UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Bureau of Consumer Protection

December 12, 2007

John E. Bowman
Chief Counsel
Regulation Comments, Chief Counsel's Office
Office of Thrift Supervision
1700 G Street, NW
Washington, DC 20552

Re: Public Comment, OTS-2007-0015

Dear Mr. Bowman:

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Unfair or Deceptive Acts or Practices, 72 Fed. Reg. 43,570-71.

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affiliated entities, as well as certain service providers. 12 U.S.C. §§ 1461-1470. The OTS ANPR states that this would be consistent with HOLA's mandate that the OTS ensure safety and soundness, since engaging in unfair or deceptive acts or practices can pose significant reputation risk, compliance risk, and legal risk. Unfair or Deceptive Acts or Practices, 72 Fed. Reg. at 43,573.

15 U.S.C. § 57a(f)(1).

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converting past OTS guidance into rules, adopting additional OTS guidance, or prohibiting specific unfair or deceptive practices. The OTS is considering taking action to curtail certain practices in credit card lending, residential mortgage lending, gift cards, and deposit accounts.[5]

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[5] Unfair or Deceptive Acts or Practices, 72 Fed. Reg. at 43,573-74.

[6] *I* . at 43,573.

[7] 15 U.S.C. § 45(a). Nonbank financial companies include nonbank mortgage companies, mortgage brokers, finance companies, and units of bank holding companies.

[8] 15 U.S.C. §§ 1601-1666j (requiring disclosures and establishing other requirements in connection with consumer credit transactions).

[9] 15 U.S.C. § 1639 (providing additional protections for consumers who enter into certain high-cost refinance mortgage loans).

[10] 15 U.S.C. § 1667-1667f (requiring disclosures, limiting balloon payments, and regulating advertising in connection with consumer lease transactions).

[17] Letter from the FTC to Hon. Wendell Ford and Hon. John Danforth, Committee on

In 1972, in *F C . & H C .*,[23] the Supreme Court addressed the FTC's articulation of unfairness in the Cigarette Rule.[24] The Court stated that, in determining if acts or practices are unfair, the Commission, "like a court of equity, considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws."[25] The Supreme Court's dicta approving the FTC's use of broad equitable considerations in concluding that acts and practices are unfair encouraged the agency to use its unfairness authority more frequently during the 1970's.[26] Specifically, the Commission commenced a series of rulemakings, sometimes relying on broad unfairness theories to try to regulate entire industries.[27] The rulemakings often failed to consider properly the cost-benefit tradeoffs of the proposed rules, and many in Congress opposed the Commission's broad rulemaking agenda.[28] Congress eventually responded by passing legislation restricting the FTC's authority.[29]

In the late 1970s, the FTC recognized that it needed an approach to unfairness that was more systematic and rigorous than its broad equitable approach. On December 17, 1980, the Commission therefore issued its Unfairness Policy Statement, declaring that "[un]justified consumer injury is the primary focus of the FTC Act."[30] The statement articulated a three-part test to determine whether the consumer injury that an act or practice causes, or is likely to cause, renders a practice "unfair:"

> The injury must be substantial; it must not be outweighed by countervailing benefits to consumers or competition that the practice produces; and it must be an injury that consumers themselves could not reasonably have avoided.[31]

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[23] 405 U.S. 233, 244 (1972).

[24] *A . F . . A . F C,* 767 F.2d 957, 971 (D.C. Cir. 1985); *& H C .*, 405 U.S. at 244 n.5.

[25] *& H C .*, 405 U.S. at 244.

[26] *E. .,* FEDERAL TRADE COMMISSION, FTC STAFF REPORT ON TELEVISION ADVERTISING TO CHILDREN 189 (1978) ("FTC STAFF REPORT ON TELEVISION ADVERTISING TO CHILDREN").

[27] *A . F . . A ,* 767 F.2d at 969.

[28] Beales, note 20, at §II.A.

[29] FTC Improvements Act, Pub. L. No. 96-252 (May 1980); Beales, note 20, at §II.C.

