal agency to carry out this task. I would recommend granting the designated agency the discretion to determine what information consumers need to make good choices when shopping for mortgage loans.

Q8. Aside from the impact that this proposal would have on companies that offer credit, and particularly on small businesses, this proposal would also have a dramatic effect on the whole rest of the economy by dramatically expanding the FTC's authority. Specifically, the Commission would have almost unlimited ability to quickly pass rules under the APA banning almost any practice that they deemed "unfair," and then they could immediately turn around and seek civil penalties for the violation of that regulation, and the only review authority the courts would have would be whether the FTC abused their discretion. What restraints on the Commission's authority will exist if this law passes?

A8. In considering whether to vest an independent agency with regulatory authority, Congress must balance the agency's need for flexibility in responding to emerging problems against its interest in determining in the first instance whether and how to address those problems. Reasonable people may disagree about how to strike that balance. I support giving support giving the FTC broad APA rulemaking authority. The APA rulemaking procedures are more streamlined and expeditious than the Magnuson-Moss rulemaking requirements that the Commission currently must follow. This does not mean, however, that the APA rulemaking process lacks rigor. Even under the APA procedures, rulemaking proceedings are thorough and take several months at a minimum and ordinarily take longer. Moreover, rules issued under the APA are subject to judicial review.

The APA notice and comment procedures the Commission would use to promulgate rules under the proposal are the same procedures that govern rulemaking by most other federal agencies. First, Section 553(b) of the APA requires that the agency publish a notice with either the terms or substance of the proposed rule or a description of subjects to be covered, and Section 553(c) mandates that the agency in most cases provide at least 30 days for the public to comment on any proposed rule.

Second, any rulemaking based on the FTC Act would have to be consistent with the FTC's deception or unfairness authority, both of which are circumscribed by statutory language and/or case law. For example, Section 5(n) of the FTC defines "unfairness" to mean practices that cause or are likely to cause substantial injury to consumers that is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition. A rulemaking based on unfairness would have to include findings that the covered practices met the Section 5(n) definition.

Third, if the Commission decides whether to issue a rule after considering public comments, Section 553(c) of the APA requires that the agency publish the rules and a concise statement of the basis and purpose for the rules. Under Section 706(b) of the APA, once rules are issued they are subject to judicial review, and a court may hold them to be unlawful and set them aside if, among other things, they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

I would note that the FTC has promulgated a number of rules under statutes other than the FTC Act, in many cases as specifically directed by Congress, using APA procedures. These include, among many others, the Telemarketing Sales Rule and numerous rules under the Fair and Accurate Credit Transactions Act of 2003. These rules typically have been issued with extensive public input, have been based on strong and comprehensive records, and have proven to be well-supported and effective.

Should the Commission obtain the authority to promulgate rules under the APA, it would still be subject to the existing requirements of Section 5(m)(1)(A) of the FTC Act if it attempted to obtain civil penalties against a violator of a rule. Specifically, to obtain penalties for rule violations, the FTC must prove in court that the defendant engaged in conduct that violated the rule "with actual knowledge or knowledge fairly implied on the basis of objective circumstances" that such act is unfair or deceptive and is prohibited by such rule. In addition, to determine the amount of civil penalties, a court must "take into account the degree of culpability, any history of prior such conduct, ability to pay, effect on ability to continue to do business, and such matters as justice may require." FTC Act, Section 5(m)(1)(C). These requirements ensure that courts consider relevant information before imposing civil penalties on a defendant.

Q9. The proposed legislation also provides the Commission with the ability to seek civil penalties for anything the Commission deems to be an unfair or deceptive act or practice – even when there is no rule governing that behavior. If the Commission didn't have the ability to write rules, there may be a better argument to needing general civil penalty

authority. But if the Commission gets APA rulemaking authority, doesn't that provide the ability to write the rules the Commission wants and obviate the need for general civil penalty authority?

A9. As a practical matter, the FTC cannot write rules to address every potential deceptive or unfair act or practice that has occurred or might occur in the United States. If Congress provides the FTC with civil penalty authority, the FTC would issue and enforce rules implementing Section 5 of the FTC Act where warranted, but it also would continue to use its general authority to bring law enforcement actions against those who violate Section 5.

Having the ability to obtain civil penalties in cases involving violations of the FTC Act as well as rules pursuant to the FTC Act would be an important deterrent to violators and enhance consumer protection. First, many FTC cases alleging a defendant engaged in unfair or deceptive acts and practices involve hard-core fraud. If these cases are not prosecuted criminally, civil penalties may be needed to deter these actors from engaging in conduct that causes serious harm to consumers.

Second, civil penalties are an especially important deterrent in cases in which other forms of monetary relief may not be available or practicable. Consumer redress may be difficult to obtain in cases in which consumers did not purchase a product from defendants but otherwise were harmed by defendants' practices, or in which it is difficult to quantify consumer injury. Disgorgement of ill-gotten gains also may be difficult to obtain in cases in which the defendants did not obtain significant profits from their violations. For example, in a case in which a defendant failed to take adequate measures to protect the security of information and a data breach has occurred, consumer redress often is unavailable because consumers may have not purchased a product or service from the defendant. Disgorgement also is not practicable because the defendant likely did not profit from its failure to protect the information; rather, the identity thief who stole the information likely profited.

Relatedly, although the bill does not include a provision to give the FTC independent litigating authority when it seeks civil penalties, consumers would benefit if the FTC could file cases in its own name. Currently, the FTC must first present cases to the Department of Justice ("DOJ") to allow it to decide whether to file an action. Independent litigating authority would allow the Commission – the agency with the greatest expertise in enforcing the FTC Act – to bring cases more efficiently while retaining the option of referring appropriate matters to the DOJ.

Because the FTC cannot anticipate the future categories of law violations for which redress or disgorgement may not be available or practicable, allowing the FTC directly to seek civil penalties for violations of the FTC Act would allow the Commission to respond promptly and effectively to these types of violations. Most if not all state attorneys general can seek civil penalties for violations of their state consumer protection laws.

Q10. Did you or your staff assist or consult in the drafting of this legislation? If so, in what capacity and what were your recommendations?

A10. The FTC played no role in the drafting of the legislative proposal for the CFPA and transfer of functions, nor did the FTC have access to the proposal before it was sent to Congress. There were brief, informal discussions between FTC and Treasury staff prior to the public unveiling of the Treasury Department's proposal, but those were general discussions that were not tied to any specific legislative proposal.

Witness Questions
Commerce, Trade, and Consumer Protection Subcommittee Hearing
Responses from Commissioner J. Thomas Rosch

On July 17, 2009, Chairman Waxman forwarded to Chairman Jon Leibowitz, on behalf of certain Members of the Committee, written questions for the record for the hearing entitled, "The Proposed Consumer Financial Protection Agency: Implications for Consumers and the FTC." Because those questions relate to the creation of a new consumer financial protection agency ("CFPA") and its impact on the Federal Trade Commission ("FTC"), Chairman Leibowitz circulated to all Commissioners his response to the Committee Members' follow-up questions. Chairman Leibowitz's responses have been supplemented accordingly.

Chairman Rush kindly agreed to make my separate statement concerning the creation of the CFPA a part of the hearing record ("Statement for the Record"). As discussed in the Statement for the Record, I believe that the creation of the new CFPA is contrary to the public interest and would severely cripple the FTC as the nation's premier consumer protection agency. Furthermore, I do not believe that any of Chairman Leibowitz's proposed amendments to the legislation creating such a new agency would be sufficient to cure the fundamental defects in that legislation; if a new agency of that sort is created, the FTC would seem to be a shadow of its former self as a consumer protection agency. Rather, any such legislation must be revised to specifically preserve the current authority and functions of the FTC as a consumer protection agency, as the legislation would do, for example, in the case of the Securities and Exchange Commission ("SEC") and the Commodities Futures Trading Commission ("CFTC"). My responses to specific follow-up questions follow.

<u>Questions from Chairman Rush</u>

Q1. In your testimony, you discussed the potential impact that the creation of this new agency could have on FTC's ability to do its job. You noted that many of FTC's cases that have nothing to do with traditional financial products or services often involve those statutes that may be moved to CFPA. As an example, you said that FTC's enforcement against fraudulent telemarketers may implicate financial data processors. Whereas FTC now can enforce against both companies involved in the fraud, if this proposal were to become law, FTC could not pursue on its own authority a case against a data processor. If the proposed legislation become law, what impact would it have on FTC's ability to bring actions against non-financial frauds? Are you concerned that FTC's ability to protect consumers in areas unrelated to traditional financial products and services will be harmed?

<u>Commissioner Rosch response</u>: As discussed in my Statement for the Record, if the proposed legislation becomes law, it will profoundly adversely affect the FTC's ability to bring actions against non-financial frauds. Specifically, I am concerned that the ability of the FTC to protect consumers in areas that are seen by the CFPA as tangentially related to traditional financial products and services will be harmed.

That is so for several reasons. Among other things, the proposed legislation contains broad definitions that may result in the CFPA asserting plenary jurisdiction over non-financial frauds that the new agency asserts have a tangential financial component, as well as overt frauds strictly related to traditional financial products and services. Moreover, many of the members of the staff of the FTC's Bureau of Consumer Protection ("BCP") and Bureau of Economics ("BE") have long been engaged in multi-tasking: they have worked not only on matters handled by the agency's Division of Financial Practices, but on a host of other consumer protection matters; the transfer to the new CFPA of those employees (which may result in the transfer of about 20% of the total current BCP FTEs) would have a dramatically adverse effect on the FTC's efforts to protect consumers from non-financial fraud.

Q2. According to the Administration's proposal, FTC could enforce the FTC Act and would have backstop authority to enforce the statutes and rules being transferred from FTC to the new agency. Would there be value in having FTC enforce the new agency's rules? If FTC is to be a backstop enforcer, should it not have all possible remedies available to it?

Commissioner Rosch response: There is little value in having the FTC enforce new CFPA rules. As more fully described in my Statement for the Record, the FTC currently has core competency in defining what financial practices are deceptive or unfair and in fashioning appropriate disclosures; it has exercised that core competency both in rulemaking and in individual cases. The proposed CFPA has no demonstrated competency at all.

As for the FTC's "backstop" authority, that may be even less authority than the states are given to enforce CFPA rules and statutes governing financial products and services. Beyond that, it is not clear what, if any, authority the FTC would have to protect consumers against fraud respecting financial products and services, absent a CFPA rule. For example, the FTC has challenged numerous deceptive loan modification and advance fee credit card scams without a rule. However, because those scams involve "financial products and services" the legislation would seem to bring a halt to the FTC's ability to bring those case-by-case challenges. If "backstop authority" is intended to make the FTC an alternative enforcer, that is no better than the balkanized system of enforcement that now exists.

Finally, if a new CFPA is not created, I agree with Chairman Leibowitz that the FTC should have the same remedies available to it that other agencies with consumer protection powers have available to them.

Q3. According to the Administration's proposal, CFPA would be authorized to enforce against unfair, deceptive, or abusive practices. The FTC Act gives FTC the authority to enforce against unfair or deceptive practices. What value does the word "abusive" add? What additional practices, if any, could FTC enforce against if it had this additional authority?

Commissioner Rosch response: I do not think "abusive" adds anything to the authority the FTC now has to challenge "unfair" practices under Section 5 of the agency's organic statute.

Q4. In your testimony, you request that the FTC Act be amended to give FTC independent litigating authority, thereby enabling FTC to bring actions seeking civil penalties in federal court without the involvement of the Department of Justice. The Administration's proposed legislation grants this authority to CFPA, but not to FTC. The proposed legislation also gives CFPA examination authority over the institutions that it regulates. FTC has not been granted this authority. Would FTC benefit from having examination authority? How could FTC use examination authority to improve consumer protections?

Commissioner Rosch response: As stated in response to the second question, as long as no new agency is created, I agree with Chairman Leibowitz that the FTC should have the same independent remedial authority that other agencies with consumer protection authority have available to them.

As more fully discussed in my Statement for the Record, I do not believe the FTC has core competency or a comparative advantage in monitoring the safety and soundness of financial institutions. However, the FTC currently conducts "sweeps" respecting the acts and practices of entities over which it has jurisdiction. These "sweeps" can involve the use of compulsory process, when necessary, and they have been sufficient to identify bad apples within the scope of the agency's jurisdiction.

Q5. FTC serves as the Federal government's leading agency in the areas of consumer privacy, data security and identity theft. This includes financial privacy. Under the Administration's proposal, CFPA would assume responsibility for financial privacy once the FTC's responsibilities under the Fair Credit Reporting Act and Gramm-Leach Bliley Act Privacy Rule are transferred to CFPA. The proposed Act transfers all matters relating to financial privacy to CFPA but leaves information security with FTC. Would this transfer of responsibility under the FCRA and the Gramm-Leach-Bliley Act impact FTC's general consumer privacy program? Are you concerned that the transfer of resources and expertise in the areas of financial privacy would impact FTC's ability to regulate and bring enforcement actions in the area of consumer privacy?

Commissioner Rosch response: To begin with, as reported in the July 3, 2009 issue of the BNA Antitrust & Trade Regulation Reporter, it has been said of the FTC's financial privacy law enforcement that there is not "a more sophisticated civil law enforcement agency in the United States, with a methodology for selecting, identifying, and pursuing enforcement matters in a reasonably predictable manner for industry."

Additionally, I believe it is impossible to separate consumer protection "information security" from "financial privacy." For the reasons discussed in my response to the first question, the FTC's ability to provide consumers with "information security" would be substantially compromised if plenary authority to protect consumers' "financial privacy" was given to the CFPA.

Q6. Some have suggested that Congress expeditiously pass H.R. 2309 as it considers this proposal. That way, FTC would have the tools it needs to better help consumers now even if these rules eventually migrate to the new agency. Do you support such an effort?

Commissioner Rosch response: If legislation creating a new CFPA is enacted, I see no legitimate basis for enacting H.R. 2309, granting the FTC additional manpower and authority. In that event, as stated, the agency would be a pale shadow of its former self as a consumer protection agency.

Questions from Representative Dingell

Q1. Section 1053 of the Administration's bill authorizes CFPA to enforce compliance with any "Federal law that the [CFPA] is authorized to enforce [...] and any regulations or orders prescribed thereunder, unless such Federal law specifically limits the Agency from conducting a hearing or adjudication proceeding [...]." Since section 1061(a)(5) of the bill gives CFPA "all powers and duties" vested in the Federal Trade Commission (FTC) "relating to consumer financial protection functions," does this mean that CFPA could technically enforce the entire FTC Act and all regulations and orders issued thereunder? Similarly, under the Administration's proposal, what authorities are left with FTC?

Commissioner Rosch response: My understanding is that your description of the meaning of Section 1061(a)(5) is accurate (in contrast to the way the SEC is treated), and I believe that under the Administration's proposal, the consumer protection authority of the FTC would be substantially diminished.

