



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

OFFICE OF
THE COMMISSIONER

July 28, 2009

The Honorable Spencer Bachus
Ranking Member
Committee on Financial Services
United States House of Representatives
Washington, D.C. 20515

Dear Ranking Member Bachus:

I write to express my opposition to the current proposal to create a Consumer Financial Protection Agency (CFPA). As a current Commissioner, former Chairman, former General Counsel, and former staff member at the Federal Trade Commission, as well as a legal academic who has studied consumer protection and competition issues, I have followed the proposed legislation with great interest. As you and your committee continue to consider how best to reform consumer financial protection regulation, I write to identify three grave risks inherent in this proposal.

First, the creation of the CFPA will reduce – not enhance – consumer protection by divesting the FTC of all of its consumer protection functions in the financial services arena. Currently, the FTC is one of several agencies responsible for protecting consumers in the financial services sector. While jurisdictional limitations significantly restrict the FTC’s authority in this sector, the FTC has been a leader in financial services consumer protection because of its superior enforcement and regulatory experience in a wide variety of consumer protection areas, from privacy to deceptive advertising in wide-ranging sectors of our economy. Unlike other agencies, the FTC’s Bureau of Consumer Protection benefits from the research of its independent Bureau of Economics and the insights of its Bureau of Competition – all of which report directly to the Commission and its Chairman.¹ For these reasons, I disagree with the proposal to divest the FTC of all consumer protection functions in the financial services area. To the extent that the legislation provides the FTC with “backstop authority” to bring enforcement actions in the financial services area, I doubt that such authority would be anything more than a mirage. Once core functions and personnel have been transferred to a new entity, the FTC’s capability to do effective work in this area likely will disappear. I believe that a more promising

¹ See generally Prepared Statement of Stephen Calkins, Testimony Before the Subcommittee on Commerce, Trade, and Consumer Protection, Committee on Energy and Commerce, United States House of Representatives, Jul. 8, 2009, *available at* http://energycommerce.house.gov/Press_111/20090708/testimony_calkins.pdf.

approach could include removing the limits on jurisdiction that currently constrain the FTC's regulatory and enforcement authority in the financial services sector.

Second, as currently drafted, the legislation will jeopardize certain core functions that the FTC would retain after creation of the CFPA. For example, by transferring the FTC's entire consumer protection function concerning consumer financial products and services, the proposed legislation could limit, hinder, or even disable our primary enforcement authority in key areas of consumer protection such as telemarketing fraud involving non-financial products and services.² In addition, as the CFPA carries out its primary enforcement authority for unfair, deceptive, or abusive acts or practices under Federal law regarding consumer financial products or services, and as the FTC continues to enforce consumer protection laws as to non-financial products and services, there is no assurance – beyond mandates for interagency coordination – that the CFPA will account properly for the FTC's views about the appropriate content of unfairness and deception jurisprudence. Conflicts in interpretation and in litigation strategies, along with an increase in litigation over jurisdictional questions, will adversely affect every core area of consumer protection for which the FTC will continue to exercise primary responsibility. Furthermore, the present draft legislation could be read to divest the FTC of certain competition authority and resources where the product market at issue involves the issuance of credit.

Third, the wisdom of granting new substantive powers to the CFPA has yet to be established. Indeed, I have concerns about the benefits of certain new responsibilities that have been proposed, such as the requirement that the CFPA prescribe "plain vanilla" products for consumers.

Please feel free to contact me if you wish to discuss these issues at greater length.

Sincerely,



William E. Kovacic

² Even assuming the legislation made it clear that the CFPA's primary enforcement authority did not extend to entities such as payment processors providing services to entities offering non-financial products/services, the FTC would be hindered by the increased costs of coordinating enforcement actions with the CFPA and other agencies in cases involving both financial and non-financial entities.