[30] Unfairness Policy Statement at 1073.

[31] *I .*

[32] *I* .

[33] 15 U.S.C. § 45(n). Section 5(n) of the FTC Act, however, also provides that “[i]n determining whether an act or practice is unfair, the Commission may consider established public policies as evidence to be considered with all other evidence.”

Unfairness Policy Statemoi34.1((i)16.3(t)3 6 27(n)]TJ6 0 0 6 108.00020-23.8789 Tm284 Tc0 T(3433)TT practices as unfair, through rulemaking or law enforcement, if they unreasonably create or take advantage of an obstacle to the ability of consumers to make informed choices, thus causing, or being likely to cause, consumer injury. The Commission's current focus on "substantial net harm" is the best way to ensure that it uses its resources wisely.[39] When used appropriately, unfairness is an important tool to address practices that, although not deceptive, cause substantial and unjustified net harm.

### B. FTC Use of Unfairness in Financial Services Rules

The Commission may issue rules pursuant to Section 18 of the FTC Act to define acts or practices that are unfair or deceptive.[40] In appropriate circumstances, the FTC promulgates rules to prevent and prohibit unfair practices. The Commission has issued the Holder in Due Course Rule ("HDC Rule") and the Credit Practices Rule ("CPR") in the consumer credit area. In addition, pursuant to the Telemarketing and Consumer Fraud and Abuse Prevention Act,[41] the Commission has issued the Telemarketing Sales Rule, which prohibits certain unfair credit-related practices.

#### 1. Holder in Due Course Rule

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[39] Unfairness Policy Statement at 1076.

[40] 15 U.S.C. § 57a(a)(1)(B); rulemaking procedures are set forth at 15 U.S.C. § 57a(b).

[41] 15 U.S.C. §§ 6101-6108.

[42] Preservation of Consumers' Claims and Defenses, Statement of Basis and Purpose, 40 Fed. Reg. 53,506 (Nov. 18, 1975) (codified at 16 C.F.R. § 433). The Commission promulgated this rule before it issued the Unfairness Policy Statement.

doctrine in consumer credit disputes was unfair.[43] The FTC considered the impact of this doctrine in an environment of extensive breaches of contract, breaches of warranty, misrepresentation, and fraud in credit sale transactions. The Commission's primary concern was that the system wholly allocated costs arising from the seller's practices to the consumer, because creditors demanded payment as "holders in due course," even though the creditor was in a better position to prevent the seller's harmful practices.[44] The FTC found that consumers were "clearly injured" by a system that "force[d] them to bear the full risk and burden of sales related abuses."[45] In promulgating the HDC Rule, the Commission found that sellers or creditors imposed adhesive contracts upon consumers.[46] The FTC also determined that consumer injury was not "off-set by a reasonable measure of value received in return."[47] Indeed, the Commission found that readily available credit from a "fly-by-night" salesperson who does not perform as promised does not benefit consumers.[48] And the FTC determined that consumers and honest merchants would benefit as prices came to o2.5(a)86 thae csehanfie io65(a)8.3(o)318.1(n11.se)11.ts, to o2.mene

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43 *I* . at 53,522. Specifically, the Commission stated that it is an unfair practice "for a seller to employ procedures in the course of arranging the financing of a consumer sale which separate the buyer's duty to pay for goods or services from the seller's reciprocal duty to perform as promised." *I* .

44 *I* . at 53,522-23.

45 *I* . at 53,523.

46 *I* . at 53,523-24.

47 *I* . at 53,524.

48 *I* . at 53,520.

49 *I* . at 53,523.

50 *I* .

51 16 C.F.R. § 433.2. The notice states: "Any holder of this consumer credit contract is subject to all claims and defenses which the debtor could assert against the seller of goods or services obtained pursuant hereto or with the proceeds hereof. Recovery hereunder by the debtor shall not exceed amounts paid by the debtor hereunder."

[52] Almost twenty years later, a House of Representatives report stated that the Holder in Due Course rule has not had a significant impact on credit availability. H.R. REP. NO. 103-652, at 163 (1994) (Conf. Rep.), 1994 U.S.C.C.A.N. 1993.