That is so for several reasons. Among other things, the proposed legislation contains broad definitions that may result in the CFPA asserting plenary jurisdiction over non-financial frauds that have only a tangential financial component, as well as overt frauds strictly related to traditional financial products and services. Moreover, many of the members of the staff of the FTC's Bureau of Consumer Protection ("BCP") and Bureau of Economics ("BE") have long been engaged in multi-tasking: they have worked not only on matters handled by the agency's Division of Financial Practices, but on a host of other consumer protection matters; the transfer to the new CFPA of those employees (which may result in the transfer of about 20% of the total current BCP FTEs) would have a dramatically adverse effect on the FTC's efforts to protect consumers from non-financial fraud.

Q2: Section 1022(d) of the bill provides that "[...] to the extent that a Federal law authorizes [CFPA] and another Federal agency to issue regulations or guidance, conduct examinations, or require reports under that law for purposes of assuring compliance with this title, any enumerated or consumer law, the laws for which authorities were transferred under subtitles F and H, and any regulations thereunder, [CFPA] shall have the exclusive authority to prescribe rules, issue guidance, conduct examinations, require reports, or issue exemptions with regard to any person subject to that law." Do you believe this provision will prohibit FTC from issuing antitrust guidance, for example? Would it not also prohibit FTC's efforts to do studies, hold workshops, issue reports, and give guidance with respect to consumer protection?

Commissioner Rosch response: My understanding is that your description of the meaning of Section 1022(d) of the bill is accurate, and I believe that the bill would prohibit the FTC from issuing some antitrust guidance, as well as prohibit the agency from engaging in the consumer protection activities mentioned.

I agree with Chairman Leibowitz that the loss of the FTC's experience and expertise in this respect would be contrary to the public interest. However, I do not believe that any of the amendments proposed by the Chairman would cure that fundamental problem. Instead, any legislation creating a new CFPA must specifically carve out the FTC, just as the legislation does with respect to the SEC.

Q3. The Administration's bill would preserve a so-called "backstop authority" for the FTC, whereby FTC may initiate an enforcement proceeding if CFPA does not do so after 120 days. Currently, FTC may refer civil penalty matters to the Department of Justice, and if the Attorney General does not commence an action within 45 days of this referral, the FTC may do so. Historically, FTC has initiated very few of these proceedings. Given this analogy between the backstop authority in the Administration's bill and the existing referral process between FTC and DOJ, do you reasonably expect that FTC will take advantage of the backstop authority?

Commissioner Rosch response: I do not know what "backstop authority" means except that, as discussed in my Statement for the Record and my response to Chairman Rush's second question, it will inevitably result in the delay and possible loss, of the FTC's efforts to enforce the consumer protection laws itself or via the U.S. Department of Justice.

Q4. Similarly, one assumes that if the Consumer Financial Protection Act is enacted, FTC would lose valuable consumer financial protection staff. Do you believe this will affect FTC's ability to exercise the backstop authority it is given under the Consumer Financial Protection Act?

Commissioner Rosch response: For the reasons stated in my response to your first question, I believe that enactment of the CFPA legislation will result in the loss not only of consumer *financial* protection staff, but also in the loss of consumer protection staff generally, because much of the FTC's consumer protection staff has been involved in multi-tasking for a long time. It is my understanding that the proposed legislation may result in the transfer of about 20% of the total current BCP FTEs.

Q5. The Administration's bill appropriates to the Consumer Financial Protection Agency "such sums as may be necessary" for its operation. Do you have an estimate of what this amount may be? Further, can you estimate the number of staff the CFPA will employ?

Commissioner Rosch response: I have not seen any estimate of what sums may be necessary for operation of the CFPA staff. As stated in my Statement for the Record, that cost seems to be open-ended.

Q6. The Administration's proposal would populate the Consumer Protection Financial Agency with five commissioners, but it includes no requirement that a proportion of these commissioners be from different political parties. Do you believe this will weaken CFPA's ability to be bi-partisan and limit any continuity that might arise out of shared leadership? Further, what rationale does the Administration have for not requiring commissioners come from different parties?

<u>Commissioner Rosch response</u>: I agree with Chairman Leibowitz that a bipartisan commission has served the FTC well, and with your observation that the proposed legislation includes no such requirement in the case of the CFPA.

Q7. The Administration's proposal establishes the Consumer Financial Protection Agency as an "independent executive agency." As you know, independent agencies and executive agencies differ in that independent agencies, such as FTC, exercise executive functions outside of an executive department. This being the case, I am confused about the designation "independent executive agency" as it applies to the proposed CFPA. Please provide clarification vis-à-vis CFPA's relationship to the executive branch.

<u>Commissioner Rosch response</u>: I assume that the proposed legislation means what it says: the new CFPA would be an Executive Branch department, and that would mean that the new CFPA would be subject to influence and oversight primarily by the Executive Branch.

Q8. How would you characterize the level of engagement from the Department of the Treasury with FTC in drafting the Consumer Financial Protection Agency Act of 2009? Was it, for example, minimal, or was FTC more intimately involved in designing this proposal?

<u>Commissioner Rosch response</u>: I agree with Chairman Leibowitz that the FTC played no role in the formulation of this proposed legislation; it was presented to me as a *fait accompli*.

Q9. In the interim between enactment of the Consumer Financial Protection Agency Act of 2009 and the inception of CFPA, how will the Federal government ensure adequate consumer financial protections? Will, for example, the FTC retain its consumer financial protection authorities during this time?

<u>Commissioner Rosch response</u>: There is no provision in the proposed legislation to ensure that the public will receive adequate consumer financial protection between now and the time that a new CFPA is constituted. I believe that it is unrealistic to conclude that if the proposed legislation is enacted, the affected FTC staff will be oblivious to the transfer of authority and functions which will occur; and that must inevitably adversely affect their morale.

Q10: Rule X of the House of Representatives designates that the Committee on Energy and Commerce shall have jurisdiction over matters related to consumer protection. Should the Consumer Financial Protection Agency Act of 2009 be enacted, do you believe the Committee on Energy and Commerce would have jurisdiction over CFPA, or do you believe this authority would be given exclusively to another committee, for example the Committee on Financial Services?

<u>Commissioner Rosch response</u>: I have no experience or expertise with respect to the meaning of Rule X.

Questions from Representative Gonzalez

Q1. Estimates vary, but the financial services industry accounted for nearly one-third of our GDP in recent years. Considering the size of the industry, it is surprising to see the suggestion that we reduce the number of agencies keeping track of such a significant sector of that industry. The proposal wisely encourages the states to monitor financial products alongside the proposed CFPA. Why not similarly increase the number of overseers at the federal level? One of the principal arguments suggested by the testimony is that the FTC may not regulate banks, while the CFPA can. Would it not be wiser to expand FTC's jurisdiction, adding the valuable oversight of FTC's proven investigators, rather than removing their current oversight?

Commissioner Rosch response: I do not favor the creation of multiple consumer protection law enforcement agencies. As discussed in my Statement for the Record, that can lead to the duplication and waste that has occurred in the current consumer protection law enforcement regime. I believe that in light of the FTC's history of consumer protection and prior knowledge of the field, it would be better for consumers if the FTC were granted most of the CFPA's proposed authority, as opposed to transferring that authority to an entirely untested and new agency. Indeed, I felt that was the gist of the Commission's written testimony at the hearing.

Q2. Much was made at the hearing of the fact that the various regulators whose functions would be taken on by the Consumer Financial Protection Agency were unable or unwilling to provide the regulations and oversight of the varied financial products we might desire. There is no sensible argument against that. But the suggestion that this is necessarily proof or a result of a superfluity of regulators does not logically follow from that fact. For the past eight years, the leadership of the Executive Branch embraced a *laissez faire* system that discouraged strict regulation of these financial products. The Bush Administration brought not a single antitrust case during those eight years and, indeed, dismissed pending cases inherited from Clinton Administration. That was not because anticompetitive practices had vanished from American business, and a majority of the Antitrust Division's staff in 2001 were the same staff as in 2000. The change was the wishes of the leadership. Why should we presume that the CFPA would fare any differently? Whether you have one bus or four, if the dispatcher directs the drivers to Cleveland, they won't end up in New York.

Commissioner Rosch response: The leadership of any federal law enforcement agency is largely responsible for that agency's law enforcement record. That is why I favor the FTC model, which requires bipartisan leadership at the agency, and contemplates Congressional oversight.

Q3. The enthusiasm and energy of the regulators of the financial services industry will depend on which President oversees them. This is a fact of our system that we must recognize and accept if we hope to make efficient reform of our regulatory structure. Regulators who wish to regulate are able do so. Our problem has been, instead, regulators who did not believe in regulation. What we might need, instead, is a new set of eyes, wholly non-partisan and completely apolitical, whose sole purpose is to represent the interests of

consumers. Such a set of watchdogs could alert existing regulators to problems they might have missed, but they could also alert the Congress, and the public, to problems to which the regulators had failed to respond, allowing the American people to pressure the regulators as appropriate. Would this not support the creation of a board or commission of consumer-representatives, such as, e.g., the Class B and Class C members of the Board of Directors of the NY Federal Reserve Bank are supposed to be?

Commissioner Rosch response: The FTC, as it is currently constituted and with the oversight provided both by Congress and the consumer community, can and will sufficiently protect consumers against deceptive and unfair financial practices. I do not believe that the Advisory Board of the CFPA which is currently contemplated would be a sufficient substitute, even if the FTC were a member of that Board (which it is not, in the current proposed legislation).

<u>Questions from Representative Radanovich</u>

Q1. The FTC has a unique perspective of managing two missions – competition and consumer protection. In your experience, if we limit competition through regulatory burdens, what is the effect on product diversity and price? Does the consumer benefit when competition is stifled? Are consumers squeezed out of the market when there are fewer products that can be tailored to their circumstances?

<u>Commissioner Rosch response</u>: Competition spurs innovation and consumer choice. As discussed in my Statement for the Record, insofar as the creation of a new CFPA would cripple the FTC's consumer protection mission, it would threaten to reduce innovation and consumer choice and thereby also cripple the FTC's competition mission.

Q2. In your written testimony you highlighted some of the recent successes the FTC has had in improving the climate of consumer protection in the financial industry. Given the FTC's long history of consumer protection, and prior knowledge of the field, would it be better for consumers to instead give the FTC the CFPA's proposed authority, as opposed to transferring massive authorities to an entirely untested and inexperienced new agency?

<u>Commissioner Rosch response</u>: As discussed in my Statement for the Record, I agree that the FTC's history of consumer protection and prior knowledge of the field make it better for consumers for the FTC to be granted most of the CFPA's proposed authority, as opposed to transferring that authority to an entirely untested and new agency. Indeed, I felt that was the gist of the Commission's written testimony at the hearing.

Q3. In your testimony you mentioned that the FTC is currently involved in issuing a number of rules and guidelines to make the financial services sector safer for consumers. This includes rules being promulgated regarding mortgages with the new rule-making authority recently granted by Congress. Could this sudden transfer of authority and powers interrupt that work and extend the time that consumers are exposed to unacceptable risks and practices?

<u>Commissioner Rosch response</u>: The transfer of the Commission's authority and power to the CFPA would interrupt the FTC's current rulemaking and formulation of guidelines to make the financial services sector safer for consumers. In fact, as discussed in my Statement for the Record and my response to Chairman Rush's second question, the current legislation would seemingly end the FTC's efforts in this regard, except as an undefined "backstop" rulemaking authority.

Q4. Unlike the proposed CFPA, the Federal Trade Commission is required to have bipartisan membership. What benefits does that bipartisan structure provide the FTC, and how might the lack of those benefits prevent the new CFPA from being as effective as the FTC in protecting consumers in the area of financial services?

<u>Commissioner Rosch response</u>: The Commission's organic statute and its legislative history

establish that Congress conceived of the FTC as a bipartisan agency precisely because it wished to insulate the agency from the kind of influence from the Executive Branch that may occur in the case of some other Executive Branch agencies. I believe that the FTC model has served consumers well, as demonstrated by the Commission's track record, not only in enforcing the laws respecting unfair and deceptive financial practices, but also in enforcing the laws respecting the occurrence of such practices in non-financial contexts. Its activities respecting Telemarketing, the Do Not Call List, Data Security Breaches, and Identity Theft, are but a few of many examples.

Q5. In your testimony you sited numerous actions that the FTC has taken to protect consumers within the realm of consumer finance. It seems that the FTC has been diligent in carrying out its role of consumer protection in this area. Do you believe that the new CFPA will do a better job than the FTC in this area? Please explain.

Commissioner Rosch response: For the reasons discussed in my Statement for the Record, I believe that an untested CFPA would do a worse, not a better, job than the FTC has done in protecting consumers with respect to financial products and services, particularly if the FTC is given the tools that the proposed legislation would give to that new agency. It is my understanding that the proposed legislation may result in the transfer to the new agency of about 20% of the FTC's total current Bureau of Consumer Protection FTEs.

Q6. Many rules were broken and much fraud was committed with regard to mortgages. This includes application fraud by borrowers.

- **a. Has the FTC brought any cases against borrowers for lying on their mortgage applications?**
- **b. Is it a violation of the Truth in Lending Act to knowingly provide false information?**
- **c. Has any other Federal or state agency brought action against any consumers for violating Federal lending laws (and were not part of a premeditated scam)? Please explain.**

Commissioner Rosch response: I agree with Chairman Leibowitz's responses to this question.

Q7. The FTC developed a simplified disclosure statement which we discussed at the previous hearing in the Subcommittee. The document was much easier for consumers to understand. Wouldn't it be more effective to take the approach of the FTC and institute changes we can mandate quickly rather than spend lengthy time debating and creating a new Federal entity from scratch? What obstacles are preventing the adoption of the model disclosure form that require a legislative solution?

Commissioner Rosch response: I agree with Chairman Leibowitz's responses to this question. However, for the reasons described in my Statement for the Record, I believe that legislation codifying the use of disclosure statements developed at the FTC is far superior to the enactment of legislation creating a brand new Executive Branch agency.

Q8. Aside from the impact that this proposal would have on companies that offer credit, and particularly on small businesses, this proposal would also have a dramatic effect on the whole rest of the economy by dramatically expanding the FTC's authority. Specifically, the Commission would have almost unlimited ability to quickly pass rules under the APA banning almost any practice that they deemed "unfair," and then they could immediately turn around and seek civil penalties for the violation of that regulation, and the only review authority the courts would have would be whether the FTC abused their discretion. What restraints on the Commission's authority will exist if this law passes?

Commissioner Rosch response: If a new CFPA is created, no legitimate argument can be made to expand the FTC's current personnel or powers. In that event, the agency would, as previously stated, be a shadow of its former self as a consumer protection agency. If a new agency is not created, I believe the bipartisan nature of the FTC, Congressional oversight and appellate court review provide a sufficient check on its rulemaking decisions.

Q9. The proposed legislation also provides the Commission with the ability to seek civil penalties for anything the Commission deems to be an unfair or deceptive act or practice – even when there is no rule governing that behavior. If the Commission didn't have the ability to write rules, there may be a better argument to needing general civil penalty authority. But if the Commission gets APA rulemaking authority, doesn't that provide the ability to write the rules the Commission wants and obviate the need for general civil penalty authority?

