

“HID [ING] ELEPHANTS IN MOUSEHOLES”:^{*} THE FTC’S
UNWARRANTED ATTEMPT TO REGULATE THE DEBT-
RELIEF-SERVICES INDUSTRY USING RULEMAKING
AUTHORITY PURPORTEDLY GRANTED BY THE
TELEMARKETING AND CONSUMER FRAUD AND ABUSE
PREVENTION ACT

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^{*} *Am. Bar Ass’n v. Fed. Trade Comm’n*, 430 F.3d 457, 467 (D.C. Cir. 2005) (quoting *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001)). Circuit Judge David B. Sentelle used this phrase in response to the FTC’s argument that by making the Gramm–Leach–Bliley Financial Modernization Act of 1999, Pub. L. No. 106-102, 113 Stat. 1338, applicable to “institutions” that are “engaged in the business of financial activity,” Congress authorized the FTC to regulate attorneys. *Id.* at 467. Judge Sentelle state: “we are reminded repeatedly of a recent admonition from the Supreme Court: [Congress] does not . . . hide elephants in mouseholes.” *Id.*

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I. INTRODUCTION

Over the past four decades, the Federal Trade Commission (FTC) has engaged in an aggressive campaign to expand its administrative enforcement and rulemaking authority over businesses and individuals in the areas of consumer protection and antitrust regulation. Sparked by a 1969 American Bar Association (ABA) report that took the agency to task for failing to achieve the ambitious goals of its early twentieth-century designers,² the FTC transformed its public perception from toothless in 1969³ to tyrannical by 1980.⁴ During that time the agency developed a strategic policy, which continues to be employed today, of pushing the envelope of its authority in the name of its enormously broad charge to prevent “unfair competition”⁵ and “unfair or deceptive acts or practices.”⁶

The agency’s latest foray into the uncharted and undefined waters of undelegated authority is its initiative to amend the Telemarketing Sales Rule (TSR)⁷ to add a wide-ranging set of new regulations⁸ targeted at the debt-relief-services industry.⁹ Oddly, these proposed new rules were announced to the public shortly after Congress began considering proposed legislation

2. COMM’N TO STUDY THE FED. TRADE COMM’N, AM. BAR ASS’N, REPORT OF THE ABA COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION (1969) [hereinafter ABA REPORT].

3. In 1969, a typical criticism was that the agency was “rudderless; poorly managed and poorly staffed; obsessed with trivia; politicized; all in all, inefficient and incompetent.” Richard Posner, *The Federal Trade Commission*, 37 U. CHI. L. REV. 47, 47 (1969).

4. By 1981, Congressional critics accused the FTC of being “a renegade agency,” a “bureaucratic agency that is out to destroy free enterprise,” and “a rogue agency gone insane.” William E. Kovacic, *Congress and the Federal Trade Commission*, 57 ANTITRUST L.J. 869, 870 (1989) (citations omitted).

5. *Id.* at 880.

6. Federal Trade Commission Act of 1914 § 5(a)(2), 15 U.S.C. § 45(a)(2) (2006).

7. FTC Telemarketing Sales Rule, 16 C.F.R. §§ 310.1–.9 (2009). In 1994 Congress authorized the FTC to adopt the TSR in the Telemarketing and Consumer Fraud and Abuse Prevention Act (TCFPA). 15 U.S.C. §§ 6101–6108. This act authorized the FTC to regulate abusive telemarketing. *Id.* § 6102(a)(1) (“The Commission shall prescribe rules prohibiting deceptive telemarketing acts or practices and other abusive telemarketing acts or practices.”).

8. FTC Notice of Proposed Rulemaking, 74 Fed. Reg. 41,988 (proposed Aug. 19, 2009) [hereinafter FTC NPRM].

9. See discussion *infra* Part III.

regulating the debt-relief industry.¹⁰ Rather than wait for the Legislature's express guidance, the agency has elected to pursue its own rulemaking, purportedly based on its existing regulatory authority. However, the proposed regulations have little to do with telemarketing,¹¹ begging the question: why would the FTC resort to the TSR as a rulemaking device given its broad rulemaking authority provided by the Magnuson–Moss Warranty Federal Trade Commission Improvement Act?¹²

The answer to this question is both obvious and troubling. The FTC's attempt to sidestep its statutory rulemaking requirements under Magnuson–Moss, and instead use the more expeditious notice and comment provisions of the TSR, raises important constitutional questions. Some might argue that this solution reflects a nimble and pragmatic response to the challenge of effectively regulating businesses in the Internet age. However, another perspective is that the agency has gone too far in its zeal to fulfill its mission and that it routinely engages in the same conduct for which it prosecutes individuals and companies: namely, failing to comply with the law.

This Article examines the background and history of the FTC's late twentieth-century activism leading up to the current Administration. It reviews the basis and limitations of the agency's rulemaking authority, both under the Federal Trade Commission Act of 1914 (FTC Act) and the Telemarketing and Consumer Fraud and Abuse Prevention Act (TCFAPA). This Article also looks at the debt-relief-services industry and the nature of the proposed regulations that have been advanced by

10. In May 2009, Rep. Bobby Rush (D-IL) introduced the "Consumer Credit and Debt Protection Act." *See* Consumer Credit and Debt Protection Act, H.R. 2309, 111th Cong. (2009). The proposed statute would grant the FTC authority to utilize the expedited rulemaking procedures of the Administrative Procedures Act ("APA") concerning consumer credit or debt and would direct the FTC to examine and promulgate rules with regard to debt settlement. The proposed Act would also allow the FTC to seek civil penalties up to \$10,000 per violation for "unfair or deceptive acts practices in connection with consumer credit or debt." *Id.*

11. "Telemarketing" is defined in the TSR as "a plan, program, or campaign which is conducted to induce the purchase of goods or services or a charitable contribution, by use of one or more telephones and which involves more than one interstate telephone call." 16 C.F.R. § 310.2(cc).

12. *See, e.g.*, 15 U.S.C. § 2302(b)(1)(A) (2006) ("The Commission shall prescribe rules requiring that the terms of any written warranty on a consumer product be made available to the consumer (or prospective consumer) prior to the sale of the product to him."); *id.* § 2306(a) ("The Commission may prescribe by rule the manner and form in which the terms and conditions of service contracts shall be fully, clearly, and conspicuously disclosed.").

the FTC to govern debt-relief-services companies. Finally, this Article examines the application of the TSR rulemaking provisions to the debt-relief-services industry and discusses why the telemarketing statute is unsuitable for the FTC’s proposed rulemaking.

II. THE HISTORY AND BACKGROUND OF THE DEVELOPMENT OF THE FTC’S LATE TWENTIETH-CENTURY ACTIVISM

“To many, [the FTC’s] comparative inefficiency will seem scandalous, but one could regard it as the agency’s saving grace.”¹³

The FTC was created by Congress in 1914¹⁴ in response to growing concerns from the public and industry about unfair methods of competition in the channels of interstate trade.¹⁵ The FTC Act created the Commission¹⁶ and prohibited unfair business practices.¹⁷ The Act also granted the Commission authority to institute administrative proceedings against any person, partnership, or corporation that it had reason to believe was using unfair methods of competition in commerce and to issue cease-and-desist orders enjoining violators from continuing the alleged unlawful activities.¹⁸

The FTC Act declared that “unfair methods of competition in or affecting commerce” are unlawful.¹⁹ However, the statute also granted the Commission authority to establish rules defining the nature of unfair methods of competition in accordance with the usages, customs, and practices of specific industries and businesses.²⁰ The new Act provided an additional source of protection to business entities that were injured as a result of unfair competition. Before the Act’s passage, injured parties were limited to remedies provided in civil lawsuits: seeking injunctive relief or damages in response to unfair

13. Posner, *supra* note 3, at 87.

14. Federal Trade Commission Act of 1914, 15 U.S.C. § 41 (2006).

15. RALPH L. NELSON, MERGER MOVEMENTS IN AMERICAN INDUSTRY, 1895–1956, at 37 (1959). From 1898 to 1902, at least 303 firms disappeared annually through mergers. *Id.* at 37 tbl. 14. In the three years prior, only sixty-nine or fewer firms had disappeared annually through consolidations. *Id.*

16. 15 U.S.C. § 41.

17. *Id.* § 45(a)(1).

18. *Id.* § 45(b).

19. 15 U.S.C. § 45(a)(1).

20. *Id.* §§ 57(a)(1)(A)–(B).

competitive practices.²¹ The Act gave injured competitors the alternative to seek the assistance of the Commission, which was authorized to impose cease and desist orders that were enforceable by the federal courts.²²

In 1938, Congress strengthened and expanded the Commission's jurisdiction by adopting the Wheeler-Lea Act of 1938,²³ which amended the Act to add a prohibition against "unfair or deceptive acts or practices in commerce." Wheeler-Lea was the Legislature's response to a series of court decisions holding that before the Commission could prohibit an "unfair" practice, it must prove injury to an actual or potential competitor.²⁴ The amendment effectively made injury to the public a sufficient basis for Commission action.²⁵ Additionally, besides retaining the original ban against "unfair methods of competition," the amendment added a prohibition against "unfair or deceptive acts or practices in commerce,"²⁶ thus laying the foundation of the Commission's consumer protection authority.

Thirty years later, the FTC Act's promise—that the Commission would utilize its powers to control unfair business competition and unfair and deceptive treatment of consumers—had all but vanished. The political atmosphere of the 1960s had inspired challenges to a wide variety of American institutions.²⁷ The FTC, which had been subjected to ongoing criticism almost since its inception,²⁸ was once again under attack.²⁹ Professor

21. Federal Trade Commission, Annual Report of the Federal Trade Commission 16 (1930).

22. *Id.*

23. Act of March 21, 1938, ch. 49, 52 Stat. 111 (codified as amended in scattered sections of 15 U.S.C.).

24. FED. TRADE COMM'N, ANNUAL REPORT OF THE FEDERAL TRADE COMMISSION 2 (1950).

25. *Id.*

26. Ch. 49, sec. 3, § 5(a), 52 Stat. at 111 (codified as amended at 15 U.S.C. 45(a)(1) (2006)).

27. *E.g.*, John Roos, *American Political Life in the 1960s: Change, Recurrences, and Revolution*, 34 REV. OF POL., 44, 44 (1972).

28. Edward F. Cox, a member of the team of young intellectuals known as "Nader's Raiders," identified studies published in 1924, 1949, and 1960 that criticized the FTC for "the staff's focus on trivia without attention to priorities, the related lack of planning and involvement in protracted meaningless litigation, a tolerance for mediocre staff, and a culture of secrecy." Edward F. Cox, *Reinvigorating the FTC: The Nader Report and The Rise of Consumer Advocacy*, 72 ANTITRUST L.J. 899, 900 n.6 (2005).

29. *See, e.g.*, Posner, *supra* note 3, at 87 ("To many, [the FTC's] comparative inefficiency will seem scandalous, but one could regard it as the agency's saving grace.")