[53] FTC Credit Practices Rule, 49 Fed. Reg. 7740 (March 1, 1984) (codified at 16 C.F.R. § 444).

[54] FTC Credit Practices Rule, 16 C.F.R. § 444.

[55] FTC Credit Practices Rule, 49 Fed. Reg. at 7743; 7749; 7753.

[56] *I* . at 7753.

*I* . at 7744. Consumers likewise faced destitution where the creditor took security concentrated their search on other factors, such as interest rates and payment terms.[58] Furthermore, consumers could not bargain over the boilerplate contract terms specifying creditor remedies.[59] Shopping for credit contracts was difficult already, because contracts were written in technical language 1e ctimeser, ot baprovided untilhe boaiftionas

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58 *I* . at 7744; 7746.

59 *I* . at 7745.

60 *I* . at 7744; 7746-47.

61 *I* . at 7744.

62 *I* .

63 *I* .

64 *I* . at 7748.

65 *I* . at 7744.

66 *I* . at 7754.

67 *I* .

[68] *I* .

[69] *I* . at 7759.

[70] *I* .

[71] *I* .

[72] *I* .

[73] *I* . at 7784.

[74] *I* .

[75] *A* . *F* . . *A* , 767 F.2d at 964.

record establishing that the practices caused substantial injury;[76] that the marginal cost to industry was clearly overshadowed by the much greater risks to consumers;[77] and that the injury was not reasonably avoidable by consumers.[78] As to the balancing of costs and countervailing benefits, the court cited favorably the Commission's determination that the CPR would have only a marginal impact on the cost or availability of credit, and that this marginal cost was clearly overshadowed by the much greater risks to consumers resulting from the use of the challenged remedies.[79]

In determining whether the FTC correctly concluded that the harm from the practices was not reasonably avoidable, the court relied on the Commission's findings that (1) consumers are not, as a practical matter, able to shop and bargain over alternative collection provisions; and (2) default is ordinarily the product of forces beyond a borrower's control.[80] Specifically, the FTC had found that contracts offered by creditors serving higher-risk borrowers were often substantially identical. The Commission also had found that consumers' ability to shop and bargain was further limited by the technical language and fine print used in the contracts.[81] And it found that in some cases, comparison was impossible because the creditor refused to provide the contract until the borrower was ready to sign it.[82] Moreover, relying principally on two large survey studies of the causes of default, the Commission concluded that because default was both unforeseeable and unavoidable, the creditors' use of the challenged remedies was not reasonably avoidable.[83] Based on all of these findings, the court held that the Commission's decision to prohibit the use of certain security interests and wage assignments was supported by substantial evidence in the record.[84]

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[76] *I* . at 972-75.

[77] *I* . at 975-76, 986.

[78] *I* . at 976-78.

[79] *I* . at 976.

[80] *I* . at 977.

[81] *I* .

[82] *I* .

[83] *I* . at 977-78.

[84] *I* . at 989. The Federal Home Loan Bank Board (OTS's predecessor agency), the Federal Reserve Board, and the National Credit Union Association issued substantially similar rules applicable to their supervised institutions. 12 C.F.R. § 535; 12 C.F.R. § 227; 12 C.F.R. § 706.

consumers.[92] Taking money without providing anything in return caused substantial harm to consumers without any countervailing benefits to consumers or competition.[93] Finally, having no way to know these offered services were illusory, consumers had no reasonable means to avoid the harm that resulted from accepting the offers.[94] Thus, these practices met the statutory criteria for unfairness. The Commission determined that consumer injury could be avoided by a rule prohibiting telemarketers from requesting or receiving payment for these services until after performance of the services was completed.[95]

### C. Law Enforcement Actions Regarding Unfairness

In the last decade, the Commission also has used case-by-case law enforcement to challenge certain acts and practices as unfair. The acts and practices challenged include a range of practices that cause widespread and significant consumer harm. In bringing these cases, the Commission has weighed the costs and benefits of the acts and practices being evaluated. This comment will provide examples in the areas of processing payments, unilateral contract modifications, and loan servicing.

