

**FINANCIAL SERVICES AND PRODUCTS:
THE ROLE OF THE FEDERAL TRADE COMMISSION
IN PROTECTING CONSUMERS—PART II**

HEARING

BEFORE THE

SUBCOMMITTEE ON CONSUMER PROTECTION,
PRODUCT SAFETY, AND INSURANCE

OF THE

COMMITTEE ON COMMERCE,
SCIENCE, AND TRANSPORTATION
UNITED STATES SENATE

ONE HUNDRED ELEVENTH CONGRESS

SECOND SESSION

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MARCH 17, 2010
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ONE HUNDRED ELEVENTH CONGRESS

SECOND SESSION

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**FINANCIAL SERVICES AND PRODUCTS: THE
ROLE OF THE FEDERAL TRADE COMMISSION
IN PROTECTING CONSUMERS—PART II**

WEDNESDAY, MARCH 17, 2010

U.S. SENATE,
SUBCOMMITTEE ON CONSUMER PROTECTION, PRODUCT
SAFETY, AND INSURANCE,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
Washington, DC.

The Subcommittee met, pursuant to notice, at 3:06 p.m. in room SR-253, Russell Senate Office Building, Hon. Mark L. Pryor, Chairman of the Subcommittee, presiding.

**OPENING STATEMENT OF HON. MARK L. PRYOR,
U.S. SENATOR FROM ARIZONA**

Senator PRYOR. I'd like to call this hearing to order.

I want to welcome everyone to the Consumer Protection Product Safety and Insurance Subcommittee of the Senate Commerce Committee. And today our hearing is on Financial Services and Products: the Role of the Federal Trade Commission in Protecting Consumers, Part 2.

This is the second in a series of two, and Senator Rockefeller was gracious enough to allow us to do this today. And we're going to have two panels, and I would like to ask the witnesses to please limit their opening statements to 5 minutes each, and then I'm sure my colleagues have a series of questions.

Today, we will examine the Federal Trade Commission's role in protecting consumers in the context of financial services reform. This is the second hearing, as I mentioned before. Senator Rockefeller heard the first Commerce Committee hearing on the subject on February 4. Today, we continue that dialogue and I look forward to robust debate.

Let's see. As Chairman of the Subcommittee last year, we held a series of hearings on deceptive advertising, frauds, and scams in the distressed economy; and the Federal Trade Commission's actions to protect consumers from unfair and deceptive practices in these areas. This is a tough economic environment America finds itself in, and unfortunately, our citizens are repeatedly targeted for fraudulent and unscrupulous actors seeking to exploit their vulnerabilities. Consequently, I think it's proper for us to look at what's working, look at what's not, talk to the FTC about how things could be strengthened or changed to make what they do work better and be more effective.

On Monday, Senator Dodd unveiled financial regulatory reform legislation he has been crafting over the past several months, and they've spent a lot of time on it in the Banking Committee. And I look forward to looking at that legislation as it is rolled out. I will be keeping a sharp eye for—as I'm sure people on this committee will, for the Federal Trade Commission's authority and the Consumer Financial Protection Bureau, proposed by Senator Dodd, that will be housed in the Federal Reserve.

As the Committee considers FTC authorities in light of proposed Financial Regulatory Reforms, I think it'll be important to make sure this agency's core consumer protection mission is properly preserved, and also to make sure that we don't create any gaps that might occur if we're not careful in how we draft that other piece of legislation. It is also very important to consider just how the Federal Trade Commission can improve on what it's doing.

And before I turn it over to the Ranking Member, Senator Wicker, I'd like to just say that we are scheduled to have a vote today, about 3:30. So, I know we have some colleagues that'll be coming and going, and I'd like to just do very brief opening statements and then turn it over to our first panel. We may have to slip out and vote and come back, but we'll try to keep the Committee going, if at all possible.

Senator Wicker?

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

Senator WICKER. Thank you, Mr. Chairman.

The FTC plays a key role in ensuring the safety of American consumers and financial services. As Chairman Leibowitz said in our last hearing, it is the only agency whose sole objective is to protect consumers. During the economic recession, when so many have taken advantage of vulnerable consumers through fraudulent offers of financial assistance, that role has been even more important. Beyond just financial services, the FTC deals with issues that economically impact every American.

We want to ensure the FTC has the capabilities and resources necessary to keep our consumers safe. However, history has shown that even the most well-intentioned protectors need boundaries to prevent overreaching and negatively impacting the very people they are trying to help. To address this concern in the late 1970s, the Congress passed laws equipping the FTC with necessary tools to protect consumers while building in safeguards that require appropriate justification for new rules and additional enforcement capabilities. That system has served our people and our economy well over 30 years. Yet, some believe there's a need for the FTC to be able to react faster, create new rules and regulations without the consent of Congress, and have the authority to enforce these rules in new ways against potentially unknown actors.

At our last hearing Chairman Leibowitz discussed this issue and talked about the expansions of authority he feels the FTC needs to conduct its mission better. Now, I appreciate his concerns, and believe we should always be willing to consider whether change is warranted; however, we must proceed with caution, as the Chairman has just said. A significant expansion of the FTC's rulemaking

and enforcement authority could essentially create powerful new policy—a powerful new policy-setting agency, one that has jurisdiction over nearly the entire economy.

No significant analysis has been conducted on how this would impact our economy. Ultimately, we are discussing today what many would argue would amount to a direct repeal of Congressional action. It concerns me that we are doing so without a full understanding of the ramifications for the economy and American jobs.

Today, we'll have the opportunity to hear from other stakeholders who are interested in how the FTC fills its consumer protection role. It is unfortunate that we're not able to hear from others in the business community who would be affected, as there was no shortage of willing participants for today's hearing. I believe it is particularly relevant to note the number and variety of industries who are concerned with Chairman Leibowitz' proposals and the impact they could have on businesses.

I have a letter in my hand from a number of these groups, and I request, at this point, Mr. Chairman, that this letter be entered into the record for this hearing.

Senator PRYOR. Without objection.

[The information referred to follows:]

January 19, 2010

U.S. Senate,
Washington, DC.

Dear Senator:

The undersigned associations write to express our significant concerns about the provisions of H.R. 4173, the Wall Street Reform and Consumer Protection Act of 2009, that would amend the Federal Trade Commission Act ("FTC Act") by removing existing procedural safeguards on the rulemaking and enforcement capabilities of the Federal Trade Commission ("FTC" or "Commission"). Expecting that the Senate may consider these provisions as part of its work on FTC reauthorization, we write to highlight the potentially significant and negative impact such changes would have on the business community at large.

The provisions in question would eliminate procedural safeguards that were imposed upon FTC rulemaking decades ago, after Congress determined the Commission had repeatedly overstepped its regulatory authority. The legislation couples this unrestrained rulemaking authority with enforcement powers to seek civil penalties for unfair or deceptive acts or practices; to seek such penalties without coordinating with the Justice Department; and to pursue companies that allegedly provide "substantial assistance" in an FTC Act violation, even without actual knowledge of the violation. Taken together, these provisions grant such sweeping powers that the FTC could essentially act as an unelected legislature governing industries and sectors across the economy.

There has been remarkably little debate on the consequences of reversing the considered decisions of two earlier Congresses. In particular, there has been no opportunity for affected industries to appear at a hearing to present their concerns about the potential effect of these provisions on American commerce and our economic future. A proposal for Congress to delegate such sweeping new regulatory authority deserves more thorough deliberation.

I. Elimination of Existing Procedural Safeguards

When the FTC operates under congressional guidance in the form of a specific authorizing statute, the Commission may use the notice-and-comment rulemaking procedures followed in most Federal agency proceedings. However, the FTC's consumer protection mandate under the FTC Act is exceptionally broad. The Commission's authority extends to all "unfair or deceptive acts or practices in or affecting commerce," including business-to-business interactions as well as conduct toward con-

sumers.¹ The statute provides scant guidance to channel the FTC's exercise of its discretion in executing this mission.

The FTC is also set apart from other Federal agencies by the breadth of its jurisdiction. The FTC has authority to regulate across the U.S. economy, except for a few sectors that are specifically exempted and within the jurisdiction of other agencies. While it is true that certain other agencies, such as the Securities and Exchange Commission and the Commodity Futures Trading Commission, may issue rules using expedited procedures under the Administrative Procedure Act ("APA"), these agencies are narrowly focused in both jurisdiction and mission. In contrast, the FTC is, by definition, a generalist agency. It is therefore appropriate to require robust industry and consumer participation when the FTC seeks to issue a rule that would affect a broad range of trades or sectors, in order to inform the agency and avoid the types of abuses that occurred previously.

In 1975 and again in 1980, Congress stepped in to stop the FTC's abuse of its rulemaking authority. Congress imposed enhanced safeguards, including more public input opportunities, when the FTC seeks to outlaw specific acts or practices as "unfair" or "deceptive." As the Senate Commerce, Science, and Transportation Committee explained in 1979, greater procedural safeguards were necessary because the FTC had proposed rules "[n]otwithstanding the intent of Congress" in areas such as abuses associated with the sale of used cars and children's television advertising.²

The procedures that Congress required, and that remain the law today, are quite reasonable. In addition to the notice-and-comment steps required by the APA, the FTC must afford advance rulemaking notice to Congress and the public, must provide an informal hearing so that the public may comment orally or in writing on the agency proposal, and must provide a Statement of Basis and Purpose for any final rule. Robust judicial review ensures that these procedures are followed. In addition, existing law requires transparency when Commissioners meet with outside parties about regulatory proceedings, and prohibits staff from giving Commissioners facts outside the regulatory record. These procedures improve the quality of agency decision-making and increase public accountability and support.

Timothy Muris, who served as Chairman of the FTC from 2001 until 2004, testified before Congress on July 14, 2009, to oppose the removal of these longstanding safeguards. As Chairman Muris explained:

"The Administration's proposal would do more than just change the procedures used in rulemaking. It also would eliminate the requirement that unfair or deceptive practices must be prevalent, and eliminate the requirement for the Commission's Statement of Basis and Purpose to address the economic effect of the rule. It also changes the standard for judicial review, eliminating the court's ability to strike down rules that are not supported by substantial evidence in the rulemaking record taken as a whole. The current restrictions on Commissioners' meetings with outside parties and the prohibition on ex parte communications with Commissioners also are eliminated. These sensible and important protections should be retained."

Jim Miller, another former FTC chairman, has commented that passage of the legislation as currently drafted would be "like putting the FTC on steroids."³ In the past, the existing safeguards have proven an essential check on FTC regulation that exceeds congressional intent. Congress, then acting under Democratic leadership, established the current set of procedural protections after finding "that in many instances the FTC had taken actions beyond the intent of Congress."⁴ For example, the FTC notoriously considered a total ban on children's advertising in a proceeding that the *Washington Post* criticized as "a preposterous intervention that would turn the FTC into a great national nanny."⁵ As laid out in H.R. 4173, these provisions would give the FTC free rein—and a congressional blessing—to repeat these abuses. There would be little to restrain the FTC from pursuing sweeping new regulations in areas where Congress has not yet legislated, or from drastically reshaping regulations in areas where Congress has already legislated.

We share the concerns expressed by these former FTC Chairmen, and we agree with current FTC Commissioner William Kovacic, who previously served as the

¹ 15 U.S.C. § 45(a).

² S. Rept. No. 96-500 (1979), reprinted in 1980 U.S.C.C.A.N. 1101, 1103.

³ Brody Mullins and John D. McKinnon, "FTC's Powers Would Grow Under Financial Overhaul," *Wall Street Journal Online*, October 29, 2009, available at <http://online.wsj.com/article/SB125677809189114853.html> (last visited October 30, 2009).

⁴ S. Rept. No. 96-500 at 2.

⁵ Editorial, *The Washington Post* (Mar. 1, 1978).

agency's Chairman and General Counsel, that it is "prudent to retain procedures beyond those encompassed in the APA" when the FTC acts without specific authorization from Congress.⁶ Given the extremely broad scope of the FTC's jurisdiction and mandate, and the agency's history of regulatory overreaching, the existing procedural protections remain necessary and appropriate in those cases when the FTC seeks to outlaw certain business acts or practices.

II. Excessive Enforcement Authorities

Likewise, removing existing checks on the FTC's enforcement powers would not serve the public interest. While we support the FTC's mission to prevent and punish unfair and deceptive acts or practices, we believe that the current limits on the FTC's discretion are appropriate given the significant consequences of any enforcement action for a targeted company and its shareholders and employees.

Civil Penalty Authority: The FTC has ample enforcement tools at its disposal, and adding civil penalty authority would produce negative unintended consequences. Currently, the FTC primarily proceeds by imposing an administrative order to change a company's behavior or seeking a court order that may force a company to return ill-gotten gains. The FTC may then seek civil penalties if an administrative order is violated. This system gives companies an incentive to reach an agreement with the FTC to improve their business practices, rather than litigating against the FTC. The FTC routinely issues detailed administrative orders to correct companies' policies and behavior, and other companies look to these orders to understand the FTC's expectations and shape their own practices. We therefore agree with Commissioner Kovacic that "routine availability of civil penalties, even if subject to a scienter requirement, would . . . risk constraining the development of doctrine" through enforcement actions, and should not be adopted.⁷

"Substantial Assistance" Violation: H.R. 4173 would provide that any person that "knowingly or recklessly" provides "substantial assistance" to another in committing an unfair or deceptive act or practice can be punished as a primary perpetrator, even without actual knowledge of the violation. We believe that such an expansion of FTC jurisdiction is neither reasonable nor necessary, given that the FTC has the ability to pursue a perpetrator of any unfair or deceptive act or practice.

Independent Litigating Authority: As passed by the House, H.R. 4173 would provide the FTC with independent litigating authority to seek civil penalties. This provision would eliminate the current requirement that the FTC notify the Department of Justice (DOJ) when the FTC intends to seek civil penalties, after which the DOJ has 45 days to decide whether to pursue the case on behalf of the FTC. This consultation is necessary to allow DOJ to coordinate law enforcement activities across agencies, and to provide a critical check on the FTC's discretion when a company is exposed to excessive and damaging penalties. This approach also provides a more considered and orderly access to the Federal courts.

For the reasons discussed above, the undersigned associations strongly oppose the provisions currently set out in H.R. 4173 that would remove existing checks on the FTC's discretion. These provisions would afford the FTC unprecedented and sweeping powers to execute its broad mandate. We urge the Senate Commerce Committee to discard these provisions as it progresses in its work toward FTC reauthorization.

Sincerely,

American Association of Advertising Agencies
 American Advertising Federation
 American Business Media
 American Financial Services Association
 Association of National Advertisers
 Consumer Data Industry Association
 Consumer Electronics Association
 Consumer Healthcare Products Association
 Direct Marketing Association
 Direct Selling Association
 Electronic Retailing Association
 Financial Services Institute, Inc.
 Interactive Advertising Bureau
 International Franchise Association
 The Marketing Research Association

⁶Prepared Statement of the Federal Trade Commission at 11 n. 25, "Proposed Consumer Financial Protection Agency: Implications for Consumers and the Federal Trade Commission," Hearing Before the House Comm. on Energy and Commerce, Subcomm. on Commerce, Trade and Consumer Protection, 111th Cong. (July 8, 2009).

⁷*Id.* at 12 n. 30.

National Association of Manufacturers
 National Association of Mutual Insurance Companies
 National Association of Professional Background Screeners
 National Association of Realtors
 National Association of Wholesaler-Distributors
 National Automobile Dealers Association
 National Business Coalition on E-Commerce and Privacy
 Natural Products Association
 National Retail Federation
 Online Publishers Association
 Shop.org
 Software & Information Industry Association
 U.S. Chamber of Commerce
 United States Organizations for Bankruptcy Alternatives

Senator WICKER. This letter, sent to all Senators, expresses strong opposition to the removal of existing safeguards on the rule-making and enforcement capabilities of the FTC. Signed by 29 different associations who represent nearly all aspects of our economy, from healthcare and manufacturers to telecommunications and financial services, the letter warns of the potentially significant and negative impact such changes would have on the business community at large. It's important to note that these are representatives of the very businesses we are relying on to create new jobs and put our constituents back to work.

It is also unfortunate that scheduling conflicts prevented FTC Commissioner Kovacic from being with us today. We would certainly have benefited from his expertise, as a current Commissioner and former General Counsel and Chairman of the FTC. However, Commissioner Kovacic has submitted testimony for the record, and it is important to point out that the Commissioner shares many of the concerns expressed about the ramifications of such a large expansion of the FTC's rulemaking authority.

[The information referred to follows:]

PREPARED STATEMENT OF HON. WILLIAM E. KOVACIC, COMMISSIONER,
 FEDERAL TRADE COMMISSION

Chairman Pryor, Ranking Member Wicker, and Subcommittee Members, thank you for the opportunity to present my views on a number of proposals to augment the FTC's authority. They are the following: APA rulemaking, civil penalty authority, independent litigating authority for civil penalty actions, and aiding and abetting liability. Although I was unable to present testimony at your Subcommittee's hearing, I am grateful for the opportunity to make my views known by offering this statement for the record.

I. APA Rulemaking

The FTC's strongest policymaking tool, in addition to litigation, is rulemaking. In 1975, Congress granted the FTC express authority to issue substantive rules under Section 18 of the FTC Act, and authority under Section 5(m)(1)(A) of the Act to seek civil penalties for violations of those rules.¹ Magnuson-Moss rulemaking, as this authority is known, requires more procedures than those needed for rulemaking pursuant to the Administrative Procedure Act ("APA").² These include two notices of proposed rulemaking, prior notification to Congress, opportunity for an informal hearing, and, if issues of material fact are in dispute, cross-examination of witnesses and rebuttal submissions by interested persons.

In addition, over the past 15 years, there have been a number of occasions where Congress has identified specific consumer protection issues requiring legislative and regulatory action. In those specific instances, Congress has given the FTC authority

¹Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. No. 93-637, 88 Stat. 2183 (1975) (codified at 15 U.S.C. §§ 57a, 57b).

²5 U.S.C. § 551.

to issue rules using APA rulemaking procedures. A significant and recent example of APA rulemaking authority that Congress expressly granted to the FTC was the authority, under the Telemarketing and Consumer Fraud and Abuse Prevention Act, to issue rules proscribing deceptive and abusive acts or practices in telemarketing.³ Under that authority, the Commission issued the Telemarketing Sales Rule,⁴ including provisions that created the do-not-call registry, whereby consumers can protect their privacy by electing not to receive commercial telemarketing calls.

My position in the past, and to which I still adhere, is to dissent from the FTC's endorsement of authority to use, for promulgating all rules respecting unfair or deceptive acts or practices under the FTC Act, the notice and comment procedures of the APA.⁵ While many other agencies do have the authority to issue rules following notice and comment procedures, the Commission's rulemaking is unique due to the range of subject matter (unfair or deceptive acts or practices) and sectors (reaching broadly across the economy, except for specific carve-outs). Except where Congress has given the FTC a more focused mandate to address particular problems, beyond the FTC Act's broad prohibition of unfair or deceptive acts or practices, I believe that it is prudent to retain procedures beyond those encompassed in the APA. As a former Bureau of Consumer Protection Assistant Director stated during a panel addressing the agency's rulemaking efforts, the Commission should wait for Congress to give the agency specific authority to issue rules in a given area because that approach results in "clearer direction" to the agency's audience.⁶ The lack of a more focused mandate and direction from Congress, reflected in legislation with relatively narrow tailoring, could result in the FTC undertaking initiatives that ultimately arouse Congressional ire and lead to damaging legislative intervention in the FTC's work. This is precisely what occurred toward the end of the Carter administration. Ongoing Commission initiatives led Congress to turn against the Commission in 1979 and 1980, enacting significant legislative constraints (while individual members proposed even more significant cutbacks in Commission authority). This occurred even though many of the Commission's initiatives were undertaken with the urging of Congressional Committees, individual Senators and Representatives.⁷ Through specific, targeted grants of APA rulemaking authority, Congress makes a credible commitment not to attack the Commission when the agency exercises such authority.

I would be willing to consider whether all the rulemaking requirements that are currently required by Magnuson-Moss to promulgate, amend, or repeal rules are needed, as they may be unnecessarily cumbersome and often lead to rulemaking proceedings that can last several years.

II. Civil Penalty Authority

The FTC has authority to seek civil penalties in some instances. For example, the FTC can seek civil penalties against an entity that violates an FTC administrative order, to which it is subject, or a trade regulation rule promulgated by the FTC. Congress has also specifically authorized the FTC to seek civil penalties for violations of certain statutes, *e.g.*, CAN-SPAM Act.⁸ The Commission has recommended that Congress authorize the FTC to seek civil penalties for all violations of the FTC Act and the authority to prosecute civil penalty cases in Federal court in its own name⁹—instead of referring such cases to the Department of Justice ("DOJ") to

³ 15 U.S.C. § 3009(a).

⁴ 16 C.F.R. § 310.1-.9.

⁵ *See, e.g.*, Prepared Statement of the Federal Trade Commission Describing the Commission's Anti-Fraud Law Enforcement Program and Recommending Changes in the Law and Resources To Enhance the Commission's Ability to Protect Consumers before the Subcommittee on Consumer Protection, Product Safety, and Insurance of the Committee on Commerce, Science, and Transportation, U.S. Senate (July 14, 2009), at 3 n.4, available at www.ftc.gov/os/2009/07/P094402antifraudlawtest.pdf.

⁶ Paul Luehr, Remarks at FTC at 100: Into Our Second Century Roundtable, Northwestern University School of Law, Chicago (Sept. 25, 2008), at 67–68 (transcript available at <http://www.ftc.gov/ftc/workshops/ftc100/transcripts/chicagotranscript.pdf>). For additional discussion of FTC rulemaking see A Report by Federal Trade Commission Chairman William E. Kovacic, The Federal Trade Commission at 100: Into Our 2nd Century, The Continuing Pursuit of Better Practices (Jan. 2009), at 124–28, available at <http://www.ftc.gov/ftc/workshops/ftc100/docs/ftc100rpt.pdf>.

⁷ *See* William E. Kovacic, *The Federal Trade Commission and Congressional Oversight of Antitrust Enforcement*, 17 *Tulsa L. J.* 587, 630–67 (1982). As the title suggests, my article focused on the Commission's antitrust enforcement.

⁸ *See* 15 U.S.C. § 7701 et seq.

⁹ *See, e.g.*, Prepared Statement of the Federal Trade Commission Describing the Commission's Anti-Fraud Law Enforcement Program and Recommending Changes in the Law and Resources

bring civil penalty actions on behalf of the Commission, as is discussed in part III below.¹⁰

In my view, the existing consequences attendant to a finding that an act or practice is unfair or deceptive under the FTC Act are generally appropriate and are consistent with the goal of developing FTC law to establish new doctrine and to reach new and emerging problems. These 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). The routine availability of civil penalties, even if subject to a scienter requirement, would risk constraining the development of doctrine. This is similar to what has happened in the antitrust sphere, where judicial concerns about the costs of private litigation, and the effect of mandatory treble damages in antitrust cases, have led the courts to constrain the development of antitrust doctrine in ways that unduly limit the U.S. antitrust system.¹¹

Additionally, if the FTC were granted civil penalty authority for consumer protection violations, another possibility is that the Commission might routinely challenge as unfair acts, under its consumer protection authority, conduct which might also be challenged under its antitrust authority as unfair methods of competition (as it did in *N-Data*¹²). Thus, it might seek (routinely or otherwise) civil penalties for competition infringements. Here, also, Judicial fears about overdeterrence could induce courts to cramp the sensible development of doctrine.

Given these concerns, instead of across-the-board civil penalty authority, Congress may consider more targeted authority to seek civil penalties where restitution or disgorgement may not be appropriate or sufficient remedies. Categories of cases where civil penalties could enable the Commission to better achieve the law enforcement goal of deterrence include malware (spyware), data security, and telephone records pretexting.¹³ What makes these cases distinguishable is that consumers have not simply bought a product or service from the defendants following defendant's misrepresentations and it is often difficult to calculate consumer losses or connect those losses to the violation for the purpose of determining the amount of restitution. In addition, disgorgement may be problematic. In data security cases, defendants may not have actually profited from their unlawful acts. The Commission has also found that in pretexting and spyware cases, the defendants' profits are often minor, and disgorgement would accordingly be an inadequate deterrent.

III. Independent Litigating Authority for Civil Penalty Actions

As noted above, the Commission must generally refer civil penalty actions to the DOJ.¹⁴ The Commission has recommended to Congress that the FTC be able to bring actions for civil penalties in Federal court without mandating that DOJ have the option to litigate on the FTC's behalf. I support expanding the FTC's inde-

To Enhance the Commission's Ability to Protect Consumers Before the Subcommittee on Consumer Protection, Product Safety, and Insurance of the Committee on Commerce, Science, and Transportation, U.S. Senate (July 14, 2009), available at www.ftc.gov/os/2009/07/P094402antifraudlawtest.pdf.

¹⁰In general, under the FTC Act, the Commission must notify the Attorney General of its intention to commence, defend, or intervene in any civil penalty action under the Act. See 15 U.S.C. § 56(a)(1).

¹¹See, e.g., *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 136–37 (1998) (“To apply the per se rule here . . . would transform cases involving business behavior that is improper for various reasons, say, cases involving nepotism or personal pique, into treble-damages antitrust cases.”); III PHILLIP AREEDA & DONALD F. TURNER, *ANTITRUST LAW* (1978), ¶625; William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, 2007 COLUM. BUS. L. REV. 1, 51–64.

¹²In *the Matter of Negotiated Data Solutions LLC*, File No. 0510094, Complaint, Decision and Order, and other documents, available at <http://www.ftc.gov/os/caselist/0510094/index.shtm>. In my dissent, I noted that, if unfair acts coverage extends to the full range of business-to-business transactions (as *N-Data* suggests it might), it would seem that the three-factor test prescribed for unfair acts (15 U.S.C. § 45(n)) could capture all actionable conduct within the FTC's competition jurisdiction, including conduct within the proscriptions of the Sherman and Clayton Acts. See Dissenting Statement of Commissioner Kovacic, In *the Matter of Negotiated Data Solutions LLC*, File No. 0510094, available at <http://www.ftc.gov/os/caselist/0510094/080122kovacic.pdf>.

¹³See Prepared Statement of the Federal Trade before the Committee on Commerce, Science, and Transportation, U.S. Senate (Apr. 8, 2008), at 10–12, available at <http://www.ftc.gov/os/testimony/P034101reauth.pdf>.

¹⁴In general, under the FTC Act, the Commission must notify the Attorney General of its intention to commence, defend, or intervene in any civil penalty action under the Act. 15 U.S.C. § 56(a)(1). DOJ then has 45 days to commence, defend, or intervene in the suit. *Id.* Should DOJ not act within the 45-day period, the FTC may file the case in its own name, using its own attorneys. *Id.*

pendent litigating authority when it seeks civil penalties as it would allow the agency with the greatest expertise in the FTC Act to litigate more of its own civil penalty cases, while still retaining the option to refer matters—where appropriate—to the DOJ. This would be in line with the authority granted to other agencies, such as the Securities and Exchange Commission (“SEC”) and Commodity Futures Trading Commission (“CFTC”). The SEC has such independent authority to seek judicial civil penalties for any violation of the securities laws,¹⁵ and may even issue administrative penalties against registered entities.¹⁶ The CFTC may also seek judicial civil penalties or assess administrative civil penalties.¹⁷

Apart from having the efficiency of having the agency with the most expertise in the area bringing the civil penalty prosecutions, it will also result in more timely actions. Currently, once the FTC makes a referral, DOJ has 45 days to commence a civil action. This extra time, and the associated delay necessary to brief DOJ attorneys on a case already familiar to their FTC counterparts, could be easily avoided if the FTC could seek civil penalties directly.

IV. Aiding and Abetting a Violation

The Supreme Court’s ruling in *Central Bank of Denver v. First Interstate Bank of Denver*¹⁸ threw the Commission’s ability to pursue those who assist and facilitate unfair or deceptive acts and practices into doubt. As the Commission has recommended in the past, I believe that Congress should clarify that the Commission is able to challenge those who provide knowing and substantial assistance to others who are violating Section 5 of the FTC Act.¹⁹

V. Conclusion

Thank you for the opportunity to submit this statement for the record. I hope that my comments will be useful to the Subcommittee.

I share concerns over the impact a new regulator like the Consumer Financial Protection Bureau could have on the FTC’s role in consumer protection, financial services and products. However, those concerns do not create an immediate need to address changes to FTC rulemaking authority and enforcement over its entire jurisdiction.

So, I want to thank our Chairman and work with him in any efforts to reauthorize the FTC. And I certainly hope that, when legislative text is available, we will make every effort to have a legislative hearing. That type of process is the best way to ensure that changes are thoroughly vetted as we fully understand the ramifications of any new FTC authority.

So, thank you, Mr. Chairman.

I want to thank our witnesses for joining us today. And we welcome your expertise in working through these issues.

Senator PRYOR. Thank you.

Senator KLOBUCHAR.

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

Senator KLOBUCHAR. Thank you very much, Senator Pryor. Thank you for holding this important and timely hearing.

And thanks, Chairman Rockefeller, as well.

As a former prosecutor, I’ve seen the devastating effects on the lives of those that have been financially victimized, and I know how important it is that our law enforcement agencies have the

¹⁵ 15 U.S.C. § 77t.

¹⁶ 15 U.S.C. § 78u–2.

¹⁷ 7 U.S.C. § 9; 7 U.S.C. § 13a; 7 U.S.C. § 13a–1.

¹⁸ 511 U.S. 164 (1994).

¹⁹ See Prepared Statement of the Federal Trade before the Committee on Commerce, Science, and Transportation, U.S. Senate (Apr. 8, 2008), at 22–23, available at <http://www.ftc.gov/os/testimony/P034101reauth.pdf>.

tools and resources they need to effectively investigate and prosecute those crimes.

Since coming to the Senate, I have worked closely with the FTC, in particular, to help protect consumers from fraud and abuse. From working to curb anticompetitive behavior in the pharmaceutical industry to protecting consumers from online scams, I have found the FTC to be a very strong ally in our fight to protect consumers.

This hearing comes at an important time as we work to create a framework for financial regulatory reform. As we look at the options available to us, we must carefully examine the future role the FTC will play. As we consider various options for strengthening enforcement in the financial industry, I want to be assured that consumers won't lose out. Moving forward, we need to make sure, as Senator Pryor and Senator Wicker mentioned, that the FTC has the resources it needs to pursue those who perpetrate fraud, and deter those who may even consider such crimes.

Finally, I'd like to add that, as we look at these regulatory options and we work together to find common ground, we have to remember that the ideas of consumer protection and a healthy business environment are not always at odds with each other; in fact, sometimes it is quite the opposite. Consumers win when competition is strong, and businesses win when consumers have confidence in the marketplace.

I think of two incidences, just in the last year, when we worked with retailers who were very concerned about the lead-in-toy issue and actually wanted a bill to pass that would show the people of this country that we were going the extra mile to protect the consumers that frequent their stores. Or I think about the formaldehyde bill, that I have with Senator Crapo, where the timber industry is behind us because they know that they want to protect people from wood products that contain formaldehyde, and they know that that's not coming from them, it's coming from other countries, since they voluntarily agreed to some strong consumer standards. So, that's just two examples, that I just thought of when I was sitting here, of where industry and consumer interests are aligned.

Thanks again, Senator Pryor and Senator Rockefeller, for holding this hearing. And I look forward to hearing from our witness.

Senator PRYOR. Thank you.

Our first witness today is J. Thomas Rosch. He's a Commissioner with the Federal Trade Commission. I have a longer bio on you, but, in the interest of time, I'll just give that very concise introduction.

But, also I want all the witnesses to know that we'll make your statements part of the record, your written statements. And we would like to ask each of you to keep your opening statements to 5 minutes.

Mr. Rosch.

**STATEMENT OF HON. J. THOMAS ROSCH, COMMISSIONER,
FEDERAL TRADE COMMISSION**

Mr. ROSCH. Thank you very much, Chairman Pryor and Ranking Member Wicker, and Senator Klobuchar, as well, for this chance to speak with you about the proposals to provide the FTC with addi-

tional tools to protect consumers in the marketplace. And I stress that it's consumer protection law enforcement tools that we're talking about today, not antitrust law enforcement tools.

I'd like to briefly discuss each of those proposed tools.

The first is APA rulemaking. The need for APA rulemaking—and I'm talking now not about expedited APA rulemaking, but about regular notice-and-comment rulemaking—is rooted in the fact that our basic organic statute, which is Section 5 of the FTC Act, is a very broad statute. On the consumer protection side, it prohibits, quote, “all unfair or deceptive acts or practices.” Rules fleshing out that broad statute are good for both consumers and the industry, as the Senator has said.

They describe with specificity what the rules of the road are. Take, for example, the Franchise Rule and the Funeral Rule. They inform businesses about the particular information they must provide to consumers during their transactions, and the ways in which to provide it, in order to prevent deception. As such, they've been very helpful in improving competition and the marketplace.

APA rulemaking, I should stress, is not radical. The SEC, for example, has the authority to engage in notice- and-comment APA rulemaking, and it seeks civil penalties for violation of those rules. Nor can any adverse inference be drawn from the Commission's existing Magnuson-Moss rulemaking procedures, under which rules can be enforced with civil penalties. I know, because I was present at the creation. I happened to be at the Bureau of Consumer Protection in 1974, when Magnuson-Moss was enacted.

We had rulemaking at the time, but not the authority to enforce a rule with civil penalties. We at the Commission suggested the current Magnuson-Moss statute to give us both. That statute has turned out to be enormously burdensome and expensive, involving lengthy hearings and cross-examination—in essence, a trial. But nobody knew that then. In fact, there have not been any Magnuson-Moss rules since 1978. That's 32 years.

Both we and the Congress just felt, as I say, that rules that had teeth in them were a good thing for both consumers and good corporate citizens. That's what Magnuson-Moss was about.

The second tool is enhanced new civil penalty authority. Let me be clear about what I don't support and what I do support. I don't support a scenario where the FTC, ourselves, can order civil penalties for violations of Section 5. I think Commissioner Kovacic is correct that coupling that kind of civil penalty authority with a statute that is as expansive as Section 5 needs some checks and balances. But I do support a grant of authority to enable us to seek civil penalties for Section 5 violations in Federal district court, where a Federal judge would ultimately decide whether, and how much of, a civil penalty would be obtained. Settlements involving civil penalties also would be filed in Federal district court and be subject to court review. As I say, that wouldn't be radical.

The third tool is independent litigating authority. As matters now stand, we don't have authority to file and litigate civil penalty cases in our own name, though we can do that when we seek other remedies. Instead, any cases seeking civil penalties must be referred to the Department of Justice, which has 45 days within which to file a civil penalty action on our behalf. As a result, we've

often had to make a choice, even before the facts of the case have been thoroughly investigated, between seeking immediate relief and pursuing consumer redress, or instead seeking civil penalties by referring the case to Justice and forgoing the ability to pursue relief, such as a TRO or asset freeze. That makes no sense. We should have the authority to pursue the most appropriate remedy in order to protect consumers. Again, as you probably know, other agencies, such as the SEC, routinely file such cases on their own behalf.

And the fourth tool is clarification of our aiding and abetting authority. Historically, we operated with the understanding that there was an implied cause of action for aiding and abetting under Section 5. Unfortunately, the decision in *Central Bank of Denver* threw that into doubt, and I'd encourage you to clarify the law to make sure that we have that aiding and abetting authority.

Thank you, Mr. Chairman. And I'll be glad to answer any questions that any member of this committee might have with respect to any of these four tools, as well as the Dodd Act.

[The prepared statement of Mr. Rosch follows:]

PREPARED STATEMENT OF HON. J. THOMAS ROSCH, COMMISSIONER,
FEDERAL TRADE COMMISSION

Thank you, Chairman Pryor, Ranking Member Wicker, and distinguished members for this chance to speak about proposals to provide the Federal Trade Commission with additional tools to protect consumers in the marketplace. I'd like to briefly discuss each of these proposed tools.

APA Rulemaking: The first is APA rulemaking. The need for APA rulemaking is rooted in the fact that our basic organic statute—Section 5—is a very broad statute. On the consumer protection side, it prohibits “all unfair or deceptive acts or practices.”

Rules fleshing out this broad statute are good for both consumers and the industry. They describe with specificity what the “rules of the road” are. Take for example, the Franchise Rule and the Funeral Rule. They inform businesses about the particular information they must provide to consumers during their transactions, and the ways in which to provide it, in order to prevent deception. As such, they've been very helpful in improving the marketplace.

APA rulemaking isn't radical. The SEC, for example, has the authority to engage in “notice and comment” APA rulemaking; and it seeks civil penalties for violations of those rules.

Nor can any adverse inference be drawn from the Commission's existing Magnuson-Moss rulemaking procedures, under which rules can be enforced with civil penalties. I know because I was “Present at the Creation” in 1974 when the Magnuson-Moss Act was enacted. We had rulemaking authority at the time, but not the authority to enforce a rule with civil penalties. We at the Commission suggested the current Magnuson-Moss statute to give us both. That statute has turned out to be enormously burdensome and expensive, involving lengthy hearings and cross-examination (in essence a trial), but nobody knew that then. Both we and the Congress just felt, as I say, that rules that had teeth in them were a good thing for both consumers and good corporate citizens.

Civil Penalty Authority: The second tool is enhanced new civil penalty authority. Let me make clear what I *don't* support and what I *do* support.

