IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

STATE OF MINNESOTA, by its Attorney General, Mike Hatch,	)	
Plaintiff,	)	
v.	)	**No. 01-CV-48 ADM/AJB**
FLEET MORTGAGE CORPORATION,	)	
Defendant.	)	

MEMORANDUM OF LAW OF AMICUS CURIAE
THE FEDERAL TRADE COMMISSIONMEMORANDUM OF LAW OF09.____

telemarketing activities undertaken by a corporation that does not itself constitute a "bank," but claims the right to be treated as a "bank," for all purposes, by virtue of its status as a subsidiary of a bank. The question presented entails the analysis of several interrelated federal statutes, including the FTC Act, the Telemarketing Act, and the recently-enacted Gramm-Leach-Bliley Act, in which Congress sought to bring clarity to previously disputed jurisdictional issues regarding bank affiliates. Because the present motion to dismiss directly addresses the FTC's jurisdiction — and prompted in large part by its abiding concern for the vigorous enforcement of consumer protection laws — the FTC submits this brief as *amicus curiae*.

ARGUMENT

I. THE PLAIN LANGUAGE OF THE PERTINENT STATUTES, AS RECENTLY CLARIFIED BY CONGRESS, SUPPORTS THE STATE'S AUTHORITY TO BRING THIS ACTION.

1. As all parties before the Court have acknowledged, the established "starting point" for statutory analysis is the "plain language" of the operative provisions. *See, e.g., United States v. McAllister*, 225 F.3d 982, 986 (8th Cir.2000); *Board of Governors of the Federal Reserve System v. Dimension Financial Corp.*, 474 U.S. 361, 373-74 (1986). In the present case, even plain language analysis requires a number of steps, in light of the need to read the pertinent language contextually. In the end, however, one finds that Congress has indeed spoken plainly, and that its most recent pronouncement, in particular, has provided an unambiguous answer.

The State has brought this action against defendant Fleet Mortgage Corporation ("FMC") under § 6103 of the Telemarketing Act, which provides for actions by the States whenever a person has engaged in a pattern or practice of telemarketing that "violates any rule of the Commission" under the Act. 15 U.S.C. § 6103. The Commission has promulgated regulations to implement the Act, in its Telemarketing

Sales Rule ("TSR"), 16 C.F.R. Part 310. The application of both the TSR and the Telemarketing Act itself is limited, however, by 15 U.S.C. § 6105(a), which provides that "no activity which is outside the jurisdiction of [the FTC] Act shall be affected by this chapter." In other words, the TSR applies — and the State may maintain this action — only if the activity in question is within the normal scope of the FTC's authority under the FTC Act.

The scope of the Commission's jurisdiction under the FTC Act is defined by 15 U.S.C. § 45 (a)(2), which provides a

affiliates of banks, whether parents, subsidiaries, or sister corporations. Second, none of these provisions indicates that the FTC *lacks* jurisdiction over a particular entity simply because OCC or one of the other federal banking agencies *has* jurisdiction over it. That is, the exception is *not* drafted to exclude, for example, "entities subject to supervision by a banking agency," "entities subject to the banking laws," or the like.[1] The courts have frequently recognized the propriety of overlapping jurisdiction, and have repeatedly rejected arguments that the FTC may

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[1] This contrasts with other exceptions in the same FTC Act provision that are conditioned on the existence of another agency's authority under other statutory schemes — *e.g.*, that for "persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act * * * ."

[2] This

pretation of the term "bank" under the FTC Act, an entirely separate statute with different focus and purpose.

Even more important, contrary to OCC's assertion, we know of no language in § 1818, or elsewhere, specifying that the authority it confers on OCC is "exclusive." The courts have consistently recognized that the conferral of authority on one federal agency does not, in the absence of a clear congressional directive, oust other agencies of parallel authority under other statutory schemes. *See Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976); *Sterling Drug, Inc. v. FTC*, 1973-2 Trade Cas. (CCH) ¶ 95,779, at 95,781 (S.D.N.Y. 1973) (EPA labeling jurisdiction over disinfectant did not out FTC of jurisdiction over disease prevention claim made in advertising).

