

**United States Federal Trade Commission Staff Comment on the
United Kingdom Department of Business Innovation & Skills
*Civil Enforcement Remedies: Consultation on extending the range of remedies available to
public enforcers of consumer law***

Staff of the United States Federal Trade Commission (“FTC”)¹ appreciates this opportunity to provide input to the consultation issued by the U.K. Department of Business Innovation & Skills (“BIS”), *Civil Enforcement Remedies: Consultation on extending the range of remedies available to public enforcers of consumer law*. Although the consultation covers several topics, our comment focuses on the importance of providing public authorities that enforce consumer protection laws with the ability to recover and distribute monetary redress to aggrieved consumers, both domestically and across borders.

Over the years, the FTC and the Office of Fair Trading (“OFT”) have had a close and highly beneficial relationship on issues that affect U.S. and U.K. consumers. The FTC has viewed the OFT as one of its leading enforcement partners, and has valued the OFT’s extensive enforcement and market-oriented approach in international consumer protection enforcement and policy discussions. This shared approach guided our previous three comments on U.K. consumer policy issues.² We expect to continue our close relationship with the U.K.’s public enforcers once the changes to the consumer landscape have been implemented fully, and therefore have a keen interest in ensuring that our consumer protection systems continue to be interoperable.

The current BIS consultation seeks input on the types of remedies that should be incorporated into civil law Enforcement Orders and undertakings under Part 8 of the Enterprise Act 2002, which currently provides only for injunctive relief against certain infringements of U.K. consumer protection legislation. Based on our experience, we recommend that BIS provide public enforcers with a mechanism to obtain monetary redress in appropriate cases and distribute it to wronged consumers. This type of authority would meet BIS’s goal of creating an enforcement regime that looks “not just to deterrence, but also to providing restorative justice for consumers, especially vulnerable consumers, who are not easily able to launch their own civil actions in the small claims courts to secure their rights.”

¹ These comments represent the views of the staff of the FTC and not necessarily the official views of the FTC or any individual commissioner.

² FTC staff has submitted two comments to BIS and its predecessor department. See “United States Federal Trade Commission Staff Comment on the United Kingdom Department of Business Innovation & Skills Consultation, Empowering and Protecting Consumers: Consultation on institutional changes for provision of consumer information, advice, education, advocacy and enforcement,” available at <http://www.ftc.gov/os/2011/09/110927bislandscapeconsultation.pdf>; “United States Federal Trade Commission Staff Response to the U.K. Department for Business Enterprise & Regulatory Law Reform’s Consumer Law Review (Apr. 2008), available at <http://www.ftc.gov/oia/berrconsumerlaw.pdf>. Former FTC Chairman Deborah Majoras also submitted a comment in response to the Hampton Commission. See “Comment of Deborah Platt Majoras, Chairman, United States Federal Trade Commission on Proposed Consumer and Trading Standards Authority” (2005), available at <http://www.ftc.gov/bc/international/docs/majorasresponsedti.pdf>.

FTC staff believes that governmental redress authority is a critical component of an effective redress system for consumers. Although injunctive relief protects consumers from future harm, it does not remedy the injury to consumers caused by a defendant's past actions or deprive a defendant of monetary gains from illegal conduct. By depriving wrongdoers of wrongful gains and distributing them to wronged consumers, monetary consumer redress serves as a compensatory function as well as a deterrent one. As the BIS consultation recognizes, "most of all, [consumers] want their position restored as though a purchase had not been made, if necessary by getting their money back." Governmental redress authority is an important tool to help accomplish this: it gives consumers (all or some of) their money back and restores consumer confidence in the marketplace.

FTC staff's view is based on our own experience in the United States. The FTC deals with issues that touch the economic life of every American. It is the only federal agency in the United States with both consumer protection and competition jurisdiction in broad sectors of the economy. It has a strong market orientation, grounded in the important role that enforcement of consumer protection and antitrust laws have played in maintaining the competitiveness of U.S. markets. In the consumer protection enforcement area, the FTC enforces a general prohibition against "unfair and deceptive acts or practices" in commerce found in Section 5 of the FTC Act. The agency also enforces numerous specific consumer protection laws and rules.³

To enforce these substantive provisions of law, the FTC Act authorizes the agency to file federal district court lawsuits seeking preliminary and permanent injunctions when the FTC has reason to believe that a law violation has occurred.⁴ These injunctions can include equitable relief, such as monetary redress for consumers, disgorgement of profits and rescission of contracts. In addition to redress authority, the FTC also has the authority to obtain monetary civil penalties in certain circumstances, i.e., where a statute expressly provides for such penalties, based on statutorily-determined penalty amounts.⁵ In regular practice, though, the FTC relies on its authority to seek monetary redress in most cases brought under Section 5 of the FTC Act.

The vigorous use of governmental redress powers can provide consumers with substantial monetary redress that they might not be able to obtain through other routes. Over the years, the

³ A brief overview of the FTC's investigative and law enforcement authority is available at <http://www.ftc.gov/ogc/brfovrwv.shtm>.

⁴ Since 1973, Section 13(b) of the FTC Act (codified at 45 U.S.C. § 53(b)) has authorized the agency to request that a federal district court enjoin acts that violate the laws that the agency enforces. Courts have uniformly held that this authority to seek an injunction invokes the full range of a court's equitable powers. Accordingly, the FTC has frequently obtained equitable monetary relief in federal court actions. A separate provision authorizes the FTC to seek monetary relief in administrative cases in a later court action when the act or practice is one "which a reasonable man would have known under the circumstances was dishonest or fraudulent." 45 U.S.C § 57b(a)(2). All actions filed by the FTC are in the name of the agency, not individual consumers. The FTC Act does not provide a private cause of action.