I *don't* support a scenario where the FTC ourselves can order civil penalties for violations of Section 5. I think Commissioner Kovacic is right that coupling that kind of civil penalty authority with a statute that is as expansive as Section 5 needs some checks and balances.

However, I *do* support a grant of authority to enable us to seek civil penalties for Section 5 violations in Federal district court, where a Federal judge would ultimately decide whether and how much of a civil penalty would be obtained. Settlements involving civil penalties also would be filed in Federal district court and be subject to court review. As I say, that wouldn't be radical.

Independent Litigating Authority: The third tool is independent litigating authority. As matters now stand, we don't have authority to file and litigate civil penalty

cases in our own name (although we can do this when we seek other remedies). Instead, any cases seeking civil penalties must be referred to the Department of Justice, which has 45 days within which to file a civil penalty action on our behalf. As a result, we often have to make a choice—even before the facts of a case have been thoroughly investigated—between seeking immediate relief and pursuing consumer redress, or instead seeking civil penalties by referring the case to Justice (and foregoing the ability to pursue relief such as a TRO or asset freeze). That makes no sense. We should have the authority to pursue the most appropriate remedy in order to protect consumers. Again, as you probably know, other agencies, such as the SEC, routinely file such cases on their own behalf.

Aiding and Abetting: The fourth tool is clarification of our aiding and abetting authority. Historically we operated with the understanding that there was an implied cause of action for aiding and abetting under Section 5 of the FTC Act. Unfortunately, the 1994 decision in *Central Bank of Denver* threw this into doubt. I'd encourage you to clarify the law and provide us with explicit authority to take law enforcement action against those who provide substantial assistance to another while knowing, or consciously avoiding knowing, that the person is engaged in unfair or deceptive acts or practices in violation of Section 5 of the FTC Act.

Senator PRYOR. Thank you very much.

Mr. ROSCH. Or Dodd bill, rather.

Senator PRYOR. Yes. I'll go ahead and start us today.

Let me dig in, if I can, on the Magnuson-Moss issue, which was your first point. You talk about "APA rulemaking isn't radical," you talk about the SEC, and so, it sounds like you definitely support the changeover from the current Magnuson-Moss to the APA—the regular APA rulemaking authority.

Mr. ROSCH. That's correct, Mr. Chairman. I will say that, as somebody who tried cases for more than 40 years, I never, ever participated in a trial that lasted as long as a Magnuson-Moss hearing did, and I never had the misfortune to participate in a case that lasted as long as some of these Magnuson-Moss proceedings do.

Senator PRYOR. And how long do they last?

Mr. ROSCH. They last, on average—the hearing lasts, on average, 38 days. The proceeding lasts, on average, for 7 years. That's an average. We have not proposed any Magnuson-Moss rules since 1978, unless one wants to count our recent attempt to carve out business opportunities from the Franchise Rule. That was proposed 4 years ago, and it didn't involve a hearing.

Senator PRYOR. And what is it about Magnuson-Moss that takes so long?

Mr. ROSCH. I beg your pardon?

Senator PRYOR. What is it about the statute that takes so long? Why is it so cumbersome?

Mr. ROSCH. A large part of the cumbersome aspect of Magnuson-Moss is attributable to the hearing process. But, it is by no means the only part of it that's cumbersome.

Senator PRYOR. Well, one reason I ask is, you know, you compared it to a trial; most trials don't take 7 years to get to a conclusion, or don't take—however—38 days, or whatever you said. So, what is it about the hearing process that just makes it go on and on?

Mr. ROSCH. Well, the hearing process involves a number of things. First of all, it involves every participant being able to suggest disputed issues of fact to the Presiding Officer at the hearing trial. And sometimes there are dozens and dozens of these participants in the process. So, that takes quite a while.

Second, there is cross-examination, just as there is in a regular trial, as well as direct examination. There are closing arguments. It is presided over by a hearing officer. The whole proceeding is presided over by a hearing officer. I don't know that there's any way to shorten the process, if one assumes that this process was supposed to hamstring us, which it was not.

Senator PRYOR. And if you could change—let's just say that the Congress decides not to repeal Magnuson-Moss, but decides to—let's just say one major change. Let's say the Congress decides to do one major change. What would you recommend that that one change be?

Mr. ROSCH. Well, there have been four, actually that have been proposed. Let me briefly recount what those are.

Senator PRYOR. Sure.

Mr. ROSCH. One is that we would retain the prevalence requirement—namely that an act or practice be prevalent in an industry before a rule could be enunciated. That was a requirement which the District of Columbia Court of Appeals upheld in the Katharine Gibbs case some time ago. And we take that quite seriously. That is part of the statute. What does “prevalence” mean? That's one problem with retaining the requirement.

The other problem I've got with that particular suggestion is that, frankly, the adage is correct that one bad apple, or a number of bad apples, can spoil the whole barrel. I believe that to be true. I think we hurt businesses if we impose too strict a prevalence rule—the legitimate businesses that are the good apples in the bunch.

Senator PRYOR. So, prevalence is—

Mr. ROSCH. Prevalence is one.

Second is to eliminate the hearing process. As I say, that would help, but it certainly did not shorten considerably our recent experience with the Business Opportunities Rule.

Third is, allow oral submissions. We already do that, to some extent, by allowing voluntary oral submissions. We also do it, frankly, by outreach, which I myself have participated in.

The fourth is to have a statement of economic effects. That's required right now with respect to the costs of a rule. So we do spell out what the costs of every rule will be, APA or otherwise. So, we're already doing that.

And the fifth is a standard of judicial review, which for Magnuson-Moss is substantial evidence, and for APA rulemaking is arbitrary and capricious. The problem with that is, the standard of review is already the same, according to, now, Justice Scalia's decision in the 1986 case, Consumer Union's case.

Senator PRYOR. Thank you.

Senator WICKER.

Senator WICKER. Thank you very much, Mr. Rosch. Appreciate your testimony.

The Magnuson-Moss Act resulted from a feeling that, because of the sweeping powers the FTC has, there was a need for protections against overzealous regulation. And apparently that argument carried the day and resulted in Magnuson-Moss. Do you believe that basic finding was in error at that time, in the early 1970s?

Mr. ROSCH. Absolutely, Senator. And I'm a Republican, I should add. But, that was my view then, and it is my view now.

Senator WICKER. So, actually, Magnuson-Moss was a mistake from the get-go.

Mr. ROSCH. Magnuson-Moss, the way it has turned out—the way it has turned out was a prescription for doing nothing with respect to rulemaking.

Senator WICKER. Well—

Mr. ROSCH. It brought rulemaking to a halt. And there was no reason for that, because at the time that it was enacted, we had enacted very few rules, and they were not abusive rules. The Funeral Rule was not an abusive rule. The Holder-in-Due-Course Rule was not an abusive rule. These were some of the rules that were enacted before the end of 1974, when Magnuson-Moss was enacted.

Senator WICKER. OK. Well, you compared this to trials in court. It seemed to me that perhaps the Commission could bring in some Federal judges and Federal administrators and get some advice from Federal courts, if they do things so much faster. For example, evidential hearings, with direct and cross-examination, you argue, is an unnecessary step. I think many Americans might think that, "Well, in the case of an agency with powers like this, we should keep that."

The 38 days for testimony, surely there's a way to shorten that, short of adopting the APA. The proceedings lasting 7 years—of course, we know that, once a case is tried in Federal court, sometimes the appeals and various levels of the district court, the circuit court, and the Supreme Court might last that long. Might it be that, if we provided the FTC with more resources, this 7-year average proceedings—or the proceedings lasting as long as 7 years could be shortened if we provided FTC with additional resources? Might that be another approach to this?

Mr. ROSCH. I think not, Senator. And let me tell you why I think that's so. The reason I think that is so is because the hearing process is not by any means the only resource-intensive part of this entire process. There are, by my count, 29 sequential steps in Magnuson-Moss rulemaking.

Senator WICKER. And you're going to supply that for us on the record? OK.

Mr. ROSCH. We have already, Senator. That is part of the submission that was sent up earlier this week.

But, in any event, I will say this. I was an antitrust lawyer. Those are the cases that I tried, and they were complex. You are quite correct that sometimes the appellate process lasted as long as some of these proceedings did. When you include the appellate process, that is correct. However, what I'm talking about in terms of the average length here—7 years—is just the rulemaking process. It does not involve appellate process at all. So, I don't think, frankly, giving the Commission a whole lot of resources is going to solve the problem, not when you have that many sequential steps in the entire process.

Senator WICKER. All right. Now let me ask about prevalence. Would it help if we better defined the term "prevalence"? We could

do that without adopting the Administrative Procedures Act for the FTC, couldn't we?

Mr. ROSCH. I think that that would be—that would be useful, Senator. I don't think it would be—it doesn't cure the bad-apple-in-the-barrel problem, but it certainly would cure the problem of ambiguity.

Senator WICKER. OK.

Thank you, Mr. Chairman.

Senator PRYOR. Thank you.

Senator Klobuchar.

Senator KLOBUCHAR. Thank you very much, Mr. Chairman.

You know, whenever we talk about enhancing the authority of the FTC—and I believe that we should do everything we can to give you the tools that you need—but, there are always concerns about due process and—for all affected parties. Could you talk about how we could do this in a way that makes sure that we are giving you the tools that you need and, at the same time, making sure that due process is there for the parties that are affected?

Mr. ROSCH. Yes. Thank you, Senator. I think that the answer to that lies in what other agencies have, the authority that they have. They have notice-and-comment APA rulemaking authority. Their rulemaking has not been successfully challenged on the grounds that it violates due process. They have been able to make rules just fine with this process. And so, frankly, have we. On the five occasions when we've come to this committee and we've asked, specifically with respect to special statutes, that we be given APA rulemaking authority, we have acted responsibly in each and every one of those cases. And it has not—the process has not lasted for 7 years. So, we can do it. Other agencies can do it, consistent with due process. I think that that's the answer.

Senator KLOBUCHAR. OK. The aiding-and-abetting enforcement authority that you talked about earlier, some people talk about how the Commission's unfairness jurisdiction would provide adequate authority to the FTC to pursue third parties who facilitate fraud. What is the response to that?

Mr. ROSCH. I think we have proceeded under the unfairness prong of Section 5 from time to time. We've also proceeded under various other theories since the Central Bank case, but nothing is as good as clarification with respect to our aiding-and-abetting authority. That—I believe, in my heart of hearts, that that is true. I just don't think it's a substitute. We can use these other tools, if you wish, but I think both you and we would be accused of pounding a round peg into a square hole. It just doesn't fit.

Senator KLOBUCHAR. When Chairman Leibowitz was here, I talked to him. I know he's getting these examples together, examples of how your ability has been hampered in recent years to protect consumers, by lack of the rulemaking authority. Do you have some examples of that?

Mr. ROSCH. Well, all I can say is that when I came back to the Commission in 2006, it was a completely different ball game than it was when I left in 1975. Practices that we never dreamed of occurring then are occurring now. And frequently, they cannot be the subject of consumer redress because while they hurt consumers, they don't hurt their pocketbooks.

Now, what am I referring to? I'm referring, for example, first of all, to the situation where there's foreclosure relief. That doesn't necessarily hurt every consumer, though it certainly does sometimes. Data security, identity theft, those are practices which hurt consumers, but they may not hurt them in the pocketbook.

Similarly, with respect to a lot of online practices, where we see spam, we see malware that isn't so prevalent that it fouls up your computer and makes it impossible for you to use it. That hurts consumers, but it doesn't necessarily cause them injury in their pocketbooks. So, we can't effectively get consumer redress for those practices. What we can do to stop them, though, is to seek civil penalties. And that's our only alternative, and that's what we try to do. That's why we want civil penalty authority that is enhanced.

Senator KLOBUCHAR. Thank you. One last question. I know, from my days as a prosecutor, that financial scams are incredibly difficult to investigate; they take a lot of resources and know-how. You need sophisticated employees. I can't tell you the number of times we had police, with good meaning, go into a house that had a computer on, maybe it was a child porn case, and they'd turn it on and just start—and it would—automatically, because the perpetrator would have put something in there that it meant it was all erased and—or that somehow the evidence got ruined. So, computer specialists, other skilled professionals, do you feel that you have the professionals on staff and the know-how to investigate these financial frauds? And what could we do to help?

Mr. ROSCH. We are facing a huge financial crisis, still, I think. The fact of the matter is, there are mortgage frauds today. There are still, as I indicated before, foreclosure relief issues. There are debt settlement issues. And all of those are very complicated. They do require the kinds of tools that you're talking about. I'm convinced that we at the FTC, have the best professionals that are available. But we could always use more, particularly in an environment like this.

Senator KLOBUCHAR. Thank you very much.

Senator PRYOR. Thank you, Senator Klobuchar.

And we have about 5 or 6 minutes left in the vote, so I assume you're going to hustle over there and cast your vote. And Senator Wicker's on his way back.

And before I bring up the next panel, I would like to say that I have—

**STATEMENT OF HON. TOM UDALL,
U.S. SENATOR FROM NEW MEXICO**

Senator UDALL. Senator Pryor, could I just—

Senator PRYOR. Oh. I'm—

Senator UDALL. Yes.

Senator PRYOR.—I'm sorry.

Senator UDALL. I was—

Senator PRYOR. I am so sorry. You snuck in on me.

Senator UDALL. I'm just sitting over here silently—

Senator PRYOR. Thank you.

Senator UDALL.—but, I wish to—

Senator PRYOR. Yes.

Senator UDALL.—to participate—

Senator PRYOR. I apologize.
 Senator UDALL.—a little bit here.
 Senator PRYOR. I apologize. Well, I may go vote——
 Senator UDALL. No problem.
 Senator PRYOR.—I may go vote——
 Senator UDALL. OK.
 Senator PRYOR.—then. Thank you.
 Senator UDALL. OK. Thank you.
 Senator PRYOR. Have you voted?
 Senator UDALL. I haven't voted.
 Senator PRYOR. OK. OK. OK.
 Senator UDALL. I haven't voted for——
 [Laughter.]

Senator UDALL. Let me just be very quick. And I want to agree with what I've heard earlier, that we have to give you the tools. And I know as a State Attorney General, when we were doing a lot of this work, protecting the public, that if you don't have the tools, it can take a long time to get them. And so, the question I really want to ask you is, it seems like you're advocating for a lesser authority than the APA. And so, if you compare these two—you have the lesser authority and you have the APA—what's the time difference to get something in place to protect the public? I've had the figure given to me, here, you know, that it takes 7 years under Magnuson-Moss. And I think what I'm advocating, and I others here are advocating—How do we get it to the point where you can more quickly protect the public, than that kind of timeline? And what do you see as a timeline?

Mr. ROSCH. First of all, let me make it clear, Senator Udall, that as far as I'm concerned, we can handle APA rulemaking. We have done it responsibly; I think we can do it.

Senator UDALL. You can handle it.

Mr. ROSCH. Absolutely.

Senator UDALL. Yes.

Mr. ROSCH. I don't know that anything in between is necessary, or even desirable.

Senator UDALL. And you would like it. You——

Mr. ROSCH. I——

Senator UDALL. As Commissioner, you would like that authority.

Mr. ROSCH. I'd like APA rulemaking authority.

Senator UDALL. Yes.

Mr. ROSCH. I've mentioned five suggestions for an in-between solution, and I've tried to identify the problems with each of them. I don't know of any suggestion that's been made for an in-between solution that doesn't have some problems attached to it.

Senator UDALL. Great. So, that's good to have on the record. You're an advocate for the Commission having APA.

Mr. ROSCH. That's correct.

Senator UDALL. Yes.

Mr. ROSCH. But, let me make it clear, Senator, that I speak for myself, and not necessarily for the Commission on that regard.

Senator UDALL. No. No, we all understand that.

Knowing we have a vote on, Mr. Chairman, I would yield back any time. Thank you very much.

Senator PRYOR. Thank you, Senator.

Senator UDALL. And thank you for your leadership on these issues.

Senator PRYOR. Thank you, Senator Udall. And I'm sorry I almost skipped over you. I just didn't see you slip in. I apologize for that.

I have two last questions. One is the question of independent litigating authority.

Mr. ROSCH. Yes.

Senator PRYOR. And could you just give us your thoughts and—very concisely on that? You mentioned it in your opening statement, but I just want to make sure I'm clear on where you stand on that.

Mr. ROSCH. OK. With respect to independent litigating authority, as far as, I know we are the only agency that has to have Justice do it for us. And we can go to the Federal district court, as it is right now, and seek a TRO, or preliminary injunction, and consumer redress. We can do that. But, when it comes to civil penalties, we can't do that. It's got to be done for us by Justice.

First of all, I think that's anomalous. It's particularly anomalous because the Dodd bill would give that independent authority to a new bureau—brand new bureau, completely untested as to how they would use it.

Senator PRYOR. That was actually—my second question is a very succinct, if possible, analysis of the Dodd bill. I'm going to have to go vote, here, in just a minute or so, but—I'll tell you what I may do is, I may—because I do want the Committee to have this answer, and I would like to get your thoughts on that. So, I'll go ahead and ask it, and I'll let Senator Wicker, then, take the gavel at that point. But, go ahead—if you don't mind, give the subcommittee your thoughts on the Dodd legislation and how it might impact the Federal Trade Commission.

Mr. ROSCH. OK. I think the first thing to be said is that it's a very lengthy bill, and we have not completely analyzed it yet. But we've done our best to review it, to identify those problems that are in it. And we will do our best to get a fix to those problems up to you, Senator, and as well as to the entire committee, as quickly as possible, hopefully by the end of the week.

Frankly, at this point, I think that the heart is in the right place. I see the intent of the Dodd bill to protect the FTC, just as the House bill does. But, I'm not clear that that intent is reflected in its sometimes warring provisions.

For example, sometimes the Dodd bill seems to take away all of our consumer protection authority, and at other times it talks about us having concurrent authority with this new bureau. Now, those can't coexist. There's not a savings clause that gives us back what's been taken away, as there is in the House bill. That's one of the major fundamental problems with the Dodd bill, and that's one of the things that we'll be sending up as a fix to you in the next couple of days.

It is vital, in our opinion, that these problems be fixed, because I'm afraid that some of these powers may fall betwixt and between the two agencies, or between the bureau, on the one hand, and the FTC, on the other hand. What is a financial practice or a financial institution versus a nonfinancial practice or a nonfinancial institu-

tion? It's very much in the eye of the beholder. And unless there are clear demarcations, I'm afraid that things are going to fall between the cracks. Unless our authority is really beefed up the way that we suggest that it should be, I'm concerned that consumers and businesses are not going to be protected the way that they ought to be.

Now, my first choice, frankly—and I'm speaking, again, for myself, Senator Wicker—my first choice is that the FTC be given all of the authority over consumer protection law enforcement—with the exception of safety and soundness. We have no core competency in that area, and I see a tension between that and consumer protection law enforcement in some instances.

But, my second choice is, frankly, that we have concurrent jurisdiction with a bureau or agency, whatever it happens to be called. We've cooperated with sister agencies in the past, we'll continue to do so in the future.

Senator WICKER [presiding]. Well, thank you very much, Mr. Rosch. And I know that if the Chairman were not away at a vote, he would also thank you.

We very much appreciate your testimony and those items that you will add to the record. So, we very much appreciate it.

And we—it now is time to bring forward panel number two.

Mr. ROSCH. Thank you, Senator.

Senator WICKER. Thank you so much.

Panel number two consists of Mr. Edmund Mierzwinski, Director of Consumer Program, Federation of State Public Interest Research Groups; The Honorable Timothy Muris, former Chairman of the Federal Trade Commission, now at the George Mason University Law School; Ms. Dee Pridgen, Associate Dean and Professor of Law at the University of Wyoming, College of Law; and Ms. Linda A. Woolley, Executive Vice President for Government Affairs at the Direct Marketing Association in Washington, D.C.

We very much appreciate these witnesses being here, also. It's such a pretty day outside that, in absence of the Chairman, I'm tempted to suggest that we have class outdoors.

[Laughter.]

Senator WICKER. But, I'll not—

VOICE. Sounds good.

Senator WICKER.—I'll not abuse my temporary privileges.

But, we're glad to have all four of you, as we appreciate Commissioner Rosch, also.

So, again, we're asking witnesses to limit testimony to 5 minutes each. And we'll begin, from my left to right, with Director Mierzwinski.

And if I need to be corrected on the pronunciation of your name, now would be a good time for that, so we won't do it all afternoon.

**STATEMENT OF EDMUND MIERZWINSKI,
CONSUMER PROGRAM DIRECTOR,
U.S. PUBLIC INTEREST RESEARCH GROUP**

Mr. MIERZWINSKI. Thank you, Senator Wicker and members of the Committee. I'm Ed Mierzwinski, consumer program director of the Public Interest Research Groups.

That was a very good pronunciation. The—

Senator WICKER. I left out the “z.”

Mr. MIERZWINSKI. Right.

Well, the State Public Interest Research Groups are a federation of nonprofit, nonpartisan consumer and public interest advocacy groups. We are here—and we have been long supporters of the Federal Trade Commission. We also support Congress enacting and establishing a new consumer financial protection agency that has broad power over regulation of all consumer financial products, whether you purchase them at a bank or at a nonbank. Nevertheless, we also support strengthening the authorities of the Federal Trade Commission, as well.

Over the last several years, the collapse of the economy was precipitated by a number of practices in the financial industry. The housing bubble was not recognized by the Federal Reserve Board; large financial institutions, not under the jurisdiction of the Federal Trade Commission, used exotic financial instruments as a match that lit the economy on fire. But, there was an accelerant to that fire in the economy, and that accelerant was the rise of predatory lending.

We believe that if the FTC had had broader authority and broader ability to take action, that the problem would not have been as great as it ended up to be in the end. We believe that it's time to modernize the FTC's authority so it can address new threats to consumers and communities, and in particular, to address the aftermath of this problem, as other witnesses have discussed, or will discuss.

Every time you have a financial crisis you have new scams and new schemes to take what money is left in consumers' wallets. So, we've already heard from the Commissioner about foreclosure relief scams and other scams that the Federal Trade Commission needs to be able to go after.

We also support returning to a system where Federal law returns to a floor, not a ceiling, of protection, and that states can go further, and their attorneys general can go further, in protecting the public.

Well, we have four recommendations to strengthen the Federal Trade Commission:

First, we also support, as was in—by the way, all of our recommendations, but one, are in the Obama-proposed legislation that the House enacted as H.R. 4173, the Wall Street Reform and Consumer Protection Act, on December 11.

First, the Obama proposal is enacted, in the House bill, to return the FTC to the more prevalent Administrative Procedures Act rule-making that is used by virtually every other agency. As Chairman Leibowitz testified last month in this committee, “Magnuson-Moss rulemaking is both draconian and medieval.” And I don't think he was being redundant. This committee, last year, already gave the Federal Trade Commission, in Section 626 of the omnibus appropriations bill, the—some of this authority, and we would encourage you to give it to the entire Commission's jurisdiction.

Second, the Obama proposal is enacted in the bill that gives the Federal Trade Commission the right to sanction professionals who are aiding and abetting unfair practices. There is no question that, behind every scammer's scheme, there could be a banker, there

could be a lawyer, there could be an accountant who could have stopped the scheme. We're not looking for deep pockets, we are looking to hold people involved in schemes accountable.

Third, we believe that a fundamental flaw in the FTC's authorities are its lack of ability to impose civil penalties, except in limited circumstances and except when it goes to the Justice Department. You have to have previously violated an order of the Commission, or in some cases it—some of the companies under its jurisdiction are, in fact, under trade rules that do have civil penalty authority for a first offense.

Commissioner Rosch talked about practices that harm consumers that are new, that weren't envisioned when the original Magnuson-Moss Act was passed and the original FTC Act was passed. And the rise of the Internet is certainly one of them, the practices on the Internet—identify theft, data security, the spamming, and the other problems that consumers face.

In the first 20 or so cases that I looked at—and I don't have the complete list with me, but I know that other groups have compiled it—concerning Internet privacy violations, the only time a company was sanctioned with a civil penalty was the company, Choice Point, that, in fact, had also violated the Fair Credit Reporting Act. And had it not been for the fact that it had violated the Fair Credit Reporting Act, even though it sold—it essentially sold credit reports to identity thieves—is the only reason it was sanctioned for \$15 million.

Finally, one thing that is not in either the House bill or the Senate proposal—we strongly support that consumers gain a private right of action under Section 5 of the Federal Trade Commission Act. We believe there should be three prongs of consumer protection in any law: Federal enforcement, state attorney general enforcement, and private enforcement.

Thank you, sir.

[The prepared statement of Mr. Mierzwinski follows:]

PREPARED STATEMENT OF EDMUND MIERZWINSKI, CONSUMER PROGRAM DIRECTOR,
U.S. PUBLIC INTEREST RESEARCH GROUP

Chairman Rockefeller, Senator Hutchison, members of the Committee. My name is Edmund Mierzwinski and I am Consumer Program Director for the Federation of State Public Interest Research Groups, or U.S. PIRG. The state PIRGs are non-partisan, non-profit public interest advocacy organizations that take on powerful interests on behalf of their members.

Among the key issues that the organization has focused on over the years is fairness in the financial services marketplace. We have published reports on skyrocketing bank fees, on inaccuracies in credit reports and other privacy threats, on credit card marketing to college students, on predatory payday loan and rent-to-own stores that seek self-serving exceptions from consumer protection and lending laws and on the need for strong reinvestment laws to ensure that heavily subsidized financial firms serve the interests of the local community. Throughout all these efforts we have urged Congress and Federal regulators to enact and enforce strong Federal laws but as a floor not ceiling of consumer protection so that states and their attorneys general can react quickly to new threats to their citizens and communities. We have also sought to preserve and enhance the rights of consumers to enforce those laws themselves.

Summary

U.S. PIRG strongly supports the proposed Consumer Financial Protection Agency (CFPA). We also support a robust Federal Trade Commission (FTC). The Obama ad-

ministration's proposed Wall Street reform legislation, as enacted by the House in December,¹ effectively provides for both.

U.S. PIRG supports establishment of a new, independent Federal Consumer Financial Protection Agency (CFPA) to protect consumers from unfair credit, banking, payment and debt management products, no matter what company—bank or non-bank—sells them and no matter what agency may serve as the primary prudential regulator for that company or bank. Having one agency for all financial products will prevent regulatory arbitrage, promote efficient rulemaking and give consumers one-stop shopping for their financial complaints.

U.S. PIRG also supports enhancement of the authorities of the Federal Trade Commission (FTC). Even after Congress establishes a CFPA, the Federal Trade Commission will still maintain broad authority over important parts of the marketplace and will also act as the CFPA's enforcement partner in many areas. Its efforts to protect consumers will be enhanced if it is given greater ability to impose civil penalties, the ability to seek redress for aiding and abetting violations and modernized, more efficient rulemaking authority under the Administrative Procedures Act.²

It is time to modernize the FTC's authorities so that it can respond to new threats to consumers and communities. Some of these threats—foreclosure relief and debt settlement scams and other frauds—are on the rise because the Federal bank regulators allowed unsafe and unsustainable practices that led first to the failure of the financial system and then to the collapse of the economy. The FTC can play a critical role in protecting consumers from its aftermath and ensuring that it won't happen again.

We also support return to a system where Federal financial protection law serves as a floor not as a ceiling and where consumers are again protected by the three-legged stool of baseline Federal protection, strong state enforcement and private enforcement.

Discussion

In our view, while the current economic crisis may have been directly caused by Federal Reserve inattention to the housing bubble that grew and then burst into flames—as it was lit by the match of exotic, risky financial instruments used by reckless Wall Street firms deemed too big or too interconnected to fail—the unregulated urge by banks, other lenders, and mortgage companies to extract even greater profits by selling predatory financial products acted as an accelerant to that fire. Those predatory products harmed consumers, families, neighborhoods and communities and helped make the mortgage meltdown into an economic catastrophe for consumers on Main Streets here and around the world.

Unfortunately, over the years the Congress in some cases and, in particular, the Federal banking regulators in nearly all cases have opposed our views that consumers needed to be protected from unfair or predatory financial practices. For at least the last fifteen-twenty years, Federal bank regulator disdain for consumer protection and antipathy toward state attorney general authority has contributed to an atmosphere that led to a spectacular rise in those predatory lending practices by banks, credit card firms and mortgage companies. At the same time, the resources and authorities of the FTC to act in the areas it was allowed to act in were constrained.

That rise in predatory lending was also fueled by regulatory arbitrage at the Federal level that allowed banks to pick and choose the most pliant bank regulator for themselves and also their non-bank affiliates. That contributed to a regulatory race to the bottom. As the report of the House Energy and Commerce Committee on its passage of CFPA legislation explained:

Consumer protection in the financial arena is governed by various agencies with different jurisdictions and regulatory approaches. This disparate regulatory system has been blamed in part for the lack of aggressive enforcement against abusive and predatory loan products that contributed to the financial crisis, such as subprime and nontraditional mortgages.

¹The original administration CFPA and FTC improvement language was released on 30 June 2009 and is available at <http://www.financialstability.gov/latest/tg189.html> (last visited 15 March 2010). The Wall Street Reform and Consumer Protection Act, H.R. 4173, passed the House on 11 December 2009. See Section 4901. This week, Senator Chris Dodd, Chairman of the Senate Banking Committee, released his own comprehensive reform proposal, which does not appear, as filed, to address issues of expanding FTC authorities as discussed herein.

²With assistance from this committee, Congress has recently given the FTC expedited rulemaking authority in the areas of unfair practices related to mortgage loans. See Omnibus Appropriations Act of 2009, Pub. L. No. 111-8, § 626, 123 Stat. 524 (Mar. 11, 2009) as modified by the Credit CARD Act of 2009, Pub. L. No. 111-24, § 511(a)(1)&(2), 123 Stat. 1734 (May 22, 2009).

FTC has broad authority to protect consumers from unfair, deceptive, and unlawful practices with respect to credit and debt. The authority of the FTC is limited, however, to those functions conducted by non-depository institutions. Depository institutions are overseen by the Office of the Comptroller of the Currency, the Office of Thrift Supervision, the Federal Reserve, the National Credit Union Administration, and the Federal Deposit Insurance Corporation.³

Consumer financial products which compete directly against one another are often covered by different laws and thus provide different rights and obligations to the consumer and to the provider. Although many new products are emerging every day, no agency has the single job of evaluating whether or how existing laws and rules should be changed to address emerging financial products. Worse, those bank regulatory agencies have a different, primary job—protecting the safety of the financial system. The new CFPA will have the single job of protecting financial consumers. Even the FTC, a strong consumer protector, has many other jobs.

The idea of a new Federal consumer protection agency focused on credit and payment products has gained broad and high-profile support because it targets the most significant underlying causes of the massive regulatory failures that occurred. First, Federal agencies did not make protecting consumers their top priority and, in fact, seemed to compete against each other to keep standards low, ignoring many festering problems that grew worse over time. If agencies did act to protect consumers (and they often did not), the process was cumbersome and time-consuming. As a result, agencies did not act to stop some abusive lending practices until it was too late. Finally, regulators were not truly independent of the influence of the financial institutions they regulated.

The New CFPA Needs a Stronger FTC As A Partner

Congress can eliminate these weaknesses and inefficiencies in the Federal Government by creating a single Federal agency—the CFPA—with exclusive authority in all consumer protection areas except enforcement. In the area of enforcement, the CFPA should be assisted by a bolstered FTC. The FTC also needs the strengthened authorities to continue its efforts in areas where it remains the primary enforcer in the consumer marketplace.

Establishing a new CFPA—while also enhancing the FTC’s enforcement authority—will remedy many of the inherent flaws in the current system. We believe that as enacted by the House, the Wall Street Reform and Consumer Protection Act, H.R. 4173, offers an approach that the Senate should consider taking.

It establishes a new CFPA as an independent agency⁴ to write rules for all financial products (subject to a few carved-out exceptions) over the entire financial sector, so that no matter where a consumer buys a financial product, at a bank or a non-bank, she has equal protection. But the House bill also improved the Obama proposal because it carefully preserves the FTC as an enforcement partner of the CFPA while eliminating some of the original bill’s consultative and procedural impediments that may have hampered both agencies. At the same time, the House-passed bill significantly improves FTC’s existing authorities. It also retains FTC authority under the FTC Act and the FTC’s enforcement authority under the enumerated statutes, concurrently and in coordination with the CFPA.

As Professor Prentiss Cox has explained, it makes sense to consolidate rule-making in the new agency but to allow for broad enforcement authority under an “open” model, with the FTC—and state Attorneys General—as partners.

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

³ 111th Congress, Rept. 111–367, House of Representatives, at page 91, 9 December 2009.

⁴ The final Senate CFPA proposal may be weaker, however. Senator Dodd’s draft this week places the CFPA inside the Federal Reserve Board as a bureau—although maintaining some independence through firewalls—and subjects its rules to a veto of 2/3rd of the proposed new Systemic Risk Council. Although the Senate proposal as introduced places all four corners of the financial sector—big banks, small banks, mortgage companies and other non-bank lenders—under CFPA’s rules, the CFPA does not have full enforcement authority over non-mortgage, non-banks, making it even more imperative that FTC authorities be bolstered, since the non-bank lenders not fully covered will include predatory payday lenders, rent-to-own stores, auto title pawn loan firms and their ilk.

an open model; a system that allows multiple public entities the opportunity to gauge compliance.⁵

But in addition, as this committee recognized when it recently used the Appropriations process to enact reforms championed by Senator Dorgan and Chairman Rockefeller to the FTC's rulewriting authority over mortgage loans,⁶ the FTC has had only limited weapons in its arsenal against corporate wrongdoing. These shackles and constraints—most enacted in the 1970s—must be removed if the FTC is to be expected to do its job in the 21st century.

Recommendations for the Committee to Improve the FTC's Authorities

The House-passed bill, H.R. 4173, the Wall Street Reform and Consumer Protection Act, makes the following changes to strengthen FTC authorities as recommended by President Obama's blueprint for financial reform. We support the House approach and urge the Committee to work with Chairman Dodd and Senator Shelby, at an appropriate time, to add these provisions to the Wall Street reform package before it is finalized.

First, the Obama proposal as enacted in the House passed bill changes the FTC's cumbersome Magnuson Moss rulemaking process to the more prevalent Administrative Procedures Act (APA) rulemaking process used by other agencies. In his recent testimony to this committee, FTC Chairman Jon Leibowitz called Magnuson-Moss rulemaking both "draconian" and "medieval." He was not being redundant.⁷ As many have noted, the FTC's inability to swiftly enact predatory mortgage lending rules was a contributor to the mortgage meltdown. From testimony before the committee by a leading expert, Kathleen Keest, a former state assistant attorney general:

Though the FTC has authority to enforce the Truth in Lending Act and the Equal Credit Opportunity Act, among others, the nature of the recent abuses were such that its UDAP authority was the primary weapon available to it. However, the FTC's ability to wield that weapon is governed by rules of engagement which make it difficult to prevent abuses. [. . .] *Rule-making: The FTC's "Mag-Moss" Albatross.* . . .⁸

Those UDAP (Unfair and Deceptive Acts and Practices) authorities were limited, as noted, by the "albatross" of the Magnuson-Moss rulemaking provisions. As noted above, the Congress has already extended APA rulemaking authority for "unfair or deceptive acts or practices regarding mortgage loans, which may include unfair or deceptive acts or practices involving loan modification and foreclosure rescue services." We recommend, however, that the APA rule-making be granted to the FTC in all its consumer protection roles, as provided by the House bill.

Second, the Obama proposal as enacted in the House passed bill gives the FTC the right to sanction professionals aiding and abetting illegal schemes by others. U.S. PIRG has long supported improving aiding and abetting statutes to better protect consumers. It is highly likely that many schemes designed to extract wealth from consumer pocketbooks involve lawyers, accountants, bankers and others advising the seller. Clarifying aiding and abetting liability will help assure that all those involved in the scheme or the scam can be reached by the law.⁹ Our goal is not to

⁵Testimony of Prentiss Cox, University of Minnesota Law School, "The Proposed Consumer Financial Protection Agency: Implications for Consumers and the FTC," Hearing of the Subcommittee on Commerce, Trade and Consumer Protection, U.S. House of Representatives, 08 July 2009.

⁶See Omnibus Appropriations Act of 2009, Pub. L. No. 111-8, § 626, 123 Stat. 524 (Mar. 11, 2009) as modified by the Credit CARD Act of 2009, Pub. L. No. 111-24, § 511(a)(1)&(2), 123 Stat. 1734 (May 22, 2009).

⁷Testimony of FTC Chairman Jon Leibowitz, "Financial Services and Products: The Role of the Federal Trade Commission in Protecting Consumers," Hearings of the Senate Committee on Commerce, Science and Transportation, (oral statement), 4 February 2010.

⁸Testimony of Center for Responsible Lending, by Kathleen E. Keest, Hearing Before the Senate Committee on Commerce, Science and Transportation, Subcommittee on Interstate Commerce, Trade and Tourism on "Improving Consumer Protections in Subprime Home Lending" April 29, 2008.

⁹In 1994, the Supreme Court eliminated the Securities and Exchange Commission's aiding and abetting authority under the Exchange Act in *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164. U.S. PIRG was an (unsuccessful) friend of the court in the case. It had been the widely held view that the FTC had a similar cause of action under Section 5 of the FTC Act for aiding and abetting unfair or deceptive acts and practices. While the Congress in the (otherwise dreadful for small investors) 1995 Private Securities Litigation Reform Act (Public Law 104-369) reinstated the SEC's aiding and abetting authority for knowing viola-

reach deep pockets, as opponents will assert, it is to deter fraud by requiring well-compensated professionals to pay attention and to be held accountable when they do not.