3. In 1999, Congress acted to resolve any lingering uncertainty in this area, addressing the very question before this Court expressly and precisely.

to any such affiliate that "is not itself a bank." Congress did *not*, for example, phrase the exclusion in terms of whether an affiliate that "is owned by a bank," or "engages in activities permitted for a bank" or "is regulated as if it were a bank." Instead, it provided expressly that an affiliate is covered by this provision unless it is "itself a bank." FMC does not and cannot argue that it is "itself a bank." Accordingly, Section 133(a) unambiguously provides that a subsidiary such as FMC "shall not be deemed to be a bank" for purposes of applying the FTC Act.

Both FMC and OCC insist that, even conducting a "plain language" analysis, one must look at an enactment as a whole. FMC Reply Br. 3-6; OCC Br. 4-5. We entirely agree with this fundamental principle of statutory construction. *See, e.g., Harmon Industries, Inc. v. Browner*, 191 F.3d 894, 899 (8th Cir. 1999). We see no conflict, however, between the plain meaning of Section 133(a) and the provision of Section 133(b) on which FMC relies. That section provides:

> SAVINGS PROVISION. No provision of this section shall be construed as restricting the authority of any Federal banking agency (as defined in section 3 of the Federal Deposit Insurance Act) under any Federal banking law, including section 8 of the Federal Deposit Insurance Act.

As discussed above, OCC has interpreted 12 U.S.C. § 1818 as affording it enforcement authority over subsidiaries of banks, and the FTC does not dispute that conclusion. But recognizing concurrent FTC authority over subsidiaries and other affiliates, as Section 133(a) dictates, does not in any way diminish the scope of the OCC's and other banking agencies' authority. OCC's arguments regarding the ostensible loss of "exclusivity of authority" (OCC Br. 5) have two serious flaws. First, OCC points to no language in 12 U.S.C. § 1818 (or elsewhere) providing for such exclusivity, and we are aware of none. Second, even if there were a basis for a claim of exclusive authority on OCC's part, the plain language of Section 133(b) does not guarantee such exclusivity or preclude concurrent FTC authority; it is a simple savings

clause that ensures that OCC's *own* authority affirmatively to act will not be cut back. This is entirely consistent with a literal application of Section 133(a), and the two sections pose no conflict that can render their clear terms ambiguous.

Furthermore, a fuller consideration of the context of the GLB Act should take into account its other provisions, such as Section 505, 15 U.S.C. § 6805, which allocates enforcement responsibility for the Act's consumer privacy protections among a number of federal agencies. OCC, for example, is given authority to enforce the privacy provisions as to "national banks, Federal branches and Federal agencies of foreign banks, *and any subsidiary of such entities* * * * ." 15 U.S.C. § 6805(a)(1)(A) (emphasis added). This section shows that, within the GLB Act itself, Congress paid close attention to the existence of subsidiary corporations, took care in allocating enforcement authority with respect to them, and crafted precise language to do so, which should be applied as Congress wrote it. The clear terms of Section 133(a) of that same enactment — which expressly guarantee the FTC's jurisdiction over a corporation (like FMC) that is controlled by a bank, but "is not itself a bank" — plainly answer the question at hand, and mandate that FMC's motion to dismiss the State's claims under the Telemarketing Act be denied.

II. THE LEGISLATIVE HISTORY AND HISTORICAL BACKGROUND OF THE GLB ACT DO NOT WARRANT DEPARTURE FROM ITS PLAIN LANGUAGE.

1. FMC, supported by the OCC as *amicus*, argues that the legislative history of the GLB Act shows that Congress sought merely to preserve the FTC's existing authority in the wake of the GLB Act's expansion of activities by bank affiliates, and that literal application of Section 133(a) would flout that intent by effecting a dramatic expansion of FTC authority. FMC Reply Br. 4-6; OCC Br. 5-7. The essential premise of this argument, of course, is that it was previously clearly settled that OCC had exclusive jurisdiction over subsidiaries of banks, and that the term "bank," as used in the FTC Act, necessarily

following year, the Comptroller of the Currency noted, in testimony to a congressional committee, that where brokerage activities are conducted "in separate subsidiaries or affiliates of the bank," such "separate entities are regulated by the SEC and the NASD in the same manner as any other non-bank broker." 1994 WL 589457 (F.R.B.), *8 (Mar. 3, 1994); *see also id.* at *12 (referring to coordination with SEC staff in light of overlapping authority).

