LEGISLATIVE HEARING ON H.R. 2309, CONSUMER CREDIT PROTECTION IMPROVEMENT ACT; AND H.R. 2190, MERCURY POLLUTION REDUCTION ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON COMMERCE, TRADE, AND CONSUMER PROTECTION

OF THE

COMMITTEE ON ENERGY AND COMMERCE

HOUSE OF REPRESENTATIVES

ONE HUNDRED ELEVENTH CONGRESS

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SUBMITTED MATERIAL

[1] Ms. O'Neill did not respond to submitted questions for the record.
[2] Ms. Goldman did not respond to submitted questions for the record.

LEGISLATIVE HEARING ON H.R. 2309, CONSUMER CREDIT PROTECTION IMPROVEMENT ACT; AND H.R. 2190, MERCURY POLLUTION REDUCTION ACT

TUESDAY, MAY 12, 2009

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COMMERCE, TRADE,
AND CONSUMER PROTECTION,
COMMITTEE ON ENERGY AND COMMERCE,
Washington, DC.

The subcommittee met, pursuant to call, at 2:05 p.m., in Room 2322, Rayburn House Office Building, Hon. Bobby L. Rush [chairman of the subcommittee] presiding.

Present: Representatives Rush, Schakowsky, Sarbanes, Barrow, Matsui, Radanovich, Gingrey, Scalise and Barton (ex officio).

Staff Present: Christian Tanotsu Fjeld, Counsel; Anna Laitin, Professional Staff; Robin Appleberry, Counsel; Valerie Baron, Legislative Clerk; Michelle Ash, Counsel; Shannon Weinberg, Minority Counsel; Brian McCullough, Minority Senior Professional Staff; Jerry Couri, Minority Professional Staff; Will Carty, Minority Professional Staff; and Sam Costello, Minority Legislative Analyst.

Mr. RUSH. The subcommittee will come to order.

Today's hearing is a legislative hearing. It is on two bills, H.R. 2309 and H.R. 2190.

[The information follows:]

I

111TH CONGRESS
1ST SESSION

H. R. 2309

To provide authority to the Federal Trade Commission to expedite rulemakings concerning consumer credit or debt and to direct the Commission to examine and promulgate rules with regard to debt settlement and automobile sales, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

MAY 7, 2009

Mr. RUSH (for himself, Ms. SCHAKOWSKY, and Ms. MATSUI) introduced the following bill; which was referred to the Committee on Energy and Commerce

---

A BILL

To provide authority to the Federal Trade Commission to expedite rulemakings concerning consumer credit or debt and to direct the Commission to examine and promulgate rules with regard to debt settlement and automobile sales, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Consumer Credit and Debt Protection Act".

SEC. 2. FTC RULEMAKING RELATING TO CREDIT OR DEBT.

(a) EXPEDITED RULEMAKING.—Section 18 of the Federal Trade Commission Act (15 U.S.C. 57a) is amended by adding at the end the following new subsection:

"(k) Notwithstanding any other procedures set forth in this section or section 22, for any rulemaking relating to consumer credit or debt, the Commission shall conduct such rulemaking in accordance with section 553 of title 5, United States Code, and the provisions for judicial review of rules promulgated in accordance such section shall apply to any rule promulgated in such a rulemaking.".

(b) SPECIFIC RULEMAKINGS.—

(1) DEBT SETTLEMENT.—

(A) IN GENERAL.—The Federal Trade Commission shall examine the practices of providers of debt settlement services and prescribe such rules as the Commission determines necessary (in accordance with section 553 of title 5, United States Code) in order to prevent unfair and deceptive acts or practices of providers of such services. The Commission shall consider adopting rules that—

(i) prohibit the charging of fees to consumers prior to any debt settlement service being fully rendered and limiting fees that may be charged after a settlement with a creditor is reached; and

(ii) require disclosures before a contract is signed regarding the fee structure, expected time frames for a successful settlement, success rate of debtors in settling their debts, information about creditor participation in settlement plans, and the potential impact on a consumer's credit score.

(B) DEFINITION.—For purposes of subparagraph (A), the term "debt settlement service" means a commercial service provided to assist consumers in managing and repaying consumer debt, including the offering of advice or acting as an intermediary between a debtor and one or more of the debtor's creditors, where the primary purpose of the advice or action is to obtain a settlement for less than the full amount of debt owed.

(2) AUTOMOBILE SALES.—The Federal Trade Commission shall examine the practices of automobile dealers with respect to credit and lending and shall prescribe such rules as the Commission determines necessary (in accordance with section 553 of

title 5, United States Code) in order to prevent unfair and deceptive acts or practices of such dealers. The Commission shall consider adopting rules that—

(A) restrict post-sale changes in financing terms;

(B) require that automobile purchase agreements or sales contracts entered into between a consumer and an automobile dealer include a provision which permits the consumer to cancel the transaction within a specified period following the sale or receipt of final information concerning the terms of the sale or financing; and

(C) limit the ability of automobile dealers to accept or solicit compensation that is based on the interest rate, annual percentage rate, or the amount financed with respect to the sale of an automobile and that is either—

(i) for the provision, procurement, or arrangement of financing; or

(ii) for the sale, assignment, or transfer of the installment sale contract.

(c) DEADLINE FOR RULEMAKINGS.—The Commission shall commence the rulemakings required under subsection (b) within 6 months after the date of enactment of this Act.

SEC. 3. AUTHORITY TO OBTAIN CIVIL PENALTIES IN CONNECTION WITH UNFAIR AND DECEPTIVE ACTS OR PRACTICES RELATING TO CONSUMER CREDIT OR DEBT.

Section 5(m)(1) of the Federal Trade Commission Act (15 U.S.C. 45(m)(1)) is amended—

(1) by redesignating subparagraph (C) as subparagraph (D), and in such subparagraph (as so redesignated), by striking "subparagraphs (A) and (B)" and inserting "subparagraphs (A), (B), and (C)"; and

(2) by inserting after subparagraph (B) the following new subparagraph:

"(C) The Commission may commence a civil action to recover a civil penalty in a district court of the United States against any person, partnership, or corporation which engages in any unfair or deceptive acts or practices in connection with consumer credit or debt with actual knowledge or knowledge fairly implied on the basis of objective circumstances that such an act is unfair or deceptive. In such action, such person, partnership, or corporation shall be liable for a civil penalty as provided in subparagraph (A).".

SEC. 4. ENFORCEMENT BY STATE ATTORNEYS GENERAL.

(a) IN GENERAL.—Except as provided in subsection (f), a State, as parens patriae, may bring a civil action on behalf of its residents in an appropriate State or district court of the United States to enforce the provisions of the Federal Trade Commission Act or any other Act enforced by the Federal Trade Commission to obtain penalties and relief provided under such Acts whenever the attorney general of the State has reason to believe that the interests of the residents of the State have been or are being threatened or adversely affected by a violation of a rule prescribed under section 2(b) or any other rule relating to consumer credit or debt promulgated by the Federal Trade Commission.

(b) NOTICE.—The State shall serve written notice to the Commission of any civil action under subsection (a) at least 60 days prior to initiating such civil action. The notice shall include a copy of the complaint to be filed to initiate such civil action, except that if it is not feasible for the State to provide such prior notice, the State shall provide notice immediately upon instituting such civil action.

(c) INTERVENTION BY FTC.—Upon receiving the notice required by subsection (b), the Commission may intervene in such civil action and upon intervening—

(1) be heard on all matters arising in such civil action;

(2) remove the action to the appropriate United States district court; and

(3) file petitions for appeal of a decision in such civil action.

(d) SAVINGS CLAUSE.—Nothing in this section shall prevent the attorney general of a State from exercising the powers conferred on the attorney general by the laws of such State to conduct investigations or to administer oaths or affirmations or to compel the attendance of witnesses or the production of documentary and other evidence. Nothing in this section shall prohibit the attorney general of a State, or other authorized State officer, from proceeding in State or Federal court on the basis of an alleged violation of any civil or criminal statute of that State.

(e) VENUE; SERVICE OF PROCESS; JOINDER.—In a civil action brought under subsection (a)—

(1) the venue shall be a judicial district in which the lender or a related party operates or is authorized to do business;

(2) process may be served without regard to the territorial limits of the district or of the State in which the civil action is instituted; and

(3) a person who participated with a lender or related party to an alleged violation that is being litigated in the civil action may be joined in the civil action without regard to the residence of the person.