Third, the Obama proposal as enacted in the House passed bill give the FTC the authority to impose civil penalties for violations of the FTC Act. Currently, a firm that violates the FTC's core enforcement mechanism—Section 5's prohibition on unfair and deceptive acts and practices—gets a free bite of the apple. The inability of the FTC to impose civil penalties for first offenses limits its ability to police the marketplace. Unless a firm violates a trade rule that the FTC enforces, such as the Fair Credit Reporting Act, or violates an existing consent decree or order, the FTC cannot impose civil penalties. This lack of a credible threat of punishment is an inadequate deterrent against wrongdoing. The proposals also wisely eliminate onerous requirements requiring the FTC to ask permission of the Department of Justice—and to give it a 45-day right of first refusal—before bringing a civil case involving civil penalties.

Finally, we would also support establishing a private enforcement right for consumers under Section 5 of the FTC Act and also under the new CFPA Act. Congress should provide a private right of action to enable consumers to enforce their own right to be free of unfair and deceptive acts and practices, for neither the FTC's nor the CFPA's resources will ever be adequate to police the entire market, and public enforcement will never move fast enough to protect them.

Conclusion

We appreciate the opportunity to testify before you today on the important matter of reinvigorating the FTC's authorities to protect the public and police the marketplace at the same time as the Congress establishes a new, Consumer Financial Protection Agency.

Senator PRYOR [presiding]. Thank you very much.
Ms. Pridgen.

STATEMENT OF DEE PRIDGEN, ASSOCIATE DEAN AND PROFESSOR OF LAW, UNIVERSITY OF WYOMING COLLEGE OF LAW

Ms. PRIDGEN. Senator Wicker and members of the Committee, thank you for inviting me to testify today.

My name is Dee Pridgen. I'm the Associate Dean and a Professor of Law at the University of Wyoming College of Law.

And I just need to say, at the outset, that the testimony that I'm giving today expresses my own private views and is not on behalf of the University of Wyoming or the College of Law.

The main thing that I would like to address today is the proposal to provide the FTC with workable APA rulemaking procedures to replace the unworkable Magnuson-Moss Act procedures from the mid-1970s. I believe this change will benefit consumers, and it will not be dangerous or radical or bad for business.

Let me just tell you why I say that. Magnuson-Moss is a hybrid kind of rulemaking. It's adjudicatory, it's adversarial, it's very time-consuming and unwieldy, and, as a result, the FTC has not used their rulemaking power that they were granted under Magnuson-Moss for many years, as the Commissioner noted. The FTC now basically issues industry guides, which are nonbinding, such as the environmental advertising guides, which they issued in the 1990s. And then, also the FTC engages in rulemaking at the specific request of Congress, on a case-by-case basis.

tions it has not reinstated the FTC's implied authority. Regrettably PSLRA also did not reinstate a similar previous implied private right of action for aggrieved investors under the Exchange Act. See also: Prepared statement of the Federal Trade Commission on "Financial Services and Products: The Role of the Federal Trade Commission in Protecting Consumers," Hearing of the Senate Committee on Commerce, Science and Transportation, 4 February 2010, at footnote 43.

Now, it's been mentioned that the Law of Unfair and Deceptive Trade Practices is very broad. And that may have been one of the reasons why it was thought special safeguards were needed in the Magnuson-Moss procedures. But, I would just like to point out that, since Magnuson-Moss was passed in the mid-1970s, a lot has changed at the Commission, and in other statutes, as well.

First of all, the FTC, in the early 1980s, passed a couple of policy statements, by which they restrained—constrained their own authority under unfairness-and-deception authority. The unfairness policy, which is now part of the statute, requires the FTC to find significant consumer injury, and to engage in a type of cost-benefit analysis before finding an unfair trade practice. And then, in the deception area, the FTC uses a standard involving misleading substantial numbers of—“misleading reasonable consumers under the circumstances” before they'll find deception. And this replaced some of the older FTC jurisdiction on deception.

The other thing I'd like to say is, the APA rulemaking is not going to be resulting in regulatory excess by the FTC or any other agency. The APA has notice requirements, comment requirements, judicial review, and it does allow the FTC and other agencies to engage in a more informal type of hearing—roundtable fact-finding hearings, without having adversarial hearings. There's also in place now, since 1975, the Regulatory Flexibility Act, which requires a statement of impact on small businesses. There's the Congressional Review Act. All regulations by any agency, including the FTC, have to be reviewed by the Office of Information and Regulatory Affairs. So, there are a lot of safe guards that are—would be in place without Magnuson-Moss procedures.

I would also like to say that the civil penalties that the FTC Act currently provides for only comes into play when there's already an order against a party, or when there's already a rule. And so, the FTC could use a better deterrent, in terms of having the opportunity to go to court and get civil penalties directly for a violation of the FTC Act. That would increase the deterrent effect of the civil penalties, and it would supplement their current jurisdiction to go into court and seek injunctions.

And then, finally—and I would also say that I support the aiding-and-abetting provisions, making that specific. The FTC is a law enforcement agency. They have always tried to go after, not just the direct violator, but also other parties that are providing financing or other kinds of assistance to a violator. And any prosecutor knows that, if you don't wipe out the whole—all the direct and indirect violators, you're not going to get rid of the problem.

So, in sum, I just would like to say, I do support these reforms for the FTC Act. And I know they're part of the Consumer Financial Protection Agency, which I'm not prepared to comment on, but I think these reforms are so important that the Senate and the Congress ought to consider amending the FTC Act, regardless of what happens with the rest of the legislation.

Thank you.

[The prepared statement of Ms. Pridgen follows:]

PREPARED STATEMENT OF DEE PRIDGEN, ASSOCIATE DEAN AND PROFESSOR OF LAW,
UNIVERSITY OF WYOMING COLLEGE OF LAW

I. Introduction

Chairman Pryor, Ranking Member Wicker, and members of the Subcommittee, I am Dee Pridgen, and I am the Associate Dean and a Professor of Law at the University of Wyoming College of Law.¹ I appreciate the opportunity to appear before you today to discuss the efforts of the Federal Trade Commission to regulate and enforce against “unfair or deceptive acts or practices” with regard to financial products and services; and on the sufficiency of the FTC’s current enforcement and regulatory authority; and whether an enhancement of that authority would benefit consumers. At the outset let me note that the views I express today are my own personal and professional views and do not represent the views of either the University of Wyoming or the College of Law.

II. FTC Activities Against Unfair and Deceptive Practices in Financial Products and Services

The Federal Trade Commission (FTC or Commission) has a long history of acting to protect the public from unfair and deceptive practices with regard to certain financial products and services. The Commission’s law enforcement responsibilities across broad sectors of the economy do include the financial sector to some extent. However, certain entities such as banks, are exempt from the FTC Act.² The FTC routinely partners with state consumer protection offices (typically state attorneys general) to conduct enforcement sweeps in the financial sector and other problem areas as they arise. The FTC also works with bank regulatory agencies to enforce certain consumer credit statutes and regulations, such as the Truth in Lending Act. The FTC is responsible for enforcing various consumer credit statutes with regard to the non-bank entities under its jurisdiction.³ It does this by bringing cases against potential violators, and in some cases, by issuing regulations. For example, the Commission promulgated a rule on the advertising and marketing of free annual credit reports on March 3, 2010, addressed to the prevention of deceptive marketing of free credit reports.⁴ The FTC has been particularly active in the financial sector recently given the rise of bad actors attempting to exploit vulnerable consumers in desperate financial straits.⁵ In another example, the FTC recently was tasked by Congress to promulgate a rule on Mortgage Assistance Relief Services (foreclosure rescue) and has just this month published a proposed rule on that subject.⁶ The FTC was able to speedily address these consumer issues in the area of residential mortgages in part because Congress authorized that these rules be promulgated using APA notice-and-comment rulemaking, rather than the FTC’s traditional Magnuson-Moss rulemaking procedure.

III. Magnuson-Moss Versus APA Rulemaking

The Federal Trade Commission’s work to protect consumers in the marketplace could be significantly enhanced if Congress were to grant the Commission the authority to use APA informal rulemaking procedures in all cases under its general authority. The FTC is the Nation’s preeminent and the oldest Federal consumer protection agency in the United States. The Commission has various tools for enforcing its legislative mandate to protect the citizens from unfair and deceptive trade practices, which include administrative proceedings generally resulting in cease and desist orders;⁷ injunctions in Federal court;⁸ policy statements and “guides”;⁹ and regulations defining with specificity acts or practices which are considered unfair or deceptive.¹⁰ The Commission’s rulemaking authority was established by statute by the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act of

¹A brief biography is attached to this testimony as an appendix.

²15 U.S.C. § 45(a)(2).

³15 U.S.C. § 1607(c) (Truth in Lending; 16 U.S.C. § 1681s(a) (Fair Credit Reporting Act); 15 U.S.C. § 1691c(c) (Equal Credit Opportunity Act); and 15 U.S.C. § 16921(a) (Fair Debt Collection Practices Act).

⁴75 Fed. Reg. 9726 (March 3, 2010) to be codified at 16 C.F.R. Part 610.

⁵See Prepared Statement of the Federal Trade Commission before this subcommittee, dated July 14, 2009, for a detailed discussion of the FTC’s recent activities regarding unfair and deceptive trade practices in the financial sector.

⁶75 Fed. Reg. 10707 (March 9, 2010), to be codified as 16 C.F.R. Part 322. Another proposed rule on Mortgage Acts and Practices is still pending. Advance Notice of Proposed Rulemaking, 74 Fed. Reg. 26,118 (June 1, 2009).

⁷15 U.S.C. § 45(b).

⁸15 U.S.C. § 53(b).

⁹15 U.S.C. § 57a(a)(1)(A).

¹⁰15 U.S.C. § 57a(a)(1)(B).

1975, and will be referred to herein as Magnuson-Moss rulemaking. Prior to 1975, the Commission utilized industry-wide “trade practice conferences” to provide guidance to business on how to comply with the FTC Act. In the mid-1960s, the Commission first asserted the power to issue binding substantive rules, pursuant to then-Section 6(g) of the FTC Act which provided that the Commission may “make rules and regulations for the purpose of carrying out the provisions of this Act.”¹¹ This rulemaking authority was upheld in the D.C. Circuit Court in a 1973 case,¹² but Congress at that time apparently felt it was prudent to provide the FTC with specific rulemaking authority. The result was the Magnuson-Moss rulemaking provisions,¹³ which are still the governing law today.

The Magnuson-Moss rules were to be conducted using a “hybrid” type of rule-making procedure, providing more due process safeguards than would be applicable under the Administrative Procedure Act, yet somewhat less than would govern in an adjudicatory context. The Commission proposed an array of regulations shortly after the legislation was passed, but the effort proved to be much more time-consuming, costly and controversial than may have been initially foreseen.¹⁴ In response to the controversies over the Commission’s proposed children’s advertising rule and the funeral rule, among other things, Congress acted again to amend the FTC Act in 1980. This law added further limitations on the FTC’s rulemaking process.¹⁵ Consequently, many of the rules proposed after the 1975 legislation were abandoned in the 1980s, with the exception of the credit practices rule,¹⁶ the used car rule¹⁷ and the funeral practices rule.¹⁸ By 1990, the FTC’s use of its formal consumer protection rulemaking authority had come to a virtual standstill.¹⁹

In the 1990s the Commission did increase the pace of rulemaking but not through the now-defunct Magnuson-Moss rulemaking procedures. Instead the Commission either reverted to the old-style Industry Guides or launched rulemaking proceedings under specific mandates from Congress. For instance, in 1992 the Commission issued an Industry Guide regarding environmental marketing claims, rather than attempting to promulgate a trade regulation rule, in order to address expeditiously the issue of deceptive “green marketing” claims.²⁰ Another emerging trend during this period was for the FTC to engage in Congressionally-mandated rulemaking. For instance, the FTC was directed to promulgate regulations governing the marketing of pay-per-call telephone services under the Telephone Disclosure and Dispute Resolution Act of 1992.²¹ The Telemarketing Act of 1994 also contained a legislative mandate for FTC rules, which ultimately resulted in the establishment of the “Do Not Call Registry,” one of the most popular Federal regulations in history.²² The Commission has also been charged with promulgating regulations under the Fair and Accurate Credit Transactions Act,²³ the CAN-SPAM Act²⁴ and several other acts as well. Most recently, Congress authorized the Commission to promulgate rules with respect to mortgage loans, using APA notice and comment rulemaking procedures.²⁵ These Rules are currently pending.²⁶

In sum, the Magnuson-Moss rulemaking procedures, which started as a clarification of the FTC’s general rulemaking authority, have become a dead letter and are not being used to protect consumers. Instead, the Commission either uses the “soft” non-binding industry guides, or waits for Congress to provide specific direction. A

¹¹ 15 U.S.C. § 46(g).

¹² *National Petroleum Refiners Ass’n v. FTC*, 482 F.2d 672 (D.C. Cir. 1973).

¹³ *Supra* n. 10.

¹⁴ See generally Dee Pridgen & Richard Alderman, CONSUMER PROTECTION AND THE LAW, §§ 12:10–12:14 (West 2009–2010 edition).

¹⁵ Pub. L. No. 96–252, 94 Stat. 374 (1980), codified at 15 U.S.C. § 57b–3.

¹⁶ 16 C.F.R. § 444.

¹⁷ 16 C.F.R. § 455.

¹⁸ 16 C.F.R. § 453.

¹⁹ Report of the American Bar Association Section of Antitrust Law Special Committee to Study the Role of the Federal Trade Commission, reprinted in 56 Antitrust & Trade Reg. Rep. (BNA, April 6, 1989), at S–20, and Graph 17, Appendix C at S–44.

²⁰ FTC Guides for the Use of Environmental Marketing Claims, 16 C.F.R. § 260. These Guides are currently being reviewed by the Commission for possible updating.

²¹ 15 U.S.C. § 5711 et seq.

²² 15 U.S.C. §§ 6101 to 6108. The FTC regulation is codified at 16 C.F.R. § 310. Rule was upheld against a constitutional challenge in *Mainstream Marketing Services v. FTC*, 358 F.3d 1228, cert. denied, 543 U.S. 812 (2004).

²³ FACT Act, Pub. L. No. 108–140, 117 Stat. 1952 (2003), amending various sections of the Fair Credit Reporting Act.

²⁴ CAN-SPAM Act, Pub. L. No. 108–187, 117 Stat. 2699 (2003), codified at 15 U.S.C. § 7704. FTC regulations are codified at 16 C.F.R. § 316.

²⁵ Credit CARD Act of 2009, Pub. L. No. 111–24, § 511(a)(1) & (2), 123 Stat. 1734 (May 22, 2009).

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

change to the more commonly used notice-and-comment rulemaking under Section 553 of the Administrative Procedures Act would allow the FTC to proceed more flexibly and more effectively. At the same time, however, the APA rulemaking procedures, along with other currently applicable regulatory safeguards, will provide ample due process and judicial review for all affected parties.

One issue with regard to notice-and-comment rulemaking by the FTC is the fact that its governing statute uses the rather broad standard of “unfair and deceptive” trade practices, which applies across a wide variety of business sectors. Thus, when Congress originally passed the Magnuson-Moss Act in 1975, a legislative committee noted that “[b]ecause of the potentially pervasive and deep effect of rules defining what constitutes unfair or deceptive acts or practices and the broad standards which are set by the words ‘unfair and deceptive acts or practices,’ the Committee believes greater procedural safeguards are necessary.”²⁷ In this regard, it should be noted that since the Magnuson-Moss Act was passed in 1975, the Commission has taken steps to define and constrain its unfairness and deception jurisdiction through the use of policy statements that have become either codified into its own statute or have been incorporated into Commission adjudicatory opinions. For instance, the Commission’s policy statement on unfairness, which defines an unfair act or practice as one which “causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition,” is now a part of the FTC authorizing statute.²⁸ This statement of policy provided a focus on consumer sovereignty and cost/benefit analysis that was lacking in the older interpretations of FTC unfairness.²⁹ Prior to the issuance of the unfairness policy statement, the Commission’s unfairness criteria included an inquiry into whether the practice offended public policy or was immoral, unethical, oppressive, or unscrupulous.³⁰

The FTC also reigned in the standard for defining consumer deception in a 1983 policy statement, which basically says that “the Commission will find an act or practice deceptive if, first, there is a representation, omission, or practice that, second, is likely to mislead consumers acting reasonably under the circumstances, and third, the representation, omission, or practice is material.”³¹ Prior to that development, the FTC’s deception standard was used to protect the ignorant and the unwary, not the “consumer acting reasonably under the circumstances” as required under current policy. Indeed, critics of the pre-policy statement approach to deception, such as Howard Beales, former Bureau of Consumer Protection Director, have called this the “fools test.”³² The Deception Policy Statement has effectively eliminated any such “fools test” at the modern FTC. Thus, the concepts of unfairness and deception have become more defined by policy statements and other precedents since 1975.

The FTC Act also contains a “public interest” standard³³ that could serve to constrain the FTC from engaging in activities that are trivial, insignificant, or are not prevalent in a particular business sector.

In addition to the agency’s own self-restraints embodied in the unfairness and deception policy statements, there are other safeguards applicable to the FTC now that were not in effect when the Magnuson-Moss procedures were passed. Thus a change from Magnuson-Moss rulemaking to APA notice-and-comment rulemaking procedures at the FTC would by no means result in a free-for-all of regulatory excess. There are checks and balances in the APA process and elsewhere that should be sufficient to protect the interests of all parties while providing the FTC with the tools it needs to protect consumers. For instance, the APA requires prior notice of rulemaking, provides a mechanism for all interested parties to submit comments, requires a statement of basis and purpose, and also provides for judicial review of the final rule.³⁴ Judicial review includes a determination of whether the rule is arbi-

²⁷ House Report No. 93-1107, reprinted in 1974 U.S.C.C.A.N. 7702, 7727.

²⁸ 15 U.S.C. § 45(n).

²⁹ See *In re International Harvester*, 1984 WL 565290, 104 FTC 949, 1061 (1984) (“The Commission [in applying its unfairness authority] . . . seeks to ensure that markets operate freely, so that consumers can make their own decisions”). See also Neil Averitt, *The Meaning of “Unfair Acts or Practices” in Section 5 of the Federal Trade Commission Act*, 70 Geo. L.J. 225, 229-36 (1981).

³⁰ Proposed Rule on Cigarette Advertising, 29 Fed. Reg. 8324, 8355 (1964), known as the “the Cigarette Rule” test. The rule was later superseded by legislation requiring a warning label in ads and on packages for cigarettes, Cigarette Labeling and Advertising Act of 1965, codified at 15 U.S.C. §§ 1331-40.

³¹ *In re Cliffdale Associates*, 103 FTC 110 (1984).

³² J. Howard Beales, III, *Brightening the Lines: the Use of Policy Statements at the Federal Trade Commission*, 72 Antitrust L.J. 1057, 1068 (2005).

³³ 15 U.S.C. § 45(b).

³⁴ 5 U.S.C. §§ 553 and 706.

trary or capricious, unconstitutional, or outside the bounds of the authorizing statutes, among other things.³⁵ Indeed over the years the level of judicial scrutiny of APA-based rules has increased and is not overly deferential to any government agency. As one scholar has put it:

Although informal rulemaking is still an exceedingly effective tool for eliciting public participation in administrative policymaking, it has not evolved into the flexible and efficient process that its early supporters originally envisioned. During the last fifteen years the rulemaking process has become increasingly rigid and burdensome. An assortment of analytical requirements have been imposed on the simple rulemaking model, and evolving judicial doctrines have obliged agencies to take greater pains to ensure that the technical bases for rules are capable of withstanding judicial scrutiny.³⁶

Other safeguards in place on all agency rulemaking include:

- the Regulatory Flexibility Act,³⁷ requiring an analysis of the impact on small entities, the publication of a regulatory agenda, and periodic review of rules;
- the Congressional Review Act,³⁸ requiring submission of rules to Congress along with a cost/benefit analysis and a Congressional “disapproval” process; and
- cost/benefit review by the Office of Information and Regulatory Affairs.³⁹

Another reason why the FTC should be authorized to use APA notice-and-comment rulemaking is that it is more appropriate for industry-wide rulemaking involving many conflicting interests. The Magnuson-Moss rulemaking process became unworkable in part because it is not suitable for large rulemaking initiatives that have multiple stakeholders. By using a quasi-judicial model, these procedures require rulemaking procedures tantamount to an individual adjudication but with multiple attorneys representing multiple parties, all of whom would seek to examine and cross-examine witnesses, etc. The APA notice-and-comment procedure is much better suited to modern-day industry-wide rulemaking in that it allows all parties to provide as much comment and as many submissions as needed, without the expense and unwieldiness of adjudicatory hearings.

APA notice-and-comment rulemaking will also allow the FTC to work with business more effectively. The FTC has traditionally used voluntary industry self-regulation as an alternative to formal regulation or adjudication. One example of voluntary self-regulation has occurred in the privacy area, where the FTC has encouraged website operators to publish a privacy policies. The FTC can then, if necessary, use individual enforcement actions against website owners who do not abide by their own policies on the basis that they have thus committed a deceptive trade practice.⁴⁰ The availability of a workable rulemaking process would enhance the FTC’s ability to encourage industry self-regulation because that option lurking in the background would provide a more powerful incentive for industry participants to self-regulate if they wish to avoid more formalized rules.

The FTC has also been very active in certain situations in bringing individual injunction and administrative cases against multiple companies aimed at addressing an industry-wide problem. When the Commission puts together a group of similar cases with similar orders, it can become tantamount to a regulation by adjudication. For instance, the FTC brought a series of cases against companies that failed to take appropriate measures to secure consumers’ personal data they had stored in

³⁵ 5 U.S.C. 706(2), allows the court to overturn an agency rule if it is:

- (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
- (B) contrary to constitutional right, power, privilege, or immunity;
- (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
- (D) without observance of procedure required by law; . . .

³⁶ Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 Duke L. J. 1385 (1992). See also Mark Seidenfeld, *Why Agencies Act: A Reassessment of the Ossification Critique of Judicial Review*, 70 Ohio St. L. J. 251 (2009).

³⁷ 5 U.S.C. § 601.

³⁸ 5 U.S.C. § 801

³⁹ This office is within the Office of Management and Budget and was established by Congress as part of the 1980 Paperwork Reduction Act, 44 U.S.C.A. §§ 3501.

⁴⁰ See, e.g., *FTC v. Toysmart.com, LLC*, consent agreement (D. Mass. 7/21/00), available at www.ftc.gov; In re National Research Center for College & University Admissions, Consent Decree (FTC 10/2/02), available at 222.ftc.gov.

their data bases.⁴¹ The resulting orders specified certain security procedures in each case. Having notice-and-comment rulemaking procedures available would give the FTC the ability to bring all parties to the table to consider an industry-wide rule, rather than establishing de facto rules by adjudication against selected individual companies.

Finally, providing the FTC with APA rulemaking power under their general unfair and deceptive practices authority will not replace the duty to respond to Congressional mandates for particular rules under specific statutes. But having the availability of notice-and-comment rulemaking could provide the FTC with the ability to identify and respond to particular unfair and deceptive trade practices more quickly. One of the benefits of the broad statutory mandate of the FTC Act, which covers all “unfair and deceptive acts or practices,” is that this statute has the potential to adjust to ongoing changes in the marketplace. Statutes that are very specific soon become outmoded as the technology and/or the marketplace move on to other ways of doing business, some of which may raise consumer protection issues. By authorizing the FTC to engage in APA informal rulemaking to combat unfair and deceptive trade practices under their general statutory authority, as defined by policy statements and precedents, Congress will empower the Commission to protect the public interest in a more timely fashion.

IV. Civil Penalties for FTC Act Violations

Civil penalty authority for violations of the FTC Act is needed to strengthen the Commission’s law enforcement activities to protect the public from unfair or deceptive trade practices. Under current law, the FTC only has authority to seek civil penalties in court for violations of rules or prior orders.⁴² It does not have the authority to obtain civil penalties directly for FTC Act violations. Also the FTC refers all civil penalty cases to the Department of Justice, which then has 45 days to determine whether to file the case itself or return it to the Commission. In the fast-moving world of financial and Internet fraud, such delays can be devastating to the consumers who could have been protected by swifter government action. While the Commission does have the authority to go to court to seek injunctive relief in situations where it has reason to believe that there is a current or imminent violation of any provision of law enforced by the FTC,⁴³ such actions may not be sufficient to deter certain types of fraud, where the harm to a potentially large number of consumers is difficult to quantify or to stop by injunction once the damage has been done. Expanded civil penalty authority would provide more meaningful deterrence against unfair and deceptive practices under the FTC Act.

V. Aiding and Abetting Authority

The FTC is not only an independent regulatory agency, it is also a law enforcement agency, and as such, needs to be able to use its limited resources effectively to stamp out fraudulent practices by reaching not only direct violators, but also those who knowingly assist the direct violators. Thus, former Bureau of Consumer Protection Director Barry Cutler said in the early 1990s that the FTC must cutoff not only the tops of the dandelions of unfair and deceptive practices, but also to get at the root of the problem, lest the weeds just spring up again.⁴⁴ Thus, in a telemarketing scam using so-called “boiler rooms,” for instance, the Commission could put a halt to the phone room, but without also being able to go behind the scenes and stop entities that were aiding and abetting by laundering money or putting together phony travel packages, the FTC would be in effect cutting off the heads of the dandelions, without getting to the roots.

Unfortunately, the ability of agencies like the FTC to go after persons or companies who knowingly support or enable direct participants in unfair or deceptive practices was called into question in 1994 by the U.S. Supreme Court ruling in *Central Bank of Denver v. First Interstate Bank of Denver*.⁴⁵ In that case, the Court ruled there was no civil liability in private suits under the Securities and Exchange Act against secondary participants in certain fraudulent practices prohibited by that statute, basically because the statute did not specifically state that. Later, Congress

⁴¹ See, e.g., *In re B.J.’s Wholesale Club, Inc.*, 2005 WL 2395788 (FTC 2005). Pursuant to the Gramm-Leach-Bliley Act, the FTC and other Federal agencies also issued regulations imposing obligations on financial institutions to protect consumer information. 16 C.F.R. § 314.

⁴² 15 U.S.C. §§ 45(1) and 45(m). The Commission can issue “cease and desist” orders in its own administrative proceedings under 15 U.S.C. § 45(b). Some would say this approach is tantamount to “every dog gets one bite.”

⁴³ 15 U.S.C. § 53(b).

⁴⁴ Barry Cutler, former director of the FTC’s Bureau of Consumer Protection, as stated in earlier Congressional testimony.

⁴⁵ 511 U.S. 164 (1994).

amended the Securities and Exchange Act to provide the SEC with direct authority to pursue persons knowingly aiding and abetting such violations.⁴⁶ In the mid-nineties, the FTC also received direct authority to sue persons “assisting and facilitating” violations of the Telemarketing Sales Act and its regulations.⁴⁷ At this point in time, it would enhance the FTC’s ability to protect the public if it could rely on explicit statutory authority to pursue aiders and abettors in all aspects of their jurisdiction, not just for telemarketing violations. For instance, in today’s world of Internet based consumer issues, such as fraudulent business opportunity or job placement sites, certain unfair or deceptive practices are supported by a complicated network of entities who knowingly receive some financial benefits, and should be held responsible. Also, despite the improvements in global enforcement initiated by the U.S. SAFE WEB Act,⁴⁸ sometimes it is not possible for the FTC to go after a foreign-based perpetrator, but could stop the damage to consumers by pursuing U.S. based affiliates who knowingly provide support to unlawful activities. “Aiding and abetting” liability could be coupled with safe harbor provisions for Internet providers and similar entities who are mere conduits and do not knowingly participate as aiders and abettors.

VI. Conclusion

In conclusion, I fully support what the FTC and Congress are doing to help protect vulnerable consumers during this time of financial trouble for the average person. However, I also support the idea that Congress should take this opportunity to enhance the FTC’s enforcement tools so that they can do an even better job of protecting the public interest. This includes giving the FTC across-the-board authority to issue regulations using APA informal rulemaking procedures. Such a change is needed because the current Magnuson-Moss rulemaking procedures are so unwieldy that they have effectively become a dead-letter. And while the cumbersome procedures under Magnuson-Moss may have become unneeded and outmoded, other developments in the law can ensure that any renewed FTC rulemaking activities using APA procedures would not be excessive. APA rules are subject to judicial review and other Congressional safeguards that have been put in place over the last 30 years. Also, the FTC has itself engaged in major policy reforms since the Magnuson-Moss Act was passed in 1975, and now has a more solid doctrinal basis for any rules it might promulgate based on unfairness or deception.

In addition to the changes in rulemaking procedures described above, I also support the use of civil penalties for FTC violations because they would provide a stronger deterrent against fraudulent, unfair or deceptive activities than the current practice of seeking civil penalties only after a company is under order or rule. Similarly, the ability to pursue not only direct violators but also the aiders and abettors of FTC violations will be of significant help to the FTC in its pursuit of protecting the public.

Thank you for allowing me this opportunity to appear before the Committee to give my views on this important matter.

APPENDIX

Dee Pridgen is Associate Dean and the Carl M. Williams Professor of Law and Social Responsibility, at the University of Wyoming’s College of Law, where she has taught since 1982. Her subjects include Consumer Protection, Contracts, Antitrust, Communications Law, Constitutional Law, and Internet Law. She received her Juris Doctorate in 1974, from New York University, and a B.A. in 1971, from Cornell University. She is a member of the Order of the Coif and Phi Beta Kappa. Pridgen has been a Fulbright Scholar/Lecturer at Tokyo University in Japan and a Visiting Professor of Law at the University of Baltimore School of Law, the University of Maryland School of Law, and the Catholic University of America, Columbus School of Law. She also served as a Staff Attorney, for the Federal Trade Commission, Bureau of Consumer Protection, Washington, D.C. from 1978–82. Pridgen’s publications include two treatises aimed at practicing Attorneys, *Consumer Protection and the Law*, and *Consumer Credit and the Law*, co-authored with Richard Alderman, both published by Thomson/West, and updated yearly. She is also a coauthor of a law school casebook Entitled *Consumer Law: Cases and Materials* (Thomson/West 3d ed. 2007). She has written articles and reports on consumer law, and has given presentations at international consumer law meetings in Helsinki, Finland and Auckland, New Zealand. She has also presented at and been the co-chair of the Con-

⁴⁶ 15 U.S.C. § 78t(e).

⁴⁷ 15 U.S.C. §§ 6101–6108; 16 C.F.R. Part 310.

⁴⁸ Pub. L. No. 109–455, 120 Stat. 3372 (2006).

sumer Issues Conference held yearly at the University of Wyoming since 2001. She has been on the faculty for Teaching Consumer Law, a biennial conference sponsored by the Consumer Law Center at the University of Houston since 2002. Pridgen was elected to the American Law Institute in 2003.

Senator WICKER. Thank you very much.
Ms. Woolley.

**STATEMENT OF LINDA A. WOOLLEY,
EXECUTIVE VICE PRESIDENT, GOVERNMENT AFFAIRS,
DIRECT MARKETING ASSOCIATION, INC.**

Ms. WOOLLEY. Thank you, Senator Wicker.

I am Linda Woolley, Executive Vice President of Government Affairs for the Direct Marketing Association. Thank you for the opportunity to be here today.

The Direct Marketing Association, or DMA, is the leading global trade association, representing more than 3,100 businesses and nonprofit associations. About 50 percent of our member companies are businesses that facilitate direct marketing; the other 50 percent are companies that actually market products and services directly to consumers, and most of those companies are household names.

DMA considers consumer protection to be one of our core functions. We have a Corporate and Social Responsibility Department that develops industry standards and—industry standards for ethical marketing practices. And those standards are enforced through a very robust self-regulatory program that's been in existence for over 30 years.

Let me begin by emphasizing that DMA and its member companies hold the FTC in extremely high regard. We have a long history of working with FTC on public education publications, the development of industry self-regulation, and on enforcement matters in order to protect consumers. While we may not agree with FTC on every policy or legal matter affecting the marketing community, the DMA views FTC as an essential partner in promoting reputable business practices, and in protecting consumers from a small minority of companies that deceives consumers and ultimately negatively affect the image of responsible businesses.

Senator Wicker, you introduced for the record a letter that DMA and nearly 30 other trade associations sent to this committee about the far-reaching and unintended consequences that would result from the FTC's expanding authority, as currently proposed. You have the record—the letter in the record, but let me note some of those signatories here in order to exemplify the breadth of the industry concern over these proposals.

Signing that letter were the American Business Media Consumer Electronics Association, Consumer Healthcare Products Association, International Franchise Association, National Association of Manufacturers, the National Association of Realtors, the National Association of Wholesalers and Distributors, National Automobile Dealers Association, the National Retail Federation, Software and Information Industry Association, and the U.S. Chamber of Commerce.

We very much believe that safeguards and protections required by Magnuson-Moss continue to serve a valuable and useful purpose, and should not be repealed. The Magnuson-Moss safeguards

were enacted incrementally—not all in one fell swoop, but incrementally—throughout the early 1980s, specifically as a result of the FTC abuse of APA rulemaking authority in the 1970s, when the FTC ventured into regulating children’s advertising, gas additives, anticompetitive gasoline prices, eyeglasses, distributors of paperback books and newspapers, lawyer’s fees, doctor’s ads, ready-to-eat cereals—breakfast cereals, automobile manufactures, hearing aids, mobile homes, over-the-counter drugs, and products that long-haul truckers could carry.

The Commission indicated that all other agencies have APA rulemaking authority. First, let me say that that—not every agency has APA authority. Second, the agencies currently having APA rulemaking authority have mandates that are much narrower in scope than that of the FTC. Third, the FTC already has APA rulemaking authority under many different statutes, because Congress has granted it that authority. And the DMA has supported every instance that the Congress has granted specific grants of APA rulemaking authority.

It’s only in this expansive area of unfair or deceptive practices, where the standards and jurisdiction are very broad, that the FTC must follow the protections and safeguards of the Magnuson-Moss Act. And, given the FTC’s very unique and broad mandate in this area, we believe that the Magnuson-Moss—the safeguards of the Magnuson-Moss Act should be retained.

DMA is particularly concerned that the Commission would use its expanding rulemaking authority to venture into areas that it’s been most actively involved in, in public-policy discussion, and that particularly involves Internet commerce. Currently, we believe that the Commission has a very good track record of working with business to encourage the establishment of meaningful and effective self-regulatory standards in the marketplace.

Just last year, following the proposed standards by FTC, DMA partnered with all of the other advertising agency—advertising associations, effectively representing the entire advertising industry, to develop self-regulatory principles for online advertising practices. And we very much believe that such a context—that the context for such a collaborative effort between industry and FTC would change significantly if the regulatory—if the rulemaking safeguards were repealed.

There are other—I’m watching the time, and I realize that there are other aspects that my panel—fellow panelists have spoken about, including aiding and abetting, civil penalty authority, and independent litigation authority, that we are prepared to discuss, but, since I’m almost out of time, I would entertain your questions on those subjects.

In summary, DMA very much believes that the FTC has done a commendable job in protecting consumers from unfair and deceptive practices through its existing enforcement and regulatory authorities. And I look forward to your questions.

Thank you.

[The prepared statement of Ms. Woolley follows:]

PREPARED STATEMENT OF LINDA A. WOOLLEY, EXECUTIVE VICE PRESIDENT,
GOVERNMENT AFFAIRS, DIRECT MARKETING ASSOCIATION, INC.

I. Introduction and Summary

Good afternoon, Mr. Chairman and members of the Subcommittee. I am Linda Woolley, Executive Vice President of Government Affairs for the Direct Marketing Association. Thank you for the opportunity to appear before the Subcommittee and provide insight from industry's perspective regarding the regulatory powers of the Federal Trade Commission ("FTC" or "Commission").

The Direct Marketing Association, Inc. ("DMA") is the leading global trade association of more than 3,100 businesses and nonprofit organizations using and supporting multi-channel direct marketing tools and techniques. About fifty percent of our member companies are in the business of facilitating direct marketing, including analytics firms, list compilers, sellers of lists, printers, mailers, and Internet Service Providers. The other fifty percent of our members are those actually marketing products and services directly to consumers. Many of those companies are household names.¹ In addition to its education, research and advocacy roles, DMA has a Corporate and Social Responsibility Department that develops industry standards for ethical marketing practices. Those standards are published as "Guidelines for Ethical Business Practice" and enforced through a robust self-regulatory program.² DMA has an antitrust exemption from the FTC that enables us to prosecute ethics cases that involve business-to-business complaints.³

Let me begin by emphasizing that the DMA and its member companies hold the FTC and its staff in very high regard. DMA regularly works with the FTC on public education campaigns, the development of industry self-regulation, and enforcement matters in order to protect consumers in a wide variety of areas.⁴ While we may not agree on every policy or legal matter affecting the marketing community, the DMA views the FTC as an essential partner in promoting reputable business practices and in protecting consumers from a small minority of companies that deceive consumers and, thus, negatively impact the image of responsible businesses. Through the work of its Corporate and Social Responsibility Department, DMA demonstrates the belief that consumer protection is one of its core functions.

