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UNFAIR OR DECEPTIVE ACTS OR PRACTICES:

Would You Recognize
Them If You Saw Them?



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The Federal Trade Commission Act¹ (FTC Act) has prohibited unfair or deceptive acts or practices (UDAP) in commerce for almost 70 years. But until the turn of the century, federally regulated financial institutions rarely needed to be concerned that their practices might be challenged as unfair or deceptive. The enforcement climate has changed. BY PAUL F. HANCOCK

UNFAIR OR DECEPTIVE ACTS OR PRACTICES:

Would You Recognize Them If You Saw Them?

Although primary authority for enforcing the act rests with the Federal Trade Commission (FTC), the federal financial regulatory agencies² now enforce the act's provisions themselves as to the institutions under their regulatory authority. As this new enforcement structure has emerged, the FTC has placed renewed emphasis on challenging practices that are deemed "unfair," even if deception did not accompany such practices. The regulators have followed this lead, alleging violations of the act in connection with credit card solicitations, loan terms, and loan-servicing practices.

The compliance challenge is complicated by the fact that specific, detailed guidance has not been provided by either the FTC or the regulators. In contrast, very specific regulations guide enforcement of other laws designed to protect consumers, such as the Truth in Lending Act (TILA)³ and the Equal Credit Opportunity Act (ECOA).⁴ Financial institutions should not expect comparable guidance for complying with the FTC Act.

Rather, banks and other financial institutions must develop their own plans for compliance. To do so, it is important to understand the meaning of the terms "unfair" and "deceptive" and also to master the analytical framework applied by the FTC and the regulators to examine the same issues. The regulators have supplied some helpful guidance in this regard.

It may hurt an institution to reimburse consumers at the directive of a regulatory agency, but it is even more harmful to face the reputational damage caused by a finding that the institution has engaged in acts or practices that are unfair or deceptive. Such damage often is irreparable.

The task is by no means easy because subjective judgments play a major role in the final outcome. This is particularly true in evaluating an act or practice that might be challenged as “unfair.” Definitions of the legal terms to guide enforcement are now available, but the definition applied by former Supreme Court Justice Potter Stewart to the term “obscenity” is equally applicable to unfairness: “I know it when I see it.”²⁵

Bankers may take some comfort in knowing that federal enforcement officials themselves have been confused for many years as to the meaning of these terms and how they might apply to federally regulated financial institutions. It is useful to understand this background. The criticisms encountered by the FTC for applying “unfairness” in the past suggests that the agency will be judicious in relying on that authority in the future. At the same time, regulators’ failure to enforce the FTC Act until recently has caused them to be quite aggressive in enforcing the law today.

The compliance challenge can be significant, because marketing and sales staff generally strive to emphasize the benefits of their products and services to consumers, while giving scant notice of the limitations. Deceptive marketing, for example, may increase business profits, which is the primary objective of the sales and marketing staff. The profit can disappear quickly, however, if the institution is charged with a violation of the FTC Act. And the reputational damage caused by such an accusation may be irreparable.

History of the FTC Act and Its Application to Federally Regulated Financial Institutions⁶

The FTC Act was enacted in 1914 and amended in 1938 to prohibit “unfair or deceptive acts or practices in or affecting commerce.”²⁷ Enforcement of the law was assigned to the FTC, but banks were exempt from FTC enforcement authority. In the early 1970s, exchanges between members of Congress and the banking agencies considered whether the banking agencies themselves had the authority to enforce the FTC Act as to the institutions they regulated, with some of the agencies opining that such authority existed pursuant to a provision of the Federal Deposit Insurance Act that granted authority to remedy a violation of any “law, rule or regulation.”²⁸

In 1975, Congress again amended the FTC Act to require each banking regulatory agency to establish a division of consumer affairs to address complaints alleging violations of the act, and also required the Federal Reserve Board (Fed) to develop regulations “defining with specificity such unfair or deceptive acts or practices, and containing requirements prescribed for the purpose of preventing such acts or practices.”²⁹

