Federal Trade Commission

Implications of the Financial Meltdown for the FTC

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Thank you for this opportunity to speak to you this evening. I would like to share my thoughts about what the implications of the ongoing financial crisis are on the FTC's mission. The financial crisis is the most pressing issue facing the Nation, not only domestically, but arguably internationally because it has rapidly spread worldwide. But it is also an extremely important topic at the FTC. The FTC's mission is to protect markets from anticompetitive, fraudulent, or deceptive conduct that prevents those markets from functioning properly. What happens when a market based economy fails, or comes dangerously close to failing? What does that mean for the FTC's mission? I have been giving this a lot of thought over the last several months and these are my tentative views. Please feel free to disagree with me. These remarks are intended to be thought-provoking.

First I will discuss the economic theory that has predominantly influenced antitrust for the past four-plus decades, and what has happened to it. Then I will discuss some of the views

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[1]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, Holly Vedova and Beth Delaney, for their invaluable assistance preparing this paper.

about how antitrust will be applied that have been circulating since the financial crisis exploded on the scene last Fall. I will explain why I would suggest that antitrust enforcement is part of the solution to the economic crisis, rather than the problem, and provide some specific examples as to how it might apply to mergers, single firm conduct, and cartels. Finally, I will also discuss how the consumer protection aspect of our mission may be impacted by the financial crisis.

I. Economic Theory

One thing is clear to me: the orthodox and unvarnished Chicago School of economic theory is on life support, if it is not dead. Antitrust enforcement principles over the last forty-plus years have been heavily influenced by this school of economic theory, which has its origins in, among others, Friedrich von Hayek's and Milton Friedman's views. Underlying the Chicago School theory is the principle that markets essentially take care of themselves without the need for extensive regulation. Thus, if not perfect, markets will quickly correct themselves, and recognizing this, rational business people will not engage in predation. This stands in contrast to John Maynard Keynes' economic theory that there can be situations where it is necessary for governments to stimulate economic growth and improve stability in the private sector. Keynesian economics holds that markets do not always take care of themselves – that some conduct may lead to aggregate macroeconomic outcomes in which output and growth are not optimal.

Robert Bork's "The Antitrust Paradox" applied Chicago School theory to antitrust law and was extremely influential.[2] He asserted that many of the then current cases applying the

[2] Robert H. Bork, The Antitrust Paradox: A Policy At War With Itself (1978).

antitrust laws were irrational and actually hurt consumers. He also argued that consumers were often beneficiaries of corporate mergers. Chicago School theory was first fully embraced by the Supreme Court of course in the 1977 *Sylvania* opinion,[3] where the Supreme Court abandoned reliance on the rule of *per se* illegality for non-price vertical restraints and instead opted for the rule of reason.

Evidence of Chicago School economics is still evident in the FTC's website, where there are repeated references to "faith in the market." For example, comments the FTC made to the OECD roundtable on the interface of competition and consumer policies in 2003 stated that, "[o]ur faith in the market is firmly grounded in the principle that free enterprise and competition best guarantee commercial freedom, economic efficiency, and consumer welfare."[4] Chicago School economic theory is also evident in the Supreme Court's *Trinko*[5] decision, where the second part of the decision suggests that monopolies are beneficial because they will spur innovation. It is also the basis for the Department of Justice Antitrust Division's Section 2 Report, where the dangers of overenforcement of the antitrust laws (called Type I error) were emphasized.[6]

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[3] *Continental T.V., Inc. v. GTE Sylvania Inc.,* 433 U.S. 36 (1977).

[4] Note by the U.S. Federal Trade Commission, Interface of Competition and Consumer Policies, submission to the October 16, 2003 OECD Roundtable, *available at*: <http://www.ftc.gov/bc/international/docs/Comp-ConsumerPro%20jnt%20rndtbl_2003%20Oct_US%20paper.pdf>.

[5] *Verizon Communications v. Law Offices of Curtis V. Trinko LLP*, 540 U.S. 398 (2004).

[6] Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act U.S. Department of Justice, September 2008, *available at:* <http://www.usdoj.gov/atr/public/reports/236681.pdf>; *see also Rambus v. Federal Trade Commission*, 522 F.3d 456, 466 (D.C. Cir. 2008).

