

Testimony of

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

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

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Subcommittee on Commerce, Trade and Consumer Protection
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The Honorable Bobby L. Rush, Chairman

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The Proposed Consumer Financial Protection Agency: Implications for Consumers and the FTC

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

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

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

Summary

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

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

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

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

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

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

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

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

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

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

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

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

mortgages and for their neighbors who did not, empty houses, declining neighborhoods and reduced property tax revenue.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹² *Id.*

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

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

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

Law enforcement is good for the public and it also is good for honest competitors. The Administration's proposal wisely does not eliminate any current enforcement powers of other federal agencies. The CFPA proposal enhances law enforcement in four ways. First, the CFPA itself can enforce rules and statutes. Second, the FTC retains its full Section Five enforcement authority, subject only to a requirement for staff level consultation and coordination. Third, the proposal preserves the other existing enforcement authority of the FTC (as well as that of the federal banking regulators), subject only to a "first refusal" type referral to the CFPA. Fourth, the proposal clearly permits state regulators and state Attorneys General to enforce CFPA rules and state consumer protections in financial products and services - regardless of the nature of the entity which provides those services. State enforcement can have special value in identifying

harmful practices that develop first in one region or in a subset of an industry. Early state enforcement can protect good competitors from the pressure to adopt abusive but profitable practices used by their competitors. It can stop harmful practices before they spread nationwide. State enforcement also adds significant enforcement resources by persons who may have close ties to the local communities where the consumers who are victims of a law violation reside.

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

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

enforcement many consumer protection statutes that will be consolidated under the CFPA.¹³ The proposal would be strengthened by adding a private right of action with respect to the CFPA rules.

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

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

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

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

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

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

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

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

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

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

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

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

VI. Transition issues

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

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

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

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

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

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

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

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

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

The FTC's current work in financial products and services and the work it will do in the time between enactment of the CFPA legislation and the transfer of functions will create a strong foundation for the future work of the CFPA. In addition, for a period of time after the transfer of

functions, the FTC's power to bring both Section Five cases with consultation and other cases after referral will be a particularly important because the enforcement functions and processes of the new agency will be being structured, tested, and tweaked during part of that time.

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

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

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

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

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

Conclusion

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

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

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

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

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

- Take enforcement action against the CRAs' persistent noncompliance with the FCRA dispute and investigation requirements. The CRAs must be required to conduct meaningful investigations, not just turn dispute letters into 2 digit codes, and not permit a boilerplate response by the furnisher to be the end of the inquiry.
- Require CRAs to send to the furnisher all documents submitted by the consumer in an FCRA dispute pursuant to the FCRA's requirement that "all relevant information" be forwarded.
- Require CRAs and furnishers to promulgate technical specifications for the Metro 2 reporting format that allow CRAs to track transferred accounts, prevent duplicate accounts, and prevent reinsertion by furnishers of deleted incorrect items.
- Require the CRAs to use the full identifying information of consumers when matching information to a file, including all nine digits of the consumer's Social Security number.
- Require CRAs to provide a copy of the same report they issued a creditor when the consumer subsequently requests a copy of his/her credit report after an adverse action. The same obligation should be imposed with respect to the sale of credit scores.
- Take more enforcement actions against non-bank furnishers, especially against debt collectors who re-age information and lack documentation to support their reporting.
- Take action against the use of "mortgage trigger lists" (lists of consumers who recently applied for mortgages sent to competing brokers) for FCRA violations such as the CRAs' lax standards in screening brokers, failure to provide true "firm offers of credit," and illegal mortgage broker acquisition of full credit reports in addition to a list of names.

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

- Prohibit debt collectors who pursue debts in court or in arbitration without evidence of the essential facts of the debt, or without holding any license required by state law. The FTC must require that no collection activity can commence without proof of indebtedness by the consumer, date of the debt, identity of the original creditor, itemization of all fees, charges and payments, and itemization of all post-default charges and credits.
- Stop debt collectors' attempts to collect on time-barred debts, deceptive settlement agreements, putting old debt on new credit cards, and cross-debt collection by refund anticipation lenders.
- Restrict debt collectors from accessing a consumer's financial account. At a minimum, there should be a requirement for express, informed, written permission.

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

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

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

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

Used car sales

- The FTC should step up enforcement of the Used Car Rule, especially regarding rebuilt wrecks, laundered lemons, and "certified" vehicles where the warranties are represented as being in effect, but in fact are partially or entirely void.
- The FTC should enforce the Used Car Rule regarding compliance with the Spanish language version.
- The FTC must do more to protect members of the armed forces and their families from auto-related scams, particularly auto sales and service practices.

Data protection and ID theft - In the area of fighting identity theft, the FTC could be more effective in informing consumers of the ability that they now have in every state¹ to place a security freeze on access to their consumer reports – essentially stopping access for purposes of opening new accounts until the consumer requests that such access to be given. The information about the security freeze remains appears in the FTC’s online consumer advice for people who have already been victims of identity theft,² but not on its advice page for people who have just been told that their sensitive personal information has been stolen or breached.³ The security freeze is still entirely absent the FTC’s printed Deter Detect and Defend flyer,⁴ which is widely used or copied by businesses and other entities when they have a security breach.

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

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

² <http://www.ftc.gov/bcp/edu/microsites/idtheft/consumers/defend.html>.

³ <http://www.ftc.gov/bcp/edu/microsites/idtheft/consumers/compromised.html>.

⁴ <http://www.ftc.gov/bcp/edu/pubs/consumer/idtheft/idth01.shtm>.

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

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

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

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

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

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

providers and vendors must take greater responsibility in considering the collateral impact their behavioral tracking models have on consumers.

The FTC should:

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

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