The wording of the amended law created uncertainty as to whether a banking agency’s authority was limited to enforcing regulations the Fed might adopt, or whether the

agency could enforce the FTC Act itself. If the former were the standard, the agencies would be quite limited inasmuch as the Fed issued regulations only once and addressed only limited issues.¹⁰

The issue lingered for 25 years until the Comptroller of the Currency concluded, in connection with a 2000 supervisory action, that the agency had authority to address a violation of the FTC Act even if the challenged practice had not been prohibited by regulation.¹¹ In 2002, Fed Chairman Alan Greenspan agreed that the agencies had authority to enforce the FTC Act, contending, “The fact that banks are excluded from the FTC’s authority to enforce this prohibition merely reflects Congress’ preference that the banking agencies—not the FTC—are the appropriate enforcing authorities for banks.”¹²

Chairman Greenspan also signaled that detailed guidance for compliance through regulations would not be forthcoming because “it is difficult to craft a generalized rule sufficiently narrow to target specific acts or practices determined to be unfair or deceptive, but not to allow for easy circumvention or have the unintended consequence of stopping acceptable behavior.”¹³ For federally regulated institutions to comply with the FTC Act, an understanding of what is deemed to be an unfair and deceptive act or practice is crucial.

Background of the Application of the “Unfair” Prong of the Act

Just as the financial regulatory agencies struggled with their authority to enforce the FTC Act, the FTC itself struggled with the substantive interpretation of the act, particularly the portion designed to prohibit practices that might be perceived as “unfair.” In the 1970s, for example, the FTC viewed the “unfair” aspect of the statute as allowing the agency to address practices that, in its view, offended public policy or were immoral, unethical, oppressive, or unscrupulous or caused substantial injury to consumers.¹⁴ Critics charged that such a standard authorized enforcement based on the personal values of the enforcement officials. Using such a standard, the FTC tried to ban all advertising directed at children and suggested its authority could be used to restrict the employment of illegal aliens and to punish tax cheats and polluters.¹⁵ A *Washington Post* editorial referred to the FTC as the “National Nanny.”¹⁶

Congressional opposition to the FTC’s views was strong. At one point the agency was shut down for a few days because of a lack of funding, and Congress did not reauthorize the FTC for 14 years.

On December 17, 1980, the FTC adopted the “Unfairness Policy Statement,” designed to address the criticisms.¹⁷ The policy identified consumer injury as the most important component of an unfairness analysis. Such injury “must be substantial; it must not be outweighed by countervailing



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benefits to consumers or competition that the practice produces; and it must be an injury that consumers themselves could not reasonably have avoided.”¹⁸ The commission also adopted a view that public policy considerations could not be an independent basis for a finding of unfairness.¹⁹

This new policy was applied cautiously through the 1980s, and in 1994 Congress finally reauthorized the FTC and formally amended the law to adopt the definition of unfairness provided in the policy statement. Congress also codified the limited role public policy may play in FTC decision making. The commission may consider public policies but it cannot use public policy as an independent basis for finding unfairness.²⁰

Though the congressional action seemingly resolved the long debate, the FTC rarely used the new statutory definition to label practices as unfair for several years after the 1994 amendments. As the decade approached its end, however, the agency began to identify a role for the unfairness authority, challenging unauthorized billing (or “cramming”) by telephone companies and newly emerging Internet trickery.²¹ In recent years, the agency has concluded that certain lending practices, particularly those that might be deemed “predatory,” are appropriate for challenge using the unfairness authority.

The Meaning of “Unfair” and “Deceptive” Today

Each enforcement agency is guided by the statutory principle that “unfair or deceptive practices” are unlawful.

Now defined by statute, unfairness challenges will be raised if an agency concludes that the act or practice

① causes or is likely to cause substantial injury to consumers, ② cannot be reasonably avoided by consumers, *and* ③ is not outweighed by countervailing benefits to consumers or competition.²²

Each of these factors is an important part of the legal analysis.