Commissioner Rosch response: Please see my response to the preceding question. If a new CFPA is not created, I agree with Chairman Leibowitz that the FTC should have the same rulemaking and civil penalty authority that other agencies having consumer protection authority (like the SEC) currently possess. I believe that the bipartisan nature of the Commission, Congressional oversight and appellate court review will provide a sufficient check on its decisions to seek civil penalties.

Q10. Did you or your staff assist or consult in the drafting of this legislation? If so, in what capacity and what were your recommendations?

Commissioner Rosch response: To my knowledge, the FTC did not assist or consult in the drafting of the proposed legislation creating a new CFPA. The proposed legislation was presented as a *fait accompli*.

Witness Questions
Commerce, Trade, and Consumer Protection Subcommittee Hearing
Responses from Commissioner William E. Kovacic

Thank you for the opportunity to provide my responses to these questions for the record relating to the hearing "The Proposed Consumer Financial Protection Agency: Implications for Consumers and the FTC." As indicated by my separate responses below, the responses of Chairman Leibowitz do not reflect my views. The lack of a separate answer to any particular question does not, however, imply my agreement with the views expressed in Chairman Leibowitz's responses.

<u>Questions from Chairman Rush</u>

Q1. In your testimony, you discussed the potential impact that the creation of this new agency could have on FTC's ability to do its job. You noted that many of FTC's cases that have nothing to do with traditional financial products or services often involve those statutes that may be moved to CFPA. As an example, you said that FTC's enforcement against fraudulent telemarketers may implicate financial data processors. Whereas FTC now can enforce against both companies involved in the fraud, if this proposal were to become law, FTC could not pursue on its own authority a case against a data processor. If the proposed legislation become law, what impact would it have on FTC's ability to bring actions against non-financial frauds? Are you concerned that FTC's ability to protect consumers in areas unrelated to traditional financial products and services will be harmed?

<u>Commissioner Kovacic response</u>: In addition to my concerns about the impact of this legislation on consumer protection in the financial services area, I share the concern suggested by your question: that the creation of the new agency as proposed could seriously impair the FTC's ability to protect consumers in non-financial services areas. For example, if the FTC were required to rely on "backstop authority" to pursue a payment processor involved in a telemarketing scam for non-financial products or services, the FTC's enforcement action could be greatly delayed – to the detriment of consumers who rely on the FTC to secure relief on an expedited basis in federal court.

Q2. According to the Administration's proposal, FTC could enforce the FTC Act and would have backstop authority to enforce the statutes and rules being transferred from FTC to the new agency. Would there be value in having FTC enforce the new agency's rules? If FTC is to be a backstop enforcer, should it not have all possible remedies available to it?

<u>Commissioner Kovacic response</u>: For the reasons outlined in the statement I submitted for the record before this Committee, I believe that the backstop authority contemplated by the legislation will amount to nothing more than a mirage. Once the FTC's core consumer protection functions and personnel are transferred to the new agency, it will not matter what remedies are available to the FTC. Regarding concurrent authority, I note that the FTC has a

strong record of enforcing rules issued by other agencies, such as the Federal Reserve Board's Regulation Z (under the Truth in Lending Act). Furthermore, if the CFPA were created, and the states given authority to enforce the CFPA's rules, I see no reason why the FTC should not be authorized to enforce the CFPA's rules as well.

Q3. According to the Administration's proposal, CFPA would be authorized to enforce against unfair, deceptive, or abusive practices. The FTC Act gives FTC the authority to enforce against unfair or deceptive practices. What value does the word "abusive" add? What additional practices, if any, could FTC enforce against if it had this additional authority?

<u>Commissioner Kovacic response</u>: The Commission interpreted "abusive" when it promulgated the "Do Not Call" amendments to the Telemarketing Sales Rule under the Telemarketing and Consumer Fraud and Abuse Act of 1994, which proscribed "abusive" practices. In its Statement of Basis and Purpose, the Commission noted that the Act included several specific examples of abusive behavior, all of which impinged on privacy interests. From these, the Commission concluded that the term "abusive" in the Act would be interpreted with special reference to broadly-construed privacy interests, but, "When the Commission seeks to identify practices as abusive that are less distinctly within th[e] parameter [of privacy], the Commission now thinks it appropriate and prudent to do so within the purview of its traditional unfairness analysis, as developed in Commission jurisprudence and codified in the FTC Act." *Telemarketing Sales Rule; Final Rule,* 68 Fed. Reg. 4580, 4614 (2003). Under the Commission's unfairness statement and section 5(n) of the FTC Act, 15 U.S.C. § 45(n), the agency can find unfairness when a practice causes substantial consumer injury, not reasonably avoidable by the consumer, whose costs aren't outweighed by countervailing benefits to consumers or competition.

The Commission's analysis of the prohibition on "abusive" practices in the Telemarketing Sales Rule seems applicable to other existing statutes that prohibit "abusive" practices and that the Commission administers. Consistent with that analysis, I would construe the term "abusive" in a new law to reach conduct covered by the unfairness statement. To the extent that Congress intends "abusive" to reach beyond unfairness by weighing values not routinely considered in the unfairness statement, it would be useful for Congress to make explicit in the statute what those values are.

<u>Questions from Representative Dingell</u>

Q1: Section 1053 of the Administration's bill authorizes CFPA to enforce compliance with any "Federal law that the [CFPA] is authorized to enforce [...] and any regulations or orders prescribed thereunder, unless such Federal law specifically limits the Agency from conducting a hearing or adjudication proceeding [...]." Since section 1061(a)(5) of the bill gives CFPA "all powers and duties" vested in the Federal Trade Commission (FTC) "relating to consumer financial protection functions," does this mean that CFPA could technically enforce the entire FTC Act and all regulations and orders issued thereunder? Similarly, under the Administration's proposal, what authorities are left with FTC?

<u>Commissioner Kovacic response</u>: The legislation appears to provide the CFPA with primary enforcement authority for FTC Act violations in the financial services area, and its backstop authority provision would require the FTC to refer all such violations to the new agency with a delay of up to 120 days. Even assuming that the Administration intends to preserve some role for the FTC in enforcement of the FTC Act in the financial services arena, I have serious doubts that the FTC would have meaningful or effective enforcement authority once the transfer of consumer protection functions and personnel has been completed and once the FTC is relegated to a "backstop" enforcer.

Q3. The Administration's bill would preserve a so-called "backstop authority" for the FTC, whereby FTC may initiate an enforcement proceeding if CFPA does not do so after 120 days. Currently, FTC may refer civil penalty matters to the Department of Justice, and if the Attorney General does not commence an action within 45 days of this referral, the FTC may do so. Historically, FTC has initiated very few of these proceedings. Given this analogy between the backstop authority in the Administration's bill and the existing referral process between FTC and DOJ, do you reasonably expect that FTC will take advantage of the backstop authority?

<u>Commissioner Kovacic response</u>: The FTC has distinguished itself from other consumer protection agencies with its record of obtaining injunctive relief in federal court on an expedited basis with respect to a wide range of consumer protection issues. The FTC often files cases in federal court and seeks temporary restraining orders to put an immediate end to unlawful practices. In certain cases involving ongoing, hard-core fraud, the FTC has foregone civil penalties in order to seek immediate injunctive relief without the delay associated with a referral to DOJ. Based on our experience with these types of cases and the 45-day DOJ referral process, I have grave concerns about the possible harm to consumers from the 120-day referral process set forth in the Administration's proposal. In addition, once the FTC is relegated to a backstop enforcer with its financial consumer protection functions and personnel transferred to the CFPA, I doubt that we will retain our existing depth of expertise in the Bureau of Consumer Protection and the Bureau of Economics.

Q4. Similarly, one assumes that if the Consumer Financial Protection Act is enacted, FTC would lose valuable consumer financial protection staff. Do you believe this will affect FTC's ability to exercise the backstop authority it is given under the Consumer

Financial Protection Act?

Commissioner Kovacic's response: As I have described in my statement submitted for the record, I doubt that the "backstop authority" contemplated for the FTC will be anything more than a mirage. Furthermore, because of the expansive definitions for financial products and services, I believe that the transfer of consumer financial protection functions and authority could severely diminish our effectiveness in the non-financial services areas of consumer protection as well.

Q10: Rule X of the House of Representatives designates that the Committee on Energy and Commerce shall have jurisdiction over matters related to consumer protection. Should the Consumer Financial Protection Agency Act of 2009 be enacted, do you believe the Committee on Energy and Commerce would have jurisdiction over CFPA, or do you believe this authority would be given exclusively to another committee, for example the Committee on Financial Services?

Commissioner Kovacic response: I believe consumers will benefit if oversight of financial consumer protection is vested in a committee that does not also oversee financial safety and soundness.

Questions from Representative Gonzalez

Q1. Estimates vary, but the financial services industry accounted for nearly one-third of our GDP in recent years. Considering the size of the industry, it is surprising to see the suggestion that we reduce the number of agencies keeping track of such a significant sector of that industry. The proposal wisely encourages the states to monitor financial products alongside the proposed CFPA. Why not similarly increase the number of overseers at the federal level? One of the principal arguments suggested by the testimony is that the FTC may not regulate banks, while the CFPA can. Would it not be wiser to expand FTC's jurisdiction, adding the valuable oversight of FTC's proven investigators, rather than removing their current oversight?

Commissioner Kovacic response: I agree with you, Representative Gonzalez, that it does not make sense to exclude the FTC from enforcement of the CFPA's rules as proposed. In addition, I believe it would be productive to explore the possibility of removing the limits on jurisdiction that currently constrain the FTC's regulatory and enforcement authority in the financial services sector. Unlike other regulators in the financial services arena, the FTC is an agency with oversight over many sectors of our economy. Thus, if given additional jurisdiction in the financial services area, the FTC would be far less susceptible to "agency capture."

Q2. Much was made at the hearing of the fact that the various regulators whose functions would be taken on by the Consumer Financial Protection Agency were unable or unwilling to provide the regulations and oversight of the varied financial products we might desire. There is no sensible argument against that. But the suggestion that this is necessarily proof or a result of a superfluity of regulators does not logically follow from that fact. For the past eight years, the leadership of the Executive Branch embraced a *laissez faire* system that discouraged strict regulation of these financial products. The Bush Administration brought not a single antitrust case during those eight years and, indeed, dismissed pending cases inherited from Clinton Administration. That was not because anticompetitive practices had vanished from American business, and a majority of the Antitrust Division's staff in 2001 were the same staff as in 2000. The change was the wishes of the leadership. Why should we presume that the CFPA would fare any differently? Whether you have one bus or four, if the dispatcher directs the drivers to Cleveland, they won't end up in New York.

Commissioner Kovacic response: I agree that the choice of leadership is crucial to the effectiveness of a public agency, including a government institution entrusted with consumer protection responsibilities for the financial services sector. The importance of agency leadership was a major theme of the self-study conducted by the FTC in 2008 and published in January 2009. *See The Federal Trade Commission at 100: Into Our 2nd Century* (January 2009), *available at* www.ftc.gov/ftc/workshops/ftc100/docs/ftc100rpt.pdf. I see no factual basis for your statement that the Executive Branch of the Bush Administration "brought not a single antitrust case during those eight years." During the Bush Administration, the Antitrust Division of the Department of Justice brought over 200 cases against cartels, over 100 challenges to mergers, and 16 civil nonmerger cases involving restraints of trade. *See* Department of Justice, Antitrust Division Workload Statistics FY 1999-2008, at 3-5, *available at* www.usdoj.gov/atr/public/workstats.pdf (visited Aug. 10, 2009). I would be happy to meet with you or your staff to discuss these statistics and other data concerning antitrust enforcement trends during the Bush Administration.

__Questions from Representative Radanovich__

Q1. The FTC has a unique perspective of managing two missions – competition and consumer protection. In your experience, if we limit competition through regulatory burdens, what is the effect on product diversity and price? Does the consumer benefit when competition is stifled? Are consumers squeezed out of the market when there are fewer products that can be tailored to their circumstances?

__Commissioner Kovacic response__: As you point out, the FTC has a unique perspective of managing both a competition and consumer protection mission. Former FTC Chairmen Tim Muris and Bob Pitofsky also have noted that consumer protection and competition naturally complement each other and share the same goal of improving consumer welfare. *See More Than Law Enforcement: The FTC's Many Tools—A Conversation With Tim Muris and Bob Pitofsky*, 72 Antitrust L.J. 773 2004-2005. Together with the economic perspective brought by the FTC's Bureau of Economics, the FTC's competition mission helps to inform the FTC's consumer protection work -- in enforcement, policy-making, and educational initiatives. I am concerned that these important perspectives would be lost if the FTC's financial consumer protection functions were transferred to the new agency.

Q2. In your written testimony you highlighted some of the recent successes the FTC has had in improving the climate of consumer protection in the financial industry. Given the FTC's long history of consumer protection, and prior knowledge of the field, would it be better for consumers to instead give the FTC the CFPA's proposed authority, as opposed to transferring massive authorities to an entirely untested and inexperienced new agency?

__Commissioner Kovacic response__: Despite jurisdictional limitations, the FTC has been a leader in financial services consumer protection. Unlike other agencies with oversight in this field, the FTC's Bureau of Consumer Protection benefits from the research of its independent Bureau of Economics and the insights of its Bureau of Competition – all of which report directly to the Commission and its Chairman. In addition, the FTC's expertise in consumer protection issues across a wide spectrum of economic sectors helps to inform and strengthen its work in the financial services arena. No other regulatory agency has this combination of consumer protection expertise and institutional design.

For these reasons, I believe that divesting the FTC of its financial consumer protection functions will reduce – not enhance – consumer protection. Rather than transferring the FTC's entire financial consumer protection function to the new agency, I believe a better approach would be to explore removing the jurisdictional limits on the FTC's oversight of the financial services sector.

Q5. In your testimony you cited numerous actions that the FTC has taken to protect consumers within the realm of consumer finance. It seems that the FTC has been diligent in carrying out its role of consumer protection in this area. Do you believe that the new CFPA will do a better job than the FTC in this area? Please explain.

<u>Commissioner Kovacic response</u>: I doubt that the new agency will have the institutional framework of independent bureaus of economics and competition that has developed over the course of decades and has strengthened the FTC's consumer protection effectiveness. The economic rigor of the FTC's Bureau of Economics, as well as the competition policy ethic of our Bureau of Competition, informs the FTC's consumer protection work in enforcement, policy-making, and education. While the new agency might seek to replicate the FTC's unique institutional design with an independent unit of economists, there is no guarantee that the CFPA will try or succeed in doing so.

Q8. Aside from the impact that this proposal would have on companies that offer credit, and particularly on small businesses, this proposal would also have a dramatic effect on the whole rest of the economy by dramatically expanding the FTC's authority. Specifically, the Commission would have almost unlimited ability to quickly pass rules under the APA banning almost any practice that they deemed "unfair," and then they could immediately turn around and seek civil penalties for the violation of that regulation, and the only review authority the courts would have would be whether the FTC abused their discretion. What restraints on the Commission's authority will exist if this law passes?