Richard Posner’s views were typical of those expressed by the FTC’s critics. In September 1969, Posner wrote, “The Commission is rudderless; poorly managed and poorly staffed; obsessed with trivia; politicized; all in all, inefficient and incompetent. And—the persistence of all of these criticisms would seem to indicate—largely impervious to criticism.”³⁰ Others complained that the agency needed “some kind of an injection to pep it up so it would fulfill its mission.”³¹

In early January 1969, Ralph Nader and his “raiders” released an updated critique of the FTC.³² Shortly after the Nader report was published, newly elected President Richard M. Nixon responded with a request to the President of the American Bar Association (ABA) for “a professional appraisal of the present efforts of the Federal Trade Commission in the field of consumer protection.”³³ The ABA assembled a top-notch commission of FTC practitioners and scholars, which delivered its report in September 1969.³⁴

The ABA Report recounted the agency’s problems that had been identified in the previous studies, including: “poor management, inadequate planning, weak personnel and cumbersome procedures.”³⁵ The ABA report stated that an FTC bureau chief responsible for recruiting believed “young lawyers are not competent to engage in both trial and investigative work” and that “[the bureau chief] preferred to hire older men—who had been out in the world for ten years or so and had come to appreciate that they were not going to make much of a mark—because they tended to be loyal and to remain with the FTC.”³⁶ The bureau chief gave “less weight” to “law school grades than to other factors.”³⁷ The ABA Commission concluded, “If there is a formula better designed to avoid hiring

30. *Id.* at 47.

31. *Nomination of Lewis A. Engman to be a Commissioner, Federal Trade Commission: Hearing Before the S. Comm. on Commerce, 93d Cong. 25 (1973)* [hereinafter *Engman Confirmation Hearings*].

32. EDWARD F. COX ET AL., *THE NADER REPORT ON THE FEDERAL TRADE COMMISSION* 180 (1969).

33. Letter from Richard M. Nixon, President, U.S., to Bernard G. Segal, President, Am. Bar Ass’n (Apr. 18, 1969), *in* ABA REPORT, *supra* note 2, at app. 1, 86.

34. ABA REPORT, *supra* note 2.

35. Kovacic, *supra* note 4, at 877.

36. ABA REPORT, *supra* note 2, at 33.

37. *Id.*

bright and energetic young men, we have not heard of it.”³⁸ The ABA Report challenged the Commission to focus its antitrust enforcement activities on “economically significant problems” and “complex, unsettled areas of law and economics.” The report exhorted the agency to curtail or eliminate its reliance on “voluntary enforcement strategies” and instead to implement “binding, compulsory techniques.”³⁹

Some, however, including ABA Committee member Professor Richard Posner, in his dissent to the ABA Report, seriously questioned whether the FTC experiment should not be written off as a failure. Rather than encourage the agency to improve upon its execution of Congress’s vision, Posner “essentially proposed the dismemberment and abolition of the FTC.”⁴⁰

In addition to initiating the ABA Report, President Nixon also appointed Casper Weinberger as FTC Chairman in 1969.⁴¹ Nicknamed “Cap The Knife,” Weinberger immediately implemented planning, recruiting, and organizational evaluation initiatives that launched a cultural transformation at the agency.⁴² By 1973, as Congress confirmed a new FTC chairman, legislators were already expressing confidence that the agency had taken significant steps toward revival. Senator Frank Moss said “the Commission has taken on new life beginning with the search for strong and imaginative, rigorous developers and enforcers of the law.”⁴³ Moss expressed his approval that the agency had “stretched its powers to provide a credible countervailing public force to the enormous economic power of huge corporate conglomerates which dominate American enterprise.”⁴⁴ Senator Ted Stevens exhorted the new chairman to reach further: “I am really hopeful that you will become a real zealot in terms of consumer affairs and some of these big business people will complain to us that you are going too far. That would be the day as far as I’m concerned.”⁴⁵

38. Arthur John Keefe, *Is The Federal Trade Commission Here to Stay?*, 56 A.B.A. J. 188 (1970).

39. Kovacic, *supra* note 4, at 874.

40. Cox, *supra* note 28, at 908.

41. *Id.* at 906.

42. *Id.*

43. *Engman Confirmation Hearings*, *supra* note 31, at 4.

44. *Id.*

45. *Id.* at 31.

In 1974, Congress granted the agency additional enforcement authority when it passed provisions in the Trans-Alaska Pipeline Authorization Act,⁴⁶ that empowered the FTC to enforce administrative cease and desist orders with federal court injunctions. Section 13(b) of the FTC Act allowed the agency to seek temporary restraining orders and preliminary injunctions and, in proper cases, permanent injunctions “to halt” violations of the FTC Act.⁴⁷ In 1975, Congress granted the FTC formal rulemaking authority and provided additional weapons to the FTC’s enforcement arsenal in the Magnuson–Moss Act.⁴⁸ Later in that year, the same Congress enacted Section 19,⁴⁹ cautiously expanding FTC powers by authorizing the Commission to bring civil actions seeking a broad array of legal and equitable monetary remedies where it establishes that a person (1) violated an FTC rule respecting unfair or deceptive practices⁵⁰ or (2) engaged in an unfair or deceptive act or practice that was the subject of a previously issued cease and desist order—“which a reasonable man would have known under the circumstances was dishonest or fraudulent.”⁵¹

Armed with more talented and aggressive lawyers and new statutory weapons from Congress, the FTC went on the offensive. Within just five years of the passage of Magnuson–Moss, the zealotry that Senator Stevens had wished for in 1973 was now the prevailing theme of attacks against the agency mounted not only by “big business” but by Congress itself. “Generated by an array of far-reaching FTC law enforcement, rule-making, and data-collection programs, a tidal wave of business opposition to the agency swept over Capitol Hill.”⁵²

46. Pub. L. No. 93-153, 87 Stat. 584 (1973) (codified as amended in scattered sections of 5, 12, 15, 33, 42, 43, and 46 U.S.C.)

47. *Id.* sec. 408(f), §§ 13(b)(1)–(2), 87 Stat. at 592 (codified as amended at 15 U.S.C. § 57(b)(1)–(2) (2006)).

48. *See, e.g.*, 15 U.S.C. § 2302(b)(1)(A) (2006) (“The Commission shall prescribe rules requiring that the terms of any written warranty on a consumer product be made available to the consumer (or prospective consumer) prior to the sale of the product to him.”); *id.* § 2306(a) (“The Commission may prescribe by rule the manner and form in which the terms and conditions of service contracts shall be fully, clearly, and conspicuously disclosed.”).

49. Magnuson–Moss Warranty–Federal Trade Commission Improvement Act, Pub. L. No. 93-637, sec. 206(a), § 19, 88 Stat. 2183 (1975) (codified as amended at 15 U.S.C. § 57b (2006)).

50. *Id.* § 19(a)(1) (codified as amended at 15 U.S.C. § 57b(a)(1)).

51. *Id.* § 19(a)(2) (codified as amended at 15 U.S.C. § 57b(a)(2)).

52. Kovacic, *supra* note 4, at 870.

Members of Congress accused the FTC of being “a renegade agency,”⁵³ a “bureaucratic agency that is out to destroy free enterprise,”⁵⁴ and “a rogue agency gone insane.”⁵⁵

In 1980, Congress attempted to reign in the agency with the Federal Trade Commission Improvements Act of 1980,⁵⁶ which contained numerous provisions curtailing the FTC’s powers.⁵⁷ Senator Howard Cannon described the Act’s background as follows:

The real reason that we have proposed this legislation for the FTC is because the Commission appeared to be fully prepared to push its statutory authority to the very brink and beyond. The FTC lost sight of the necessity to listen to the evidence and legal arguments of its opponents. Good judgment and wisdom had been replaced with an arrogance that seemed unparalleled among independent regulatory agencies. The FTC brought this legislation upon itself because its own chairman sought to ‘venture in the unchartered [sic] territory’ of the Federal Trade Commission Act.⁵⁸

But the genie was now out of the bottle. Beginning in the early 1980s, the FTC shifted its focus to expanding the reaches of its statutory authority through the Judiciary. Exploiting cases that involved egregious wrongdoing by various defendants,⁵⁹ the

53. *Id.* (citation omitted).

54. 126 Cong. Rec. 6,707 (1980) (statement of Rep. Quillen).

55. 125 Cong. Rec. 32,350 (1979) (statement of Rep. Frenzel).

56. Pub. L. No. 96-252, 94 Stat. 374 (1980) (codified as amended in scattered sections in 15 U.S.C.).

57. *See, e.g., id.* sec. 7, § 18(a)(1)(B) (codified at 15 U.S.C. § 57a(a)(1)(B) (2006)) (“[T]he Commission shall not develop or promulgate any trade rule or regulation with regard to the regulation of the development and utilization of the standards and certification activities pursuant to this section.”); *id.* sec. 8, § 18(b)(2)(A) (codified at 15 U.S.C. § 57a(b)(2)(A)) (“Prior to the publication of any notice of proposed rulemaking pursuant to paragraph (1)(A), the Commission shall publish an advance notice of proposed rulemaking in the Federal Register.”).

58. 126 Cong. Rec. 11,917 (1980).

59. The Director of the Bureau of Consumer Protection recently described this activist strategy as follows:

[P]art of our job is to be stewards of the statutes that we have to implement. And if we think the law says X, but there isn’t a case that establishes X and people are not conforming their conduct to our belief about how the law ought to work, then we should look for a good case to establish X as a governing legal principle. I would define the term ‘test case’ as a case in which the facts directly and clearly support the legal theory that you are advocating, even if the legal theory has not been accepted by a court prior to that time. And you bring a test case to see whether you can persuade the court to adopt your reading of the law.

agency slowly and meticulously undertook a concerted and deliberate campaign to expand the remedies available under Section 13(b) of the FTC Act without Congressional approval.⁶⁰ The Commission understandably found the injunctive remedies available in Section 13(b) to be particularly valuable tools because they enable the Commission “to obtain an order not only permanently barring deceptive practices, but also imposing various kinds of monetary equitable relief (i.e., restitution and disgorgement) to remedy past violations.”⁶¹

The FTC accomplished this unauthorized expansion of Section 13(b) by convincing courts that “equitable” monetary relief could include expanded forms of “restitution” and “disgorgement” against defendants accused of violating Section 5 of the FTC Act, which prohibits “unfair or deceptive acts or practices.”⁶² The FTC persuaded the courts to make these awards based on two older Supreme Court decisions that authorized the use of the courts’ “inherent equity powers” to award monetary relief to enforce compliance with non-FTC-related statutes “in the absence of a clear and valid command” from Congress restricting such powers.⁶³

In *FTC v. H.N. Singer, Inc.*,⁶⁴ the agency successfully argued that the FTC Act authorized the federal court to utilize the full array of equitable remedies at its disposal in Section 13(b) cases. The FTC pressed the Ninth Circuit to rule (in dicta) that the court’s “inherent equity powers” authorized the award of monetary relief in the form of equitable rescission for Section 5 violations.

59. John Villafranco, *Interview with David Vladeck, Director, FTC Bureau of Consumer Protection*, *The Antitrust Source*, Vol. 9, Issue 4 (Apr. 2010), <http://www.abanet.org/antitrust/at-source/10/04/Apr10-VladeckIntrvw4-14f.pdf>.

60. For detailed retelling of the FTC’s campaign to expand the reach of Section 13(b) by a former FTC attorney, see David M. FitzGerald, *The Genesis of Consumer Protection Remedies Under Section 13(b) of the FTC Act* (Sept. 23, 2004), <http://www.ftc.gov/ftc/history/docs/fitzgeraldremedies.pdf>.

