

This memorandum outlines the authority of the Federal Trade Commission (FTC) under Section 5 of the Federal Trade Commission Act (15 U.S.C. §§ 41-58, as amended) to take action against those who fail to protect the privacy of personal information in accordance with their representations and/or commitments to do so. It also addresses the exceptions to that authority and the ability of other federal and state agencies to take action where the FTC does not have authority.

FTC Authority over Unfair or Deceptive Practices

Section 5 of the Federal Trade Commission Act declares "unfair or deceptive acts or practices in or affecting commerce" to be illegal. 15 U.S.C. § 45(a)(1). Section 5 confers on the FTC the plenary power to prevent such acts and practices. 15 U.S.C. § 45(a)(2). Accordingly, the FTC may, upon conducting a formal hearing, issue a "cease and desist" order to stop the offending conduct. 15 U.S.C. § 45(b). If it would be in the public interest to do so, the FTC can also seek a temporary restraining order or temporary or permanent injunction in U.S. district court. 15 U.S.C. § 53(b). In cases where there is a widespread pattern of unfair or deceptive acts or practices, or where it has already issued cease and desist orders on the matter, the FTC may promulgate an administrative rule prescribing the acts or practices involved. 15 U.S.C. § 57a.

Anyone who does not comply with an FTC order is subject to a civil penalty of up to \$11,000, with each day of a continuing violation constituting a separate violation.⁽¹⁾ 15 U.S.C. § 45(l). Likewise, anyone who knowingly violates an FTC rule is liable for \$11,000 for each violation. 15 U.S.C. § 45(m). Enforcement actions can be brought by either the Department of Justice, or if it declines by the FTC. 15 U.S.C. § 56.

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FTC Authority and Privacy

In exercising its Section 5 authority, the FTC takes the position that misrepresenting why information is being collected from consumers or how the information will be used constitutes a deceptive practice.⁽²⁾

In a letter to Director General John Mogg of the European Commission, FTC Chairman Pitofsky noted the limitations on the FTC's authority to protect privacy where there has not been a misrepresentation (or no representation at all) as to how the information collected will be used. FTC Chairman Pitofsky letter to John Mogg (September 23, 1998). However, companies that want to avail themselves of the proposed "safe harbor" will have to certify that they will protect the information they collect in accordance with prescribed guidelines. Consequently, where a company certifies that it will safeguard the privacy of information and then fails to do so, such action would be a misrepresentation and a "deceptive practice" within the meaning of Section 5.

As the FTC's jurisdiction extends to unfair or deceptive acts or practices "in or affecting commerce," the FTC will not have jurisdiction over the collection and use of personal information for noncommercial purposes, charitable fund-raising for example. *See* Pitofsky letter, p. 3. However, the use of personal information in any commercial transaction will satisfy this jurisdictional predicate. Thus, for example, the sale by an employer of personal information on its employees to a direct marketer would bring the transaction within the purview of Section 5.

Financial Institutions⁽³⁾

The first exception applies to "banks, savings and loan institutions described in section 18(f)(3) [15 U.S.C. § 57a(f)(3)]" and "Federal credit unions described in section 18(f)(4) [15 U.S.C. § 57a(f)(4)]."⁽⁴⁾ These financial institutions are instead subject to regulations issued by the Federal Reserve Board, the Office of Thrift Supervision⁽⁵⁾, and the National Credit Union Administration Board, respectively. *See* 15 U.S.C. § 57a(f). These regulatory agencies are directed to prescribe the regulations necessary to prevent unfair and deceptive practices by these financial institutions⁽⁶⁾ and to establish a separate division to handle consumer complaints. 15 U.S.C. § 57a(f)(1). Finally, authority for enforcement derives from section 8 of the Federal Deposit Insurance Act (12 U.S.C. § 1818), for banks and savings and loans, and sections 120 and 206 of the Federal Credit Union Act, for Federal credit unions. 15 U.S.C. §§ 57a(f)(2)-(4).

Although the insurance industry is not specifically included in the list of exceptions in Section 5, the McCarran-Ferguson Act (15 U.S.C. § 1011 *et seq.*) generally leaves the regulation of the business of insurance to the individual states.⁽⁷⁾ Furthermore, pursuant to section 2(b) of the McCarran-Ferguson Act, no federal law will invalidate, impair, or supersede state regulation "unless such Act specifically relates to the business of insurance." 15 U.S.C. § 1012(b).