<u>Commissioner Kovacic response</u>: I disagree with the proposal to grant the FTC authority to use, for promulgating all rules respecting unfair or deceptive acts or practices under the Federal Trade Commission Act, the notice and comment procedures of the Administrative Procedure Act. 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, I believe it is prudent to retain procedures beyond those encompassed in the APA for the Commission to issue rules backed by civil penalties. However, I am willing to consider whether all of the procedures currently required to issue, repeal, or amend these rules are necessary.

Q9. The proposed legislation also provides the Commission with the ability to seek civil penalties for anything the Commission deems to be an unfair or deceptive act or practice – even when there is no rule governing that behavior. If the Commission didn't have the ability to write rules, there may be a better argument to needing general civil penalty authority. But if the Commission gets APA rulemaking authority, doesn't that provide the ability to write the rules the Commission wants and obviate the need for general civil penalty authority?

<u>Commissioner Kovacic response</u>: I do not support the proposal to give the FTC 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 (violation of which would then subject the respondent to civil penalties) or a court-issued injunction (which can contain such equitable remedies as redress and disgorgement). In my 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 my 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). I would prefer that Congress grant more targeted authority to seek civil penalties, particularly in matters where existing remedies are likely to be inadequate. *See* Prepared Statement of the Federal Trade Commission 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, *available at* http://www.ftc.gov/os/testimony/P034101reauth.pdf.

Questions from Congressman Charles A. Gonzalez

1. Estimates vary, but the financial services industry accounted for nearly one-third of our GDP in recent years. Considering the size of the industry, it is surprising to see the suggestion that we reduce the number of agencies keeping track of such a significant sector of that industry. The proposal wisely encourages the states to monitor financial products alongside the proposed CFPA. Why not similarly increase the number of overseers at the federal level? One of the principle arguments suggested by the testimony is that the FTC may not regulate banks, while the CFPA can. Would it not be wiser to expand FTC's jurisdiction, adding the valuable oversight of FTC's proven investigators, rather than removing their current oversight?

   We believe that reform of the federal regulatory structure for consumer protection for financial products and services requires three elements: mission focus; market-wide coverage; and consolidated authority. The problems with the current regulatory authority for consumer financial products and services are not due to the lack of the number of federal agencies that have some role is supervising the financial services marketplace, but instead arise because of the structure itself: responsibility for consumer protection is fragmented among many federal regulators, most of which have higher priorities than protecting consumers. The primary mission of the federal banking agencies, in law and in practice, is to ensure that banks act prudently so they remain safe and sound. With respect to the Federal Trade Commission (FTC), although consumer protection is one of the primary missions, that mission competes for resources with its antitrust mission. With the consumer protection functions, consumer financial products and services are only part of a wide array of products and services that compete for those resources. Moreover, the FTC is primarily a law enforcement agency, leaving the non-bank providers of financial products and services without any ongoing supervision at the federal level.

   These deep structural flaws cannot be solved by tinkering with the consumer protection mandate of all of the existing agencies. Rather, we need one agency for one marketplace with one mission – to protect consumers of financial products and services – and the authority to achieve that mission.

   A new agency with a focused mission, comprehensive jurisdiction, and broad authorities is the only way to ensure consumers and providers high and consistent standards and a level playing field across the whole marketplace without regard to the form of a product – or the type of its provider. It is the only way to ensure independence, accountability, effectiveness, and balance in consumer protection regulation.

   Rulemaking, supervision and enforcement authority for consumer financial products and services is presently scattered among a number of different federal agencies in addition to the FTC – including the Federal Reserve Board, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, the Office of the Comptroller

of the Currency, the National Credit Union Administration, and the Department of Housing and Urban Development. The Consumer Financial Protection Agency Act (CFPA Act) is not intended to establish a new layer on top of this presently balkanized federal structure. Rather, it is intended to consolidate federal authority over this marketplace to ensure consistent standards and a level playing field.

2. Much was made at the hearing of the fact that the various regulators whose functions would be taken on by the Consumer Financial Protection Agency were unable or unwilling to provide the regulations and oversight of the varied financial products we might desire. There is no sensible argument against that. But the suggestion that this is necessarily proof or a result of a superfluity of regulators does not logically follow from that fact. For the past eight years, the leadership of the Executive Branch embraced a *laissez faire* system that discouraged strict regulation of these financial products. The Bush Administration brought not a single antitrust case during those eight years and, indeed, dismissed pending cases inherited from Clinton Administration. That was not because anticompetitive practices had vanished from American business, and a majority of the Antitrust Division's staff in 2001 were the same staff as in 2000. The change was the wishes of the leadership. Why should we presume that the CFPA would fair any differently? Whether you have one bus or four, if the dispatcher directs the drivers to Cleveland, they won't end up in New York.

   We believe that an independent agency with one mission, market-wide coverage, and consolidated authority will help ensure that there is accountability at the federal level for protecting consumers in the financial services marketplace.

   The Consumer Financial Protection Agency (CFPA) will be an independent agency. The five-member Board of the CFPA would be comprised of four members appointed by the President for terms of five years, by and with the consent of the Senate, and the head of the agency responsible for regulating national banks. The proposal recommends this structure so that the focus when appointing Board members can be on expertise in the consumer financial marketplace, and not constrained by party affiliation. The requirement of advice and consent of the Senate will help balance the Board. The five-year terms of the Board members will be staggered, which will help ensure continuity across different administrations.

   In addition to its independent structure, the CFPA Act also has several specific requirements that will ensure accountability: the CFPA will be required to monitor the entire market continuously for risks to consumers, and publish significant findings at least once yearly. The CFPA will also be required to assess the effectiveness of each significant newly-enacted rule no later thau five years after the rule takes effect, including the rule's effectiveness in protecting consumers and preserving innovation. In conducting these assessments, the CFPA would be required to seek public comment on the need to expand, modify, or eliminate the rule. Finally, the CFPA would be required to report to Congress each year on rulemakings, supervisory and enforcement activity, and consumer complaints.

With authority and responsibility for consumer protection in financial services consolidated under the CFPA, no longer would many agencies be able to point fingers at others because they did not have regulatory authority or did not have jurisdiction over the part of the market that was causing the problems. The CFPA would be responsible for the entire consumer financial services marketplace, would have sufficient authority, and could be held accountable.

3. The enthusiasm and energy of the regulators of the financial services industry will depend on which president oversees them. This is a fact of our system that we must recognize and accept if we hope to make efficient reform of our regulatory structure. Regulators who wish to regulate are able to do so. Our problem has been, instead, regulators who did not believe in regulation. What we might need, instead, is a new set of eyes, wholly non-partisan and completely apolitical, whose sole purpose is to represent the interests of consumers. Such a set of watchdogs could alert existing regulators to problems they might have missed, but they could also alert the Congress, and the public, to problems to which the regulators had failed to respond, allowing the American people to pressure the regulators as appropriate. Would this not support the creation of a board or commission of consumer-representatives, such as, e.g., the Class B and Class C members of the Board of Directors of the NY Federal Reserve Bank are supposed to be?

We believe that the CFPA will be structured in a way to provide the most opportunity to ensure that consumers are protected in marketplace for consumer financial products and services. The CFPA will be an independent agency, and protecting consumers in this marketplace will be its sole mission.

The five-member Board of the CFPA would be comprised of four members appointed by the President for terms of 5 years, by and with the consent of the Senate, and the head of the agency responsible for regulating national banks. The proposal recommends this structure so that the focus when appointing Board members can be on expertise in the marketplace for consumer financial products and services, and not constrained by party affiliation.

Moreover, the CFPA Board would be required to establish a Consumer Advisory Board to advise the CFPA and provide information on emerging practices. Members of this Advisory Board should have deep experience in financial services and community development and be selected to promote diversity of views on the Advisory Board.

In addition to these structural requirements, the CFPA Act also has several specific requirements that will ensure accountability: the CFPA will be required to monitor the entire market continuously for risks to consumers, and publish significant findings at least once yearly. The CFPA will also be required to assess the effectiveness of each significant newly-enacted rule no more than five years after the rule takes effect, including the rule's effectiveness in protecting consumers and preserving innovation. In conducting these assessments, the CFPA would be required to seek public comment on the need to expand, modify, or eliminate the rule. Finally, the CFPA would be

required to report to Congress each year on rulemakings, supervisory and enforcement activity, and consumer complaints.

Questions from Congressman George Radanovich

1. The notion of simple, transparent financial products may sound appealing, however more "complex" financial products can offer consumers benefits unique to their respective situations. For example, a fixed rate mortgage may seem more standard and simpler, but might cost the consumer more than an adjustable rate mortgage if the consumer will only be living in the home for the typical seven years or less before moving. If we limit consumer access to a more diverse selection of financial products in favor of simplified and "standard" products, what damages might we do to consumers?

   Under the proposed Consumer Financial Protection Agency Act (CFPA Act), one core objective of the Consumer Financial Protection Agency (CFPA) is to promote innovation. Innovation is most beneficial when it is driven by consumer preferences. By promoting transparency and disclosure, the CFPA will help ensure that consumers fully understand the choices available to them. Moreover, transparency and disclosure will increase consumer confidence in innovation.

   The CFPA will not mandate any particular product and consumers will have the same ability they have today to choose any product on the market. The CFPA will simply help ensure that consumers understand the full range of products available to them. Standard products would include, for example, a fixed-rate mortgage as well as a standard adjustable-rate mortgage. Consumers could still be able to choose from a diverse array of product types, but would have standard product offerings as a point of comparison, to help them understand and choose between these products.

2. In your written testimony, you stated that having comprehensive authority over the whole market will provide the proposed agency the ability to choose the least costly option for regulation because of its range of options. For whom will these new regulations be least costly — those institutions that are large enough to absorb the regulatory burden, or those least capable of handling the costs of new regulation, such as small businesses?

   Under the proposal, the CFPA would have a range of tools to apply which would allow it to choose the ones that will be the most effective, least-cost option to suit the need. These tools mean that the CFPA would not necessarily propose new rules to address a particular problem, but may instead proceed through the use of supervisory guidance, examination reports, or other techniques to address any consumer protection problems.

   It is precisely because the CFPA will have the perspective of covering the entire marketplace, and supervising all types of financial services providers, that it will be able to determine whether the problem warrants a new regulation, or whether another, less-costly approach would be sufficient. With respect to any new regulations, the CFPA will be required to consider the costs to businesses, and weigh them against the potential benefits, when prescribing rules. With respect to supervision and examination, the CFPA will use a risk-based approach, and allocate its resources based on risks to consumers.

One of the primary goals of the CFPA Act is to level the playing field between non-bank and bank financial service providers. Today, non-banks like mortgage brokers and mortgage bankers are beyond the scope of federal supervision, including for compliance with consumer protection laws. As a result, banks and credit unions have been forced to compete with less-regulated non-bank competitors, who often drove bad practices across the market. The CFPA will create a level playing field, so that non-banks are subject to the same standards as banks. That is especially good for small community banks and credit unions, which have increasingly had to compete against these non-bank entities.

3. In reviewing the Administration's proposal, there is a distinct lack of political balance on the independent agency's board:
   a. Was this by design or simply an oversight?
   b. If by design, then doesn't the proposal deny the agency an invaluable level of independence and consistency, instead subjecting it to changing political whims every four to eight years?

The five-member Board of the CFPA would be comprised of four members appointed by the President for terms of five years, by and with the consent of the Senate and the head of the agency responsible for regulating national banks. The proposal recommends this structure so that the focus on appointing Board members can be on expertise in the consumer financial marketplace, rather than be constrained by party affiliation. The requirement of advice and consent of the Senate will help balance the Board. The five-year terms of the Board members will be staggered, which will help ensure continuity across different administrations. The CFPA Board would be similar in structure to the Federal Reserve Board, whose members serve for staggered terms and are not subject to requirements relating to political affiliation.

4. The proposed legislation defines a covered person as one who engages in a financial activity, which is defined to include those who provide financial tax planning, financial and other related advisory services, or provide educational courses and instructional materials to consumers. PBS often runs such programming for their audiences as do financial cable stations, radio stations, and other media. Would these entities be "covered persons" under the proposed legislation because they engage in a "financial activity" and potentially subject to the fees assessed on the regulated entities?

The CFPA will not regulate the media or subject the media to fees.

5. Many borrowers knowingly committed application fraud to get a mortgage; this includes misstating their income. Is that a crime to provide false information? While many were given adjustable rate loans they would not be able to afford after the rate reset, many took on the loans for investment purposes or to "flip" the property for quick profits. When it didn't work out, many have walked away from the mortgage.
   a. Have any individual borrowers been prosecuted for their misdeeds? Any who weren't

part of an organized scam?

b. Shouldn't there be some provision to keep consumers honest too?
c. Should consumers who profited by lying on their loan application have their profits clawed back?

Yes, individuals have been prosecuted for their misdeeds in committing mortgage fraud. As discussed in the 2008 Mortgage Fraud Report by the Federal Bureau of Investigation (FBI), mortgage fraud is a material misstatement, misrepresentation or omissions relied upon by an underwriter or lender to fund, purchase, or insure a loan. Mortgage fraud can be divided into two categories: (1) fraud for property/housing, which involves misrepresentation by the applicant for the purpose of purchasing a property for a primary residence(usually involving a single loan where applicants overstate their income or conceal their debt/liabilities); and (2) fraud for profit, , which often involves multiple loans and elaborate schemes perpetrated to gain illicit proceeds from property or sales (frequently involving gross misrepresentations concerning appraisals and loan documents, and payments to participants in the scheme). The FBI has created a National Mortgage Fraud Team to detect and combat mortgage fraud. The FBI reports 574 indictments/informations and 354 convictions related to mortgage fraud in fiscal year 2008.

In addition, on May 20, 2009, the President signed the Fraud Enforcement and Recovery Act (FERA) into law. FERA added significant criminal and civil tools to the Department's arsenal in the investigation and prosecution of mortgage fraud, commodities fraud, and related financial offenses. Subsection 2(c) of FERA amended 18 U.S.C. § 1014 to cover false statements in mortgage applications that are made by borrowers and mortgage lending businesses. Prior to FERA, section 1014 applied only to the Federal agencies, banks, and credit associations and did not extend to private mortgage lending businesses. This new provision will provide prosecutors with an important tool to charge those who make false applications and appraisals.

6. The draft legislation contains a number of specific requirements for detailed information gathering regarding location to be provided to the proposed agency, including such things as the number of ATM withdrawals, consumer checking and savings account numbers, as well as available balances. Isn't this invasive of a consumers' privacy? Can the financial institutions legally turn that customer information over to the government? ***(See Question 26)

In the connection with any data collection, the CFPA would need to adhere to all applicable privacy laws, including those that require proper handling and protection of personally identifiable information and the financial information of consumers.