61. FTC Office of the General Counsel, *A Brief Overview of the Federal Trade Commission’s Investigative and Law Enforcement Authority*, <http://www.ftc.gov/ogc/brfovrw.shtm> (last visited May 26, 2010).

62. FitzGerald, *supra* note 60, at 16–17.

63. See *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 291 (1960) (holding that unless a statute actually or by necessary and inescapable inference restricts the Court’s jurisdiction in equity, the full scope of the Court’s equitable jurisdiction is to be recognized and applied); *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946) (holding that where the public interest is involved the Court’s equitable powers are even broader and of a more flexible character).

64. 668 F.2d 1107 (9th Cir. 1982).

Although the *Singer* decision paved the way for subsequent decisions that accepted the argument that Section 13(b) authorized the courts to award monetary relief in Section 5 actions, the new line of cases was flawed from the beginning as a result of several defects in the court's analysis.

First, the only issues that were presented in *Singer* were the trial court's authority to enjoin the defendants from committing further violations of the Franchise Trade Rule, to freeze their assets, and to require an accounting (all of which were consistent with legitimate Section 13(b) objectives of preserving the status quo pending the completion of the FTC's administrative process). There was no need or reason for the Ninth Circuit to reach the question whether any equitable remedies were available under Section 13(b) beyond the injunction, freeze order and accounting issues that were presented. The FTC had separately sought Section 19 relief, which provided for the monetary remedies of rescission, restitution and refund. The court's determination that it had authority to maintain the status quo by ordering the injunction, freeze and accounting based on the legislative intent of Section 13(b) was all that was required where all of the other monetary remedies that were sought by the FTC were expressly provided by Section 19.

Second, the *Singer* court reviewed only enough of the legislative history to make the correct determination that "The purpose of [Section 13(b)] is to permit the Commission to bring an immediate halt to unfair or deceptive acts or practices when to do so would be in the public interest."⁶⁵ But the court disregarded clear indications of legislative intent when it held that application of the court's equitable powers, including rescission and restitution, was consistent with the stated purpose of the statute. In reaching this decision, the Ninth Circuit failed to consider the more complete analyses of the statutory history performed by the Fifth Circuit in *FTC v. Southwest Sunsites, Inc.*,⁶⁶ and the D.C. Circuit in *FTC v. Weyerhaeuser Company*.⁶⁷

Relying on the Ninth Circuit's dicta in *Singer*, the agency continued its campaign to unilaterally expand its power to obtain monetary relief under Section 13(b) in other circuits,

65. 668 F.2d at 1111 (quoting S. Rep. 93-151, p. 30-31) (emphasis added).

66. 665 F.2d 711 (5th Cir. 1982).

67. 665 F.2d 1072 (D.C. Cir. 1981).

often selecting cases involving unrepresented defendants⁶⁸ and/or egregiously deceptive and fraudulent conduct.⁶⁹ Generally, these cases were brought against the direct perpetrators of those schemes where the consumer loss was directly equal to the defendants’ gains.⁷⁰ Consequently, the issues regarding statutory interpretation were often not raised at all or the courts were apparently dissuaded by the FTC from closely scrutinizing the agency’s authority to obtain monetary relief based on Section 13(b). Had a more careful statutory analysis been performed, the courts should have and likely would have rejected the FTC’s assertion that Section 13(b) allows for consumer redress based on: (1) the express language of Section 13(b) itself, (2) the legislative history of the FTC Act and the amendments that added Sections 13(b) and 19(b) in the mid-1970s, and (3) the decisions that first interpreted Section 13(b) after it was amended.⁷¹

Significantly, the Supreme Court has subsequently refused to imply equitable remedies in statutes where Congress has established—“elaborate enforcement provisions” similar to,

68. *E.g.*, Fed. Trade Comm’n v. Stefanchik, 559 F.3d 924, 931 (9th Cir. 2009).

69. FTC v. Gem Merch. Corp., 87 F.3d 466, 469–70 (11th Cir. 1996) (telemarketers lured customers by misrepresenting terms, conditions and likelihood of winning prizes consumers would receive if they consumer purchased medical alert systems); FTC v. Pantron I, 33 F.3d 1088 (9th Cir. 1994) (no scientifically reliable evidence (other than “placebo effect”) supporting claim that defendant’s Helsinki Formula baldness treatment, consisting of a shampoo and conditioner promoted hair growth or prevented hair loss); FTC v. Security Rare Coin & Bullion, 931 F.2d 1312, 1316 (8th Cir. 1991) (marketers misrepresented the value and risk of collectible coins as excellent low-risk investments with superior liquidity and profit potential when in fact the company arbitrarily marked up the price of the coins two or three times the wholesale price, such that the coins would have to double or triple in value before any gain could be realized); FTC v. Amy Travel Service, Inc., 875 F.2d 564 (7th Cir. 1989) (misleading telemarketing of approximately 35,000 travel vouchers from \$289 to \$328 that actually had little value to consumers); FTC v. World Travel Vacation Brokers, Inc., 875 F.2d 1020, 1026 (7th Cir. 1988) (sold more than 600,000 vacation certificates purporting to provide airfare to Hawaii for \$29, yet actually charged consumers hundreds of dollars for full airfare and hotel rates).

70. *See, e.g.* Fed. Trade Comm’n v. Stefanchik, *supra* note 68.

71. A prominent attorney working for Ropes & Gray in Washington, D.C., has recognized that “the Commission’s general authority to employ § 13(b) beyond the right to seek injunctive relief remains poised on relatively narrow legal footing.” James M. Spears, Comment for Federal Trade Commission, Mar. 29, 2002, at 6, <http://www.ftc.gov/os/comments/disgorgement/spearsjamesm.pdf>; *see also Government Civil Liberties: Hearing before the Antitrust Modernization Comm.* 13 n.24 (2005) (statement of Kevin Arquit, Partner, Simpson Thatcher & Bartlett), *available at* http://govinfo.library.unt.edu/amc/commission_hearings/pdf/Statement_Arquit.pdf (“While at one time a better case could be made for 13(b) disgorgement authority, there is more recent precedent than *Porter v. Warner Holding Co.*, which casts some doubt on that authority.”) (citation omitted).

albeit less clear than, the elaborate enforcement scheme in the FTC Act.⁷² The D.C. Circuit has also held that the implied equitable remedy of disgorgement is not available to address “forward-looking” injunctive provisions, such as those contained in the FTC Act.⁷³ Finally, even the FTC Chairman has acknowledged by implication that Section 13(b) does not authorize the recovery of monetary relief when he cited only to Section 19(b) to support his recent statement to Congress that the Commission “can only obtain monetary relief, including consumer redress and disgorgement of the ill-gotten gains.”⁷⁴

Read together, current case law, the express terms of Section 13(b) and 19, the characterizations of Sections 13(b) and 19(b) in other sections of the FTC Act⁷⁵, and the applicable and relevant legislative history demonstrate that Section 13(b) was intended to be limited to the plain meaning of its terms—providing the FTC with authority to seek, and the courts with authority to grant *temporary restraining orders, preliminary injunctions and, in appropriate cases, permanent injunctions*. In short, the purpose of Section 13(b) was to provide a mechanism to halt illegal conduct and maintain the status quo, thus allowing the FTC to bring administrative proceedings and, if appropriate, to seek the broader remedies that were made available under the limited circumstances specified in Section 19(b).

Having secured, for the time being, the Judiciary’s blessing of its ability to obtain complete relief against FTC Act violators in court, outside of the cumbersome restrictions and limitations set forth in Section 19(b) and the administrative process,⁷⁶ the FTC

72. *Meghrig v. KFC W., Inc.*, 516 U.S. 479, 487–88 (1996).

73. *United States v. Phillip Morris USA, Inc.*, 396 F.3d 1190, 1198 (D.C. Cir. 2005).

74. *Proposed Consumer Financial Protection Agency: Implications for Consumers and the Federal Trade Commission: Hearing Before the Subcomm. on Commerce, Trade and Consumer Protection of the H. Comm. on Energy and Commerce* 3–4 (2009) (statement of the Fed. Trade Comm’n).

75. See § 16 (codified at 16 U.S.C. § 56) (describing §13(b) as providing for injunctive relief and § 19(b) as providing for “consumer redress”).

76. Prior to 1980, virtually all FTC consumer protection enforcement actions were administrative proceedings conducted pursuant to § 5. Compare FTC Annual Report (1970) with FTC Annual Report (2009). By contrast, the most recent data shown on the FTC website reflects only nine pending FTC adjudicative proceedings from 2007 to 2009. Meanwhile, the FTC’s annual report dated March 30, 2009 states that from March 2008 through February 2009, the FTC filed 64 actions in federal district courts. THE FTC IN 2009: THE ANNUAL REPORT OF THE FEDERAL TRADE COMMISSION (2009).

has apparently now turned its attention to unilaterally expanding its rulemaking authority.⁷⁷

III. THE FTC’S RULEMAKING AUTHORITY

The FTC’s authority to prescribe substantive rules defining the terms “unfair or deceptive acts or practices” emanates from Congress in two forms: (1) a specific delegation of rulemaking authority by Congress in statutes that direct the agency to promulgate rules in support of a specific statutory purpose,⁷⁸ and (2) pursuant to the rulemaking authority granted by the Magnuson–Moss Act in Section 18 of the FTC Act.⁷⁹

Due to the restrictions imposed by Magnuson–Moss rulemaking, however, the vast majority of the FTC’s substantive rules have been promulgated using “expedited” rulemaking procedures based on express congressional authorizations. Examples of specific statutory delegations include:

- The 2009 Omnibus Appropriations Act, which authorized the FTC to engage in Administrative Procedures Act (APA)⁸⁰ rulemaking proceedings relating to mortgage loans,⁸¹
- The Do-Not-Call Implementation Act of 2003, which allowed consumers to opt-out of receiving calls from telemarketers,⁸²
- The Children's Online Privacy Protection Act, prohibiting online marketers from seeking or obtaining personal information from children,⁸³
- The Fair and Accurate Credit Transactions Act of 2003, authorizing consumers to obtain free copies of their annual credit reports,⁸⁴

77. See *infra* Part III.

78. E.g., 15 U.S.C. § 6502(b)(1) (2006).

79. *Id.* § 57a(1)(B) (2006).

80. 5 U.S.C. § 553 (2006).

81. Pub. L. No. 111-8 § 626(a), 123 Stat. 524, 677 (2009).

82. 15 U.S.C. § 6153 (2006).

83. *Id.* § 6502(b)(1)(a).

84. *Id.* § 1681s(a)(1).

