



The Consumer Financial Protection Agency and the Hazards of Regulatory Restructuring

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The United States is in the midst of an important debate about how best to protect consumers of financial services and products. The Administration has proposed the creation of a new agency, the Consumer Financial Protection Agency (CFPA), which would have exclusive rulemaking authority and primary enforcement authority over consumer financial protection statutes and any rules promulgated by the CFPA.¹ The legislation divests consumer financial protection functions from the Federal Trade Commission (FTC) and certain other federal regulators and places them in the CFPA.² Although the legislation leaves wholly intact the authority of the Department of Justice, the Securities and Exchange Commission, and the Commodity Futures Trading Commission,³ proponents of the CFPA argue that consolidation of consumer financial protection in the CFPA will provide more robust protection for consumers than our current system.

The periodic reassessment of the distribution of regulatory authority and the routine evaluation of the performance of individual regulatory bodies are sound elements of public administration. No single agency or collection of bodies entrusted with shared regulatory tasks should be exempt from a regular, probing examination of how well they carry out their responsibilities. Good regulatory design is the product of a continuous process of experimentation and evaluation, and one would expect the configuration of regulatory authority to change over time in light of experience.

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¹ For purposes of this discussion, the Administration's legislative proposal, the Consumer Financial Protection Agency Act of 2009 (CFPA Act), does not differ materially from H.R. 3126, the legislation proposed by Representative Barney Frank, Chairman of the House Financial Services Committee. All statute citations refer to sections of the CFPA Act.

² The other federal regulators affected by the legislation are: the Federal Reserve Board; the Office of the Comptroller of the Currency; the Federal Deposit Insurance Corporation; the Office of Thrift Supervision; and the National Credit Union Administration.

³ Section 1021(f) of the Consumer Financial Protection Agency Act of 2009, H.R. 3126 (introduced in the House of Representatives on July 8m 2009) specifies that the legislation is not intended to affect the authority of the Department of Justice, the Securities and Exchange Commission, or the Commodity Futures Trading Commission, though coordination between the two agencies and the CFPA is required with respect to any rule regarding a product or service that is the same type of product, or that competes directly with, a product or service subject to the CFPA's jurisdiction.

My primary concern with the CFPB proposal is that it will not improve consumer financial protection but will degrade it. As now conceived, the CFPB also may have the unexpected consequence of diminishing the quality of consumer protection in non-financial sectors. The proposed alternative consumer protection framework for financial services reflects a terribly imperfect understanding of the FTC's work in this area and how the suggested redistribution of regulatory tasks will affect the quality of financial services oversight and alter the Commission's capacity to fulfill duties in other areas of the economy.

Two critical public policy problems attend the proposed divestiture of consumer financial protection functions from the FTC and other federal regulatory authorities and the placement of these functions at the federal level within the CFPB. Each deserves careful consideration as Congress contemplates the adoption of these and related proposed reforms.

The CFPB Will Weaken Consumer Financial Protection

Divesting the FTC of all of its consumer financial protection functions will reduce – not enhance – the quality of consumer protection involving financial services. Unlike the other federal agencies with consumer financial protection responsibilities, the FTC's distinctive institutional design combines a valuable collection of policy perspectives. The FTC's consumer protection work benefits significantly from the agency's capabilities in economic analysis and competition policy. Like the FTC's Bureau of Consumer Protection, the agency's Bureau of Economics and Bureau of Competition report directly to the Commission and its Chairman. The FTC's unique institutional framework has evolved over decades and ensures that the FTC is more than just a law enforcement agency. The FTC protects consumers through law enforcement, policy research and development, rulemaking, consumer education, and the issuance of guidance.³⁹ The FTC's Bureau of Economics influences the agency's consumer protection work in two important ways. First, the Bureau of Economics reviews every proposed consumer protection enforcement matter, settlement, and rulemaking, and can make its own independent recommendation to the Commission. The independence of the FTC's economists strengthens the vetting of the agency's consumer protection initiatives and helps ensure that policies designed to protect consumers do so without having adverse economic consequences.

