Federal Trade Commission

Managing Irrationality: Some Observations on Behavioral Economics and the Creation of the Consumer Financial Protection Agency

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I.

As some critics have noted,[1] the White House's proposal to establish a new Consumer Financial Protection Agency (CFPA) seems to be based – at least in part – on behavioral economics theory. Consequently, I'd like to briefly discuss my own views about that theory. I have five observations in this regard.

First, insofar as antitrust is concerned, behavioral economics is relatively new.

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* The views stated here are my own and do not necessarily reflect the views of the Commission or other Commissioners. I am grateful to my attorney advisors, Amanda Reeves and Beth Delaney, for their invaluable assistance preparing this paper. I presented Part I and Part II of these remarks at the Conference's morning and afternoon sessions, respectively.

[1] *See, e.g.*, Richard A. Posner, "Treating Financial Consumers as Consenting Adults," THE WALL STREET JOURNAL (July 22, 2009) ("The plan of the new agency reveals the influence of 'behavioral economics,' which teaches that people, even when fully informed often screw up because of various cognitive limitations."); Simon Johnson, "The Dark Side of Behavioral Economics," *The New Republic* (July 29, 2009), *available at* http://www.tnr.com/blog/the-plank/the-dark-side-behavioral-economics.

When I practiced antitrust law in San Francisco in the mid-1970s, the economic theory du jour was so-called "Chicago School" theory as explicated by Robert Bork in *The Antitrust Paradox*[2] and Richard Posner in *Antitrust Law: An Economic Perspective*.[3] The central tenets of Chicago School theory were pretty simple: first, sellers and buyers both acted rationally – sellers trying to maximize their profits and buyers trying to maximize their bargains; second, as a result, Chicago School theory assumed that imperfect markets would self-correct rather quickly; and third, rational sellers would recognize that predatory conduct was not in their self-interest.

Over the years, some so-called "post Chicago School" economists spoke up. But those scholars simply expanded the range of conduct that might be considered rational and profit-maximizing to include some predatory conduct that would raise rivals' costs, increase entry barriers, or exclude rivals cheaply.[4] Although these theorists did offer a more sophisticated, nuanced view of seller behavior than the orthodox Chicago School, they did not undermine the basic assumption that sellers and buyers alike acted rationally.

Indeed, I think it is safe to say that, for the last 40 or so years, the Chicago School's fundamental premise that individuals behave as rational profit maximizers was

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[2] ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (1978).

[3] RICHARD POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE (1976).

[4] Some examples are (1) Salop's "raising rivals' costs" theories, *see, e.g.*, Thomas G. Krattenmaker & Steven Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price*, 96 YALE L. J. 209 (1986); Michael H. Riordan & Steven C. Salop, *Evaluating Vertical Mergers: A Post-Chicago Approach*, 63 ANTIRUST L. J. 513, 519-22 (1995); Steven C. Salop & R. Craig Romaine, *Preserving Monopoly: Economic Analysis, Legal Standards, and Microsoft*, 7 GEO. MASON L. REV. 617, 626-28 (1999); (2) Whinston's "tying" theories, *see, e.g.*, Michael D. Whinston, *Tying, Foreclosure, and Exclusion*, 80 AM. ECON. REV. 837 (1990); Michael D. Whinston, *Exclusivity and Tying in U.S. v. Microsoft: What We Know, and Don't Know*, 15 J. ECON. PERSP. 63, 79 (Spring 2001); and (3) Creighton's "cheap exclusion" theories, *see* Susan A. Creighton et al., *Cheap Exclusion*, 72 ANTITRUST L. J. 975 (2005).

not seriously questioned. I date the Chicago School's primacy to the Supreme Court's embrace of Chicago School way of thinking in its 1977 *GTE Sylvania* decision; there the Court overturned its 1967 decision in *Schwinn* and held that non-price vertical restraints were subject to the rule of reason.[5]

More recently, however, as Professor Maurice Stucke and others have written,[6] a number of economists have begun to suggest that all market participants might not behave rationally after all. Instead, these economists have suggested that there are certain "predictably irrational" ways in which humans behave, by, for instance, overvaluing their prospect of success in a risky situation and undervaluing their likelihood of loss in such a situation. These insights, to me at least, ring true because, however rational we may all try to be, we have all taken actions – often consciously – that we know are not in our