(f) PREEMPTIVE ACTION BY FTC.—Whenever a civil action or an administrative action has been instituted by or on behalf of the Commission for violation of any rule described under subsection (a), no State may, during the pendency of such action instituted by or on behalf of the Commission, institute a civil action under subsection (a) against any defendant named in the complaint in such action for violation of any rule as alleged in such complaint.

(g) AWARD OF COSTS AND FEES.—If the attorney general of a State prevails in any civil action under subsection (a), the State can recover reasonable costs and attorney fees from the lender or related party.

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I

111TH CONGRESS
1ST SESSION

H. R. 2190

To amend the Toxic Substances Control Act to phase out the use of mercury in the manufacture of chlorine and caustic soda, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

APRIL 30, 2009

Ms. SCHAKOWSKY (for herself, Mr. BERMAN, Mr. CARNAHAN, Mr. ELLISON, Ms. DELAURO, Mr. GRIJALVA, Mr. FARR, Mr. HARE, Ms. HIRONO, Ms. LEE of California, Mr. MORAN of Virginia, Mrs. NAPOLITANO, Mr. PALLONE, Mr. SESTAK, Ms. WOOLSEY, Ms. WATSON, Ms. NORTON, Mr. BLUMENAUER, and Mr. PRICE of North Carolina) introduced the following bill; which was referred to the Committee on Energy and Commerce

---

A BILL

To amend the Toxic Substances Control Act to phase out the use of mercury in the manufacture of chlorine and caustic soda, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Mercury Pollution Reduction Act".

SEC. 2. FINDINGS.

Congress finds that—

(1) mercury and mercury compounds are highly toxic to humans, ecosystems, and wildlife;

(2) as many as 10 percent of women in the United States of childbearing age have mercury in their bloodstreams at a level that could pose risks to their unborn babies, and hundreds of thousands of children born annually in the United States are at risk of neurological problems relating to mercury exposure in utero;

(3) the most significant source of mercury exposure to people in the United States is ingestion of mercury-contaminated fish;

(4) the long-term solution to mercury pollution is to minimize global mercury use and releases of mercury to eventually achieve reduced contamination levels in the environment, rather than reducing fish consumption, since uncontaminated fish represents a critical and healthy source of nutrition for people worldwide;

(5) mercury pollution is a transboundary pollutant that—

(A) is deposited locally, regionally, and globally; and

(B) affects bodies of water near industrial areas, such as the Great Lakes, as well as bodies of water in remote areas, such as the Arctic Circle;

(6) of the approximately 30 plants in the United States that produce chlorine, only 5 use the obsolete "mercury cell" chlor-alkali process, and 4 have not yet committed to phasing out mercury use;

(7)(A) less than 5 percent of the total quantity of chlorine and caustic soda produced in the United States comes from the chlor-alkali plants described in paragraph (6) that use the mercury cell chlor-alkali process;

(B) cost-effective alternatives are available and in use in the remaining 95 percent of chlorine and caustic soda production; and

(C) other countries, including Japan, have already banned the mercury cell chlor-alkali process;

(8) the chlor-alkali industry acknowledges that—

(A) mercury can contaminate products manufactured at mercury cell facilities; and

(B) the use of some of those products results in the direct and indirect release of mercury;

(9) despite those quantities of mercury known to have been used or to be in use, neither the chlor-

alkali industry nor the Environmental Protection Agency is able—

(A) to adequately account for the disposition of the mercury used at those facilities; or

(B) to accurately estimate current mercury emissions; and

(10) it is critically important that the United States work aggressively toward the minimization of supply, demand, and releases of mercury, both domestically and internationally.

SEC. 3. STATEMENT OF POLICY.

Congress declares that the United States should develop policies and programs that will—

(1) reduce mercury use and emissions within the United States;

(2) reduce mercury releases from the reservoir of mercury currently in use or circulation within the United States; and

(3) reduce exposures to mercury, particularly exposures of women of childbearing age and young children.

SEC. 4. USE OF MERCURY IN CHLORINE AND CAUSTIC SODA MANUFACTURING.

(a) IN GENERAL.—Title I of the Toxic Substances Control Act (15 U.S.C. 2601 et seq.) is amended by inserting after section 6 the following:

"SEC. 6A. USE OF MERCURY IN CHLORINE AND CAUSTIC SODA MANUFACTURING.

"(a) DEFINITIONS.—In this section:

"(1) CHLOR-ALKALI FACILITY.—The term 'chlor-alkali facility' means a facility used for the manufacture of chlorine or caustic soda using a mercury cell process.

"(2) HAZARDOUS WASTE; SOLID WASTE.—The terms 'hazardous waste' and 'solid waste' have the meanings given those terms in section 1004 of the Solid Waste Disposal Act (42 U.S.C. 6903).

"(b) PROHIBITION; USE PRIOR TO PROHIBITION.—

"(1) PROHIBITION.—Effective on the date 24 months after the enactment of this section, the manufacture of chlorine or caustic soda using mercury cells is prohibited in the United States.

"(2) EXPORT BAN.—Effective on the date of the enactment of this section, the export of any mercury, mercury cells, mercury compounds, and mixtures containing mercury by the owner or operator of a chlor-alkali facility is prohibited.

"(c) REPORTING.—

"(1) IN GENERAL.—Not later than 24 months after the enactment of this section, the owner or operator of each chlor-alkali facility shall submit to the Administrator and the State in which the chlor-alkali facility is located a report that identifies—

"(A) each type and quantity of mercury-containing hazardous waste and nonhazardous solid waste generated by the chlor-alkali facility during the preceding calendar year;

"(B) the mercury content of the wastes;

"(C) the manner in which each waste was managed, including the location of each offsite location to which the waste was transported for subsequent handling or management;

"(D) the volume of mercury released, intentionally or unintentionally, into the air or water by the chlor-alkali facility, including mercury released from emissions or vaporization;

"(E) the volume of mercury estimated to have accumulated in pipes and plant equipment of the chlor-alkali facility, including a description of—

"(i) the applicable volume for each type of equipment; and "(ii) methods of accumulation; and

"(F) the quantity and forms of mercury found in all products produced for sale by the chlor-alkali facility.

"(2) AVOIDANCE OF DUPLICATION.—To avoid duplication, the Administrator may permit the owner or operator of a facility described in paragraph (1) to combine and submit the report required under this subsection with any report required to be submitted by the owner or operator under subtitle C of the Solid Waste Disposal Act (42 U.S.C. 6921 et seq.).

"(d) INVENTORY.—

"(1) IN GENERAL.—For each chlor-alkali facility that ceases operations on or after January 1, 2009, not later than 1 year after the date of cessation of operations, the Administrator, in consultation with the State in which the facility is located, shall conduct a comprehensive mercury inventory covering the life and closure of the chlor-alkali facility, taking into account—

"(A) the total quantity of mercury purchased to start and operate the chlor-alkali facility;

"(B) the total quantity of mercury remaining in mercury cells and other equipment at the time of closure of the chlor-alkali facility;

"(C) the estimated quantity of mercury in hazardous waste, nonhazardous solid waste, and products generated at the chlor-alkali facility during the operational life of the chlor-alkali facility; and

"(D) the estimated aggregate mercury releases from the chlor-alkali facility into air and other environmental media.

"(2) RECORDS AND INFORMATION.—In carrying out paragraph (1), the Administrator is authorized and directed to obtain mercury purchase records and such other information from each chlor-alkali facility as are necessary to determine, as accurately as practicable from available information, the magnitude and nature of mercury releases from the chlor-alkali facility into air and other environmental media.

"(3) AUTHORITIES.—This Administrator shall use the authorities of section 11 and any other appropriate authorities of this Act to carry out this subsection.".

(b) CONFORMING AMENDMENTS.—

(1) TABLE OF CONTENTS.—The table of contents of the Toxic Substances Control Act (15 U.S.C. 2601 note) is amended by inserting after the item relating to section 6 the following:

(2) ENFORCEMENT.—Section 15 of such Act is amended by striking out "or 6" and inserting ", 6, or 6A" in each place it appears.

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OPENING STATEMENT OF HON. BOBBY L. RUSH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

Mr. RUSH. The Chair will recognize himself for 5 minutes for the purposes of opening statements.

Today, as I said before, the subcommittee is conducting yet another legislative hearing on two more bills, H.R. 2309, the Consumer Credit and Debt Protection Act, and H.R. 2190, the Mercury Pollution Reduction Act. This hearing continues our trend to hold legislative hearings with the intent of moving bills towards eventually becoming law.

H.R. 2390, the Mercury and Pollution Reduction Act, was introduced by the Vice Chair of the subcommittee, my friend and colleague from Chicago Ms. Schakowsky. The bill effectively bans the use of mercury in the production of chlorine and caustic soda and prohibits the export of mercury effective immediately.