For example, an act or practice will not be challenged as unfair unless the agency concludes that the act or practice has caused or is likely to cause substantial injury to consumers.²³ This usually means monetary harm and generally does not include intangible factors such as emotional distress. The harm need not actually have occurred, however, if the agency concludes that the harm was “likely” to occur. Also, the agencies will consider the harm to be substantial even if no individual consumer suffered major harm, so long as a large number of consumers suffered at least some harm. The harm to consumers is the most significant factor in

agency consideration, and without substantial consumer harm, it is unlikely that enforcement agencies will label an act or practice as unlawfully unfair.

Even if substantial consumer harm is present or likely, enforcement agencies will evaluate whether consumers could reasonably avoid the injury. Agencies try not to second-guess the decision of an informed consumer even if the decision was unwise. But the agencies will consider whether material information was withheld from the consumer so that the choice was not informed.

Equally significant, enforcement agencies will consider whether the consumer injury, even if reasonably unavoidable, is outweighed by countervailing benefits to consumers or to competition. For example, the FTC declined to prohibit provisions of consumer credit contracts requiring debtors to pay attorneys fees in debt collection proceedings. Obviously such a provision might harm consumers, but the agency recognized that creditors are often not fully reimbursed for collection costs and that prohibiting the provision might increase legal costs by encouraging additional litigation. On balance, the agency concluded that the costs of the considered prohibition outweighed the benefits that might be achieved.²⁴

In sum, application of the unfairness standard is essentially a cost-benefit analysis, starting with the harm to consumers and balancing such harms against countervailing benefits to consumers or to competition. Considerations of public policy may play some role in the analysis but will not serve as the primary basis for the ultimate decision.

Like the unfairness analysis, the primary focus of challenges based on a claim of deception is on preventing consumer injury. The deception analysis, however, does not look for offsetting benefits to consumers or to competition. Rather, it is presumed that false or misleading statements either have no benefit or that the injury inflicted on consumers could be avoided at little cost to the organization responsible for the deception.

A deceptive act or practice is a representation, omission, or practice that is likely to mislead consumers who are acting reasonably in the circumstances presented. To be unlawful, the representation, omission, or practice must be material—that is, it must be likely to affect a consumer’s choice to buy or use the product.²⁵ In general, information about costs, benefits, or restrictions on the use or availability of a product or service is material.²⁶ Knowingly false statements will be presumed to be material, and omissions will be presumed to be material when the advertiser knew, or should have known, that the consumer needed the information to evaluate the product or service.²⁷

An FTC official recently summarized the types of unlawful deception by stating “A representation might be deceptive because it is not true, it might imply something that’s not true, or it might be a statement that’s unsubstantiated, [such as] performance claims for products.”²⁸

Deceptive statements might arise in advertising, direct marketing, individual sales pitches, consumer billing, or

loan servicing. In the FTC's view, it is not necessary for the agency to establish that the challenged company *intended* to deceive consumers, nor is it necessary to establish that consumers were, in fact, injured. Rather, the injury is presumed to follow the deceptive act or practice.²⁹ Also, the enforcement agencies do not believe it necessary to establish that consumers were actually misled by a challenged act or practice, as long as they are comfortable that the act or practice was "likely" to mislead consumers.

A potentially deceptive statement is not evaluated in isolation, but rather is examined in the context of the entire transaction or advertisement. The agencies seek to determine the impact that the transaction or advertisement likely will have on a "reasonable consumer." It is important to note, however, that the definition of "reasonable consumer" is evaluated from the perspective of the group to whom the transaction or advertisement is directed. Thus, in evaluating marketing directed toward an immigrant population, for example, enforcement officials will attempt to determine how members of the target audience would read the representations contained in the materials.³⁰

An issue that often arises is the extent to which qualifying information will be evaluated in considering whether an act or practice is deceptive. For example, an advertisement might advise consumers that a financial product contains "no up-front fees" when, in fact, there is an account setup fee that is also disclosed in the same advertisement.