- The Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003, regulating the distribution of commercial electronic correspondence,⁸⁵ and
- The TCFAPA, which authorized the FTC to propound rules governing abusive telemarketing activities.⁸⁶

The benefit of such statutory delegations of rulemaking authority, at least in the eyes of the FTC, is that the agency is not required to comply with the requirements of the Magnuson–Moss Act.⁸⁷ In each instance, Congress expressly authorized the FTC to utilize the simplified “notice-and-comment” provisions of the APA, substantially shortening the rulemaking process and eliminating many of the constraints that were imposed by Magnuson–Moss.⁸⁸ As Commissioner Thomas Rosch put it, “Magnuson–Moss rulemaking proceedings are very cumbersome, and frankly, the [Bureau of Consumer Protection] staff has hated them.”⁸⁹ In a recent interview, David Vladeck, current Director of the Bureau of Consumer Protection, said, of the Magnuson–Moss procedures, “we are now hobbled with a byzantine, Rube Goldberg-like rulemaking system that is close to useless.”⁹⁰

Other than the specific statutes where Congress has expressly authorized the agency to use APA rulemaking procedures, the FTC acknowledges that “Section 202(a) of Magnuson–Moss provides that the Commission’s Section 18 authority is its only authority to promulgate rules respecting unfair or deceptive acts or practices.”⁹¹ In fact, the staff “hates” the requirements of Section 18 to the extent that FTC Chairman Jon Leibowitz, in an effort to expand the Commission’s rulemaking authority, recently appealed to Congress to allow the agency to utilize the

85. *Id.* § 7706(d).

86. *Id.* § 6102(a)(1).

87. *Id.* § 57(a)(1)(B).

88. *Id.* § 57(a)(1)(B).

89. J. Thomas Rosch, Comm’r, Fed. Trade Comm’n, Rip Van Winkle Awakens: Some Reflections on Remedies, Remarks at ABA Antitrust Section Spring Meeting 3 (Mar. 30, 2006), available at <http://www.ftc.gov/speeches/rosch/060330roschfinal.pdf>.

90. Villafranco, *supra* note 59.

91. FED. TRADE COMM’N, OPERATING MANUAL, § 7.2.3.1 (1989).

less “cumbersome” procedures of the APA to perform rulemaking in additional areas beyond those specifically delegated by Congress—such as the mortgage lending industry.⁹² The Chairman’s appeal illuminates why the FTC prefers the simplified APA rulemaking procedures over the more complex plenary procedures required when the staff seeks to regulate beyond those areas expressly designated by Congress.

The Magnuson–Moss rulemaking provisions require the FTC to:

- Publish a notice of proposed rulemaking in the Federal Register, including the text of and reasons for the proposed rule and invite the response of interested persons;⁹³
- Submit notices of rulemaking to the Senate Committee on Commerce, Science, and Transportation and the House Committee on Energy and Commerce;⁹⁴
- Make a determination before issuing any notices of proposed rulemaking if it has reason to believe that the unfair or deceptive acts or practices which are the subject of the proposed rule are “prevalent”;⁹⁵
- Provide an opportunity for an informal hearing subject to specific procedural requirements, including the ability for interested persons to present oral and documentary evidence and, if the FTC determines that there are disputed issues of material fact to be resolved,

92. In March 2009, Chairman Leibowitz stated: “The FTC also believes that it could do more to assist consumers if it could use APA [§ 553] notice and comment procedures to promulgate rules for those entities under the Commission’s jurisdiction for unfair and deceptive acts and practices related to financial services other than mortgage loans.” *Consumer Credit and Debt: The Role of the Federal Trade Commission in Protecting the Public: Hearing Before the Subcomm. on Commerce, Trade and Consumer Protection of the H. Comm. on Energy and Commerce* 22–23 (2009) (statement of the Fed. Trade Comm’n).

93. 15 U.S.C. § 57a(b)(1) (2006).

94. *Id.* § 57a(b)(2)(B).

95. *Id.* § 57a(b)(3). The Act defines an act or practice as “prevalent” where the FTC has (1) “issued cease and desist orders regarding such acts or practices,” *id.* § 57a(b)(3)(A), or (2) “any other information available to the Commission [that] indicates a widespread pattern of unfair or deceptive acts or practices.” *Id.* § 57a(b)(3)(B).

to present rebuttal evidence and conduct cross-examinations of witnesses;⁹⁶ and

- Promulgate a final rule based on the record and provide a statement of basis and purpose that addresses the prevalence of the acts or practices addressed by the rule, the manner and context in which the acts or practices are unfair or deceptive, and regarding the economic effect of the rule on small businesses and consumers.⁹⁷

The Magnuson–Moss procedures also provide for judicial review of the agency’s rules by the federal Courts of Appeals⁹⁸ and directs that the courts shall set aside any rule that “is not supported by substantial evidence in the rulemaking record”⁹⁹ or if the Commission’s failure to allow cross-examination or submission of evidence “precluded disclosure of disputed material facts that were necessary for fair determination by the Commission.”¹⁰⁰

IV. THE FTC’S RULEMAKING AUTHORITY UNDER THE TELEMARKETING SALES RULE

On August 16, 1995, the FTC promulgated the Telemarketing Sales Rule pursuant to its authority under the Telemarketing and Consumer Fraud and Abuse Prevention Act (TCFAPA).¹⁰¹ The FTC views the rule as applying to virtually all “telemarketing,” which means “a[ny] plan, program, or campaign . . . to induce the purchase of goods or services or to solicit a charitable contribution” involving more than one interstate telephone call.¹⁰²

In pertinent parts, the TSR requires telemarketers to obtain a consumer’s express verifiable authorization and to provide certain material information, such as the total cost of the service,

96. *Id.* § 57a(c)(2).

97. *Id.* § 57a(d).

98. *Id.* § 57a(e)(1).

99. *Id.* § 57a(e)(3)(A).

100. *Id.* § 57a(e)(3)(B).

101. FTC Telemarketing Sales Rule, *supra* note 7, §§ 310.1–8.

102. FTC NPRM, *supra* note 8, at 41,989.

before the consumer pays for the goods or services.¹⁰³ The TSR prohibits telemarketers from misrepresenting—expressly or implicitly—specific categories of information about a telemarketing transaction that is likely to affect a consumer’s decision to purchase the goods or services offered.¹⁰⁴ These categories include, among others: (1) the total costs of the services offered; (2) any material restriction, limitation, or condition to purchase, receive, or use the services offered; (3) any material aspect of the performance, efficacy, nature, or central characteristics of the goods or services offered to the consumer, and (4) any affiliations with—or endorsements or sponsorships by—any person, organization, or government entity.¹⁰⁵

The TSR exempts certain types of calls from its coverage. These include unsolicited calls from consumers, calls placed by consumers in response to a catalog, calls made in response to direct mail advertising, and calls made in response to “general media advertising.”¹⁰⁶ “General media advertising” includes television commercials, infomercials, and home shopping programs.¹⁰⁷ Accordingly, the FTC’s jurisdiction, under the TSR, does not extend to inbound calls induced by television commercials, radio, and the Internet.¹⁰⁸

As with other statutory delegations of rulemaking authority, Congress expressly directs the FTC to promulgate rules implementing the TCFAPA using the “notice-and-comment” rulemaking procedures of the APA.¹⁰⁹ The TCFAPA specifically instructs the FTC to “prescribe rules prohibiting deceptive telemarketing acts or practices and other abusive telemarketing acts or practices.”¹¹⁰ The statute further enumerates specific provisions to be included in the TSR, including banning deceptive charitable solicitations,¹¹¹ prohibiting coercive or abusive patterns of telephone calls,¹¹² placing restrictions on

103. 16 C.F.R. § 310.3(a).

104. *Id.*

105. *Id.*

106. *Id.* § 310.6(b)(6).

107. *Id.* § 310.6(b)(5).

108. *Id.*

109. 15 U.S.C. § 6102(b) (2006).

110. *Id.* § 6102(a)(1).

111. *Id.* § 6102(a)(2).

112. *Id.* § 6102(a)(3)(A).

hours when calls can be made,¹¹³ requiring prompt and clear disclosures relating to goods and services sold by telemarketing,¹¹⁴ and mandating disclosure of the purpose of charitable telemarketing solicitations.¹¹⁵

Although the TCFAPA specifically limited the FTC's rulemaking authority to "deceptive *telemarketing* acts or practices and other abusive *telemarketing* acts or practices,"¹¹⁶ when the FTC adopted the TSR, consistent with strategies it has used previously, the agency knowingly included a minor but important expansion of its delegated authority in the new rules. Moving beyond regulations controlling the appropriate content and execution of telemarketers' communications with consumers, the FTC decided to regulate the nature of certain *fees* that could be charged by companies that engaged in telemarketing. The agency accomplished this objective by expanding upon the "abusive telemarketing acts or practices" identified by Congress in the TCFAPA.

The FTC acknowledged in its Final Notice implementing the TSR that the TCFAPA directed it to include three specific provisions prohibiting "abusive telemarketing practices" that related to consumer privacy.¹¹⁷ However, the agency decided to supplement these practices with five additional practices that it deemed "abusive."¹¹⁸ The first two additional practices were undeniably consistent with the statutory purpose of eliminating abusive "telemarketing" practices. The rules prohibited: (1)

113. *Id.* § 6102(a)(3)(B).

114. *Id.* § 6102(a)(3)(C).

115. *Id.* § 6102(a)(3)(D).

116. *Id.* § 6102(a)(1) (emphasis added).

117. FTC Telemarketing Sales Rule Final Amended Rule, 68 Fed. Reg. 4580, 4613 (Jan. 29, 2003) (codified at 16 C.F.R. 310 (2009)). Even the legislative history cited by the FTC in support of these regulations confirms that Congress's rulemaking authority was intended to reach nothing other than privacy issues. *See id.* at 4614 n.395. The Final Notice stated:

With respect to the bill's reference to 'other abusive telemarketing activities' . . . the Committee intends that the Commission's rulemaking will include proscriptions on such inappropriate practices as threats or intimidation, obscene or profane language, refusal to identify the calling party, continuous or repeated ringing of the telephone, or engagement of the called party in conversation with an intent to annoy, harass, or oppress any person at the called number. The Committee also intends that the FTC will identify other such abusive practices that would be considered by the reasonable consumer to be abusive and thus violate such consumer's right to privacy.

Id. (citing H.R. REP. NO. 103-20, at 8 (1993)).

118. *Id.* at 4614.

“threatening or intimidating a consumer, or using profane or obscene language,”¹¹⁹ and (2) “causing any telephone to ring, or engaging any person in telephone conversation, repeatedly or continuously with intent to annoy, abuse, or harass any person.”¹²⁰

However, the agency added other “advance fee” prohibitions that went far beyond “telemarketing practices” into the realm of regulating the underlying business models themselves.¹²¹ These provisions included bans against “requesting or receiving payment for credit repair services prior to delivery and proof that such services have been rendered,”¹²² “requesting or receiving payment for recovery services prior to delivery and proof that such services have been rendered,”¹²³ and “requesting or receiving payment for an advance fee loan when a seller or telemarketer has guaranteed or represented a high likelihood of success in obtaining or arranging a loan or other extension of credit.”¹²⁴

Recognizing that it had stretched the limits of its authority to the breaking point, the FTC attempted to justify these provisions by claiming that the TCFAPA granted the agency “broad authority to identify and prohibit additional abusive telemarketing practices beyond the [Congressional] specified practices that implicate privacy concerns.”¹²⁵ Remarkably, the agency relied upon a *Webster’s Dictionary* definition of the word “abusive” for this conclusion.¹²⁶ Casting a sideways glance to the fact that it had departed from the boundaries of its TCFAPA authority and was now operating in Magnuson–Moss territory, the FTC concluded its detour with an attempt to bolster the end-result with an analysis of the advance fee practices using its “traditional unfairness analysis.”¹²⁷ Finding that “[a]n important

119. *Id.* at 4613.

120. *Id.*

121. *Id.* at 4613–14.

