

United States Federal Trade Commission Staff Response to the U.K. Department for Business Enterprise & Regulatory Law Reform's Consumer Law Review: Call for Evidence

The staff of the United States Federal Trade Commission (FTC)¹ respectfully submits this brief response to the U.K. Department of Business, Enterprise and Regulatory Reform's call for evidence on the U.K. consumer law review (the Call for Evidence). FTC staff appreciates the opportunity to provide input. This comment is in four sections. The first provides background about the FTC and its international activities. The next two sections provide some perspective from the FTC's experience in response to questions on the case for reform and legislative options raised in Sections 1 and 2 of the Call for Evidence. The fourth, in response to Section 3 of the Call for Evidence, emphasizes the critical importance of ensuring that consumer protection regulators have the authority to recover and distribute monetary redress to aggrieved consumers, both domestically and across borders.

Introduction: FTC

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. The FTC pursues vigorous and effective law enforcement; develops policy and research tools through hearings, workshops, and conferences; and creates practical and plain-language educational programs for consumers and businesses in a global marketplace with constantly changing technologies.

The FTC is first and foremost an agency dedicated to consumer welfare. 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. Increasingly, as more U.S. companies and consumers do business overseas, and as technological developments make consumer protection more of a global concern, the FTC's work involves international cooperation. The FTC works with more than 100 foreign competition and consumer protection authorities around the world, and cooperates with foreign authorities on enforcement and policy matters through formal and informal agreements. In particular, the FTC has a close relationship with our counterparts at the U.K. Office of Fair Trading (OFT), and shares OFT's belief that making markets work well is the best protection for consumers and businesses. The FTC works closely with the OFT on many international consumer protection and enforcement and policy issues, on a bilateral basis through two memoranda of understanding, and in multilateral organizations such as the Organisation for Cooperation and Development (OECD), the International Consumer Protection and Enforcement Network (ICPEN), and the London Action Plan, and international anti-spam enforcement network.

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.

Section 1: The case for reform

Section 1 of the Call for Evidence raises general questions about the current regulatory framework in the U.K, including the challenges of legislative complexity and future adaptability. FTC staff has been following recent developments in European and U.K. consumer legislation closely. We are interested in seeing how the OFT enforces the new Consumer Protection from Unfair Trading Regulations (CPRs), which implement the European directive on unfair commercial practices (UCPD). As we discuss in more detail in Section 2, below, careful implementation of the general “duty to trade fairly” in this new legislation may provide some of the simplification, flexibility, and updating that are among the goals of the U.K. consumer law review.

Section 1 (Question 4) also asks about the value of information provision requirements. FTC staff has done some empirical work related to this question that you may find useful. Thus a 2007 FTC Bureau of Economics study, *Improving Consumer Mortgage Disclosures: An Empirical Assessment of Current and Prototype Disclosure Forms*, by James M. Lacko and Janis K. Pappalardo, presents the results of 36 in-depth interviews with recent mortgage customers, and quantitative consumer testing with over 800 mortgage customers. The study examined how consumers search for mortgages; how well consumers understand current mortgage cost disclosures and the terms of their own recently obtained loans; and whether better disclosures could improve consumer understanding of mortgage costs, consumer shopping for mortgage loans, and consumers’ ability to avoid deceptive lending practices. The results of the study show that current U.S. mortgage cost disclosures fail to convey key mortgage costs to many consumers, and that prototype disclosures developed for the study significantly improved consumer recognition of mortgage costs, demonstrating that better disclosures are feasible.²

Another example is a 2004 study, *The Effect of Mortgage Broker Compensation Disclosures on Consumers and Competition: A Controlled Experiment*, also by James M. Lacko and Janis K. Pappalardo. This report presents the results of a controlled experiment with over 500 U.S. mortgage customers to examine a mortgage broker compensation disclosure proposed by the Department of Housing and Urban Development (HUD). The focus of the disclosure is on any “yield spread premium” paid by the lender to the broker for loans originated with “above par” interest rates. The study finds that the disclosure is likely to confuse consumers, cause a significant proportion to choose loans that are more expensive than the available alternatives, and create a substantial consumer bias against broker loans, even when the broker loans cost the

² This report and related materials are available from the FTC website at <http://www.ftc.gov/be/econrpt.shtm> . See also the transcript and related materials from the May 29, 2008 FTC conference, Consumer Information and the Mortgage Market, available at <http://www.ftc.gov/be/workshops/mortgage/index.shtml> , and the June 11, 2008 FTC Staff Comment Before the Department of Housing and Urban Development Concerning the Real Estate Settlement Procedures Act ("RESPA"), available at <http://www.ftc.gov/os/2008/06/V080012respa.pdf> .

same or less than direct lender loans. The report concludes that a better way to help consumers obtain less expensive mortgages would be to encourage and facilitate consumer comparison shopping on loan costs.³

On a related note, we note that it is useful to provide consumers and businesses with clear and practical guidance of their rights and obligations under consumer-related laws, particularly for new legislation. The FTC has developed many plain-English consumer education materials for new laws and regulations. For example, in 2003 Congress passed amendments to the Fair Credit Reporting Act, which promotes the accuracy, fairness, and privacy of information in the files of consumer reporting agencies. The amendments, contained in the Fair and Accurate Credit Transactions Act, require each of the nationwide credit reporting agencies to provide consumers with a free copy of their credit reports once every 12 months.⁴ The FTC launched a major campaign that includes numerous publications written in plain English plus a website - <http://www.ftc.gov/credit> - to explain to consumers clearly and concisely their rights in this area of the law.