It is important to note that an act or practice may be challenged as unfair or deceptive even if it technically complies with other laws designed to protect consumers, such as the Truth in Lending Act,³² the Truth in Savings Act,³³ the Equal Credit Opportunity Act,³⁴ the Fair Housing Act,³⁵ or the Fair Debt Collection Practices Act.³⁶ For example, a creditor's disclosures may comply with TILA, but the accompanying solicitation may be deemed deceptive if it states falsely that the rate is guaranteed for life. Similarly, an unfair or deceptive act or practice can also violate other consumer protection laws. For example, predatory lending practices targeted to minority consumers may constitute a violation of both the FTC Act and the Fair Housing Act.

FTC Enforcement of the Act

By filing more than 20 cases since 1998, the FTC has applied its enforcement authority to challenge lending practices it views as predatory.³⁷ The great majority of these actions challenged practices that were deemed to be deceptive. For example, in 2000, the FTC filed a lawsuit against First Alliance Mortgage Company alleging that the company misled consumers regarding loan fees and interest rates, such that "consumers believe they are borrowing less money at a lower interest rate than they actually are."³⁸

In a 2002 settlement involving The Associates, the FTC obtained the largest monetary award for consumers in the agency's history after alleging that the company utilized deceptive lending practices, such as the packing of unwanted credit insurance on consumers' loans.³⁹ In a 2003 action

against Stewart Finance, the agency again alleged that the company deceptively sold other products with its personal loans, such as insurance and car club memberships.⁴⁰

As the FTC enforcement drive has continued, the agency has utilized its authority to challenge practices that, even if not deceptive, were deemed to be unfair. In a November 2003 settlement with Fairbanks Capital, a company engaged in the servicing of subprime loans, the FTC alleged that the company implemented both unfair and deceptive practices. The unfairness authority provided a neat fit for portions of the challenge because as a servicer, the defendant had made few representations to the borrowers but was nevertheless implementing practices that cried out for legal challenge, such as failing to post loan payments when received and then charging a late fee when the payment was finally posted after the due date.⁴¹

Enforcement of the Act by the Federal Financial Regulatory Agencies

All indications are that the federal financial regulatory agencies will closely mirror the FTC efforts as to lenders under their supervisory authority. For example, in 2004 the Office of Thrift Supervision (OTS) entered a supervisory agreement with Ocwen Federal Bank, applying the FTC Fairbanks' model to address issues of deception and unfairness in the servicing of subprime loans.⁴²

The Office of the Comptroller of the Currency (OCC) boasts on its Web site that "[t]he OCC has taken the lead among bank regulatory agencies in developing effective approaches to protecting America's consumers."⁴³ Since its first FTC Act enforcement case in 2000, the OCC has filed nine other enforcement actions under the FTC Act. Like the FTC, most of the OCC's actions have addressed deceptive practices (particularly in credit card marketing), but the agency's more recent actions have included claims based on unfairness.⁴⁴

In evaluating whether qualifying statements preclude a claim of deception, enforcement agencies examine what is known as the "FOUR PS":

- 1 PROMINENT:** Is the statement big enough for the consumer to notice? Misleading impressions cannot be cured by fine print.
- 2 PRESENTATION:** Are the wording and format easy for a consumer to understand?
- 3 PLACEMENT:** Is the information in a location where consumers can be expected to look?
- 4 PROXIMITY:** Is the information near the claim it qualifies?³¹