Mercury is well known to cause neurological damage, especially to children. The toxin is also found in fish, and when people eat contaminated fish, they also consume the mercury. Pregnant women who ingest the mercury in fish pass the toxic effects along to their developing fetus, which can lead to long-term neurological harm.

Furthermore, studies indicate that unsafe mercury levels are more prominent in people of color and in poor communities, and this disparate impact along ethnic and racial lines is likely the result of fish and seafood consumption.

It is my understanding that only four manufacturing plants still use mercury in the production of chlorine. It is also my understanding that the chlorine industry has made the transition away from mercury as a result of increased efficiency in alternative methods of manufacturing. As such, I am interested to know why Ms. Schakowsky's bill shouldn't become law as soon as possible due to the harmful effects of mercury and the cost savings associated with producing chlorine from other methods. I want to commend Ms. Schakowsky for her work on this bill.

I am the author of the second bill we are considering today. H.R. 2309, the Consumer Credit and Protection Act, is a result of two oversight hearings this subcommittee has held on consumer credit issues this year. The bill provides the Federal Trade Commission with normal rulemaking authority under the Administrative Procedures Act, for all consumer credit and debt-related issues as opposed to its current cumbersome rulemaking authority under the Magnuson-Moss Act. This authority will empower the Commission to nimbly respond to current and future abuses perpetrated on consumers.

My bill also directs the Commission to specifically address current abuses in the automobile and debt consolidation industries. It is my intent, during an eventual markup, to also add a directive rulemaking on pending legislation as well.

I hope the witnesses will provide the information the subcommittee needs on how effective H.R. 2309 would be in protecting consumers not only from the credit and debt scams of today, but the scams of tomorrow, also.

It is important that the FTC have the requisite flexibility and authority to address numerous credit fraud that plagues consumers. Moreover, I believe it is extremely important that the Commission retain this aggressive posture of consumer credit and debt regardless of the political leadership at the top. Both Democrats and Republicans are guilty of being asleep at the switch, and difficulties in the financial and housing market have shown us that we can no longer afford this type of political negligence. It is vital that we revitalize the Federal Trade Commission's work on behalf of consumers in order to prevent the types of widespread abuses that weren't addressed in the past.

Today I hope to have an informative legislative hearing on these two bills and work with all of the affected stakeholders and my friends on the other side of the aisle. We may end up disagreeing, but as always, I believe in disagreeing in a civil and politically honest manner.

With that, I yield back the balance of my time.

[The prepared statement of Mr. Rush follows:]

NEWS FROM
Congressman Bobby L. Rush
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Statement by the Honorable Bobby L. Rush, Chairman
Energy and Commerce Committee Subcommittee on
Commerce, Trade, and Consumer Protection
Legislative Hearing: H.R. 2309, the Consumer Credit and Debt Protection Act and H.R. 2190, the Mercury Pollution Reduction Act
May 12, 2009

WASHINGTON, D.C. — "The Subcommittee will come to order.

"Today, the Subcommittee is conducting yet another legislative hearing on two more bills: H.R. 2309, the Consumer Credit and Debt Protection Act, and H.R. 2190, the Mercury Pollution Reduction Act. This hearing continues our trend to hold legislative hearings with the intent of moving bills towards eventually becoming law.

"H.R. 2190, the Mercury Pollution Reduction Act was introduced by the vice-chair of the Subcommittee, my friend from Chicago, Ms. Schakowsky. The bill effectively bans the use of mercury in the production of chlorine and caustic soda, effective two years after enactment; and further prohibits the export of mercury, effective immediately.

"Mercury is well-known to cause neurological damage, especially to children. The toxin is often found in fish, and when people eat contaminated fish, they also consume the mercury. Pregnant women who ingest mercury in fish pass the toxic effects along to their developing fetuses, which can lead to long-term neurological harm. Furthermore, studies indicate that unsafe mercury levels are more prominent in people of color and in poorer communities; and this disparate impact along ethnic and racial lines is likely the result of fish and seafood consumption.

– more –

"It is my understanding that only four plants still use mercury in the production of chlorine. It is also my understanding that the chlorine industry has made the transition away from mercury as a result of increased efficiency in alternative methods of manufacturing. As such, I am interested to know why Ms. Schakowsky's bill shouldn't become law as soon as possible, given the well-established harmful effects of mercury and the cost-savings associated with producing chlorine from other methods. I want to commend Ms. Schakowsky for her work on this bill.

"I am the author of the second bill we are considering today. H.R. 2309, the Consumer Credit and Debt Protection Act is the result of two oversight hearings this subcommittee has held on consumer credit issues this year. The bill provides the Federal Trade Commission with normal rulemaking authority under the Administrative Procedures Act for all consumer credit and debt-related issues, as opposed to its current, cumbersome rulemaking authority under the Magnusson-Moss Act. This authority will empower the Commission to nimbly respond to current and future credit abuses perpetrated on consumers. My bill also directs the Commission to specifically address current abuses in the automobile and debt consolidation industries. It is my intent, during an eventual mark-up, to also add a directed rulemaking on payday lending as well.

"I hope the witnesses will inform the subcommittee on how effective H.R. 2309 will be in protecting consumers not only from the credit and debt scams of today, but the scams of tomorrow. It is important that the FTC have the requisite flexibility and authority to address numerous credit and debt schemes that plague consumers. Moreover, I believe it's extremely important that the Commission retain this aggressive posture on consumer credit and debt regardless of the political leadership at the top. Both Democrats and Republicans are guilty of being asleep at the switch, and the current difficulties in the financial and housing markets have shown us that we can no longer afford this type of political negligence. It is vital that a strong, revitalized Federal Trade Commission work on behalf of consumers in order to prevent the types of wide spread abuses that went unaddressed in the past.

"Today, I hope to have an informative legislative hearing on these two bills and work with all affected stakeholders and my friends on the other side of the aisle. We may end up disagreeing; but as always, I believe in disagreeing in a civil and politically honest manner.

"With that, I yield back the balance of my time."

# # #

Mr. RUSH. The Chair now recognizes the Ranking Member of the subcommittee Mr. Radanovich for 5 minutes for an opening statement.

OPENING STATEMENT OF HON. GEORGE RADANOVICH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. RADANOVICH. Thank you very much.

Today we examine two pieces of legislation under the subcommittee's jurisdiction. The first bill is H.R. 2309, addressing credit and debt issues under the Federal Trade Commission's jurisdiction.

As I have stated previously, I support cracking down on anybody who breaks the law or takes unfair advantage of others for their own gain. Mortgage and foreclosure problems have revealed deception, lying and stealing at all levels of the homebuying process from consumers falsely stating their income to mortgage companies deceiving consumers about their loans. There should be no tolerance for these practices, practices that have devastated many consumers with foreclosures and have put all taxpayers on the hook for these bad actors' deeds.

Similarly, the economic downturn has caused many to find themselves over their heads with nonmortgage debt. I support the markets' creation of third-party entities who negotiate on these individuals' behalves, but I also see opportunities where abuse and fraud may arise. Therefore, I support the legislation's direction to the FTC to examine debt settlement practices and promulgate rules as necessary. However, my question within these proposed rules is what is lacking in the current law? Is there a problem so widespread that it requires an industrywide solution; and, finally, will the proposed rule solve the problem?

My primary concern is that the examination be thorough and the evidence substantial before any rules are proposed. Industrywide rules impose costs on innocent, law-abiding citizens and, therefore, need to be thoroughly vetted to ensure they are justified and the best solution for the problem.

This leads me to a larger concern with the bill's authorization of the general APA rulemaking authority with credit and debt practices. Congress imposed the more rigorous Magnuson-Moss rulemaking procedures on the FTC for a reason. Providing a blank check for more rules is a change Congress should not contemplate lightly, particularly when the impact will be sweeping. The benefit must outweigh the costs.

The two provisions which I am concerned with are the grants of civil penalty authority in cases of implied knowledge, and the broad State attorneys general enforcement provision. The FTC may currently seek civil penalties only in a case where the defendant was on notice that their conduct was wrongful. This bill would make people liable without their knowledge that they are engaged in wrongful conduct.

My second concern is the breathtaking extent of the proposed State attorney general's enforcement power. It would apply to an FTC-enforced statute regulating consumer credit or debt without transparency or checks and balances on that power. Additionally, because most suits prosecuting unfair, deceptive acts are not based on hard and fast rules, this authority will yield many inconsistent interpretations and outcomes.