7. Although it is generally assumed that this agency is targeted at large banks and other financial institutions, in reality this agency has the authority to regulate vast components of our economy — including any company that offers credit, such as doctor offices and law

firms, as well as lawn care companies and plumbers. Also, under the Administration proposal, this agency not only has the ability to regulate these companies and how they interact with their customers, but it also has the unfettered ability to tax these companies — it can set any tax rate it likes, and can determine the size of the agency that it wants, without any oversight by Congress or the Executive branch. (Page 18, line 2).

a. Is that correct? Is that Constitutional?
b. Did you intend to create an agency with such broad powers and such little oversight?

We believe that reform of the federal regulatory structure for consumer protection for financial products and services requires three elements: mission focus, market-wide coverage, and consolidated authority. The jurisdiction of the CFPA under the CFPA Act is limited to the markets for consumer financial products and services, and, within these markets, the CFPA would have authority over those who are engaging in a financial activity in connection with the provision of these financial products and services, or those providing material services for those activities.

The CFPA Act includes structural provisions that will ensure accountability and oversight. In particular, the five-member Board of the CFPA would be comprised of four members appointed by the President for staggered terms of five years, by and with the consent of the Senate, and the head of the agency responsible for regulating national banks.

In promulgating rules, the CFPA will be required to consider the costs and benefits to consumers and to covered businesses, including the potential reduction of consumers' access to consumer financial products and services resulting from the rule.

The CFPA would have the authority under this proposal to assess fees on covered persons to help recover funds expended for its operations. However, such fees could be assessed only after promulgating rules with respect to such fees. That rulemaking process would include publishing any proposed fees for public notice and comment.

In addition, the CFPA Act also has several specific requirements that will ensure accountability: The CFPA will be required to monitor the entire market continuously for risks to consumers, and publish significant findings at least once yearly. The CFPA will also be required to assess the effectiveness of each significant newly-enacted rule no more than five years after the rule takes effect, including the rule's effectiveness in protecting consumers and preserving innovation. In conducting these assessments, the CFPA would be required to seek public comment on the need to expand, modify, or eliminate the rule. Finally, the CFPA would be required to report to Congress each year on rulemakings, supervisory and enforcement activity, and consumer complaints.

8. How much of the current financial crisis that we are in was caused by a lack of consumer protection. Did AIG or Bear Sterns or Lehman Brothers fail because of a lack of consumer protection?
   a. While some consumers are suffering because of overly aggressive mortgage brokers,

b. What percentage of foreclosures is attributable to fraudulent deceptive practices? What percentage is due to unemployment?

In the run-up to the financial crisis, mortgage companies and other firms outside of the purview of banking regulation exploited that lack of clear accountability by selling mortgages and other products that were overly complicated and unsuited to the financial situation of many borrowers. Too often, banking institutions followed suit. While we know that there were many borrowers, including investors, who took out loans they knew they would not be able to afford after interest rate resets, there were also millions of borrowers who entered into loan contracts they did not understand offered by lenders who did not always tell the whole truth. There were disastrous results for consumers and the financial system.

It is very difficult to determine the number of foreclosures that have resulted directly or indirectly from fraudulent or deceptive practices, Realtytrac has reported that more than 1.5 million properties in the U.S. received a foreclosure filing during the first half of 2009 and more than 2.3 million properties, approximately one in 54, received a foreclosure filing in 2008, which was over an 80 percent increase from 2007. A substantial portion of these foreclosures were on owner-occupied homes, although some portion were on investor-owned properties. While rising unemployment clearly contributes to the growth in foreclosures, one of the root causes of the sharp increase in unemployment is the financial crisis.

9. When Professor Elizabeth Warren testified before the House Financial Services Committee, and when President Obama released this plan, both talked at length about a failure of consumer disclosure and how that necessitates a complete overhaul of the consumer economy regulatory structure. Couldn't a more concise and straightforward system of consumer notice be provided far more simply than the proposed plan?

We believe that consumer disclosures for consumer financial products and services can and should be improved: mandatory disclosure forms should be clear, simple and concise, and tested with consumers. In particular, mortgage disclosures are due for significant reform. The CFPA would have authority over both the Truth in Lending Act and Real Estate Settlement Procedures Act and the responsibility to develop a single, integrated federal mortgage disclosure that provides consumers with the simplicity they deserve, and reduces regulatory burdens on providers.

While disclosures can and should be improved, however, that will not solve the structural problems of our current failed regulatory system, which is not designed to be independent or accountable, effective or balanced, but rather designed for failure. To

address these inherent structural problems, we need complete structural change: an agency that has consumer protection as its sole focus, with market-wide coverage, and consolidated authority, so that it can improve disclosures and provide the appropriate protections consumers need in connection with consumer financial products and services.

10. As you know, this proposal would give the FTC "backstop" law enforcement authority when the Agency declines to act. Doesn't this risk creating dual enforcement problems, where a company may face one requirement from the Agency and an inconsistent requirement from the FTC?

    As proposed, the backstop law enforcement authority that remains with the federal banking agencies and the Federal Trade Commission (FTC) could be exercised only after a written referral is sent to the CFPA, and the CFPA declined to act after 120 days. The purpose of this referral requirement is to ensure that the CFPA can exercise its roles as primary enforcement agency, and to ensure consistency in the application of the law.

11. There appears to be no limit on the budget authorization or amounts that could be assessed on regulated entities to pay for the proposed agency. Is that correct? What is the oversight and Congressional authorization of the proposed agency?

    The funding for the CFPA is designed to ensure that the agency has an adequate, independent source of funding by providing an authorization for "such sums as necessary." The agency would also have the authority to assess fees, which would help cover its costs. However, such fees could be assessed only after promulgating rules with respect to such fees, which is consistent with methods employed by other independent regulators. That rulemaking process would include publishing any proposed fees for public notice and comment.

    The CFPA Act includes structural provisions that will ensure accountability and oversight. In particular, the five-member Board of the CFPA would be comprised of four members appointed by the President for staggered terms of five years, by and with the consent of the Senate, and the head of the agency responsible for regulating national banks.

    In addition, the CFPA Act also has several specific requirements that will ensure accountability: The CFPA will be required to monitor the entire market continuously for risks to consumers, and publish significant findings at least once yearly. The CFPA will also be required to assess the effectiveness of each significant newly-enacted rule no more than five years after the rule takes effect, including the rule's effectiveness in protecting consumers and preserving innovation. In conducting these assessments, the CFPA would be required to seek public comment on the need to expand, modify, or eliminate the rule. Finally, the CFPA would be required to report to Congress each

year on rulemakings, supervisory and enforcement activity, and consumer complaints.

12. You testified that the states are not equipped to handle enforcement, yet your proposal envisions a larger role for the states. How do you see the states becoming more effective if they – like the FTC – are charged with enforcement across many different aspects of the economy and consumer protection?

    The states are not equipped, by themselves, to provide sufficient oversight of the entire marketplace for consumer financial products and services, which is one of the reasons that we are proposing to create the CFPA. The CFPA will be able to provide oversight and supervision of this market, and in particular will ensure that the oversight of non-bank consumer financial services is not left to the states. For the first time, a federal agency would have the authority to apply to non-bank financial providers the tools of supervision that regulators now apply only to banks – including setting compliance standards, conducting compliance examinations, reviewing files, and issuing supervisory guidance. The CFPA would be able to set and enforce national standards. With this market-wide perspective and consolidated authority, the CFPA will be able to provide leadership that is currently lacking, which will help states be more effective by sharing information and leveraging state resources.

13. You've stated that the proposed agency, with all relevant powers centralized under its jurisdiction, would be better able to detect and prevent fraud and unfair practices. But isn't nearly every fraud detected after the fact when complaints are filed? How will the proposed agency prevent fraud?

    The CFPA would be able to better detect and prevent fraud because of its structure: its sole mission will be to protect consumers in the marketplace for consumer financial products and services and it would have consolidated authority. The CFPA therefore would be able to continually gather information on what fraudulent or unfair practices were occurring throughout this marketplace, and to use its rulemaking, supervisory, enforcement or other authority to put a stop to and prevent these practices.

    The CFPA would be continually monitoring the marketplace in a number of ways – not just by tracking consumer complaints, but also through collecting data and information on market trends and conducting examinations on participants throughout the marketplace. If consumer complaints showed possible fraud, the CFPA would have the authority to gather the information needed to determine whether those complaints indicated an incipient pattern of fraud through an examination, which could be done more quickly than by conducting an investigation. Moreover, the CFPA would have the authority to regulate sales practices or to prescribe operational standards where needed to deter and detect unfair, deceptive, abusive or fraudulent practices.

14. You testified that the FTC will retain authority to investigate financial related frauds under its FTC Act authority, but the proposed legislation severely limits their authority when it relates

to a financial fraud, especially by requiring the FTC to wait up to 120 days for the proposed agency to act.

a. How do you see this helping your goal of bringing timely, efficient enforcement?
b. Won't the inclusion of two regulators cause problems of inconsistency and dual regulation the proposed legislation is seeking to avoid?

The FTC would not be required to refer cases of financial fraud to the CFPA. Under our proposal, the FTC would retain its authority to pursue financial fraud without delay, including, for example, its authority to pursue claims of unfair and deceptive practices by those selling debt negotiation, advance fee loans, credit repair, and foreclosure rescue or loan modification services. In these cases, the FTC would simply be required to consult and coordinate with – but not refer cases to – the CFPA. For these types of cases, which typically involve straightforward deceptive or unfair acts and practices, we believe that the consultation and coordination requirement is sufficient to ensure consistency but also further the goal of timely enforcement.

To further the goal of consolidated authority at the federal level and the application of consistent standards to the bank and non-bank financial product and service providers, the CFPA would be the primary federal enforcement agency of the transferred statutes. The authority that remains with the FTC and the federal banking agencies is intended to serve as a backup authority only, not concurrent authority. Under that authority, if the FTC or a federal bank regulator becomes aware of a possible law violation of one of those statutes, the agency may send a written recommendation to the CFPA recommending that the CFPA initiate an enforcement proceeding, stating its concerns. If the CFPA does not take action in 120 days, the referring agency may proceed itself on the matter. This requirement would allow the CFPA sufficient time to review the matter after receiving a recommendation, and the authority to guide consistent application of these statutes across the marketplace for consumer financial products and services.

15. You testify the proposed agency will have examiners on the ground and in the largest institutions as is currently the practice. Is that the correct model to follow or do we need a new way of assessing risk that can deploy resources to the riskiest institutions rather than the largest, which may not have compliance problems?

The CFPA will use a risk-based approach to supervision and enforcement. It will allocate oversight resources based on risks to consumers. One factor determining risk to consumers is the size and transaction volume of an institution. All else being equal, a larger institution would receive more attention from the CFPA than a smaller one. This would be true of non-banks as well as banks.

16. How long do you anticipate it will take for the proposed agency to be fully functioning?

Although there will be a transition period while the CFPA is established and begins its

work, we expect that the new agency can be fully functioning very quickly because the CFPA will be composed after the transfer date largely of professional staff from various federal agencies that will have experience in the consumer protection functions performed by the new agency. The CFPA will then begin building its staff to address the responsibilities to supervise the non-bank sector that will fall under its jurisdiction, which are not now supervised at the federal level.

17. You see the proposed agency maintaining a research unit. Doesn't the FTC already conduct thorough research on activities for non-bank institutions and produce very useful information such as their simplified model mortgage disclosure form? Isn't there a real risk that expertise be lost in the transition?

The FTC has conducted research relating to the non-bank consumer financial services marketplace, including a useful study demonstrating that most consumers do not understand current mortgage disclosures and that those disclosures can be improved. However, this is one of only a handful of studies the FTC has done in the last two decades related to consumer financial services. The FTC's research functions in this area would transfer to the CFPA, along with the consumer research functions of the Federal Reserve Board and Federal Reserve Banks, and other federal agencies. It is likely that the research capabilities of each agency will be strengthened considerably by being brought together in one agency that will focus exclusively on issues relating to consumer financial products and services.

18. The CFPA's scope of regulatory and enforcement authority is extremely broad, encompassing everything from gift card sales to jewelry appraisals. Do you have any concerns that the scope of the CFPA's new authority might be too broad, and subject some actors to greater regulation than is necessary or beneficial for consumers?

The jurisdiction of the CFPA under the CFPA Act is limited to the provision of consumer financial products and services. The authority of the CFPA in this area, however, is intentionally broad so that the CFPA will have sufficient authority to protect consumers throughout that marketplace. Because the CFPA Act would require the agency to consider the costs and benefits to businesses and consumers when promulgating new rules, it is not likely to subject covered persons to greater regulation than necessary or beneficial to consumers,

19. The proposed draft legislation would provide the CFPA with extremely broad regulatory and enforcement authority over the financial markets. According to the current language are there any specific actions, practices or institutions that could under no circumstances fall under the CFPA's jurisdiction? If so, what are they?

Yes, the proposed legislation expressly limits the authority of the CFPA with respect to persons regulated by the Securities and Exchange Commission or the Commodities Future Trading Commission. In addition, the agency would not have authority over

insurance products, except for credit insurance, mortgage insurance, and title insurance.

20. President Obama has made a number of comments regarding the need for fiscal responsibility in Government, recently saying that "Congress can only spend a dollar if it saves a dollar elsewhere." Keeping that spirit in mind as we examine this proposal to create a new regulatory body to enforce already existing and enforced regulations, do you or the Administration have an estimate for the costs of this new proposal, or a plan to account for those costs? If not, when do you intend to have these estimates?

We do not have an estimate at this time. We are in the process of gathering the information needed from the federal agencies that would transfer functions to the CFPA to determine the resources that would transfer and information related to the additional resources needed for the activities not currently covered, such as the supervision of non-bank financial services providers.

21. The definition of regulated entities looks very broad and permissive for the proposed agency to define. As I understand, it could include anyone who extends credit as well as other broad spectrums of society. Who could fall under the proposed agency's jurisdiction:

a. Could lawyers?
b. Could doctors?
c. Could a coffee shop that issues gift cards?
d. Could a plumber?
e. Could a teacher who teaches a financial education course?
f. A university that offers financial education courses?

Under the proposed CFPA Act, a covered person would be defined, in relevant part, as any person who engages directly or indirectly in a financial activity, in connection with the provision of a consumer financial product or service. A teacher who teaches a financial education course or a university that offers financial education courses should not be subject to the proposed CFPA Act because those activities are not provided to consumers on individual financial matters, as described in the legislation. To the extent that a person engages, directly or indirectly, in a financial activity in connection with a consumer financial product or service, such as selling or issuing a stored value product, the person would be subject to the proposed CFPA Act. The CFPA, like the FTC and the federal banking agencies, would be expected to exercise discretion to appropriately regulate covered persons with respect to the variety of consumer financial products and services that would be subject to the agency's jurisdiction under the CFPA Act.

22. What entities that are not currently regulated by a Federal financial regulatory body could be potentially subject to new regulator or enforcement authorities under the provision of this act?

Most non-bank financial institutions, including mortgage lenders, mortgage brokers, payday lenders, debt collectors, credit bureaus, and money services businesses, have not

been subject to federal supervision, and could be subject to more oversight by the CFPA.