§§ 1681 *et seq*. Those consumer credit laws have jurisdictional provisions that carve banks and specified thrift institutions out of the FTC's enforcement authority. The ECOA, for example, assigned to the Federal Home

[5] FMC suggests that the *Green Tree* case is distinguishable from the present matter because there the court found that the FHLBB "never had jurisdiction" over the subsidiary. FMC Reply Br. 11-12. Obviously, if the court had viewed the "institution" as including its wholly owned subsidiary, it would have found that the FHLBB *did* have jurisdiction over the subsidiary. That is, the court addressed a precisely parallel issue to the present case: whether a jurisdictional carve-out from FTC authority for a specified (continued...)

In addition to the OCC statements discussed above, acknowledging concurrent SEC jurisdiction over bank subsidiaries that act as brokers and dealers, on at least one occasion, OCC staff expressly recognized the existence of similar concurrent FTC jurisdiction over bank subsidiaries, when such subsidiaries engage in conduct that may violate the FTC Act. In a 1982 letter to the FTC Division of Credit Practices, OCC staff stated, *inter alia*:

> You note that in situations where a company is subject to the concurrent jurisdiction of the FTC and the Comptroller's Office, the FTC practice has been to suspend its investigation of the organization pending an investigation by this Office. Such arrangements have been agreed to specifically in the case of national bank operating subsidiaries.

OCC Trust Interpretive Letter, 1982 WL 170954 (O.C.C.) (July 22, 1982). While OCC presumably no longer adheres to the views stated in this letter, it shows, at the very least, that the FTC has long asserted authority over nonbank subsidiaries of banks, and it belies the notion that the law was plainly settled against such authority.

Accordingly,

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[5](...continued)
entity automatically includes its wholly owned, but separately incorporated, subsidiary. Accordingly, FMC's criticisms of the State's reliance on *Green Tree* are misplaced. While it is indeed "undisputed" that OCC has broad jurisdiction over bank operating subsidiaries by virtue of Section 8 and various provisions of the National Bank Act, 12 U.S.C. §§ 21 *et seq*., that proposition does not at all undermine the *Green Tree* court's approach to the exception language found in the FTC Act and related statutes.

The FHLBB's successor, the Office of Thrift Supervision ("OTS"), has recognized precisely this distinction, in later legal opinions asserting authority to take enforcement action as to ECOA violations by subsidiaries of thrifts. In concluding that it could take such actions, OTS did *not* attempt to shoehorn such subsidiaries into the ECOA definition of "savings associations"; rather it relied on the broad authority granted to it under Section 8 of the Federal Deposit Insurance Act. *See* OTS Memorandum, 1994 OTS LEXIS 33 (June 14, 1994).

issue. This is unsurprising, however, in light of the gradual expansion of the activities of banks and bank affiliates. The State's claims in the present case involve allegations of misconduct in the course of telemarketing of a sort that is far removed from traditional banking services — *i.e.,* membership programs involving items such as discounts for car repair, prescription drugs, and legal services. *See* Complaint, ¶ 9. Although we have no reason to question FMC's authority to engage in such conduct, this is not the sort of activity that banks commonly engaged in until recent years. That the FTC — and States acting under the authority of the Telemarketing Act — have not brought such cases previously is neither remarkable as a matter of fact, nor relevant as a matter of law. *See, e.g., Cooley v. FERC*, 843 F.2d 1464, 1470 (D.C. Cir.), *cert. denied*, 488 U.S. 933 (1988) ("even a prolonged failure to assert an agency power does not destroy it").[6]