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[5] *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), *overruled by Continental T.V., Inc. v. GTE Sylvania*, 433 U.S. 36 (1977). The Court cited then Professor Posner's *Antitrust Law*, as support for the proposition that economists had identified several ways in which manufacturers use non-price vertical restraints to compete against other manufacturers. *GTE Sylvania*, 433 U.S. at 54-55. The Court noted that

> Economists have identified a number of ways in which manufacturers can use such restrictions to compete more effectively against other manufacturers . . . Service and repair are vital for many products, such as automobiles and major household appliances. The availability and quality of such services affect a manufacturer's goodwill and the competitiveness of his product. Because of market imperfections such as the so-called "free rider" effect, these services might not be provided by retailers in a purely competitive situation, despite the fact that each retailer's benefit would be greater if all provided the services than if none did.

Id. at 55. Relying solely on economic theory, the Court found that a manufacturer's limitation of intrabrand competition actually aided that manufacturer in the interbrand market. *Id*. at 56.

[6] *See, e.g.*, Maurice E. Stucke, *New Antitrust Realism*, Global Competition Policy (January 2009); Maurice E. Stucke, *Behavioral Economics at the Gate: Antitrust in the Twenty-First Century*, 38 LOY. U. CHI. L. J. 513 (Spring 2007). *See also* Avishalom Tor, *the Fable of Entry, Bounded Rationality, Market Discipline, and Legal Policy*, 101 MICH. L. REV. 482 (Nov. 2002)

"wealth-maximizing self-interest," but which we pursue anyway. I am intrigued by the prospect of incorporating these insights into the Commission's approach to antitrust and consumer protection law.

Second, behavioral economics has been described as having more relevance on the buy side – that is to say, in analyzing consumer behavior – than on the sell side.[7] For example, George Akerlof and Robert Shiller's recent *New York Times* bestseller *Animal Sprits*, which focuses on behavioral economics, argues that free-market ideology is fundamentally incomplete because it fails to account for the fact that human irrationality infects human decision-making on the buy side and, thus infects decisions that govern how the market actually (as opposed to hypothetically) functions.[8] Other best sellers have taken the same approach.[9]

Similarly, in describing their disappointment about the recent financial crisis, previous disciples of Chicago School economics have directed their statements towards buyers, rather than sellers. In his testimony before Congress in October 2008, for example, Alan Greenspan recanted his faith in the market and the rationality of business people, testifying that more government regulation of the financial sector was both necessary and proper.[10] Similarly, in *Jones v. Harris*, a securities case which is now at

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[7] *See* Economics Roundtable, Global Competition Review (March 2009).

[8] GEORGE A. AKERLOF & ROBERT J. SHILLER, ANIMAL SPIRITS: HOW HUMAN PSYCHOLOGY DRIVES THE ECONOMY, AND WHY IT MATTERS FOR GLOBAL CAPITALISM (2009).

[9] *See, e.g.*, DAN ARIELY, PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS (HarperCollins 2009); JUSTIN FOX, THE MYTH OF THE RATIONAL MARKET: A HISTORY OF RISK, REWARD, AND DELUSION ON WALL STREET (HarperCollins 2009).

[10] Edmund L. Andrews, "Greenspan Concedes Error in Regulation," NEW YORK TIMES, Oct. 23, 2008, *available at*

the Supreme Court, Judge Posner himself recently advanced a behavioral economics approach – and sharply rejected Chief Judge Easterbrook's free-market theory – in his dissent from the Seventh Circuit's denial of rehearing en banc.[11] Consistent with the behavioral economics literature, Posner observed that, in the absence of a competitive market, regulation is needed to protect consumers because market participants are not infallible.[12] And certainly the regulatory failures alleged by the CFPA's proponents have been based on concerns about inadequate consumer protection.

Third, as a former Director of the FTC's Bureau of Consumer Protection, I agree that consumers do not always behave rationally. The Supreme Court long ago recognized as much in 1937 when it held that the standard for liability in judging consumer fraud should be the "least sophisticated consumer" test.[13] Under that test, the courts

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http://www.nytimes.com/2008/10/24/business/economy/24panel.html (Greenspan stating that he is in a state of "shock and disbelief" at what has happened and that he has found a "flaw" in his ideology and is "very distressed by that fact.").