Second, the Bureau of Economics conducts vital research that shapes the FTC's policy and educational initiatives. A prominent example includes the Bureau's seminal research on mortgage disclosures, which found that mortgage disclosure forms fail to convey key mortgage costs and terms to many consumers.⁴⁰

³⁹ See generally Prepared Statement of Stephen Calkins, Testimony Before the Subcommittee on Commerce, Trade, and Consumer Protection, Committee on Energy and Commerce, United States House of Representatives, Jul. 8, 2009, available at http://energycommerce.house.gov/Press_111/20090708/testimony_calkins.pdf (hereinafter "Calkins testimony").

⁴⁰ See Federal Trade Commission, Bureau of Economics Staff Report, *Improving*

Consumer Mortgage Disclosures: An Empirical Assessment of Current and Prototype Disclosure Forms (June 2007), available at <http://www.ftc.gov/os/2007/06/P025505mortgagedisclosurereport.pdf>.

The Bureau of Economics built upon its state of the art research by convening a conference at which experts on real estate economics, information economics, consumer behavior, and consumer information policy examined how consumer information and information regulation affects consumer choices, mortgage outcomes, and consumer welfare with the goal of developing concrete policy proposals.⁴¹ This type of research and intellectual leadership guides the FTC's policy initiatives and helps direct the FTC's consumer education activities in the financial services area and beyond.

Similarly, the FTC's Bureau of Competition provides a valuable competition policy perspective that informs and enhances the Commission's consumer protection work. In the area of deceptive advertising, for example, the FTC has long recognized that deception harms consumers and damages the functioning of the marketplace.⁴² Since the time of its establishment almost a century ago, the FTC has pursued two complementary goals – to eliminate deception and to challenge restraints on truthful advertising. The agency's efforts to promote the flow of truthful information complement the agency's goal of eliminating deception in the marketplace. In this way, the FTC's competition perspective strengthens its consumer protection work.⁴³ The CFPA might try to replicate the institutional arrangements by which the FTC ensures that rigorous economic analysis and the contributions of an independent unit of economists proficient in theory and empirical research guide the formulation of consumer protection policy for financial services. There is no guarantee that the new agency will attempt to do so or succeed in the effort. Nor is it apparent that the team that drafted the CFPA proposal considered this valuable dimension of FTC policymaking or regarded it as worth preserving. The legislative proposal merely contemplates the creation of a "research unit . . . whose functions shall include researching, analyzing, and reporting on" developments in consumer financial product/service markets and consumer understanding of disclosures, among other things.⁴⁴ The legislation does not mandate the independence of the CFPA's research unit. Nor does it determine the particular role that such research unit must play in the CFPA's enforcement and regulatory activities. The CFPA lacks these institutional features and will lose the considerable benefits that have flowed from them at the Commission. For this reason alone, the CFPA's consumer protection work

⁴¹ See Federal Trade Commission, *Consumer Information and the Mortgage Market* (May 2008), Conference Transcript, available at <http://www2.ftc.gov/be/workshops/mortgage/transcript.pdf>.

⁴² Early FTC deception cases relied on the FTC's authority to proscribe unfair methods of competition. See, e.g., *FTC v. Raladam Co.*, 283 U.S. 643 (1931) (challenging advertisements of dietary supplement manufacturer as misleading or deceptive under the FTC's authority to prohibit unfair methods of competition).

⁴³ Two of my predecessors, former Chairmen Robert Pitofsky and Timothy Muris, also have discussed these advantages in *More Than Law Enforcement: The FTC's Many Tools—A Conversation With Tim Muris and Bob Pitofsky*, 72 Antitrust L.J. 773 (2005).

⁴⁴ Section 1014(c)(1).

will not be as robust or well-grounded as its proponents anticipate and, almost inevitably, will be inferior to the FTC's work in this area.

Drawing upon the strength of its institutional framework and its superior experience in a wide variety of consumer protection areas, the FTC has been a leader in financial consumer protection. Nevertheless, as a practical matter, the legislation eliminates the FTC's role in financial consumer protection. Based on the FTC's extensive experience, it is difficult to understand why the FTC should be excluded even from enforcing the rules promulgated by the new agency.

Although jurisdictional limits significantly curb the range of entities subject to the FTC's authority in this sector,⁴⁵ the FTC has a strong record of enforcing the FTC Act and other consumer protection laws in the areas of mortgage advertising and marketing, mortgage servicing, loan modification and foreclosure rescue, debt settlement and credit counseling, debt collection, and credit repair.⁴⁶ During the last five years alone, the FTC has brought more than 70 consumer protection cases involving the offering or provision of financial services. In many of these cases, the FTC has obtained immediate injunctive relief in federal court to halt the illegal activity and preserve assets for consumer redress.