Today, we wish to discuss the Commission's current authority, as well as the proposed grant of additional powers to the FTC in financial regulatory reform legislation. We do not believe providing the FTC with broad new authority of the type included in the "Wall Street Reform and Consumer Protection Act"—and as requested by the Commission—is a necessary or relevant response to the causes of the current financial crisis. The kind of additional authority that the FTC seeks is in no way related to "credit default swaps" or "subprime mortgages," and would have far-reaching effects on a multitude of businesses outside of the financial services area.

DMA and nearly thirty other associations recently wrote to this committee about the far-reaching and unintended consequences that would result from expanding the FTC's authority. With your permission, I would like to submit that letter for the record, but let me also note some of those signatories here in order to exemplify the breadth of industry concern over these proposed changes to the FTC's authority: American Business Media, Consumer Electronics Association, Consumer Healthcare Products Association, International Franchise Association, National Association of Manufacturers, National Association of Realtors, National Association of Whole-

¹ Founded in 1917, DMA today represents more than 3,100 members across dozens of vertical industries in the U.S. and 50 other nations, including a majority of the Fortune 100 companies, as well as nonprofit organizations. Included are cataloguers, financial services, book and magazine publishers, retail stores, industrial manufacturers, Internet-based businesses, and a host of other segments, as well as the service industries that support them. DMA and our members appreciate the Subcommittee's continued outreach to the business community on significant issues such as FTC authority.

² The full text of DMA's *Guidelines for Ethical Business Practice*, as well as additional information regarding our robust self-regulatory program are available at <http://www.dmaresponsibility.org/>.

³ DMA releases an annual Ethics Case Report summarizing the findings of the DMA Committee on Ethical Business Practice. The most recent report, covering the period between February 2009 and February 2010 is available online at <http://www.the-dma.org/guidelines/DMAEthicsCaseReport2-09-2-10-Final.pdf>.

⁴ For example, we have worked with the Commission in the following areas, among others: (1) Telemarketing Sales Rule (Complying with the Telemarketing Sales Rule, available at <http://www.ftc.gov/bcp/edu/pubs/business/marketing/bus27.shtm>); (2) Children's Online Privacy Protection (*How to Comply with the Children's Online Privacy Protection Rule: A Guide from the Federal Trade Commission, the DMA, and the Internet Alliance*, available at <http://www.ftc.gov/bcp/edu/pubs/business/idtheft/bus45.shtm>); and (3) Onguard Online, available at <http://www.onguardonline.gov/about-us/overview.aspx>.

salers-Distributors, National Automobile Dealers Association, National Retail Federation, Software & Information Industry Association, and the U.S. Chamber of Commerce.

Further, we believe that the safeguards and protections required by Magnuson-Moss—enacted in the early 1980s as a result of FTC abuse of APA rulemaking in the 1970s—continue to serve a valuable and useful purpose, and should not be repealed. These protections were established to achieve balance in government policymaking, limit regulatory overreaching, and to maintain Congress’ authority to legislate on policy issues. We do not believe that a complete elimination of important procedural safeguards is necessary, or that it will ultimately be in the best interest of businesses and consumers.

My remarks today will focus on the following four areas, which have been the subject of recent discussion surrounding FTC reauthorization: (1) Rulemaking under the Administrative Procedure Act (“APA”); (2) Authority to assess civil penalties; (3) Authority to pursue aiding and abetting; and, (4) Authority for independent litigation.

II. The Procedural Safeguards Currently Governing the FTC’s “Unfair or Deceptive” Authority Should Remain Intact

A. Procedural Safeguards Are Necessary Given the FTC’s Broad Jurisdiction

As I mentioned earlier, DMA has joined with nearly thirty major trade associations—representing virtually every industry—in expressing concerns about the proposed repeal of statutory protections that currently govern the FTC’s rulemaking ability. These statutory protections were enacted precisely to ensure appropriate checks and balances on FTC rulemaking under its “unfair or deceptive” authority, which gives the Commission sweeping jurisdiction over all but a few sectors of the American economy. The legislation currently under consideration would give the FTC streamlined APA authority to promulgate rules regarding any “unfair or deceptive” acts or practices across dozens of industries and countless marketing practices. Such a sweeping allocation of power would mitigate the need for congressional oversight and specific grants of authority to regulate on particular issues.

DMA believes that the potential economic impact of such broad, new authority should be fully evaluated by Congress in the process of considering such a dramatic change. Many DMA member companies were severely impacted by the current economic downturn. Our most recent *Quarterly Business Review* suggests that marketing spending—the principle measure of economic productivity—is “finally reversing the endemic downward spiral that began, for many, as early as mid-2007,”⁵ but that economic recovery in the marketing community remains very slow in gaining steam. We strongly believe that the addition of new regulatory burdens at this time would limit market innovation and reduce the number of new jobs that the business community is able to create.

B. The FTC Already Has APA Rulemaking Authority in Many Significant Areas and Congress Has the Power to Grant Additional Authority as Is Appropriate and Necessary

Let me address several items that must be clarified with regard to the FTC’s current rulemaking authority. The Commission has indicated that all other agencies have APA rulemaking authority. First, not every other agency has APA rulemaking authority. Second, the agencies currently using APA rulemaking have mandates that are very different from that of the FTC. Third, the FTC already has APA rulemaking authority under many different statutes,⁶ and DMA supports those specific grants of APA authority. It is only in the expansive area of “unfair and deceptive” practices—where the standards and jurisdiction are very broad—that the FTC must follow the protections and safeguards of the Magnuson-Moss Act.

Prior to the implementation of the Magnuson-Moss safeguards in 1975 and 1980, the FTC followed APA rulemaking procedures to fulfill its exceptionally broad mandate. The Commission exercised little restraint and began conducting rulemakings on a wide range of subjects, including a proposal to completely ban children’s adver-

⁵*DMA/Winterberry Group Quarterly Business Review: Fourth Quarter of 2009*. Pg. 6. New York: Direct Marketing Association. March 2010.

⁶See e.g., Controlling the Assault of Non-Solicited Pornography and Marketing Act, Children’s Online Privacy Protection Act, Fair Credit Reporting Act, Gramm-Leach-Bliley Act, American Recovery and Reinvestment Act (i.e., health data security breach notification), Energy Policy and Conservation Act (i.e., appliance labeling, testing procedures and labeling for recycled oil), Fair Debt Collection Practices Act, Fairness to Contact Lens Consumers Act, Telemarketing and Consumer Fraud and Abuse Prevention Act, Omnibus Appropriations Act of 2009 as clarified by the Credit CARD Act of 2009 (i.e., mortgage loans).

tising. *The Washington Post* viewed such rulemakings as “preposterous intervention[s] that would turn the agency into a great national nanny.”⁷ As a result, Congress took steps to curb such FTC overreaching by enacting the Magnuson-Moss Act.

The FTC’s extremely broad authority spans innumerable industries and, therefore, is quite different in nature from that of other Federal agencies, whose powers tend to be more industry-specific. When a Federal agency has authority over particular industry, such as pharmaceuticals or education, its staff can become expert in that area. Even in the case of the Environmental Protection Agency, whose regulatory powers span many industries, its rulemaking authority is limited to particular areas by congressionally-approved and narrowly focused statutes, such as the Clean Air Act that limits air pollutants. By contrast, the FTC has authority to determine on its own what constitutes an “unfair or deceptive” practice, and to regulate such a practice wherever it occurs. Based on the Commission’s record of past overreaching, we are concerned that providing the FTC with comprehensive APA rulemaking authority would once again lead the agency to overstep its bounds. Given the FTC’s broad mandate and the historical need for the imposition of safeguards, we believe that the Magnuson-Moss provisions should not be repealed.

C. There Is No Need for Comprehensive APA Rulemaking Authority and Specific Shortcomings of Magnuson-Moss Have Not Been Demonstrated

We question the Commission’s claims that it needs APA rulemaking authority in order to properly protect consumers, and strongly believe that the FTC has done a superb job heretofore without such broad authority. Just last month, FTC Chairman Jon Leibowitz testified before this committee that, “. . . in 2009 alone, the FTC and the states, working in close coordination, brought more than 200 cases against firms that peddled phone mortgage modification and foreclosure rescue scams.”⁸ He went on to say,

“The FTC is primarily a law enforcement agency, and it has used its authority proactively to protect financially distressed consumers. In many of these cases, the Commission has used its powers to seek temporary restraining orders, asset freeze orders, and other immediate relief to stop financial scams in their tracks and preserve money for ultimate return to consumers. Even prior to the economic downturn, the Commission acted aggressively to stop financial fraud and assist consumer victims. For example, the agency brought a series of cases against a number of the Nation’s subprime mortgage lenders and services challenging a variety of unfair and deceptive practices. Over the past 5 years, the FTC has filed over 100 actions against providers of financial services, and in the past 10 years, the Commission has obtained nearly half a billion in redress for consumers of financial services.”⁹

Over the past fifteen years, there is no record of the FTC requesting broad APA rulemaking authority from Congress. Further, if such rulemaking authority is critical, the Commission should be able to specifically enumerate the areas in which it would use such authority. Instead, during last month’s hearing, in response to a request from Senator Johanns that he enumerate areas in which APA rulemaking authority would be helpful, Chairman Leibowitz indicated “. . . we’d really want to [. . .] think for a while if we got this authority about what we wanted to do and what we wouldn’t want to do . . .”¹⁰

If there are specific areas in which such streamlined rulemaking authority is necessary, then we believe that Congress should consider and pass legislation detailing those areas. In general, DMA supports granting APA rulemaking authority to the FTC in order to address very specific problems. For example, the Commission was appropriately given APA rulemaking authority when implementing rules regarding children’s privacy, commercial e-mail, telemarketing, and (jointly with other financial regulators) financial privacy. Just last year, Congress provided APA rulemaking authority to the FTC in order to address specific problems in the mortgage industry.

⁷ Editorial, *The FTC as National Nanny*, *Washington Post*. Mar. 1, 1978, at A22.

⁸ Prepared Statement of the Federal Trade Commission on Financial Services and Products: The Role of the Federal Trade Commission in Protecting Consumers, before the Senate Committee on Commerce, Science, and Transportation.” Pg. 1. February 4, 2010.

⁹ Prepared Statement of the Federal Trade Commission on Financial Services and Products: The Role of the Federal Trade Commission in Protecting Consumers, before the Senate Committee on Commerce, Science, and Transportation.” Pg. 4. February 4, 2010.

¹⁰ “Senate Commerce, Science and Transportation Committee Holds Hearing on the Role of the Federal Trade Commission Concerning Financial Services and Products As it Relates to Consumers.” CQ Congressional Transcripts. February 4, 2010.

Similarly, while it has been suggested that the Magnuson-Moss safeguards make it impossible to promulgate a rule in less than 8 to 10 years, the Commission has not shown any specific evidence to support this assertion, or to show that a particular procedure under Magnuson-Moss results in an unduly lengthy rulemaking process. In the absence of such evidence, Congress should not change the Magnuson-Moss procedures. If the FTC were to make such a specific showing, then we believe that Congress should evaluate the particular aspects of Magnuson-Moss that the Commission finds problematic, and it should seek to identify a targeted solution in order to preserve the policy goals behind these important and longstanding safeguards.

We are particularly concerned about the unintended consequences of repealing the “prevalence” requirement under Magnuson-Moss. This provision requires the FTC to issue a finding that an “unfair or deceptive” practice has become “prevalent” in the marketplace before proceeding with a rule. Requiring that the Commission show prevalence of an “unfair or deceptive” practice by industry ensures that responsible businesses across the country are not burdened with regulations that stifle innovation or legitimate commerce as a result of the bad practices of a few actors. The FTC has asserted that it has had difficulty making a showing of prevalence, and that such a requirement is burdensome, since the Commission is required to amass a body of evidence before a rulemaking can proceed.

Currently, the FTC independently decides to expend considerable resources on enforcement actions, workshops, and other educational and information-gathering activities in order to establish weighty hearing records on a particular issue for the purpose of commencing a rulemaking. We are not aware that the FTC has documented any difficulty in establishing a finding under the “prevalence” standard, and we do not believe that Congress should repeal it until or unless the FTC can document evidence to support such a claim.

Likewise, there has been no evidence to suggest that the Commission has experienced difficulty in demonstrating “prevalence” in our Nation’s courts, or that the courts are incapable making such an interpretation. Both business and consumers will benefit if Congress continues to require the FTC to produce evidence of “prevalence” that will survive independent legal scrutiny. Business will not have to bear the expense of unnecessary litigation, which is sure to arise if a lesser standard of proof were to be created. Consumers will be sure that the FTC was focusing its attention and resources on the most prevalent and egregious problems in the marketplace.

D. Magnuson-Moss Protections Should Remain in Place to Avoid Limiting Innovation in Critical Areas of the Economy Such as the Internet

The DMA is particularly concerned that the Commission would use its expanded rulemaking authority to regulate in the areas where it has been most actively involved in policy discussion and enforcement activity, and that its involvement in those areas would hinder new and emerging business practices, such as mobile and interactive marketing. Currently, the Commission has an especially good track record of working with business to encourage the establishment of meaningful and effective self-regulatory standards in the marketplace. Just this year, following proposed standards by the FTC, DMA partnered with the American Association of Advertising Agencies (4A’s), Association of National Advertisers (ANA), Interactive Advertising Bureau (IAB) and Better Business Bureau (BBB)—collectively representing the entire advertising industry—to develop self-regulatory standards for online advertising practices. We believe that the context for such collaborative efforts would change significantly if the rulemaking safeguards were repealed.

Specifically, we are concerned that over time regulations could emerge without affording Congress the opportunity to exercise its important oversight function to ensure that the appropriate checks and balances are in place. Such unchecked regulation might occur in areas such as information-sharing, privacy, Internet advertising and marketing, mobile marketing, affiliate marketing, targeted marketing, online behavioral marketing, marketing to children and teenagers, and numerous other topics where the best-intentioned rulemaking almost certainly cannot anticipate innovation and change, and may not be able to achieve its intended purpose without significant unintended consequences.

For example, regulation could limit Internet development—one of the continued key economic drivers and areas of job growth. DMA recently forecast that the Internet marketing workforce has the potential to grow 6.1 percent over the next 5 years—with 11 percent growth in the social networking medium alone—generating more than 2.6 million new jobs. Growth of the mobile marketing workforce was pro-

jected at more than 30 percent by 2014.¹¹ Instead, such rules could limit market innovation, and jeopardize the corresponding jobs and products that flow from such innovation.

III. The Commission Already Has Sufficient Enforcement Powers to Deter and Punish Bad Actors

We are also concerned with proposals to remove checks on the FTC's enforcement powers, including the proposal to grant the agency civil penalty authority. DMA believes that the FTC's existing enforcement tools are sufficient to protect consumers. Currently, the FTC can impose settlement orders on companies and seek the disgorgement of ill-gotten gains. If a company subsequently violates the order, then the FTC can also seek to obtain civil penalties. Based on feedback from DMA's members, this system provides very strong and effective incentives for companies to work cooperatively with the Commission in reaching settlements, which in turn provide industry with valuable guidance on the scope of acceptable practices in a timely fashion. We, therefore, strongly recommend against granting the FTC new authorities that could have significant unintended consequences, such as disrupting and even discouraging the cooperative spirit in negotiating settlements, and unduly lengthening the settlement process, thus leaving more time when consumers are unprotected.

IV. Additional Authority to Pursue Aiding and Abetting Is Unnecessary

Likewise, DMA is concerned with the proposals to grant the FTC authority to treat persons that "knowingly or recklessly" provide "substantial assistance" to others in committing "unfair or deceptive" acts or practices as primary wrongdoers even when they lack actual knowledge of a violation. The FTC already has authority to pursue those who commit "unfair or deceptive" acts or practices. We also caution that granting authority specifically over aiders and abettors in this manner would be unworkable because it would put a wide range of service providers in the position of policing the actions of clients over which they exercise no control. Examples of service providers who would be put in the position of having to police the actions of their clients—were the FTC to have authority over aiders and abettors—include agencies involved in the creation of a campaign advertising a product that was later found to be faulty, printers of catalogues, web hosting companies, or publishers who place advertisements in their newspapers or on their websites.

V. Current Litigating Authority That Is Coordinated Through the Department of Justice Is Effective

Finally, we oppose proposals to grant the FTC independent litigating authority to seek civil penalties. Such proposals would remove the current requirement that the FTC provide the Department of Justice ("DOJ") with 45 days to determine whether it will take a case on behalf of the FTC, and instead permit the agency to bring suits immediately on its own. We believe that inclusion of the DOJ in this process is necessary to provide a check on agency discretion and that it has the added benefits of promoting orderly access to the Federal courts, as well as providing for consistent and coordinated Federal litigation.

VI. Conclusion

In summary, DMA believes that the FTC does a commendable job in protecting consumers against unfair or deceptive acts or practices through its existing enforcement actions under the more than twenty statutes that it currently administers. Given the broad organic jurisdiction of the FTC, however, we oppose the repeal of important safeguards provided by the Magnuson-Moss Act over "unfair and deceptive" practices. Similarly, we believe that the current enforcement regime provides effective tools to both combat bad practices and to deter wrongdoers.

I thank you for your time and for the opportunity to speak before your Subcommittee. I look forward to your questions.

Senator PRYOR. Thank you.
Mr. Muris.

¹¹*The Power of Direct Marketing 2009–2010*. Produced by IHS Global Insight for DMA. 13th Edition. Pg. 184–185. New York: Direct Marketing Association. October 2009.

**STATEMENT OF HON. TIMOTHY J. MURIS, FOUNDATION
PROFESSOR, GEORGE MASON UNIVERSITY SCHOOL OF LAW,
AND OF COUNSEL, O'MELVENY & MYERS LLP**

Mr. MURIS. Thank you, Mr. Chairman.

I've held four positions at the FTC. I was Chairman from 2001 through 2004, and am the only person ever to direct both of the agency's enforcement bureaus. While at the Commission I worked on each issue I discuss today. I've also worked on most as an academic and consultant.

I believe strongly in the mission of the Commission. Serving as Chairman was the greatest honor of my professional career, and I'm especially proud of our accomplishments. As just one example, we protected the privacy of Americans, including creating the National Do Not Call Registry.

My testimony makes seven points:

First, Americans use markets to organize the economy. The FTC has an important, albeit limited, role. The Commission works best as a referee, not the star player.

Second, using its existing authority over vast parts of our economy, the prestigious Global Competition Review already gives the Commission its highest rating, praising the agency's performance in both areas.

Third, again using its existing authority, the Commission has embraced new initiatives that would greatly expand its impact on the economy. As one example, the Commission, together with three other agencies, recently proposed guides to ban advertising of many breakfast cereals, soups, yogurts, and other products from thousands of TV shows and other media.

The agency has been down this road before. Thirty years ago, after 3 years of work, an editorial in the Post, scolding the Commission for acting like the National Nanny, and an increasingly exasperated Congress, the Commission abandoned the children's advertising rulemaking. Today's proposal should fare no better.

Obesity is a major problem, but these guides would be ineffective, because the ads kids see do not make them obese. Although American children see many food ads each year, they have done so for decades, since long before the dramatic upswing in obesity.

Today's kids actually watch less television than previous generations, and have many more commercial-free choices. They see fewer food ads, but they weigh more. Even our dogs and cats are fat, and it's not because they're watching too much advertising.

[Laughter.]

Mr. MURIS. My fourth point is that, coupled with almost certain Congressional requests for new rules, lowering the barriers to agency rulemaking will transform the FTC. It would be a major mistake for formal rulemaking to be a substantial component of FTC consumer protection.

The agency tried this in the 1970s, with disastrous consequences. Over 15 months, the Commission proposed 16 rules to transform entire industries, usually without a clear theory of why there was a law violation, and, at best, a shaky empirical foundation. Of course, such rules took a long time. Nevertheless, at least 15 rules got to the Commission under Magnuson-Moss procedures, some in only a few years.

The procedures currently required for rules force the Commission to be clear about its theories and focus its evidence on the key questions. As in the 1970s, the FTC will fail in its mission to protect consumers if it seeks to become the second most powerful legislature in Washington. The ability of rulemaking participants to designate disputed factual issues and cross-examine witnesses is very useful to test the Commission's theories. Properly focused, the procedures are workable, and, in many rules, they were done in just a few years.

My fifth point is that the FTC already can obtain civil penalties in many cases. Further, the FTC currently can obtain all the monetary relief possible in fraud cases, already, through its existing 13(b) authority. Automatic civil penalty authority in every case would result in over deterrence sometimes, and unnecessarily complicate FTC efforts to expand the law in new areas. Moreover, because there is no sure way to limit the expansion of FTC authority to consumer protection cases, it would create an additional arbitrary and unfair distinction between the two Federal antitrust agencies, the Department of Justice being the other. Those firms subject to FTC review would face a different remedial regime, not because there's something different about the industries, but merely because of the unfortunate accident of falling under the FTC, not the DOJ.

My sixth point is that, if this committee does reauthorize the FTC, it should address another arbitrary and unfair distinction between the two antitrust agencies, namely the different standards the FTC has, and easier standards when seeking to adjoin a merger. Both the FTC and DOJ enforce the same statute, but the FTC has an easier time. That's fundamentally unfair.

Finally, I believe that a separate third-party liability section in the FTC Act is both unwise and unnecessary. It's unwise, because it creates a uniform standard where uniformity is inappropriate. A new section is unnecessary, because the FTC already can attack third-parties in appropriate circumstances. The standards for third-party liability should be developed case by case, under the FTC's current unfairness jurisdiction.

Thank you. I would be glad to answer your questions.

[The prepared statement of Mr. Muris follows:]

PREPARED STATEMENT OF HON. TIMOTHY J. MURIS, FOUNDATION PROFESSOR,
GEORGE MASON UNIVERSITY SCHOOL OF LAW, AND OF COUNSEL, O'MELVENY &
MYERS LLP

Chairman Pryor, Ranking Member Wicker, and members of the distinguished Subcommittee, my name is Tim Muris. I am Foundation Professor at the George Mason University School of Law, and Of Counsel at O'Melveny & Myers LLP. Most relevant for today's hearing, I have held four positions at the Federal Trade Commission (FTC), most recently as Chairman from 2001–2004. Also I am the only person ever to direct both of the FTC's enforcement arms—the Bureau of Consumer Protection and the Bureau of Competition. I believe strongly in the importance of the FTC as a consumer protection agency. Serving as Chairman was the greatest honor of my professional career, and I am especially proud of our accomplishments, such as our work in fostering competition in healthcare, developing and strengthening the anti-fraud program, and promoting and protecting the privacy of Americans, including creation of the National Do Not Call Registry.

Because most of the issues raised by the efforts to expand the FTC's authority are in the agency's consumer protection mission, most, but not all, of my testimony discusses that mission. I address seven points:

1. The FTC has an important, albeit limited, role in our economy. The Commission works best when it acts as a referee, not the star player.
2. Using its existing statutory authority, the Commission ranks as one of the world's preeminent competition and consumer protection agencies.
3. Under its existing statutory authority, the Commission has embraced some new, aggressive, and in some cases controversial, initiatives that would greatly expand its impact on the economy.
4. The so-called "Magnuson-Moss" rulemaking procedures are reasonable; their elimination would result in a major regression for the FTC. Coupled with almost certain Congressional requests for new rules, lowering the barriers to agency rulemaking will transform the FTC, threatening to place the Commission in the untenable posture of the 1970s, during which time it sought to be the second most powerful legislature in Washington, proposing dramatic, usually harmful, changes over wide-ranging sectors of the economy.
5. The FTC already can obtain civil penalties in many cases, notably those involving Commission order and rule violations. Further, the FTC currently can obtain all the monetary relief possible in fraud cases through its existing Section 13(b) authority. Civil penalties would add nothing to the FTC's arsenal in such cases. Nevertheless, a majority of the Commission seeks automatic civil penalty authority in *all* cases. Such authority would represent another fundamental change in FTC law, resulting in over-deterrence in some circumstances, and unnecessarily complicating efforts to expand FTC law to new areas. Moreover, because there is no sure way to limit this expansion of FTC authority to consumer protection cases, it would create an additional, arbitrary, and unfair distinction between the two Federal antitrust agencies, the Department of Justice and the FTC. (Given that the FTC and the DOJ divide the economy between the two agencies in making enforcement decisions, those firms subject to FTC review would face a different remedial regime, not because there is something different about the industry, but merely because of the historical accident of falling under FTC review, and not the DOJ.)
6. If this committee does reauthorize the FTC Act, it should address another arbitrary and unfair distinction between the FTC and the DOJ, namely the different, and easier, enforcement standards that the FTC has recently obtained for itself in seeking to enjoin proposed mergers. Although both the FTC and the DOJ enforce the same merger statute, Section 7 of the Clayton Act, a merger's legality can turn, not on its underlying merits, but on which agency evaluates the transaction.
7. Finally, creation of a separate third-party liability section in the FTC Act is both unwise and unnecessary. The step is unwise because it creates a uniform standard in an area where uniformity is inappropriate. The new section is unnecessary because the FTC already has the ability to attack third parties in appropriate circumstances. Careful use of the Commission's "unfairness" jurisdiction provides the best vehicle to address third parties who facilitate violations by others. The standards for third-party liability should be developed, case-by-case, under the FTC's current authority.

1. The FTC Is a Referee in Our Economy, Not a Star Player

As a Nation, we use markets to organize and drive our economy. We derive vast economic benefits from these markets and the competition that helps markets function properly. These benefits should not be taken for granted; they are not immutable. The Nation's consumer protection policy can profoundly enhance these benefits by strengthening the market. The policy also can reduce these benefits, however, by unduly intruding upon the market and hampering the competitive process. The Federal Trade Commission has a special responsibility to protect and speak for the competitive process, to combat practices that harm the market, and to advocate against policies that reduce competition's benefits to consumers.

The FTC protects consumers in part through its responsibility to prevent "unfair or deceptive acts or practices."¹ The FTC, and other public institutions, operate against a backdrop of other consumer protection institutions, most notably the market and common law. In our economy, producers compete to offer the most appealing mix of price and quality. This competition spurs producers to meet consumer expectations because the market generally disciplines sellers who disappoint consumers, and thus those sellers lose sales to producers who better meet consumer needs. These same competitive pressures encourage producers to provide truthful informa-

¹ 15 U.S.C. § 45.

tion about their offerings. Market mechanisms do not always effectively discipline deceptive claims, however, especially when product attributes are difficult to evaluate or sellers are unconcerned about repeat business.

When competition alone cannot punish or deter seller dishonesty, another institution can mitigate these problems. Private legal rights provide basic rules for interactions between producers and consumers. Government also can serve a useful role by providing default rules, which apply when parties do not specify rules. These rights and default rules alleviate some of the weaknesses in the market system by reducing the consequences to the buyer from a problematic exchange. Although private legal rights provide powerful protections, in some circumstances—as when court enforcement is impractical or economically infeasible—they may not be an effective deterrent.

When consumers are vulnerable because market forces are insufficient and the common law is ineffective, a public agency, such as the Federal Trade Commission, can help preserve competition and protect consumers. The FTC's consumer protection and competition missions naturally complement each other by protecting consumers from fraud, deception, and harmful restraints on competition without restricting their market choices or their ability to obtain truthful information about products or services. The Commission attacks conduct that undermines competition, impedes the exchange of accurate information, or otherwise violates the common law rules of exchange.

Because of its antitrust responsibilities, the agency is well aware that robust competition is the best, single means to protect consumers. Rivalry among incumbent producers, and the threat or fact of entry from new suppliers, prompt firms to satisfy consumers. In competitive markets, businesses prosper by surpassing their rivals. In turn, this competitive market has important implications for the design of consumer protection policies to regulate advertising and marketing practices.

Without a continual reminder of the benefits of competition, consumer protection programs can impose controls that ultimately diminish the very competition that increases consumer choice. Some consumer protection measures—even those motivated by the best of intentions—can create barriers to entry that limit the freedom of sellers to provide what consumers demand. While I was Chairman, for example, the Commission participated in a court challenge to a state law that banned anyone other than licensed funeral directors from selling caskets to members of the public over the Internet. While recognizing the state's intent to protect its consumers, the Commission questioned whether the law did more harm than good. In an amicus brief, the FTC noted that “[r]ather than protect[ing] consumers by exposing funeral directors to meaningful competition, the [law] protects funeral directors from facing any competition from third-party casket sellers.”² The synergy between protecting consumers from fraud or deception without unduly restricting their choices in the market or their ability to obtain truthful information should undergird all of the Commission's consumer protection initiatives.

2. Under its Existing Authority, the FTC Has Become One of the World's Preeminent Competition and Consumer Protection Agencies

With broad authority to protect consumers from fraudulent, deceptive, and unfair practices and to preserve competitive markets by prohibiting anticompetitive mergers and business conduct, the Federal Trade Commission's actions affect the lives of every American. As the only Federal agency with both consumer protection and competition jurisdiction, the FTC has the unique ability to investigate the conduct of numerous players across our ever-changing economy and stop unlawful behavior that harms Americans. Particularly in difficult economic times, the agency protects financially distressed individuals who fall victim to fraud and deception and stops anticompetitive practices that deter the lower cost products and services that result from vigorous competition.

During the past 2 years alone, the Commission has targeted problems in financial services as a primary area for helping consumers.³ In particular, the agency has focused on deceptive practices in mortgage servicing, subprime credit, foreclosure rescue, fair lending, debt relief, credit repair, debt collection, advance fee loans, payday lending, and credit card marketing.⁴ In addition, the FTC has targeted deceptive

²Memorandum of Law of *Amicus Curiae* Federal Trade Commission, *Powers v. Harris*, No. CIV-01-445-F (W.D. Okla. Sept. 5, 2002), available at <http://www.ftc.gov/os/2002/09/okamicus.pdf>.

³See Federal Trade Commission, *The FTC in 2009* 45 (Mar. 2009).

⁴See *id.* at 46-48; *Financial Services and Products: The Role of the Federal Trade Commission in Protecting Consumers Before the Senate Comm. On Commerce, Science, & Transportation*, 110th Cong. 4-9 (2010) (Statement of the Federal Trade Commission).

health, safety, and weight loss claims; telemarketing fraud; fraud against small business; and business opportunity schemes.⁵

The Commission has been very successful in addressing fraudulent, deceptive, and unfair practices. For example, from March 2008 through February 2009, the Commission filed 64 Federal district court actions and secured 83 judgments and orders requiring defendants to pay more than \$371 million in consumer redress or disgorgement of ill-gotten gains.⁶ During this same time, the Department of Justice, on behalf of the FTC, obtained 15 civil penalty orders and \$9.6 million in assessed civil penalties, of which nearly \$8.3 million has been collected.⁷

Besides the high status accorded to fraud, deception, and unfairness cases, the FTC also places a very high priority on consumer privacy and the protection of personal information. The FTC enforces the FTC Act, the Safeguards Rule under the Gramm-Leach-Bliley Act, and the Fair Credit Reporting Act to protect consumers from threats to the security of their personal information. Using these various statutes and the Safeguards Rule, as of March 2009, the FTC brought 25 enforcement actions that challenged inadequate security practices by firms that mishandled sensitive consumer information.⁸

On the competition side, the FTC scrutinizes industries that have a significant effect on consumers' daily lives, including health care, energy, technology, and consumer goods and services.⁹ Challenging alleged anticompetitive mergers has been a key priority. The Commission reviews premerger notification filings and other information to determine if a transaction may substantially lessen competition. From March 2008 through February 2009, for example, the FTC filed six preliminary injunctions and administrative complaints challenging proposed and consummated mergers that it believed raised competitive concerns.¹⁰ The agency also identified competitive concerns in an additional 16 proposed acquisitions during that time period that it resolved through consent agreements with the merging firms.¹¹ These consent orders permitted the transactions to proceed after changes were adopted in markets such as those involving generic and branded pharmaceuticals, specialty chemicals, medical devices, electronic public records services, and consumer goods and technology.¹²

The Commission continues to be vigilant in challenging possible anticompetitive conduct through filing actions in Federal court. Examples of such challenges from March 2008 through February 2009 include actions to stop:

- (a) The payments by branded drug makers to generic rivals to agree not to market a lower-priced generic drug;¹³
- (b) The use of Multiple Listing Service rules to prevent discount real estate professionals from making their listings available on popular websites listing homes for sale;¹⁴ and
- (c) The use of joint fee negotiation by physician groups to keep reimbursement rates high without providing benefits to patients.¹⁵

The FTC uses a variety of tools to accomplish its objectives, including litigation, rulemaking, policy research and development, competition advocacy, consumer and business education, hearings, and the encouragement of self-regulatory initiatives.¹⁶ The Commission also promotes sound policy initiatives by holding public workshops with industry leaders and consumers. Recent workshops have included, "Exploring Privacy: A Roundtable Series,"¹⁷ held in March 2010; "Horizontal Merger Guide-

⁵ See, e.g., Final Order, *FTC v. Roex, Inc. et al.*, No. SACV09-0266 (C.D. Cal. May 20, 2009) (Marketers of dietary supplements and devices agree to pay \$3 million to settle FTC charges of deceptive advertising); Final Order, *FTC v. Advantage Credit Repair, et al.*, No. 08-CV-5994 (N.D. Ill. Oct. 27, 2009) (Credit repair scammers settle FTC charges).

⁶ See *The FTC in 2009 supra* note 3 at 45-46.

⁷ *Id.* at 46-48; Statement of the Federal Trade Commission *supra* note 4 at 4-9.

⁸ *The FTC in 2009 supra* note 3 at 56.

⁹ *Id.* at 15.

¹⁰ *Id.* at 12.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 13.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Former Chairman Robert Pitofsky and I discuss the remarkable range of FTC tools in Timothy J. Muris & Robert Pitofsky, *More Than Law Enforcement: The FTC's Many Tools—A Conversation With Tim Muris and Bob Pitofsky*, 72 *Antitrust L.J.* 773 (2005).

¹⁷ "Exploring Privacy: A Roundtable Series" explored privacy issues posed by 21st century technology and business practices that collect and use consumer data, including social net-

lines Workshop,”¹⁸ held in January 2010; and “Protecting Consumers in Debt Collection Litigation and Arbitration: A Roundtable Discussion,”¹⁹ held in December 2009.

Given this impressive agenda and workload, in 2009 the Global Competition Review (“GCR”) gave the FTC its highest rating, five out of five stars.²⁰ The GCR stated that “[f]ew agencies in the world balance their antitrust and consumer protection duties as well as the U.S. Federal Trade Commission. While many agencies struggle to be good at one or the other, the FTC has mastered both.”²¹ The agency does not need new authority to continue this stellar performance.

3. Under its Existing Statutes, the FTC Already Is Embarking on Major, Sometimes Controversial, Expansions of its Authority

As our economy evolves, so too should the FTC. Fraud, for example, takes new forms, and the Commission must adapt to the new threats. Moreover, the agency is currently considering using new remedies against fraudsters that appear worthwhile, such as banning them from certain activities in the future. Even without expanded statutory powers, the Commission has embarked on many other new initiatives. Whether or not one thinks these initiatives are wise, it is clear the FTC does not feel constrained by a lack of authority to pursue them. I discuss a few of the new activities in this section.

A. The Proposed “Voluntary” Guides for Food Marketing

Today, most adults are either obese or overweight, and the rate of overweight children has increased rapidly. This alarming increase in obesity is a complex public health issue that demands effective response by parents, industry, physicians, consumer advocates, and government.

Responding to a Congressional request for a report and recommendations about guidelines for marketing food to children and teens, the Commission, together with the Food and Drug Administration (FDA), the Center for Disease Control, and the U.S. Department of Agriculture released proposed guides that would ban advertising of (among other products) many breakfast cereals, soups, and yogurts from thousands of TV shows and other media.²² These foods, according to the standards, should not be advertised on television and other media when the audience has more than 20 percent teens or 30 percent children.

The FTC has been down this road before. Prodded by consumer activists in the late 1970s, the Commission sought to stop advertising to children because of concerns that they did not understand the nature of advertising, were eating too much of the wrong food, and were suffering tooth decay and other health risks as result.²³ After 3 years of work, 6,000 pages of transcript, 60,000 pages of comments, an editorial in *The Washington Post* scolding the Commission for acting like the National Nanny, and an increasingly exasperated Congress, the Commission abandoned the rulemaking.

Today’s proposal should fare no better. It is impractical, ineffective, and (were it to become law) illegal. It’s impractical because, although kids see many food ads on children’s programming, many ads they see air on programs that are not directed to them. Moreover, a ban would be ineffective because there is no reason to think that the ads kids see make them obese. Although American children see thousands of food ads each year, they have done so for decades—since long before the dramatic upswing in obesity. Today’s kids actually watch less television than previous generations and have many more commercial-free choices. They see fewer food ads, but they weigh more. Even our dogs and cats are fat, and it is not because they are watching too much advertising.

Finally, a ban would be illegal. Food is not illegal to sell to those under 18. Our First Amendment requires government to demonstrate that restrictions on truthful,

working, cloud computing, online behavioral advertising, mobile marketing, and the collection and use of information by retailers, data brokers, third-party applications, and other diverse businesses.

¹⁸“Horizontal Merger Guidelines Workshop” explored possible updates to the Horizontal Merger Guidelines used by both the FTC and the Department of Justice to evaluate the potential competitive effects of mergers and acquisitions.

¹⁹“Protecting Consumers in Debt Collection Litigation and Arbitration: A Roundtable Discussion” examined consumer protection issues in debt collection proceedings.

²⁰Global Competition Review, *Rating Enforcement 2009—United States Federal Trade Commission* (2009).