[11] *Jones v. Harris Assocs. L.P.* ("*Jones II*"), 527 F.3d 728, 729 (7th Cir. 2008) (Posner, J., dissenting from denial of rehearing en banc). Writing for a unanimous panel, Chief Judge Frank Easterbrook had applied a stringent standard to hold that mutual fund shareholders could not sue their financial advisers for exacerbating their losses during the financial meltdown. *Jones v. Harris Assocs. L.P.* ("*Jones I*"), 527 F.3d 627 (7th Cir. 2008). In so holding, Easterbrook advanced a classical law-and-economics analysis that presumed a well-functioning market for investment advice, dismissed possibly irrational investor behavior, and concluded with a call for greater deregulation of the industry. In sharp contrast, Posner asserted in his dissent that Easterbrook's faith in the self-disciplining nature of market forces in the mutual fund industry is misplaced because "mutual funds are a component of the financial services industry, where abuses have been rampant." 527 at 730. Finding an absence of healthy competition, Posner took the view that market regulation was needed to correct for disordered behavior.

[12] *See also* RICHARD A. POSNER, A FAILURE OF CAPITALISM: THE CRISIS OF '08 AND THE DESCENT INTO DEPRESSION (2009) (contends that there is a need for more active government regulation and that deregulation of the financial industry went too far by "exaggerating the resilience – the self-healing powers – of laissez-faire capitalism").

[13] *FTC v. Standard Educ. Soc'y*, 302 U.S. 112, 116 (1937) (finding encyclopedia-selling scheme in violation of Federal Trade Commission Act).

subsequently found that the Federal Trade Commission Act[14] was not made "'for the protection of experts, but for the public – the vast multitude which includes the ignorant, the unthinking and the credulous.'"[15] The FTC, however, rejected that standard when it issued its Deception Statement in 1983, "a consumer acting reasonably under the circumstances."[16]

As far as I am concerned, there is good reason for that change. On the one hand, as Professor Meier has observed, there are certain circumstances in which consumers are prisoners of circumstances. That may be true, for example, when consumers are asked to choose between a current product or service and an alternative product or service that may be more attractive over the long run. It may also be true when there is an asymmetry of information respecting a product or the terms of an offering as between sellers and buyers. That arguably happens most often when a product is complicated (think of personal computers) or when the terms of an offering are complex (think of financial derivatives). Or, as the Commission noted in our 1983 Deception Statement, there may be certain especially vulnerable classes of consumers who cannot help themselves.[17] Children, the elderly, and the disabled come to mind. When those circumstances exist, I think that consumers deserve protection – and indeed the protection they receive should be beefed up.

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[14] 15 U.S.C. § 41 *et seq.*

[15] *Charles of the Ritz Distributors Corp. v. FTC*, 143 F.2d 676, 679 (2d Cir. 1944), quoting *Florence Mfg. Co. v. J.C. Dowd & Co.*, 178 F. 73, 75 (2d Cir. 1910).

[16] FTC Statement on Deception ("Deception Statement"), appended to *Cliffdale Associates, Inc.*, 103 F.T.C. 110 (1984), *available at* http://www.ftc.gov/bcp/policystmt/ad-decept.htm.

[17] *Id.* ("When representations or sales practices are targeted to a specific audience, such as children, the elderly, or the terminally ill, the Commission determines the effect of the practice on a reasonable member of that group").

On the other hand, as Professor Meier has also observed, there may be some circumstances when consumers simply do not take the time or make the effort needed to act rationally. Think, for example, of instances in which an asymmetry of information (or understanding) between sellers and buyers exists only because consumers are slothful or are otherwise willfully "ignorant, unthinking, or credulous." In those circumstances, I am not at all sure that consumers are deserving of protection by the government (or anyone else).

Fourth, that is a good segue into whether irrationality just exists on the buy side. There are arguments why it may exist on the sell side as well. Some have argued, for example, that there is an "agency" problem that exists in some organizations in the sense that middle managers, who often implement decisions for the organization, are not always on the same page as the senior management making those decisions. The thesis, in other words, is that while senior management's decisions may be profit-maximizing, the way those decisions are carried out may be. That makes sense to me. Beyond that, organizations are just groups of individuals who may or may not always behave rationally, whether they are buyers or sellers or are in top management or not.