In addition to pursuing an active law enforcement program, the FTC has led public education campaigns to help ensure that consumers do not succumb to fraudulent financial services schemes. Recently, the FTC collaborated with a wide array of government, non-profit, and mortgage industry members to launch a new consumer education campaign to help consumers avoid loan modification and foreclosure rescue scams. The FTC also issued a new consumer education publication on this topic, which several mortgage servicers have provided directly to consumers through various means, including loan counseling sessions, monthly statements, correspondence to delinquent borrowers, and on their websites.⁴⁷ These consumer education

⁴⁵ Financial service providers that are banks, thrifts, and federal credit unions are exempt from the Commission's jurisdiction under the FTC Act. The Commission's jurisdiction under the FTC Act extends only to non-bank financial companies, including non-bank mortgage companies, mortgage brokers, and finance companies. Similarly, under the Fair Debt Collection Practices Act and the Credit Repair Organization Act, the Commission has jurisdiction over non-bank entities, including debt collectors and credit repair organizations, respectively.

⁴⁶ In tandem with its law enforcement program, the FTC also recently issued a report recommending legislative and other changes to reform and modernize the debt collection regulatory system. See FTC Workshop Report, *Collecting Consumer Debts – The Challenges of Change* (Feb. 2009), available at <http://www.ftc.gov/bcp/workshops/debtcollection/dcwr.pdf>.

⁴⁷ See FTC Publication, *A Note to Homeowners*, available at <http://www.ftc.gov/bcp/edu/pubs/consumer/homes/rea16.pdf>; FTC Publication, *Foreclosure Rescue Scams: Another Potential Stress for Homeowners in Distress*, available at <http://www.ftc.gov/bcp/edu/pubs/consumer/credit/cre42.shtm>.

materials complement the FTC's other publications that explain to consumers how to manage their mortgages in a variety of circumstances.⁴⁸

The FTC also has been a leader in financial privacy policy. The FTC's Chairman co-chairs the President's Identity Theft Task Force, and the Commission has had a robust law enforcement program.⁴⁹ The FTC also has promulgated, individually or in conjunction with other agencies, approximately twenty implementing rules, guidelines, compliance forms, and notices in connection with the FACT Act.⁵⁰

Using its unique combination of institutional capabilities, the FTC has achieved an excellent record of law enforcement, rulemaking, research, and consumer education in the financial services field. It has done so through a conscious, decades-long process of policy innovation. Yet the CFPA Act will have the effect of divesting the FTC of *all* of its financial consumer protection functions in a manner that provides no assurances that the new regulatory body will attain the FTC's existing level of effectiveness or develop an institutional platform that yields future enhancements. Not only does the CFPA Act transfer "[a]ll consumer financial protection functions of the Federal Trade Commission" to the CFPA, but the legislation also defines consumer financial protection functions so broadly as to include "research, rulemaking, issuance of orders or guidance. . . ."⁵¹ This expansive definition would include the Bureau of Economics' research as well as the FTC's enormously valuable public workshops and consumer education programs.

Moreover, the legislation grants the CFPA exclusive authority to issue rules prohibiting unlawful unfair, deceptive, or abusive acts or practices in connection with consumer financial product/service transactions, but does not authorize the FTC to enforce those rules. It is conceivable that one aim of the CFPA's drafters was to unify policymaking and eliminate the costs associated with having multiple public entities enforce consumer protection commands for financial services. Yet the CFPA on its own terms falls well short of that aim, for it leaves a major independent source of enforcement in place: it authorizes the states to enforce

⁴⁸ See FTC Publication, *Mortgage Servicing: Making Sure Your Payments Count*, available at <http://www.ftc.gov/bcp/edu/pubs/consumer/homes/rea10.shtm>; FTC Publication, *Mortgage Payments Sending You Reeling? Here's What to Do*, available at <http://www.ftc.gov/bcp/edu/pubs/consumer/homes/rea04.shtm>; FTC Publication, *How to Manage Your Mortgage If Your Lender Closes or Files for Bankruptcy*, available at <http://www.ftc.gov/bcp/edu/pubs/consumer/homes/rea12.shtm>.

