Comments to the Federal Trade Commission
regarding
Hearings on Competition and Consumer Protection in the 21st Century

FR Doc. 2018–16608, 83 Fed. Reg. 38307 (Aug. 6, 2018)

by the

National Consumer Law Center on behalf of its low income clients,[1]
Americans for Financial Reform,[2] Consumer Action,[3] and the
National Association of Consumer Advocates[4]

August 20, 2018

Comments on Topic 10: The interpretation and harmonization of state and federal statutes and regulations that prohibit unfair and deceptive acts and practices

We thank the Commissioners for the opportunity to comment on the matters described in its request for public comment on its proposed Hearings on Competition and Consumer Protection in the 21st Century. These comments address Topic 10. Per the Commission's instructions, we have separately submitted brief comments on Topic 11. If the Commission schedules hearings on these or other topics affecting consumers, we will likely file more detailed comments at that point.

We urge the FTC not to hold hearings on harmonization between the FTC Act and state UDAP laws.

Topic 10 of the FTC's request for information asks "whether the Commission can, and to what extent it should, take steps to promote harmonization between the FTC Act and similar statutes[]" prohibiting unfair and deceptive acts and practices (UDAP laws). While we encourage the FTC to collaborate with state consumer protection authorities when appropriate, we urge it not to seek, through hearings or otherwise, to bring state consumer protection laws into conformity with the FTC Act.

We are not aware of any authority the FTC may have to compel states to harmonize their state UDAP laws with the FTC Act. Nor do we believe the FTC should encourage states to do so. Although most state UDAP laws are based on the UDAP provisions in the FTC Act, there is still great diversity among their provisions.[5] But all state UDAP laws have one important aspect in common: they all give consumers a private right of action. While the FTC's enforcement actions bring relief to many consumers and shut down many fraudulent operations, it simply cannot police the market in all fifty states. Consumers have to rely on their state consumer protection statutes when they have been deceived or treated unfairly, and it is the private right of action that makes this possible.

Promoting true harmonization between the FTC Act and state laws would mean weakening the stronger state laws and strengthening the weaker ones. But in practice, harmonization or standardization usually results in weakening all laws to meet the lowest common denominator. We strongly discourage any attempt to weaken state UDAP laws.

States should have the right to give their citizens more protection than available under federal law. That principle is enshrined in the constitutional doctrine of federalism. Eminent Supreme Court justices, such as Oliver Wendell Holmes, Jr. and Louis Brandeis have memorably emphasized that federalism allows states to independently experiment.[6] Doing so can ultimately benefit the nation. States have long been considered a "laboratory of democracy" and "should be able to test their own solutions to problems observed in their constituencies . . . ."[7] Attempting to compel states to standardize their consumer protection laws will federalize the regulation of many local transactions and thereby hurt consumers whose problems do not attract attention from federal authorities.

A number of states provide in their UDAP statutes that courts are to use FTC rulings as a guide. Thus, strong FTC standards benefit the states. Even where there is no explicit statutory provision to this effect, courts, state enforcement agencies, and litigants often look to the FTC for leadership, both on well-known and on emerging issues. But the weight to give FTC interpretations is and should remain a matter for each state to determine.

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[1] Since 1969, the nonprofit **National Consumer Law Center® (NCLC®)** has used its expertise in consumer law and energy policy to work for consumer justice and economic security for low-income and other disadvantaged people, including older adults, in the United States. NCLC's expertise includes policy analysis and advocacy; consumer law and energy publications; litigation; expert witness services, and training and advice for advocates. NCLC works with nonprofit and legal services organizations, private attorneys, policymakers, and federal and state government and courts across the nation to stop exploitive practices, help financially stressed families build and retain wealth, and advance economic fairness.

[2] **Americans for Financial Reform (AFR)** is a nonpartisan coalition of more than 200 civil rights, consumer, labor, business, investor, faith-based, and civic and community groups. Formed in the wake of the 2008 crisis, we are working to lay the foundation for a strong, stable, and ethical financial system—one that serves the economy and the nation as a whole.

[3] **Consumer Action** has been a champion of underrepresented consumers since 1971. A national, nonprofit 501(c)3 organization, Consumer Action focuses on financial education that empowers low to moderate income and limited-English-speaking consumers to financially prosper. It also advocates for consumers in the media and before lawmakers and regulators to advance consumer rights and promote industry-wide change particularly in the fields of consumer protection, credit, banking, housing, privacy, insurance and utilities.

[4] The **National Association of Consumer Advocates (NACA)** is a nonprofit association of more than 1,500 consumer advocates and attorney members who represent hundreds of thousands of consumers victimized by fraudulent, abusive and predatory business practices. As an organization fully committed to promoting justice for consumers, NACA's members and their clients are actively engaged in promoting a fair and open marketplace that forcefully protects the rights of consumers, particularly those of modest means.

[5] NCLC described the range of state UDAP provisions in a March 2018 report, available at https://www.nclc.org/issues/how-well-do-states-protect-consumers.html.

[6] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."); Truax v. Corrigan, 42 S. Ct. 124, 134 (1921) (referring to "the making of social experiments that an important part of the community desires[] in the insulated chambers afforded by the several states").

[7] Tammy Murray, State Innovation in Health Care: Congress' Broad Spending Power Under A National Health Care System Will Stifle State Laboratories of Democracy A Government That Is Big Enough to Give You All You Want Is Big Enough to Ta, 3 Ind. Health L. Rev. 263, 265–66 (2006)