²¹*Id.*

²²Workshop, Federal Trade Commission, *Sizing Up Food Marketing and Childhood Obesity* (Dec. 15, 2009).

²³See FTC Staff Report on Television Advertising to Children (Feb. 1978); Notice of Proposed Rulemaking on Television Advertising to Children, 43 *Fed. Reg.* 17,967 (April 27, 1978).

non-misleading commercial speech for legal products meaningfully advance a compelling interest. Because a children's advertising ban would be ineffective,²⁴ it would fall far short of that test. Moreover, many of the restricted foods actually meet existing government standards—such as those under WIC, the Special Supplemental Nutrition Program for Women, Infants, and Children.²⁵ Among the foods that the government is encouraging children to eat, but that the proposed standards would prevent advertisers from marketing to families, are milk, cheese, eggs, most breakfast cereal, and peanut butter. In any event, the government certainly cannot legally restrict truthful ads when the majority of the audience are adults.

One difference between the current proposal and the old rulemaking—called Kid Vid—is that this time the agencies are suggesting that the standards be adopted “voluntarily” by industry. Yet, can standards suggested by a government claiming the power to regulate truly be “voluntary”? Moreover, at the same workshop that the standards were announced, a representative of one of the same activist organizations that inspired the 1970s efforts speculated that a failure to comply with the new proposal would provoke calls for rules or legislation.²⁶ And, it would be a risky proposition for advertisers all to adopt the Commission's standards voluntarily, as joint restraints on advertising are well known to impair competition,²⁷ and these restraints would hardly pass antitrust muster.²⁸

Attacking food advertising may offer the illusion of progress in the fight against childhood obesity. But in the end, Americans must eat less and exercise more. That said, advertising can play a role in fighting obesity. One FTC study showed that when the government changed its position and permitted cereal advertisers to make truthful claims about the relationship between fiber intake and reduced cancer risk, consumers and sellers responded.²⁹ Consumers increased their consumption of high-fiber cereals, the market share for high-fiber cereals increased, and more high-fiber cereals found a place on grocers' shelves.

We need to harness that same power to help fight obesity. Year after year, manufacturers have shown great ingenuity in pitching foods to kids as tasty and fun; their challenge now is to develop and promote healthy foods, too. Major marketers (representing over three quarters of all ads kids see) have already undertaken initiatives to market nutritious foods and healthy lifestyles. Under the auspices of the Council of Better Business Bureaus, the companies also made individual commitments to do so, and we have seen big shifts in advertising to kids, and major reformulations of the foods advertised to them.

B. Changes in Advertising Substantiation

Changing the advertising substantiation doctrine is another significant new initiative. The Commission has long required that advertisers possess a “reasonable basis” to substantiate their advertising claims. Since its inception, the substantiation doctrine has employed a flexible approach for determining the amount of evidence an advertiser needs to substantiate a particular claim.³⁰ Recognizing the importance of the free flow of information to help markets best serve consumers' needs, the Commission has developed a balancing test to assure that information

²⁴The Institute of Medicine found insufficient evidence to conclude that advertising caused obesity in either kids or teens. See IOM, *Food Marketing to Children and Youth: Threat or Opportunity?* (2006).

²⁵ “[T]he WIC Program—serves to safeguard the health of low-income women, infants, & children up to age 5 who are at nutritional risk by providing nutritious foods to supplement diets, information on healthy eating, and referrals to health care.” See <http://www.fns.usda.gov/wic/aboutwic/>.

²⁶ See Jared Favole, Federal Group Proposes Curbs on Marketing Food to Kids, *WSJ.com*, Dec. 16, 2009, available at <http://online.wsj.com/article/SB126092800862493091.html> (“The foods and beverages that could be affected if the proposed marketing restrictions became law include most sodas, candies, cookies, cereals and some types of yogurt, said Margo Wootan, Director of Nutrition Policy at the Center for Science in the Public Interest.”).

²⁷ Numerous studies have demonstrated the role of advertising in competitive markets. Some are collected in William MacLeod, et al., *Three Rules and a Constitution: Consumer Protection Finds Its Limits in Competition Policy*, 3 *Antitrust L. J.* (2005). For an example in the food industry, see C. Robert Clark, *Advertising Restrictions and Competition in the Children's Breakfast Cereal Industry*, 50 *J. L. & Econ.* (Nov. 2007), which found that cereal prices and shares of leading brands were higher in Quebec Canada, which banned advertising to children under 13, than in other Canadian provinces where the advertising is allowed.

²⁸ See *Food Marketing to Children and Youth: Threat or Opportunity?* *supra* note 24.

²⁹ Pauline Ippolito & Alan Mathios, *Health Claims in Advertising and Labeling: A Study of the Cereal Market* (1989) (FTC Bureau of Economics Staff Report) (“Study of the Cereal Market”).

³⁰ *Pfizer, Inc.*, 81 *FTC 23* (1972).

flows both freely and truthfully, without unnecessarily chilling advertisers' ability to provide consumers with important information.³¹

Thus, to support health-related claims for foods, the Commission has traditionally required that companies have "competent and reliable scientific evidence."³² That standard requires tests or other studies using "procedures generally accepted in the profession to yield accurate and reliable results."³³ Clinical testing is sometimes required because there is no other method that professionals believe yields accurate and reliable results. In other cases, however, other forms of evidence are generally accepted as reliable. There are, for example, no clinical trials of parachutes—and no serious doubt about whether they actually work to reduce risk.

In recent investigations, however, the staff has been seeking to replace that flexible standard with the same kinds of evidence that the Food and Drug Administration has traditionally required to approve new drugs. These proposed standards would require two well-controlled clinical trials to substantiate certain claims even if experts generally accept other methods as reliable. Moreover, they would apparently prohibit more limited claims that accurately disclose the limitations of the available evidence. An advertiser could not report, for example, that a single well-conducted clinical trial supports a claim until a second study came to the same conclusion. Courts have consistently rejected such blanket prohibitions on truthful speech as violations of the First Amendment.³⁴

Abandoning the flexible substantiation standard is a bad idea. The current approach lets the Commission strike the appropriate balance between the risks of mistakenly allowing false claims and the risks of mistakenly prohibiting truthful ones. When the consequences of false claims are high, as they are when an unsafe new drug is allowed on the market even though effective alternatives are available, a high substantiation standard is appropriate. But the risks of mistaken claims about foods are vastly lower. Consumers may pay a few pennies more or give up a better tasting product, costs that are purely economic.

In contrast, mistakenly prohibiting truthful claims about the relationship between diet and disease creates risks to public health. Consumers who do not know about the relationship between saturated fat consumption and heart disease, or about the relationship between fiber and cancer, or the relationship between folic acid and neural tube birth defects may suffer serious health consequences. When experts in the field believe that reliable studies indicate the likely truth of these relationships, there is good reason to allow such claims, even if the evidence does not meet the standard that would be required for a new drug.

The empirical evidence is clear that excessive restrictions on truthful advertising harm consumers.³⁵ They lead to higher product prices and less incentive for sellers to improve their products. Moreover, excessive restrictions have a disproportionate effect on those who are not as good at finding information from other sources. The well-educated, two-parent household may find their information elsewhere, but too often the less-educated, single-parent household will not. Much of the evidence for these conclusions is developed in a series of reports by the FTC's Bureau of Economics, beginning with a ground-breaking study of the impact of health claims on the market for cereals.³⁶ Applying FDA-like standards in cases in which experts regard other methods as reliable is simply bad policy.

Finally, repudiation of the Commission's flexible standard is not necessary to facilitate enforcement of FTC orders. Although the Commission does not win every case, it wins the overwhelming majority of those it brings. That fact alone makes clear that a more specific standard is not necessary to simplify enforcement. "Fencing in" order provisions that cover more products or more claims from a company that has violated the law are entirely appropriate, and widely used. There is no reason, however, to require past violators to meet a higher burden to substantiate the likely truth of their claims. A more specific requirement would not "fence in" proven violators; rather, it would "wall off" truthful claims that would be quite valuable to consumers.

³¹ FTC Policy Statement Regarding Advertising Substantiation, *appended to Thompson Med. Co.*, 104 FTC 648, 839 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986).

³² Bureau of Consumer Protection, FTC, *Dietary Supplements: An Advertising Guide for Industry* 9 (1998).

³³ *Id.*

³⁴ See *Pearson v. Shalala*, 164 F.3d 650 (D.C. Cir. 1999); *Whitaker v. Thompson*, 248 F. Supp. 2d 1 (D.D.C. 2002).

³⁵ See J. Howard Beales & Timothy J. Muris, *State and Federal Regulation of National Advertising* (1993), especially Chapter 2.

³⁶ Ippolito and Mathios, *Study of the Cereal Market*, *supra* note 29.

C. Behavioral Advertising

Increasingly, advertising supports the provision of free Internet content. The amount of money available to fund that content, and hence the quality of information available online, will depend on the advertising rates. The higher the rates, the more (and better) content consumers will receive. Behavioral advertising, which uses information about an anonymous consumer's browsing behavior to infer which ads are most likely to appeal to that consumer, promises to raise the rates that advertisers are willing to pay. Inappropriate restrictions on such ads could significantly impair the advertising-based model for financing Internet content.

The FTC is evaluating its approach to privacy, and is considering preventing behavioral advertising unless consumers affirmatively agree (*i.e.*, opt in) to accept such ads.³⁷ The analytical framework that the FTC currently employs was the result of a similar review undertaken when I became Chairman in 2001. That review led the Commission to shift its focus to the adverse consequences of the use and misuse of sensitive consumer information. Consequently, the Commission launched the National Do Not Call Registry and filed several cases involving failure to protect sensitive personal information.

The consequences model remains a powerful basis for guiding FTC privacy policy. Under that model, the Commission can protect consumers' subjective preferences for anonymity, just as it protects subjective preferences for products that are "Made in America." (Advertising misrepresenting that a product is made in America would violate the FTC Act. Moreover, customs and tariff rules may require disclosure of origin information for reasons unrelated to consumer misrepresentation.) For the Commission to protect consumer preferences, however, they must be preferences that are actually reflected in marketplace behavior. Subjective preferences only can be known from consumer behavior in the marketplace. They cannot be inferred from survey results if consumers can ignore the consequences of their own answers. Precisely because they are subjective, we cannot infer that because some consumers care about a particular attribute that such an attribute is worth the costs to others.

The question is one of approach. Of course, the Commission should protect known subjective consumer preferences, whether for products made in America or for privacy. Such preferences are important drivers of a market economy. It is another thing altogether, however, to argue that because *some* consumers have a preference, the Commission should require *all* sellers to satisfy that preference. That argument is simply wrong. Assuring the accuracy of claims that a product is made in America enhances consumer sovereignty—it lets consumers choose what matters to them and what does not. Requiring all sellers to offer American-made products—or even to disclose that their products are not made in America—is another matter altogether. It imposes the costs of admittedly real preferences of some on many who do not share them. The fact that a particular product characteristic, whether related to privacy or product attributes, is important to *me* is a very good reason for protecting affirmative claims about that characteristic. It is a very bad reason for imposing that preference on everyone else.

For consumers who independently value anonymity, an opt-out regime protects them because for these consumers, the benefits of opting out exceed the minimal costs.³⁸ Consumers who are willing to opt out reveal that they, in fact, have a preference for anonymity.

An opt-in regime, however, does not reveal consumer preferences in the same way. Because most consumers apparently think that little is at stake in deciding whether to allow information sharing, they are not willing to incur even small costs to exercise choice. Therefore, an opt-in regime will protect "privacy" on which they place little value, while denying them the benefits of information sharing—including, perhaps, some of the Internet content they desire.

Opt-out is clearly superior to opt-in in this context. It protects those who care about preserving anonymity in commercial transactions, while allowing the benefits of information sharing and advertiser-supported content for those who do not care. An FTC decision to require opt-in for behavioral advertising would adversely affect consumers and their use of the Internet.

D. Endorsements and Testimonials

Many advertisers use testimonials from satisfied customers to tout the product's benefits. The available evidence indicates that consumers discount the performance

³⁷Stephanie Clifford, *FTC: Has Internet Gone Beyond Privacy Policies?*, *N.Y. Times*, Jan. 11, 2010.

³⁸Of course, the ability to opt out should be prominently disclosed and easy to use.

claimed in testimonials. Most consumers believe that their results will differ from those claimed and that a variety of factors influence the results they will achieve.³⁹

In 1972, the Commission published Guidelines for endorsements and testimonials that have provided valuable guidance to advertisers using such techniques.⁴⁰ Nevertheless, there were some problems that were apparent in certain testimonial advertising. For example, testimonials were frequently used for essentially fraudulent products with a ritualistic disclaimer that the results were not typical. Such a disclaimer should not protect fraud. A second problem occurs when the testimonials, even for non-fraudulent products, portray results that are so extreme that almost no one will realize them.

Rather than narrowly addressing these problems, the revised Guidelines the Commission recently issued are overbroad.⁴¹ The changes have created confusion among advertisers, endorsers, celebrities, bloggers, and the media regarding what conduct complies with Section 5 of the FTC Act. Accompanying this confusion is the fear that the Commission may soon have the power to impose civil penalties the first time it decides an advertiser failed to follow its guidance.

Contrary to consumer expectations, the tendency at the Commission now is to treat a testimonial as a representation of the average or typical performance that consumers can expect.⁴² If advertisers meant to communicate that the results in a testimonial were those that most people receive, they could say so directly, and thereby avoid the discounting that consumers apply to claims made in testimonials.

An additional problem with the new Guidelines involves “endorsers,” especially those in the new media, such as bloggers. The Commission warned advertisers that they would be responsible for media over which they had no control:

An advertiser’s lack of control over the specific statement made via these new forms of consumer-generated media would not automatically disqualify that statement from being deemed an “endorsement” within the meaning of the Guides.⁴³

After severe criticism in the blogosphere, the Commission has sought to temper the implications of this statement. Although company sponsorship and support of blogs raise different issues, merely providing free samples of a product to a blogger should not render the manufacturer liable for the blogger’s conclusions. There is no reason to think that product reviews online are any different from a book or movie review for which the reviewer did not pay for the product.

4. Magnuson-Moss Procedures Should Be Retained⁴⁴

Proposals to expand the Commission’s rulemaking authority should be considered in the historic context of the Commission’s purpose and mission.

A. The Role of FTC Rulemaking

As I discussed above, the Commission has relied on the development of common law principles, supplemented with occasional rules and guides. The cornerstone of the FTC’s consumer protection mission is the fraud program, discussed in more detail below, through which the Commission has returned hundreds of millions of dollars to defrauded consumers.

Although many do not think of them as such, these common law principles are rules, providing a crucial part of the institutional framework that helps our market economy to function. In most circumstances, these common law rules provide both clear guidance to the business community and an adequate basis for FTC enforcement actions.

The common law process is well suited to develop new policy. For example, the Commission has used this process to formulate general rules to protect the security

³⁹See Comments Of Kelley Drye & Warren On The Commission’s Guides Concerning The Use Of Endorsements And Testimonials In Advertising, *In re Guides Concerning the Use of Endorsements and Testimonials in Advertising*, Commission File No. P034520 (Mar. 2, 2009), available at <http://www.ftc.gov/os/comments/endorsementguides2/539124-00016.pdf>.

⁴⁰FTC Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 C.F.R. § 255 (1980).

⁴¹Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 C.F.R. pt. 255 (Dec. 1, 2009).

⁴²David C. Vladeck, Director, Bureau of Consumer Protection, Federal Trade Commission, *A Look Forward With the FTC: Advertising and Marketing Enforcement Challenges* (Feb. 3, 2010).

⁴³Guides Concerning the Use of Endorsements and Testimonials in Advertising, Overview of the Commission’s Review of the Guides (Dec. 1, 2009), available at <http://www.ftc.gov/os/2009/10/091005endorsementguidesfnnotice.pdf>.

⁴⁴Although within the Commission these procedures are uniformly referred to as “Magnuson-Moss,” in fact, the procedures are contained within Title II of the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act of 1975. Only Title I involved the Magnuson-Moss Warranty Act, but I use here the conventional designation of Magnuson-Moss procedures.

of sensitive consumer information. Using both its deception and unfairness authority, the Commission has brought cases addressing information security, as the growth of the Internet and new technologies have created new vulnerabilities. Attempting to write a rule defining the scope of liability in advance could have stymied the natural development of this common law process, leading to uncertain results.⁴⁵

Rules seeking to address fraudulent or other practices often are very difficult to write. Unlike the Federal Communications Commission, the Securities and Exchange Commission, or other regulatory bodies, the FTC is not a sector-specific regulator. Thus, the agency generally lacks industry-specific knowledge, expertise, and routine contacts with regulated entities and congressional committees with jurisdiction over those industries.⁴⁶ Instead, in its law enforcement experience, the Commission deals with pathology. It is familiar with bad actors, who have demonstrated their unwillingness to comply with basic legal principles.

By their nature, however, rules also must apply to legitimate actors, who actually deliver the goods and services they promise. Remedies and approaches that are entirely appropriate for bad actors can be extremely burdensome when applied to legitimate businesses, and there is usually no easy or straightforward way to limit a rule to fraud. Rather than enhancing consumer welfare, overly burdensome rules can harm the very market processes that serve consumers' interests. For example, the Commission's initial proposal for the Telemarketing Sales Rule was extremely broad and burdensome, and one of the first acts of the Pitofsky Commission was to narrow the rule.⁴⁷ More recently, the Commission found it necessary to re-propose its Business Opportunity Rule, because the initial proposal would have adversely affected millions of self-employed workers.⁴⁸

Of course, rulemaking can be appropriate. For example, the Commission sometimes can provide "rules of the game" that reduce consumer harm in the future. The Commission can establish new default rules and procedures for transferring rights when it is otherwise difficult to do so. Thus, the Commission's Mail Order Rule provides that, unless the parties agree otherwise, the merchandise must be delivered within 30 days. While seeking to facilitate the exercise of consumer choice, the agency also is highly cognizant of the need to avoid unduly shackling market forces.⁴⁹ For example, this balance undergirds the FTC's approach to unsolicited telemarketing calls, through which consumers decide whether or not they wish to receive such calls and express their preferences effectively through the Do Not Call Registry. Once these new rules of exchange are established, if transaction costs are low, parties can more easily transfer these rights when a different allocation is important to them.⁵⁰

It would be a major mistake for rulemaking to be a substantial component of FTC consumer protection. The FTC went down this road once before, with disastrous consequences. In the 1970s, using its unfairness authority under Section 5 without meaningful standards, the Commission embarked on a vast enterprise to transform entire industries. Over a 15-month period, the Commission issued a rule a month, usually without a clear theory of why there was a law violation, with only a tenuous connection between the perceived problem and the recommended remedy, and, at

⁴⁵ Although the FTC promulgated the Safeguards Rule at the same time as it was initiating information security cases, the rule was primarily useful in establishing a structure for remedies. Adopted under GLB, the rule set out a flexible, process-oriented approach to providing information security. Because Congress had specified liability for financial institutions that failed to protect sensitive information, the rule did not require a theory of who was liable under Section 5 and under what circumstances. Those theories were developed through the common law process in individual cases, and most of the Commission cases have involved industries not covered by GLB.

⁴⁶ Of course, the agency and its staff have become quite knowledgeable about certain sectors of the American economy, including, for example, the downstream parts of the oil industry, certain aspects of health care, and credit reporting agencies. For credit reporting agencies, the FTC is the regulator, and pursuant to the FACT Act, has promulgated numerous rules in the last few years. These rules, and many others, were promulgated pursuant to congressional direction.

⁴⁷ Telemarketing Sales Rule, 60 Fed. Reg. 8313 (Feb. 14, 1995) (codified at 16 C.F.R. pt. 310 (1995)).

⁴⁸ Business Opportunity Rule, 73 Fed. Reg. 16110 (Mar. 26, 2008).

⁴⁹ See, e.g., Comment of the Staff of the FTC before the Department of Health and Human Services Food and Drug Administration, *In re Food Labeling: Health Claims; Dietary Guidance*, Docket No. 2003-0496 (Jan. 26, 2004), available at <http://www.ftc.gov/os/2004/040126fdacomments.pdf>.

⁵⁰ See Ronald H. Coase, *The Problem of Social Cost*, 3 J. L. & Econ. 1, 15-16 (1960) ("Once the costs of carrying out market transactions are taken into account it is clear that such a rearrangement of rights will only be undertaken when the increase in the value of production consequent upon the rearrangement is greater than the costs which would be involved in bringing it about.")

best, a shaky empirical foundation.⁵¹ This enterprise foundered because of the internal inadequacies of the Commission's procedures and because of intense opposition from both parties in Congress.

As it did before, the FTC will fail in its mission to protect consumers if it seeks to become the second most powerful legislature in Washington. This is surely an unsuitable task for five unelected representatives, not closely supervised by the White House or a Cabinet department.

Regardless of the procedures, rulemaking is a resource-intensive activity that inevitably draws resources away from enforcement. While I was Chairman, the agency was pursuing subprime lending cases involving failure to disclose adequately key terms of the transaction. In 2005, however, as more and more dubious loans were made, the agency diverted substantial resources to rulemakings to implement the FACT Act. The FTC asked for rulemaking authority in one narrow area (risk-based pricing); it ended up with statutory mandates for more than a dozen separate rules and studies. Whatever their value, those rules and studies consumed resources the Commission could have productively employed on cases.

B. Magnuson-Moss Procedures Are Appropriately Tough, But Usable

Rulemaking is an exercise in generalization. The FTC should determine whether a problem occurs often enough to justify a rule, whether the problem has a common cause in a sufficient number of cases to justify the remedy, and whether that remedy can correct the problem without imposing excessive costs. Because the FTC cannot generalize simply from its own experiences or from the horror stories of others, it should rely on projectable evidence such as surveys of consumers and econometric studies of industry behavior.

The Magnuson-Moss procedures force the Commission to be clear about its theories and focus its evidence on the key questions. Otherwise, the procedures can make the rulemaking almost interminable, as Chairman Leibowitz recently testified.⁵² The ability of rulemaking participants to propose disputed factual issues and cross-examine witnesses on those issues the presiding officer designates as disputed is very useful in testing the Commission's theories. Properly focused, Magnuson-Moss procedures are workable.

The Commission's recent experience in the Business Opportunity Rulemaking is a reminder of the useful aspects of the Magnuson-Moss procedures. The Commission proposed a wide-ranging rule, apparently aimed at fraud, but that instead would have adversely affected millions of self-employed workers and the consumers they serve. Based on the public comments and the need to proceed under Magnuson-Moss, the Commission has now sensibly proposed a much more targeted rule that addresses fraud without regulating legitimate businesses.⁵³ Although the Commission may have retreated without the threat of hearings and cross examination, those threats undoubtedly helped to influence the Commission's deliberations.

The FTC has successfully used Magnuson-Moss Rulemaking in the past. Several of the rules proposed in the 1970s were eventually promulgated. Some rules, like the two involving eyeglasses, were well conceived initially and concluded expeditiously. More recently, the Commission has used these procedures to amend the Franchise Rule.

The Commission's most prominent rulemaking endeavor, the creation of the National Do Not Call Registry, could have proceeded in a timely fashion under Magnuson-Moss procedures. It took 2 years from the time the rule was first publicly discussed until it was implemented. Although it would have been necessary to structure the proceedings differently, there would have been little, if any, additional delay from using Magnuson-Moss procedures.

*C. Magnuson-Moss Procedures Should Be Retained*⁵⁴

The problems that resulted from FTC rulemaking in the 1970s are not just that the agency needed "better" regulators. Instead, the problem is one of incentives and

⁵¹For similar criticisms of the FTC's rulemaking binge, see the extensive, contemporaneous studies by Barry Boyer, Report to the Administrative Conference of the U.S., *Trade Regulation Rulemaking Procedures of the Federal Trade Commission* (1979); and Teresa Schwartz, *Regulating Unfair Practices Under the FTC Act: The Need for a Legal Standard*, 11 *Akron L. Rev.* 1 (1977). See also Timothy J. Muris, *Rules Without Reason—The Case of the FTC*, 6 *Regulation* 20 (Sept./Oct. 1982).

⁵²*Financial Services and Products: The Role of the Federal Trade Commission in Protecting Consumers Before the Senate Comm. On Commerce, Science, & Transportation*, 110th Cong. (2010) (Statement of the Federal Trade Commission).

⁵³Business Opportunity Rule *supra* note 48.

⁵⁴The Administration's proposal would do more than just change the procedures used in rulemaking. It also would eliminate the requirement that unfair or deceptive practices must be

constraints. We are entering a period of unusual consumer activism. Numerous groups are pressing the Commission for immediate action, whether or not the proposal is well considered. In the short run, Congress may push hard for action as well. Without the constraints of the Magnuson-Moss procedures, the potential for mischief and long run harm to the Commission and to consumers is enormous. Although Congress and the courts may eventually restrain the Commission, it would be far better to avoid these costs from the beginning.

It is true that part of the problem from the 1970s has been addressed with the Commission's adoption of the Deception Policy Statement and the codification of the definition of unfairness. Nonetheless, the Commission's authority remains extremely broad. The procedural safeguards of Magnuson Moss create a strong need for the Commission to develop clear theories and strong incentives to develop a firm evidentiary base early in the rulemaking proceeding. When these requirements are met, Magnuson Moss rulemaking is workable.

In some areas, the FTC has engaged in rulemaking, pursuant to congressional direction, using APA procedures. Congressional directives avoid a significant part of the problems that bedeviled the FTC in the 1970s, as they provide explicit political "cover" for the specific rulemaking at issue. That cover may subside, however, as the political tides shift or as the specific parameters of the proposal prompt fierce industry resistance. Moreover, congressional directives often remove the question of what constitutes a violation, which proved to be one of the most contentious issues of many 1970s rulemakings. Even with congressional authorization, I would retain Magnuson-Moss procedures when a rulemaking is major and when Congress has not specifically defined the violation.

5. Broad Expansion of FTC Civil Penalty Authority Is Unwise

A. Automatic Civil Penalties Are Both Unnecessary and Harmful

In most of its consumer protection matters for which monetary relief is appropriate, the FTC already has authority to obtain money. Using the extraordinary equitable powers of Federal district courts, the Commission routinely obtains *ex parte* asset freezes, injunctions, and redress for consumers. The Commission also can obtain disgorgement of ill-gotten gains, and in its fraud program, discussed in detail below, the Commission has used these powers extensively, and successfully.

The Commission also has used these equitable remedies to recover substantial sums from legitimate companies that engaged in significant violations of the law. Moreover, the money recovered usually is paid as redress to consumers injured by the illegal conduct, rather than to the Treasury. For example, the agency obtained significant financial recoveries in many of its subprime lending cases, including \$215 million from Citigroup⁵⁵ and \$60 million from Famco.⁵⁶ It obtained substantial monetary relief in the form of restoring inadequately disclosed fees in its gift card cases.⁵⁷ And just last week it obtained \$12 million in refunds for consumers to settle allegations of deceptive advertising of identity theft protection services.⁵⁸

The Commission should not, however, have the authority to obtain civil penalties in all cases. Faced with the threat of substantial civil penalties, firms may become too cautious to avoid any possibility of a law violation. The statutory cap on penalties at \$16,000 per violation may not sound huge, but the way the FTC counts violations magnifies the impact. In one case, for example, the court regarded each instance of a direct mail advertisement sent to consumers as a separate violation.⁵⁹ It is easy to argue that a separate violation occurs each time an advertisement containing a deceptive claim is aired (ordinarily hundreds or thousands of times in a campaign); it is plausible to argue that each consumer who sees the message constitutes a separate violation. Thus, a direct-mail advertising campaign sent to 10 million consumers is potentially subject to a civil penalty of up to \$160 billion. In practice, FTC civil penalties are obviously far smaller, but the potential for substan-

prevalent, and eliminate the requirement for the Commission's Statement of Basis and Purpose to address the economic effect of the rule. It also changes the standard for judicial review, eliminating the court's ability to strike down rules that are not supported by substantial evidence in the rulemaking record taken as a whole. The current statutory restrictions on Commissioners' meeting with outside parties and the prohibition on *ex parte* communications with Commissioners also are eliminated. These sensible and important protections should be retained.

⁵⁵ Order, *FTC v. Citigroup Inc.*, No. 01 CV-0606 (N.D. Ga. Sept. 19, 2002).

⁵⁶ Order, *FTC v. First Alliance Mortgage Co.*, No. SACV 00-964 (C.D. Cal. Mar. 21, 2002).

⁵⁷ *E.g.*, FTC Order, *In re Kmart Corp.*, No. 062 3088 (Mar. 12, 2007); FTC Order, *In the Matter of Darden Restaurants, Inc., et al.*, No. 062 3112 (Apr. 3 2007).

⁵⁸ Order, *FTC v. Lifelock, Inc.*, (D. Ariz., Mar. 9, 2010).

⁵⁹ *U.S. v. Reader's Digest Ass'n*, 662 F.2d 955, 960 (3d Cir. 1981).

tial liability may lead cautious firms to avoid conduct that would actually benefit consumers.

Consider, for example, advertising cases. As discussed above, the economic evidence is clear that advertising offers important benefits for consumers. When advertising is restricted, prices rise because markets are less competitive. There is less incentive for product improvements, because producers find it more difficult to tell consumers about the change and to explain the benefits of the product change. Differences between demographic groups are larger, because advertising makes information widely available to everyone in a form that is remarkably easy to use.

If the risk of substantial civil penalties makes advertisers too careful about providing information, these benefits of advertising may be reduced. There are, of course, advertising violations that are crystal clear, and as noted above, the Commission has obtained monetary relief in such cases. Many cases, however, are judgment calls about whether admittedly imperfect evidence is sufficient to substantiate a particular claim. Such cases may turn on disagreements between qualified experts, with different views about the state of the science or the appropriate methods for testing a particular claim. Civil penalty liability may make advertisers considerably less willing to make such claims, because the consequences of agreeing with the wrong expert could be large. Consumers, however, will benefit from hearing different points of view from different products, or from products in different categories, enabling them to make their own choices about which expert to believe. The risk of large civil penalty liability may discourage that marketplace debate.

Obviously, we do not want companies to stretch the truth when doing so would be profitable. But it should be equally obvious that we also do not want companies to suppress the truth to avoid the risk that the FTC will second guess their judgment and impose civil penalties. If the claims are egregious, the Commission already has ample authority to seek financial sanctions against violators, and has done so successfully.

A second difficulty of across-the-board civil penalty authority stems from the Commission's role in developing and extending common law principles. The case-by-case process is well suited to developing new policy, and the Commission has used it effectively to develop common law principles of consumer protection in new areas. For example, the Commission recently formulated general rules to protect the security of sensitive consumer information. Using both its deception and unfairness authority, the Commission has brought numerous cases in this century addressing information security.⁶⁰

Before the Commission began pursuing information security cases, companies were not on notice that failure to maintain reasonable and appropriate security precautions to protect sensitive information would subject them to liability, let alone to civil penalty liability. The fact that the Commission lacks the authority to impose civil penalties in such cases makes it easier to establish new legal principles, because it encourages both the Commission and the respondent to focus on reasonable standards for future conduct.⁶¹ Indeed, the vast majority of the Commission's efforts to expand consumer protection to new areas occur through consent agreements. For example, virtually none of its information security cases have been litigated. Civil penalty liability would increase a company's incentive to defend the choices it had made, even when it is perfectly willing to agree to new standards of conduct.⁶² This result would retard, rather than advance, the Commission's important mission of developing appropriate standards of consumer protection in areas it has not previously addressed. It would waste resources in litigation about past conduct that would be better spent on establishing appropriate standards for future behavior.

Given that the FTC's information security standards are now well known (although there are of course disputes at the margin), there may be a case for civil penalty authority in such cases, because establishing either harm (and therefore the basis for consumer redress) or ill-gotten gain is difficult. In fact, the Commission has only rarely obtained financial relief in its information security cases.⁶³ If there

⁶⁰ See, e.g., FTC Order, *Eli Lilly & Co.*, No. C-4047 (May 8, 2002) (deception); FTC Order, *Microsoft Corp.*, No. C-4010 (May 15, 2001) (deception); FTC Order, *BJ's Wholesale Club, Inc.*, No. C-4148 (Sept. 20, 2005) (unfairness); FTC Order, *Cardsystems Solutions, Inc.*, No. C-4168 (Sept. 5, 2006) (unfairness).

⁶¹ Of course, the Commission could decide not to seek civil penalties, but doing so when such penalties are available would subject the agency to serious second-guessing by Congress, the press, and consumer groups.

⁶² As the General Counsel of the respondent in one information security case expressed it, the company was willing to be a martyr for privacy, but did not want to be Joan of Arc.

⁶³ See *U.S. v. ChoicePoint Inc.*, No. 1:06-cv-0198-JTC (N.D. Ga. Oct. 14, 2009).

is a case for civil penalties, however, it is a narrow one, based on the nature of the particular violation, and not at all generalizable to most Section 5 violations.

It is crucial to recognize that the Commission's ability to impose sanctions is not the only consequence for companies subject to FTC orders. Even before the FTC obtained financial relief in advertising cases, academic studies found that an FTC complaint about deceptive advertising led to a significant reduction in the stock market's valuation of the company. Peltzman, for example, found a 1 to 2 percent reduction in the stock market valuation of a company in the month before an FTC deceptive advertising complaint, and an additional 2 percent loss in the month after a complaint.⁶⁴ FTC economists found an even larger effect.⁶⁵ These losses are themselves a substantial deterrent to violating the FTC Act. As Peltzman noted, "the overall message of the results is that the salary of the copywriter or lawyer who avoids entanglement with the FTC in the first place is a bargain."⁶⁶

Since these studies, other players able to impose significant financial penalties have also entered the scene. Class actions under state deceptive practices laws, virtually nonexistent when the academic studies were done, have increased substantially, and continue to grow. State attorneys general often also weigh in, and frequently seek monetary relief.

There is simply no reason to suspect that widespread violations by legitimate companies subject to the Commission's jurisdiction are occurring or will occur because of inadequate financial sanctions. The Commission has not offered any persuasive examples of why it needs automatic civil penalty authority.

B. Civil Penalties Are Not Needed For Fraud Cases

Preventing fraud is a crucial part of the Commission's support of the market system and the common law. More than half of the Commission's budget and staff is devoted to consumer protection, with a significant focus on fraud. Fraud is essentially theft. Fraud distorts market forces, limiting the ability of consumers to make informed choices. Fraud leads to inefficiency, causing consumers to allocate their resources unproductively. Fraud also reduces consumer confidence and reduces the efficacy of legitimate advertising, diluting the amount of useful information to guide consumers' choices. This effect also raises costs for legitimate competitors, who must offer more assurances of performance to overcome consumers' wariness.

The costs of fraud to consumers are enormous. Fraud takes many forms from fraudulent credit repair services, to unauthorized billing, to deceptive weight loss products. A 2007 FTC survey showed that an estimated 13.5 percent of U.S. adults, approximately 30.2 million consumers, were victims of one or more of the frauds covered in the survey, and that an estimated 48.7 million incidents of these frauds had occurred during the previous year.⁶⁷

The victims of fraud are as varied as the form of the fraud. For example, the AARP has shown that investment fraud victims are more likely to be male, 55–61, more financially literate, college-educated, higher income, and more optimistic.⁶⁸ Lottery fraud victims are more likely to be female, over 70 years old, less financially literate, less educated, and have lower incomes.⁶⁹

Because fraud is often national in scope, and scarce Federal criminal law enforcement resources are used primarily against drug trafficking, terrorism, and other crimes, fraud will go largely unchecked without the active leadership of the Nation's consumer protection agency. We created the FTC's modern anti-fraud program in 1981 when I was Director of the Bureau of Consumer Protection. The development of a vibrant anti-fraud program at the FTC is a major success story. Fortunately, the legal tools for such a program already existed; in 1973, Congress had amended the FTC Act in Section 13(b) to allow the Commission to sue in Federal district

⁶⁴Sam Peltzman, *The Effects of FTC Advertising Regulation*, 24 J.L. & Econ. 403 (1981) ("The story the stock market appears to be telling is that an FTC complaint implies essentially a wiping out of the brand's advertising capital.")

⁶⁵Alan Mathios & Mark Plummer, *The Regulation of Advertising by the FTC: Capital Market Effects*, 12 Res. L. & Econ. 77 (1989).

⁶⁶Peltzman note 63 at 419.

⁶⁷FTC Staff Report, *Consumer Fraud in the United States: The Second FTC Survey s-1* (Oct. 2007) available at <http://www.ftc.gov/opa/2007/10/fraud.pdf>.

⁶⁸FTC Fraud Forum, Presentation, Day One: Panel 1 (Doug Shadel, State Director, AARP Washington, *Advances in Fraud Prevention Research*), at slide 31 (Feb. 25, 2009), available at <http://www.ftc.gov/bcp/workshops/fraudforum/index.shtm#presentations>.

⁶⁹*Id.* at slide 32.

court and obtain strong preliminary and permanent injunctive relief, including redress for defrauded consumers.⁷⁰

Before the shift to Federal court, the Commission's consumer protection work relied on its administrative process. Most investigations relied upon voluntary production of requested documents and information from the investigated targets, who had every incentive to delay. This process had obvious drawbacks for addressing fraud. Federal district court cases proved much more effective, enabling the Commission to bring fraudulent schemes to an immediate halt, to take the targets by surprise so that money might be available for redress, and to prevent destruction of records showing the extent of the fraud and identifying injured parties.