The second bill we are examining today, H.R. 2190, would ban the use of mercury cell technology to produce chlorine and caustic soda. I think we need to look carefully not just at the bill itself, but also at the other legal and regulatory actions at the Federal level on this matter. This legislation only addresses four plants in the United States. We should neither be cavalier about the bill's impact because it affects four plants, nor should we fully ignore its effects on policy.

For starters, the last Congress took great care to overwhelmingly pass bipartisan legislation that banned export of elemental mercury beginning in 2013. This law represents a collaborative effort among diverse stakeholders and created an orderly transition for management and storage of mercury held by both public and private interests. I fear the provisions of this bill will unnecessarily undo our thoughtful work and make mercury repositories of chlorine factories for several years.

In addition, I am concerned that parts of the bill unnecessarily duplicate existing reporting requirements on these facilities. I have problems requiring reports for the sake of requiring them, and I hope that at least one of our witnesses can point out to me both the practical need for and the legal gap being plugged by each of these mandates.

From a larger policy perspective, I am concerned that this bill continues the trend of selectively deciding which products, technologies, and substances are OK for the public to have, and, in my view, some of the proponents of this bill are inconsistently applying their concerns about mercury depending on the technology or the product.

Let me give you an example. H.R. 2190 states that the U.S. should develop policies that reduce exposure to mercury, particularly the exposure of child-bearing-aged women and young children. Yet in the last Congress, the Democrat Majority insisted on legislation forcing daycare centers, hospitals, schools, and nursing homes to use mercury-laced compact fluorescent light bulbs. If we are serious about this issue, Congress cannot send mixed signals to the American public about these public health threats.

I want to thank today all of our witnesses for being here, and I want to thank you, Mr. Chairman, and know that I am eager to work in a bipartisan manner to address the concerns on both sides of the aisle on these issues.

Thank you very much.

Mr. RUSH. The Chair thanks the gentleman.

The Chair now recognizes the sponsor of one of the bills that we are considering today, H.R. 2190. My friend from Chicago Ms. Schakowsky is recognized for 2 minutes.

OPENING STATEMENT OF HON. JANICE D. SCHAKOWSKY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

Ms. SCHAKOWSKY. Thank you for holding this hearing today. I congratulate you on this legislation.

Right now I want to focus my remarks on H.R. 2190, the Mercury Pollution Reduction Act, a bill that protects the public health by ending the hazardous use of mercury cell technology at chlor-alkali plants in the United States.

Mr. Chairman, the dangers associated with exposure to mercury are well documented, and you mentioned some. According to the EPA, mercury pollution can do irreparable damage to cognitive functioning in adults and to an infant's developing nervous system. It is so dangerous that the Federal Government has warned pregnant women and those who may become pregnant not to eat fish with high levels of mercury, such as swordfish, and to severely limit their consumption of others, such as tuna.

While H.R. 2190 only addresses mercury pollution from four remaining chlor-alkali plants that use mercury, it must be emphasized that the impact these plants have on surrounding communities is severe, and, even worse, unnecessary. Unlike coal-fired power plants, there are readily available alternatives that could and should be used. In fact, converting from mercury cell technology to membrane cell has proven not only to be drastically better for the environment, but also wise business practice, saving companies millions of dollars in energy-efficiency costs.

I introduced this legislation because I believe that Congress has a responsibility to minimize the public's exposure to mercury pollution, especially when cleaner, safer alternatives exist.

And I want to thank Oceana, an environmental organization, for their tireless efforts, and the committee staff for their diligent work on this bill.

I urge my colleagues to support its passage, and I yield back the balance of my time.

Mr. RUSH. The Chair now recognizes the gentleman from Georgia for 2 minutes.

OPENING STATEMENT OF HON. PHIL GINGREY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF GEORGIA

Dr. GINGREY. Mr. Chairman, thank you so much for calling this hearing today so we can hear testimony on H.R. 2190, the Mercury Pollution Reduction Act. It is my hope that moving forward on these two bills, including H.R. 2309, the Consumer Credit and Debt Protection Act, we can work in a bipartisan manner to accomplish our shared goal of increased and enhanced consumer protection.

H.R. 2309 would expand the role of the Federal Trade Commission by changing the rulemaking authority that relates to consumer credit and debt from the established and rigorous Magnuson-Moss procedures to the authority under the administrative procedures at APA.

Mr. Chairman, at a hearing on this topic on March the 24th, I urged my colleagues to take caution in making this change in rulemaking procedure. Magnuson-Moss was designed in the 1970s to be onerous so as to avoid whimsical changes in FTC regulations. While I think the end goal here is commendable, I still have concerns that a simple legislative change will open the door to future unraveling of the Magnuson-Moss procedures.

H.R. 2190 bans the manufacturer of chlorine using the mercury cell process, including the export of any mercury, within 2 years.

As a physician for nearly 30 years, I believe it is critically important that we take proactive steps to ensure the health and safety of our citizens.

During the 110th Congress, President Bush signed into law Senate bill 906, the Mercury Export Ban of 2008, that was introduced by then-Senator, now President, of course, Barack Obama. This legislation specifically outlawed the export of elemental mercury starting in 2013, similar, very much, to what is proposed in 2190. Therefore, given the duplicative nature of H.R. 2190 in regard to at least that section, I am concerned that we would be stretching our Federal resources too thinly on this important matter if the bill is enacted.

Mr. Chairman, on both bills before us today, I urge my colleagues to exercise due caution, to consider the possible unintended consequences that we always should.

I do look forward to hearing from our two panels today on these issues.

Mr. RUSH. The Chair now recognizes the gentleman from Maryland Mr. Sarbanes for 2 minutes for the purposes of opening statement.

OPENING STATEMENT OF HON. JOHN P. SARBANES, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MARYLAND

Mr. SARBANES. Thank you, Mr. Chairman. I appreciate you calling a hearing on these two important bills.

I want to congratulate Ms. Schakowsky for her efforts with respect to the Mercury Pollution Reduction Act. It sounds like it is a pretty focused measure to address what is a kind of loophole right now in terms of a major source of mercury pollution, and I hope we can move quickly forward on this.

With respect to the Consumer Credit Debt and Protection Act, I participated in the hearing that you called previously. It was very eye-opening in viewing how this subprime culture that we addressed mostly in our discussions with respect to the housing sector has also infected auto financing and other sources of credit, and how these loopholes exist in a way that allows predators to enter that space. And so this proposes giving the FTC—which, of course, comes with an exclusive focus on consumer protection—a role in the designing of a new regulatory framework with respect to the financial services industry, and a very important role at that.

One of the anxieties many of us have is that as we design that new framework, it will not be done in a strategic way. We will end up with loopholes in it that people can take advantage of. And I think having an agency at the table that has got this very keen focus on the consumer is part of making sure that that strategic framework is as robust as it can possibly be.

So I thank you for calling the hearing so we can hear these proposals discussed.

Mr. RUSH. The Chair thanks the gentleman.

The Chair now recognizes my friend from Georgia Mr. Barrow for 2 minutes for the purposes of an opening statement.

OPENING STATEMENT OF HON. JOHN BARROW, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF GEORGIA

Mr. BARROW. I thank the Chair.

I am going to limit my remarks to H.R. 2190, the Mercury Pollution Reduction Act.

I am in a tough spot today because while I recognize the environmental benefits of banning chlor-alkali mercury technology, I am one of the few Members of Congress who actually represents one of the facilities that still uses that technology. While I am willing to acknowledge it is a good thing there are only four of these plants left in the country, I have to be sensitive and ask my colleagues to be sensitive to the 150 jobs and the multimillion-dollar impact this plant brings to my district.

My colleagues have done a good job of highlighting environmental and health reasons to move this bill. I think they are obvious and compelling. I ask my colleagues to also be sensitive to the economic impacts, as I think those arguments are also obvious and compelling.

The question is, can we serve both purposes and find a productive solution for all involved? I think we can. I respectfully suggest the bill, as written—and considering time and financial pressures, it is going to be very hard for the affected companies to comply with except to shut them down. It is not my goal to shut down an employer in my district. I won't consider that a success.

The ideal solution, in my mind, would be the plant which I represent have the opportunity and the ability to transition to the new technology and preserve the jobs there for a long time into the future. I hope that is the intention of the committee, and I look forward to working to find a solution that secures the jobs and protects the environment.

Mr. RUSH. The Chair now recognizes the gentlelady from California. Ms. Matsui is recognized for 2 minutes for the purposes of opening statement.