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The OCC has released guidance on several occasions in recent years. On March 22, 2002, the OCC issued an advisory letter, titled “Guidance on Unfair or Deceptive Acts or Practices” to “help national banks avoid being placed in jeopardy of penalties, judgments, and harm to their reputation that can result from [unfair or deceptive] practices.”⁴⁵ In April 2004, the agency issued an advisory letter providing a stern warning regarding the terms of secured credit cards.⁴⁶ In September 2004, the agency provided guidance on other credit card practices that may constitute unfair or deceptive acts or practices.⁴⁷ More recently, in February 2005 the agency released “OCC Guidelines Establishing Standards for Residential Mortgage Lending Practices.”⁴⁸ An overarching objective of the most recent guidance is that a “[b]ank must not become engaged in abusive, predatory, unfair, or deceptive practices, directly, indirectly through mortgage brokers or other intermediaries, or through purchased loans.”⁴⁹

On March 11, 2004, the Federal Deposit Insurance Corporation (FDIC) and the Board of Governors of the Federal Reserve System issued joint guidance entitled “Unfair or Deceptive Acts or Practices by State-Chartered Banks.”⁵⁰ The agencies said the purpose of the guidance is “to outline the standards that will be considered by the agencies as they

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carry out their responsibility to enforce the prohibitions against unfair or deceptive trade practices found in Section 5 of the Federal Trade Commission Act.”

The guidance provided by the agencies is less specific than the regulatory provisions accompanying other consumer protection laws, such as Regulation B (ECOA)⁵¹ or Regulation Z (TILA).⁵² Nevertheless, the guidance is designed to teach the agencies’ analytical methodologies and is appropriate in that the ultimate decision is driven by a totality of the factual information presented. In most instances, an act or practice is not *per se* unfair or deceptive. Rather, the act or practice may be lawful if implemented in one manner, but unlawful if implemented in another manner.

For example, the agencies have concluded that “default pricing”—increasing the APR on a credit card if the consumer fails to make timely payments on the account or on another account—may be an appropriate means of managing credit risk. But such a practice may be deemed unfair or deceptive if the terms were not properly conveyed to the consumer in advance. In examining the totality of facts to consider the legality of the practice, the agencies will apply the Four Ps to determine whether the consumer was adequately informed. As long as the consumer was adequately informed and chose to accept the credit card with knowledge of the terms and

consequences, the practice will be considered valid.

Other credit card practices that have evoked agency attention include “up to” marketing (e.g., “You can receive a credit limit of up to \$10,000.”) and promotional or teaser rate marketing (e.g., “We are offering a promotional interest rate of only 4 percent.”). Neither practice is unlawful *per se*, but the agencies will examine whether the promotional materials are likely to mislead consumers. For example, the materials may cross the line into deception if, in fact, a very small percentage of the consumers receiving the solicitation are actually eligible for the \$10,000 credit limit. Similarly, the limitations of the teaser rates would have to be fully disclosed (under the Four Ps test) to ensure against a challenge based on deception.

Further, the agencies will attempt to determine the impact of the overall solicitation and disclosures from the perspective of the audience to whom the creditor was marketing. A credit card solicitation program directed toward an immigrant neighborhood, for example, might require more careful disclosures than the same product marketed toward a neighborhood composed of persons with greater credit experience and sophistication.

Developing a Plan for Compliance

It is important that bank compliance officials fully understand the analytical framework of the regulators, and that they themselves apply the analyses to the institution’s policies, practices, procedures, and marketing programs. The agencies’ publications cited above provide helpful guidance for compliance officials, such as the following:⁵³

- Review marketing materials to ensure they fairly and adequately describe the terms, benefits, and material limitations of the product or service being offered, including any related or optional products or services, and that they do not misrepresent such terms either affirmatively or by omission. A consumer should be able to understand all terms without having to do “detective” work.
- Avoid the use of claims such as “guaranteed,” “pre-approved,” or “lifetime rates” if there is a significant possibility that consumers will not receive the terms that have been advertised and this possibility is not described adequately.
- Inform consumers in a clear and timely manner about any fees, penalties, or other charges (including charges for any forced-placed products) that have been imposed and the reason for their imposition.
- Clearly inform consumers of contract provisions that permit a change in the terms and conditions of an agreement.
- Clearly notify consumers in connection with “free trial periods” for services—at the time of the initial solicitation and subsequently—if the consumer will be required to affirmatively act to cancel the service at the end of the trial period to avoid being billed for service past the trial period. Get clear and affirmative consent to terms and billing arrangements.
- Tailor advertisements, promotional materials, disclosures, and scripts to account for the sophistication and experience of the target audience. The primary language of

the target audience should also be considered.

