

ORAL STATEMENT OF
COMMISSIONER JON LEIBOWITZ

before the
Senate Committee on Commerce, Science, and Transportation
on the
Federal Trade Commission Reauthorization Act of 2008
April 8, 2008, 10:00 a.m.

Chairman Dorgan, Vice-Chairman Stevens, and Members of the Committee:

Let me begin by underscoring how much we appreciate your ambitious legislation to reauthorize the Federal Trade Commission. My colleagues have asked me to focus on two provisions today: authority to bring civil enforcement actions against those who aid or abet illegal acts, and authority to seek civil penalties for violations of the FTC Act. Both measures are designed to provide strong deterrents to would-be lawbreakers.

Aiding & Abetting

First, aiding and abetting. The Commission unequivocally supports Section 7 of the bill to the extent that it would prohibit aiding or abetting a violation of any consumer protection statute enforced by the Commission.

For many years, our agency relied on Section 5 of the FTC Act to pursue not only direct violators, but also those who assisted violations. The Supreme Court's 1994 ruling in *Central Bank of Denver*, however, compromised our ability to reach such aiders and abettors. Since then, we have developed alternative theories to prosecute secondary actors but, as you know, sometimes it can be difficult to prove liability. Indeed, in some cases, we have been unable to bring actions against potential defendants who enabled illegal behavior. Clear enforcement authority would certainly help.

In fact, we already have this authority for telemarketing fraud. Pursuant to a 1994 statute, the FTC's Telemarketing Sales Rule prohibits "assisting and facilitating" violations. It has enabled us to successfully prosecute, for example, brokers who knowingly provided lead lists so scammers could find easy victims, and payment processors who electronically debited consumers' accounts on behalf of obviously fraudulent enterprises. But the rule is limited to *telemarketing* violations.

Why give a pass to facilitators of unlawful schemes that use the Internet or the mail – but not that use the telephone? To ask the question is to answer it: authority to prosecute aiders and abettors would be an effective law enforcement tool – as well as a strong deterrent for malefactors and their accomplices.

Civil Penalties for Violations of FTC Act Section 5

Second, civil penalties. Section 5 of the FTC Act – which prohibits “unfair or deceptive acts or practices” as well as “unfair methods of competition” – is the “bread and butter” of our law enforcement program. The FTC may seek *equitable* remedies for violations – including restitution for injured consumers and disgorgement of profits from violators. We use these remedial tools often – and very successfully. But the Commission does not have authority to obtain fines for Section 5 violations.

The FTC’s civil penalty authority is effectively restricted to three circumstances: (1) violations of statutes that authorize civil penalties, such as the CAN-SPAM Act; (2) knowing violations of FTC rules; and (3) violations of administrative cease and desist orders. Thus, a wide range of unfair and deceptive conduct, including outright fraud, may not be subject to this sanction.

Your bill would authorize the Commission to seek fines for *knowing* violations of Section 5 of the FTC Act.

The Commissioners all agree that we need additional civil penalty authority in certain categories of cases where the FTC’s usual monetary remedies – restitution and disgorgement – are inadequate. In recent years, we have testified in support of authorizing fines for spyware, data security breaches, and telephone record pretexting – instances in which it can be difficult to quantify consumer harm or in which the defendants’ ill-gotten gains are often slim, non-existent, or difficult to determine.

Admittedly there is some debate about how far the Commission’s civil penalty authority should extend. Some believe that Congress should authorize civil penalties piecemeal, in discrete areas, as problems arise. Or that the

a real deterrent to a lawbreaker.”¹ In response, the Senate passed legislation authorizing the FTC to seek fines in federal court, but this provision was dropped in conference with the House. We are all pleased that you are revisiting this issue today.

Speaking for myself, I strongly support the proposed reauthorization – including the additional civil penalty authority. Your bill, I believe, will help give us the critical tools we need to successfully confront the antitrust and consumer protection challenges of the 21st century.

I would be happy to answer any questions after my colleague, Commissioner Rosch, has testified.

¹*Hearings on H.R. 14931 and Related Bills Before the Subcomm. on Commerce and Finance of the H. Comm. on Interstate and Foreign Commerce, 91st Cong. 53, 54 (1970) (statement of Caspar W. Weinberger, Chairman, Federal Trade Commission).*