#### 1. Processing Payments

In a number of cases, the FTC has found that companies have assessed charges on consumers or debited their bank accounts without any contact with the consumers at all, simply by obtaining their telephone billing information or bank account numbers and sending charges through a payment system.[96] These practices clearly result in significant consumer injury, and there are no countervailing benefits to consumers or competition.[97] Consumers also cannot reasonably avoid the practice because they never had contact with the company billing or debiting their accounts.[98] Thus, imposing charges on consumers in these circumstances is an

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92 *I .*

93 *I .*

94 *I .*

95 *I .*

96 *E. ., F C . E P LLC,* No. 07-4880 (C.D. Cal. 2007); *F C . P C ,* No. 04-0712 (D. Nev. 2004); *F C . I L .,* No. 00-7422 (S.D.N.Y. 2000); *F C . J.K P , I .,* No. 99-00044 (C.D. Cal. 1999); *F C . H B ., L .,* No. 98-0629 (W.D. Tex. 1998).

97 *F C . J.K P , I .,* 99 F. Supp.2d 1176, 1201-03 (C.D. Cal. 2000).

98 *I .*

unfair act or practice.[99] Moreover, the Commission has sued payment processors that submitted unauthorized charges to be debited from consumers' accounts.[100] In *F C .* *M ,* for example, the court, in determining that a payment processor had engaged in unfair practices, found that the processor had notice that it was processing payments for which consumers had not given their consent.[101] Processing charges in these circumstances causes substantial injury to consumers, has no offsetting benefits to consumers and competition, and cannot be reasonably avoided.

### 2. Unilateral Contract Modification

Unilaterally modifying contracts also was found to be an unfair practice in *I O*

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100 *E. ., F C . I L .,* No. 06-01644 (D. Nev. 2006); *F C . G M G , I .,* No. 06-02272 (M.D. Fla. 2006); *F C . P , I .,* No. 05-6054 (C.D. Cal. 2005); *F C . F A . P P , I .,* No. 04-0074 (D. Ariz. 2004); *F C . E . F . G ,* No. 03-211 (W.D. Tex. 2003); *F C . M ., L .,* No. 96-615 (N.D. Ga. 1997).

101 *F C . M ., L .,* No. 96-615, 1997 U.S. Dist. LEXIS 17114, at *37-38 (N.D. Ga. Oct. 1, 1997).

102 *I O E C .,* 108 F.T.C. 263 (1986), *, O E C . . F C*, 849 F.2d 1354 (11th Cir. 1988); *G L C* ., FTC Docket No. C-4120 (July 7, 2004) (consent order) (retroactive application of a materially changed privacy policy to information that the respondent had previously collected from consumers was an unfair practice).

103 *O E C .,* 849 F.2d at 1356.

104 *I .* at 1358.

5 of the FTC Act.[105] After an administrative proceeding, the Commission concluded that Orkin had engaged in an unfair practice through raising its fee, and the company appealed.[106]

On appeal, the court held that there was sufficient evidence in the record to support the Commission determination that Orkin's fee increase was unfair. The court affirmed the Commission's finding of "substantial injury," emphasizing that the FTC had found that Orkin's breach of these contracts generated more than $7 million in renewal fees over a four year period of time.[107] The court also affirmed the Commission's determination that the fee increase did not provide a benefit to consumers or competition, noting that the FTC had found that there was no improvement in the amount or quality of the service provided when the fee was increased.[108] Finally, the court affirmed the Commission's finding that consumers could not reasonably avoid the injury from the fee increase, as the contracts gave no indication that the company would raise the renewal fees for any reason.[109]

### 3. Loan Servicing

The Commission also has challenged allegedly unfair practices in the servicing of

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[105] Beales, note 20 at §IV.A. In the financial services context, the FTC has sued companies selling payment processing services to small business clients for unilaterally modifying the contracts. *F C . M P , I .*, No. 07-00533 (D. Ore. 2007); *F C . C M . L .*, No. 02-44 (E.D. Tex. 2002).