OPENING STATEMENT OF HON. DORIS O. MATSUI, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Ms. MATSUI. I want to thank you very much for calling today's hearing. I would also like to thank our panelists for sharing their expertise with us.

In today's economic recession, many families in my home district of Sacramento are struggling to make ends meet. I have heard countless stories of people struggling to keep their homes, their jobs, and their way of life. Many of my constituents were victims of predatory lending and were steered into high-cost, bad loans. Now, many of these homeowners are seeking assistance in modifying their loans to more affordable terms, yet many of these individuals are now being tricked by scam artists posing as so-called "foreclosure consultants" to save their homes. These scams are costing thousands of dollars and represent false promises to struggling homeowners.

During last week's debate on the mortgage reform bill, I offered an amendment that was included in the final bill that directs the GAO to conduct a study of the government's current efforts to combat foreclosure rescue scams. It is clear that consumers are not being properly protected from these shameful practices.

It is also clear that we can do more to protect the American people from harmful exposure to mercury. Mercury is a known toxin, and we should do all in our power to ensure that it stays out of our newborns' bodies.

I look forward to hearing from today's witnesses, particularly from Dr. Lynn Goldman, who is the principal investigator of the National Children's Study, and who is an expert on mercury exposure.

I thank you, Mr. Chairman, for holding this important hearing today. I yield back the balance of my time.

Mr. RUSH. The Chair thanks the gentlelady.

Now it is my honor and privilege to recognize this panel of experts that have taken time out from their busy schedules to participate in this hearing. They come from well-established institutions, and they are, indeed, highly esteemed individuals in their line of work.

First of all, to my left is Ms. Eileen Harrington. Ms. Harrington has made a habit of coming before this committee, and you are always welcome. And she often appears before this subcommittee, and she is the Acting Director of the Bureau of Consumer Protection at the FTC.

Next to Ms. Harrington is Ms. Kathleen Keest. She is the senior policy counsel for the Center for Responsible Lending.

And our next witness and panelist is Mr. John Beisner. Mr. Beisner is the managing partner of the firm O'Meleveny & Myers. He is appearing on behalf of the U.S. Chamber of Commerce.

I want you to know, again, that you are welcome to this committee. And we are looking forward to your testimony. And you can please begin your testimony with 5 minutes of opening statements.

The Chair recognizes Ms. Harrington.

STATEMENTS OF EILEEN HARRINGTON, ACTING DIRECTOR, BUREAU OF CONSUMER PROTECTION, FEDERAL TRADE COMMISSION; KATHLEEN KEEST, SENIOR POLICY COUNSEL, CENTER FOR RESPONSIBLE LENDING; AND JOHN BEISNER, MANAGING PARTNER, O'MELEVENY & MYERS, ON BEHALF OF THE U.S. CHAMBER OF COMMERCE

STATEMENT OF EILEEN HARRINGTON

Ms. HARRINGTON. Thank you, Chairman Rush.

I am Eileen Harrington, the Director of the FTC's Bureau of Consumer Protection. I appreciate the opportunity to appear here today to discuss the Consumer Credit and Debt Protection Act and the FTC's role in protecting consumers of financial services. The Commission's views are set forth in the written testimony that we have submitted. My oral presentation and answers to your questions represent my own views.

As we know, the current economic crisis continues to have a devastating effect on many consumers. Many are struggling to pay their bills, keep their homes, deal with abusive debt collectors, and maintain their credit ratings. Two months ago you asked the FTC to tell you what it has been doing to help consumers through this difficult time. We told you about how we have been using our tools, law enforcement, consumer education policy and research, to help protect consumers in financial distress from being taken advantage of by those who flout the law. When we came before you then, we recognized that we needed to do more, however, and we asked for your help.

Your response, the Consumer Credit and Debt Protection Act, is directly on point. In particular, this bill would build on the new authority we obtained under the 2009 Omnibus Appropriations Act by enabling us to issue rules targeting the practices that caused the most harm to consumers in the broader credit and debt marketplace.

Historically, the Commission has relied heavily on its law enforcement experience to inform its rulemakings undertaken under the Administrative Procedures Act with the express consent of Congress. This approach has served us well in the past, and will continue to do so here. Thus, in deciding which practices in the credit and debt market to target, we would rely on our casework to help identify any industrywide problems and pervasive consumer injury.

The Consumer Credit and Debt Protection Act also would allow us to seek civil penalties against those who violate any such rules that the Commission issues in this area. This is significant because civil penalties deter would-be violators. The FTC strongly supports the enactment of this type of legislation.

As you know, we are already using our new authority under the 2009 Omnibus Appropriations Act to develop new consumer protection regulations in the mortgage context. We expect these rules to address unfair and deceptive practices in mortgage lending, mortgage foreclosure rescue, mortgage loan modification, and mortgage servicing. The 2009 Omnibus Appropriations Act enhanced the Commission's ability to enforce these rules by allowing the FTC to obtain civil penalties against violators. Meanwhile, the Commission continues to vigorously enforce the FTC Act as well as other statutes and rules for which it has enforcement authority.

In response to the current economic crisis, the FTC has intensified its focus on protecting consumers of financial services and has targeted particular illegal practices in mortgage advertising, lending and servicing. Let me give you two examples. This past Friday the Commission announced an enforcement action against Golden Empire Mortgage and its individual owner for alleged violations of the Equal Credit Opportunity Act and Regulation B. The Commission alleged that the defendants charged Hispanic consumers higher prices for mortgage loans than non-Hispanic white consumers. The FTC alleged that the credit characteristics or underwriting risk of the company's customers could not explain the differences in the prices charged.

A second example. On April 6th, also since the last time we were here, the FTC joined with Treasury, HUD, the Department of Justice, and the Illinois attorney general to announce a coordinated crackdown on mortgage foreclosure rescue fraud. The Federal law enforcement component of that crackdown was done by the FTC.

Although vigorous law enforcement is essential in providing more effective Federal oversight of the financial services sector, a broader legislative response may be appropriate here. Several bills have been introduced and proposals offered under which there would be some type of overall Federal regulator of financial services. There are differences in these bills and proposals to rationalize the oversight system, and there are numerous challenging issues that would have to be resolved to implement those concepts. Because of its unequaled comprehensive focus on consumer protection, its independence from providers of financial services, and its emphasis on vigorous law enforcement, we ask Congress to ensure that the FTC is considered as Congress moves forward in determining how to modify Federal consumer financial services. The Commission would be pleased to work with Congress and the subcommittee in developing and defining a new role for the FTC.

Thank you for inviting the Commission to testify at this hearing. I would be pleased to answer any of your questions.

Mr. RUSH. Thank you.

[The prepared statement of Ms. Harrington follows:]

PREPARED STATEMENT OF

THE FEDERAL TRADE COMMISSION

on

"H.R. ___, the Consumer Credit and Debt Protection Act"

Before the

HOUSE COMMITTEE ON ENERGY AND COMMERCE
SUBCOMMITTEE ON COMMERCE, TRADE, AND CONSUMER PROTECTION
UNITED STATES HOUSE OF REPRESENTATIVES

Washington, D.C.
May 12, 2009

I. Introduction

Chairman Rush, Ranking Member Radanovich, and members of the Subcommittee, I am Eileen Harrington, Acting Director of the Bureau of Consumer Protection of the Federal Trade Commission (FTC or Commission).[1] I appreciate the opportunity to appear before you today to discuss the Commission's efforts to protect consumers of financial services.

The current economic crisis has had a devastating impact on consumers of financial services. As we have previously testified, the FTC has a long history of consumer protection efforts in the financial services area, and substantially increased its law enforcement efforts to protect consumers of financial services to respond to this crisis.

The Commission is using its new authority under the Omnibus Appropriations Act of 2009 to expeditiously promulgate rules prohibiting or restricting unfair or deceptive acts and practices concerning mortgage servicing, loan modification and foreclosure rescue services, and other mortgage-related conduct.[2] The Consumer Credit and Debt Protection Act would allow the FTC to expeditiously promulgate rules prohibiting or restricting unfair or deceptive acts and practices relating to the broader consumer credit and debt marketplace. Under both the Omnibus Appropriations Act of 2009 and the proposed Consumer Credit and Debt Protection Act, violators of the FTC's implementing rules will be subject to civil penalties. Because giving the FTC the ability to issue such rules would be beneficial to consumers, the Commission strongly supports the enactment of such legislation.

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1 The views expressed in this statement represent the views of the Commission. My oral presentation and responses to any questions are my own, however, and do not necessarily reflect the views of the Commission or any Commissioner.