And let us assume that those on the sell side always act rationally—or act to maximize profits, as Chicago School theory according to Professor Bork would have it. If that is so, recognizing that consumers do not always act rationally, sellers will be prone to exploit that irrationality in order to maximize their profits. That in turn justifies robust consumer protection (and, I might add, consumer protection that informs antitrust enforcement in an agency like the FTC, which has both a consumer protection and an antitrust mission).

Fifth and finally, although I think there is a very good case to be made for more robust consumer protection, I worry about whether behavioral economics will leave us without an "organizing principle" or, to put it differently, a default theory. Say what you will about the Chicago School. However, it did provide those of us in public law enforcement with an excellent theoretical framework upon which we could fall back in making our decisions. I am concerned that we may be left with nothing so comforting if we simply posit that sellers or buyers act irrationally. Perhaps, though, that result can be avoided by replacing that theoretical framework with a series of practical questions that we should ask before proceeding—as, for example, whether there is informational or understanding asymmetry; whether that asymmetry is beyond the control of the individuals involved; whether there is indeed an agency problem.

I can give you two such examples of possible doctrinal modifications on the antitrust side that reflect such a framework. First, as I suggested last June at the Bates White Antitrust Conference, one way to inject more of a consideration of the parties' actions (as opposed to theoretical assumptions about their actions) is by applying a structured rule of reason analysis in Sherman Act Section 1 and 2 conduct cases. There are two essential ingredients of the analysis. The first ingredient is proof of a practice which, considered in context, is "inherently suspect" under the antitrust laws because it is likely to adversely impact consumer welfare. The second ingredient is an analysis of the efficiencies stemming from the conduct. By engaging in a fact-bound analysis of the conduct and its anticompetitive effect rather than, as the Chicago School would have it, assuming that certain conduct is inherently pro-competitive, I believe the Commission

could incorporate insights from the behavioral economics literature in a way that would still put firms on notice of the type of conduct that is anticompetitive.

Second, you may also see evidence of a move towards behavioral economics in some of the modifications that the agencies are presently considering to the merger guidelines. To be clear, the agencies are not considering making far-reaching changes to those guidelines. There are, however, practices that we at the Commission already engage in, such as examining the parties' documents to better understand the intent of the merging parties. To the extent the agencies decide to provide additional guidance to merging parties as to how the agencies use "direct" evidence of competitive effects, the revisions to the merger guidelines would provide a roadmap for looking at the parties' actions, as opposed to, again, making assumptions based on the structure of the marketplace.

Moving back to consumer protection analysis, if the Commission or the new agency were to take the time to identify in advance the various factors that the government will consider in imposing liability – arguably as we did with our Deception Statement in 1983 more than a quarter of a century ago – then firms would be on notice of the type of conduct that runs the risk of creating liability. Such a framework would, in my view, provide a mechanism for judging parties based on how they actually behave, as opposed to how economists predict they will behave.

II.

Let me begin by starting where I left off this morning. It is one thing to say that consumer protection with respect to financial products and services should be beefed up. It is quite another thing to say that a brand new federal agency should be created in order

to do that. And it is still another thing to say that such agency should replace an existing agency like the Federal Trade Commission (FTC) which did the best with the resources it had to protect consumers from the financial crisis that we recently experienced. I have no problem with the first proposal. I have grave doubts about the second. And, as I have told the relevant elected representatives on the Hill, I think the third is bad public policy.

As matters now stand, I have four fundamental concerns about the proposed legislation now pending in the Senate. First and foremost, this proposed bill (as well as the Administration's proposal and the legislation initially drafted by the House) appears to assume that, like some other agencies whose consumer protection law enforcement authority is transferred to the new agency, the FTC failed to perform adequately its consumer protection functions during the recent financial crisis. That assumption is fundamentally erroneous. You will notice that I stressed the words "some other agencies" when discussing the proposed transfer of authority (as well as personnel and resources) to the new agency. The proposal was based on political considerations, not the merits. That is apparent from the fact that no transfer of authority, personnel or functions of the Securities & Exchange Commission was proposed. If any agency was asleep at the switch before the recent financial crisis, it was the SEC.