The antitrust agencies have tried to export this theory, especially when counseling the Chinese about the development of their anti-monopoly laws. Although the counseling to the Chinese was done orally, the theory is evident in speeches. For example, in a speech before a standard setting conference in Beijing, former Counsel to the Assistant Attorney General of the Antitrust Division, Hill Wellford, declared that, "[a]s we consider the challenges and proposed solutions within standard setting, we should keep in mind the power of markets to self-correct."[7] And in a Beijing speech, Former Assistant Attorney General Hew Pate declared: ". . . the American intellectual property system rests on two fundamental foundations: first, protecting and enforcing private intellectual property rights; and second, a trust in markets, which means a belief that private solutions are usually more efficient than government solutions."[8]

In light of the events of late last year – that continue today – the positions I just discussed have been called into question – some would even say that Chicago School is "out" and Keynesian economics is "in." Alan Greenspan and former Secretary of the Treasury Henry Paulson both fully subscribed to the Chicago School theory before the crisis. But in his testimony before Congress last October Alan Greenspan recanted his faith in the market and the rationality of business people; he testified that more government regulation of the financial

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[7] Remarks of Hill Wellford, Antitrust Issues in Standard Setting, 2nd Annual Seminar on IT Standardization and Intellectual Property, China Electronics Standardization Institute, Beijing, China, March 29, 2007, *available at:* <http://www.usdoj.gov/atr/public/speeches/222236.htm>.

[8] Remarks of R. Hewitt Pate, Promoting Economic Growth Through Competition and Innovation, Chinese Academy of Social Sciences, Institute of Law, Beijing, China, July 1, 2004, *available at:* http://www.usdoj.gov/atr/public/speeches/204931.htm>.

sector was both necessary and proper.[9] Although Secretary Paulson was not so specific about market imperfections and irrational behavior, he has intervened repeatedly to try to deal with perceived imperfections in that market. This is not to say that one size fits all when it came to his interventions. Secretary Paulson intervened in different ways at different times. For example, he intervened when he felt that some institutions were "too big to fail" – *e.g.,* Bear Stearns, Fannie Mae, Freddie Mac, and Citicorp – but did not do so when other institutions failed – *e.g.,* Lehman Brothers. Also, initially he intervened by purchasing (or standing behind) the distressed assets of financial institutions, and he initially considered using TARP funds to do that exclusively. But he ultimately intervened instead by buying equity in major financial institutions that were considered "too big to fail."

In short, two of my fellow Republicans whose opinions I respect a great deal have declared emphatically by their words and their deeds that in the real world – as opposed to the worlds of political and economic theory – markets are not perfect; that imperfect markets do not always correct themselves; and that business people do not always behave rationally.

II. Viewpoints

So what does all this mean for antitrust enforcement? There have been a lot of ruminations about the financial crisis slowing or stopping antitrust enforcement. One of those expressing that view has been David Boies. Two months ago he speculated that the antitrust

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[9] Edmund L. Andrews, "Greenspan Concedes Error in Regulation," New York Times, Oct. 23, 2008, *available at:* <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.")

agencies would not proceed to block any transactions in the face of the financial crisis.[10] He speculated that politicians wouldn't be able to afford to worry about anticompetitive mergers and other practices as much as they would worry about saving jobs. If an anticompetitive merger would at the same time save jobs, Mr. Boies declared that it would not be politically palatable to kill the deal.

This is not the first time Mr. Boies has made predictions of easy antitrust clearance. He predicted that antitrust clearance would be a slam dunk when President Bush was President and, more specifically, when Charles James was Assistant Attorney General in charge of the Antitrust Division. Mr. Boies was wrong about that. The Antitrust Division, under Charles James, blocked the acquisition of Direct TV by Echostar, which Mr. Boies represented, and Echostar ended up paying Direct TV a huge breakup fee.

Another commentator has articulated a more nuanced approach. In a December article, Randy Smith of Crowell and Moring opined that current merger analysis undertaken by the agencies must account for economic realities affecting a particular industry.[11] He pointed to the forward looking analysis the agencies currently utilize. In this analysis the key issue is whether past market shares accurately reflect the future competitive significance of the merging parties.

Although the article doesn't cite *General Dynamics*,[12] the most recent Supreme Court

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[10] Why Obama May Say 'Yes' to Deals, November 11, 2008, New York Times Dealbook (interview with David Boies), *available at:* <http://dealbook.blogs.nytimes.com/2008/11/11/why-obama-may-say-yes-to-deals/?scp=1&sq=boies%20sorkin&st=cse>.