2 Omnibus Appropriations Act 2009, Pub. L. No. 111-8, § 626, __ Stat. __ (Mar. 11, 2009).

New statutes and rules, however, do little to protect consumers unless they are enforced. The FTC is primarily a law enforcement agency. The agency will vigorously enforce any new rules that it issues. The Commission will continue to aggressively enforce the Federal Trade Commission Act (FTC Act) as well as the other statutes and rules for which it has enforcement responsibility. For example, the Commission filed an action last week alleging that a mortgage lender violated the Equal Credit Opportunity Act by unlawfully charging Hispanic consumers higher prices for mortgage loans than non-Hispanic white consumers.[3] Through such law enforcement as well as its consumer education and research activities,[4] the Commission believes that it can provide more robust protection in the future for consumers of financial services.

This testimony updates testimony from earlier this year before this Subcommittee about the Commission's consumer protection authority and activities related to financial services.[5] The testimony also describes the FTC's rulemaking currently underway pursuant to the Omnibus

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[3] *FTC v. Golden Empire Mortgage, Inc., et al.*, cv-09-03227 CAJ (SHx) (C.D. Cal. May 8, 2009) (complaint filed).

[4] For example, the Commission recently announced a new website – www.ftc.gov/MoneyMatters – to provide information to people dealing with debt, struggling to find a job, or trying to create a budget, save and spend wisely during these challenging economic times. Money Matters offers practical tips, videos, and links to reliable resources for more information on topics like credit repair, debt collection, job-hunting and jobs scams, vehicle repossession, managing mortgage payments, and foreclosure rescue scams. The Spanish version of the site is available at www.ftc.gov/asuntosdedinero.

[5] *See* Prepared Statement of the Federal Trade Commission on Consumer Protection in the Used and Subprime Car Market before the House Committee on Energy and Commerce Subcommittee on Commerce, Trade, and Consumer Protection, March 5, 2009, ("FTC Used Automobile Testimony") *available at* http://www.ftc.gov/os/2009/03/P064808usedcarstestimony.pdf; Prepared Statement of the Federal Trade Commission On Consumer Credit and Debt: The Role of the Federal Trade Commission in Protecting the Public before the House Committee on Energy and Commerce Subcommittee on Commerce, Trade, and Consumer Protection, March 24, 2009, ("FTC Role Testimony") *available at* http://www.ftc.gov/os/2009/03/P064814consumercreditdebt.pdf.

Appropriations Act of 2009. Finally, it offers views as to how the Consumer Credit and Debt Protection Act, if enacted, would make the agency more effective.

II. The FTC's Jurisdiction over Financial Services

Although many federal agencies have authority over financial services, the FTC is the only federal agency whose sole objective with respect to financial services is to protect consumers. The Commission enforces the FTC Act, which prohibits unfair or deceptive acts or practices in or affecting commerce.[6] The Commission also enforces many other consumer protection statutes that govern financial services providers.[7]

Although the Commission has authority over a wide range of acts and practices related to financial products and services, financial service providers that are banks, thrifts, and federal credit unions are exempt from the Commission's jurisdiction under the FTC Act. The Commission's jurisdiction under the FTC Act reaches only to non-bank financial companies, including non-bank mortgage companies, mortgage brokers, and finance companies. Similarly, under the Fair Debt Collection Practices Act and the Credit Repair Organization Act, the Commission has jurisdiction over non-bank entities, including debt collectors and credit repair organizations, respectively.

The Commission recognizes that more must be done to protect consumers of financial services. Several bills have been introduced and proposals offered under which there would be

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[6] 15 U.S.C. § 45(a).

[7] The FTC enforces the Truth in Lending Act, the Home Ownership and Equity Protection Act, the Consumer Leasing Act, the Fair Debt Collection Practices Act, the Fair Credit Reporting Act, the Equal Credit Opportunity Act, the Credit Repair Organizations Act, the Electronic Funds Transfer Act, and the privacy provisions of the Gramm-Leach-Bliley Act.

changes in federal oversight of financial services.[8] There are differences in these bills and proposals, and there are numerous challenging issues that would have to be resolved to implement these concepts.

As these discussions about consumer financial services regulation continue, the Commission urges this Subcommittee and the Congress to consider how best to utilize the Commission's unparalleled expertise in consumer protection. The FTC has extensive experience enforcing consumer credit laws and a wide variety of other consumer protection laws, as well as working successfully with state law enforcers and regulators. The Commission is recognized as a leader in educating consumers and businesses on a wide range of financial services topics. The agency has conducted critical research and policy development in the financial services sector, including seminal research on mortgage and other disclosure issues.

Because of its unequaled and comprehensive focus on consumer protection, its independence from providers of financial services, and its emphasis on vigorous law enforcement, we ask you to ensure that the FTC is considered as Congress moves forward in determining how to modify federal oversight of consumer financial services.

III. Financial Services Law Enforcement

As the FTC has previously testified, the Commission has actively enforced the FTC Act and other consumer protection laws in the areas of mortgage advertising and marketing,

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[8] *See, e.g.*, Financial Product Safety Commission Act of 2009, S. 566, 111th Cong. (1st Sess. 2009); Consumer Credit Safety Commission Act of 2008, S. 3629, 110th Cong. (2d Sess. 2008); Consumer Credit Safety Commission Act of 2008, H.R. 7258, 110th Cong. (2d Sess. 2008); Cong. Oversight Panel, "Special Report on Regulatory Reform: Modernizing the American Financial Regulatory System: Recommendations for Improving Oversight, Protecting Consumers, and Ensuring Stability," (Jan. 2009), at 34; U.S. Department of the Treasury, "Blueprint for a Modernized Financial Regulatory Structure," (Mar. 2008).

mortgage servicing, loan modification and foreclosure rescue, automobile finance, debt settlement and credit counseling, debt collection practices, and credit repair operations. In addition, the FTC has been active in the areas of mortgage discrimination and unsecured consumer credit, such as personal loans, payday loans, and credit cards. During the last five years, the agency has brought more than seventy consumer protection cases against those who violated the law in connection with offering or providing financial services.

Since our last testimony before this Subcommittee, the FTC, the Department of the Treasury, the Department of Justice, the Department of Housing and Urban Development, and state regulators, jointly announced several law enforcement actions and initiatives as part of a broader crackdown on fraud and deception by loan modification and foreclosure rescue entities.[9] In connection with this effort, the Commission also sent warning letters to 71 companies for marketing potentially deceptive mortgage loan modification and foreclosure assistance programs. The FTC also joined forces with a wide array of government, non-profit, and mortgage industry members to launch a new consumer education campaign to help those in financial trouble avoid becoming victims of a loan modification or foreclosure rescue scam. The Commission issued a new consumer education publication on this topic, which several servicers have provided directly to consumers, including during loan counseling sessions, in monthly statements, in correspondence to delinquent borrowers, and on their websites.[10]

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[9] *See* Press Release, Federal and State Agencies Crack Down on Mortgage Modification and Foreclosure Rescue Scams (Apr. 6, 2009), *available at* http://www.ftc.gov/opa/2009/04/hud.shtm; Press Release, Federal, State Partners Announce Multi-Agency Crackdown Targeting Foreclosure Rescue Scams, Loan Modification Fraud (Apr. 6, 2009), *available at* http://www.ftc.gov/opa/2009/04/loanfraud.shtm.

[10] *See* FTC Publication, A Note to Homeowners, *available at* http://www.ftc.gov/bcp/edu/pubs/consumer/homes/rea16.pdf; FTC Publication, Foreclosure

A. Mortgage Discrimination

A significant FTC focus in the mortgage lending area is preventing and deterring unlawful discrimination. The FTC enforces the Equal Credit Opportunity Act, which prohibits discrimination in credit decisions. Since the ECOA was enacted, the Commission has brought over three dozen cases alleging that large subprime lenders, major non-mortgage creditors, and smaller finance companies violated that statute. The FTC recently has increased its fair lending law enforcement activities. Last week, the Commission filed an action alleging that Golden Empire Mortgage and its owner violated the ECOA by charging Hispanic consumers higher prices for mortgage loans than non-Hispanic white consumers. Similarly, in December 2008, the FTC reached a settlement with Gateway Funding Diversified Mortgage Services, L.P., and Gateway Funding Inc. (collectively, Gateway), after alleging that Gateway violated the ECOA by charging African-American and Hispanic consumers higher prices for mortgage loans than non-Hispanic white consumers.[11] The $2.9 million settlement, which was partially suspended due to Gateway's inability to pay, bars Gateway from discriminatory lending practices and requires it to implement a fair lending monitoring and training program. The FTC is using the settlement funds to redress African-American and Hispanic consumers who were harmed by Gateway's practices.