23. Given the precedent of post-agency employment restrictions elsewhere, and the President's stated anti-revolving door policy for the rest of his Administration, why isn't there a similar restriction in this proposal? Should there be a similar restriction in the proposal?

Any political appointee serving the CFPA would be subject to the Administration's Ethics Pledge as mandated by Executive Order 13490, and therefore covered by the "revolving door" restrictions. Those restrictions include that the appointee commit that he or she will not, for a period of two years following appointment, participate in any particular matter involving specific parties that is directly and substantially related to his or her former employer or former clients. Moreover, any employee of the CFPA would be covered by the criminal post-employment statue, 18 U.S.C. 207, which provides, among other things, a permanent bar from representing anyone back to any Federal department, agency, or court on a matter the employee was involved in personally and substantially while in government service.

24. Professor Barkow's written testimony drew out the numerous ways this Agency proposal departs from the traditional independent agency model by neglecting to include important safeguards that maintain true agency independence. If it is the Administration's intent that this be a truly independent agency, then what steps can we take to ensure it does not become an instrument to implement each Administration's policies?

The five-member Board of the CFPA would be comprised of four members appointed by the President for terms of five years, by and with the consent of the Senate and the head of the agency responsible for regulating national banks. The proposal recommends this structure so that the focus on appointing Board members can be on expertise in the consumer financial marketplace, rather than be constrained by party affiliation. The requirement of advice and consent of the Senate will help balance the Board. The five-year terms of the Board members will be staggered, which will help ensure continuity across different administrations. The CFPA Board would be similar in structure to the Federal Reserve Board, whose members serve for staggered terms and are not subject to requirements relating to political affiliation.

25. To what extent does the Administration's proposal contemplate Presidential involvement and oversight?

The five-member Board of the CFPA would be comprised of four members appointed by the President for terms of five years, confirmed by a vote of the Senate, and the head of the agency responsible for regulating national banks, who is also appointed by the President and confirmed by a vote of the Senate. The President would only be able to remove a Board member for cause.

26. Section 1071 of the Administration's proposal requires the collection and public disclosure of some very sensitive information: geo-coding of customer addresses, types of accounts held by those customers, and the number and dollar amounts of deposit accounts of those customers. Isn't this information already available in the aggregate? Why does the government need such detailed information down to census tract and geo-coded address? ***** (See Question 6)

Section 1071 requires the collection of certain deposit account data in order to promote awareness and understanding of the access of individuals and communities to financial services, and to identify business and community development needs. Currently, this data is available only at a highly-aggregated bank level that does not permit analysis of deposit account information by neighborhood or census tract. Section 1071(b)(4) requires the removal of any personally identifiable information in any data made public to protect the identities of customers. In addition, the CFPA would need to adhere to all applicable privacy laws, including those that require proper handling and protection of personally identifiable information and the financial information of consumers.

Consumers Union

Nonprofit Publisher
of Consumer Reports

July 28, 2009

The Honorable Charles A. Gonzalez
303 Cannon House Office Building
Washington, DC 20515-4320

Re: Consumer Financial Protection Agency, follow up questions to July 8, 2009 hearing of the Subcommittee on Consumer Protection

The Honorable Representative Gonzalez:

Thank you for the opportunity to address your further questions regarding the structure of the proposed Consumer Financial Protection Agency.

1. Question: Estimates vary, but the financial services industry accounted for nearly one-third of our GDP in recent years. Considering the size of the industry, it is surprising to see the suggestion that we reduce the number of agencies keeping track of such a significant sector of that industry. The proposal wisely encourages the states to monitor financial products alongside the proposed CFP A. Why not similarly increase the number of overseers at the federal level? One of the principle arguments suggested by the testimony is that the FTC may not regulate banks, while the CFPA can. Would it not be wiser to expand FTC's jurisdiction, adding the valuable oversight of FTC's proven investigators, rather than removing their current oversight?

Answer: The Consumer Financial Protection Agency (CFPA) will enhance accountability and effectiveness of the federal oversight of consumer financial products and services. The current system of dividing up consumer protection responsibilities between different federal regulators has not delivered effective consumer protection. For example, the GAO found that the "fragmented U.S. regulatory structure contributed to failures by the existing regulators to adequately protect consumers...," and that "efforts by regulators to respond to the increased risks associated with new mortgage products were sometimes slowed in part because of the need for five federal regulators to coordinate their response."[1] The GAO report refers to the five federal banking regulators. The FTC's role with nonbank entities makes it the sixth federal regulator with responsibility over a slice of the lending market.

The CFPA will eliminate structural flaws in the current system. The first of those flaws is that consumer protection responsibilities are not the top priority of any federal banking regulator. Except for the FTC, all of the federal agencies charged with overseeing specific types of financial services providers have both safety and soundness and consumer protection

[1] Government Accountability Office, *Financial Regulation: A Framework for Crafting and Assessing Proposals to Modernize the Outdated U.S. Financial Regulatory System,* January 2009, GAO 09-216, p. 15, available at: http://www.gao.gov/new.items/d09314t.pdf.

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responsibilities. In practice, consumer protection has been last among banking agency priorities. The second flaw is that competing bank providers can change their regulator by changing their charters, creating a risk of regulators competing to provide the most industry-friendly form of regulation, instead of the most effective regulation. This is often called the "race to the bottom." A third flaw is that the current regulatory structure can easily become gridlocked while multiple regulators confer over the need for, or scope of, regulatory responses to problems that are posed by entities regulated by more than one of the existing federal agencies. Finally, the current system emphasizes the enforcement of existing laws and regulations, not the prevention of harm to consumers that may stem from either a law violation or a hole in the regulatory framework.

Consumers Union strongly agrees with your statement that it is wise to encourage states to monitor financial products alongside the proposed CFPA. State Attorneys General and state regulators may become aware of problems more quickly than any federal agency; should be given the opportunity to address those problems before they spread throughout the country; and may even develop responses and solutions that will later prove useful at the federal level.

Your question also asks about the powers that the FTC will lose to the CFPA. FTC Chairman Leibowitz testified on July 8, 2009 that the FTC would lose only about 5% to 10% of its current jurisdiction to the CFPA.[2] The FTC retains all of its current enforcement authority. The FTC keeps its Section Five enforcement authority against unfair or deceptive acts or practices, and also its current enforcement authority for violations of specific federal consumer statutes. In both cases the FTC enforcement authority is subject only to a referral requirement to ascertain if the CFPA wishes to bring that case.

The principal power to be transferred from the FTC to the CFPA is the rulemaking power with respect to financial products and services. The FTC last used this power in promulgating the Credit Practices Rule, a process which began in 1975 and resulted in a final rule in 1985. Finally, with respect to the FTC's proven staff, H.R. 3126 calls for the FTC and the CFPA to jointly determine which staff members should be moved to the new agency.

The CFP A will be a different type of agency than the FTC or the existing banking agencies. The CFPA will have a greater focus on preventive rulemaking, be given the job to fill gaps in existing regulations, be charged with developing needed rules on marketing practices and the duties of financial product advisers, and will have examination authority to go along with its enforcement authority. By contrast, the FTC's primary job is to enforce existing law.

2. Question: Much was made at the hearing of the fact that the various regulators whose functions would be taken on by the Consumer Financial Protection Agency were unable or unwilling to provide the regulations and oversight of the varied financial products we might desire. There is no sensible argument against that. But the suggestion that this is necessarily proof or a result of a superfluity of regulators does not logically follow from that fact. For the

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[2] Hearing on The Proposed Consumer Financial Protection Agency: Implications For Consumers and the FTC, Preliminary Transcript before the H. Subcomm. on Commerce, Trade, and Consumer Protection, Comm. on Energy and Commerce 2009, p. 102:2045-46.

past eight years, the leadership of the Executive Branch embraced a *laissez faire* system that discouraged strict regulation of these financial products. The Bush Administration brought not a single antitrust case during those eight years and, indeed, dismissed pending cases inherited from Clinton Administration. That was not because anticompetitive practices had vanished from American business, and a majority of the Antitrust Division's staff in 2001 were the same staff as in 2000. The change was the wishes of the leadership. Why should we presume that the CFPA would fair any differently? Whether you have one bus or four, if the dispatcher directs the drivers to Cleveland, they won't end up in New York.

Answer: Consumers Union agrees that the federal banking agencies failed to provide effective consumer protection over the past decade. Consumer advocates were warning of problems in the mortgage market as early as the year 2000.[3] Those warnings were ignored by federal regulators while the bad practices spread and the size of the market exploded. During the nearly a decade while federal banking regulators failed to address blossoming problems in the mortgage market, one of those federal regulators, the Office of Comptroller of the Currency, was actively seeking to stop states from developing and applying consumer protections to loans made by nationally chartered banks and their operating subsidiaries.[4]

Putting the job of financial services consumer protection in the CFPA with a clear mandate and sufficient tools will improve accountability. The CFPA will be the federal agency which will be accountable to the public and to Congress to promote "transparency, simplicity, fairness, accountability, and access in the market for consumer financial products or services."

It will finally be clear whose job it is in the federal government to develop appropriate and balanced consumer protections in financial products and financial services. When six federal regulators each share part of the job, it is hard to tell who fails to do their job when something goes wrong. Indeed, if one regulator is more proactive than others, the entities it regulates complain that they are placed at a disadvantage as compared to their more lightly regulated competitors. The CFPA will end that structural flaw in the current regulatory system.

3. Question: The enthusiasm and energy of the regulators of the financial services industry will

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[3] Modernizing Bank Supervision and Regulation, Before the S. Comm. on Banking, Housing & Urban Affairs (2009), Testimony of Gail Hillebrand, Financial Services Campaign Manager, Consumers Union of U.S., Inc., at page 6; Regulatory Restructuring: Enhancing Consumer Financial Products Regulation Before the H. Comm. on Financial Services (2009), Testimony of Travis B. Plunkett & Edmund Mierzwinski, at page 10.

[4] The Office of Comptroller of the Currency invited banks to bring to its attention state laws requiring national banks and their operating subsidiaries to adhere to consumer protection requirements in 2002, issued opinion letters favoring preemption of a variety of state laws to restrict mortgage practices in 2002 and 2003, and completed regulations in 2004 to preempt state laws in the areas of deposits, real-estate loans, non-real estate loans, and with respect to operating subsidiaries of national banks. 12 CFR sections 7.4000, 7.4007, 7.4008, 7.4009, and 34.4. This history is discussed in and in more detail in Regulatory Restructuring: Enhancing Consumer Financial Products Regulation Before the H. Comm. on Financial Services (2009), Testimony of Travis B. Plunkett & Edmund Mierzwinski, at page 33-34; *see also* Modernizing Bank Supervision and Regulation, Before the S. Comm. on Banking, Housing & Urban Affairs (2009), Testimony of Gail Hillebrand, Financial Services Campaign Manager, Consumers Union of U.S., Inc., at page 11.

depend on which president oversees them. This is a fact of our system that we must recognize and accept if we hope to make efficient reform of our regulatory structure. Regulators who wish to regulate are able to do so. Our problem has been, instead, regulators who did not believe in regulation. What we might need, instead, is a new set of eyes, wholly non-partisan and completely apolitical, whose sole purpose is to represent the interests of consumers. Such a set of watchdogs could alert existing regulators to problems they might have missed, but they could also alert the Congress, and the public, to problems to which the regulators had failed to respond, allowing the American people to pressure the regulators as appropriate. Would this not support the creation of a board or commission of consumer representatives, such as, *e.g.,* the Class B and Class C members of the Board of Directors of the NY Federal Reserve Bank are supposed to be?

Answer: The enthusiasm and energy of financial services regulators is important to individual consumers and also to our economy as a whole. The CFPA will provide more than a new set of eyes. It will have the power and the responsibility to act on what it sees, not merely to advise some other regulator. A board or commission lacking in staff, rulemaking authority, examination authority and enforcement authority is unlikely to become an effective and protective body. The clear placement of responsibility in one federal agency should make it easier for both Congress and the public to insist that the new agency perform its mission effectively.

Thank you for the opportunity to provide Consumers Union's views on these important matters of public policy.

Very truly yours,

Gail Hillebrand
Financial Services Campaign Manager
Consumers Union of U.S., Inc.

cc: Subcommittee Chairman Bobby L. Rush
Committee Chairman Henry A. Waxman

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July 31, 2009

The Honorable George Radanovich
Member, Committee on Energy and Commerce
Ranking Member, Subcommittee on Commerce, Trade, and Consumer Protection
United States House of Representatives
Washington, D.C. 20515

Dear Representative Radanovich:

By letter dated July 17, 2009, Chairman Henry A. Waxman forwarded to me your questions for the record of the hearing before the Subcommittee on Commerce, Trade, and Consumer Protection on July 8, 2009, entitled "The Proposed Consumer Financial Protection Agency: Implications for Consumers and the FTC." As requested in that letter, I hereby respond, including the text of each question.

1. In the proposed language, the CFPA is granted an extremely broad regulatory and enforcement jurisdiction over the financial system. Are there any specific actions, practices or instructions that are specifically exempted from the CFPA's authority? Given the current language, what would we—without a doubt—not see regulated by this new agency?

Your question is a good one. The bill that I reviewed has three kinds of limitations on the authority of the new agency. First, the bill is careful to preserve the authority of the Department of Justice, the Securities and Exchange Commission, and the Commodity Futures Trading Commission, and to prevent interference by the new agency. Section 1022(f). Second, there are some very specific limits, such as the explicit statement that the bill does not confer authority to impose a usury limit. Section 1022(g). Finally, and most important, almost all of the new agencies' powers must relate to "a consumer financial product or service" or a "consumer financial protection function." See, e.g., Section 1031(a) ("The Agency may take any action authorized under subtitle E to prevent a person from committing or engaging in an unfair, deceptive, or abusive act or practice . ... in connection with any transaction with a consumer for a consumer financial product or service."); Section 1032(a) ("The Agency may prescribe rules to ensure the appropriate and effective disclosure or communication to consumers of the costs, benefits, and risks associated with any consumer financial product or service."). Transferred to the new Agency would be "all powers and duties . . . relating to consumer financial protection functions" currently vested in several financial regulatory institutions and the Federal Trade Commission.

As suggested in my testimony, key to all of this are the definitions. "Consumer financial protection functions" are sweepingly defined to include "research, rulemaking, issuance of orders or guidance, supervision, examination, and enforcement activities, powers, and duties relating to the provision of consumer financial products or services . . . ." Section 1061(d). "Consumer financial product or service" is defined as "any financial product or service to be used by a consumer primarily for personal, family, or household purposes." Section 1002(8). "Financial product of service" is defined as "any product or service that, directly or indirectly, results from or is related to engaging in 1 or more financial activities." Section 1002(19). And "financial activities" includes a list seemingly of every imaginable activity that relates to money or finance—and, for good measure, adds "any other activity that the Agency defines, by rule as a financial activity for the purposes of this title" with the sole exception of regular insurance. Section 1002(18). Would the courts provide a check were the new agency to abuse its power to write its own definition? Presumably. But one cannot be confident that a court would reject any Agency-provided definition that related to consumers and money or finance. Those good things in life that are free could not be regulated, but one cannot be sure about the rest.