[106] Note that, "[a]lthough all breaches of contract cause injury, not all breaches necessarily constitute unfair practices." Timothy J. Muris and J. Howard Beales, III, *L F C A* 37 (Association of National Advertisers, Inc. 1991). Under the common law, the damages available in a private action for breach of contract usually provide an incentive not to breach contracts. In ordinary circumstances, private enforcement of contracts therefore is sufficient to prevent consumer injury. However, if the prospect of liability for damages in private action is not sufficient to deter a company from breaching consumer contracts, treating breaches in these circumstances as unfair may be necessary to prevent them from injuring consumers. *O* , 108 F.T.C. at 375 and 379-80 (separate statement of Chairman Oliver) ("some, perhaps many, Orkin customers were unable or unwilling to avail themselves of their private remedies because the individual losses are so small," thus eliminating the company's incentive not to breach its fixed fee service contacts with consumers).

[107] *O* , 849 F.2d at 1365.

[108] *I* .

[109] *I* . at 1365.

subprime mortgage loans.[110] For example, in November 2003, the Commission, along with the Department of Housing and Urban Development, announced a settlement with Fairbanks Capital Corp. (now called Select Portfolio Servicing, Inc.). The Commission alleged that Fairbanks engaged in several unfair practices. In particular, the FTC alleged that Fairbanks failed to timely or properly post payments received from borrowers, and then assessed late fees and other charges as a result. The injury caused by improper posting was substantial, including significant delinquency fees and possibly improper foreclosures when the borrower could not pay the sometimes hundreds of dollars of fees imposed by Fairbanks. The injury was not reasonably avoidable by consumers because, even if they sent their payments on time, the servicer did not credit payments to their accounts on time. Finally, there was no increase in services or benefits to consumers from improper posting of payments, nor any benefits to competition. Thus, the Commission alleged that Fairbanks' conduct constituted an unfair practice under Section 5.

In addition, the FTC alleged that Fairbanks' practice of placing casualty insurance on consumers' homes when such insurance was already in place, while failing to disclose adequately to consumers that their mortgage accounts would be assessed for such insurance, was an unfair practice. The practice caused substantial injury. Consumers who refused to pay for the duplicative insurance incurred significant delinquency fees that put them at risk of foreclosure. Consumers could not reasonably avoid this injury because, even if they provided proof of their insurance coverage to Fairbanks, the company allegedly did not remove the insurance charges from their accounts.

The Commission also alleged unfair loan servicing practices in litigation against Capital City Mortgage Corp. ("Capital City"), which both originated and serviced subprime mortgage loans.[111] According to the Commission's complaint, Capital City required borrowers to pay money not owed or suffer impairment of title to the property securing their loan, refusing to release liens in many instances where borrowers paid all amounts due under the loan. This practice clearly caused substantial injury to consumers. The injury was not reasonably avoidable by consumers, as even when they paid the amounts due under their loans, Capital City refused to release the lien without additional payments. Finally, these practices were not outweighed by countervailing benefits to consumers or competition.

As stated in the Unfairness Policy Statement, a wide variety of business practices can be unfair if they unreasonably create or take advantage of an obstacle to consumer decision-making in a "well-functioning market."[112] The Commission has used its unfairness authority carefully to prevent practices that cause or are likely to cause substantial injury not reasonably avoidable by

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110 . *F* *C* *C* ., No. 03-12219 (D. Mass. 2003); *F* *C* . *C* *C* *M* *C* ., No. 98-00237 (D.D.C. 1998).

111 *F* *C* . *C* *C* *M* *C* ., No. 98-00237 (D.D.C. 1998).