B. Unsecured Credit

Many consumers obtain and use unsecured credit to purchase goods and services. Some

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Rescue Scams: Another Potential Stress for Homeowners in Distress, *available at* http://www.ftc.gov/bcp/edu/pubs/consumer/credit/cre42.shtm.

[11] *FTC v. Gateway Funding Diversified Mortgage Services, L.P.*, No. 08-5805 (E.D. Pa. Dec. 17, 2008).

common examples are small personal loans, payday loans, and credit cards. The FTC has taken action to protect consumers of unsecured credit products from unfair, deceptive, and other unlawful acts and practices.

The Commission recently increased its law enforcement activities relating to payday loans. The FTC has challenged companies that allegedly violated the Truth in Lending Act by failing to disclose the annual percentage rate (APR) in their advertisements for payday loans, making it harder for consumers to comparison shop for credit. For example, in the last year, the Commission settled three cases against online payday lenders and two cases against lead generators for payday lenders for allegedly failing to disclose the APR in their advertisements in violation of the TILA.[12] Similarly, the FTC filed an enforcement action against a United Kingdom-based online payday lender for violating the TILA by allegedly failing to disclose in writing to consumers, prior to consummation of the transaction, the key terms of their loan, including the APR, the payment schedule, the amount financed, the total number of payments, and any late payment fees.[13]

With regard to credit cards, the Commission has jurisdiction over very few issuers, most of which are banks.[14] The FTC, however, does have jurisdiction over the non-bank entities that

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[12] *In the Matter of We Give Loans, Inc.*, FTC Dkt No. C-4232 (Sept. 5, 2008) (final consent order); *In the Matter of Aliyah Associates, LLC d/b/a American Advance*, FTC Dkt No. C-4229 (Sept. 5, 2008); *In the Matter of CashPro*, FTC Dkt No. C-4220 (June 6, 2008) (final consent order); *In the Matter of American Cash Market, Inc.*, FTC Dkt No. C-4221 (June 6, 2008) (final consent order); *In the Matter of Anderson Payday Loans*, FTC Dkt No. C-4222 (June 6, 2008) (final consent order).

[13] *FTC and State of Nevada v. Cash Today, Ltd.*, No. 3-cv-00590 (D. Nev. Nov. 6, 2008) (complaint filed).

[14] Banks, savings associations, and credit unions issue the vast majority of credit cards, with national banks alone being responsible for approximately 75 percent of credit cards

market credit cards. In June 2008, the FTC sued CompuCredit Corporation for allegedly deceptively marketing its credit cards to subprime consumers nationwide.[15] Last December, CompuCredit agreed to settle this case for an estimated $114 million in credits and cash refunds to consumers.[16]

IV. Mortgage Rulemaking under the Omnibus Appropriations Act of 2009

Pursuant to the Omnibus Appropriations Act of 2009 (Omnibus Act), the FTC has new rulemaking authority to prohibit or restrict entities within the Commission's jurisdiction under the FTC Act from engaging in unfair or deceptive acts or practices with respect to mortgage loans. The Omnibus Act directed the Commission to commence such a rulemaking proceeding within ninety days of its March 11, 2009 enactment. The Omnibus Act allows the FTC to use the relatively streamlined notice and comment rulemaking procedures under Section 553 of the Administrative Procedure Act (APA) in promulgating these rules.[17] By enabling the Commission to use the APA notice and comment procedures, Congress ensured that the FTC will be able to act more quickly than it would have under the onerous and time-consuming Magnuson-Moss rulemaking procedures set forth in Section 18 of the FTC Act.[18] Any violation of a rule the FTC adopts pursuant to the Omnibus Act will be treated as a violation of a rule

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issued.

[15] *FTC v. CompuCredit Corp.*, No. 1:08-CV-1976-BBM-RGV (N.D. Ga. 2008). The Commission worked closely on this case with the Federal Deposit Insurance Corporation, which brought a parallel action challenging this deceptive conduct.

[16] *See* Press Release, Subprime Credit Card Marketer to Provide At Least $114 Million in Consumer Redress to Settle FTC Charges of Deceptive Conduct (Dec. 19, 2008), *available at* http://www.ftc.gov/opa/2008/12/compucredit.shtm.

[17] 5 U.S.C. § 553.

[18] 15 U.S.C. § 57a.

promulgated pursuant to Section 18 of the FTC Act.[19] Therefore, the Commission may seek civil penalties as a remedy for such rule violations.[20]

As part of its rulemaking proceeding, the Commission intends to address unfair or deceptive acts and practices that occur in connection with mortgage loan modification and foreclosure rescue scams. The FTC also intends to address unfair and deceptive acts and practices related to mortgage servicing, in addition to other mortgage lending activities. The Commission appreciates this new authority and believes that it will be instrumental in increasing consumer protections for mortgage borrowers, especially those in financial distress.[21]

V. Non-Mortgage Consumer Credit and Debt Services Rulemaking: The Consumer Credit and Debt Protection Act

Earlier this year, the Commission testified before this Subcommittee and recommended that the FTC be allowed to use APA notice and comment procedures to promulgate rules concerning financial services and to obtain civil penalties for violations of such rules.[22]

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19 *Id.*

20 15 U.S.C. § 45(m)(1)(A). In addition, pursuant to Section 626(b) of the Omnibus Appropriations Act, a state may bring a civil action, in either state or federal court, to enforce the FTC mortgage loan rules and obtain civil penalties and other relief for violations. Before initiating an enforcement action, the state must notify the FTC, at least 60 days in advance, and the Commission may intervene in the action.

21 The FTC will have a vigorous program of law enforcement to enforce any mortgage rules it issues to implement the Omnibus Appropriations Act of 2009. In addition, the FTC will enforce new mortgage rules that the Federal Reserve Board issued last year pursuant to TILA that prohibit a variety of unfair, deceptive, and abusive home mortgage advertising, lending, appraisal, and servicing practices. *See* Truth in Lending, Final Rule, 73 Fed. Reg. 44,522 (July 30, 2008), *available at* http://edocket.access.gpo.gov/2008/pdf/E8-16500.pdf. The Board's rules generally take effect in October 2009, and the FTC will be able to enforce them as to non-bank financial companies, including mortgage lenders, mortgage brokers, and finance companies.

22 *See* FTC Role Testimony, *supra* n. 5 at 3 and 21-23.

The Consumer Credit and Debt Protection Act would change the law consistent with the Commission's recommendation. The FTC would like to thank Chairman Rush for his support in introducing this bill.

The FTC strongly supports proposed legislation that would allow the Commission to issue rules prohibiting or restricting unfair or deceptive acts and practices relating to consumer credit or debt services. The Commission currently may promulgate rules prohibiting or restricting unfair or deceptive acts and practices related to such non-mortgage consumer credit or debt services only if the agency follows the aforementioned Magnuson-Moss rulemaking procedures set forth in Section 18 of the FTC Act. Under Section 2(a) of the proposed bill, however, the FTC would be able to promulgate such rules using the notice and comment procedures under the APA that most federal agencies are permitted to use in promulgating rules. Section 2(a) thus would allow the Commission to act quickly and effectively in developing and issuing rules in response to consumer protection problems that arise in connection with consumer credit and debt services. In addition, Section 3 of the bill is intended to give the Commission authority to obtain civil penalties for violations of rules that the agency promulgates with regard to consumer credit or debt. The Commission believes that having this civil penalty authority would increase deterrence of would-be violators and allow it to protect consumers more effectively.

VI. Conclusion

The FTC believes that its past efforts have provided important protections to American consumers in the credit marketplace. The agency, however, recognizes that it must do more. The Commission appreciates Congress' recent efforts to enhance our ability to protect consumers of financial services. In particular, the Commission believes that its new authority under the Omnibus Appropriations Act of 2009 to issue rules regarding unfair or deceptive mortgage loan practices will enable it to more effectively protect mortgage borrowers and financially distressed homeowners.

The Commission strongly supports proposed legislation that would allow the FTC to issue rules to protect consumers in the broader consumer credit and debt marketplace and to obtain civil penalties for violations of these rules. Such authority would strengthen the Commission's ability to address unfair and deceptive practices that are causing the greatest harm to consumers in the financial services marketplace.

Mr. RUSH. Our next witness is Ms. Keest.

Ms. Keest, you are recognized for 5 minutes for the purposes of opening statements.