■ Clearly disclose when optional products and services—such as insurance, travel services, credit protection, and consumer report update services that are offered simultaneously with credit—are not required to obtain credit or considered in decisions to grant credit.

■ Implement and maintain effective risk and supervisory controls to select and manage third-party servicers.

■ Review compensation arrangements for employees as well as third-party vendors and servicers to ensure they do not create unintended incentives to engage in unfair or deceptive practices.

■ Ensure that the institution and its third-party servicers have and follow procedures to credit consumers' payments in a timely manner. Consumers should be clearly told when and if monthly payments are applied to fees, penalties, or other charges before being applied to regular principal and interest.

■ The need for clear and accurate disclosures that are sensitive to the sophistication of the target audience is heightened for products and services that have been associated with abusive practices. Accordingly, banks should take particular care in marketing credit and other products and services to the elderly, the financially vulnerable, and customers who are not financially sophisticated. In addition, creditors should pay particular attention to ensure that disclosures are clear and accurate with respect to the points and other charges that will be financed as part of home-secured loans; the terms and conditions related to insurance offered in connection with loans; loans covered by the Home Ownership and Equity Protection Act⁵⁴; reverse mortgages; credit cards designed to rehabilitate the credit position of the cardholder; and loans with pre-payment penalties, temporary introductory terms, or terms that are not available as advertised to all consumers.

Agency officials have also stressed the importance of providing a clear avenue for consumers to voice complaints regarding practices they view as unfair or deceptive. It is suggested that banks and other creditors clearly disclose a telephone number, mailing address, e-mail address, or Web site consumers may use to contact the bank or its third-party representative. Banks should implement procedures for fairly addressing and resolving consumer complaints, in part because the complaints themselves can be a means of evaluating whether marketing or other materials are actually conveying the message to the target audience as intended by the institution.⁵⁵

In addition, a meaningful compliance plan requires the delegation of substantial authority to the compliance staff. It should be expected that compliance officials may bump heads with sales staff and marketing officials in light of their differing roles. The usual objective of sales and marketing staff is to maximize profits, so they want to emphasize the benefits of products and services, not the limitations. However, if the limitations are not fully disclosed to consumers the institution may be charged with implementing unfair or deceptive practices. Thus, meaningful input from the

compliance staff is crucial for compliance.

Similar issues may arise in dealing with outside companies, such as marketing or solicitation firms, who are hired to perform services on behalf of the institution. Banks must be careful to remember that they can be liable for the acts and practices of those with whom they establish certain business relationships.

For example, promotional or teaser rates for mortgages and credit cards certainly are designed to attract new customers to an institution. Marketing staff, or outside vendors, may argue for fine print explaining that the rate remains in effect for a brief period or that it is applicable only to certain charges, such as balance transfers. Such personnel may not want the consumer to focus on these limitations. But unless the marketing material is presented in a manner that effectively informs the consumer of the limitations of the program, the institution may be charged with a violation of the FTC Act.

The message of compliance must emanate from the top officials of an institution. Each department may have its own interests, but senior management needs to provide the balance that considers all interests, and, most importantly, mandates decision making that minimizes the risks of non-compliance. It may hurt an institution to reimburse consumers at the directive of a regulatory agency, but it is even more harmful to face the reputational damage caused by a finding that the institution has engaged in acts or practices that are unfair or deceptive. Such damage often is irreparable.