112 Unfairness Policy Statement at 1073.

consumers, and are not outweighed by countervailing benefits to consumers and competition.[113]

## III. FTC Use of Deception Authority

### A. Overview of Deception Principles

As with unfairness, since 1938 thew(th)Tr0nmth(i)12.96.96 0 0 6.96 519.1232 -2w[ 52 14 .5Tc[Tc(213)T

[113] Even if consumers do not take away a claim from a seller's silence in the circumstances, the Commission nevertheless may challenge such "pure omissions" as unfair. Such pure omissions are likely to be considered unfair if they concern: (1) core aspects of the transaction that virtually all consumers would consider essential to an informed decision, or (2) the basic characteristics of common law merchantability, such as information bearing on the fitness of a product for its intended use and information bearing on significant hidden safety standards. *I I H* , 104 F.T.C. 949, 1062 (1984). For example, in *I H* , a tractor manufacturer did not inform farmers that if they removed or loosened a fuel cap on a hot or running tractor to check fuel levels, it could cause fuel geysering. The Commission concluded that the manufacturer's silence was unfair in these circumstances because: (1) it caused farmers to suffer fatal and serious burns, (2) consumers and competition received no benefits from the manufacturer's silence, and (3) farmers could not reasonably avoid injury, because, although they understood generally they should not remove a fuel cap from a hot or running engine, they did not appreciate that something as dangerous as fuel geysering could occur. *I* . at 1064-67.

[114] *I* . at 1060.

[115] *I* . at 1056.

[116] *I* .

[117] Federal Trade Commission Policy Statement on Deception, *I C* *A* ., 103 F.T.C. 110, 174-83 (1984) ("Deception Policy Statement"); *F C* . , 318 F.3d 1273, 1277 (11th Cir. 2003); *F C* . *G* , 265 F.3d 944, 950 (9th Cir. 2001); *F C* . , *I* ., 448 F.

information is material.[118]

A claim may be deceptive by either misrepresenting or omitting a material fact that causes consumers to be misled.[119] There are two types of claims: express and implied. Express claims directly represent the fact at issue, while implied claims do so in an oblique or indirect way.[120] The Commission may rely on its own reasoned analysis to determine what claims, including implied ones, are conveyed in a challenged advertisement, so long as those claims are reasonably clear from the face of the advertisement.[121] If, after a facial analysis, the Commission cannot conclude that a particular advertisement can reasonably be read to contain a particular implied message, it needs extrinsic evidence to determine whether such a reading is reasonable.[122] Extrinsic evidence may include, but is not limited to, results from consumer surveys.[123]

A claim is deceptive if the overall net impression that consumers take away based on all of the elements (language, pictures, graphics, etc.) in an advertisement is likely to mislead them.[124] The FTC evaluates whether the consumer's impression or interpretation of a

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Supp. 2d 908, 957 (N.D. Ill. 2006); *F C . A*, 144 F. Supp. 2d 993, 1009 (N.D. Ind. 2000); *F C . M P*, 53 F. Supp. 2d 248, 258 (E.D.N.Y. 1998).

[118] Deception Policy Statement at 171.

[119] *F C . M . C .*, 532 F.2d 708, 716 (9th Cir. 1976); *F C . P , I .*, 576 F. Supp. 294, 300 (D.D.C. 1983).

In some circumstances, silence also may be deceptive. Silence associated with the appearance of a particular product, the circumstances of a specific transaction, or ordinary consumer expectations represents that the product is reasonably fit for its intended purpose. Deception Policy Statement at 170. For example, in connection with sale of a car, consumers assume in the absence of other information that the car can go fast enough for ordinary use on a freeway. If the car cannot, the seller's silence on this point may have been deceptive.

[120] *F C . , I .*, 448 F. Supp. 2d 908, 957 (N.D. Ill. 2006).

[121] *F C . K , I .*, 970 F.2d 311, 319 (7th Cir. 1992); *, I .*, 448 F. Supp. 2d at 958.

[122] *I K , I .*, 114 F.T.C. 40, 121, , 970 F.2d 311 (7th Cir. 1992).

[123] *I .* at 122.