[11] Lax Merger Enforcement in an Obama Administration? December 31, 2008, Law360, *available at:* <http://www.law360.com/articles/81245>.

[12] *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974).

merger case, that is what it is based on. There of course the Supreme Court allowed the acquisition of a coal company despite the fact that the transaction resulted in high market shares. It held that high market shares did not reflect the true nature of the acquired firms' future competitiveness, because the firms' coal reserves were either depleted or committed under long term contracts.[13] This undermined the government's prima facie case. Mr. Smith argued that this analysis allows parties to argue that current high market shares are not always good indicators of what future competition will be like. That is correct. But the impact of a financial crisis on antitrust enforcement can work both ways – it is by no means clear that it will result in less enforcement.

Contrary to Mr. Boies, I think antitrust laxity during an economic recession can result in a deepening of economic contraction. Competition spurs innovation, productivity, growth and cost effectiveness. Increased prices are almost always (if not always) accompanied by reduced output. Thus, reduced antitrust enforcement could result in increased prices and reduced output, and in turn more unemployment. Put differently, if anticompetitive mergers and other business practices are permitted during an economic crisis, it is likely to cause reduced innovation and output, and consumers will lose the benefits of lower prices. Thus, I would suggest that competition laws need to be implemented at least as strictly during a time of economic crisis as they are otherwise.

At a minimum we need to be more humble. We can't make orthodox and unvarnished Chicago School of economics claims with the same authority. This does not necessarily mean that antitrust based on Chicago School economics is dead wrong. But the message needs to be

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[13] *Id*. at 503-04.

fine tuned. In terms of economic theory, we may need to move more towards what has been called "behavioral economics," based on the facts about how individuals *are* behaving rather than on how Chicago School of economic theory would predict they will behave.[14] This would require some adjustments in how we apply the antitrust laws – particularly in the Section 2 area, which I will briefly discuss in a moment.

But at the same time, antitrust enforcement agencies should arguably be cautious in embracing market intervention, lest it result in unforseen consequences. After all, I recall the problem that occurred when certain nations sought to manage their iron and steel industries. That led to severe protectionism and undermined free trade, to the detriment, I would suggest, of all, including themselves. In sum, there may be circumstances in which intervention is not well advised in a financial crisis. But that isn't necessarily because antitrust is less important, but because the financial crisis creates certain discrete failures in the market, and intervention in other respects is not advisable.

III. Merger Policy

Let me please provide some examples to illustrate how *merger* law enforcement may be affected by the financial crisis. To begin with, mergers should arguably be examined with an eye toward whether they are creating a merged entity that is "too big to fail." If so, the transaction may violate Section 7 (or Section 1). I acknowledge this is a controversial point; some may argue that the antitrust laws – specifically the Clayton Act – does not reach this type

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[14] *See, e.g.,* Maurice E. Stucke, New Antitrust Realism, GCP, The Online Magazine for Global Competition Policy, January 2009, *available at:* <http://www.globalcompetitionpolicy.org/index.php?&id=1544&action=907>.

of concern and that legislation amending the Clayton Act to include this concern is appropriate.[15] But I doubt that an amendment is necessary. The Clayton Act is inherently prospective and the current standard prevents anticompetitive harm in its incipiency. Hence, if a merger creates a firm whose failure is likely to have a catastrophic effect on the market as a whole, because it is so integral to the market, the end result may be a substantial lessening of competition. It would arguably be better to avoid the creation of such firms in the first place through merger instead of having the Treasury Department bail them out.

Conversely, as my predecessor, former FTC Commissioner Tom Leary has suggested, a merger involving two firms who do not compete in the same relevant market may violate Section 7 or Section 5 if, because of the resulting financial weakness of the merged entity, the merged entity may not constrain the exercise of monopoly or near-monopoly power by a powerful competitor as much as that power is likely to be constrained prior to the merger. In other words, in his view, such a merger arguably can have just as pernicious an effect on competition as a merger of two powerful rivals.[16]

There may also be situations where a merger of two weak and financially struggling firms (though not necessarily on the brink of failure) could result in a stronger competitor and enhance competition. Or there may be situations where a merger will create unique synergies that enhance efficiency, so the transaction results in a stronger competitor and thus enhances

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[15] Albert A. Foer, The American Antitrust Institute, Preserving Competition After the Banking Meltdown, Global Competition Policy, December 2008, *available at*: <www.globalcompetitionpolicy.org>.