Conclusion

Compliance with the FTC Act presents new challenges for federally regulated financial institutions. In five brief years, the regulatory agencies have dramatically increased their focus on compliance with this act, and the FTC has found new methods of addressing issues in the lending industry. At the same time, guidance now is available for the development of a compliance plan. Financial institutions may be required to apply compliance methodologies and thought processes differently than they have in the past, but an understanding of the analytical framework utilized by the agencies provides a strong foundation for a compliance plan. As bank officials focus on these issues, they likely will agree that their acts and practices should not be unfair or deceptive to consumers, and a sound compliance plan should promote a realization of that objective. BC

ABOUT THE AUTHOR

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Endnotes

¹⁵ U.S.C. 41-58 (hereinafter cited as "the act" or "the FTC Act").

² The term "federal financial regulatory agencies" encompasses the Board



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of Governors of the Federal Reserve System (FRB), the Federal Deposit Insurance Corporation (FDIC), the National Credit Union Administration (NCUA), the Office of the Comptroller of the Currency (OCC), and the Office of Thrift Supervision (OTS).

³¹15 U.S.C. § 1601 et seq. Regulation Z, 12 C.F.R. Part 226, guides enforcement of TILA.

⁴¹15 U.S.C. § 1691 et seq. Regulation B, 12 C.F.R. Part 202, guides enforcement of ECOA.

⁵*Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964).

⁶The history of enforcement of the FTC Act by the federal financial regulatory agencies is derived from “On the Same Page: Federal Banking Agency Enforcement of the FTC Act to Address Unfair and Deceptive Practices by Banks” by Julie L. Williams and Michael S. Bylsma, *The Business Lawyer*, Vol. 58, p. 1243-58 (May 2003) (hereinafter cited as “Williams and Bylsma”). Readers are referred to the article for a more complete analysis of the background.

⁷The text quotes the present version of Section 5 of the FTC Act, which is codified at 15 U.S.C. § 45(a)(1).

⁸See Williams and Bylsma, p. 1246.

⁹15 U.S.C. § 57a.

¹⁰12 C.F.R. 1818 (b)(2002).

¹¹See Williams and Bylsma, p. 1247.

¹²Letter from Chairman Alan Greenspan to Representative John J. LaFalce (May 30, 2002) available at <http://www.federalreserve.gov/boarddocs/press/bcreg/2002/20020530/attachment.pdf>.

¹³*Ibid.*

¹⁴The history of the FTC’s use of the “unfairness” authority as described in the text is taken from a paper prepared by J. Howard Beales III, a former director of the FTC’s Bureau of Consumer Protection. The paper, “The FTC’s Use of Unfairness Authority: Its Rise, Fall, and Resurrection” (hereinafter cited as “Beales”), available at www.ftc.gov/speeches/beales/unfair0603.htm.

¹⁵Beales, p. 2.

¹⁶Beales, p. 2, citing *The Washington Post*, March 1, 1978.

¹⁷Unfairness Policy Statement, 104 F.T.C., p. 1073.

¹⁸*Ibid.*, p. 1076.

¹⁹Beales, p. 2.

²⁰15 U.S.C. § 45(n).

²¹Beales, p. 4-8.

²²15 U.S.C. § 45(n).

²³On November 30, 2004, the American Bankers Association conducted a telephone briefing titled “Unfair or Deceptive Acts and Practices: The New Supervisory Enforcement Specter.” Presenters included Peggy L. Twohig of the Federal Trade Commission, Robert E. Cook of the Federal Reserve Board, Michael S. Bylsma of the Office of the Comptroller of the Currency, and the author of this article (hereinafter cited as “ABA Briefing”). The text summarizes the views of the representatives of the regulatory agencies expressed during the briefing and the written materials they submitted. A recording of the briefing, as well as written materials utilized, are available from the ABA. A transcript of the presentations is available from the author.

²⁴Beales, at 3, citing Credit Practices Rule, 49 Fed. Reg., p. 7764-65.

²⁵ABA Briefing, transcript, p. 6-7.