Section 2: Options for legislative reform

Section 2 of the Call for Evidence focuses on the regulatory framework and poses a set of questions about reforming legislative instruments. From our perspective, while a mix of “prescriptive” and “principles-based” legislation is probably unavoidable, we think the move toward a greater use of general principles in consumer protection legislation, as in the UCPD and the CPRs, makes sense in rapidly changing market economies. We enforce numerous specialized consumer protection laws pertaining to, for example, telemarketing, unsolicited commercial email (spam), consumer credit, and privacy and information security, and specific legislative direction and authority can be useful in some circumstances. At the same time, the FTC’s primary authority and the majority of its enforcement activity derive from the FTC’s general consumer protection statute, Section 5 of the FTC Act.⁵

The core of the FTC Act in the consumer protection area is Section 5(a), which prohibits unfair or deceptive acts or practices in or affecting commerce, and is analogous to the general duty to “trade fairly” in the new U.K. legislation. In general, deceptive practices are representations, omissions or practices that are likely to mislead a reasonable consumer and are likely to affect a consumer’s course of conduct with respect to a product or service.⁶ Unfair acts

³ This report and related materials are available from the FTC’s website at <http://www.ftc.gov/be/econrpt.shtm>.

⁴ 15 U.S.C. §§ 1681 *et seq.*

⁵ 15 U.S.C. §§ 45. The FTC Act is codified at 15 U.S.C. §§ 41-57.

⁶ These principles are summarized in the FTC’s “Deception Statement.” *See* Letter from the Federal Trade Commission to The Honorable John D. Dingell, Chairman, Committee on Energy and Commerce (Oct. 14, 1983), *reprinted in Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 175-83 (1984), and available at <http://www.ftc.gov/bcp/policystmt/ad-decept.htm>.

or practices are those that cause “substantial injury” – injury that is not outweighed by countervailing benefits and that a consumer could not have reasonably avoided.⁷ This broad general prohibition against “unfair and deceptive acts or practices” allows the FTC to bring law enforcement actions against a broad and evolving range of practices that cause harm to consumers. The FTC has long recognized that the flexible nature of this doctrine permits the Commission to adapt our specific strategies to the changing circumstances in the market place and to new technologies and any new threats and schemes facilitated by such new technologies. For example, the FTC brought more than 50 cases in which unsolicited commercial email – spam – was an integral element of the alleged overall deceptive or unfair practice even before the passage of the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (the “CAN-SPAM Act”), which was designed specifically to address spam, in 2003.⁸ Most of those cases focused on the deceptive content of the spam message, alleging that the various defendants violated Section 5 of the FTC Act through misrepresentations in the body of the message while others also included allegations about the manner in which the spam was sent. The FTC’s broad authority under Section 5 is one way to address the issue of “future-proofing” discussed in the Call to Evidence.

Section 3: Consumer empowerment and redress

Section 3 of the Call for Evidence focuses on consumer empowerment and redress including legal redress. From our perspective, it would be useful to consider broadening consumer protection regulators’ powers to recover and redistribute the proceeds of fraud and deception to affected consumers. In our experience, governmental redress authority is a critical component of an effective redress system for consumers. Although injunctive relief protects the public 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 a compensatory function as well as a deterrent one. It is an important tool to alleviate consumer injury and restore consumer confidence in the marketplace. In addition to the U.S., several other countries have begun to recognize the importance of monetary redress for an effective consumer protection system. In the last few years, several countries in Europe and elsewhere have begun to give their consumer protection agencies authority to obtain monetary redress on behalf of aggrieved consumers.⁹ Indeed, we understand that the Regulatory

⁷ These principles are summarized in the FTC’s “Unfairness Statement.” See Letter from the Federal Trade Commission to Hon. Wendell Ford and Hon. John Danforth, Committee on Commerce, Science and Transportation (Dec. 17, 1980), reprinted in *International Harvester Co.*, 104 F.T.C. 1070 (1984), and available at <http://www.ftc.gov/bcp/policystmt/ad-unfair.htm>.

⁸ 15 U.S.C. § 7710(2).