122. *Id.* at 4613.

123. *Id.* at 4613–14.

124. *Id.* at 4614.

125. *Id.*

126. *Id.* at 4614 n.398.

127. *Id.* at 4614. The FTC’s unfairness analysis was originally based on the Supreme Court’s decision in *Federal Trade Commission v. Sperry & Hutchinson Co.*, 405 U.S. 433 (1972). In 1981, it was affirmed by the FTC in its Statement of Policy on the Scope of Consumer Unfairness Jurisdiction. Letter from Fed. Trade Comm’n to Sen. Wendell H. Ford & Rep. John C. Danforth (Dec. 17, 1980), *available at*

characteristic common to credit repair services, recovery services, and advance fee loan services is that in each case the offered service is fundamentally bogus,”¹²⁸ the agency reached the unsurprising conclusion that “these practices meet the statutory criteria for unfairness.”¹²⁹ As such, the FTC determined that it was authorized to regulate the timing of fees charged by these services, regardless of whether the advance fees had anything to do with the functional act of “telemarketing.”¹³⁰

V. THE DEBT-RELIEF-SERVICES INDUSTRY

American consumers are currently enduring the most difficult financial crisis since the Great Depression.¹³¹ As of January 2009, credit-card debt was reported to have soared to an all-time high of \$960 billion.¹³² As a result of this dramatic increase in consumer debt, Americans have increasingly turned to debt-relief services for assistance.¹³³ Two distinct types of debt-relief-service providers have developed as the primary models offering debt-relief services to consumers: non-profit credit counseling agencies (CCAs) and for-profit debt-settlement companies.¹³⁴

A. Credit Counseling Agencies

CCAs are traditionally non-profit entities that operate as a liaison between a consumer and his creditor to negotiate a debt-

<http://www.ftc.gov/bcp/policystmt/ad-unfair.htm> [hereinafter FTC Unfairness Policy Statement]. Congress codified these principles in § 5(n) of the FTC Act. 15 U.S.C. § 45(n) (2006).

128. FTC Telemarketing Sales Rule Final Amended Rule, *supra* note 116, at 4614.

129. *Id.*

130. *Id.* The FTC stated, “[A]ccordingly, the remedy imposed by the [TSR] to correct them is to prohibit requesting or receiving payment for these services until after performance of the services is completed.” *Id.*

131. Liam Dennig, *Obama Leaves Markets in a VIX*, WALL ST. J., Jan. 23, 2010, at B12.

132. Suki Kim, Op-Ed, *Notes from Another Credit Card Crisis*, N.Y. TIMES, May 18, 2009, at A23.

133. FTC NPRM, *supra* note 8, at 41,990.

134. *Id.* at 41,990, 41,993. A third variety of debt-relief service providers, known as “debt consolidation,” assists indebted consumers by offering new loans that consolidate the consumer’s existing debts into a single loan with the goal of reducing the consumer’s interest rate and monthly payments. *Id.* at 41,997. This option is of limited value in the current economic environment where, although interest rates are at historic lows, credit is extremely tight and most consumers who are struggling to meet their monthly payments do not qualify for new loans. In addition, the NPRM states that “[a]ccording to industry sources consulted by Commission staff, there are believed to be fewer than 100 for-profit credit counseling firms operating in the United States.” *Id.* at 42,013 n.272. The NPRM proposes to regulate all of these service providers along with the for-profit debt-settlement industry under the proposed TSR amendments. *Id.* at 41,999.

management plan (DMP).¹³⁵ The credit counseling model typically begins with an assessment of the consumer’s financial situation.¹³⁶ Once this analysis is completed, the CCA initiates contact with the consumer’s unsecured creditors.¹³⁷ By working in cooperation with the consumer’s creditors, the CCA determines what, if any, repayment options are available to the consumer based upon her income and total debt.¹³⁸ At the end of the negotiations, the credit counselor calculates a new payment schedule, typically with consolidated monthly payments extending over a period of three to five years.¹³⁹ During the term of the renegotiated payment schedule, the CCA collects monthly payments from the consumer and distributes appropriate amounts to each creditor.¹⁴⁰ Accordingly, this form of debt settlement may appeal both to consumers, who receive more manageable terms, and to creditors, who are paid the outstanding balances.

In exchange for their services, nonprofit CCAs receive remuneration from both the consumers and the creditors.¹⁴¹ According to the National Foundation for Credit Counseling (NFCC), on average, consumers pay an upfront fee of \$20 to enroll in a DMP and continue to pay a monthly \$12 service fee.¹⁴² The consumer’s creditors also make a monthly “fair share” contribution to the CCA.¹⁴³ The fair share contribution can amount to as much as 15% of the amount received as a result of the DMP.¹⁴⁴

CCAs have been criticized on a number of grounds. First, the CCA model was originally established as a non-profit adjunct of the credit card industry, assisting creditors to perpetuate and extend their payment flows beyond the point when consumers

135. *Id.* at 41,990.

136. *Id.*

137. *Id.*

138. *Id.* at 41,990–91.

139. *Id.* at 41,990.

140. *Id.* at 41,990–91.

141. *Id.* at 41,991.

142. *Id.* (citing DEANNE LOONIN & TRAVIS PLUNKETT, CONSUMER FED’N OF AM. & NAT’L CONSUMER LAW CTR. INC., CREDIT COUNSELING IN CRISIS: THE IMPACT ON CONSUMERS OF FUNDING CUTS, HIGHER FEES AND AGGRESSIVE NEW MARKET ENTRANTS 13–14 (2003)).

143. FTC NPRM, *supra* note 8, at 41,991.

144. *Id.* (citing LOONIN & PLUNKETT, *supra* note 141, at 10–12).

would naturally default on their loans.¹⁴⁵ Although this relationship has been severed to some extent in recent years, and creditors have steadily reduced the amount of their fair share contributions, CCAs are still viewed as agents of the credit card companies working to ensure that consumers continue to make monthly payments for as long as possible.¹⁴⁶ Second, the CCA model rarely involves a concession by the creditor that reduces the consumer's principal debt.¹⁴⁷ Generally, CCAs only obtain creditor concessions that reduce interest rates on existing debts, and can sometimes obtain a reduction in certain penalties or other fees charged by the credit card companies.¹⁴⁸ Depending upon their income and other financial resources, most indebted consumers can not qualify for DMPs,¹⁴⁹ which require the ability to make ongoing payments over three to five years.¹⁵⁰ Finally, studies have determined that DMP plans suffer from low success rates, with as few as one in five of the consumers that qualify and begin a DMP actually completing the program.¹⁵¹ These less-than-stellar statistics have attracted both regulatory concern¹⁵² and competition from the for-profit debt-relief industry.¹⁵³

B. Debt-Settlement Agencies

In the late 1990s, the for-profit debt-settlement model developed as an alternative to CCAs.¹⁵⁴ As a result of the historic levels of consumer debt and the concomitant increase in demand for debt-relief services following the economic downturn that began in about 2000, for-profit debt-settlement

145. *See id.* ("Beginning in the mid-1960s, creditor banks initiated this model, providing funding for CCAs with the intent of reducing personal bankruptcy filings.")

146. The history and relationship between credit counseling and the banking industry is discussed by Harvey Warren in his book describing his experiences as president of the National Consumer Council, a non-profit organization that offered information about debt settlement to consumers until it was shut down by the FTC and the California Department of Corporations in May 2004. HARVEY Z. WARREN, *FOREVER IN YOUR DEBT* ch. 6 (2007). *See also, e.g.*, TASC Position Paper, (2006) *available at* <http://www.ftc.gov/os/comments/debtsettlementworkshop/536796-00013.pdf>.

147. FTC NPRM, *supra* note 8, at 41,990.

148. *Id.*

149. *Id.* at 41,993.

150. *Id.* at 41,990–91.

151. *See, e.g., Pushed off the Financial Cliff*, CONSUMER REPORTS (Jul. 2001). In 2001, the National Foundation for Credit Counseling reported completion rates of 21%.

152. FTC NPRM, *supra* note 8, at 41,990.

153. *Id.* at 41,993.

154. *Id.*

companies now represent a substantial segment of the debt-relief-services industry.¹⁵⁵ The fact that an increasing number of consumers lack sufficient income to qualify for traditional DMPs has also led to the proliferation of for-profit debt-settlement companies to satisfy the growing need for debt relief. As a result, the industry has grown and matured significantly since its origins.

As indicated in the NPRM, for-profit debt-settlement companies are distinct from traditional CCAs in three principal respects. First, for-profits generally advertise their services to consumers through major mediums such as radio, television, and Internet.¹⁵⁶ Interested consumers generally initiate communications with the debt-settlement provider voluntarily by calling the advertised number.¹⁵⁷

Second, for-profit debt-settlement companies offer to reduce the consumer's debt to a fraction of the principal.¹⁵⁸ Industry surveys indicate that debt-settlement companies often negotiate with debt collectors regarding accounts that are, due to their delinquency status, listed in the creditor's portfolio as losses.¹⁵⁹ Thus, creditors often agree to settle the debt for less than the full principal value in order to minimize losses.¹⁶⁰

And third, debt-settlement companies offer to alleviate the attendant stresses of debt collection.¹⁶¹ According to the FTC, many consumers drawn to debt-settlement companies are already behind on their debt payments and thus are subject to annoying debt-collection calls.¹⁶² The debt-settlement companies generally instruct their clients to assign them powers of attorney, and then serve creditors with cease-communication notices.¹⁶³ As a corollary, the debt-settlement providers sometimes instruct customers to execute a change of address, substituting the debt-settlement company's address for the consumer's address and redirecting billing statements and collections notices so that the consumer no longer receives

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.* at 41,994.

them.¹⁶⁴ The FTC contends that in this manner, for-profit providers offer consumers the hope of alleviating the stress of debt-collection calls by attempting to interpose themselves between the consumers and the debt collectors.¹⁶⁵

Debt-settlement companies have generally adopted three major fee models.¹⁶⁶ The “front-end fee model” requires that customers pay a portion of the company’s fee within the first three or four months of enrollment and the balance over the ensuing 12 months or less.¹⁶⁷ A second common fee structure, the “flat fee model,” provides that the consumer will pay the entire fee over approximately the first half of the total enrollment period.¹⁶⁸ Finally, the “back-end model” requires the consumer to make a relatively small initial payment, nominal monthly payments for the duration of the plan, and then, when and if a settlement is achieved, an amount based on the total amount saved.¹⁶⁹

VI. FTC’S ASSERTED BASIS FOR HEIGHTENED ENFORCEMENT MEASURES

Over the past decade, the FTC has shifted greater attention to entities operating in the debt-relief-services industry. In what the FTC maintains is a response to growing deceptive and unfair practices by debt-relief-services providers,¹⁷⁰ the Commission has undertaken six civil enforcement actions against CCAs¹⁷¹ and seven actions against for-profit debt-settlement companies.¹⁷²

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.* at 41,991.

