

**Statement for the Record  
of  
Commissioner J. Thomas Rosch  
Federal Trade Commission  
on  
The Proposal to Create A Consumer Financial Protection Agency**

**Before the Committee on Financial Services  
U.S. House of Representatives  
July 21, 2009**

I appreciate the opportunity to share my personal opposition to the proposal to create a new consumer financial protection agency. I am a Commissioner of the Federal Trade Commission (FTC), sworn in on January 5, 2006, to a term that expires in September 2012.<sup>1</sup> Although I am a Republican appointee, in the three-and-a-half years of my service as a Commissioner, I have not hesitated to exercise my independence when I believed that it was in the best interests of consumers to do so.<sup>2</sup> I also served as the Director of the FTC's Bureau of Consumer Protection from 1973 to 1975, and in 1989 was a member of the American Bar Association's Special Committee to Study the Role of the FTC. I have nothing to gain or lose politically or personally by opposing the proposal to create a new consumer financial protection agency (CFPA).

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<sup>1</sup> By law, the Commission is an independent regulatory agency. The Commission is headed by five Commissioners, nominated by the President and confirmed by the Senate, each serving a seven-year term. The President chooses one Commissioner to act as Chairman. No more than three Commissioners can be of the same political party. 15 U.S.C. § 41.

The Commission is not an Executive Branch agency. It is instead subject to oversight by a number of Congressional committees. *See Humphrey's Executor v. United States*, 295 U.S. 602, 628 (1935).

<sup>2</sup> I have previously described my own independence. *See J. Thomas Rosch, The Redemption of a Republican*, FTC Watch, June 1, 2009, at 4, available at <http://www.ftc.gov/speeches/rosch/090601redemption.pdf>. My career predating my term as a Commissioner is described at <http://www.ftc.gov/commissioners/rosch/index.shtml>.

## **I. Summary of Position.**

The current system for protecting consumers against deception and unfairness in the financial marketplace is broken. Authority and responsibility to define and prevent deceptive and unfair practices are both diffuse and under-utilized. The current consumer protection regime gives authority and jurisdiction to a host of federal agencies without regard to whether those agencies have the expertise or experience (core competency) to best perform the consumer protection functions assigned to them. Because some agencies have little or no core competency to perform those functions and lack adequate resources to do so, they cannot fairly be (and generally are not) held responsible for their failure to protect consumers adequately.

The proposal to create a brand new Executive Branch agency<sup>3</sup> to protect consumers of financial products and services would replace the current flawed system with an even more fundamentally flawed system. The proposed new agency has no track record in protecting consumers from deceptive and unfair practices in the financial marketplace, and the time, money and other resources necessary to implement the new agency promise to be immense. As proposed, the new agency seemingly would have unlimited jurisdiction, yet the extent to which the new agency would be subject to Congressional oversight is completely unclear. The public is simply asked to buy a pig in a poke. The only thing about which the public can be certain is that creation of this new agency would result in considerable delay in protecting consumers, wasteful and inefficient consumer protection law enforcement, and very substantial (if still indeterminate) costs to taxpayers.

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<sup>3</sup> As proposed, the President would appoint all members of the new agency's governing board, but in contrast to the FTC, which limits to three the number of Commissioners from any one political party, all members of the new agency's governing board could come from one political party.

The current broken system should be replaced instead with a system that assigns exclusive authority and responsibility to perform consumer protection functions to specific agencies based on the core competency of the agency to perform those functions. In the case of the FTC, this would mean that it would assume plenary authority and responsibility for, among other things, defining and requiring the necessary and appropriate consumer disclosures respecting financial products and services. It would also mean assigning to the FTC plenary authority and responsibility for protecting consumers against invasions of their privacy, including protecting them from identity theft and securing their other confidential data. These are functions where the FTC has not only taken the lead, but where other federal agencies have looked to the FTC for guidance. Finally, it would mean that the FTC would be provided with the resources and law enforcement tools to enable it to perform those law enforcement functions by itself. Taking these steps would make it fair to hold the agency responsible for performing those functions in a fashion that protects consumers.

In short, replacing the current balkanized system of financial consumer protection with a brand new Executive Branch agency is very poor public policy. The FTC is an independent agency that has the expertise and experience to protect consumers in the realm of financial products and services, and there is no reason to supplant it.

## **II. The Current System is Broken.**

No one can say that the current balkanized paradigm of consumer protection law enforcement regarding financial products and services is desirable. As matters now stand, for example, at least six different federal agencies are responsible for protecting consumers in the

financial marketplace,<sup>4</sup> each having jurisdiction over only a specific segment of the marketplace. For example, the FTC's jurisdiction reaches only to non-bank financial companies, including non-bank mortgage companies, mortgage brokers, and finance companies. Banks, thrifts, and federal credit unions are exempt from the Commission's jurisdiction under the FTC Act but are instead subject to the jurisdiction of other agencies.