⁹ See generally, Prof. Dr. Jules Stuyck *et al.* [The Study Centre for Consumer Law – Centre for European Economic Law, Katholieke Universiteit Leuven, Belgium], “Final Report: An analysis and evaluation of alternative means of consumer redress other than redress through ordinary judicial proceedings” (Jan. 16, 2007), available at www.ec.europa.eu/consumers/redress/reports_studies/comparative_report_en.pdf; see also Law

Enforcement and Sanctions Act 2008, which gives U.K. regulators such as the OFT new powers to impose civil monetary penalties as well as discretionary powers to provide restorative justice, has received Royal Assent.

The vigorous use of such powers can provide consumers with substantial monetary redress that they might not be able to obtain through other routes. Over the years, the FTC has developed a considerable consumer redress program. From March 2007 through February 2008, the FTC filed 38 actions in federal district court and obtained 111 judgments and orders requiring defendants to pay over \$240 million in remedies. This figure includes more than \$161 million in consumer redress and referrals to the Department of Justice which resulted in 16 civil penalty orders and more than \$11 million in civil penalties. During the same time period in the previous year, the FTC filed 59 actions in federal district court and obtained 120 judgments and orders requiring defendants to pay \$414 million in redress to consumers, and \$12 million in civil penalties. The FTC returns millions of dollars of these funds to defrauded consumers, both in the U.S. and abroad. Although the FTC, of course, encounters obstacles in collecting all of the monetary amounts ordered by the courts, monetary redress is an important part of our overall consumer protection system.

The usefulness of governmental redress authority is particularly strong in the cross-border context. There are other mechanisms in the U.S. that can be used to provide redress to consumers domestically and across borders (e.g., alternative dispute resolution/online dispute resolution, payment card chargeback mechanisms, small claims courts, and private collective/class actions). Such mechanisms, however, are not feasible for cases of fraudulent or deceptive practices affecting large numbers of consumers, such as sweepstakes and lottery scams, pyramid schemes, and Internet-based frauds, particularly when there are relatively small individual losses. This may be even more true in the case of jurisdictions where there are a more limited range of routes in the civil justice system for consumers to pursue redress even in purely domestic situations.

More specifically, in cross-border cases, government agencies have a unique ability to bring complex lawsuits against fraud operators who have harmed large numbers of consumers. The FTC's redress program 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 around the world. For example, in fiscal years 2006 and 2007, the FTC distributed a total of nearly \$1.3 million to consumers located outside the United States. Monetary consumer redress, in the form of restitution or other restorative payments to consumers, 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. Foreign jurisdictions, however, may be more amenable to enforcing restitutionary or restorative money

No. 19.955, Art. 51 (Chile 2004) (Chilean law authorizing national consumer protection agency and other specified groups to file collective lawsuits for monetary redress).

judgments obtained by government agencies. The U.S.- Australia Free Trade Agreement, for example, contains a provision facilitating the efforts of government agencies in each jurisdiction to enforce restitutionary judgments on behalf of defrauded consumers.¹⁰

To make any grant of redress powers effective, it is also important to ensure that consumer protection regulators have adequate resources, investigative and enforcement powers, relationships with foreign counterparts, and abilities to track and freeze assets, and provide redress to both domestic and foreign consumers. From a global perspective, it is critical that the U.K. consumer protection agency have the authority to receive and distribute any redress monies obtained by consumer protection and other law enforcement agencies overseas directly to U.K. consumers. We are aware of at least one cross-border telemarketing matter where the OFT's lack of authority, at the time, to distribute funds obtained by Canadian law enforcement officials created difficulties in providing U.K. consumers with restitution. In the United States, the U.S. SAFE WEB Act of 2006, which amends the FTC Act to provide the FTC with additional tools to combat cross-border fraud, expressly confirms the FTC's ability to obtain and award restitution to foreign as well as U.S. consumers.¹¹ We believe that this type of authority is important for national consumer protection regulators.

The FTC staff again appreciates the opportunity to submit this comment. Please feel free to contact Hugh G. Stevenson, Deputy Director for International Consumer Protection in the FTC's Office of International Affairs, at hstevenson@ftc.gov or 202-326-3511, or Stacy Feuer, Assistant Director for International Consumer Protection in the same office, at sfeuer@ftc.gov or 202-326-3072, if you have any questions or would like any additional information about the issues raised in this Staff Comment.

¹⁰U.S.-Australia Free Trade Agreement, art. 14.7.2, U.S.-Austl., May 18, 2004, *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/Australia_FTA/Final_Text/Section_Index.htm.

¹¹15 U.S.C. § 45(a)(4)(B) (remedies for violations of Act's provisions on "unfair and deceptive acts or practices" include "restitution to domestic or foreign victims."); *see also* OECD, "Guidelines for Protecting Consumers from Fraudulent and Deceptive Commercial Practices across Borders" (2003), *available at* <http://www.oecd.org/dataoecd/43/50/38960101.pdf>.