In its submission to this Court, OCC focuses on the FTC Act's division of rulemaking authority, for rules that "define with specificity acts or practices which are unfair or deceptive," as between the FTC and the Federal Reserve Board ("FRB"). OCC Br. 2-3. That rulemaking authority is not directly relevant to the present case, because the Commission's Telemarketing Sales Rule, 16 C.F.R. Part 310, is promulgated under a separate provision of the Telemarketing Act itself. *See* 15 U.S.C. § 6102. Nevertheless, the FRB's extension of its own rule to "subsidiaries" of banks is indeed anomalous, because its rulemaking authority is limited to "banks" (and other types of institutions not relevant here) as defined in the FTC Act. 15 U.S.C. § 57a(f)(1). In promulgating that rule, the FRB did not discuss its reasons for interpreting the FTC Act as it did with respect to bank subsidiaries, but simply asserted such authority. *See*

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6 For the same reasons, we have no reason to question OCC's authority to enforce the FTC Act's prohibition of unfair and deceptive trade practices with respect to banks, though to our knowledge it had not exercised its authority to do so prior to last year.

50 Fed. Reg. 16695 (1985). While this regulation may well reflect an understanding of the FTC Act by the FRB that is at odds with the FTC's own understanding, it hardly provided a definitive resolution to the issue at hand.[7]

In the years just prior to passage of the GLB Act, the "legal landscape" surrounding the status of bank subsidiaries became "even more scrambled than before." *See* J. Smoot, Bank Operating Subsidiaries: Free at Last or More of the Same?, 46 DePaul L. Rev. 651, 660 (1997). As the State has discussed (Minn. Br. 8-11), OCC's 1996 rules regarding operating subsidiaries emphasized the differences between subsidiaries and banks themselves, and permitted the former to engage in a broader range of activities not permitted for a "bank." The point of such observations is not to cast any doubt on the authority of OCC over operating subsidiaries, nor to question the propriety of the 1996 regulations. *Cf.* FMC Reply Br. 8-9. The developments of that time do, however, plainly undermine any notion that "wholly-owned operating subsidiaries are indistinguishable from their parent national bank." FMC Br. 4. Moreover, the logic of permitting subsidiaries to engage in securities activities not allowed to banks themselves required a reading of the word "association" — as used in the Glass-Steagall Act, 12 U.S.C. § 24 (Seventh) (1994), to refer to banks — that excluded subsidiaries. As a commentator defending the 1996 OCC regulations put it, "[t]he plain meaning of the words of the relevant portions of Title 12 would seem to compel the conclusion

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[7] Any implication that the FTC has acquiesced in the interpretation of the FTC Act now advanced by FMC by failing to object to the FRB rule is ill-founded. In fact, regardless of the propriety of the FRB rule as a formal matter, the FTC had little practical reason for concern. As explained above, the banking agencies (including the FRB and OCC) unquestionably have *enforcement* authority as to unfair and deceptive practices by bank affiliates, regardless of whether they have the authority to promulgate rules under 15 U.S.C. § 57a(f)(1), comparable to FTC rules elaborating upon the statutory standards of unfairness and deception. Accordingly, it is most unlikely that any agency effort to apply the rules in question would have led to a result at odds with the underlying standards of § 45(a)(1), proscribing unfair and deceptive trade practices generally.

that operating subsidiaries should be treated like affiliates, which they in fact are, and not like banks, which they patently are not." Smoot, *supra*, at 709.

2. Although the foregoing discussion shows that a court would have been on firm footing, even prior to the GLB amendments, in concluding that the FTC had authority with respect to operating subsidiaries of banks, this Court need not determine how it would have decided the case in 1998. The real relevance of the foregoing is that, when Congress undertook its effort at financial restructuring in the GLB Act, there were indeed substantial indications that the FTC had jurisdiction over bank operating subsidiaries, concurrent with OCC, although the matter was subject to some uncertainty. Thus, at the congressional hearings preceding passage of the Act, FTC Bureau of Competition Director William Baer expressed concern that "the jurisdiction of the FTC would remain somewhat cloudy if banks, through subsidiaries and affiliates, engage in the sort of activity that we address every day in other sectors of the economy." Financial Services Competitiveness Act of 1997, Hearings Before the Subcomm. on Finance and Hazardous Materials, House Comm. on Commerce, 105th Cong., 1st Sess. (July 1997), FMC Exh. 11, at 122. Mr. Baer specifically made reference to telemarketing as an area of substantial FTC experience. *Id.* He concluded by urging the Committee to consider "clarifying our jurisdiction." *Id.* at 123.