Similarly, a host of federal statutes – the Gramm-Leach-Bliley Act, the Truth-in-Lending Act, the Fair Credit Reporting Act, the Home Ownership and Equity Protection Act, the Consumer Leasing Act, the Fair Debt Collection Practices Act, the Fair Credit Reporting Act, the Equal Credit Opportunity Act, the Credit Repair Organizations Act, and the Electronic Funds Transfer Act – distribute to a number of federal agencies various consumer protection responsibilities and obligations respecting only the financial institutions that they regulate.

Thus, the current framework does not accord authority and responsibility based on any agency's core competency to perform that agency's consumer protection function(s). Rather, the current framework gives each federal agency consumer protection authority and responsibility for the specific institutions over which it has jurisdiction in the financial marketplace. As a result, the current framework entrusts some agencies with consumer protection functions even though those agencies have little or no expertise in performing those functions. Other agencies, recognizing their shortcomings, rely on the agency which has demonstrated the highest degree of core competency to perform the functions. For example, a number of agencies in the past have looked to the FTC to determine the disclosures that are necessary and appropriate to protect

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<sup>4</sup> These agencies are the Federal Trade Commission, 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.

consumers in the financial marketplace.<sup>5</sup>

This patchwork quilt of jurisdiction results in wasteful duplication in performing some consumer protection functions. Law enforcement activities in the credit card industry illustrate this inefficiency. In a federal court complaint filed in June 2008, the FTC alleged that CompuCredit Corporation, a company marketing Visa and MasterCard credit cards to consumers in the subprime credit market, engaged in deceptive conduct in connection with the marketing of credit cards.<sup>6</sup> CompuCredit ultimately settled with the FTC and agreed to reverse fees charged to eligible consumers' accounts, estimated to result in more than \$114 million in credits.

However, because CompuCredit also acted on behalf of some entities regulated by the Federal Deposit Insurance Corporation (FDIC), in addition to the FTC action, the FDIC also challenged the same practices, and put CompuCredit under order extracting a civil money penalty of \$2.4 million.<sup>7</sup> The need to engage in dual prosecutions relating to the same consumer protection issues was inefficient, time-consuming and a wasteful use of agency resources.

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<sup>5</sup> See, e.g., Federal Trade Commission Staff Comment for the Board of Governors of the Federal Reserve Board Regarding Truth in Lending, Proposed Rule (April 2008), available at <http://www2.ftc.gov/opa/2008/04/frb.shtm>; 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* (November 2007), (comment to the OCC, the Federal Reserve Board, the FDIC, the OTS, and the NCUA), available at <http://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* (September 2006), available at <http://www.ftc.gov/opa/2006/09/fyi0661.shtm>.

<sup>6</sup> CompuCredit settled with the FTC and agreed to reverse fees charged to eligible consumers' accounts to settle allegations that it violated federal law. It is estimated that the redress program will result in more than \$114 million in credits to consumer accounts. See Press Release, available at <http://www.ftc.gov/opa/2008/12/compucredit.shtm>.

<sup>7</sup> *Id.*

Beyond that, because no one agency is given plenary authority or jurisdiction or the resources to effectively protect consumers, no single agency fairly can be held ultimately accountable for the protection of consumers.<sup>8</sup> Consequently, the current balkanized system may result not only in the inefficient use of agency resources, but also in under-enforcement of existing consumer protection statutes and inadequate protection of consumers. For example, even though the FTC may detect deceptive and unfair practices in the financial marketplace, it can act only within its limited jurisdiction. Thus, despite the FTC's success in challenging the inadequate disclosures made by CompuCredit, the FTC was otherwise constrained from bringing such a case against any depository institutions – such as banks that issue credit cards.

### **III. The Proposal to Create a New Agency is Fundamentally Flawed.**

The creation of a new Executive Branch consumer protection agency will only make matters worse by compounding, rather than mitigating, the enforcement problems that now exist. First and foremost, there is no evidence that this proposed new agency has any core competency in protecting consumers in the financial marketplace. It is entirely untested and without any experience or expertise.