2. The Administration's proposal would transfer the FTC's financial consumer protection authorities to the newly established CFPA. The FTC though, already has a long history of consumer protection, including in the Financial Services area. Is there any reason to believe that this new, inexperienced agency would do a better job of enforcing the FTC's jurisdiction than the commission already does?

In my view there is no reason to believe that a new Agency would do a better job of enforcing the FTC's jurisdiction than the FTC already does. The FTC is a particularly effective, successful agency that has passed the test of time and, importantly, thrived under both Republican and Democratic leadership. For decades now it has succeeded in attracting some remarkably talented leaders. Its consumer protection mission has been staffed largely by first-rate career lawyers and economists who have exhibited energy, imagination, and commitment. It is hard to imagine how any other agency could perform this work better.

3. Consumers, institutions, and the financial system are facing regulatory challenges. The FTC has the regulatory and enforcement authorities, as well as a consumer oriented focus. Could this change in power leave American consumers exposed to a lapse in competent financial regulation?

Your question suggests three worries. First, could the bill's concentration of so much power in a single agency, which could be led by five people all appointed from the same political party, lead to a lapse in financial regulation if, for instance, the party in power was opposed to financial regulation? The answer is obviously yes. As I indicated in my testimony, the Federal Trade Commission is a bi-partisan agency, and over the years this has proved to be an important strength that has brought stability and moderation to its work.

Second, could the possible politicizing of a new agency, with five leaders all from the same party, reduce the likelihood of "competent" financial regulation? I believe that it could. Again, the FTC's experience has shown that a bi-partisan agency can be particularly successful in attracting and retaining "competent" professionals.

Third, can the uncertainty created by this bill expose consumers to a lapse in protection? Although this is a risk, it is not a major one. The same career professionals who are doing such good work today will continue doing so while the issues raised by this Bill are resolved. There will be some distraction, to be sure, and already I understand that there is jockeying for positions that will be favored in the future, but so long as the issues are resolved and then not constantly revisited there should be little serious harm.

Yours truly,

Stephen Calkins
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July 31, 2009

The Honorable Charles A. Gonzalez
Member, Committee on Energy and Commerce
United States House of Representatives
Washington, D.C. 20515

Dear Representative Gonzalez:

By letter dated July 17, 2009, Chairman Henry A. Waxman forwarded to me your questions for the record of the hearing before the Subcommittee on Commerce, Trade, and Consumer Protection on July 8, 2009, entitled "The Proposed ?Consumer Financial Protection Agency: Implications for Consumers and the FTC." As requested in that letter, I hereby respond, including the text of each question.

1. Estimates vary, but the financial services industry accounted for nearly one-third of our GDP in recent years. Considering the size of the industry, it is surprising to see the suggestion that we reduce the number of agencies keeping track of such a significant sector of that industry. The proposal wisely encourages the states to monitor financial products alongside the proposed CFPA. Why not similarly increase the number of overseers at the federal level? One of the principle arguments suggested by the testimony is that the FTC may not regulate banks, while the CFPA can. Would it not be wiser to expand FTC's jurisdiction, adding the valuable oversight of FTC's proven investigators, rather than removing their current oversight?

As I indicated in my testimony, I think it is critically important to end the exemption from FTC jurisdiction for common carriers subject to the Communications Act. That exemption stems from a different era, when such firms were tightly regulated, government-sanctioned monopolies. Those days have past, and with them the justification for special treatment for these firms.

The question of FTC regulation of banks is trickier. I doubt that the case has been made to extend FTC authority to core bank regulation, which is something that the FTC has never done and is not equipped to do. On the other hand, the FTC has done a creditable job of consumer protection in financial services, and this authority should not lightly be eliminated. My inclination is that it would be better to extend the FTC's authority than to cut it back, but my expertise does not lie in bank regulation.

2. Much was made at the hearing of the fact that the various regulators whose functions would be taken on by the Consumer Financial Protection Agency were unable or unwilling to provide the regulations and oversight of the varied financial products we might desire. There is no

The Honorable Charles A. Gonzalez
July 31, 2009
Page 2

sensible argument against that. But the suggestion that this is necessarily proof or a result of a superfluity of regulators does not logically follow from that fact. For the past eight years, the leadership of the Executive Branch embraced a laissez faire system that discouraged strict regulation of these financial products. The Bush Administration brought not a single antitrust case during these eight years and, indeed, dismissed pending cases inherited from Clinton Administration. That was not because anticompetitive practices had vanished from American business, and a majority of the Antitrust Division's staff in 2001 were the same staff as in 2000. The change was the wishes of the leadership. Why should we presume that the CFPA would fair any differently? Whether you have one bus or four, if the dispatcher directs the drivers to Cleveland, they won't end up in New York.

Your basic point that regulators are appointed by politicians and that the leaders of a given agency can be activist or reluctant enforcers, depending upon their personal views, is obviously correct. Indeed, that is why it is so valuable to have the leaders of a multi-member agency come from different political parties, as is true of the Federal Trade Commission but was conspicuously not true for the proposed new agency as set out in the bill on which I testified. Minority FTC Commissioners help keep that agency on an even course and, through dissents and concurrences, shed light on excesses one way or another. It would be unfortunate, it seems to me, to concentrate all power in a single, multi-member agency, and then allow a President to appoint leaders exclusively from his or her own political party.

On the other hand, I do think it is worth exploring just why this country has failed to craft sensible disclosures and documents for use in connection with purchasing homes. Anyone who has bought a home and survived the strange experience of being given scores of pages of fine print, all too late to help the consumer decision, knows that something is wrong with our system. It would be ironic were we to create a whole new agency only to see that mortgage firms, for instance, manage to preserve much of the status quo.

3. The enthusiasm and energy of the regulators of the financial services industry will depend on which president oversees them. This is a fact of our system that we must recognize and accept if we hope to make efficient reform of our regulatory structure. Regulators who wish to regulate are able to do so. Our problem has been, instead, regulators who did not believe in regulation. What we might need, instead, is a new set of eyes, wholly non-partisan and completely apolitical, whose sole purpose is to represent the interests of consumers. Such a set of watchdogs could alert existing regulators to problems they might have missed, but they could also alert the Congress, and the public, to problems to which the regulators had failed to respond, allowing the American people to pressure the regulators as appropriate. Would this not support the creation of a board or commission of consumer-representatives, such as e.g., the Class B and Class C members of the Board of Directors of the NY Federal Reserve Bank are supposed to be?

With all due respect, Commissioners of the Federal Trade Commission view themselves, not as regulators, but as watchdogs who are there to protect consumers. Although it is useful for consumer groups and academics to provide input to Commissioners as a balance to the private lobbying that inevitably occurs, I see no reason to anoint a special board or commission of consumer representatives. That is what we pay FTC Commissioners to do. Whether bank regulators would benefit from an established board or commission of consumer representatives is something about which I have no basis for an expert opinion. As a general matter, however, I believe that institutions work best when top officials are accountable for their actions. Consumer concerns should be represented by persons who have both power and responsibility. The best criticism comes from genuine outsiders and members of Congress.

Thank you for your interest.

Yours truly,

Stephen Calkins
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July 22, 2009

Representative Charles A. Gonzalez
303 Cannon House Office Building
Washington, DC 20515-4320

RE: Consumer Financial Protection Agency

Dear Representative Gonzalez:

Thank you for the opportunity to address your further questions regarding the structure of the proposed Consumer Financial Protection Agency. My responses are below.

1. Question: Estimates vary, but the financial services industry accounted for nearly one-third of our GDP in recent years. Considering the size of the industry, it is surprising to see the suggestion that we reduce the number of agencies keeping track of such a significant sector of that industry. The proposal wisely encourages the states to monitor financial products alongside the proposed CFP A. Why not similarly increase the number of overseers at the federal level? One of the principle arguments suggested by the testimony is that the FTC may not regulate banks, while the CFPA can. Would it not be wiser to expand FTC's jurisdiction, adding the valuable oversight of FTC's proven investigators, rather than removing their current oversight?

Answer: I agree. The FTC should have the authority to bring enforcement actions against banks. The prohibition against such actions in section 5 of the FTC Act needlessly limits the power of the FTC to protect consumers. Furthermore, the FTC should have strong and unencumbered powers to bring enforcement actions for the violation of current federal consumer credit laws and future CFPA regulations. Under the proposal before Congress, the FTC only has authority to enforce the former.

Currently, "charter competition"—where the regulated financial institutions get to select their regulator-- has led to the worst of all possible regulatory outcomes for consumers. The banking regulators have spent their resources protecting their regulated entities from complying with consumer protection laws more than vigorously investigating and prosecuting such violations. Allowing the FTC to pursue UDAP cases against banks would help consumers and it would help keep the federal banking regulators at least somewhat attuned to consumer protection concerns by preventing them from closing off other public enforcement agencies from exposing their failure to prevent UDAP violations by banks.

Rule-making is a different matter. In this area, the proper concern is with fragmentation that leads to an incoherent set of rules. We need a rule-making agency with a focus on consumer protection to enact uniform rules with the purpose of protecting consumers. The Congress could consider giving that power to the FTC rather than a new agency, but the critical elements of the structure must be unified rule-making authority coupled with a strong focus on consumer, rather than industry, protection and a floor rather than a ceiling for preemption of state law.

2. Question: Much was made at the hearing of the fact that the various regulators whose functions would be taken on by the Consumer Financial Protection Agency were unable or unwilling to provide the regulations and oversight of the varied financial products we might desire. There is no sensible argument against that. But the suggestion that this is necessarily proof or a result of a superfluity of regulators does not logically follow from that fact. For the past eight years, the leadership of the Executive Branch embraced a *laissez faire* system that discouraged strict regulation of these financial products. The Bush Administration brought not a single antitrust case during those eight years and, indeed, dismissed pending cases inherited from Clinton Administration. That was not because anticompetitive practices had vanished from American business, and a majority of the Antitrust Division's staff in 2001 were the same staff as in 2000. The change was the wishes of the leadership. Why should we presume that the CFPA would fair any differently? Whether you have one bus or four, if the dispatcher directs the drivers to Cleveland, they won't end up in New York.

Answer: You state that fragmentation of regulation alone did not lead to the problem of industry capture, which is accurate. But fragmentation is counter-productive for the task of creating a coherent set of rules governing regulation of terms and conditions, and sales practices, for consumer financial products. While an open and over-lapping structure will best promote vigorous enforcement, rule-making would best occur in a single federal agency that sets a floor for market conduct. One counter-weight to the problem of industry capture is to allow the states to experiment with stronger regulation, which is a part of the CFPA proposal. It is vital to maintain this language in the bill. If the CFPA ends up driving the bus to Cleveland, as you put it, the states can take the back roads to New York.

3. Question: The enthusiasm and energy of the regulators of the financial services industry will depend on which president oversees them. This is a fact of our system that we must recognize and accept if we hope to make efficient reform of our regulatory

structure. Regulators who wish to regulate are able to do so. Our problem has been, instead, regulators who did not believe in regulation. What we might need, instead, is a new set of eyes, wholly non-partisan and completely apolitical, whose sole purpose is to represent the interests of consumers. Such a set of watchdogs could alert existing regulators to problems they might have missed, but they could also alert the Congress, and the public, to problems to which the regulators had failed to respond, allowing the American people to pressure the regulators as appropriate. Would this not support the creation of a board or commission of consumer-representatives, such as, *e.g.*, the Class B and Class C members of the Board of Directors of the NY Federal Reserve Bank are supposed to be?

Answer: Thank you for raising this critical and often over-looked matter. The mission of the CFPA clearly is to provide a long overdue focus on consumer protection in financial products. Implementing and maintaining that mission is a task that will fall to the Obama Administration, future administrations, and ultimately to the Congress. While I agree that the last eight years were especially dark days for consumers looking to the federal government to protect them in financial services, there is a bipartisan history of assuming the needs of the powerful industry groups as primary and relegating consumer concerns to occasional rhetorical acknowledgement.

A good place to start with solving this problem in implementation of the CFPA is to appoint at least one Commissioner to the new agency with deep experience in and commitment to consumer protection. Consider this: the only group of people who understood and warned in detail about the problems with subprime mortgages were consumer advocates, and the only group of individuals not represented in appointments to the top positions of authority in the Administration, the new Financial Crisis Inquiry Commission and the like are these consumer advocates. Why?

Sincerely,

Prentiss Cox
Associated Professor of Clinical Law

cc: Representative Bobby L. Rush
Representative Henry A. Waxman

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Faculty Director, Center on the Administration of Criminal Law

July 28, 2009

The Honorable Charles A. Gonzalez
Congress of the United States
House of Representatives
Subcommittee on Commerce, Trade, and Consumer Protection
2125 Rayburn House Office Building
Washington, DC 20515-6115

Dear Representative Gonzalez:

I am writing in response to the questions you submitted in the wake of my testimony at the hearing entitled "The Proposed Consumer Financial Protection Agency: Implications for Consumers and the FTC," held on July 8, 2009, before the Subcommittee on Commerce, Trade, and Consumer Protection. I will address each of your questions in turn.

Your first question is as follows:

> *1. Estimates vary, but the financial services industry accounted for nearly one-third of our GDP in recent years. Considering the size of the industry, it is surprising to see the suggestion that we reduce the number of agencies keeping track of such a significant sector of that industry. The proposal wisely encourages the states to monitor financial products alongside the proposed CFPA. Why not similarly increase the number of overseers at the federal level? One of the principle arguments suggested by the testimony is that the FTC may not regulate banks, while the CFPA can. Would it not be wiser to expand FTC's jurisdiction, adding the valuable oversight of FTC's proven investigators, rather than removing their current oversight?*

I am not in a position to assess whether the CFPA or the FTC is the better agency for regulating financial products, assuming that only one agency should be or would be charged with that task. But I can offer some input on the question of whether, given CFPA authority in this field, it also makes sense to expand the FTC's jurisdiction. The answer to that question depends in large measure on whether the FTC would be given the power to set rules for financial service providers or whether it would be given only enforcement authority.

Overlapping Regulatory Authority. In my view, it would be unwise to have both the CFPA and the FTC setting regulatory policy for this industry. There is a significant risk that giving regulatory authority to both agencies would result in conflicting regulatory policies. As I explained in my initial testimony, the CFPA, as currently designed, shares more in common with traditional executive agencies than with independent regulatory agencies like the FTC. In particular, the proposed legislation does not currently require that CFPA members come from different parties, and it is susceptible to a reading that would require the CFPA to submit any proposed rules to the President's Office of Information and Regulatory Affairs (OIRA) before enactment. Taken together, those structural attributes mean that the CFPA is likely to seek to further the President's directives. In contrast, the FTC is more likely to chart an independent course because its members come from both parties, and it is not required to allow OIRA to give input on its rules before enactment. Thus, if both agencies have jurisdiction to set regulatory policy for this industry, it is not inconceivable that they will disagree on the right course. Industry cannot be held to conflicting standards, so the overlapping authority has the potential to create gridlock and confusion.