Almost from the inception of the § 13(b) program, the Commission has not only halted fraudulent schemes, but also pursued consumer redress and other potent equitable remedies to benefit consumers. Very early in the § 13(b) consumer protection cases, the Commission obtained, as ancillary to issuance of permanent injunctions, provisional remedies such as a freeze of assets, expedited discovery, an accounting, and the appointment of a receiver on the ground that these remedies would insure the effectiveness of any final injunction ordered.⁷¹

To use this approach effectively, the agency employed modern investigative techniques geared for speed and stealth. The agency also developed professional investigators trained to uncover fraudulent schemes, determine ownership and control of such assets, trace assets, develop evidence, preserve evidence for trial, and testify in court. More recently, Commission investigators have become experts in Internet investigative techniques and have provided training for thousands of local, state, Federal, and international criminal and civil law enforcement offices.

Once launched, the fraud program grew in importance and success. Each succeeding FTC Chairman has expanded its scope and improved its operation. By 2004, when my tenure as Chairman ended, there had been a total of 78 sweeps, resulting in 2,200 law enforcement actions.⁷² Not surprisingly, as the number of filings increased, so has the amount of consumer redress ordered. In Fiscal Year 2003, for example, nearly \$873 million in consumer redress was ordered in 98 judgments.⁷³

Because of the ability to obtain consumer redress, and because virtually all of the money paid to the fraudsters is obtained illegally and thus eligible for redress, the FTC already has the authority to obtain all of the monetary relief available in these cases. The effective limit on the FTC's ability to recover money in cases of fraud is the money available, not any lack of authority to recover the funds. Expanded civil penalty authority is simply unnecessary in fraud cases.⁷⁴

C. Automatic Civil Penalties Are Unnecessary in Antitrust Cases

Although largely unnoticed, this committee's reauthorization bill in the last Congress and the House-passed version last year also would allow for automatic civil penalties in antitrust cases. The Senate Commerce Committee did so by its express

⁷⁰The Commission uses the "second proviso" of § 13(b), "in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction." Trans-Alaska Pipeline Authorization Act, Pub. L. No. 93-153, § 408(f), 87 Stat. 576 (1973). See, e.g., John Villafranco, *Looking Back on the Muris Years in Consumer Protection: An Interview With Timothy J. Muris*, *Antitrust* 80, 82-83 (Summer 2004).

⁷¹*FTC v. H.N. Singer, Inc.*, 668 F.2d 1108 (9th Cir. 1982) is a seminal case establishing the Commission's authority to seek, and the district courts' power to grant, all the traditional equitable remedies inherent in the authority granted by § 13(b) to obtain permanent injunctions. *Singer* was the first § 13(b) case to attack a business opportunity scam.

⁷²David R. Spiegel, *Chasing the Chameleons: History and Development of the FTC's 13(b) Fraud Program*, 18 *Antitrust* 43 (Summer 2004).

⁷³FTC, *Federal Trade Commission Performance Report—Fiscal Year 2003* (Mar. 2004).

⁷⁴Many fraudsters should be jailed, and the Commission also has taken important steps to improve its cooperation with criminal law enforcement agencies. While Chairman, we established a Criminal Liaison Unit to coordinate with criminal law enforcement agencies across the country to encourage criminal prosecution of consumer fraud. The unit identifies criminal law enforcement agencies that may bring specific types of consumer fraud cases, educates criminal law enforcers in areas of FTC expertise, coordinates training with criminal authorities to help the FTC prepare cases for referral and parallel prosecutions, and provides Special Assistant United States Attorneys to help prosecute the worst FTC Act violators. Between October 1, 2002, and July 31, 2007, 214 individuals were indicted in telemarketing fraud cases resulting from referrals from the Criminal Liaison Unit. (Prepared Statement of The Federal Trade Commission Before the Senate Committee on Commerce, Science and Transportation, U.S. Senate, July 31, 2007, available at <http://www.ftc.gov/os/testimony/P034412telemarket.pdf>.)

Another important expansion of the FTC's consumer protection efforts involves Spanish language media. The agency uses its full powers to prosecute fraud and deception occurring in the media, and has brought numerous cases against fraud and other illegal marketing practices that targeted the Hispanic community. That effort continues.

terms.⁷⁵ At first glance, the House bill does not appear to do so, because it provides for civil penalties only in cases involving “unfair or deceptive acts or practices.” Within the FTC, antitrust cases are traditionally thought of as involving “unfair methods of competition.” Yet, there is no prohibition, legal or otherwise, that prevents the agency from designating antitrust cases as involving “unfair or deceptive acts or practices,” and, in fact, the Commission has recently done so in its actions against Negotiated Data Solutions and Intel.⁷⁶ Moreover, the FTC has proposed unfair acts or practices rules involving practices most practitioners would regard as antitrust issues, including restraints on advertising and restrictions on the form of operations businesses could take.⁷⁷

Automatic civil penalties in antitrust cases are both unnecessary and unwarranted. Indeed, a unanimous FTC explicitly stated in 2003 that monetary relief (in the form of disgorgement) was inappropriate for most of its antitrust cases.⁷⁸ The FTC said that it would “continue to rely primarily on more familiar, prospective remedies,”⁷⁹ and would not seek monetary relief when it would result in injured persons receiving duplicative recoveries or cause defendants to make multiple payments for the same injury. As the agency stated: “although a particular illegal practice may give rise both to monetary equitable remedies and to damages under the antitrust laws, when an injured person obtains damages sufficient to erase an injury, [the FTC does] not believe that equity warrants restitution to that person.”⁸⁰ Because private, treble actions follow most FTC antitrust cases, monetary relief is simply unnecessary as a routine part of the FTC’s antitrust arsenal.

6. Congress Should Restore Equality Between FTC and DOJ Merger Standards

Both the FTC and the DOJ enforce Section 7 of the Clayton Act,⁸¹ which determines the legality of mergers. Mergers or acquisitions of a certain size⁸² (and not subject to an exemption) must be notified to the FTC and the DOJ, and the parties must observe a waiting period, prior to consummation of the transaction. Either the FTC or the Antitrust Division of the Department of Justice (but not both) can investigate a merger and seek to enjoin it in Federal district court. Unfortunately, a few recent court decisions provide the FTC with a lower preliminary injunction standard than the standard for the DOJ. Because of this lower standard, it is now possible for the FTC to obtain a preliminary injunction to block a merger with evidence that would be insufficient for the DOJ to obtain the injunction. Because most preliminarily enjoined deals cannot, as a practical matter, survive the months (much less years) of delay attendant upon an FTC administrative proceeding, the FTC’s relative ease in obtaining a preliminary injunction means that it can permanently foreclose more mergers than its counterpart.

This result is fundamentally unfair. Because the FTC and DOJ divide merger review between them pursuant to an *ad hoc* agreement, the legality of some mergers today depends not on their underlying merits, but instead on which agency reviews them. In other words, the flip of a coin (to resolve a dispute between the two agencies over which agency should review the merger) could determine whether a merger survives antitrust scrutiny.

Moreover, the FTC’s advantage results from a judicial misreading of Congressional intent. Under the public interest test the courts apply, the DOJ must prove a likelihood of success to obtain a preliminary injunction:

The proper test for determining whether preliminary relief should be granted in a Government-initiated antitrust suit is *whether the Government has shown a reasonable likelihood of success on the merits and whether the balance of equi-*

⁷⁵ FTC Reauthorization Act of 2008, S. 2831, 110th Cong. (2008) (“The Commission may commence a civil action to recover a civil penalty in a district court of the United States against any person, partnership, or corporation which violates this Act . . .”).

⁷⁶ FTC Order, *Negotiated Data Solutions*, No. C-4234 (Sept. 22, 2008); FTC Order, *Intel Corp.*, No. 9341 (Jan. 19, 2010).

⁷⁷ Advertising of Ophthalmic Goods and Services, 43 Fed. Reg. 23992 (June 2, 1978); (“Eyeglasses I”); Ophthalmic Practice Rules, 54 Fed. Reg. 10285 (Mar. 13, 1989) (“Eyeglasses II”) (the rule regarding advertising restrictions was mooted when the Supreme Court protected such advertising under the First Amendment of the U.S. Constitution. The D.C. Circuit struck down the commercial practices rule for reasons unrelated to the antitrust/consumer protection distinction) (see *Am. Optometric Ass’n v. FTC*, 626 F.2d 896 (D.C. Cir. 1980)).

⁷⁸ Federal Trade Commission, *Policy Statement on Monetary Equitable Remedies in Competition Cases*, 68 Fed. Reg. 45,820 (Aug. 4, 2003).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ 15 U.S.C. § 18.

⁸² 15 U.S.C. § 18(a).

ties tips in its favor . . . once the Government demonstrates a reasonable probability that § 7 has been violated, irreparable harm to the public should be presumed. To warrant that presumption, the Government must do far more than merely raise sufficiently serious questions with respect to the merits to make them a fair ground for litigation.⁸³

In some circumstances, the DOJ does not need to meet this standard. If the DOJ wants to use a lesser likelihood-of-success standard, however, it must—like private litigants—*prove* that the equities are strongly in its favor.⁸⁴

Once the FTC acquired the right through section 13(b) of the FTC Act to seek an injunction against mergers, it was initially held to a quite similar standard. Under section 13(b), the FTC is entitled to a preliminary injunction “[u]pon a showing that, weighing the equities and considering the Commission’s likelihood of ultimate success, such action would be in the public interest.”⁸⁵ As one court commented: “The case law Congress codified [in section 13(b) of the FTC Act] . . . permits the judge to presume from a likelihood of success showing that the public interest will be served by interim relief.”⁸⁶ Like the DOJ, a lesser showing on likelihood of success was held to be appropriate only with a “requisite showing on the equities”:⁸⁷

[I]f [the FTC] shows that the newly-minted “equities” weigh in its favor, a preliminary injunction should issue if the FTC has raised questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance and ultimately by the Court of Appeals.⁸⁸

Recent court decisions, however, have reduced the FTC’s burdens. Under *Whole Foods*, the FTC can now use the “serious question” standard *without* making an equitable showing in its favor. It can enjoin a merger simply by demonstrating that there are “questions going to the merits so serious, substantial, difficult, and doubtful as to make them fair grounds for thorough investigation.”⁸⁹ According to Judge Brown, this means that the FTC is entitled to a preliminary injunction unless it “entirely failed to show a likelihood of success.” This conclusion departs from the statutory standard and its legislative history, which requires the FTC, in the first instance, to show likelihood of success. Further, the equitable burden has somehow shifted to the merging parties, who now must demonstrate a “balance [of equities] against the FTC” in order to hold the FTC to a “greater likelihood of success.”⁹⁰

These changes had a notable and predictable impact on the outcome in *FTC v. CCC Holdings Inc.* After finding that both the government and defendants had adduced evidence in their respective favors—a “tie” so to speak—the Court still granted the preliminary injunction, commenting that:

Whether the Defendants’ argument that the unique combination of factors in these markets negates the probability that the merger may tend to lessen competition substantially, or whether the FTC is correct that the market dynamics confirm the presumptions that follow its *prima facie* case, is ultimately not for the Court to decide. . . . The Defendants’ arguments may ultimately win the day when a more robust collection of economic data is laid before the FTC. On this preliminary record, however, the Court must conclude that the FTC has raised questions that are so ‘serious, substantial, difficult and doubtful’ that they are ‘fair ground for thorough investigation, study, deliberation and determination by the FTC.’⁹¹

⁸³ *U.S. v. Siemens Corp.*, 621 F.2d 499, 506 (2d Cir. 1980) (emphasis added).

⁸⁴ See, e.g., *United States v. Gillette*, 828 F. Supp. 78, 96 (D.D.C. 1993) (“given the strength of plaintiff’s irreparable injury argument, plaintiff need only make a lesser showing on likelihood of success” but “[a]s plaintiff has failed to demonstrate any likelihood of success, the court may not enter a preliminary injunction on this balance”); *United States v. UPM-Kymmene, Oyj*, No. 03–2528, 2003 WL 21781902 (N.D. Ill. July 25, 2003) (describing a sliding scale analysis that balances the harm to the parties against the Government’s likelihood of success).

⁸⁵ 15 U.S.C. § 53(b).

⁸⁶ *FTC v. Weyerhaeuser Co.*, 665 F.2d 1072, 1082 (D.C. Cir. 1981) (quoting H.R. Rep. No. 624, at 31 (1973), reprinted in U.S.C.A.N. at 2533).

⁸⁷ *FTC v. Beatrice Foods Co.*, 587 F.2d 1225, 1229 (D.C. Cir. 1978) (citing *FTC v. Lancaster Colony Corp.*, 434 F. Supp. 1088 (S.D.N.Y. 1977)).

⁸⁸ *FTC v. Lancaster Colony Corp.*, 434 F. Supp. 1088 (S.D.N.Y. 1977) (citing *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 740 (2d Cir. 1953)).

⁸⁹ See *FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028 (D.C. Cir. 2008); followed shortly thereafter by *FTC v. CCC Holdings Inc.*, 605 F. Supp. 2d 26 (D.D.C. 2009).

⁹⁰ *Whole Foods*, 548 F.3d at 1035, 1041.

⁹¹ *CCC Holdings*, 605 F. Supp. 2d at 67–68. O’Melveny & Myers, of which I am Of Counsel, represented one of the merging parties.

This lower standard is much more like that imposed for summary judgment—whether there are issues of fact that require a trial—than the standard for a preliminary injunction.⁹² The court further found that the defendants had not met their equitable burden—even though it accepted that the evidence supported the combined company’s ability to offer an integrated product that incorporated the best features of each company’s portfolio, that the merging parties envisioned spending more on research and development than they could spend individually, and that the consumers would benefit from more innovative products.⁹³

With these rulings, the DOJ and FTC no longer operate under the same, or even similar, standards. The DOJ must still prove that it is likely to succeed in blocking a merger to obtain a preliminary injunction. Alternatively, if the DOJ shows that the equities are in its favor, above and beyond the normal public interest presumption, it may obtain a preliminary injunction by showing that it has raised a “serious question” meriting further investigation. In contrast, the FTC can now invoke *Whole Foods* and *CCC Holdings* to access the “serious question” standard *without* making a concomitant equitable showing. Indeed, to avoid a preliminary injunction the merging parties in an FTC case (but not a DOJ one) must demonstrate that the equities are decidedly in their favor.

Thus, merging companies under FTC review have a more onerous burden than those before the DOJ in preliminary injunction proceedings: they must show that there is no serious question on the merits or, if there is a serious question, that the preliminary injunction would irreparably harm the public. Because there is no policy justification for imposing a higher standard of proof on some industries and not on others, and because this result is fundamentally unfair, this difference in standards should be rectified. Congress should restore its original intent and return the FTC standard to that of the DOJ.⁹⁴

7. Creation of a Separate Third-party Liability Section in the FTC Act Is Both Unwise and Unnecessary

The step is unwise because it creates a uniform standard where uniformity is inappropriate. For example, consider advertising agencies, which the Commission has long held liable for deceptive and unsubstantiated claims if they “knew or should have known” that the claim was deceptive or unsubstantiated.⁹⁵ The rationale for liability is that the ad agency has considerable expertise in how consumers are likely to interpret the communication, and can easily check with the client to determine whether there is a reasonable basis for the claim. Agencies are not, however, held responsible for evaluating all of the scientific details that may stand behind the claim. If the substantiation on its face supports the claim, the agency can rely on the client for the details, but it is responsible if there are obvious flaws in the substantiation.

Publishers are every bit as essential to the completed deceptive advertisement as the advertising agency. If they are liable at all, given the First Amendment concerns that such an action would raise, it should be under a different and much more stringent standard than the standard for ad agency liability. The publisher has no particular expertise in determining the messages the advertisement is likely to convey to consumers, and it has no expertise in evaluating the substantiating evidence.

This conclusion does not mean that publishers cannot play a role in policing fraud. During my tenure as Chairman, we launched a program to address deceptive weight loss claims that were widespread in the popular press. After a workshop to explore the scientific issues, we developed a list of seven weight loss claims that were false on their face. These claims, identified and explained in a pamphlet distributed to publishers called *Red Flag Bogus Weight Loss Claims*,⁹⁶ formed the basis for a campaign to get publishers to reject advertisements containing bogus

⁹²*Id.* at 36, n. 11 (“precedents irrefutably teach that in this context ‘likelihood of success on the merits’ has a less substantial meaning than in other preliminary injunction cases”).

⁹³*Id.* at 76.

⁹⁴This committee may also wish to consider the recommendations of the Antitrust Modernization Commission in 2007, which address the issue discussed above, as well as the FTC’s ability to challenge mergers administratively while the DOJ can proceed only in Federal court. See *Antitrust Modernization Commission—Report and Recommendations* 129–132 (2007).

⁹⁵See e.g., FTC Consent Order, *Bozell Worldwide, Inc.*, (Jan. 13, 1999); FTC Consent Order, *Jordan, McGrath, Case & Taylor*, No. 96–3053 (June 26, 1996).

⁹⁶Available at <http://www.ftc.gov/bcp/edu/pubs/business/adv/bus60.pdf>.

claims.⁹⁷ The campaign reduced the incidence of obviously false claims from 50 percent of weight loss ads in 2001 to 15 percent in 2004.⁹⁸

A new section establishing third-party liability is unnecessary because the FTC already has the ability to attack third parties in appropriate circumstances. Careful use of the Commission's "unfairness" jurisdiction, which Congress codified in 1994,⁹⁹ provides the best vehicle to address third parties. If a third party can prevent a violation that injures consumers at low net cost, it is straightforward to argue that the failure to do so is an unfair practice. Unfair practices derive from substantial injury to consumers, that consumers cannot reasonably avoid, the third party can prevent the violation at low cost, and the injury is not outweighed by countervailing benefits. The extent to which the third party knows of the violation will of course be relevant in determining the costs of avoiding injury, but it is not necessarily the only factor. The unfairness analysis focuses the inquiry on the benefits and costs of liability for a particular practice, which is precisely where the focus should be.

In a recently proposed rule aimed at fraud in certain mortgage practices, the FTC would impose third-party liability, using its existing authority.¹⁰⁰ As in this proceeding, the standards for third-party liability should be developed under current law.

Conclusion

Once again, thank you for the opportunity to testify today. I would be glad to answer any questions.

Senator PRYOR. Thank you.

And I want to thank Senator Wicker for helping me manage this hearing.

But, thank you very much.

Let me start, if I might, with Ms. Pridgen. You mentioned, in your written testimony, that there are checks and balances, in the APA process and elsewhere, that would be sufficient to protect the interests of all parties, while providing FTC with the tools it needs to protect consumers. Which checks and balances are you talking about? And, you know, how will they protect interested parties?

Ms. PRIDGEN. Well, what I was saying was that, under the APA rulemaking, the agency has to provide notice of the proposed regulation, and they have to allow comments from all interested parties. It's my understanding that the FTC and other agencies don't rely solely on written comments, but also have open roundtable-type hearings to gather information. The main difference would be, instead of having a trial-type arena, where you have 100 attorneys examining 100 witnesses, and 100 other attorneys cross-examining those witnesses, you have a more informal roundtable discussion, where the facts can be gathered.

APA rulemaking is subject to judicial review. Not only can a rule be overturned if it's arbitrary and capricious, it can be overturned if it goes beyond the statutory mandate of the agency. And also, courts can review regulations, under the Constitution; and that would be particularly relevant, in terms of the FTC, if they were to regulate in the area of advertising. Commercial advertisers do have some limited First Amendment rights, and the court would be there to provide a check on that.

As far as impact on businesses is concerned, there are—the Regulatory Flexibility Act, the Congressional Review Act. And then,

⁹⁷ Timothy J. Muris, Chairman, FTC, *Remarks at the Cable Television Advertising Bureau: Do the Right Thing* (Feb. 11, 2003).

⁹⁸ 2004 Weight-Loss Advertising Survey: A Report From the Staff of the Federal Trade Commission (April 2005), available at <http://www.ftc.gov/os/2005/04/050411weightlosssurvey04.pdf>.

⁹⁹ 15 U.S.C. § 45(n).

¹⁰⁰ Mortgage Assistance Relief Services, 74 *Fed. Reg.* 26,130 (June 1, 2009).

also, a little-mentioned part of the FTC Act is, the FTC Act already requires the Commission to act in the public interest. That doesn't get mentioned much in FTC cases. But, under state little FTC Acts or Unfair and Deceptive Trade Practices Acts, the public-interest requirement is often used in court cases to say that those statutes can't be used for individual or trivial cases, that it has to be something that affects the public at large. And so, I think that would be kind of a substitute for the prevalence requirement in Mag-Moss.

Senator PRYOR. OK.

Mr. Mierzwinski, let me ask you—in your testimony, you wrote that you support a robust FTC, and you also support the proposed Consumer Financial Protection Agency. So, tell me, in your view, kind of, what's the interplay between them, you know, what's the right combination of a—in your view, a strong FTC and a strong Consumer Protection watchdog.

Mr. MIERZWINSKI. Thank you, Senator.

And the reason that consumer groups and others—Professor Elizabeth Warren came up with the idea—support a new Consumer Financial Protection Agency is that we don't have an agency that has one job: protecting financial consumers. The bank regulators have at least two jobs; safety and soundness always trumps the consumer role that they have. And we have numerous cases and examples of the bank regulators ignoring their consumer protection mission. As we heard earlier, the Federal Trade Commission has numerous other missions, besides its Division of Financial Practices.

The Federal Trade Commission is primarily a law enforcement agency, however, and most of its actions are after a violation has occurred. It doesn't—it has limited rulemaking authority, as we've already heard. And we do support giving it more. But, it doesn't have that examination authority, that prudential supervision authority that we want to give the CFPB. We want to make it one-stop shopping for consumers. But, on the other hand, on the enforcement side, we think that they can work together with concurrent jurisdiction over enforcement. More than one cop on the beat is usually a good thing. My office is on Capitol Hill, as yours are, and we're patrolled both by Metro and by the Capitol Police. There's no problem with that. We see the same issue here. The Federal Trade Commission and the CFPB or the CFPB, in Senator Dodd's bill, can work together on the enforcement side.

Senator PRYOR. Mr. Muris, I'd like to ask you a follow-up to something you said in your opening statement, and I just want to make sure I got this right. I think you said that rulemaking should not be part of—I don't remember if you said "oversight" or "enforcement"—

Mr. MURIS. No, I—no. Formal rulemaking shouldn't be a major part of FTC consumer protection.

Senator PRYOR. OK.

Mr. MURIS. You want me to—

Senator PRYOR. Yes. I—

Mr. MURIS. I'm sorry. I didn't mean to

Senator PRYOR. Well, I—

Mr. MURIS.—cut you off.

Senator PRYOR. No, no. That's really, you know, what I'm asking. And one of the concerns I have about Magnuson-Moss is—you've heard the witnesses today say that—and Mr. Rosch earlier said this—that when you get into this, I guess they call it a trial or this hearing phase, it sounds like it's a kind of a morass of a procedure could literally take years to get through. And with all the cross-examinations and all the panels—and I'm not sure I understand it—you've been there, and you know how it works—you know, I'm concerned about that process. That sounds very inefficient and ineffective. But, at the same time, I am curious about your views about whether rulemaking should really be part of what FTC does.

Mr. MURIS. Well, it should be a part. But, as I testified last summer before most of what the FTC does is enforce what are already rules. We just don't think of them as rules. They're the common-law principles of—

Senator PRYOR. Right.

Mr. MURIS.—for example, “Don't breach your contract. Don't engage in fraud”——

Senator PRYOR. I remember you saying that.

Mr. MURIS. Right.

Senator PRYOR. Right.

Mr. MURIS. Right. And so, those are rules. I believe in enforcing them. I believe it's most of what the FTC does. That's why I used the word “formal” in terms of rulemaking. I believe there are some necessary rules—we did the National Do Not Call rule, my 15 minutes of fame in life. So, I'm certainly not an opponent of FTC rules.

I do think the Magnuson-Moss procedures are workable. You've been involved in trials. Many rules got through in 2, 3, 4 years. The problem of why so many rules took so long is the FTC began them without knowing what they were doing. This whole idea of the designation is not a big problem. In the notorious children's advertising rule, they designated three disputed issues of material fact. Three isn't a large number. If you know what you're doing, you can manage the process.

And, as Ms. Woolley said, the FTC's an unusual and, in some ways, unique agency. It has this broad jurisdiction over everything. It's not an expert. So, I think these extra procedures are useful and helpful.

Senator PRYOR. Thank you.

Senator Wicker.

Senator WICKER. Thank you.

Continuing with Chairman Muris, Commissioner Rosch said there were no Magnuson-Moss rules since 1978. Is that correct?

Mr. MURIS. Well, that's literally not true. By my count, there are at least 15 Magnuson-Moss rules that got to the Commission. Some of them the Commission killed. Most of them started before 1978, but there have been a few rules. But, it's clear that the major binge of FTC rulemaking—of proposed rulemaking—began before 1978, and that's what I was responding to, for Chairman Pryor. That was a different agency.

Senator WICKER. Before 1974?

Mr. MURIS. No, 1978. When Magnuson-Moss passed in 1975, you had a splurge of rulemaking; some of them had already been underway. You had 16 in 15 months. And that was a different vision

of the FTC. It was a vision of the FTC as the second most powerful legislature in Washington, passing rules to transform entire industries. The vision of the FTC that has prevailed for the last 30 years is that the FTC's primary job is a law enforcement agency enforcing these basic common-law rules, supplemented by occasional formal rules.

What I'm worried about is, if you change Magnuson-Moss and go to APA rulemaking that, unfortunately, as Congress has shown in the past when it makes these changes, they come with mandates to do many rules. When we did the Fact Act, a Republican Congress gave us 15 or 16 new rules to do. I'm worried about that. And I'm worried about the temptation to send the FTC back to the 1970s.

Senator WICKER. The Magnuson-Moss statute did not change in 1978, did it?

Mr. MURIS. It was 1975 that it passed.

Senator WICKER. OK. So, what I understand your testimony to be is that, from 1975 to 1978 there was a spate of rulemaking.

Mr. MURIS. Correct.

Senator WICKER. And then the tapering off of that rulemaking was for reasons other than the statute—

Mr. MURIS. Yes.

Senator WICKER.—we have.

Mr. MURIS. Magnuson-Moss did not kill FTC rulemaking. A change in enforcement philosophy killed FTC rulemaking.

Senator WICKER. So, the large number of rules that were made early on, were made under the very statute that we're operating under today, is that correct?

Mr. MURIS. As I discussed, yes.

Senator WICKER. OK.

Mr. MURIS. Yes, that's correct.

Senator WICKER. What about this issue that Commissioner Rosch mentioned of not, after all this time, being able to know what the word "prevalent" means?

Mr. MURIS. I would like a real prevalence requirement—that the problem is, at the Commission, they interpret it as having two consent orders. And if you're in an industry with some bad actors, you can have lots of consent orders, where most of the industry is legitimate. I would support a prevalence requirement that meant something. The current prevalence requirement doesn't mean—

Senator WICKER. So, you—

Mr. MURIS.—anything.

Senator WICKER.—have no objection to the Congress working on tightening that definition up and being more helpful.

Mr. MURIS. That's correct. But, the heart of Magnuson-Moss is the designation of the disputed issues of material fact and the cross-examination. "Prevalence" is not meaningful as defined now.

Senator WICKER. OK. Chairman Pryor mentioned, in his question, the testimony about the complicated procedures of cases. And then his question actually went in a different direction. But, let me follow up on that.

"Thirty-eight days of testimony, 7 years of proceedings," that was the testimony of Commissioner Rosch. Do you have any reason to

disagree with those facts? Was that factual testimony, as far as you know?

Mr. MURIS. I don't know the exact average. But, I do know there's a big variance. I know the eyeglasses rules, for example, in which I was involved, took around 3 years. I dare say—I know Senator Pryor's prior record in enforcement, and he would've done the rules a lot faster.

Senator WICKER. OK. Well, why would a case take 38 days and 7 years of proceeding?

Mr. MURIS. Well, 38 days of hearings is not always a lot of days. Seven years of proceedings was because they did not have a clear theory of what they were doing. They believed, in those days, that the Commission had this vast power to transform the economy. And they were proposing rules with 500-page statements, that—when you sorted them out, they didn't really say, "These are the three or four things we think are wrong. These are why we think they're wrong. This is the empirical evidence that supports why we think they're wrong." The eyeglasses rules, on the other hand, which took 3 years, did exactly the things that I said.

Senator WICKER. If we move forward and repeal, or substantially change, the Magnuson-Moss safeguards, what's it going to hurt? How's it going to hurt the average guy out there in Arkansas and Mississippi?

Mr. MURIS. The Commission has enormous power over vast sectors of the economy. If you change rulemaking and give the FTC instructions to do rules in food, to do rules in behavioral advertising, to do rules in this, that, or the other thing, you'll put the FTC on a course where, 5 years later, you know, your constituents are going to be very unhappy and Congress is going to say, "Why are you doing all this?" The Commission can't be a competitor with the Congress in trying to legislate for so much of the economy. And I don't think the Commission can do it well. I think what it does well, and what it has done well for 30 years, is enforce these common-law rules. And that's made the Commission one of the most renowned agencies in the world, and I think it deserves that rank. Most of their work today continues on that. And I would hope it would continue.

Senator WICKER [presiding]. Thank you.

And the Chair's allowed me to go over just a bit.

Mr. Mierzwinski, Ms. Pridgen seems to be saying, in her testimony, that things have changed since 1974. Commissioner Rosch says Magnuson-Moss was wrong from the outset. Which position do you subscribe to?

Mr. MIERZWINSKI. Well, I think I subscribe to both. Things have changed, and Magnuson-Moss was wrong. I think where things have changed is, the Commission has, in fact, new duties and new responsibilities, that weren't countenanced back then, that it deserves greater powers to enforce against. But I think Magnuson-Moss was wrong, because it imposed just a tremendous regulatory burden on the agency. It slowed it down. It tied it in knots. And it never really worked.

Senator WICKER. And then, for Professor Pridgen and Ms. Woolley, and then Commissioner Muris, I understand, Professor, that your testimony is that there are indeed safeguards against

overzealousness, above and beyond the generic Administrative Procedures Act. Is that your testimony? And would you describe those in a little more detail?

Ms. PRIDGEN. Yes. Well, first of all, the FTC has tried to restrain itself with their unfairness and deception policies, so that the Commission no longer views itself as a second legislature. It has used cost-benefit analysis, it looks for material consumer injury, it looks for deception against the reasonable consumer. So, there are those things within the agency itself.

The Regulatory Flexibility Act came into play, I believe, in the early 1980s, which requires all agencies to have a regulatory agenda, to submit a statement of impact on small entities, and kind of a cost-benefit analysis there.

The Congressional Review Act requires regulations to be submitted to Congress before they take effect.

Senator WICKER. Been used one time.

Ms. PRIDGEN. Well, it's there.

Senator WICKER. Ms. Woolley, would you like to comment?

Ms. WOOLLEY. I would have to say that—going back to the previous witness's testimony of the amount of time that APA rule-making authority takes, versus Magnuson-Moss—in some ways, I would have to say that that's kind of evidence that Magnuson-Moss is actually working. There have been—in the intervening 30 years, there have been many instances where Congress—many instances where Congress has designate—has delegated APA rulemaking authority to the Federal Trade Commission. Some of the issues, that have been mentioned here already, include data security and data-breach issues, identify theft. The—those are—CAN-SPAM is another one—Those are all areas where the Congress has been the decider and said, “We think that these are significant enough practices that—they've attracted our attention, and we would like you, FTC, to issue rules on these practices.” And FTC has done that quite successfully.

So, I would argue that it's really Congress's role to decide when FTC needs that authority, delegate it appropriately, and then have FTC do its job.

Senator WICKER. Commissioner Muris, do you have anything to add to that?

Mr. MURIS. Yes. Let me give you a recent example why Magnuson-Moss is helpful. The FTC, again, has experience with fraud. And they decided to do a business opportunities rule recently, because they had this experience with fraud. It turned out that—and they didn't know this, and, there was no reason that they should by their experience—they were proposing a rule that would affect 13 million people in part-time business—in your state, for example, there are Amway agents and several part-time insurance agents—legitimate business people, who work part-time who would've been hurt by that rule. If the Commission had gone ahead, you would have been deluged. I represented someone in this issue, and we were able to threaten the Commission with Magnuson-Moss procedures. They were never used. And the Commission—I hope it would have pulled back anyway, but it did pull back. It—they said we didn't mean this. We did not want to regulate all these legitimate businesses. But, because the Commission isn't a sector-spe-

cific regulator, like most of the other agencies we're talking about, the Mag-Moss procedures provide this extra check. And they worked there. Yet the Commission didn't even have to use them. The threat, I think, was helpful.

Senator WICKER. Thank you.

Senator PRYOR [presiding]. Thank you.

Mr. Muris, let me follow up with you on that sort of general line. Just—not to spar with you, but just for clarification, you said that Magnuson-Moss didn't change because the statute changed, but it was a philosophy that changed. But, I thought there—

Mr. MURIS. Yes.

Senator PRYOR.—there was a statutory change in 1980. Am I wrong about that?

Mr. MURIS. There were some changes in 1980. There was a reauthorization fight, and the biggest change since 1975 happened in 1994, which was the codification of Unfairness. Congress made it clear, in 1980, that the Commission could not do the children's advertising rule under Unfairness. Yet, the Commission when it killed the Children's Advertising Rule, said, "We could've done it anyway, under Deception, but we're not going to do it." The Congressional opposition was a big deal, but I don't think the statutory change—I think it was in an Appropriations Act—was a big deal.

Senator PRYOR. And you mentioned Do Not Call. How long did that take you—the Commission to do?

Mr. MURIS. The Do Not Call, from the time we first talked about it publicly to the time it went into enforcement, was 2 years. I believe if we were just doing Do Not Call—I said this in my testimony—and it was Magnuson-Moss, we would have had to change how we did it, but we could have done it in 2 years.

Senator PRYOR. So, in other words, it was done under APA.

Mr. MURIS. Sure.

Senator PRYOR. Yes. I just wanted to get that clear in my mind, and also on the record.

Ms. Woolley, let me ask you a question about the DMA. And I know you talked about this some in your testimony and in questions since, but, give me—and I'm sorry I missed a little bit of your testimony because of the vote—but, which proposed reform, in—of the FTC concerns DMA the most? Is it the Magnuson-Moss? And which part of Magnuson-Moss? The reform or—

Ms. WOOLLEY. Thank you, Senator.

Senator PRYOR.—you know.

Ms. WOOLLEY. Yes. It is the Magnuson-Moss provision. Of the four things that have been outlined today—aiding and abetting, civil penalties, independent litigation authority, and APA rule-making authority—I would have to say APA rulemaking authority is our primary concern. I don't want to diminish the others, but that would be—

Senator PRYOR. Right.

Ms. WOOLLEY.—right at the top of the list.

Senator PRYOR. And is it your view that your industry—at least your industry does a good job of self-policing?

Ms. WOOLLEY. Our self-regulatory program is—has been in existence for 30 years, and does a very good job of policing not only DMA members, who—when you become a DMA member, you lit-

erally have to sign, on your application—membership application, that you will adhere to our guidelines and standards. But, because there are so many DMA members and they represent such a large sector of the economy—as an example, most Fortune 500 companies that market to consumers are members of DMA—because we represent such a large sector and such a swath across the economy, our guidelines wind up being, in essence, best practices for marketing. And our self-regulatory program is—takes enforcement cases, not only against DMA members, but against nonmembers, as well. We actually have an exemption from the Federal Trade Commission that allows us to prosecute business-to-business—the exemption is an antitrust exemption and it allows us to prosecute business- to-business complaints.

Senator PRYOR. Now, when you say “prosecute those complaints,” what’s the remedy there?

Ms. WOOLLEY. Well, let me explain that the process is a quasi-judicial process. There is a notice that goes out to the parties, and they have a certain amount of time to respond, and the responses are reviewed and go out to the parties. And there is a procedure for dealing with a complaint. The remedies, in our ethics cases, are really—the point of it is really to turn bad actors into good actors, and to stop the practice that’s going on. So, our complaint process is—our ethics process is not focused on monetary damages or any of the other things that the FTC would seek, in terms of remedies. We want to get the practice out of the system and, as I say, turn bad actors into good actors.

If we’ve got a recalcitrant party and we can’t do that, we refer cases to the FTC for enforcement. So—and the ultimate remedy for a DMA member is that they are——

Senator PRYOR. They lose their membership.

Ms. WOOLLEY.—thrown out of membership, and we publicize that.

Mr. MURIS. Mr. Chairman, could I——

Senator PRYOR. Yes, sir.

Mr. MURIS.—add one sentence of clarification on what I said before? I believe, in 1980 the Congress—somewhere in and around there—may have also added “prevalence” and requiring addressing economic effects. I don’t think either of those had a significant effect, but I think they’re useful. Like I said with “prevalence,” the effect is very minor.

Senator PRYOR. Well, listen, I want to thank the panel. I actually have several more written questions that I’ll probably submit to you, but, in the interest of time, I think what we will do is hold the record open for—7 days? Two? For 2 weeks. We’ll hold the record open for 2 weeks. So, it’s very possible—and, in fact, probable—that you’ll be getting questions from the Committee staff, that the Senators are submitting. So, we appreciate those coming back in the next—as quickly as you can, but in the next couple of weeks.

And I want to thank you for your time, and your preparation.

And I want to thank Senator Wicker for his participation, and the other Senators that were here today.