[124] *F C . C .* , 453 F.3d 1196, 1200 (9th Cir. 2006) ("A solicitation may be likely to mislead by virtue of the net impression it creates even though the solicitation also contains truthful disclosures"); *F C . G* , 265 F.3d 944, 956 (9th Cir. 2001) (affirming deception finding based on "overall 'net impression'" of statements); *I C . . F C*, 884 F.2d 1489, 1497 (1st Cir. 1989) (advertisement was deceptive despite written qualification); *M C . . F C,*

representation or omission is reasonable.  Reasonableness is evaluated based on the

791 F.2d 189, 197 (D.C. Cir. 1986) (literally true statements may nonetheless be deceptive); *F C . , I .,* 448 F. Supp. 2d 908, 958 (N.D. Ill. 2006).

125 Deception Policy Statement at 177.

126 *I .* at 178.

127 *I .* at 184.

128 *E. .,* . at 183; *I H D C .,* 119 F.T.C. 762 (1995); *F C .,* 118 F.T.C. 746 (1994); *I K , I .,* 114 F.T.C. 40, 124 (1991), , 970 F.2d 311 (7th Cir. 1992).

129 Deception Policy Statement at 183.

130 *I .*; FEDERAL TRADE COMMISSION, DOT COM DISCLOSURES: INFORMATION ABOUT ONLINE ADVERTISING, http://www.ftc.gov/bcp/conline/pubs/ buspubs/dotcom/index.shtml; FEDERAL TRADE COMMISSION, DIETARY SUPPLEMENTS: AN ADVERTISING GUIDE FOR INDUSTRY 1988 at Section A.3; *I K & D , I .,* 124 F.T.C. 300 (1997); *I C .,* 116 F.T.C. 1189 (1993) (consent orders requiring disclosures to be repeated during television infomercials); *I N / , I .,* 116 F.T.C. 1408 (1993) (consent order requiring a shorter disclosure for 15 second

television ads).

131 *K , I . . F C,* 970 F.2d 311, 322 (7th Cir. 1992); *I C A ., I* ., 103 F.T.C. 110, 165 (1984); *F C . A , I* ., 77 F. Supp.2d 1263, 1272 (S.D. Fla. 1999) (citations omitted).

132 Deception Policy Statement at 171.

133 *F C . P I C* ., 33 F.3d 1088, 1095-1096 (9th Cir. 1994).

134 *I P B* , 86 F.T.C. 1532, 1562 (1975), , 553 F.2d 97 (4th Cir. 1977); Deception Policy Statement at 190.

135 *A . H P* ., 98 F.T.C. 136, 368 (1981), , 695 F.2d 681 (3rd Cir. 1982).

136 *N C . . F C*, 223 F.3d 783, 786-87 (D.C. Cir. 2000).

137 The Commission also uses a variety of other means to identify and prevent deceptive claims, such as legislative rules, interpretive rules, guides, policy statements, informal business guidance, and public workshops.

138 *F C . A F C C .,* No. 01-00606 (N.D. Ga. 2001); *I F P F . G , I* ., FTC Docket No. C-3984 (2000).

139 *F C . E P LLC,* No. 07-4880 (C.D. Cal. 2007); *F C . C F . F* , No. 04-549 (C.D. Cal. 2004).

140 *F C . M P H . C C* ., No. 06-00019 (E.D. Tex. 2006); *F C .*

*M C* ., No. 02-5079 (N.D. Ill. 2002).

141 *F C . D ,* No. 07-558, (D. Colo. 2007); *F C . A D ,* No. 03-3317 (D. Md. 2003).

142 *F C . E P LLC,* No. 07-4880 (C.D. Cal. 2007); *F C . D ,* No. 07-558, (D. Colo. 2007); *F C . A D ,* No. 03-3317 (D. Md. 2003).

143 *F C . A D ,* No. 03-3317 (D. Md. 2003).

144 *I N. M , I .,* FTC Docket No. C-3947 (Apr. 27, 2000); *I F M , I* ., FTC Docket No. C-3950 (Apr. 27, 2000); *I C C .,* FTC Docket No. C-3847 (Jan. 13, 1999); *I M A ,* FTC Docket No. C-3846 (Jan. 13, 1999); *I F B O , I .,* FTC Docket No. C-3774 (Jan. 9, 1998); *I M , . .A., I* ., FTC Docket No. C-3776 (Jan. 9, 1998); *I B F , I* ., FTC Docket No. C-3777 (Jan. 9, 1998); *I A , I* ., FTC Docket No. C-3778 (Jan. 9, 1998); *I F , I* ., FTC Docket No. C-3779 (Jan. 9, 1998); *I L F A N , I* ., FTC Docket No. C-3780 (Jan. 9, 1998).