By contrast, before the financial crisis arose in the Fall of 2007, the FTC worked vigorously to protect consumers in the financial marketplace. For example, with respect to mortgages, the FTC initiated its fight against deceptive subprime lending and servicing practices in 1998, when it filed its case alleging that Capital City Mortgage had taken advantage of African American consumers. Since then, the FTC has brought many actions focused on the mortgage lending industry, with particular attention to entities in

the subprime market, alleging that mortgage lenders and servicers engaged in unfair or deceptive acts and practices. Through these cases, the FTC has returned hundreds of millions of dollars to consumers.[18] I am not unmindful of the distinction that Eric Stein drew between *ex post* law enforcement activities and *ex ante* activity, and there is much in what he said about that distinction. But the FTC engaged in much *ex ante* as well. For example, it convened a May 2006 workshop on alternative mortgage products[19] and engaged in consumer education respecting the perils of certain kinds of mortgages.[20] The FTC also has provided advice and developed prototype mortgage disclosures for other federal regulatory agencies, including I might add, the Federal Reserve.[21] The mortgage market is only one of the areas of the financial marketplace in which the FTC has been active. Other areas include – to the extent we have jurisdiction – debt settlement and collection; the marketing of subprime credit cards; payment systems (including remotely created checks); conducting research on, and drafting, consumer disclosures for a variety

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[18] *See generally* Hearing On Improving Consumer Protections In Subprime Lending, Before the Before the Subcommittee On Interstate Commerce, Trade, and Tourism of the Committee On Commerce, Science, and Transportation, United States Senate (Apr. 29, 2008).

[19] *See* "Protecting Consumers in the New Mortgage Marketplace," May 24, 2006, *available at* www.ftc.gov/bcp/workshops/mortgage/index.shtml.

[20] *See, e.g.*, "Home Equity Loans: Borrowers Beware," "High-Rate, High-Fee Loans," and "Reverse Mortgages: Get the Facts Before Cashing In On Your Home's Equity," *available at* www.ftc.gov/bcp/conline/edcams/credit/coninfo.htm.

[21] *See, e.g.*, Federal Trade Commission Staff Comment to Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve Board System, Regarding Proposed Illustrations of Consumer Information for Subprime Mortgage Lending (Nov. 2007), (comment to the OCC; the Federal Reserve Board; the FDIC; the OTS; and the NCUA), *available at* www.ftc.gov/opa/2007/11/mortgage.shtm; Federal Trade Commission Comment Before the Board of Governors of the Federal Reserve System, Docket No. OP-1253: Unfair and Deceptive Practices in the Mortgage Lending Market, Alternative Mortgage Products, and Informed Consumer Choice in the Mortgage Marketplace (Sept. 2006), *available at* www.ftc.gov/opa/2006/09/fyi0661.shtm.

of products with financial components;[22] the protection and use of credit scores and educating consumers about their importance; and pay day loans – to name just some of the areas.

The credit for those consumer protection activities must largely be given to our staff and more specifically to Peggy Twohig, whom Eric enticed over to Treasury. But there are still a number of superstars at the FTC's Bureau of Consumer Protection, as well as the Bureau of Economics. And they are perfectly capable of conducting research, and based on the results of that research (or, insofar as their information is proprietary, based on their independent judgment), advising other agencies about consumer disclosures.

Second, the current draft of the legislation proposed by the Senate could be read to prevent the FTC from adequately enforcing even Section 5, which is its core consumer protection law enforcement statute. For example, although the Senate proposal purports to except from transfer to the new agency the FTC's enforcement authority under Section 5,[23] it also transfers to the CFPA exclusively "all consumer protection functions of the Federal Trade Commission,"[24] which are broadly defined to include all "research,

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[22] The Commission has a long history of conducting empirical tests of the efficacy of disclosures in a wide variety of commercial contexts. For example, the FTC staff released a study showing that broker compensation disclosures that the Department of Housing and Urban Development had proposed confused consumers, leading many of them to choose loans that were more expensive. *See* Federal Trade Commission, Bureau of Economics Staff Report, *The Effect of Mortgage Broker Compensation Disclosures on Consumers and Competition: A Controlled Experiment* (February 2004). Another example is seminal empirical research conducted by FTC staff on rent-to-own transactions, including evaluating consumer disclosure requirements. *See* Federal Trade Commission, Bureau of Economics Staff Report, *Survey of Rent-to-Own Customers* (April 2000).

[23] Section 1061(b)(5)(C)(ii).

[24] Section 1061(b)(5)(A).

rulemaking, issuance of orders or guidance, supervision, examination and enforcement activities, powers and duties relating to the provision of consumer financial products or services."[25] At a minimum, the language of the proposed legislation could be read to prevent the Commission from conducting research or issuing guidance under Section 5 of the FTC Act, as well as the enumerated consumer laws and other areas where the Commission has traditionally conducted research, provided business guidance, and marshaled consumer education efforts.