⁴⁹ See, e.g., *United States v. ChoicePoint, Inc.*, No. 106-CV-0198 (N.D. Ga.) (settlement entered on Feb. 15, 2006 for alleged violations of the FTC Act involving the sale of sensitive information to a criminal gang that then used that information in some instances to commit identity theft).

⁵⁰ See generally Prepared Statement of the Federal Trade Commission on Protecting Consumer Privacy and Combating Identity Theft, Testimony Before the Subcommittee on Crime, Terrorism, and Homeland Security of the Committee on the Judiciary, United States House of Representatives, Dec. 18, 2007, available at <http://www.ftc.gov/os/testimony/P065404idtheft.pdf>.

⁵¹ Sections 1061(a)(5)(A), 1061(d)

the CFPA's rules. If the states are to remain as significant enforcement agents in this policy domain, it makes no sense to exclude the FTC. The FTC's authority under the FTC Act to prohibit unfair or deceptive acts or practices overlaps heavily with the CFPA's authority to prevent "unfair, deceptive, or abusive" acts or practices in connection with consumer financial product/service transactions.⁵² In light of the strong similarities between the FTC's unfair or deceptive authority and the CFPA's authority with respect to unfair, deceptive, or abusive practices, it would be wise to authorize the FTC to enforce CFPA rules. The FTC already has proven that it is a valuable enforcer of rules issued by other agencies, such as the Federal Reserve Board's Regulation Z (under the Truth in Lending Act).

Although the legislation will effectively extinguish the FTC's consumer protection authority for financial services, the CPFA reveals an evident ambivalence about doing so. The legislation purports to preserve some FTC role by providing the FTC with "backstop authority" to bring enforcement actions in the financial services area. This authority promises to be a mirage.⁵³ A regulatory agency's capacity to do good work depends crucially on the expertise of its staff. With no expertise there is no program – at least not a program in which one would place any confidence. Once the FTC has fulfilled the CFPA's command that it transfer its core functions and financial services personnel to the new regulatory entity, the Commission's ability to do effective work in this area will vanish. The FTC will lose the deep pool of financial services expertise it has worked hard for decades to build in its Bureau of Consumer Protection and Bureau of Economics. It is conceivable that some of the FTC's experts might remain, but it is difficult to imagine that a talented attorney or investigator will want to work on cases that another agency will litigate or the FTC, at best, will pursue subject to a 120-day delay.⁵⁴ As now planned, the new regulator will pay its employees salaries that will exceed the FTC's by fifteen percent or more – a further inducement for Commission financial services personnel to depart.

⁵² Section 1031. When the FTC interpreted a statutory prohibition on "abusive" practices in its promulgation of the "Do Not Call" amendments to the Telemarketing Sales Rule, the FTC chose, except for practices related to broadly-construed privacy interests (which it found to merit special consideration in light of specific examples in the underlying statute), to identify as abusive only those practices that would also qualify as unfair under the FTC's traditional unfairness analysis. *Telemarketing Sales Rule; Final Rule*, 68 Fed. Reg. 4580, 4614 (2003). Under the FTC's unfairness statement and section 5(n) of the FTC Act, 15 U.S.C. § 45(n), the agency can find unfairness when a practice causes substantial consumer injury, not reasonably avoidable by the consumer, whose costs are not outweighed by countervailing benefits to consumers or competition.

⁵³ Section 1022(e) provides that the FTC may "recommend in writing to the [CFPA] that the [CFPA] initiate an enforcement proceeding" and that if the CFPA does not "initiate an enforcement proceeding" within 120 days of receipt of the FTC's recommendation, the FTC may initiate an enforcement proceeding.

⁵⁴ The legislation mandates that all CFPA employees receive compensation and benefits that are at least equivalent to those provided by the Board of Governors. Section 1014. Therefore, even if FTC staff with relevant expertise were not automatically transferred to the CFPA, the higher benefits at the new agency could lure many of the FTC's staff.