However, the provisions of the FTC Act apply to the insurance industry "to the extent that such business is not regulated by State law." *Id.* It should also be noted that McCarran-Ferguson defers to the states only with respect to "the business of insurance." Therefore, the FTC retains residual authority over unfair or deceptive practices by insurance companies when they are not engaged in the business of insurance. This could include, for example, when insurers sell personal information about their policy holders to direct marketers of non-insurance products.⁽⁸⁾

State "Unfair and Deceptive Practices" Authority

According to an analysis prepared by FTC staff, "All fifty states plus the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands have enacted laws more or less like the Federal Trade Commission Act ("FTCA") to prevent unfair or deceptive trade practices." FTC fact sheet, reprinted in Comment, Consumer Protection: The Practical Effectiveness of State Deceptive Trade Practices Legislation, 59 *Tul. L. Rev.* 427 (1984). In all cases, an enforcement agency has the authority "to conduct investigations through the use of subpoenas or civil investigative demands, obtain assurances of voluntary compliance, to issue cease and desist orders or obtain court injunctions preventing the use of unfair, unconscionable or deceptive trade practices." *Id.* In 46 jurisdictions, the law allows private actions for actual, double, treble, or punitive damages and, in some cases, recovery of costs and attorney's fees. *Id.*

Florida's Deceptive and Unfair Trade Practices Act, for example, authorizes the attorney general to investigate and file civil actions against "unfair methods of competition, unfair, unconscionable or deceptive trade practices," including false or misleading advertising, misleading franchise or business opportunities, fraudulent telemarketing, and pyramid schemes. *See also* N.Y. General Business Law § 349 (prohibiting unfair acts and deceptive practices carried out in the course of business).

A survey conducted this year by the National Association of Attorneys General (NAAG) confirms these findings. Of forty-three states that responded, all have "mini-FTC" statutes or other statutes that provide comparable protection. Also according to the NAAG survey, 39 states indicated they would have the authority to hear complaints by non-residents. With respect to consumer privacy, in particular, 37 out of forty-one states that responded indicated that they would respond to complaints alleging that a company within their jurisdiction was not adhering to its self-declared privacy policy.

1. In such an action, the United States district court can also order injunctive and equitable relief appropriate to enforcing the FTC order. 15 U.S.C. § 45(l)
2. "Deceptive practice" is defined as a representation, omission or practice that is likely to mislead reasonable consumers in a material fashion.
3. On November 12, 1999, President Clinton signed the Gramm-Leach-Bliley Act (Pub. L. 106-102, codified at 15 U.S.C. § 6801 *et seq.*) into law. The Act limits the disclosure by financial institutions of personal information about their customers. The Act requires financial institutions to, *inter alia*, notify all customers of their privacy policies and practices with respect to the sharing of personal information with affiliates and non-affiliates. The Act authorizes the FTC, the Federal banking authorities and other authorities to promulgate regulations to implement the privacy protections required by the statute. The agencies have issued proposed regulations for this purpose.
4. By its terms, this exception does not apply to the securities sector. Therefore, brokers, dealers and others in the securities industry are subject to the concurrent jurisdiction of the Securities and Exchange Commission and the FTC with respect to unfair or deceptive acts and practices.
5. The exception in Section 5 originally referred to the Federal Home Loan Bank Board, which was abolished in August 1989 by the Financial Institutions Reform, Recovery and Enforcement Act of 1989. Its functions were transferred to the Office of Thrift Supervision and to the Resolution Trust Corporation, the Federal Deposit Insurance Corporation, and the Housing Finance Board.
6. While removing financial institutions from the FTC's jurisdiction, Section 5 also stipulates that whenever the FTC issues a rule on unfair or deceptive acts and practices, the financial regulatory Boards should adopt parallel regulations within 60 days. *See* 15 U.S.C. § 57a(f)(1).
7. "The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business." 15 U.S.C. § 1012(a).
8. The FTC has exercised jurisdiction over insurance companies in different contexts. In one case, the FTC took action against a firm for deceptive advertising in a state in which it was not licensed to do business. The FTC's jurisdiction was upheld on the basis that there was no effective state regulation because the firm was effectively beyond the reach of the state. *See* FTC v. Travelers Health Association, 362 U.S. 293 (1960).