[16] Thomas B. Leary, A Suggestion For Revival Of Section 5, Remarks Before FTC Section 5 Workshop, October 17, 2008, *available at:* http://www.ftc.gov/bc/workshops/section5/docs/tleary.pdf>; Thomas B. Leary, The Bipartisan Legacy, *available at:* <http://www.ftc.gov/speeches/leary/050803bipartisanlegacy.pdf>.

competition. These possibilities have always been taken into consideration in merger analysis, even without a financial crisis, but the financial crisis may make them even more important, because preserving competition in this environment becomes all the more vital.

Entry conditions may also be impacted by the financial crisis. One of the assumptions of federal merger policy, based in large measure on orthodox Chicago School thinking, has been that entry is frictionless. In large measure, that assumption is in turn based on the assumption that capital is readily available. Those assumptions undergird a number of attitudes about mergers: that entry is likely; that efficiencies will occur; and that "fixes" can be achieved. During the recent crisis, capital has been entirely or partially frozen These assumptions must be re-examined in light of that experience. Short and medium term tightening of capital markets make entry less likely. This may arguably make it more difficult for the antitrust agencies to find suitable buyers for our divestiture orders, making it more difficult to craft an appropriate remedy. If so, the lack of an effective fix may lead to more aggressive action by the enforcement agencies – for example, an action to block the merger.

Are we going to see more failing firm arguments? The answer is probably yes, and the FTC's analysis may be the same as it has always been.[17] The 1992 Merger Guidelines describe the conditions the agencies look for to see if a failing firm defense should apply. First, the firm must be unable to meet its financial obligations in the near future. Second, the firm must be unable to successfully reorganize under Chapter 11 of the Bankruptcy Code. Third, the firm must have made unsuccessful good faith efforts to elicit reasonable alternative offers. And

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[17] Ilene Knable Gotts, Ramsey Shehadeh, and Joseph Larson have argued that in fact the failing firm analysis in these circumstances should focus on whether the transaction will increase efficiencies. Arguably, however, that analysis is captured by the second element of the failing firm defense.

fourth, absent the acquisition, the assets of the firm would exit the relevant market.[18] In fact, the Commission has already been faced with not just a failing firm argument, but an *actual* failing firm in one industry in the last month and a half. The most the agency could do was explain to the bankruptcy court which of two bidders for the failed firms' assets appeared to be the least anticompetitive (though both appeared anticompetitive). As almost always happens in these situations, the more anticompetitive firm offered more money for the assets to the bankruptcy court, and the court approved that buyer. The result will probably be reduced output, higher prices, less innovation and fewer jobs, but there is nothing the antitrust enforcement agencies can do about it. This is not a good result, and underscores the need to closely analyze the financial conditions of all firms involved when we review mergers – the resulting merged entity as well as remaining competitors.

On a very granular micro level, the financial crisis has resulted in far fewer filings under the Hart-Scott-Rodino Act, which means fewer HSR fees for the enforcement agencies. It is possible that over the next four to six months the FTC's merger shops will have more resources freed up. This may not be a bad thing because the resources that are freed up can be used to conduct much needed retrospective analysis of our merger and non-merger remedies. This is something that Chairman Kovacic has often advocated. We need to examine whether the relief we order is working. Too often in the last three years of my tenure at the FTC I have wondered whether a merger remedy was so complicated it was doomed to fail. For example, when a remedy requires licensing, sharing of manufacturing plants, supply agreements or other ongoing

[18] U.S. Dep't of Justice & Federal Trade Comm'n, Horizontal Merger Guidelines § 5.1 n.39 (1992) (with Apr. 8, 1997 revisions to § 4 on efficiencies), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,104; *see also Citizen Publishing v. United States*, 394 U.S. 131 (1969).

entanglements between firms, I've wondered whether it would be better to just say "no" to the transaction in some situations. I am not the first Commissioner, past and present, to have such thoughts. Conducting retrospective analysis of some of the agencies' more complex remedies will help us understand whether in some circumstances it is better to just say no.