171. Fed. Trade Comm’n v. Express Consolidation, No. 06-cv-61851-WJZ (S.D. Fla. 2006); United States v. Credit Found. of Am., No. CV 06-3654 ABC(VBKx) (C.D. Cal. 2006); Fed. Trade Comm’n v. Integrated Credit Solutions, No. 06-806-SCB-TGW (M.D. Fla. 2006); Fed. Trade Comm’n v. Nat’l Consumer Council, No. SACV04-0474 CJC(JWJX) (C.D. Cal. 2004); Fed. Trade Comm’n v. Debt Mgmt. Found. Servs., No. 04-1674-T-17-MSS (M.D. Fla. 2004); Fed. Trade Comm’n v. AmeriDebt, Inc., No. PJM 03-3317 (D. Md. 2003); FTC NPRM, *supra* note 8, at 41,991–92.

172. Fed. Trade Comm’n v. Debt-Set, Inc., No. 1:07-cv-00558-RPM (D. Colo. 2007); Fed. Trade Comm’n v. Edge Solutions, No. CV-07-4087 (E.D.N.Y. 2007); Fed. Trade Comm’n v. Connelly, No. SA CV 06-701 DOC (RNBx) (C.D. Cal. 2006); Fed. Trade Comm’n v. Better Budget Fin. Servs., Inc., No. 04-12326 (WG4) (D. Mass. 2004); Fed. Trade Comm’n v. Innovative Sys. Tech., Inc., No. CV04-0728 GAF JTLx (C.D. Cal. 2004); Fed. Trade Comm’n v. Nat’l Consumer Council, No. SACV04-0474 CJC(JWJX) (C.D. Cal.

The actions brought against CCAs have generally been based upon fraud-related claims and, in some instances, for violations of the TSR.¹⁷³ Against for-profit debt-settlement companies like: “the FTC’s actions against deceptive credit counselors, . . . these suits commonly allege the misrepresentation of fees, or the failure to fully disclose them—including the significant up-front fees that are often charged.”¹⁷⁴ Additionally, the Commission has alleged that “these defendants falsely promised high success rates, promised unattained results (*e.g.*, settlements for a certain percentage of the total original debt), and misrepresented their refund policies.”¹⁷⁵ Further, “the Commission[’s] complaints charged that the defendants in these matters failed to warn consumers of the negative consequences of debt settlement, including the accumulation of late fees and other charges, the effect on consumers’ credit ratings, and the fact that debt collectors would continue to contact consumers.”¹⁷⁶

Consistent with the FTC’s policy of abandoning the administrative enforcement process in favor of bringing civil actions based on Sections 13(b) and 19, the NPRM does not reflect that the agency has issued any cease and desist orders against any CCAs or debt-settlement companies.¹⁷⁷

VII. SUMMARY OF THE FTC’S PROPOSED AMENDMENTS TO TSR

In its effort to police the debt-services industry, the FTC has apparently decided that additional legal restrictions are needed. The agency has proposed certain amendments to the TSR specifically intended to increase the agency’s ability to regulate debt-relief providers.¹⁷⁸ Because the FTC’s jurisdiction does not extend to non-profit entities,¹⁷⁹ however, the proposed TSR

2004); Fed. Trade Comm’n v. Jubilee Fin. Servs., Inc., No. 02-6468 ABC (Ex) (C.D. Cal. 2002); FTC NPRM, *supra* note 8, at 41,992.

173. See FTC NPRM, *supra* note 8, at 41,992 (stating that the enforcement actions stemmed from deceptive statements, misrepresentation, and violations of the TSR).

174. *Id.* at 41,996.

175. *Id.*

176. *Id.*

177. As discussed *supra* Part III, a record of issuing prior cease and desist orders is one means of meeting the “prevalence” requirement for the agency to conduct rulemaking under § 18. 45 U.S.C. § 57a(b)(3)(A) (2006).

178. FTC NPRM, *supra* note 8, at 42,017–24.

179. The FTC discusses the determination that non-profit entities are not subject to its jurisdiction in the NPRM:

Section 5(a)(2) of the FTC Act states: “The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations . . . from using

amendments would apply only to for-profit debt-relief entities companies.¹⁸⁰

The proposed amendments address a wide spectrum of activities engaged in by debt-relief providers. Proposed Section 310.2(m), for example, provides a broad definition of “debt-relief service” to include DMPs, debt-settlement services, and debt-negotiation services.¹⁸¹ The definition expressly excludes services provided that relate to secured debt and mortgage loans.¹⁸²

The proposed amendments would significantly expand the TSR’s coverage of debt-relief providers by eliminating the Rule’s current exemption of most *inbound calls* from consumers in response to advertisements¹⁸³ and qualifying direct mail solicitations.¹⁸⁴ TSR Section 310.6 presently exempts calls “initiated by a customer . . . in response to an advertisement through any medium”¹⁸⁵ and exempts calls “initiated by a

unfair or deceptive acts or practices in or affecting commerce.” Section 4 of the Act defines “corporation” to include: “any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, *which is organized to carry on business for its own profit or that of its members . . .*”

Id. at 11,998 (citations omitted)

180. FED. TRADE COMM’N, ADDITIONAL REPORT TO CONGRESS PURSUANT TO THE DO NOT CALL REGISTRY FEE EXTENSION ACT OF 2007, at 10 (2009).

181. Proposed § 310.2(m) defines the term “debt relief service” to mean:

any service represented, directly or by implication, to renegotiate, settle, or in any way alter the terms of payment or other terms of the debt between a consumer and one or more unsecured creditors or debt collectors, including, but not limited to, a reduction in the balance, interest rate, or fees owed by a consumer to an unsecured creditor or debt collector.

FTC NPRM, *supra* note 8, at 42,017.

182. *Id.*

183. The FTC’s TSR compliance guide states that “[t]he Rule generally does not apply to consumer calls made in response to . . . television commercials; infomercials; home shopping programs; print advertisements in magazines, newspapers, the Yellow Pages, or similar general directories; radio ads; banner ads on the Internet; and other forms of mass media advertising and solicitation.” Federal Trade Commission, Facts for Business, Complying with the Telemarketing Sales Law, <http://www.ftc.gov/bcp/edu/pubs/business/marketing/bus27.shtm>.

184. “Generally, consumer calls in response to a direct mail solicitation that clearly, conspicuously, and truthfully makes the disclosures required by the Rule are exempt from the Rule.” *Id.* “Direct mail advertising includes, but is not limited to, postcards, flyers, door hangers, brochures, ‘certificates,’ letters, email, facsimile transmissions, or similar methods of delivery sent to someone urging a call to a specified telephone number regarding an offer of some sort.” *Id.*

185. 16 C.F.R. § 310.6 (2009). The exemption does not apply to consumer-initiated calls in response to advertisements for investment or business opportunities not covered by the Franchise Rule, credit card protection, credit repair, recovery services, advance fee loans, or instances of “upselling” additional products or services that were not included in the advertisement. *Id.*

customer . . . in response to a direct mail solicitation,” including facsimiles and e-mail solicitations that meet certain requirements.¹⁸⁶ The proposed amendments would require for-profit providers that advertise on radio, television, the Internet or by mail, e-mail, or facsimile, who were previously exempt from the TSR’s disclosure requirements, to comply with the Rule on all calls, whether outbound or incoming.¹⁸⁷ “As a result, virtually all debt-relief telemarketing transactions would be subject to the TSR if the proposed modifications to the Rule are adopted.”¹⁸⁸

Apart from expanding the Rule’s coverage to most inbound calls, the proposed amendments would require debt-relief providers to make six additional material disclosures that are not required of any other telemarketers. These new disclosures include:

- The amount of time required to achieve the purported results of a DMP or debt-settlement program;¹⁸⁹
- The amount of money or percentage of each of the consumer’s outstanding debts that would have to be accumulated before the debt-relief provider will make settlement offers to each of the customer’s creditors;¹⁹⁰
- A statement that “not all creditors or debt collectors will accept a reduction in the balance, interest rate, or fees a customer owes such creditor or debt collector”;¹⁹¹
- Notification that, “pending completion of the represented debt-relief services, the customer’s creditors or debt collectors may pursue collection efforts, including initiation of lawsuits”;¹⁹²

186. *Id.*

187. FTC NPRM, *supra* note 8, at 41,999.

188. *Id.*

189. *Id.* at 42,019.

190. *Id.*

191. *Id.*

192. *Id.*

- That the use of the debt-relief service will likely adversely affect the consumer's creditworthiness, may result in consumers being sued by their creditors, and may increase the amount owed to creditors as a result of the accrual of additional fees and interest;¹⁹³ and
- A statement that any "savings a customer realizes from use of a debt-relief service may be taxable income."¹⁹⁴

Current TSR Section 310.3(a)(4) prohibits "[m]aking a false or misleading statement to induce any person to pay for goods or services,"¹⁹⁵ and Section 310.3(a)(2) prohibits telemarketers from making specified misrepresentations of material information.¹⁹⁶ Yet, despite these existing provisions, which broadly prohibit telemarketers from misrepresenting their products or services, the FTC has decided it should amend the TSR to add additional provisions banning debt-relief providers from making specific misrepresentations regarding their services.

Proposed Section 310.3(a)(2)(x) would specifically prohibit telemarketers of debt services from misrepresenting any material aspect of debt-relief services, including (but not limited to) a laundry list of issues.¹⁹⁷ The proposed amendment would expressly ban, among other things, misstatements regarding the percentage or number of customers that attain the represented results and the amount of time necessary to achieve the represented results.¹⁹⁸

193. *Id.*

194. *Id.*

195. 16 C.F.R. § 310.3(a)(4) (2009).

196. *Id.* § 310.3(a)(2).

197. FTC NPRM, *supra* note 8, at 42,019.

198. Proposed § 310.3(a)(2)(x) would specifically prohibit misrepresentations regarding, among other issues, the amount of money or the percentage of the debt amount that a customer may save by using such service; the amount of time necessary to achieve the represented results; the amount of money or the percentage of each outstanding debt that the customer must accumulate before the provider of the debt-relief service will initiate attempts with the customer's creditors' debt collectors to negotiate, settle, or modify the terms of customer's debt; the effect of the service on a customer's creditworthiness; the effect of the service on collection efforts of the consumer's creditors or debt collectors; the percentage or number of customers who attain the represented results; and whether a service is offered or provided by a non-profit entity. *Id.* at 42,003.

Finally, and most significantly to the debt-settlement industry, proposed Section 310.4(a)(5) would impose an “advance fee” ban on debt-relief-service providers, similar to the ban imposed in the TSR on credit-repair services, recovery services, and advance fee loan services.¹⁹⁹ The proposed amendment, which would be added to Section 310.4 prohibits:

[r]equesting or receiving payment of any fee or consideration from a person for any debt relief service until the seller has provided the customer with documentation in the form of a settlement agreement, debt management plan, or other such valid contractual agreement, that the particular debt has, in fact, been renegotiated, settled, reduced, or otherwise altered.²⁰⁰

The NPRM expressly refers to the “analytical framework” developed in the original TSR to support the advance fee ban on credit-repair services, recovery services, and advance fee loan services, and claims that the same considerations for prohibiting the imposition of advance fees by those industries also apply to advance fees charged by debt-relief providers.²⁰¹ Reprising its analysis in the original TSR,²⁰² the FTC asserts that although “[t]he Telemarketing Act directs the Commission to include in the TSR provisions to address three specific practices denominated by Congress as ‘abusive,’ . . . the Act ‘does not limit the Commission’s authority to address abusive practices beyond these three practices legislatively determined to be abusive.’”²⁰³ Once again the agency relies on the definition of the word “abusive” in *Webster’s Dictionary* as authority for

199. See discussion *supra* Part III.

200. FTC NPRM, *supra* note 8, at 42,009.

201. *Id.* at 42,005.