Second, the creation of a brand new Executive Branch agency will come at a great financial cost to consumers. The resources necessary to implement this proposal will be immense, including space requirements, employees, infrastructure, and overhead. I have yet to see proponents of the proposal offer even an estimate of the cost to American taxpayers for this anticipated project. This proposal seems particularly ill-advised in light of the current economic

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<sup>8</sup> *See generally*, Hearing On Improving Consumer Protections In Subprime Lending, Before the Subcommittee On Interstate Commerce, Trade, and Tourism of the Committee On Commerce, Science, and Transportation, United States Senate, April 29, 2008.

situation and the fact that at least one existing federal agency with proven expertise (the FTC) stands ready, willing and able to better perform most of the consumer protection functions that would be given to this new agency. Indeed, it is ironic that a consumer protection proposal should be so anti-consumer; as consumers, we generally demand to know beforehand the costs and benefits of the products we purchase.

Third, it is anticipated that it will take at least eighteen to twenty-four months for this new agency to become operational. This long start-up time will entail considerable burden and delay in protecting consumers in the financial marketplace – consumers that need immediate assistance.

Fourth, the proposal creates an agency with virtually unlimited jurisdiction and entirely uncertain Congressional oversight. The definitions that determine the extent of the new agency's exclusive or primary authority are extremely broad:

- The definition of “financial activity” includes a long list of activities, and then allows the proposed agency to add others to the list by rule.
- Likewise, the definition of “financial product or service” includes any product or service that “directly or indirectly” “results from or is related to” engaging in a financial activity. The payment side of every business of every sort could be so described and thus apparently become the responsibility of the proposed new agency.
- Specifically, because the granting of “credit” is considered a “financial product or service,” the proposed new agency would have authority over every transaction that involves payment by means other than cash on the barrel head. That is because “credit” is defined as including, among other things, the right granted by a person to a consumer to “purchase property or services and defer payment therefor.”

Fifth, the broad definitions of the new agency's plenary authority would also severely impact the future operations of the FTC. For example, in the proposal, a “covered person” is

defined as one who engages “directly or indirectly” in a financial activity in connection with the provision of a consumer financial product or service, or one who provides a material service to or processes a transaction on behalf of such person. That definition would result in the transfer to the new agency all of the consumer protection functions that relate to financial products and services even if tangentially offered by any entity. Such a transfer would not only include a transfer of authority, but a transfer of staff, office space, infrastructure and funding – critical components without which the FTC would be crippled in exercising whatever enforcement authority remains.

Indeed, the exclusive authority of the proposed new agency would extend beyond rulemaking to “guidance, examination, and requiring reports.” Such expansive authority would threaten to atrophy the FTC’s ability to issue enforcement policy statements, business education materials, consumer education, press releases explaining its cases and other kinds of guidance relating to its retained authority over financial matters.

Similarly, the proposal provides for the collection of financial consumer complaints by the new agency. Yet, for years, the FTC has developed and maintained an extensive database of consumer complaints including complaints about financial products and services, obtained from a myriad of sources and available to all interested law enforcement agencies. That database would inevitably wither.

Finally, and perhaps most strikingly, the proposal does not even appear to authorize the FTC to enforce the new agency’s rules (although it does authorize the states to enforce them). To be sure, there is a provision for coordinating enforcement, but it provides that the FTC must refer to the new agency any enforcement matter, then wait up to 120 days for the new agency to bring the case; the FTC can then only bring a case if the new agency declines to do so. At worst,



that is a recipe for duplicative and wasteful exercise of the agencies' prosecutorial discretion. At best, it is a recipe for delay. As noted earlier, there is no estimate as to the size or cost of the new agency's staff, but it is likely that it will be created at the expense of the FTC.

This is not just parading horrors. The proposal would of course provide the FTC with "backstop enforcement authority." However, that provision is at best a fig leaf for stripping the agency of its current role as the primary agency responsible for protecting consumers in the financial market.<sup>9</sup>

In sum, the creation of a new Executive Branch consumer protection agency for financial products and services will introduce an even worse situation than now exists. As with the creation of any new federal agency from whole cloth, the proposal guarantees that there will be substantial delay in law enforcement while the new agency is established, in addition to imposing substantial financial costs on the public and sapping the vitality of the FTC as a consumer protection agency.

#### **IV. The Proposal to Create the CFPA Should Be Scrapped in Favor of Entrusting Consumer Protection Authority and Responsibility on the Basis of Core Competency.**

Plenary and exclusive authority and responsibility for consumer protection functions in the financial market, as in other markets, should be assigned to that agency which has the highest degree of expertise, experience and core competency to perform those functions.

That agency is not inevitably the FTC. There are certain functions which the FTC is ill-

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<sup>9</sup> See Prepared Statement of Stephen Calkins On the Proposed Consumer Financial Protection Agency: Implications for Consumers and the FTC, Testimony Before the Committee on Energy and Commerce Subcommittee on Commerce, Trade, and Consumer Protection, United States House of Representatives, July 8, 2009, at 9-10, *available at* [http://energycommerce.house.gov/Press\\_111/20090708/testimony\\_calkins.pdf](http://energycommerce.house.gov/Press_111/20090708/testimony_calkins.pdf).

equipped to perform. For example, the monitoring of the safety and soundness of financial institutions has never been within the FTC's purview and it is strongly arguable that the FTC might not be effective in performing that function. Likewise, the FTC lacks a comparative advantage in terms of the experience and expertise required to determine whether a particular financial product or service should or should not be offered to the public.