145 The FTC has sued over 55 companies since 1998 alleging that they charged advance fees for credit cards but never provided the cards. *E. ., F C . C* ., No. 06-20168 (S.D. Fla. 2006)*; F C . C F . B LLC,* No. 05-5442 (N.D. Ill. 2005); *F C . 3 B ,* No. 04-7177 (N.D. Ill. 2004); *F C . C O ., I .,* No. 03-81105 (S.D. Fla. 2003); *F C . P , LLC,* No. 03-61987 (S.D. Fla. 2003); *F C . A , I* ., No. 03-007 (W.D. Tex. 2003); *F C . C ., I .,* No. 02-4500 (E.D.N.Y. 2002); *F C . C C C C , I* ., No. 02-21050 (S.D. Fla. 2002); *F C . B A B C , I .,* No. 02-5762 (N.D. Ill. 2002); *F C . 1 B C . LLC,* No. 02-1591 (N.D. Ohio 2002); *F C . M M ; .D. .*

[146] *F C . ED P LLC,* No. 07-4880 (C.D. Cal. 2007).

[147] *. M M C .*, No. 02-5079 (N.D. Ill. 2002) (misrepresentations regarding balloon payments and other loan terms); *F C . A F C C .,* No. 01-00606 (N.D. Ga. 2001); *F C . F A M C .,* No. 00-964 (C.D. Cal. 2000) (misrepresentations regarding up-front fees and other loan costs);

misrepresented the true cost of the loan.[149] A higher loan amount imposed higher fee and interest

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[149] Indeed, as several banking agencies have recognized, an advertisement or transaction that is in technical compliance with the Truth in Lending Act may nevertheless violate the FTC Act. Board of Governors of Federal Reserve System and Federal Deposit Insurance Corporation, *D A P C B* (March 11, 2004), at 5-6, available at www.federalreserve.gov/BoardDocs/press/bcreg/2004/20040311/attachment.pdf; OCC Advisory Letter 2002-3, *G D A P* (March 22, 2002), at 6, available at www.occ.gov/ftp/advisory/2002-3.doc.

[150] *P B*, 86 F.T.C. 1532, 1562 (1975), , 553 F.2d 97 (4th Cir. 1977).

[151] *F C . C F . F*, No. 04-549 (C.D. Cal. 2004); *F C . D*, No. 02-5078 (N.D. Ill. 2002).

[152] *F C . D*, No. 02-5078 (N.D. Ill. 2002).

[153] *F C . C F . F*, No. 04-549 (C.D. Cal. 2004); *F C .*, No. 04-1065 (D. Colo. 2004); *F C . D*, No. 02-5078 (N.D. Ill. 2002); *F C . M P H . C C* ., No. 06-00019 (E.D. Tex. 2006).

[154] *F C . C F . F*, No. 04-549 (C.D. Cal. 2004).

*I* *K* *C* .

## IV. Conclusion

In sum, the Commission's activities are focused primarily on ensuring that consumers obtain the truthful, non-misleading information they need to make informed financial decisions, and on protecting them from unlawful acts and practices that are likely to cause them harm. The FTC uses case-by-case enforcement and carefully crafted rules to accomplish these goals. The Commission staff recommends that the OTS consider the FTC's experience applying its current legal standards in determining whether to impose rules prohibiting or restricting particular acts and practices of financial institutions.

The FTC staff appreciates your consideration of this information. If any other information would be useful regarding these matters, please contact Peggy L. Twohig, Associate Director for Financial Practices, at (202) 326-3224.

Sincerely,

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Peggy L. Twohig, Associate Director, Division of Financial Practices
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