202. FTC Telemarketing Sales Rule Notice of Proposed Rulemaking, 67 Fed. Reg. 4492, 4510 (Jan. 30, 2002) (codified at 16 C.F.R. § 310 (2009)).

203. FTC NPRM, *supra* note 8, at 42,005. Remarkably, the authority for the proposition that “the Act does not limit the Commission’s authority to address abusive practices beyond these three practices legislatively determined to be abusive” is nothing more than the agency’s own Proposed Rule issued in 2002. *Id.* at 42,005 n.202. In other words, the FTC’s supporting authority for this proposition consists of no more than its own prior analysis, which was founded on the definition of the word “abusive” in the 1949 edition of Webster’s International Dictionary. FTC Telemarketing Sales Rule Notice of Proposed Rulemaking, *supra* note 201, at 4,511 n.176.

exceeding the scope of Congress's express statutory authorization.²⁰⁴

The FTC reprised its application of the Section 5(n) "unfairness" standards,²⁰⁵ used to justify the original TSR regulation of advance fees, to the proposed debt-relief advance fee ban, determining once again that such a prohibition did not exceed its rulemaking authority.²⁰⁶ Based upon "the information available to the Commission,"²⁰⁷ the FTC found that the first unfairness element of substantial injury to consumers had been shown by its determinations that, according to the FTC, debt-relief services (1) provide a "low likelihood of success,"²⁰⁸ and (2) impose the "significant burden on consumers of front-loaded fees."²⁰⁹ Ignoring the industry's claim that 35–60% of debt-settlement consumers complete their programs,²¹⁰ the FTC based its conclusion that debt relief provides a low likelihood of success primarily on statistics gathered from three FTC civil

204. FTC NPRM, *supra* note 8, at 42,005 n.204. The agency acknowledges once again that the TSA's statutory grant of authority to regulate "abusive practices" was clearly grounded in addressing privacy concerns:

In determining which conduct should be characterized by the TSR as abusive, the Commission noted that each of the statutorily-denominated abusive practices implicate consumers' privacy. Nevertheless, the plain meaning of the term 'abusive' suggests that no such inherent limitation in the meaning of the term constrains the Commission in crafting the Rule.

FTC NPRM, *supra* note 8, at 42,005.

205. Section 5(n) provides:

The Commission shall have no authority under this section or section 57a of this title to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice 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. In determining whether an act or practice is unfair, the Commission may consider established public policies as evidence to be considered with all other evidence. Such public policy considerations may not serve as a primary basis for such determination.

15 U.S.C. § 45(n) (2006).

206. FTC NPRM, *supra* note 8, at 42,005.

207. *Id.* at 42,006. Although the NPRM mentions "complaint data, [the FTC's] law enforcement experience, as well as state enforcement efforts, the [debt-relief industry] Workshop [conducted by the agency in September 2008], and additional independent research conducted by Commission staff," the "state enforcement efforts" appear to be limited to the New York Attorney General's action mentioned in footnote 215 and there is no further discussion of the "additional independent research conducted by Commission staff." *Id.*

208. *Id.*

209. *Id.* at 42,007.

210. THE ASS'N OF SETTLEMENT COS., STUDY ON THE DEBT SETTLEMENT INDUSTRY I (2007).

enforcement actions²¹¹ and on the unproven allegations contained in a press release issued by the New York Attorney General’s office.²¹² The agency found a “significant burden” existed on consumers from the fact that the “front-end” fee model is the most prevalent in the industry and that “substantial harm accrues when debt-relief providers charge fees and then fail to provide the represented services.”²¹³ What is missing from the FTC’s analysis, however, is any data supporting the prevalence of debt-relief providers taking fees without delivering services. Although the agency found it “telling that nearly all states have now adopted laws that regulate the provision of some or all debt-relief services,”²¹⁴ the FTC mentions only one state, North Carolina, which prohibits debt-relief providers from charging advance fees,²¹⁵ which seems more telling.

Disturbingly, in support of its claim that consumers experienced low success rates, the FTC once again trotted out one of its favorite statistics about the debt-relief industry, claiming that its civil enforcement action brought against the National Consumer Council (NCC) and other defendants in 2004, “show[ed] that only 1.4% of the consumers that entered defendant’s debt-settlement program obtained the promised results.”²¹⁶ In truth, the NCC case was a bungled prosecution that put a responsible and effective debt-relief program out of business and left nearly 25,000 financially troubled consumers without access to their savings and without the company’s assistance.²¹⁷ Remarkably, the FTC seized upon a statistic in the court-appointed receiver’s report that reflected that very few consumers had completed the debt-relief program.²¹⁸ What the FTC repeatedly neglects to disclose is that the reason so few

211. FTC NPRM, *supra* note 8, at 41,995 n.102 (citing Fed. Trade Comm’n v. Connelly, No. SA CV 06-701 DOC (RNBx) (C.D. Cal. 2006); Fed. Trade Comm’n v. Debt Solutions, Inc., No. 06-0298 (W.D. Wash. 2006); Fed. Trade Comm’n v. Nat’l Consumer Council, Inc., No. SACV04-0474 CJC(JWJX) (C.D. Cal. 2004)).

212. *Id.*

213. *Id.* at 42,007.

214. *Id.*

215. *Id.* at 41,996 n.121; see N.C. GEN. STAT. § 14-424 (making any person engaged in debt adjusting guilty of a Class 2 misdemeanor). In North Carolina, debt adjusting includes charging advance fees. *Id.* § 14-423(2).

216. FTC NPRM, *supra* note 8, at 41,995 n.102.

217. WARREN, *supra* note 145, ch. 1.

218. Press Release, Fed. Trade Comm’n, Debt Services Operations Settle FTC Charges (Mar. 30, 2005), *available at* <http://www.ftc.gov/opa/2005/03/creditcouncil.shtm>.

consumers graduated was that the FTC prematurely *shut down* the NCC program after it operated for only thirty-nine months, with all but a miniscule number of consumers spending less than projected thirty-six months required to complete the program.²¹⁹ More than half of those who had enrolled in the program were still enrolled and relying on the program to help them settle their debts.²²⁰ The FTC obtained a court order shuttering the company without any notice based upon comparisons to “operational problems, accounting irregularities, and stolen consumer funds” encountered by regulators in previous actions against other debt-settlement companies;²²¹ however, these comparisons proved to be inapplicable in the NCC case, where the receiver determined that all of the consumer funds were present and properly accounted for.²²² At the time it was terminated by the FTC’s action, the program was exceeding its marketing representations by generating average settlements at the rate of 57.3% of their principal debt balances (excluding fees).²²³ In consistently quoting the NCC 1.4% completion percentage, the FTC has purposely kept the NCC receiver’s findings, which show that debt settlement can provide a substantial benefit for consumers that have the opportunity to complete the program out of the debate.²²⁴ A second unfairness requirement considered by the FTC was whether there are potential countervailing benefits to consumers or competition.²²⁵ The FTC briefly considered the industry’s claims that eliminating advance fees would be an unsustainable business

219. Report of Temporary Receiver’s Activities, May 3, 2004–May 14, 2004, First Report to the Court, *FTC v. National Consumer Council, et. al.*, SACV 04-0474 CJC (JWJx).

220. *Id.*

221. WARREN, *supra* note 145, ch. 1.

222. Report of Temporary Receiver’s Activities, *supra* note 218.

223. *Id.* at 7-8. The receiver’s report reflects that “[t]he debt reduction process was promoted to potential and existing consumers as the opportunity to reduce consumer debt by 25% to 50% and then become debt free.” Based on the 57.3% settlement rate, the program was saving consumers an average of 42.7%, exclusive of fees. Even after the program fees are deducted, the program generated savings of approximately 20% from their principal balance *as of the start* for consumers who completed the program.

224. When the FTC shut down the NCC and its supporting companies, consumers enrolled in an NCC certified debt settlement program had, according to the court-appointed receiver, settled 40,572 cards totaling \$196,451,977 of debt for \$80,419,080 at an average settlement percentage of 41.57%. *Id.* When total average savings percentage was still over 33%. *Id.* These numbers did not and do not support the notion that consumers derive no benefit from a properly run debt settlement program.

225. FTC NPRM, *supra* note 8, at 42,008.

model and would create a barrier to entry; that the stream of clients’ advance fees is required to pay the marketing and labor costs that occur before and while settlement negotiations occur; and that if debt-settlement companies are not paid until after they complete settlement negotiations, they will be forced into the role of becoming their clients’ creditors.²²⁶ However, the agency found that “insufficient empirical data have been presented to substantiate that these purported benefits outweigh what appears to be substantial harm to consumers.”²²⁷

Significantly, the FTC acknowledged that

at least conceivably, such [an advance fee] prohibition could increase the costs incurred by any legitimate providers of debt relief services, make it impossible for some firms to continue to exist, and reduce the ability of new firms to enter the market. . . . If existing providers’ costs are increased, they could be forced to increase the prices they charge consumers for their services in order to remain solvent.²²⁸

However, the agency’s underlying doubts as to whether debt-relief provides any real services or benefits to consumers apparently negated this concern:

[T]he record lacks any empirical data on whether debt relief companies actually provide the debt relief as represented to consumers. In fact, the federal and state law enforcement record demonstrates that few, if any consumers who pay upfront fees, receive any benefits from the advance fee practices. Thus, any increase in costs resulting from the advance fee ban would be unlikely to outweigh the consumer injury resulting from the current fee practice.²²⁹

The third unfairness factor considered by the FTC was whether the injury caused by advance fees is one that consumers can reasonably avoid.²³⁰ The reasonable avoidance standard is designed to ferret out those instances where consumers can

make their own private purchasing decisions without regulatory intervention [and] survey the available alternatives, choose those that are the most desirable, and avoid those that are inadequate or unsatisfactory. However, it has long been

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.* at 42,008 n.235.

recognized that certain types of sales techniques may prevent consumers from effectively making their own decisions, and that corrective action may then become necessary.²³¹

In those circumstances, the FTC has taken the position that rulemaking, enforcement activity, or both, is appropriate.

The FTC based its NPRM determination that consumers cannot reasonably avoid the injury caused by advance fees on the unsupported and circular premises that “the offered services are illusory”²³² and “the promised services are almost never provided.”²³³ Yet the agency fails to identify any substantial evidence supporting these statements.²³⁴ Without any showing that the debt-relief industry is “fundamentally bogus,” as it purported to show with respect to credit-repair services, recovery services, and advance fee loan services when it enacted the advance fee prohibition in the original TSR,²³⁵ the FTC’s determination that injury from debt-relief companies cannot be reasonably avoided by consumers is based, at best, on assumption and speculation.

231. FTC Unfairness Policy Statement, *supra* note 126.

232. FTC NPRM, *supra* note 8, at 42,008.

233. *Id.*

234. The FTC’s support for its claim that services, “in most cases, are never provided to the vast majority of consumers,” is limited to information that was purportedly gathered from FTC enforcement actions. *Id.* at 42,006. As noted, however, in the only example identified by the FTC, which involved the NCC, the FTC’s conclusions were unfounded.