Review of consummated mergers could also be stepped up with freed up resources resulting from a decline in HSR filings. In the current crisis there may be more last minute mergers that should have been blocked. Many of these deals will not work out very well, for a variety of reasons, and the merged entity may end up divesting assets of its own volition. But to the extent that doesn't happen, and down the road it becomes clear that a consummated transaction has created a firm with the ability to exercise market power, the FTC can always challenge the transaction after the fact.[19]

Finally, Mr. Boies may be right that there will be an increase in political and societal pressure to either block or allow a merger because it will prevent job losses, or plant closures, good or bad. In other countries, the government has been more willing to step in and override the relevant antitrust authority. For example, very recently, in the face of the current financial crisis, the UK has altered its regulatory framework as applied to financial sector mergers to enable public interest concerns to trump competition review. In September 2008, the UK Secretary of State issued an Intervention Notice under the Enterprise Act of 2002 on the Lloyds TBS/HBOS merger, thereby eliminating the authority of the Office of Fair Trade to review the transaction and placing it in the hands of the Secretary of State. But our antitrust laws in the U.S. do not incorporate this type of analysis. I hope that the Administration here resists the

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[19] *See, e.g., Chicago Bridge & Iron Company v. Federal Trade Commission,* 534 F.3d 410 (5th Cir. 2008).

temptation to emulate the UK in this respect. I think it will: if the antitrust agencies take into consideration the financial condition of the merged entity, that is likely to help solve the current financial crisis.

Now let me make a few comments about how non-merger antitrust law enforcement may be affected by the financial crisis.

IV. Unilateral Conduct

As I've said, one of the corollaries of orthodox Chicago School thought has been that firms are rational and predation is rarely rational (because imperfect markets correct themselves). This theory has been questioned by various "post-Chicago" School economists like Salop, Lande, and Whinston and others (like Susan Creighton) who have suggested that predation may be rational (and may work) in a number of instances. Recent events should further fuel that intellectual ferment, particularly when there is direct evidence that predation was intended. Indeed, the Commission and the Antitrust Division should be willing to challenge any course of conduct whose purpose and effect may be to eliminate or cripple rivals whose competition could operate to constrain a firm with monopoly power from exercising that power. In those circumstances, the rival is arguably "too important to fail."

V. Cartel Activity

An uptick in cartel activity may occur because firms may be especially tempted to conspire with competitors in order to prop up their prices, margins and stock prices during a recession or depression. Thus, extra vigilance is in order to protect consumers and other competitors from that kind of conduct.

VI. Consumer Protection

I would like to finish tonight by talking briefly about the impact of the financial crisis on the American consumer and, consequently, how this will inform the consumer protection aspect of our mission at the FTC. As you are probably well aware, the current economic situation is extremely grim for many consumers: delinquencies on auto loans and home equity lines of credit have reached their highest levels since record-keeping began in 1980;[20] a record one in 10 American homeowners with a mortgage were either at least a month behind on their payments or in foreclosure at the end of September;[21] increasing numbers of Americans are struggling to pay off medical debt;[22] and in December, the unemployment rate rose from 6.8 percent to 7.2 percent, the highest rate since January 1993.[23]

Clearly, consumers are struggling with personal financial difficulties. Whether these difficulties are caused by a general downturn in the economy, a loss of employment, or the burden of a ballooning mortgage payment, many consumers will need some sort of assistance.

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[20]Nancy Trejos, "Loan Delinquencies Hit Record High Last Year," The Washington Post, Jan. 8, 2009, p. D03, *available at:* <http://www.washingtonpost.com/wp-dyn/content/article/2009/01/07/AR2009010703913.html>; "Late Loans Payments Hit a Record High," MSNBC.com, Jan. 7, 2009, *available at:* <http://www.msnbc.com/id/28541097/>.

[21]Alan Zibel, "Home Loan Troubles Break Records Again," The Associated Press, Dec.5, 2008, *available at:* <http://www.newsvine.com/_news/2008/12/05/2180597-home-loan-troubles-break-records-again>.

[22]Sandra G. Boodman, "Seeing Red – The Rising Costs of Care and a Failing Economy Drive More Americans into Medical Debt," The Washington Post, Jan. 13, 2009, *available at:* <http://www.washingtonpost.com/wp-dyn/content/article/2009/01/12/AR2009011202892.html>.

[23]Statement of Keith Hall, Commissioner, Bureau of Labor Statistics, "Commissioner's Statement on the Unemployment Situation," Jan. 9, 2009, *available at:* <http://data.bls.gov/cgi-bin/print.pl/news.release/jec.nr0.htm>.

Unfortunately, unscrupulous actors will use this time of crisis to take advantage of vulnerable consumers who are trying to solve their financial problems.