Even assuming that the FTC retained the bare minimum resources to bring cases in the consumer financial protection area, the delay associated with the 120-day referral process will be problematic at the very least. One hallmark of the FTC's work is its ability to respond quickly to fraud and to obtain immediate relief in federal court. Based on our enforcement experience, a delay of 120 days would be plenty of time for many of our targets to close up shop and reopen under new names or with new individual aliases. It is precisely because many FTC targets are skilled at evading law enforcement that the Commission seeks temporary relief, even on an *ex parte* basis where necessary, to ensure that defendants do not destroy documents and that their assets are preserved for the possibility of consumer redress. In certain cases involving ongoing, hard-core fraud, the FTC has foregone civil penalties in order to seek immediate injunctive relief without the 45-day delay associated with referrals to DOJ. The 120-day referral process entails a delay in FTC action that could be the difference between a successful law enforcement action that returns money to consumer victims and a failed attempt to shut down a financial scam.

Rather than divest the FTC of all of its consumer financial protection functions and give it hollow "backstop authority," a more promising approach could be to remove jurisdictional limits that currently constrain the FTC's regulatory and enforcement authority in the financial services sector. As noted above, the FTC has a strong enforcement record in the financial services sector, even though many entities fall outside the agency's enforcement authority. Unlike other financial services regulators, the FTC applies its consumer protection authority in many sectors of the U.S. economy. Even if the FTC obtained jurisdiction over additional financial services actors, the Commission would be far less susceptible to "agency capture" than other financial regulators.⁵⁵

The CFPA Will Jeopardize Certain Core Consumer Protection Functions that the FTC Will Retain

A second major problem with the CFPA proposal is that it will jeopardize the FTC's ability to carry out its core non-financial consumer protection functions. The CFPA defines "financial activity" and "financial product or service" so broadly as to provide no meaningful limits on the new entity's jurisdiction. The legislation defines "financial activity" to include, among other things, the extension of credit, consumer reporting activities, debt collection, financial data processing, transmitting money, or "*any other activity that the [CFPA] defines, by rule, as a financial activity.*"⁵⁶ "Credit" is defined as "the right granted by a person to a consumer to defer payment of a debt, incur debt and defer its payment, or purchase property

⁵⁵ There also may be significant advantages to ensuring that congressional oversight of consumer financial protection is vested in a committee that does not also oversee financial safety and soundness.

⁵⁶ Section 1002(18) (emphasis added).

or services and defer payment therefor.”⁵⁷ The legislation also defines “financial product or service” to mean “any product or service that, directly or indirectly, results from or is related to engaging in 1 or more financial activities.”⁵⁸

Even though the CFPA’s announced aim is to enhance consumer protection in the financial services sector, the legislation defines financial activity and financial services so expansively as to sweep within the CFPA’s jurisdiction any activity that is even *indirectly related* to engaging in any activity that the CFPA defines as a “financial activity.” For example, the legislation’s definition of “credit” might encompass the CFPA’s primary enforcement jurisdiction of every business that does not require cash on the barrelhead – regardless of the products or services offered. Furthermore, the CFPA could decide by rulemaking that the definition of financial activity includes the payment side of every business, whether in the financial services sector or not. The new regulatory body could assert primary enforcement authority over all businesses and relegate the FTC to the illusory backstop enforcement role even as to these non-financial businesses. Because the CFPA’s primary enforcement authority might extend even to those areas of core consumer protection enforcement relating to non-financial products and services, the proposed legislation could limit, hinder, or even disable the FTC’s primary enforcement authority in key areas of consumer protection such as telemarketing fraud involving non-financial products and services.⁵⁹

Let’s suppose that the legislation made it clear that the CFPA’s primary enforcement authority did not cover the activities of entities such as payment processors when such entities provide services to enterprises offering non-financial products or services. The FTC still would be hindered by the increased costs of coordinating enforcement actions with the CFPA and other agencies in cases involving both financial and non-financial entities. The FTC also would spend more resources to litigate these types of jurisdictional questions. The delays associated with resolving disputes over jurisdictional boundaries will diminish the FTC’s effectiveness in pursuing targets that offer products or services traditionally considered outside the financial services sector.

As the CFPA carries out its primary enforcement authority for unfair, deceptive, or abusive acts or practices under Federal law regarding consumer financial products or services, and as the FTC continues to enforce

⁵⁷ Section 1002(10).

⁵⁸ Section 1002(19).