In response, Congress helpfully provided, in Section 133(a) of the GLB Act, "Clarification of Federal Trade Commission Jurisdiction." As discussed above, the terms of that section are unmistakable, and create no tension with other portions of the statute. FMC and OCC urge that the plain language should be restricted, presumably to the activities of "financial subsidiaries" authorized by the GLB Act. *See* 12 U.S.C. § 24a. But if Congress had intended to effect such a limitation, within the very statute that created and structured the category of financial subsidiary, it could easily have done so. Moreover, the Conference

Report language that FMC relies on, which speaks generally of making clear that certain "kinds of businesses do not fall within the bank or savings association exemption because they are owned by such an entity," is hardly such a clear expression of contrary congressional intent as to overcome unambiguous statutory language. *See* H.R. Conf. Rep. No. 106-434, at 162 (1999), FMC Exh. 10.

Similarly, OCC's suggestions that a plain reading of Section 133(a) would contradict the GLB Act's "major thrust" to "provide a single regulatory agency for different categories of financial services," OCC Br 5, and that the section must apply only to financial subsidiaries, OCC Br. 7, do not provide any basis for rejecting the plain language of the section. OCC's approach would still not eliminate overlapping jurisdiction,

of the FTC — and therefore of the State, in the present case — to maintain claims under the Telemarketing Act.

III. APPLICATION OF THE GLB ACT'S PLAIN TERMS LEADS TO A SENSIBLE RESULT, IN KEEPING WITH CONGRESSIONAL POLICY.

Apart from its reliance on the GLB Act's limited legislative history, FMC criticizes the result that literal application of Section 133(a) would produce as "novel and unworkable." FMC Reply Br. 13-14. FMC has an extraordinarily high standard to meet to prevail on such a theory, for a court is warranted in ignoring the plain language of a congressional enactment only to avoid an "absurd or glaringly unjust" result. *See, e.g.*, *Inter-Modal Rail Employees Ass'n v. Atchison, Topeka & Santa Fe Ry.*, 520 U.S. 510, 516 (1997) (quotation omitted); *Cullum v. Mutual of Omaha Ins. Co.*, 840 F.2d 619, 621-22 (8th Cir. 1988). The issue at hand does not remotely meet that criterion. To the contrary, applying Section 133(a) as written produces an eminently sensible result, consonant with the congressional policies of the banking statutes as well as of the FTC Act.

FMC's principal practical objection to coverage under the Telemarketing Act is that any concurrent jurisdiction of the FTC and OCC would be unduly "disruptive" to its business. FMC Reply Br. 14. There is ample precedent, however, for such overlapping authority. In light of the divergent focuses of various federal statutes, the courts have long recognized the propriety of "overlapping agency jurisdiction under different statutory mandates." *FTC v. Texaco, Inc.*, *supra*; *Thompson Medical Co. v. FTC*, *supra*. Indeed, FMC itself seemingly recognizes the propriety of overlaps, because its arguments are directed solely to certain subsidiaries of national banks; even if FMC's arguments were accepted, there would still be concurrent jurisdiction, by the FTC and OCC or another agency, as to other affiliates — *e.g.,* subsidiaries other than operating subsidiaries, as well as any parent or sister corporation. Within the Tele-

marketing Act itself, moreover, Congress recognized the ability of government agencies to coordinate enforcement efforts under overlapping authority, by its decision to permit both state and federal enforcement.