For example, we have already started to see the tip of this iceberg with respect to mortgage foreclosure scams.[24] In the past year, the Commission has filed several law enforcement actions against business entities and individuals that were targeting consumers faced with foreclosures.[25] Generally speaking, these types of scams usually involve claims that if the consumer pays an upfront fee – often in the range of $500 to $1,200 – the defendant will save the consumer's home from foreclosure by negotiating better mortgage terms with mortgage lender. However, in most cases the foreclosure is not prevented by the scam artists. In addition to losing their homes, affected consumers may be left in worse shape because they followed instructions not to contact their mortgage lender and may have further damaged their credit history. And, of course, consumers are rarely able to get their fees refunded as promised.

Personal financial difficulties also may make consumers vulnerable to other scams or deceptive practices involving debt settlement offers, credit repair counseling, debt collection efforts, and the extension of credit, including subprime lending. The FTC is engaging in comprehensive law enforcement and regulatory efforts in order to protect consumers from these

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[24] John Leland, "Swindlers Find Growing Market in Foreclosures," The New York Times, Jan. 15, 2009, *available at:* <http://www.nytimes.com/2009/01/15/us/15mortgage.html>.

[25] *FTC v. National Hometeam Solutions, LLC*, No. 4:08-cv-00067 (E.D. Tex. Feb. 26, 2008) (complaint filed), *available at:* <http://www.ftc.gov/opa/2008/09/uhsnfs.shtm>; *FTC v. Mortgage Foreclosure Solutions, Inc.*, No. 8:08-cv-00388 (M.D. Fla. Jan. 5, 2009) (stipulated final judgment and permanent injunction entered), (M.D. Fla. Feb. 5, 2008) (complaint filed), *available at:* <http://www.ftc.gov/opa/2009/01/mfs.shtm>; *FTC v. Foreclosure Solutions, LLC*, No. 1:08-cv-01075 (N.D. Ohio Apr. 28, 2008) (complaint filed), *available at:* <http://www2.ftc.gov/opa/2008/04/foresolutions.shtm>; *FTC v. United Home Savers, LLP*, No. 8:08-cv-01735 (M.D. Fla. Sept. 3, 2008) (complaint filed), *available at:* <http://www.ftc.gov/opa/2008/09/uhsnfs.shtm>.

practices.

Along the same lines, the Commission has also been aggressively investigating some of the practices that may have contributed to putting consumers into precarious financial situations in the first place. For example, the Commission has challenged mortgage advertising that has promised low rates or low payment amounts but that has failed to disclose the short time period for these rates, or advertising that has failed to disclose that the loan is "negatively amortizing."[26] The Commission also recently settled an enforcement action that alleged that defendants engaged in deceptive conduct while marketing Visa and MasterCard credit cards to consumers in the subprime credit market.[27]

In addition to bringing law enforcement actions, the Commission continues to foster efforts to educate consumers about the potential harms related to mortgage foreclosure rescue,[28] debt settlement,[29] credit repair,[30] debt collection,[31] and a variety of other potentially deceptive

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[26] *In the Matter of American Nationwide Mortgage Co.*, Docket No. C-3168 (Fed. Trade Comm'n Jan. 8, 2009) (consent agreement accepted for public comment); *In the Matter of Michael Gendrolis d/b/a Good Life Funding*, Docket No. C-3034 (Fed. Trade Comm'n Jan. 8, 2009) (consent agreement accepted for public comment); *In the Matter of Shiva Venture Group, Inc. d/b/a Innova Financial Group*, Docket No. C-3032 (Fed. Trade Comm'n Jan. 8, 2009) (consent agreement accepted for public comment), *available at:* <http://www.ftc.gov/opa/2009/01/anm.shtm>.

[27] *See* FTC Press Release, "Subprime Credit Card Marketer to Provide At Least $114 Million in Consumer Redress to Settle FTC Charges of Deceptive Conduct," Dec. 19, 2008, *available at:* <http://www.ftc.gov/opa/2008/12/compucredit.shtm>.

[28] "Foreclosure Rescue Scams: Another Potential Stress for Homeowners in Distress," Feb. 2008, *available at:* <http://www.ftc.gov/bcp/edu/pubs/consumer/credit/cre42.shtm>, "Mortgage Payments Sending You Reeling? Here's What to Do," Dec. 2008, *available at:* <http://www.ftc.gov/bcp/edu/pubs/consumer/homes/rea04.shtm>.