On the other hand, the FTC has traditionally exercised particular expertise and experience with respect to, among other things, the fashioning of disclosures that are necessary and appropriate to protect consumers both from a lack of sufficient information to make an informed choice as well as from information overload. The Commission has a long history of conducting empirical tests of the efficacy of disclosures in a wide variety of commercial contexts.<sup>10</sup> The Commission has made the development and testing of disclosures (especially mortgage disclosures) a key priority in its research relating to financial services. Current statutory and regulatory schemes related to financial services include a host of requirements mandating that information be disclosed to consumers. Most recently, the FTC's Bureau of Economics published a seminal research report concluding that the current mortgage disclosure requirements do not work and that alternative disclosures should be considered and tested.<sup>11</sup>

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<sup>10</sup> 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).

<sup>11</sup> See Federal Trade Commission, Bureau of Economics Staff Report, *Improving Consumer Mortgage Disclosures: An Empirical Assessment of Current and Prototype*

In fact, evidencing that core competency, other agencies (including the Federal Reserve Board) have looked to the FTC for guidance in this respect. Furthermore, the FTC has been the dominant force in spearheading efforts to educate consumers about a wide array of important financial issues.<sup>12</sup>

Another function as to which the FTC has been the lead agency has been data security and protection of consumers from identity theft. Because of its experience and expertise regarding consumer expectations, the FTC has exercised primacy in that area. Specific examples include the Commission's efforts to protect privacy and fight identity theft through its law enforcement actions, its leadership on the President's Identity Theft Task Force, and its extensive consumer and business education and outreach activities.<sup>13</sup> This discussion of the FTC's core competencies is illustrative not exhaustive.

Of course, the FTC cannot adequately perform these functions on a plenary and exclusive basis (as it should do) without adequate resources. Thus, the assignment of these functions to the FTC must be accompanied by an adequate addition of staff to perform them, as well as by

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*Disclosure Forms* (June 2007), available at <http://www.ftc.gov/os/2007/06/P025505mortgagedisclosurereport.pdf>.

<sup>12</sup> For example, the FTC distributes consumer education materials on mortgage servicing, what consumers should do if they are having trouble making mortgage payments, and how consumers can manage their mortgage if their lender closes or files for bankruptcy. *See* <http://www.ftc.gov/bcp/edu/pubs/consumer/homes/real0.shtm>; <http://www.ftc.gov/bcp/edu/pubs/consumer/homes/rea04.shtm>; <http://www.ftc.gov/bcp/edu/pubs/consumer/homes/real2.shtm>.

<sup>13</sup> *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>.

safeguards against those resources being indirectly attacked by superior wages at other federal agencies.<sup>14</sup>

There is another compelling reason for entrusting certain functions to the FTC on a plenary and exclusive basis rather than to a new agency. Quite apart from its demonstrated superior core competency in performing these functions, the FTC has long maintained a vibrant competition mission. As former FTC Chairman Muris has pointed out, it is imperative to the competition mission that the consumer protection mission inform the competition mission. Otherwise, there is a danger that competition will be distorted by unwise consumer protection initiatives.<sup>15</sup> This cross-fertilization is all the more important today, when “behavioral economists” suggest that consumers are not always rational in their behavior and that the best competition missions are those which are coupled with an expert and experienced consumer protection mission.<sup>16</sup>

## **V. Conclusion**

In short, trading the current flawed balkanized system of consumer protection for a new federal Executive Branch consumer financial protection agency, with all of its fundamental faults, is no way to make sound public policy.

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<sup>14</sup> For example, the Securities and Exchange Commission and the Federal Reserve Board have higher pay scales than comparable pay scales at the FTC. Of course, reducing those pay scales is not the only way to avoid this problem.

<sup>15</sup> See Prepared Statement of Timothy Muris On The Economy and Fraud: Protecting Consumers During Downward Economic Times, Testimony Before the Committee on Commerce, Science, and Transportation, United States Senate, July 14, 2009, at 3-4, *available at* [http://commerce.senate.gov/public/\\_files/MurisJuly14Testimony.pdf](http://commerce.senate.gov/public/_files/MurisJuly14Testimony.pdf).

<sup>16</sup> See Economics Roundtable, Global Competition Review (March 2009).