So, with that, we'll adjourn the hearing.
And thank you very much.
[Whereupon, at 4:39 p.m., the hearing was adjourned.]

A P P E N D I X

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

Today's hearing reflects the Commerce Committee's ongoing commitment to consumer financial protection and the important role of the Federal Trade Commission (FTC). It is an important follow-up to the full committee hearing we held on February 4th when we heard from FTC Chairman Jon Leibowitz.

Today, members of the Subcommittee will hear a wider array of viewpoints on proposed reforms to the FTC and its authorizing statute, the Federal Trade Commission Act. I want to thank Senator Pryor for presiding and for his excellent work as Chairman of the Subcommittee on Consumer Protection.

As I said last month, we cannot forget how we got here: many of the enormous economic problems we face today are a direct result of weak consumer protections in the financial sector.

We have to do better for the American consumer. With family budgets stretched thin, foreclosures up and unemployment still sky-high, unscrupulous business practices continue to target consumers directly when they can least afford it. The American people need to know there is someone out there they can trust to stand up against those bad actors.

The Federal Trade Commission is our Nation's premier consumer protection agency. When credit repair companies defraud consumers, it is the FTC that steps in to stop the scams and provide relief to victims. When people are sold products or services under false pretenses, billed for services they do not want, or have their identity stolen, it is the FTC that takes action. Only the FTC has the experience and expertise to regulate consumer protection across a broad swath of the U.S. economy.

The Commission's core consumer protection mission embodied under Section 5 of the FTC Act is to prevent and enforce against "unfair or deceptive acts or practices in or affecting interstate commerce." This broad prohibition has served as the bedrock of consumer protection law in the United States for over 70 years. Throughout its history, the FTC has used its authority to enforce and regulate against unfair or deceptive acts or practices to address a wide range of commercial abuses—from abusive credit practices, to fraudulent debt relief scams, to deceptive advertisements and marketing schemes.

Whenever and however the Senate addresses financial regulatory reform and consumer protection in the coming weeks and months, I believe this well-established authority must be kept firmly intact. We cannot afford to compromise the FTC's core consumer protection mission that has served the American public well.

What is more, we may need further reforms to the FTC and its underlying statute, to ensure the Commission can fulfill its mission as effectively as possible. During the full committee hearing we discussed a number of long-sought reforms. Consumer advocates believe we need to liberate the FTC from statutory limitations that have shackled the Commission from aggressively and effectively addressing abusive commercial practices.

At the top of the list: granting the FTC normal rulemaking authority set forth under the Administrative Procedures Act. Currently, the Commission must follow cumbersome Magnuson-Moss rulemaking procedures, so difficult to navigate that it can take the FTC, literally, 10 years to promulgate a rule involving any controversy. The rulemaking process is so burdensome the Commission no longer devotes any time or resources to it.

Critics argue that Magnuson-Moss's procedural hurdles are necessary given the broad scope of "unfair or deceptive acts or practices." And they point to alleged Commission abuses of the past, specifically during the late 1970s. But the statutory and regulatory landscape has changed significantly since the turbulent 70s, and I am not sure the criticism still stands.

Other proposed reforms include granting the Commission authority to:

- Independently seek civil penalties without approval from the Justice Department;
- Enforce against those who aid and abet unfair or deceptive acts or practices and;
- Seek civil penalties for general violations of the FTC Act.

All of these reforms were included in the House-passed version of consumer financial protection legislation, and they deserve to be considered in our Committee as well.

We can bring much-needed transparency to financial services by fully preserving the FTC's enormously important role in protecting consumers from unfair or deceptive practices and strengthening that authority through legislative reforms. As Chairman of the Commerce Committee with a fundamental commitment to consumer protection, I fully intend to pursue the legislative options that best serve this goal.

Again, I want to thank Senator Pryor for presiding over this important hearing. And I want to thank our witnesses for testifying today. As the Committee continues to focus on consumer financial protection, we will continue to call on their expertise and perspective.

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

Thank you, Mr. Chairman, for scheduling this second hearing this year to review the Federal Trade Commission (FTC) and the role it plays in protecting consumers.

Last month, FTC Chairman John Leibowitz appeared before the Committee and outlined a request for new authorities for the Commission. Chairman Leibowitz stated that the significant expansions of authority and jurisdiction are necessary in his judgment to protect consumers. I look forward to working with my colleagues to consider this request and to making sure that the FTC has the resources and authorities that it needs to execute its vital consumer protection mission. I would be remiss, however, if I did not say that I am concerned about the potential for a significant increase in the agency's regulatory footprint given the extremely broad jurisdiction it has.

As we continue our work on consumer protection as it relates to the FTC, I believe we need to remain mindful of the costs associated with complying with new regulations and the difficult economic circumstances of the country. Protecting consumers is a key responsibility of the FTC and of this committee, and we can stay true, in my judgment, to that goal while not complicating the efforts of thousands of businesses to create new jobs by dramatically increasing their legal and operational costs.

In evaluating whether, and how, to change the scope and extent of FTC regulatory authority, I believe we must first ask whether there is a particular exigency, or area of consumer harm, that is so pervasive that the FTC's existing enforcement capabilities and rulemaking processes are not sufficient to address the issue. Second, if there is such an exigency, is the proposed legislative change broadly applied, resulting in greater regulatory burdens across a wide range of industries, or is it appropriately narrow to provide the FTC greater ability to develop rules and carry out enforcement actions directly relevant to that exigency. Third, we need to consider whether the FTC has sufficient personnel in key areas of its responsibility to carry out its enforcement and consumer protection mandates. Finally, we should consider whether there are areas, such as Internet-based commerce where the FTC lacks technical proficiency and experience such that we should require it to proceed carefully through traditionally deliberative rulemaking proceedings that allow extensive comment from the public and the relevant industries.

This framework is how I will be looking at any potential reauthorization of the FTC. I am pleased that this hearing will provide concerned entities and knowledgeable parties the opportunity to express their views on what could be a substantial variation of authority for an already powerful Federal agency. I do wish, however, that we could hear from more of the stakeholders and a broader segment of the public interest community.

When Chairman Leibowitz testified before this committee last month, he specifically requested the ability to use streamlined Administrative Procedure Act-style rulemaking across the entirety of the Commission's broad jurisdiction. He also requested the ability to collect civil penalties for violations of the FTC Act, the authority to litigate independently when seeking civil penalties, and the ability to pursue parties the FTC believes "aided or abetted" violators of the FTC Act. While I appreciate the Chairman's position, I will say at the outset that I have very strong con-

cerns about these requests, particularly permitting the FTC to promulgate rules using the procedures outlined in the Administrative Procedure Act (APA). We must not forget the reasons why the more deliberative rulemaking process was established for the FTC in the first place, it's rules apply to a significant range of the Nation's economy and the impact of hastily crafted rules has the potential for substantial, and costly, unintended consequences. Congress expressed a desire for the FTC to proceed through additional steps that allow for extensive comment and input to avoid these unintended consequences.

Mr. Chairman, we all share the desire to ensure that the FTC has all of the tools that it needs to protect consumers, particularly during a difficult economic climate where some have sought to prey upon vulnerable consumers. The key point, however, is to ensure the agency has the authority it actually needs. I have not seen an indication that the FTC actually needs these new authorities to address any existing or ongoing activity. I will be looking for that demonstration as we move forward and will apply the framework for evaluating the FTC's appropriate structure and authority that I outlined earlier. I hope that we will proceed carefully with potential legislation.

Thank you again, Mr. Chairman.

March 17, 2010

Hon. MARK PRYOR,
Chairman,
Subcommittee on Consumer Protection, Product Safety, and Insurance,
Senate Committee on Commerce, Science, and Transportation,
Washington, DC.

Hon. ROGER WICKER,
Ranking Member,
Subcommittee on Consumer Protection, Product Safety, and Insurance,
Senate Committee on Commerce, Science, and Transportation,
Washington, DC.

Dear Chairman Pryor and Ranking Member Wicker:

We commend you for holding today's hearing on "Financial Services and Products: The Role of the FTC in Protecting Consumers, Part II."

I appreciate the opportunity to submit for the hearing record this statement on behalf of the Association of National Advertisers (ANA). The focus of this hearing is on the powers of the FTC with regard to financial products and services. That was also the focus of the full Senate Commerce Committee hearing on February 4. As you know, the FTC has very broad regulatory authority over many other sectors of the American economy as well.

We have very serious concerns about several changes that have been proposed in the broad consumer protection regulatory authority of the Federal Trade Commission (FTC). Those changes were included in H.R. 4173, the "Wall Street Reform and Consumer Protection Act of 2009," which passed the House of Representatives on December 11th. H.R. 4173 would make three critical changes in the regulatory authority of the Commission: expedited rulemaking authority; expanded liability for "aiding and abetting" an unfair act or practice; and immediate civil penalty authority.

We are also very concerned about the potential overlap between the regulatory powers of the FTC and any new Federal agency or bureau created to regulate consumer financial products and services. H.R. 4173 would create a powerful new independent Consumer Financial Protection Agency (CFPA). Senator Chris Dodd (D-CT), Chairman of the Senate Banking Committee, just introduced legislation that would create a new Bureau of Consumer Financial Protection, to be housed at the Federal Reserve. It is far from clear in either bill how the FTC would interact with this new mega-regulatory agency in the financial arena. What would these changes mean for the current authority of the FTC? How would these agencies coordinate in order to avoid duplication and confusion for both consumers and the business community?

Congress is considering one of the largest regulatory reorganization efforts for the financial sector since the Great Depression of the 1930s. However, due to its scope and complexity, we believe critical aspects of this proposal, including the proposed changes in FTC regulatory authority, have received inadequate focus and analysis. We agree that our Nation's consumer protection regulatory regime needs to be reformed. However, we are very concerned that this legislation would dramatically

transform the regulatory powers of the FTC without any detailed hearings or opportunity for industry input.

Expedited Rulemaking Authority

H.R. 4173 gives the FTC authority to conduct across the board rulemakings under the expedited Administrative Procedures Act (APA) rather than under the present Magnuson Moss rulemaking procedures. This would allow three commissioners to push through a sweeping new rule affecting entire industries with limited opportunity for industry input or thoughtful consideration.

Congress instituted the Magnuson-Moss rulemaking procedures in 1975 and expanded the Commission's powers in several areas, including the ability to impose fines and seek injunctions against false or deceptive acts. In light of the Commission's extremely broad powers over vast segments of the Nation's economy, the Congress believed that expedited rulemaking authority (180 days) could lead to a serious "rush to judgment" allowing the FTC to make major, industry-wide regulatory changes without adequate time for industry input and thoughtful consideration.

Thus, the Magnuson-Moss rulemaking procedures include a number of important checks and balances. These safeguards include: the requirement that the Commission must identify a pattern of activity—a prevalence, as opposed to one instance—before engaging in a rulemaking; the requirement that a rule may be overturned by the courts if it is not supported by substantial evidence taken as a whole; the requirement that the Commission provide a statement as to the economic effect of the rule.

All of these protections would be removed in the House bill. They are all sensible requirements that should be maintained.

Senator Warren Magnuson (D-WA) and Congressman Frank Moss (D-CA) were two of the leading consumer champions of their era and certainly would never have pushed this legislation if they thought it would handcuff the agency.

Timothy Muris, who served as Chairman of the FTC from 2001–2004, testified at a July 14 hearing of the U.S. Senate Commerce Committee Subcommittee on Consumer Protection, Product Safety, and Insurance to strongly urge the Congress to retain the Magnuson Moss rulemaking procedures at the FTC. Muris stated:

"The administration's [CFPA] proposal would do more than just change the procedures used in rulemaking. It also would eliminate the requirement that unfair or deceptive practices must be prevalent, and eliminate the requirement for the Commission's Statement of Basis and Purpose to address the economic effect of the rule. It also changes the standard for judicial review, eliminating the court's ability to strike down rules that are not supported by substantial evidence in the rulemaking record taken as a whole. The current restrictions on Commissioners' meetings with outside parties and the prohibition on ex parte communications with Commissioners also are eliminated. These sensible and important protections should be retained."

The FTC is not an agency that has specific subject matter expertise over a particular area of the economy, such as the SEC, the CFTA or the EPA. Therefore, it is more important for the agency to follow the detailed and focused procedures of Magnuson Moss when carrying out an industry-wide rulemaking.

There has been no explanation why requirements to demonstrate a substantial basis for a rule or to require a showing of prevalence should make an FTC rulemaking unnecessarily cumbersome or time consuming. When regulating whole industry sectors, careful deliberation should be required.

We urge the members of the Senate Commerce Committee to either uphold the Magnuson Moss provisions or keep some hybrid version of the procedural safeguards in the Act.

Aiding and Abetting

H.R. 4173 would give the FTC the authority to go after companies or persons that "aid or abet" a violation of the FTC Act. This would have serious implications for advertising agencies, media companies and other companies that play any role in the communication/sale/delivery process. For example, if a television station knowingly accepts an ad from a marketer and the FTC later decides that the ad was somehow false or deceptive, the television station could also be subject to very serious financial penalties. This also raises some serious practical and constitutional concerns for marketers. If there is any ambiguity about what is lawful, that may result in the chilling of speech because the media will reject ads that are in fact truthful and nondeceptive because of the blurring of the legal lines.

We are also very concerned that this change would import criminal law concepts into a civil statute.

Immediate Civil Penalty Authority

H.R. 4173 would give the FTC general power to impose civil penalties without any prior rule or order by the agency for any violation of section 5 of the FTC Act, a sweeping scope of authority the Commission has never had before.

Currently, the FTC is generally limited to recovering civil penalties for violations of a rule or a final cease and desist order with respect to an unfair or deceptive act or practice. For example, unfairness is a very broad and evolving standard. Giving the FTC the authority to immediately impose civil penalties, without any understanding of or notice that particular conduct is "unfair," could impose serious multi-million dollar financial burdens on a business. Honest companies could be faced with back-breaking burdens despite the fact that they made every effort to stay within the strictures of the FTC Act.

It is possible that these major revisions to FTC authority might be appropriate after careful review. However, we believe it is inappropriate to make such significant and fundamental changes to FTC powers without full hearings and analysis, as an afterthought in a legislative package focusing on financial regulatory reform.

Relationship between the CFPA and FTC

We are very concerned that there has not been adequate consideration given to the potential overlapping jurisdiction of the FTC and any new agency or bureau that is created to regulate consumer financial products and services, broadly defined. This overlap and potential confusion could have very serious consequences for both the business community and consumers.

Under H.R. 4173, much of the regulatory authority that the Congress has given to the FTC over financial products and services would be transferred to the new Consumer Financial Protection Agency (CFPA), with the FTC retaining backstop or residual authority in this area. Under the new bill introduced this week by Senator Dodd, a number of consumer financial protection functions of the FTC would be transferred to the Bureau of Consumer Financial Protection. However, that bill also provides that the FTC would continue to have authority to enforce section 5 of the FTC Act, the Credit Repair Organizations Act and the Telemarketing and Consumer Fraud and Abuse Prevention Act.

It is unclear which products and services would fall under the jurisdiction of the CFPA or the Bureau and which would remain under the jurisdiction of the FTC. For example, if an automobile company creates a consumer lease program, are the terms of the lease subject to the CFPA, the Commission or both? Cable television operators often provide digital video recorders and modems under a lease that is part of the monthly subscriber program. Does this convert the subscription to a financial instrument subject to the CFPA?

Also, which agency would take the lead in protecting consumers? Under the Dodd bill, the FTC would retain jurisdiction over the telemarketing fraud law. However, if a financial product that is subject to the jurisdiction of the CFPA is being sold through fraudulent telemarketing, would the FTC have to defer to the new Bureau?

We do not believe there has been sufficient consideration given to these and a host of other concerns about the relationship and potential overlap between the two agencies.

Conclusion

H.R. 4173 not only attempts to totally transform consumer financial regulation. It also launches sweeping changes in the enforcement powers of the FTC in areas having nothing ostensibly to do with financial reorganization. These changes do not merely tinker at the margins of the Commission's authority. Instead, they substantially impact critical aspects of the FTC's functions and responsibilities.

Nevertheless, there has been no systematic examination of the implications of these changes or an opportunity for thorough examination by the numerous constituencies directly affected by these proposals.

Overlapping jurisdiction and inconsistent standards could lead to bureaucratic overregulation or confusion for companies that operate in a national and global marketplace. We urge you to reject these proposed changes in FTC authority.

Thank you for your consideration of our views.

Sincerely,

DANIEL L. JAFFE,
Executive Vice President,
 Association of National Advertisers (ANA).

FEDERAL TRADE COMMISSION
 Washington, DC, November 24, 2009

Hon. CHRISTOPHER J. DODD,
 Chairman,
 Committee on Banking, Housing, and Urban Affairs,
 U.S. Senate,
 Washington, DC.

Dear Chairman Dodd:

Thank you for undertaking the difficult task of seeking to improve consumer protection for financial services. I want to bring to your attention, however, five fundamental concerns I have with the November 10, 2009 discussion draft of the Committee's proposed legislation relating to the creation of a new consumer financial protection agency.

First and foremost, as currently drafted, the proposed bill appears to assume that, like other agencies whose consumer protection law enforcement authority is transferred to the new agency, the FTC failed to perform adequately its consumer protection law enforcement during the recent financial crisis. That assumption is erroneous.

Before the financial crisis arose in the Fall of 2007, the FTC worked to vigorously protect consumers in the financial marketplace, including mortgages, through its law enforcement efforts. Since 1998, the FTC has been at the forefront of the fight against deceptive subprime lending and servicing practices, when it filed its case against Capital City Mortgage, which allegedly took advantage of African American consumers. In the past decade, the FTC has brought dozens of actions focused on the mortgage lending industry, with particular attention to entities in the subprime market, alleging that mortgage lenders and servicers engaged in unfair or deceptive acts and practices. Through these cases, the FTC has returned hundreds of millions of dollars to consumers.¹ In addition, the FTC convened a May 2006 workshop on alternative mortgage products and engaged in consumer education respecting the perils of certain kinds of mortgages.² The FTC also provided advice and developed prototype mortgage disclosures for other Federal regulatory agencies.³

Second, as currently drafted, the proposed bill could be read to prevent the FTC from adequately enforcing even Section 5, which is its core consumer protection law enforcement statute. To be sure, subsection (C) of section 1061(b)(5) purports to exempt from transfer to the new agency the FTC's enforcement authority under Section 5. However, subsection (A) of section (b)(5) transfers to the CFPA exclusively "all consumer protection functions of the Federal Trade Commission," which are broadly defined to include all "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." § 1061(a)(1). At a minimum, that provision may be read to prevent the Commission from conducting research or issuing guidance under Section 5 of the FTC Act, as well as the enumerated consumer laws and other areas where the Commission has traditionally conducted research, provided business guidance, and marshalled consumer education efforts.

Third, "consumer protection financial products or services" is also broadly defined.⁴ Thus, the proposed bill, as currently drafted, could be read not only to strip the FTC of the authority that it exercised to protect consumers during the recent financial crisis, but actually to disable the FTC from enforcing its core consumer

¹ See generally Hearing On Improving Consumer Protections In Subprime Lending, Before the Subcommittee On Interstate Commerce, Trade, and Tourism of the Committee On Commerce, Science, and Transportation, U.S. Senate (Apr. 29, 2008).

² See, e.g., "Home Equity Loans: Borrowers Beware," "High-Rate, High-Fee Loans," and "Reverse Mortgages: Get the Facts Before Cashing In On Your Home's Equity," available at www.ftc.gov/bcp/conline/edcams/credit/coninfo.htm.

³ See, e.g., 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* (Nov. 2007), (comment to the OCC; the Federal Reserve Board; the FDIC; the OTS; and the NCUA), available at 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* (Sept. 2006), available at www.ftc.gov/opa/2006/09/fyi0661.shtm.

⁴ Section 1002 (5) defines "consumer financial product or service" as "any financial product or service to be used by a consumer primarily for personal, family, or household purposes." Section 1002 (14) defines "financial product or service" as meaning "any product or service that, directly or indirectly, results from or is related to engaging in one or more financial activities." Section 1002 (13)(0), in turn, includes within the definition of "financial activity," "engaging in any other activity that the CFPA defines, by rule, as a financial activity. . . ."

protection statute against a broad spectrum of arguably “financial” scams practiced by individuals and firms not normally considered as financial institutions.

Fourth, the proposed bill, as currently drafted, could be read to hinder the role the Congress has heretofore given the FTC in vigorously challenging violations of the Equal Opportunity Act, the Fair Credit Reporting Act, the Fair Debt Collection Practices Act, the Truth in Lending Act, the Home Ownership and Equity Protection Act, the Electronic Funds Transfer Act, and the Gramm-Leach-Bliley Act. Authority to enforce those other statutes would also be transferred to the proposed new agency as the “primary” Agency having authority to enforce them.⁵ Indeed, to the extent the FTC retains any authority at all to enforce those statutes,⁶ it could apparently do so only after first recommending that the new agency initiate an enforcement proceeding itself, and initiating an enforcement proceeding only after the new agency does not do so within 4 months of receiving the recommendations. It goes without saying that with respect to cases involving fraud, where immediate action is needed to stop consumer injury and freeze assets for consumer redress, that waiting period would severely impair the FTC’s effectiveness.

Finally, the proposed bill, as currently drafted, could be read to transfer to the new agency not only the FTC’s authority, but also its personnel and resources performing the transferred law enforcement functions, on a mandatory basis. See Section 1061 (b)(5) (“all consumer protection functions of the Federal Trade Commission are transferred to the CFPA”).

I believe that the best solution to these problems would be to amend the proposed bill to exempt completely the FTC from the strictures of this legislation. Such a carve out would correct the misimpression that the FTC did not exercise its consumer protection law enforcement powers to the best of its ability during the recent financial crisis. If and to the extent the Committee is concerned about the FTC’s authority to provide consumer financial protection, it should supplement that authority as does the proposed financial consumer protection bill offered in the House.

If these amendments are not adopted, however, I would like to offer some proposed language on how to revise the proposed bill to address the other issues I have highlighted. First, the seemingly different scope of section 1061 (b)(5)(A) and section 1061 (b)(5)(C) can be remedied by narrowing the transfer language in subsection (A) from “all consumer protection functions of the Federal Trade Commission,” to “the consumer protection functions of the Federal Trade Commission that are contained within the enumerated consumer laws.” Likewise, subsection (B) would be revised to narrow the scope from “all consumer protection functions of the Federal Trade Commission,” to “all consumer protection functions that were contained within the enumerated statutes, except as provided in Section 1022 (e).” Subsection (C) would then be unnecessary and should be deleted.⁷

Second, the problems introduced by transfer of authority to the new agency as the “primary” agency to enforce the enumerated statutes should be eliminated by revising the proposed bill to remove the FTC from the referral and backstop authority provisions in section 1022 (e), and to instead add a new subsection that would authorize the FTC specifically to enforce such laws and rules and to notify the CFPA prior to initiating an enforcement action, or as soon thereafter as practicable. In addition, subsections of current Title H, Conforming Amendments, should be amended to provide the FTC with at least concurrent enforcement authority jurisdiction over the entities it has historically regulated.

Third and finally, the mandatory transfer of the FTC’s personnel and resources should be avoided by exempting the FTC from the mandatory transfer provisions of the proposed bill and any other Federal statute. The following language could be added to avoid that unintended effect: “Nothing in this title shall be construed to require a mandatory transfer of any employee of the Federal Trade Commission to the Agency.”

⁵See, e.g., §§ 1002 (12), 1011, 1022 (e)(1) (“[t]o the extent that a provision of Federal law authorizes enforcement by the CFPA and another Federal agency, the CFPA shall have primary authority to enforce that provision of Federal law”).

⁶See Section 1022 (e)(2) & (3). These provisions arguably could affect both the FTC’s ability bring a case solely alleging violations of the enumerated consumer law statutes as well as its ability to supplement a Section 5 case with violations of those statutes.

⁷It may also be beneficial to add a savings clause to the proposed legislation that would specifically articulate the intent that no provision of this title shall be construed as modifying, limiting, or otherwise affecting the authority of the Federal Trade Commission under the Federal Trade Commission Act or other laws other than the enumerated consumer laws.”

Thank you in advance for your consideration of these matters, and I wish you the best as you mark up this bill.

Sincerely,

J. THOMAS ROSCH,
Commissioner.

cc: The Honorable Richard C. Shelby
Ranking Member
Committee on Banking, Housing, and Urban Affairs
U.S. Senate

FEDERAL TRADE COMMISSION
Washington, DC, July 16, 2009

Hon. BARNEY FRANK,
Chairman,
Committee on Financial Services,
U.S. House of Representatives,
Washington, DC.

Dear Chairman Frank:

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),

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 agency³ 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 pro-

¹By 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).

²I 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>.

³As 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.

protecting consumers, wasteful and inefficient consumer protection law enforcement, and very substantial (if still 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 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

⁴These 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.

⁵See, 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. 0P-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>.

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.

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 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.”

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. Press Release, available at <http://www.ftc.gov/iopa/2008/12/compucredit.shtm>.

⁷ *Id.*

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, U.S. Senate, April 29, 2008.

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 horrors. 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-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 discl-

⁹See 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, U.S. House of Representatives, July 8, 2009, at 9-10, available at http://energycommerce.house.gov/Press_111/20090708/testimony_calkins.pdf.

asures 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

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 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

¹⁰For 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).

¹¹See 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 <http://www.ftc.gov/os/2007/06/P025505mortgagedisclosurereport.pdf>.

¹²For 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>.

¹³See 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, U.S. House of Representatives, Dec. 18, 2007, available at <http://www.ftc.gov/os/testimony/P065404idtheft.pdf>.

¹⁴For 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.

¹⁵See 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, U.S. Senate, July 14, 2009, at 3–4, available at http://commerce.senate.gov/public/_files/MurisJuly14Testimony.pdf.

¹⁶See Economics Roundtable, Global Competition Review (March 2009).

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.

Sincerely,

J. THOMAS ROSCH,
Commissioner.

RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. TOM UDALL TO
HON. J. THOMAS ROSCH

Question. Mr. Rosch, Native American and rural communities face different, but no less important, challenges in fighting consumer fraud. How would you describe the quality of the FTC's outreach to Native American and rural communities, especially regarding the current economic crisis? Are there areas for improvement? If so, what are your plans for implementing these improvements?

Answer. The agency has done a significant amount of outreach to Native American and rural communities, but we can and will do more.

For several years, the FTC—particularly through our Regional Offices—has partnered with the United States Department of the Interior's Indian Arts and Crafts Board to undertake outreach activities at various Native American and Alaska Native arts and crafts events where we have provided a wide range of consumer protection materials. Additionally, one of our Regional Offices has partnered with state law enforcement and the AARP in Montana to do outreach in rural parts of that state. Another Regional Office has done significant outreach in Oklahoma, meeting with dignitaries of several nations and with an Indian Legal Aid office in Oklahoma.

There is more that we can and will do in this area. One project we are preparing to initiate in the near future is the development of a database of tribal newsletters and newspapers so that we can send them our consumer protection educational materials. Additionally, in the next few months, FTC staff will be doing more outreach in this area.

The FTC is always looking for more partners, including partners with connections to Indian Country, and would welcome additional suggestions and ideas on ways to improve our outreach efforts.

In addition, the FTC produces, promotes, and disseminates educational messages and materials to the widest possible audience through multi faceted communications and outreach programs, and we have focused extensively on issues relating to the current economic crisis.¹ These efforts involve the use of print, broadcast, and electronic media, the Internet, special events, and partnerships with other government agencies, consumer groups, trade organizations, businesses, and other organizations. Additionally, our Office of Congressional Relations supports individual Members of Congress who are holding town halls on consumer issues and encourages them to put the FTC's consumer education materials on their websites.

Given the size of our agency and our limited resources, our strategy is to be "wholesalers" of information, rather than "retailers." We work with an informal network of about 10,000 community based and special interest groups that distribute our information to their members, clients and constituents. Most of the 10 million print publications we distribute each year then are "re-distributed" through this network of local partners. In addition to providing these groups with free publications, we encourage them to reprint our materials in their newsletters, websites or other communications channels.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. ROGER F. WICKER TO
HON. J. THOMAS ROSCH

Question 1. Please provide a chronological breakdown of each step in a rule-making for a rule promulgated under the Magnuson-Moss process that is required of the FTC under current law (with references for each step to its specific location in statute).

¹ In March 2009, the FTC launched ftc.gov/MoneyMatters with information to help people dealing with challenging economic times. MoneyMatters offers short, practical tips, videos and links to reliable resources for more information on topics like credit repair, debt collection, job hunting and job scams, vehicle repossession, managing mortgage payments and recognizing foreclosure rescue scams.

A chronological breakdown of each step in the Mag-Moss rulemaking process was submitted in response to the Questions for the Record (“post-hearing questions”) sent to Chairman Leibowitz (see pages 1–2 of his response). For your convenience (and because it was submitted pursuant to an extension which meant that it was submitted shortly before the hearing), it is reproduced here with references to the statute (or the implementing regulations, if applicable). By my count, there are approximately 29 sequential steps in the Mag-Moss rulemaking process.

	Description of Step	Reference
1	Prepare an Advance Notice of Proposed Rulemaking (“ANPR”) describing the area of inquiry under consideration, the objectives the FTC seeks to achieve, and possible regulatory alternatives under consideration	15 U.S.C. § 57a(b)(2)(A)
2	Submit the ANPR to House and Senate oversight committees	15 U.S.C. § 57a(b)(2)(B)
3	Publish the ANPR in the Federal Register for public comment	15 U.S.C. § 57a(b)(2)(A)
4	Receive public comments on the ANPR	15 U.S.C. § 57a(b)(2)(A)(ii)
5	Determine that there is reason to believe that the unfair or deceptive acts or practices at issue appear are “prevalent,” on the basis either of cease and desist orders it has issued regarding such acts or practices, or if “any other information available to the Commission indicates a widespread pattern” of such acts or practices	15 U.S.C. § 57a(b)(3)
6	Analyze comments received in response to the ANPR	15 U.S.C. § 57a(b)
7	Prepare an initial Notice of Proposed Rulemaking (“NPR”) that: <ul style="list-style-type: none"> > Summarizes and addresses the ANPR comments; > Sets forth specific proposed rule text and any alternatives under consideration; > Explains the legal and factual basis for the proposed rule; > Invites interested parties to participate in the rulemaking through submission of written data, views, or arguments; > Invites interested parties to propose issues; > Includes, if applicable, an initial analysis under the Regulatory Flexibility Act (“Reg Flex”) based on the anticipated effects of the rule on small entities and an analysis under the Paperwork Reduction Act (“PRA”) of any disclosure, reporting, or record keeping requirements the rule would impose; and > Sets forth a preliminary Regulatory Analysis of anticipated effects of the rule, both positive and negative 	15 U.S.C. § 57a; 5 U.S.C. § 553(c) 15 U.S.C. § 57a(e)(3)(A) 15 U.S.C. § 57a(b)(1)(A), 15 U.S.C. § 57a(e)(3)(A) 15 U.S.C. § 57a(b)(1)(B) 5 U.S.C. §§ 601, 603; 44 U.S.C. § 3506(c)(2) 15 U.S.C. 57b–3(b)
8	Submit the NPR to House and Senate oversight committees 30 days before publishing it	15 U.S.C. § 57a(b)(2)(B)
9	Publish the NPR in the Federal Register for public comment	15 U.S.C. § 57a(b)(1)(b); 5 U.S.C. § 553(c)
10	Receive public comments on the NPR, usually for 60 days or more Provide an opportunity for a public oral hearing before a presiding officer, and if any member of the public requests such hearing:	15 U.S.C. § 57a(b)(1)(b); 5 U.S.C. § 553(c) 15 U.S.C. § 57a(b)(1)(c); 15 U.S.C. § 57a(c)
11	Appoint a presiding officer	15 U.S.C. § 57a(c)(1)(A)

	Description of Step	Reference
12	Designate disputed issues of fact to be addressed at the hearing	15 U.S.C. § 57a(c)(2)(B)
13	Decide petitions to designate fact issues as disputed for the hearing	
14	Accord to (potentially numerous) interested persons, rights to examine, rebut, and cross-examine witnesses	15 U.S.C. § 57a(c)(4)(A)
15	Determine which among those interested persons have similar interests	15 U.S.C. § 57a(c)(4)
16	Allow each group of persons with similar interests to choose a representative	15 U.S.C. § 57a(c)(4)
17	Appoint a representative if the group cannot choose one	15 U.S.C. § 57a(c)(4)
18	Decide appeals from determinations on which persons have similar interests	15 U.S.C. § 57a(c)(4)(B)
19	Prepare and publish a second NPR addressing all these issues	15 C.F.R. § 1.12;
20	Conduct the hearings	15 U.S.C. § 57a(c)
21	Make complete transcripts of all testimony and cross-examinations available to the public	15 U.S.C. § 57a(c)(5)
22	Analyze the record amassed, and prepare a staff report that summarizes and analyzes the record and sets forth the final rule text recommended for adoption by the Commission	15 C.F.R. § 1.13(f)
23	If hearings have been held, the Presiding Officer must prepare a report with a summary and analysis of the record amassed and recommendations as to adoption of final rule provisions	15 U.S.C. § 57a(c)(1)(B) 15 C.F.R. § 1.13(g)
24	Publish a Federal Register notice announcing issuance of the Staff Report and seeking comments on it and on the Presiding Officer's report, if any	15 C.F.R. § 1.13(h)
25	Receive public comments on Staff Report and Presiding Officer's Report for 60 days or more	15 C.F.R. § 1.13(h)
26	Obtain OMB approval for any disclosure, reporting, or record keeping requirement	44 U.S.C. § 3506(c)(2); 44 U.S.C. § 3507(a)(2)
27	Prepare a Final Rule and Statement of Basis and Purpose ("SBP") that sets forth: > A summary and analysis of the record; > The text of the recommended final rule; > A determination that the practices addressed by the recommended final rule are prevalent; > An explanation of the legal and evidentiary basis for each provision; > A Final Regulatory Analysis, includes a Final Reg Flex, if applicable; and > An effective date not earlier than 30 days after publication in the Federal Register	15 U.S.C. § 57a(d); 5 U.S.C. § 553(c) 15 U.S.C. § 57a(e)(3)(a) 5 U.S.C. § 706(2)(a) 15 U.S.C. § 57a(d)(1)(A) 15 U.S.C. § 57a(e)(3)(a) 5 U.S.C. § 706(2)(a); 15 U.S.C. § 57a(d)(1)(C) 5 U.S.C. § 553(d)
28	Publish the Final Rule and SBP in the Federal Register	15 U.S.C. §§ 57a(b)(1)(D) 15 U.S.C. § 57a(d)

	Description of Step	Reference
29	Submit a notification to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act ("SBREFA"), initiating a period during which Congress can invalidate the rule by legislation and issue compliance guides if required under SBREFA	5 U.S.C. § 801; Section 212 of SBREFA, P.L. 104-121, Mar. 29, 1996 (As Amended by P.L. 110-28, May 25, 2007)

Question 1a. Include the average amount of time that each step in the process takes based on historical rulemaking data. If sufficient historical data to determine the average amount of time is not available, please estimate how long it would take and provide an explanation of how the estimate was determined.

Answer. I cannot submit "historical rulemaking data" respecting the average amount of time spent on each step in the process because, except for the instances described below, no new Mag-Moss rules have been proposed for more than 30 years and because task-based timekeeping records are no longer retained.

Based on my experience respecting the seriousness with which the Bureau of Consumer Protection ("BCP") staff took its responsibilities when I was Director of that Bureau (from 1973-1975), I estimate that steps 1-6 would have taken an average of approximately 2 years. Based on my experience as an antitrust defense trial lawyer for nearly 40 years (from 1965-1973 and from 1976-2006), and on the hearing-related steps that resemble pre-trial or post-trial steps, including motions practice and appeals,¹ I estimate that steps 11-25 would take an average of approximately 3 years, taking into account petitions, and interlocutory appeals on them, as well as continuances, holidays, travel schedules and the extraordinary amount of pre-hearing preparation and post-trial work required by steps 11-25. Based on my experience with Administrative Procedure Act ("APA") rulemaking since my return to the Commission as a Commissioner (2006-present), I estimate that steps 7-9, and steps 26-29 (which largely duplicate APA rulemaking requirements) would take an average of approximately 2 years, for a total of 7 years on average.

As I testified at the hearing, the Mag-Moss hearing process alone (not including the extraordinary pre-hearing and post-hearing work) consumed an average of 38 nonconsecutive days (566 days divided by 15 rules) with the longest hearing lasting 58 nonconsecutive days and 6 of the hearings lasting 40 or more non-consecutive days.² The Mag-Moss rulemaking process in its entirety consumed an average of 7 years (102 years divided by 15 rules) with the longest proceeding lasting more than 11 years and nine of the proceedings lasting more than 8 years.

Question 2. Please provide a chronological breakdown of any additional requirements that are performed during a Magnuson-Moss rulemaking that result from FTC created rules and/or guidelines.

Answer. As stated on page 14 of Chairman Leibowitz's responses to the post-hearing questions submitted to him, "[i]n addition to the statutory requirements, the implementing rules provide that FTC staff shall make recommendations to the Commission in a report on the rulemaking record" (referring to steps 22 and 24-25 of the 29 sequential steps), that "the public have an opportunity to comment on both the staff report and the Presiding Officer's report" (speaking to step 25 of the 29 sequential steps), and that "a procedure for oral presentations to the Commission after the close of the hearing record" be established (referring also to step 25 of the 29 sequential steps). The most time-consuming of these is the staff report, which marshals and analyzes the voluminous record that results from the hearing process; while not specifically mandated by statute, such a report was considered essential to the Commission's consideration of the record.