Thus, if the FTC were given regulatory authority, the law would need to have a provision that set out whether the FTC or the CFPA had trumping power in the case of a conflict between the two of them. The current version of the legislation, for example, addresses the overlapping jurisdiction between the CFPA and the states. It specifies that the CFPA retains authority to set the rules in the case of a conflict, though states are free to enact protections that are more favorable to consumers without that being deemed a conflict. Most likely, that same preemption scheme would have to be enacted to govern the relationship between the CFPA and the FTC. But, as I noted in my initial testimony with respect to the existing preemption provisions that govern states, this preemption scheme would likely create controversy as financial product providers sought to argue that their preferred regulation was the most consumer-friendly. And if the provisions governing the FTC/CFPA relationship mirror those that govern the CFPA/state relationship, at the end of the day, the question gets resolved by the CFPA. So, authority will ultimately revert back to the CFPA, raising the issue of why the FTC was given regulatory authority in the first instance.

Indeed, this question is particularly important because requiring the CFPA to fight for its regulatory authority has costs of its own. The CFPA has a daunting task. It will have to make demands on heavily-financed, sophisticated industries. And it will need the perceived confidence of Congress to succeed in its mandate. Engaging in turf battles with the FTC would be both distracting and diminishing, and, at the end of the day, likely provide little payoff.

In addition to the fact that, ultimately, the CFPA would likely preempt any conflicting regulation by the FTC, there is a serious question whether the FTC has the resources, expertise, or incentives to properly police every sector of the financial products industry. The FTC up to this point has set policies only for non-bank entities. It would therefore have to develop knowledge of the banking, savings and loan, and credit union industries. Even if its budget and personnel were expanded so that it had the necessary resources to take on this task – and that is a big if in this time of fiscal austerity – there remains the question of whether the agency's culture is capable of such a dramatic shift from its initial mandate. The FTC already has a list of entrenched priorities, so it is at best unclear whether the CFPA Act's priorities would ultimately rise to the top of the FTC's agenda.

In light of the uncertain benefits and almost certain costs, giving overlapping regulatory authority to the FTC and the CFPA seems unwise.

Overlapping Enforcement Authority. The downside risks to overlap are not as pronounced if the shared authority is with respect to enforcement as opposed to rulemaking powers. That is, the situation would be different if the CFPA has the sole power to set the governing regulations for the industry, but enforcement actions could be brought by either the CFPA or the FTC. This is how the legislation is currently written. In effect, this structure aims to put more cops on the beat to ensure that the CFPA's rules are taken seriously. The FTC may bring particular advantages to this task because it has an existing team of experienced investigators who know how to uncover financial abuses.

It should be noted that even enforcement overlap has potential costs. Unless one agency is given primary responsibility, there is the risk that each agency will not be as zealous because it is of the view that the other agency will take the lead or pick up any slack.[1] When only one agency has responsibility for enforcement, it is more likely to be diligent in pursuing that task because it knows it will be accountable for any failures. This same risk is not as pronounced with the state/CFPA overlap because the CFPA knows that any blame for lack of a federal response will fall on the CFPA. No amount of vigorous state enforcement can make the CFPA less blameworthy if it fails to enforce the law because the legislation makes clear that this is primarily a problem that requires federal oversight and cannot be left to the states to handle on their own. The recent history of the Securities and Exchange Commission and state attorney general enforcement actions offers some insights into how this dynamic plays out. When the New York Attorney General's Office brought actions for abuses in the mutual fund industry, those actions highlighted that the SEC was not sufficiently zealous in policing the industry. The SEC could not credibly respond that it was up to the states to police those abuses in the first instance because the relevant laws make clear this mutual fund abuse is a problem that ideally requires a federal solution. Thus, the SEC was criticized for failing to adequately address the abuses, and the fact that the NY AG picked up the slack offered no cover for the federal agency. The SEC, then, remained accountable.

This same dynamic, however, is less likely when there are overlapping federal enforcers. In that situation, the question is which federal enforcer is responsible for failing to police the industry, not whether there should be a federal response at all. In that setting, it is all too easy for agencies to point fingers at each other with no one ultimately accountable. Indeed, that

[1] *See* Anne Joseph O'Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Intelligence in the Post 9/11 World*, 94 CAL. L. REV. 1655, 1680 (2006).

scenario is eerily similar to the lead-up to our current crisis, with each overlapping regulatory agency essentially casting blame on others. One agency must therefore be designated as the primary enforcer to ensure greater accountability and to increase the incentives for the responsible agency to take action.

A designated primary law enforcer is also necessary because enforcement actions have a policymaking component. It is impossible to bring actions against every law violator, so ultimately priorities need to be made. In addition, if regulatory standards are vague or uncertain, the decision whether to bring an enforcement action in the face of an ambiguity also involves a substantive policy judgment. To the extent that these questions arise, there is the same risk of inconsistent standards discussed above. The current version of the CFPA Act addresses this problem with respect to dual federal and state enforcement authority by giving the CFPA the right to intervene in any action brought by a state attorney general.

The current law addresses overlap concerns with CFPA and FTC enforcement authority by requiring that the FTC seek advance permission from the CFPA before bringing an enforcement action. Specifically, Section 1022(e) requires the FTC to refer an enforcement recommendation to the CFPA and then wait for a period of up to 120 days for the CFPA to decide whether it would prefer to bring its own enforcement action. As the FTC indicated in its testimony, that period may well be too long. But regardless of the right length of time, what is clear is that some kind of coordinating mechanism is necessary to avoid enforcement actions that have the effect of creating different substantive standards for the industry to follow.

Your second question is as follows:

> *2. Much was made at the hearing of the fact that the various regulators whose functions would be taken on by the Consumer Financial Protection Agency were unable or unwilling to provide the regulations and oversight of the varied financial products we might desire. There is no sensible argument against that. But the suggestion that this is necessarily proof or a result of a superfluity of regulators does not logically follow from that fact. For the past eight years, the leadership of the Executive Branch embraced a laissez-faire system that discouraged strict regulation of these financial products. The Bush Administration brought not a single antitrust case during those eight years and, indeed, dismissed pending cases inherited from the Clinton Administration. That was not because anticompetitive practices had vanished from American business, and a majority of the Antitrust Division's staff in 2001 were the same staff as in 2000. The change was the wishes of the leadership. Why should we presume that the CFPA would fair any differently? Whether you have one bus or four, if the dispatcher directs the drivers to Cleveland, they won't end up in New York.*

For just about every agency, it is true that the substance of regulatory policy is driven more by the views of the President in power than any element of institutional design. But the degree of presidential influence over agency decisionmaking varies, and institutional design plays a significant role in how much authority a President has. In the case of the CFPA, for example, the legislation as currently written gives the President significant authority over the agency's policies. As I pointed out in my initial testimony, it does so in two fundamental respects. First, it allows the President to select the CFPA's five-member board without any restrictions on party affiliation. This means that the President can stack the board with members of his or her own party, which makes it more likely that the Board will follow the President's policies. Second, the current legislation states that the agency will be "in the executive branch." As I explained in my initial testimony, this language could be read to give the President the authority to insist that the CFPA submit any proposed regulations to OIRA for review. This gives the President even greater authority over the ultimate content of the agency's rules.

Thus, the question for Congress is how much authority it would like to give the President in setting the agenda of this new agency. Under the law as it is currently written, that agenda will likely shift dramatically with each election of a new President, particularly if there is a change in the President's party affiliation. While this is true of most agencies, the amount of change is likely to be more pronounced for an agency designed as the CFPA currently is – that is, without a requirement of political balance and without exemption from OIRA review.

Your third question is as follows:

> *3. The enthusiasm and energy of the regulators of the financial services industry will depend on which president oversees them. This is a fact of our system that we must recognize and accept if we hope to make efficient reform of our regulatory structure. Regulators who wish to regulate are able to do so. Our problem has been, instead, regulators who did not believe in regulation. What we might need, instead is a new set of eyes, wholly non-partisan and completely apolitical, whose sole purpose is to represent the interests of consumers. Such a set of watchdogs could alert existing regulators to problems they might have missed, but they could also alert the Congress, and the public, to problems to which the regulators had failed to respond, allowing the American people to pressure the regulators as appropriate. Would this not support the creation of a board or commission of consumer-representatives, such as, e.g., the Class B and Class C members of the Board of Directors of the NY Federal Reserve Bank are supposed to be?*

The biggest challenge in regulating this field will be avoiding an agency that is captured by the financial products industry and that is insufficiently attentive to consumer interests. In my initial testimony, I explained in detail why capture is a major threat, and I offered some reflections on how to protect the CFPA from capture. This question raises another possible means of protecting consumer interests: through consumer representatives or public advocates. In evaluating this proposal, it is helpful to consider analogous attempts to create consumer oversight mechanisms.

The Federal Reserve Board of Directors. One place to look is suggested by the question: the Class B and Class C members of the Board of Directors of the Federal Reserve Bank. Although Class B and Class C directors are charged with representing the public,[2] in practice, they are often more representative of industry. Several factors push toward that result. First, the legislation stating that they should represent the public also states that they should be selected with "consideration to the interests of agriculture, commerce, industry, services, labor, and consumers."[3] Second, and more importantly, the selection process itself gives banks influence. Class B directors are elected by the same banks that elect Class A directors.[4] Class C directors are appointed by the Board of Governors.[5]

As a result of this selection process, the Class B and Class C directors generally have strong ties to regulated industries as opposed to consumers. For example, in Boston, the Class B representatives are affiliated with The Kraft Group, MassMutual Life Insurance Company, and BJ's Wholesale Club.[6] In Cleveland, the Class B representatives are from smaller businesses: Steris Corporation, New Horizons Baking Company, and AEP Transmission.[7] The Federal Reserve Bank of New York currently has two Class B vacancies, but the one seat that is filled is held by the Chairman and CEO of General Electric.[8]

Class C directors generally appear little different from their Class B counterparts. Generally, the positions are filled with Presidents and CEOs of small- and medium-sized companies. But there are exceptions. In New York, the head of the AFL-CIO and Columbia University serve as Class C members. At the other extreme, one Class C director of the Federal Reserve Bank of Chicago, and the current chair, is the chairman of Madison Dearborn Partners, which specializes in management buyout and special equity investing and manages over $10 billion of committed capital and portfolio investments.[9]

But regardless of affiliation, it is unlikely that the Class B and Class C directors are able to conduct sufficient oversight over state member banks. Given the significant responsibilities that each of these directors appears to have apart from their position at the Federal Reserve Bank, it is unlikely that any of them have sufficient time, staff, or energy for supplemental oversight that is sufficient to protect consumers.

There are, then, at least two larger lessons to draw from the experience of the Federal Reserve Bank Directors. First, the selection process for a consumer representative is critically important. Because anyone is a consumer – even high-powered financiers – it is important to have processes and selection criteria that target people who have a greater interest in consumer welfare than in any particular industry in which they participate. The selection, moreover, should not be made by the industry being regulated. Second, no consumer representative can succeed without sufficient

[2] 12 U.S.C. § 302.
[3] *Id.*
[4] 12 U.S.C. § 304.
[5] 12 U.S.C. § 305.
[6] http://www.bos.frb.org/about/officers.htm#directors.
[7] http://www.clevelandfed.org/about_us/officers_and_boards/cleveland_bod.cfm?DCS.nav=Local.
[8] http://www.newyorkfed.org/aboutthefed/org_nydirectors.html.
[9] http://www.chicagofed.org/about_the_fed/board_of_directors_canning_john.cfm.

resources to look for agency transgressions. Representing consumers cannot be a part-time job. It is a full-time task that requires sufficient staffing and funding to allow consumer representatives to properly monitor agency actions and to challenge those actions where appropriate.

The Role of Consumer Representatives at the Consumer Products Safety Commission. The Federal Reserve Bank Directors are not the only model of consumer representation. Lessons can also be drawn from attempts to give consumers greater influence with the Consumer Products Safety Commission (CPSC). First, it should be noted that the bipartisan study group that recommended the creation of the CPSC had also endorsed the creation of a Consumer Safety Advocate who would be appointed by the President and be charged with representing consumers in the CPSC's decisionmaking process to defend consumer safety against "exploitation, excess or neglect."[10] This proposal mirrors the suggestion in your question. But because the proposal was rejected in the Consumer Product Safety Act (CPSA), we cannot assess its effectiveness in that context.

We can, however, evaluate two other efforts to protect consumer interests before the CPSC. As I explained in my initial testimony, the CPSA as initially passed did attempt to give consumers a greater role in the regulatory process, but both efforts ended up backfiring. The Section 7 offeror process, which I described in detail, was designed to allow consumer groups to play a greater role in drafting safety standards. But the process ended up being dominated by industry because only industry groups had the resources to take part in the process. Section 10 of the CPSA was similarly designed to give consumers a check on regulatory inertia by the agency by allowing them to petition for rules and obtain judicial review of the agency's decisions. But, here, too, industry took over the process. Industry representatives were the ones who sought the most petitions, and the agency was so overcome with requests that it was incapable of accomplishing much of anything.

This experience offers some lessons that I described in greater detail in my initial testimony. Despite the best intentions to have consumer interests represented and to allow consumers to serve as watchdogs when agencies fail to act, those attempts will not succeed unless these consumers representatives are given the resources they need to serve this policing function. Otherwise, regulated industries will always outmatch the consumers and use their resource advantage to have greater influence with the agency and with the agency's overseers in Congress.

State Utility Consumer Advocates. There is a third model of consumer representation that may be worth a closer look. Many states have created public utility consumer advocates to give consumers a greater role in the ratemaking processes of state utilities. In some jurisdictions, such as Arizona, this consumer representative is directly appointed by the governor.[11] In other jurisdictions, such as the District of Columbia, there is an independent agency with a head appointed by the mayor and confirmed by the city council.[12] Other states have a special division within the attorney general's office charged with representing consumers in ratemaking proceedings.

[10] NATIONAL COMMISSION ON PRODUCT SAFETY, FINAL REPORT PRESENTED TO THE PRESIDENT AND CONGRESS 115 (1970)
[11] ARIZ. REV. STAT. ANN. § 40-462 (2009) (providing for the director of the Residential Utility Consumer Office)
[12] D.C. CODE § 34-804(b) (2009).

Studies have found that participation by a consumer advocate leads to lower rates,[13] which suggests that these advocates can make a difference in substantive agency policy. This may therefore be a potential model for creating a similar advocate to represent consumer interests before the CFPA.

I hope these responses to your questions are helpful. Thank you for giving me the opportunity to address your questions and to provide my views on the proposed CFPA.

Sincerely,

Rachel E. Barkow

[13] *See, e.g.*, Stephen Littlechild, *Stipulated Settlements, the Consumer Advocate, and Utility Regulation in Florida*, 35 J. REGULATORY ECON. 96 (2009); Robert N. Mayer, Cathleen D. Zick and John R. Burton, *Consumer Representation and Local Telephone Rates*, 23 J. OF CONSUMER AFFAIRS 267, 279 (1989).