235. FTC Telemarketing Sales Rule Final Amended Rule, *supra* note 116, at 4,614.

VIII. THE FTC’S AUTHORITY TO AMEND THE TELEMARKETING SALES RULE TO ADOPT REGULATIONS TARGETED AT THE DEBT-RELIEF INDUSTRY

*“Plainly, if we were ‘to presume a delegation of power’ from the absence of ‘an express withholding of such power, agencies would enjoy virtually limitless hegemony”*²³⁶

In 2009, the FTC apparently determined that the debt-relief industry was harming American consumers and that its Section 5 authority to prohibit and enforce “unfair and deceptive acts or practices”²³⁷ was insufficient to effectively regulate the industry. In response, the FTC moved to enhance its available tools by utilizing the rulemaking process to curtail the debt-relief industry. Because the FTC staff “hated” the formal rulemaking process provided by Congress in the Magnuson–Moss Act, viewing it as “cumbersome,”²³⁸ the FTC is seeking to shortcut the process by unilaterally and improperly expanding the scope of the TCFAPA to justify issuance of rules governing the debt-relief industry.

The FTC’s rulemaking authority under the TCFAPA is limited to remedying abusive telemarketing sales practices.²³⁹ To the extent the FTC’s proposed rules legitimately address abusive telemarketing activities, the agency’s use of its TCFAPA rulemaking authority is probably appropriate to the extent particular debt-settlement marketing falls within the existing reach of the TSR. Examples of such provisions included among the proposed amendments are the disclosure requirements set forth in Proposed Section 310.3(a)(1)(viii)²⁴⁰ and the prohibited representations set out in Proposed Section 310.3(a)(2)(x).²⁴¹ These proposed amendments, although targeted solely at the debt-relief industry, implement new regulations designed to remedy purportedly abusive telemarketing sales practices, which is clearly within the scope of the authority granted to the FTC by Congress.

236. *Am. Bar Ass’n v. Fed. Trade Comm’n*, 430 F.3d 457, 468 (D.C. Cir. 2005) (quoting *Ry. Labor Exec. Ass’n v. Nat’l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994) (en banc)).

237. 15 U.S.C. § 45(a) (2006).

238. Rosch, *supra* note 88, at 3.

239. *See supra* Part III.

240. FTC NPRM, *supra* note 8, at 42,019.

241. *Id.*

The FTC's proposed TSR amendments are invalid to the extent they exceed that authority. In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*,²⁴² the Supreme Court discussed the standard for reviewing an agency's construction of a statute it administers: "First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."²⁴³ In evaluating Congress' intent, the courts utilize "traditional tools of statutory construction," including the terms, legislative history, and purposes of the statute.²⁴⁴ If the court "ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect."²⁴⁵

Both the express language of the TCFAPA and its legislative history make clear that the purpose of the Act was to remedy abusive *telemarketing sales practices* that were causing substantial harm to consumers' financial and privacy interests. Congress entrusted the FTC to utilize its "valuable experience in combating such activities"²⁴⁶ to "prescribe rules prohibiting deceptive telemarketing acts or practices and other abusive telemarketing acts or practices."²⁴⁷ To carry out this authority, Congress directed the FTC to establish a "definition of deceptive telemarketing acts or practices which shall include fraudulent charitable solicitations, and which may include acts or practices of entities or individuals that assist or facilitate deceptive telemarketing, including credit card laundering."²⁴⁸ The legislative history of the TCFAPA reflects that Congress never intended "that telemarketing practices be considered per se 'abusive.' The [House] Committee [on Energy and Commerce] is not interested in further regulating the legitimate telemarketing industry through this legislation."²⁴⁹

In its discussion of the kinds of "other abusive practice" that should be prohibited in the FTC's regulations, the House

242. 467 U.S. 837 (1984).

243. *Id.* at 842-43.

244. *Id.* at 843 n.9.

245. *Id.*

246. H.R. REP. NO. 103-20, at 8 (1994).

247. 15 U.S.C. § 6102(a)(1) (2006).

248. *Id.* § 6102(a)(2).

249. H.R. REP. NO. 103-20, at 4.

Committee’s report provided a laundry list of “inappropriate practices,” similar to the specific provisions that were expressly included in the Act.²⁵⁰ Beyond those delineated practices, the Committee stated that it “also intends that the FTC will identify such other abusive practices that would be considered by the reasonable consumer to be abusive *and thus violate such consumer’s right to privacy.*”²⁵¹ As an example of such “other abusive practices,” the Committee described a scenario where an aggressive telemarketer randomly calls consumers late at night in an effort to reach people who stay up late at night, disregarding the annoyance caused to the vast majority of consumers that would be awakened by such calls.²⁵² Significantly, the Committee provided no examples of “other abusive conduct” that supported, in any respect, the adoption of regulations of how or when telemarketers may charge consumers for their products or services.

In *Chevron*, the Supreme Court also set out the second part of the analysis to be applied in the event that a reviewing court determines that Congress’s intentions are unclear:

If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.²⁵³

In such instances, the court determines “whether the agency’s interpretation is a permissible construction of the statute.”²⁵⁴

250.

With respect to the bill’s reference to ‘other abusive practices,’ . . . the Committee intends that the Commission’s rulemaking will include proscriptions on such inappropriate practices as threats or intimidation, obscene or profane language, refusal to identify the calling party, continuous or repeated ringing of the telephone or engagement of the called party in conversation with an intent to annoy, harass, or oppress any person at the called number.

Id. at 8.

251. *Id.* (emphasis added).

252. *Id.*

253. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843 (1984).

254. *Mainstream Mktg. Sys., Inc. v. Fed. Trade Comm’n*, 358 F.3d 1228, 1250 n.16 (10th Cir. 2004).

In this case, the FTC adopted the original TSR, including the provisions prohibiting credit-repair services, recovery services, and advance fee loan services from charging advance fees, despite evidence that these provisions were inconsistent with the agency's *own* interpretation of the statutory authority that had been granted by Congress under the TCFAPA. This same analysis indicates that the FTC relied on its Section 5 rulemaking authority, rather than the authority granted by Congress in the TCFAPA, to implement the advance fee provisions in the original TSR. Because the FTC failed to comply with the Section 5 rulemaking requirements imposed by Magnuson–Moss when it enacted the advance fee provisions in the original TSR, however, those provisions, as well as the currently proposed amended advance fee provisions, are invalid.

In the Notice of Proposed Rulemaking for the original TSR, the FTC acknowledged several times that the “other abusive telemarketing practices” that Congress authorized the agency to address in Section 6102(a)(2) of the TCFAPA are linked to telemarketing conduct that affects consumers’ privacy rights. First, the agency affirmed that its proposed TSR prohibitions against threatening or intimidating a consumer, using profane or obscene language, or causing a consumer’s phone to ring repeatedly or continuously to annoy, abuse, or harass the consumer,²⁵⁵ “are directly consistent with the Act’s emphasis on privacy protection.”²⁵⁶ In addition, the FTC included in the Proposed Rules the House Report’s unambiguous statement directing the FTC to “identify other abusive practices that would be considered by the reasonable consumer to be abusive and thus violate such consumer’s right to privacy.”²⁵⁷

Finally, and most significantly, the FTC specifically addressed the question of its authority to promulgate rules governing “other abusive practices” that are not related to privacy when it discussed its application of its traditional unfairness analysis to the question of advance fees in the original TSR Proposed Rules. The agency acknowledged that “some of the practices prohibited as abusive under the Act flow directly from the

255. FTC Telemarketing Sales Rule Final Amended Rule, *supra* note 116, at 4613.

256. *Id.* at 4614. The FTC also acknowledged that Congress directed that these specific practices be addressed in the rules.

257. *Id.* at 4614 n.395.

Telemarketing Act’s emphasis on protecting consumers’ privacy.”²⁵⁸ However, the FTC went on to state that:

When the Commission seeks to identify practices as abusive that are less distinctly within that parameter, the Commission thinks it appropriate and prudent to do so within the purview of its traditional unfairness analysis, as developed in Commission jurisprudence and codified in the FTC Act. This approach constitutes a reasonable exercise of authority under the Telemarketing Act, and provides an appropriate framework for several provisions of the original rule.²⁵⁹

In other words, where the agency’s rulemaking exceeded the “parameter” of the privacy concerns addressed by Congress in the statute and the legislative history, the FTC apparently felt compelled to apply its traditional unfairness analysis to ensure that such rules did not exceed its Section 5 authority.²⁶⁰ Otherwise, if the FTC was confident that its rules prohibiting advance fees did not exceed the rulemaking authority delegated by Congress in the TCFAPA, there would be no reason to engage in the Section 5 unfairness analysis.

IX. CONCLUSION

The FTC’s attempt to promulgate debt-relief industry regulations that exceed the authority provided by the TSR is an example of the agency’s campaign to expand its authority beyond the limits imposed on it by Congress. The endgame is obvious—the FTC seeks to obtain complete regulatory and enforcement discretion by obtaining the authority to freely engage in APA rulemaking and employ the threat of unlimited Section 19(b) remedies in any enforcement action. Moreover, given the FTC’s stated desire to expand the availability of civil penalties beyond the limitations currently imposed by statute,²⁶¹ it can only be a matter of time before the FTC moves either to promulgate its own civil penalties or to impose such penalties under its overly inflated interpretation of Section 19(b). In

258. *Id.*

259. *Id.*

260. The agency apparently anticipates and attempts to head off this challenge, stating that “[w]hether privacy-related intrusions or concerns might independently give rise to a Section 5 violation outside of the Telemarketing Act’s purview is not addressed or affected by this analysis.” *Id.*

261. *See supra* note 59 and accompanying text.

short, the FTC continues “to push its statutory authority to the very brink and beyond.”²⁶²

Despite these coordinated efforts, we anticipate that significant legal challenges will be raised to the FTC’s expansionism. Objections to the agency’s Section 13(b) strategy have been raised in the District of Columbia, the Northern District of California and the Ninth Circuit, and we fully expect that upon thorough review, the courts will ultimately draw the correct conclusion that the agency was never authorized to obtain expansive Section 19(b) remedies beyond the situations outlined by Section 19(a). Similarly, we expect that if the FTC continues its efforts to promulgate debt-relief industry regulations under the dubious authority of the TSR, rather than wait for express guidance from Congress, the courts will repel such efforts as a violation of the agency’s statutory authority.

Given the questionable legal basis supporting the FTC’s attempt to amend the TSR, and the interest the debt-settlement industry is receiving from Congress and various state legislatures, it appears that the FTC’s aggressive attack on the settlement industry is motivated by political pressure exerted by special interest groups opposing the industry, rather than a genuine concern for consumers suffering a crisis of debt. As Commissioner Rosch acknowledged, there is a place for debt settlement as a tool to address consumer debt issues: the task at hand at this point is to “separate the wheat from the chaff.”²⁶³ The FTC’s proposed TSR amendment does not address this task. Rather, it lays to waste the entire wheat field. Unfortunately, this scorched earth philosophy is entirely consistent with an agency that appears more focused on expanding its authority and flexing its muscles than it is with ensuring consumers have safe and available options to deal with crushing debt.

262. See *supra* note 58 and accompanying text.

264. *Transcript of FTC Debt Settlement Workshop 14* (Sept. 25, 2009) available at www.FTC.gov/bcp/workshops/debtsettlement/officialtranscript.pdf.