[29] "Knee Deep in Debt," Dec. 2005, *available at:* <http://www.ftc.gov/bcp/edu/pubs/consumer/credit/cre19.shtm>; "For People on Debt Management Plans: A Must-Do List," Dec. 2005, *available at:*

and illegal practices.[32]

At the same time, however, there is a recognition that more must be done to protect consumers and to assist them in getting the disclosures and information they need before the harm has occurred. One respected commentator has proposed the creation of a single federal regulator that would be put in charge of consumer credit products.[33] The hallmarks of this framework would include providing the administrative agency with a broad mandate rather than using piecemeal legislation.[34] In addition, the authority over consumer credit products would be vested in a single federal regulator, so that the same regulation applies to all similar products, regardless of the identity of the lender.[35] Another proposal for reform was issued by Secretary Paulson, who presented a conceptual model for a new financial regulatory structure, focused on functions, rather than type of entity, to cover not only consumer credit, but also banking, insurance and securities industries.[36]

<http://www.ftc.gov/bcp/edu/pubs/consumer/credit/cre38.shtm>.

[30]"Fiscal Fitness: Choosing a Credit Counselor," Dec. 2005, *available at:* <http://www.ftc.gov/bcp/edu/pubs/consumer/credit/cre26.shtm>; "Before You File for Personal Bankruptcy: Information About Credit Counseling and Debtor Education," Nov. 2006, *available at:* <http://www.ftc.gov/bcp/edu/pubs/consumer/credit/cre41.shtm>.

[31]"Fair Debt Collection," Mar. 1999, *available at:* <http://www.ftc.gov/bcp/edu/pubs/consumer/credit/cre18.shtm>.

[32]*See generally* <http://www.ftc.gov>.

[33]Elizabeth Warren, "Making Credit Safer," 157 U. Pa. L. Rev. 1, Nov. 2008.

[34]*Id*. at 98.

[35]*Id.*

[36]The Department of the Treasury, "Blueprint for a Modernized Financial Regulatory Structure," Mar. 2008, *available at:* <http://www.treas.gov/press/releases/reports/Blueprint.pdf>.

While the framework for ensuring greater consumer protection in financial services has yet to be decided, I believe that the FTC should play an important role not in ensuring the safety and soundness of financial institutions (which has not traditionally been its province) but in providing meaningful and consistent protection for consumers in this area. Consumer protection has been the central mission of the FTC for many decades, and the agency has extensive experience not only in the enforcement of many consumer credit laws,[37] but also regulating advertising and consumer disclosures across a wide swath of industries and products. The Commission also has devoted significant resources to the development of policy and research, including into mortgage disclosures, privacy notices, and financial practices disclosures.[38] Furthermore, the FTC has been recognized as a leader in developing and distributing consumer and business education materials on a wide range of topics. In this time of economic belt-tightening, it arguably makes sense to reduce spending by vesting consumer protection leadership in an existing agency.[39]

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[37]*E.g.*, Consumer Leasing Act, Fair Debt Collection Practices Act, Fair Credit Reporting Act, Credit Repair Organizations Act, and the privacy provisions of the Gramm-Leach-Bliley Act, Truth in Lending Act, Home Ownership and Equity Protection Act, and Equal Credit Opportunity Act.

[38]FTC Press Release, "FTC Releases Staff Report on Improving Consumer Mortgage Disclosures," Feb. 13, 2007, *available at:* <http://www.ftc.gov/opa/2007/06/mortgage.shtm>; "FTC Releases Staff Report on Mortgage Broker Compensation Disclosures," Feb. 27, 2004, *available at:* <http://www1.ftc.gov/opa/2004/02/mortgagerpt.shtm>.

[39] *See, e.g.*, United States Government Accountability Office, Report to Congressional Addresses, *Financial Regulation: A Framework for Crafting and Assessing Proposals to Modernized the Outdated U.S. Financial Regulatory System*, GAO-09-216, Jan. 2009, at p. 58, *available at* <http://www.gao.gov/new.items/d09216.pdf> ("For example, policymakers should identify ways to improve upon the existing, largely fragmented, system of regulators that must coordinate to act in these areas. As noted above, this should include serious consideration of whether to consolidate regulatory responsibilities to streamline and improve the effectiveness of consumer protection efforts.")

Conclusion

Let me conclude by emphasizing that I have done a lot of crystal ball-gazing. These are uncertain times, and many of the predictions I've made are uncertain. But one thing is certain, it is that the FTC has much to learn from the financial crisis. And, if we don't learn from it, we are foolish.