Question 2a. Identify when in the sequence of requirements outlined in your response to question 1 each of these FTC created rules and/or guidelines occurs.

Answer. As I testified, each of these additional implementing rules was considered at the time to be necessary to carry out Congressional intent under the Mag-Moss Act. The sequence of these requirements in the Mag-Moss rulemaking process is described in the description of the 29 total steps in the Mag-Moss rulemaking process set forth in response to Question 1.

Question 2b. Include the average amount of time that each of these FTC created rules and/or guidelines take based on historical data. If sufficient historical data to

¹ The Mag-Moss hearing process is an adversarial process that can be very similar to a multi-party trial. Determinations that would help control the process are themselves subject to interlocutory Commission review and/or to judicial review with the potential for reopening the matter.

² See Chairman Leibowitz's response at 12-13 and accompanying chart.

determine the average amount of time is not available, please estimate how long it would take and provide an explanation of how the estimate was determined.

Answer. The average amount of time that each of these FTC-created rules and/or guidelines took, based on historical data, is not available for the reasons described in my response to Question 1. Based on my experience respecting the seriousness with which BCP staff took its responsibilities when I was Director of that Bureau, I estimate that it would have taken an average of 18 months to complete these three tasks.

Question 3. Please repeat questions 1 and 2 for the Commission's rulemaking process when a rule is promulgated under APA authority.

Answer. A chronological breakdown of each step in the APA rulemaking process was submitted in response to the post-hearing questions sent to Chairman Leibowitz (pages 3–4 of his response). For your convenience (and because the responses were submitted pursuant to an extension which meant that it was submitted shortly before the hearing), it is reproduced here with references to the statute (or as supplemented by FTC practice):

1. The rulemaking agency must prepare and publish in the Federal Register a Notice of Proposed Rulemaking (NPR) that: (a) sets forth either the terms or substance of the proposed rule or a description of the subjects and issues involved; (b) explains the legal and factual basis for the proposed rule provisions; and (c) includes, if applicable, a Regulatory Flexibility (Reg Flex) analysis based on the anticipated effects of the rule on small entities, and an analysis under the Paperwork Reduction Act (PRA) of any disclosure, reporting, or record keeping requirements the rule would impose. In addition, the proposed legislation would retain the current FTC Act requirement that, for rules under the Act, the NPR also must set forth a preliminary Regulatory Analysis of anticipated effects of the rule, both positive and negative. 5 U.S.C. § 553(b); 5 U.S.C. § 603; 44 U.S.C. § 3506(c)(2).
2. The agency then must accept public comments on the NPR for a period of 30 days or more. 5 U.S.C. §§ 553 (c) & (d).
3. The agency must also obtain OMB approval of any disclosure, reporting, or recordkeeping requirements in the rule under the PRA. 44 U.S.C. § 3507(a)(2).
4. After considering the comments, the agency then must prepare and publish in the Federal Register a Statement of Basis and Purpose, setting forth the final rule provisions and "a concise general statement of their basis and purpose." This statement provides a summary and analysis of the record; an explanation of the legal and evidentiary basis for the rule provisions adopted; a final Reg Flex Analysis, if applicable; and an effective date for the rule. Also, under the current FTC Act requirement that would be retained by the proposed legislation, the Statement of Basis and Purpose of rules must set forth a final Regulatory Analysis. 5 U.S.C. § 553(c); 5 U.S.C. § 604.
5. Subsequently, the agency submits a notification to Congress pursuant to the Small Business Regulatory Enforcement Act (SBREFA), initiating a period during which Congress can invalidate the rule by legislation. The agency also commonly issues compliance guides. 5 U.S.C. § 801(a)(1).
6. The final rule can be challenged in Federal court and will be set aside if the court determines that the Commission's findings are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

By my count, and as set forth in the Chairman's response to post-hearing questions, the APA statutory process requires six sequential steps, with no required hearing, and the Commission, as a matter of practice, has added four additional steps in some instances:

1. First, in many instances, the Commission has published an Advanced Notice of Proposed Rulemaking (ANPR), providing even earlier notice of the proceeding and opportunity to comment. *See, e.g.,* <http://www.ftc.gov/opa/2009/05/deceptmortgage.shtm> (ANPR issued by the Commission initiating its mortgage practices rulemakings). Although they increase the time it takes to promulgate the ultimate rule, ANPRs have proven useful in situations where the Commission lacks sufficient experience or knowledge in a particular area to formulate a proposed rule.
2. Second, in some cases, the FTC has held public workshops during the course of the rulemaking proceeding, enriching the record and providing additional opportunities for those who might be affected by the rule to express their views, provide data, and address the assertions of other participants in a practical

manner and forum. *See, e.g.,* <http://www.ftc.gov/opa/2009/08/tsrforum.shtm> (announcing public forum to discuss proposed debt relief amendments to the Commission's Telemarketing Sales Rule.)

3. Third, to further ensure that its decisions are fully informed, the Commission routinely has conducted informal, but extensive, outreach to affected parties. For example, the FTC participated in or conducted a number of rulemakings as required by the FACT Act. For most of these rules, the FTC (with its sister agencies in some cases) solicited data and opinions in addition to the formal request for comments, and often on multiple occasions, from industry groups, legal practitioners, consumer advocates, and others.

4. Fourth, the Commission has an ongoing program of reviewing all of its rules periodically, seeking public comment on them, and revising or repealing them as appropriate.

I do not have "historical rulemaking data" respecting the average time spent on each of these steps in the APA process. Based on my experience with APA rulemaking since my return to the Commission (which represents the totality of my experience with APA rulemaking), I estimate that those six sequential steps would take approximately 2 years or less to complete.

I should add several caveats. First, the dates submitted and my estimates describe only the rulemaking requirements imposed by the APA, as supplemented by the Commission's APA rulemaking practices. They do not, in other words, describe the rulemaking that has occurred at other agencies (like the SEC) that are authorized to conduct APA rulemaking.

Second, the Commission has engaged in APA rulemaking in a number of instances. Some examples of APA rulemaking (as supplemented by the Commission's practices) are described on page 11 of Chairman Leibowitz's response: (1) APA rulemaking pursuant to the Telephone Disclosure and Dispute Resolution Act of 1992; (2) APA rulemaking pursuant to the Telemarketing and Consumer Fraud and Abuse Prevention Act (including the Do Not Call Amendments); (3) APA rulemaking pursuant to the Children's Online Privacy Protection Act of 1998; (4) APA rulemaking pursuant to the Fairness to Contact Lens Consumers Act; (5) APA rulemaking pursuant to the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003; and (6) APA rulemaking pursuant to the Omnibus Appropriations Act, 2009 (mortgage practices draft rule). APA rulemaking has also been conducted pursuant to the Fair and Accurate Credit Transactions Act of 2003 and the Gramm-Leach Bliley Act.

By my estimate, APA rulemaking respecting those rules (excepting the most recent mortgage practices rule, which has not been completed) has taken an average of zero (0) hearing time and the proceedings have taken less than 2 years. Where there have been statutory deadlines for completing APA rules—sometimes deadlines of a year or less—the FTC has met those deadlines in every instance.

Question 4. For every proposed rule since 1970 (under both Magnuson-Moss and APA procedures), please identify each step in the processes outlined in question 1 and 2, or 3 (as appropriate) that was taken. In the description, please include the amount of time that was spent on each step and the number of staff that were a part of completing that step.

With respect to "historical rulemaking data" for the number of staff members working on each step in the process, Chairman Leibowitz's response to the prior post-hearing questions stated at page 12:

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

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

These numbers do not include the Presiding Officer (who was obligated to produce a separate report) or his staff, Bureau management reviewers, Office of General Counsel advisors, or the Commissioners' offices.

I have no reason to doubt the above statement.

I cannot submit additional "historical rulemaking data" for the time spent on each step in the Mag-Moss rulemaking process for the reasons described in response to Questions 1 and 2. I do not have "historical rulemaking data" for the time spent

on each step of the APA rulemaking process. I have instead provided my best estimates of the time spent on those tasks.

Based on my experience respecting the seriousness with which the BCP took its responsibilities when I was Director of that Bureau, I estimate that at least 13–16 staff members would have participated in the tasks described in steps 1–6 of the 29 sequential steps of the Mag-Moss procedures. Based on my experience as an anti-trust defense trial lawyer described in response to Question 1, I estimate that the hearing officer and his staff, the stenographer, the staff members responsible for preparing the proposed rule, and cross examining opponents of the rule, as well as the staff members involved during the pre-hearing and post-hearing phases would have been required to participate in steps 11–25 of the 29 sequential steps of the Mag-Moss procedures. Again, based on my experience respecting the seriousness with which the BCP staff took their responsibilities, I estimate that for the tasks described in steps 11–25 at least 20 staff members would have been necessary.

Based on my familiarity with the APA rulemaking since I have returned to the Commission as a Commissioner, I estimate that approximately 7–10 BCP staff members would have participated in the 6 steps in the APA rulemaking process, as supplemented by the Commission's practices.

Question 4a. For each rule, please provide details on whether or not the rule was completed. If not completed, please state what the final outcome of the rulemaking was and why that decision was made. Please also provide a summation of the total amount of time spent working on each rulemaking by the Commission.

Answer. Of the 15 Mag-Moss rules proposed, 5 were finalized; the Credit Practices Rule, the Funeral Industry Practices Rule, the Ophthalmic Practices Rule, the Used Car Rule and the Home Insulation Rule. In addition, Magnuson-Moss procedures were used to complete or modify some rules that had been issued or begun pre-Mag Moss.³ The other ten Mag-Moss rule proceedings were closed.

As you state in Question 14, former Chairman Muris has testified that the reason for that was because there was a “change in enforcement philosophy.” I have no reason to doubt his testimony. After the change in Administration in 1980, former Chairman Muris was appointed Director of BCP and I have no doubt that the issuance of Mag-Moss rules was contrary to his “enforcement philosophy” and hence that he recommended closing those pending rulemaking proceedings. However, the Congress created the FTC as an independent agency, providing that no more than three of its members should come from the same political party, in order to avoid just such shifts in “enforcement philosophy” upon a change in Administration. Thus, the explanation for closing the ten Mag-Moss rule proceedings proffered by former Chairman Muris would describe the sort of “independent” agency capture by an Administration that Congress intended to prevent.

Furthermore, former Chairman Muris' view that this “change in enforcement philosophy,” not the time-consuming and burdensome nature of the Mag-Moss rule-making process, “killed FTC rulemaking” (see Question 15) does not accord with the views of other BCP Directors. As previously stated, I was the BCP Director in 1975, when most of the 15 Mag-Moss rules were proposed. At the outset, I felt the Mag-Moss process was workable. However, after all of those rules had already been in process for 3 or more years, and 12 of them for over 5 years, and before the change in enforcement policy referred to, I became convinced that my initial view was wrong. Instead, I came to realize that Mag-Moss rulemaking proceedings were not viable. Also, two subsequent Bureau Directors, for example, told me (when they were BCP Directors) that they shared that view, and that was the reason for the absence of Mag-Moss rulemaking.

Moreover, former Chairman Muris has acknowledged that when he was Chairman, his “enforcement philosophy” did not prevent him from championing the Do Not Call Rule. He further acknowledged that that rule was promulgated using APA, instead of Mag-Moss, rulemaking procedures. Although he claims that a Mag-Moss

³It appears to me that the Mail Order Merchandise Rule was initially proposed in 1971 under Section 6(g) of the FTC Act, but completed at the end of 1975 after the Mag-Moss Act was enacted by Congress. Similarly, it appears that the Franchise Rule was initially proposed in 1971, but completed over 7 years later in 1978 as a Mag-Moss rule. That makes sense to me. Prior to the Mag-Moss Act, the FTC had the authority to challenge practices under Section 5 of the FTC Act and to enact rules respecting those practices but did not have the power to seek civil penalties for violations of either Section 5 or a rule unless and until a respondent was held in contempt of a Commission order respecting the same. Thus, a respondent effectively got “two bites of the apple” (the first one being a violation of Section 5 or a rule, for which there was no monetary penalty). One of the purposes of the Mag-Moss Act was to enable the Commission to make rules that were enforceable by civil penalties, thus giving a respondent only “one bite at the apple.”

rule would not have taken any more time to issue, his assertion is unsupported and contrary to the way the Commission in fact proceeded.

Question 4b. For hearings, please note how long each hearing took and how long was spent after the hearing reviewing the record. Please identify the number of staff members who reviewed the hearing records.

There are zero (0) hearings required in the APA rulemaking process. For my estimate of the time and staff resources spent on average in reviewing the hearing record in a Mag-Moss proceeding (see step 22), based on my experience as a BCP Director and my personal knowledge respecting the seriousness with which the BCP staff performed their responsibilities, I estimate the role of staff involved would accord with the number of staff reported to have worked on that task in connection with the Mobile Homes, Used Cars, and Funeral Industry proceedings (13–15 staff members), and the time needed to perform that task would have taken, on average, approximately 18 months.

Question 5. Please identify which specific requirements under the FTC’s Magnuson-Moss rulemaking process you believe are unnecessary or overly burdensome. For each requirement identified, please explain why you believe that requirement is unnecessary or overly burdensome.

I consider all but the 6 steps of the Mag-Moss rulemaking process that are also required by APA rulemaking (*i.e.*, publication of the prescribed NPR; acceptance of public comments; obtaining OMB approval of any disclosure, reporting or record keeping requirements in the rule; publication of the prescribed Statement of Basis and Purpose; notification to Congress pursuant to the SBREFA; and defending against challenges) to be duplicative, unnecessary and burdensome. The Commission has demonstrated repeatedly that it can fashion responsible rules using the APA procedures, without engaging in the numerous other time-consuming and burdensome steps required under Mag-Moss procedures. A number of other agencies (including but not limited to the SEC) have also demonstrated that APA rulemaking is sufficient to ensure due process and fairness. Indeed, Congress itself does not generally require hearings and proceedings that are as burdensome and time-consuming as Mag-Moss rulemaking procedures before adopting important legislation (such as the Patriot Act).

The justifications that have been proffered for such burdensome and time-consuming Mag-Moss procedures do not stand up to serious examination. It is said, for example, that Mag-Moss rules are necessary because otherwise the FTC’s broad jurisdiction would make it “the second most powerful legislature in Washington.”⁴ Indeed, the opposite is true. Each of the 15 Mag-Moss rules sought to define specific “rules of the road” for businesses that otherwise would be governed by a broad statute (Section 5 of the FTC Act). Similarly, it has been said that rulemaking diverts the staff from doing what it should be doing, which is to bring cases.⁵ I am a big fan of bringing cases. But I am also a big fan of giving the businesses advance notice of the specific “rules of the road” before they are sued.

Question 6. With a Notice of Proposed Rulemaking, the APA process removes the explicit requirement to provide the text and purpose for a proposed rule, which is present under the Magnuson-Moss proceedings and has helped ensure the FTC designates the issues it is pursuing at the outset of a rulemaking. Do you believe this identification of issues is an unnecessary step in the FTC’s rulemaking process?

This question says that the APA process “removes the explicit requirement to provide the text and purpose for a proposed rule, which is present under the Magnuson-Moss proceedings and has helped ensure the FTC designates the issues it is pursuing at the outset of a rulemaking.” That is not how I read or interpret the APA. The APA process specifically requires that the Notice of Proposed Rulemaking (“NPR”) sets forth either the terms or substance of the proposed rule or a description of the subjects and issues involved; explains the legal and factual basis for the proposed rule provisions; and includes, if applicable, a Regulatory Flexibility analysis based on the anticipated effects of the rule on small entities, and an analysis under the Paperwork Reduction Act of any disclosure, reporting, or record keeping requirements the rule would impose. These are all necessary steps occurring at the outset of the APA rulemaking process, and I believe they adequately identify the issues. In any event, however, the Commission’s long standing practice in its APA rulemaking is to include the text of the proposed rule in its NPR, and I do not foresee any change in this practice.

⁴Testimony of Timothy F. Muris before the U.S. Senate Committee on Commerce, Science, and Transportation, at 12–14 (July 14, 2009).

⁵*Id.* at 14.

Question 7. Do you believe it is beneficial to require a demonstration of prevalence at the outset of a rulemaking to ensure there is sufficient reason to pursue an industry wide rule? At what point in a rulemaking do you believe the Commission should be required to demonstrate the prevalence of a deceptive act or practice on which it intends to enunciate a rule?

Answer. Requiring a demonstration of prevalence “at the outset” of a rulemaking proceeding to ensure that there is sufficient reason to issue an industry-wide rule seems to me to put the cart before the horse. A primary purpose of a rulemaking proceeding is to determine if there is a sufficient reason to issue an industry-wide rule; requiring that to be determined “at the outset” would oblige the FTC to pre-judge that key issue. Moreover, requiring a demonstration of “prevalence” to be shown at any point in the proceeding seems to me to be imprudent for two additional reasons. First, “prevalence” is largely in the eye of the beholder in that it is not defined in either the statute or the case law. Second, requiring a demonstration of “prevalence” is contrary to the sage adage that even if bad apples do not predominate, they may spoil an entire barrel: more specifically, a rule that condemns specific “deceptive or unfair” business practices protects not only consumers but also legitimate businesses that must compete with the businesses engaging in those practices; indeed, that is why the FTC’s consumer protection mission is symbiotic with its mission to protect against unfair competition. This is not to say I would favor issuing a rule to address a small number of isolated problems; business education and, if needed, enforcement action ordinarily would be the appropriate answer to that situation.

Question 8. You stated the hearings usually take 38 days to complete. Why do you believe that the removal of this relatively short requirement (in the context of a multi-year rulemaking) will significantly decrease the time the Commission spends on a rulemaking?

Answer. I do not consider 38 days of hearings to be a “relatively short” requirement in the context of a multi-year proceeding. As I testified, for nearly 40 years, I was an antitrust litigator for defendants in the Federal courts. Many of the antitrust cases in which I participated were “multiyear” proceedings. Yet, I never participated in a trial that was as long as the average Mag-Moss hearing (the closest I came was a 37 day jury trial in Chicago in the early 2000s). And, the average 38 day Mag-Moss hearing time omits the extensive time spent in preparing for, and analyzing the results of, the hearing, which are integral parts of the hearing process. Judged by other metrics—*i.e.*, as previously discussed, the APA rulemaking proceedings (which involve 0 hearing time) conducted by both the FTC and other agencies, this is an inordinately long period of time. Nor can the time-consuming and burdensome nature of the Mag-Moss rulemaking process be justified by the breadth or the importance of the rule proposed. As previously discussed, each of the proposed Mag-Moss rules actually defined with specificity the applicable “rules of the road” under a broad statute; and those “rules of the road” were not any more important than the subject matter of APA rules proposed by the FTC and other like agencies, much less than legislation enacted by Congress.

Question 9. Under Magnuson-Moss procedures, the hearing allows every party to suggest disputed issues of fact. Do you believe that allowing all parties to do so is unnecessary? If the Commission is given full APA authority for all rulemakings, how can we be sure that this and future Commissions will ensure that the concerns of all parties related to potentially disputed issues of fact are heard and considered?

Answer. Based on my experience as an antitrust litigator described in response to Question 1, I believe requiring the FTC to consider the disputed issues submitted by all parties is unnecessary. Rule 26 of the Federal Rules of Civil Procedure, governing pre-trial proceedings in Federal courts, does not require a Federal judge to consider the issues submitted by all parties even though many of the antitrust cases in which I participated were multi-party proceedings with potential binding effects on the parties outside the scope of the particular case. Moreover, these submissions cannot be viewed in isolation; they are a prelude to cross-examination respecting each issue at the hearing. Thus, this requirement has the potential to make the hearing process extremely time-consuming and burdensome. Indeed, I know of no other agency that faces such a requirement. The APA requirement compelling an agency to consider all comments submitted, and to defend any rule in the courts, has proved to ensure that the legitimate concerns of all parties related to potentially disputed issues of fact are heard and considered.

Question 10. In testimony, you referenced a recent attempt by the Commission to carve out business opportunities from the Franchise Rule as the only proposed rule under Magnuson-Moss requirements since 1978. Please explain what occurred with

that rulemaking, including the ultimate result. Do you think the Magnuson-Moss procedures were too burdensome in that case? Why or why not?

Answer. In 1995, the Commission conducted a regulatory rule review of the Franchise Rule to ensure that it was continuing to serve a useful purpose. In that review the Commission explored the issue of how the Franchise Rule was applied to the sale of business opportunities. At the conclusion of the rule review, the Commission determined to retain the Franchise Rule with modifications but also decided to seek additional comment on whether to address the sale of business opportunities through a separate, narrowly tailored rule. To that end, under Mag-Moss rulemaking procedures, in 1997 the Commission published an ANPR, which jointly considered Franchise Rule modifications as well as the bifurcation of the sale of business opportunities from the Franchise Rule. In addition to soliciting written comments, the Commission staff held 3 public workshops—held in Chicago, Dallas and Washington, D.C.—specifically addressing business opportunity sales issues.

In October 1999, the Commission announced its intention to conduct a separate rulemaking to address business opportunity sales, but proceeded to modify the Franchise Rule under Mag-Moss rulemaking procedures first. As the Franchise Rule proceeding began to wind down (the final rule was published in January 2007), the Commission began Mag-Moss rulemaking proceedings relating to the sale of business opportunities. In April 2006, the Commission published an NPR, which included proposed language for the new Business Opportunity Rule.⁶ The comment periods for the NPR ultimately concluded at the end of September 2006. The Commission received over 17,000 comments and rebuttal comments.

In March 2008, still proceeding under the Mag-Moss rulemaking steps, the Commission issued a revised NPR, which proposed a more narrowly-focused Business Opportunity Rule. The comment periods for this NPR concluded in July 2008, and the Commission received 115 comments and rebuttal comments. A public comment period relating to the Paperwork Reduction Act was conducted that October. The Commission held a day-long workshop on June 1, 2009, to explore proposed changes to the Business Opportunity Rule and the comment period for that hearing closed at the end of June 2009. A Staff Report is currently being drafted on the proposed Business Opportunity Rule and the Commission anticipates seeking comment on that Report later this year.

The rulemaking proceedings described above illustrate the problems that I believe are inherent to the Mag-Moss rulemaking process. The proceeding to amend the Franchise Rule and bifurcate a separate rule for business opportunity sales began in 1995 and has still not been completed. Although not all of the delay in the Franchise Rule/Business Opportunity rulemakings has been due to Mag-Moss rulemaking procedures, I believe that much, if not most, of that delay has been.

There are too many unnecessary steps in the Mag-Moss rulemaking process. For example, although the interested parties in the Business Opportunity rulemaking waived a hearing, thereby eliminating the time and resources required to conduct a hearing (as well as the pre-hearing and post-hearing steps integral to such a hearing), four workshops—three in 1997 and one in 2009—were conducted as an alternative. Furthermore, Commission staff must still prepare a Staff Report and seek comment (with the requisite comment period) on that Report.

In addition, Mag-Moss procedures require an unwieldy method of amending rules such as the Franchise Rule. The primary reason behind amending that Rule was to conform disclosure requirements with those of the Uniform Franchise Offering Circular. This modification would reduce costs on the business side of franchise sales by streamlining certain requirements. Because it took almost 12 years to amend the Franchise Rule, businesses lost out on 12 years of potentially reduced costs, most of which arguably were passed on to purchasers of those franchises.

Question 11. In testimony, you stated that you believe the Commission should allow oral submissions during rulemakings. If the Commission were given full APA authority, would you support adding this as an additional requirement in statute?

Answer. I stated in my testimony that the FTC as a matter of practice allowed oral submissions in some APA rulemaking proceedings. See my response to Question 4. I do not recall testifying that the Commission should allow such submissions in all APA proceedings, and I do not consider that necessary. I do think it is advisable when a rule is unusually novel or complex. However, I do not support adding that requirement to the statute. It should be the exception, not the rule.

⁶The initial comment period was 60 days, and was extended for an additional month. The rebuttal period was extended twice—first to accommodate the extension of the initial comment period, and then extended an additional 6 weeks to allow more time for rebuttal comments.

Question 12. In testimony, you stated that too strict a prevalence requirement on rulemakings would hurt legitimate business. Please explain why you believe this to be true.

Answer. See my prior response to Question 7 respecting a “prevalence” requirement above.

Question 13. Former Chairman Muris stated that the FTC’s rulemaking process has taken so long not because of the Magnuson-Moss procedures, but because many times the FTC did not have a clear idea of what it wanted to accomplish with a particular rule. Do you agree or disagree with this statement? Please explain your response.

I respectfully disagree with my good friend former Chairman Muris. It is not correct to assert that “many times the FTC did not have a clear idea of what it wanted to accomplish with a particular rule.” Before any Mag-Moss rule was proposed, it was the subject of extensive investigation by the staff; vetting by the Bureau of Consumer Protection management; recommendation by the staff, the Bureau management and other interested offices at the agency (like the Office of Policy Planning and Evaluation (“OPPE”) and the Bureau of Economics); and review and adoption by the Commissioners. This was in addition to the 29 sequential steps of the Mag-Moss procedures. So in the case of each of the 15 proposed rules, both the agency staff and the Commission had a very “clear idea of what [the Commission] wanted to accomplish” with respect to the rule.

Second, with respect, I was in a better position than former Chairman Muris to speak to whether the Commission had a clear idea about what it wanted to accomplish with the MagMoss rules it proposed in 1975. As previously stated, I was the Director of BCP at the time and, as such, I was involved in the investigation, vetting and recommendation processes I have described for each of the Mag-Moss rules proposed. By contrast, former Chairman Muris was a junior member of OPPE when the rules were proposed: as he acknowledged in his testimony last July, “one of the first jobs I had out of law school was that as a staffer at the Federal Trade Commission.”⁷ Finally, I do not recall any instance in which OPPE opposed any of the Mag-Moss rulemaking proposals recommended by BCP in 1975. To the contrary, OPPE enthusiastically supported a number of Mag-Moss rulemaking proposals in 1975, including at least one that the Commission rejected.

Question 14. In his testimony, Mr. Muris stated that Magnuson-Moss did not kill FTC rulemaking. A change in enforcement philosophy slowed FTC rulemaking efforts. Do you agree or disagree with this statement? Please explain your response.

Answer. See my prior response to Question 4.

Question 15. In her testimony, Ms. Woolley expressed concern that providing the FTC with full APA authority, and the resultant removal of Magnuson-Moss’s procedural safeguards, creates a threat of new regulatory burdens that would limit market innovation and reduce the number of jobs the business community is able to create. Do you agree or disagree with this statement? Please explain your response.

Answer. I respectfully disagree with Ms. Woolley. She did not explain how or why innovation or the number of jobs in the business community would be threatened. Nor did she link the FTC’s use of APA rulemaking procedures with any of these effects. Thus, I am at a loss about what she had in mind.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. DAVID VITTER TO
HON. J. THOMAS ROSCH

Question 1. The FTC is asking Congress to change a process enacted three decades ago, specifically the rulemaking procedures created by the Magnuson-Moss Act. In reviewing the prior testimony of Chairman Leibowitz before this committee, there is little documentation on the record of the specific problems the Commission incurred over the past several decades in exercising its current rule-making powers. Likewise, there are no recommended proposals offered by the FTC to fix any specific problems with the procedures. We simply have the FTC’s proposal to replace the current process with APA authority for all the FTC’s rulemakings. On what specific grounds is the FTC asking Congress to completely change the process required in one of the key statutes that guides the Commission’s actions? Is there any documented evidence that the FTC can offer us today supporting this complete change in procedure for the Commission? If specific problems can be identified with the pro-

⁷Transcript of Hearing of the Consumer Protection, Product Safety, and Insurance Subcommittee of the Senate Commerce, Science, and Transportation Committee, at 20 (July 14, 2009).

cedures of the Magnusson-Moss Act that have prevented the FTC from carrying out its mission, can the FTC document those so that this committee can work on addressing those specific concerns with those procedures?

I respectfully submit that the ongoing experience respecting the Mag-Moss rule-making process (which is described in the responses to post-hearing questions that Chairman Leibowitz and I have submitted) speaks for itself. Mag-Moss rulemaking has 29 sequential steps and it has resulted in hearings that have *averaged* 38 days in length and proceedings that have *averaged* 7 years in length. With the exception of the proposed Business Opportunity Rule, there has been *no* new Mag-Moss rule proposed since 1978. That is more than 30 years in which not only have consumers been without the protections afforded by a rule, but also bad businesses in the barrel have had two bites at the apple in most cases. Moreover, since a Mag-Moss rule is essential to the agency obtaining civil penalties in most cases, the good businesses have not only gone without “rules of the road” afforded by a rule, but have not had the protection against unfair competition provided by rules. Additionally, the FTC and numerous other agencies have demonstrated that APA rulemaking not only is an extremely valuable and responsible tool, but also that the APA procedures are more than adequate to ensure due process and fairness.

Question 2. Businesses need greater certainty in order to have the confidence to invest in growth and new jobs. The proposed expansion of FTC powers creates a significant amount of uncertainty about how the FTC may use these new powers to regulate businesses across the entire economy. Before we take such a significant step, which may be difficult to reverse, it seems prudent to understand at least the potential economic impact that each of the FTC’s proposed provisions could have on our economy. Has the Federal Trade Commission completed an economic analysis or impact report that it can share with the members of this committee? If not, does the FTC plan to conduct a cost-benefit analysis or otherwise assess what impact this proposal may have on our economy?

Answer. To be sure, businesses need as much certainty as possible. That is why rules are essential and the delay that has occurred is intolerable. As I testified, the Commission has routinely prepared and included in the Statement of Basis and Purpose of each rule a consideration of the costs and benefits associated with that rule, which can and will be shared with the Committee.

RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. TOM UDALL TO
EDMUND MIERZWINSKI

Question. Mr. Mierzwinski, in your organization’s experience, how would you rate the quality and effectiveness of the FTC’s efforts in Native American and rural communities? What, if any, suggestions would you have for improvement in services to these communities?

Answer. Senator Udall, your point about financial threats to Native Americans and rural Americans is well-taken. Several years ago, on a tour of predatory lending hot spots in New Mexico as part of a campaign against payday lending, I visited Gallup. A legal services attorney who I met with reminded me of what General William Tecumseh Sherman had said in the 1870s: “A reservation is a parcel of land inhabited by Indians and surrounded by thieves.” What he said in 1870 is true in Gallup today.

As you know, sadly, the same could be said of our military bases. But while the Congress in 2006 passed the Military Lending Act to protect service families from predatory lending I am unaware of any significant efforts to assist Native Americans, on or off the reservation, or rural Americans, by the FTC or other agencies. I have also spoken with private attorneys in New Mexico who have represented Native Americans who face deplorable and outrageous violations of law, including physical threats, by debt collectors.

Does the FTC have such outreach programs? Perhaps, but it is not something I am aware of. Others I spoke with in response to your question did not know of any programs for Native, rural or any other under-served Americans. To be fair, perhaps there are outreach efforts in the FTC’s regional offices I do not know about.

The first step would be to study the problem more closely to determine whether my anecdotal opinions are fair. You might ask the FTC itself this same question or ask CRS or GAO for information. I would suggest that you consider holding a field hearing in Gallup, or on any of the reservations in your state. I would be glad to help you find witnesses. Then, the correct approach might be to seek greater budget authority for the FTC’s field offices to conduct specific additional outreach efforts to these under-served communities. Alternatively, it might be a better solution—since the FTC does not have field offices in each state—to consider a program

where it makes grants to or partners with state attorneys general offices or local legal services offices to provide these services. I hope you find this helpful.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. ROGER F. WICKER TO
HON. TIMOTHY J. MURIS

Question 1. Please explain why you believe the designation of issues in a rule-making is so important, and how the Magnuson-Moss process ensures that the designation of issues is performed. What would the effect on the designation of issues be if the Commission was granted full APA rulemaking authority?

Answer. Probably the most important benefit of designating issues is that it forces the Commission to be clear about its theories and their factual predicates. A clear theory of why a rule provision is needed makes clear which facts matter, and avoids the costs and delays inherent in exploring every possibly relevant fact. The need to limit the number of issues that must be explored is an important incentive for the Commission to think through its proposals before it begins the rulemaking process.

The process of designating issues under the Magnuson-Moss procedures accomplishes other objectives. It is vital that rules, especially far-reaching ones, be based on a sound factual record. Designation identifies the key factual disputes that emerge from the written comments. Moreover, the procedures ensure that these factual predicates of the rulemaking proceeding are fully explored through hearings and, if necessary, cross examination. Whether to adopt a rule, and if so how to structure its regulatory requirements, depends on the Commission's ultimate conclusions about the facts, and the designated issues process causes the factual questions to be explored fully.

Under the Commission's rules, any participant in the rulemaking can propose designated issues. The presiding officer or the Commission itself then identifies the particular issues that will be the subject of further exploration. Under the APA, there is no requirement to designate issues. The Commission can identify the questions on which it particularly seeks comment, and commenters can present their own view of the facts.

Question 2. Please explain why you believe the right for parties to cross-examine during the rulemaking is an important step that should be retained.

Answer. Because the Commission is not expert on many of the facts it must resolve, it is more dependent on the fact-finding process than many other agencies. Cross examination, as all trial lawyers know, is an extremely useful tool to identify weaknesses in the position a witness has taken and to highlight the differences between the opposing sides.

Question 3. Commissioner Rosch testified that the Magnuson-Moss process was a mistake from its inception, and that the Commission was not guilty of overzealous regulation warranting Congressional restrictions on their rulemaking authority. Do you agree or disagree with this statement? Please explain your response.

Answer. I disagree. The Magnuson-Moss procedures are tough, but workable, and an important safeguard for an agency with the FTC's far-reaching authority and lack of expertise.

Many of the early Magnuson-Moss rules were initially proposed before the statute was enacted. When Congress codified the Commission's rulemaking authority, the Commission simply re-proposed the rules under the new procedures. Frequently, these proposals sought to restructure entire industries, based on anecdotal evidence and poorly specified legal theories. (The Commission itself ultimately rejected many proposed rules.) Thus, the scope of the Commission's rulemaking ambitions were already apparent when the statute was enacted, and Congress appropriately concluded that special safeguards were necessary to ensure that the Commission made its decisions after a thorough exploration of the facts and issues.

Question 4. In your testimony, you discussed the Business Opportunity Rule and how the threat of Magnuson-Moss procedures prevented the Commission from moving forward. Please explain what occurred in that situation, and how the Magnuson-Moss procedures prevented the Commission from creating unintentionally burdensome and unnecessary rules in that case.

Answer. The originally proposed Business Opportunity rule was intended to do two things. First, it was envisioned as an easier way for business opportunity sellers historically subject to the Commission's Franchise Rule to provide consumers with the information they need to make an informed decision about whether to purchase the opportunity. Second, it sought to reach business opportunity areas, such as work at home schemes, where fraud was widespread and the Franchise Rule did not apply.

Because it knew more about the fraudulent operators who were the subjects of frequent enforcement actions than it knew about legitimate businesses, the Commission's initial proposal was overly broad, and would have covered literally millions of self employed individuals, who often worked part time. Comments on the initial proposal documented these problems, and proposed numerous disputed issues of material fact that it would be necessary to resolve if the Commission wished to proceed. Based on the initial comments, the Commission re-proposed a more limited rule that avoided overreaching. Although the Commission may have retreated without the threat of hearings and cross examination, those threats undoubtedly helped to influence the Commission's deliberations.

Question 5. In his testimony, Commissioner Rosch stated that the Magnuson-Moss rulemaking process is a "prescription for doing nothing" and has brought rulemaking at the FTC to a halt. Do you agree or disagree with this statement? Please explain your response.

Answer. As I testified at the hearing, it was a change in enforcement philosophy, not Magnuson-Moss, that led to the reduced use of rulemaking that has characterized the Commission in the last thirty years. A bipartisan consensus has emerged that the Commission should seek to enforce common law principles, often through law enforcement actions in Federal district court. This approach has been extremely productive, and has led to substantial recoveries for injured consumers. Moreover, it has led to the development of the law through case by case exploration of the issues in areas where rulemaking would have been very difficult. For example, the Commission has developed through its cases important legal principles governing privacy and information security. Writing rules that specify in detail what companies must do in this area would be very difficult, and potentially counterproductive.

The notion that Magnuson-Moss proceedings must take "forever" or an average of 8 years is, to say the least, misleading. If the Commission is clear about its theories and the facts that are relevant to those theories, there is no reason why rules under Magnuson-Moss cannot be completed within 2 to 4 years, as occurred in the two eyeglasses rules and would have occurred with the Do Not Call Rule had we been required to use Magnuson-Moss.

Moreover, the historical average overstates the likely time for new rules. Many 1970s rules were re-proposed after the statute was passed, adding many months to the process. The controversial nature of several proposals, which were poorly considered, led to a public outcry that delayed the process. The election of Ronald Reagan brought rulemaking proceedings to a halt, as the staff realized that the new leaders of the Commission would likely have different attitudes toward many of the rules. In fact, it was 11 months after the election before the new Chairman, Jim Miller, took office, and several years after that before final decisions were made to resolve many of the pending rules. Even in the unhappy event that similarly ill-thought out proposals were introduced today, they would not likely encounter the unique set of obstacles that delayed the early proposals.