⁵ A majority of FTC Commissioners have urged Congress to expand the agency's civil penalty authority as a complement to its monetary redress authority. Broad civil penalty authority for FTC Act violations would enable the agency to more effectively deter unfair and deceptive trade practices, especially in cases in which obtaining consumer redress is impossible or impractical. Prepared Statement of the Federal Trade Commission on Financial Services and Products: The Role of the Federal Trade Commission Protecting Consumers before the Senate Committee on Commerce, Science and Transportation, 17 (Feb. 4, 2010), <http://www.ftc.gov/os/testimony/P064814financial-services.pdf>.

FTC has developed a considerable consumer redress program. From March 16, 2011 to February 29, 2012, the FTC was awarded over \$220 million in redress, and 1.5 million consumers received redress. From April 2010 to February 2011, the FTC mailed redress checks to 1.2 million consumers for a total of more than \$40 million.

The FTC obtained these redress funds through litigated judgments from federal courts and through settlement agreements approved by the courts. For example, last year, the FTC returned \$108 million to over 450,000 consumers through an agreement with Countrywide Home Loans, Inc. resolving charges stemming from Countrywide's mortgage servicing practices. The FTC also entered into an agreement with Skechers requiring the company to pay \$40 million to provide refunds over charges that it made unfounded claims that its shoes would help people lose weight and tone their legs and buttocks. A similar agreement with Reebok provided for \$25 million for consumer redress. The agency also obtained a litigated judgment of \$5.5 million as restitution for consumer redress from several defendants engaged in a mortgage rescue scheme.

As these examples show, the FTC uses its monetary redress authority in a wide variety of cases to provide restorative justice to consumers. To determine the amount of consumer harm, the FTC's economists prepare analyses that are used in negotiations and cases, and also serve as expert witnesses in litigation. When distributing redress, the FTC works with several contractors to help it reach consumers and administer the redress program.

The BIS consultation paper indicates that some U.K. businesses have raised concerns about the availability of monetary redress in civil, as opposed to criminal proceedings.⁶ BIS states that it believes the civil standard remains appropriate in consumer protection cases, but is seeking input from stakeholders on this issue. We agree with BIS.

The FTC has only civil enforcement authority under the FTC Act and our monetary redress proceedings do not require a criminal burden of proof.⁷ Our redress program is built on the FTC's civil litigation authority under Section 13(b) of the FTC Act. Staff believes that the burden of proof required in FTC civil cases, and the concomitant level of evidence required to prove violations of consumer protection laws and obtain monetary redress, is proportionate to the nature and extent of the harm done and the need to prevent further law violations.

To make any grant of monetary redress powers to public enforcers effective, it is also important to ensure that consumer protection enforcers have adequate resources, investigative and enforcement powers, relationships with foreign counterparts, and abilities to track and freeze assets. We recommend that as BIS considers extending the range of remedies available to public enforcers for violations of consumer protection laws, it consider the types of resources such enforcers will require to implement these remedies effectively. Additionally, from a global perspective, it is critical that authorities have the ability to receive and distribute redress monies obtained by consumer protection and other law enforcement agencies overseas directly to

⁶ Department of Business Innovation & Skills ("BIS"), *Civil Enforcement Remedies: Consultation on extending the range of remedies available to public enforcers of consumer law*, ¶¶ 2.18-2.20.

⁷ The FTC has a Criminal Liaison Unit ("CLU") that works to ensure that the full range of civil and criminal law enforcement measures are deployed to protect consumers. The CLU coordinates with criminal law enforcement agencies across the country to encourage criminal prosecution of consumer fraud.

domestic consumers. In the United States, the U.S. SAFE WEB Act of 2006, which is incorporated into the FTC Act, expressly confirms the FTC's ability to obtain and award restitution to foreign as well as U.S. consumers.

The usefulness of a governmental redress authority is particularly strong in the cross-border context. There are other mechanisms in the United States that can be used to provide redress to consumers, such as alternative dispute resolution systems, payment card chargeback mechanisms, small claims courts, and private collective/class actions. Such mechanisms, however, may not be feasible for cases of deceptive practices affecting large numbers of consumers, such as Internet-based practices that distort global online markets. This is particularly true when there are relatively small individual losses.

More specifically, in cross border context, government agencies have a unique ability to bring complex lawsuits against unscrupulous marketers who have harmed large numbers of consumers. The FTC's experience shows the need for a cross-border redress component in a global economy – indeed, the FTC has distributed millions of dollars in redress to consumers all over the world. During the past decade, the FTC distributed \$3.8 million to consumers outside the United States. Monetary consumer redress is also important in the cross-border context given the difficulties of obtaining recognition and enforcement of penal or public judgments (including orders for fines and penalties) in foreign jurisdictions. These foreign jurisdictions may be more amenable to enforcing monetary redress judgments that are designed to compensate consumers for damages they suffered as a result of violations of law.

FTC staff appreciates the opportunity to submit this comment. Please feel free to contact Stacy Feuer, Assistant Director for International Consumer Protection at the Office of International Affairs, at sfeuer@ftc.gov or 202-326-3072, or Guilherme Roschke, Counsel for International Consumer Protection in the same office, at groschke@ftc.gov or 202-326-3677, if you have any questions or would like any additional information about the issues raised in this Staff Comment.