Professor Barkow's wise admonition that agency "capture" should be avoided can't be used as an excuse for the proposed transfer as it relates to the FTC either. To begin with, while she is correct that agency "capture" is a substantial potential problem, my personal view is that that problem can't be solved by any agency design because no design can be expected to be perfect. The best defense against agency "capture" is an experienced professional staff dedicated to the consumer protection mission. That said, the institutional structure of the FTC is about as close to meeting the criteria that she identified for avoiding agency "capture" as any agency I've seen in Washington.

Specifically, the FTC meets each and every one of her criteria for avoiding agency "capture." Importantly, it is an independent agency: in fact, I recall several instances in the early 1970s when the FTC's chairmen wrote letters to Cabinet members who were trying to influence the Commission's prosecutorial decisions, reminding them that the FTC was an independent agency and would make its decisions accordingly. The FTC is also a bipartisan agency – currently composed of a Democrat, two Republicans and an Independent. Professor Barkow said it took 20 months for President Clinton and

[25] Section 1061(a)(1).

Bush to control agencies, but as far as I can tell, no Administration has ever controlled the FTC. Professor Barkow warned about the danger of "capture" when an agency has jurisdiction over just a couple of industries, especially when its funding comes from those industries. But the FTC's consumer protection mission covers a myriad of industries, and a *de minimus* amount of its funding comes from those industries (really just the funding from registration fees for the Do-Not-Call Registry). Professor Barkow also emphasized the desirability of a consumer protection mission that does not conflict with other missions such as, for example, safety and soundness, which, as some have said, may be in tension with vigorous consumer protection (because protecting consumers may be in tension with enhancing the safety and soundness of those institutions). Professor Barkow said that preferably consumer protection should be the agency's primary mission. Although the FTC also has a competition mission, I personally have always considered those two missions to be symbiotic, and not in conflict. Finally, to be sure, the FTC has sometimes resisted redundancy, particularly with state law enforcement activities where efforts may sometimes be harmful rather than helpful, but Professor Barkow has acknowledged that redundancy is not always a virtue; it can be expensive and burdensome, notwithstanding the contributions it can theoretically make to avoid agency "capture."

Third, as currently drafted, the proposed Senate bill broadly defines "consumer protection financial products or services," and could be read not only to strip the FTC of the authority that it exercised to protect consumers during the recent financial crisis, but actually to disable the FTC from enforcing its core consumer protection statute against a

broad spectrum of arguably "financial" scams practiced by individuals and firms not normally considered as financial institutions.[26]

Fourth, the proposed Senate bill could be read to hinder the role the Congress has heretofore given the FTC in vigorously challenging violations of the Equal Opportunity Act, the Fair Credit Reporting Act, the Fair Debt Collection Practices Act, the Truth in Lending Act, the Home Ownership and Equity Protection Act, the Electronic Funds Transfer Act, and the Gramm-Leach-Bliley Act. To the extent the FTC retains any authority at all to enforce those statutes, it could apparently do so only after first recommending that the new agency initiate an enforcement proceeding itself, and initiating an enforcement proceeding only after the new agency does not do so within four months of receiving the recommendations. It goes without saying that with respect to cases involving fraud, where immediate action is needed to stop consumer injury and freeze assets for consumer redress, that waiting period would severely impair the FTC's effectiveness.

The final version of the consumer financial protection legislation voted out by the House late last fall tackled and addressed each of these concerns, and I will be eternally grateful to Chairman Frank for that. The mark up of the Senate version of the proposed legislation is ongoing, and what will happen to it is anyone's guess, particularly now that

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[26] Section 1002 (5) defines "consumer financial product or service" as "any financial product or service to be used by a consumer primarily for personal, family, or household purposes." Section 1002 (14) defines "financial product or service" as meaning "any product or service that, directly or indirectly, results from or is related to engaging in 1 or more financial activities." Section 1002 (13)(O), in turn, includes within the definition of "financial activity," "engaging in any other activity that the CFPA defines, by rule, as a financial activity . . . ."

Senator Dodd has announced he will not stand for re-election. But I am hopeful that progress can be made on that front as well to alter the proposal to best protect consumers.