The degree to which such overlaps engender burdens on affected parties depends upon the particular context, and the manner in which the agencies deal with the overlap. For example, the FTC has recognized that premerger notification under both the Hart-Scott-Rodino Act ("HSR"), 15 U.S.C. § 18a, and special statutes requiring banking agency approval of bank or holding company mergers would be duplicative and unnecessary, since the parallel premerger schemes serve much the same purpose. *See* 65 Fed. Reg. 17880 (2000). Accordingly, the Commission issued guidance to minimize any overlap by treating as exempt from the HSR reporting requirement an acquisition of a bank's operating subsidiaries as part of a bank acquisition that requires banking agency approval. *Id.* at 17883, Example 8. (Such treatment does not apply, however, to a bank's simple acquisition of a traditional operating subsidiary, which does not require banking agency approval, and therefore is subject to HSR reporting requirements. *Id*. at 17882, Example 5.) This straightforward administrative accommodation — by an agency that has broad interpretive authority under that statute, 15 U.S.C. § 18a(d)(2) — comports with its own context, but does not dictate the answer to the question at hand.[8]

In the present context, the two groups of federal statutes involved — the banking statutes on the one hand, and the FTC Act and related enactments such as the Telemarketing Act on the other — serve

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[8] There are, moreover, additional reasons why the FTC's HSR ruling has nothing to do with the issues presented here. The HSR provisions — which are not even part of the FTC Act — differ substantially from Section 5(a)(2) of the FTC Act in that they do not exclude "banks" and other entities as such, but base their exclusions expressly on the requirement for merger approval under other statutes, thus evincing a clear congressional policy of avoiding overlapping reporting. *See* 15 U.S.C. §§ 18a(c)(7), 18a(c)(8).

complementary yet distinct public policies. As reflected in the broad enforcement provision cited by OCC, an important focus in regulation by the banking agencies is ensuring the safety and soundness of banking institutions, which is of vital concern to depositors and to the banking system as a whole. *See, e.g.*, 12 U.S.C. § 1818(b)(1). The Telemarketing Act, like the consumer protection provisions of the FTC Act itself, is targeted more specifically on protecting consumers from "deception and abuse" by businesses using improper means to sell goods or services. *See* 15 U.S.C. § 6101. These legislative schemes both ultimately serve the economic interests of the consuming public, and they certainly impose no conflicting standards on affected businesses. Yet the existence of overlapping authority is reasonable and beneficial, since it leaves the FTC and State consumer protection officials free to focus on consumer fraud issues, while the banking agencies focus on broader issues regarding the safety and soundness of financial institutions. And, to the extent that OCC or another banking agency exercises its power to enforce consumer protection laws against entities within its purview, interested agencies are fully capable of coordinating their efforts so as to avoid either the wasteful use of agency resources, or undue burdens on business.

In this respect, the analogy to the SEC's authority over broker-dealer activities by bank subsidiaries, discussed above, is again highly pertinent. The securities laws, too, have their own focus, which is to maintain a fair and orderly securities market and protect investors. Indeed, FMC acknowledges that it is "logical" to subject a broker-dealer to SEC regulation when the broker-dealer operates within a bank subsidiary. FMC Reply Br. 13. But it fails to explain why it is any less logical to subject a telemarketer to the normal legal remedies applicable to other telemarketers, when that activity takes place within a bank subsidiary. And, although Congress drew a line that precluded SEC authority over broker-dealer

operations of banks

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[9] In the normal course, any exposure by Fleet Bank would be limited to its investment in FMC, as is the very nature (and often an important purpose) of using subsidiaries. *See* OCC Interpretive Letter No. 289, 1984 WL 63797 (O.C.C.) (May 15, 1984). This fact is an added reason why the line drawn by Congress in the text of the GLB Act is a reasonable one, that should be applied according to its terms.

For the foregoing reasons, the Court should deny FMC's motion to dismiss the State's claims under the Telemarketing Act.

Respectfully submitted,

WILLIAM E. KOVACIC

CERTIFICATE OF SERVICE

I hereby certify that, on this 6th day of September, 2001, I have served copies of the foregoing Memorandum of Law of Amicus Curiae the Federal Trade Commission, by overnight courier, on each of the following:

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