⁵⁹ The legislation also authorizes the CFPA to take action against “an unfair, deceptive, or abusive act or practice under Federal law in connection with any transaction with a consumer for a consumer financial product or service.” Section 1031. The legislation thus appears to allow the CFPA to enforce the FTC Act’s prohibition against unfair or deceptive acts or practices, thereby bringing enforcement of the FTC Act under the CFPA’s primary enforcement authority. See § 1022(e).

consumer protection laws as to non-financial products and services, there is no assurance – beyond aspirational mandates for interagency coordination – that the CFPA will account properly for the FTC’s views about the appropriate content of unfairness and deception jurisprudence. Conflicts in interpretation and in litigation strategies will adversely affect every core area of consumer protection for which the FTC will continue to exercise primary responsibility.

Besides the impact on the FTC’s law enforcement program described above, the legislation requires the CFPA to collect financial consumer complaints. The FTC already performs this function through its Consumer Sentinel database, a rich body of information whose creation and enhancement ranks as one of the most important modern innovations in public policy for consumer protection. As things stand now, individual consumers, consumer groups, and a wide range of law enforcement authorities at home and abroad contribute complaints to the FTC’s complaint database. The creation of the CFPA could cause massive consumer confusion about where to file financial-related complaints. The disorientation will be particularly acute if the definitions for financial activity and financial products/services were to include entities not typically identified as part of the financial services sector. Because the FTC relies heavily on its consumer complaint system to identify law enforcement targets, such consumer confusion also could lead to delays in enforcement in non-financial areas of consumer protection for which the FTC will continue to exercise primary responsibility.

The proposal to create the CFPA also appears to take away the FTC’s capacity to use non-litigation policy instruments to achieve important consumer protection goals. Among other means, the FTC in recent decades has made major contributions in the financial services field by providing guidance, issuing reports, and convening public workshops. Section 1022(d) provides that “the [CFPA] shall have the exclusive authority to prescribe rules, issue guidance, conduct examinations, require reports, or issue exemptions with regard to any person subject to that law,” including the consumer financial protection functions transferred from the FTC to the CFPA. Thus the legislative proposal appears to eliminate the FTC’s important role in providing guidance to the public. In recent years the FTC has played this useful role with respect to mortgage disclosures, alternative mortgage products, debt collection, debt settlement, and other financial issues.¹ Because the legislation defines consumer financial protection functions expansively, the proposal jeopardizes the FTC’s ability to continue providing guidance even with respect to non-financial areas of consumer protection.

¹ For example, on August 5-6, 2009, the FTC convened a roundtable discussion to address issues concerning debt collection litigation and arbitration. Participants included judges, academics, government officials, consumer advocates, and industry representatives. See *Debt Collection: Protecting Consumers Roundtable Transcript* (Aug. 5-6, 2009), available at <http://www2.ftc.gov/bcp/workshops/debtcollectround/090805-CHIL/transcript-90805.pdf> and <http://www2.ftc.gov/bcp/workshops/debtcollectround/090805-CHIL/transcript-90806.pdf>.

Finally, the draft legislation could be read to divest the FTC of certain competition authority and resources where the product market at issue involves the issuance of credit. Here, too, the legislation provides a sweeping definition for financial product or service and authorizes the agency to expand upon its jurisdiction by rule. The transfer of all functions “relating to the provision of consumer financial products or services” conceivably could include parts of the FTC’s Bureau of Competition and those personnel in the Bureau of Economics who work on competition matters. As Professor Stephen Calkins has pointed out, cases such as *FTC v. Tigor Title Insurance Co.*,² which involved the joint setting of title insurance rates as an unfair method of competition, would fall within the incredibly broad jurisdiction of the new agency.³

Conclusion

The protection of consumers of financial services products is a crucial domestic priority. Institutions are the conduits that deliver public policy, and the quality of protection afforded American consumers depends vitally on the proper design and allocation of regulatory authority. My experiences as an FTC Commissioner, former Chairman, former General Counsel, and a junior case handler have reinforced what I learned in studying consumer protection and competition policy issues as an academic: good institutions are the necessary foundations of good public policy. I strongly believe that the current proposal to create the CFPA makes the unwise decision of cutting the FTC out of consumer financial protection altogether. I also am concerned that the proposed legislation will have major, unintended consequences on the FTC’s ability to carry out even those core consumer protection functions that will remain the FTC’s primary responsibility after creation of the CFPA. With further discussion, careful crafting, and a thorough examination of what jurisdictional boundaries still remain sensible, we can and must get these complex and important public policy decisions right.

² *FTC v. Tigor Title Insurance Co.*, 504 U.S. 621 (1992).

³ Calkins testimony, p. 5.