²⁶See, e.g., Statement of Board of Governors of the Federal Reserve System and the Federal Deposit Insurance Corporation, entitled “Unfair or Deceptive Acts or Practices by State-Chartered Banks,” dated May 11, 2004, p. 4 (hereinafter cited as “FRB and FDIC Statement”). The statement is available at <http://www.federalreserve.gov/boarddocs/press/bcreg/2004/20040311/default.htm>.

²⁷FRB and FDIC Statement, p. 5.

²⁸ABA Briefing, transcript, p. 8.

²⁹ABA Briefing, transcript, p. 9.

³⁰FRB and FDIC Statement, p. 3.

³¹ABA Briefing, transcript, p. 13-14.

³²15 U.S.C. § 1601 et seq.

³³12 U.S.C. § 4301 et seq.

³⁴15 U.S.C. § 1691 et seq.

³⁵42 U.S.C. § 3601 et seq.

³⁶15 U.S.C. § 1692 et seq.

³⁷A listing of the FTC’s actions against subprime lenders is available at <http://www.ftc.gov/opa/2002/07/subprimelendingcases.htm>.

³⁸*Federal Trade Commission v. First Alliance Mortgage Company*, Civil No. SACV 00-964-DOC (MLGx)(C.D. Calf.), settlement announced on October 4, 2000. See www.ftc.gov/bcp/online/edcams/famco/index.html. It should be noted that state attorneys general enforce state laws that are comparable to the federal FTC Act. These laws are often referred to as “Mini-FTC Acts.” State attorneys general also have been aggressive in challenging lending practices they believe to be unfair or deceptive. The action against First Alliance Mortgage Company was a joint effort between the FTC and a number of state attorneys general. In fact, state attorneys general obtained the largest direct restitution amount ever in a state or federal consumer case (approximately \$484,000,000.00) in their action against Household Finance Corp. See <http://www.naa.org/issues/20021011-multi-household.php>.

³⁹*Federal Trade Commission v. Associates First Capital Corp., et al*, No. 1:01-CV-00606 JTC (N.D. Ga.), settlement announced on September 19, 2002. See www.ftc.gov/os/2002/09/associates.pdf.

⁴⁰*Federal Trade Commission v. Stewart Finance Company Holdings, Inc.*, Civ. No. 103CV-2648 N.D. Ga.), settlement announced on October 28, 2003. See <http://www.ftc.gov/opa/2003/10/stewart.htm>.

⁴¹*United States v. Fairbanks Capital Corp.*, Civil No. 03-12219 (D. Mass.), settlement announced on November 12, 2003. See <http://www.ftc.gov/opa/2003/11/fairbanks.htm>.

⁴²The Supervisory Agreement is available at <http://www.ots.treas.gov/docs/9/93106.pdf>.

⁴³See <http://www.occ.gov/consumernews.htm>.

⁴⁴ABA Briefing, transcript, p. 26.

⁴⁵OCC Advisory Letter AL 2002-3 (March 22, 2002) available at <http://www.occ.gov/ftp/advisory/2002-3.doc>.

⁴⁶See <http://www.occ.gov/ftp/advisoryboard/2004-4.doc>. The letter “discusses the OCC’s particular concerns regarding secured credit card programs in which security deposits (and fees) are charged to the credit card account, with the result that the consumer has little or no available credit or card utility at account opening” and adds that “this type of secured credit card product is not appropriate for national banks, and should not be offered by them.”

⁴⁷See <http://www.occ.gov/ftp/advisory/2004-10.txt>.

⁴⁸See <http://www.occ.gov/ftp/bulletin/2005-3a.pdf>.

⁴⁹*Ibid.*

⁵⁰See <http://www.federalreserve.gov/boarddocs/press/bcreg/2004/20040311/default.htm>.

⁵¹12 C.F.R. Part 202.

⁵²12 C.F.R. Part 226.

⁵³The text repeats some of the specific suggestions of the regulators but the reader is referred to the documents themselves for a more complete listing of suggestions.

⁵⁴15 U.S.C. § 1939.

⁵⁵ABA Briefing, transcript, p. 88-89

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