STATEMENT OF KATHLEEN KEEST

Ms. KEEST. Thank you, Mr. Chairman, and thank you very much for inviting me to testify. In my remarks today, I am only going to focus, I think, on a couple of points, primarily the Magnuson-Moss rulemaking, and I may add a couple of remarks about the Attorney General's enforcement authority, as I used to be in the Attorney General's office myself. And I would refer the committee to my written testimony for the specifics.

While we are not talking so much about mortgages today, I think since we are talking about consumer credit, we have an object lesson that we can learn from in what happened there. And the FTC's jurisdiction over consumer credit covers a lot of the same subject matter area that the Federal banking agencies did. And what we know is that from a regulatory perspective, that there are three tools that are needed to make sure that there are clear rules to the game, and that there is a referee on site to enforce those rules.

We know, now, that the banking agencies, much to our dismay, didn't use any of them. The FTC, by contrast, really, it functionally only had one of those tools, and that was the tool that allows the referee to call a foul after it has already happened, and it is an important tool, but it is not sufficient.

What are those three tools? One of them is to set the rules of the game that everybody has to play. And I am a strong believer in the fact that that is as important for ethical and honest business competition as it is for consumers. I do not believe it is a zero-sum game, and I think that has been part of the problem of thinking of it in that way.

The second is the right to sort of keep an ongoing monitoring system where you can do prevention through monitoring. That is a tool that the banking industries have that the FTC doesn't, which leaves just the law enforcement, and that was the only tool the FTC had in practice. In theory, it had the rulemaking authority, but Magnuson-Moss, I understand—I am sorry Congressman Gingrey isn't here—I understand the purpose of it originally, but I can tell you that I have got gray hair now.

The first year, my first year in practice, was when the last time the Magnuson-Moss rule was used by the FTC. The credit practices rule was started in 1975 when I was a brand new lawyer. That process took 10 years. I testified at one of the hearings; I was part of that two-book record that it took to get that rule in place. It was 10 years later when that rule finally went into effect. The amount of credit out there went from something like $190 billion to almost $500 billion in that time, and the market had already started to change.

Now, that rule was very important, and it did a lot of things, but we were so far behind the eight ball by the time it happened—and in an agency that has got the breadth of jurisdiction this one does, devoting time and resources to a process that could take 10 years is a march down into a long, dark tunnel that they simply could not afford, and neither could consumers, because too much damage happens along that way.

By contrast, the Federal banking agencies, once they got on the dime, they proposed their credit card rules. The OTS, the Federal Reserve Board and the NCUA proposed their credit card rules. It was proposed, there was input, there was a lot of discussion, and it was promulgated within less than a year; and now there is a year-and-a-half lead time for the issuers who are affected by that rule to gear up and do it, but they know what those rules are going to be, and they have got that time to do it.

So I think the APA rulemaking is a critical, critical part of this.

And I would just like to make a pitch for—Congressman, you mentioned sort of perhaps wanting to consider paydays along the way. In our testimony that we had suggested—that is, this credit practices rule, the last one that the FTC used, this Magnuson-Moss provision that had a delivery period that would make an elephant weep, it was a really good rule that took care of some of the most egregious abuses that were in the consumer credit market that day. It took care of the wage assignments that basically had people's paychecks going first to a creditor before it went to the groceries. It took care of the confession of judgment clauses that prevented people from raising a defense, which I can tell you as an old legal aid lawyer where a lot of people had them, and it took care of the in terrorem use of some of the tactics.

My first client—the reason I spent 35 years doing this, it was my very first client who in my very first case, a loan company wanted to come in and clean out her house, the furniture in a 72-year-old widow's house, everything down to the two gray washtubs. And the credit practices rule got rid of that.

And we have some segments of the market today that use practices which are a modern-day electronic equivalent of that, holding checks or the key to somebody's bank account. And they can do everything that credit practices rule took care of by the abuses with that check hold. And so we have suggested that now that we are approaching the silver anniversary of that credit practices rule, that the FTC review that to see if, perhaps, we can update that and take care of some of those abuses again.

And if I still have a couple of minutes left.

Mr. RUSH. No. Sorry.

[The prepared statement of Ms. Keest follows:]

Testimony of
Kathleen E. Keest

on behalf of
Center for Responsible Lending[1]
Consumer Federation of America[2]
National Consumer Law Center (on behalf of its low-income clients)[3]

before the
Subcommittee on Commerce, Trade and Consumer Protection
Committee on Energy and Commerce

H.R. 2309: The Consumer Credit and Debt Protection Act

May 12, 2009

Good afternoon, Chairman Rush, Ranking Member Radanovich, and members of the Subcommittee. Thank you for inviting me to testify on the Consumer Credit and Debt Protection Act (CCDPA), a bill to bring long-needed reform that would enable the Federal Trade Commission to be a more efficient and effective force for protecting American consumers, honest and ethical businesses, and the integrity of a well-functioning marketplace.

Too often in the recent past, discussions over consumer protection regulation have been portrayed as a zero-sum game, where consumer protections are assumed to be a drag on the market, and must come at the expense of business. But that is a false dichotomy. Businesses have a symbiotic relationship with their customers. In the end, the health of the business community – indeed, the health of the economy as a whole – depends upon the financial health of America's households. Practices which undermine the financial health of households in the long run undermine the health of the businesses that depend upon them. If, for a while, we forgot that the absence of common sense and balanced rules for the marketplace is just as bad for business as it is for consumers, the events of the last year and a half should be a forceful reminder.

This shared benefit has been at the basis of the FTC's dual mission from its earliest days. Though Congress did not add preventing consumer injury explicitly to the FTC Act until 1938,[4] the Commission understood that unfair methods of competition injure both competitors and consumers, so that "there is a direct link between consumer protection and the prevention of unfair competition."[5] Honest, efficient and ethical competitors benefit as much from sound ground rules that level their playing field as do consumers.

In this testimony, we first discuss why we support eliminating what is functionally discrimination in the law against the FTC in its rule-making authority, compared to other agencies. *Section I.* We also support the Congressional guidance to the FTC to use the APA rule-making in the area of consumer credit and debt, which we recognize to be central to the health of the economy as a whole. We first put that priority into context, with a general picture of the financial health of the majority of America's households. *Section II.* Turning to the specific areas identified in the bill, *Section III* discusses the two areas that the bill would set as priorities for the FTC: *III-A* explains some of the critical and widespread problems which have infected the auto sales and finance market. *Section III-B* details some of the problems in the debt settlement industry which led the sponsors of the CCDPA to prioritize that industry. In *Section III-C,* we suggest, too, that the Commission review its existing credit-related rules, including the Credit Practices Rule, now a quarter of a century old, to evaluate whether they need to be updated to address the evolution of the consumer credit market place. Finally, in *Section IV*, we support giving concurrent enforcement authority to state attorneys general.

I. Magnuson-Moss Rule-Making: The FTC's Albatross

A. Magnuson-Moss: Hollow Authority

The Magnuson-Moss procedure that the FTC is required by law to use to define unfair or deceptive acts and practices by rule is a cumbersome and resource draining process.[6] It has been almost a quarter of a century since the Commission used that process, when it adopted the Credit Practices Rule,[7] and its experience with that rule suggests why it has not been used again.

As a young lawyer, with just 34 months of experience, I was one of the witnesses in field hearings conducted by a Federal Trade Commission hearing officer as part of that process. That hearing was in Chicago, in October, 1977, and it was already two years after the proposed rule was published, in 1975. Magnuson-Moss even prescribes special judicial review procedures, and by the time that rule-making process was exhausted, including industry's failed legal challenge to the rule, a full decade had passed.[8]

Now, with over 35 years of experience, including eight years of law enforcement experience in a state attorney general's office, I can easily understand why the Magnuson-Moss process is little more than window dressing. With limited resources to deploy over a vast array of issues and players – literally thousands of players – and faced with a rapidly evolving and growing marketplace, it is not a rational choice for an agency that also has law enforcement responsibilities to commit to that kind of a long march into a blind tunnel.

We therefore strongly support putting the FTC's unfair and deceptive acts and practices (UDAP) rule-making authority on a procedural par with other agencies. The Federal Reserve Board last year promulgated UDAP rules regarding subprime mortgages using the Administrative Procedures Act's notice-and-comment process.[9] More recently, the FRB, the Office of Thrift Supervision and the National Credit Union Administration promulgated UDAP rules regarding credit cards issued by entities under their respective jurisdictions (the overwhelming majority of cards in American wallets), again using the

APA process.[10] Yet the FTC, the agency with the broadest jurisdiction, the agency with almost a century of experience with applying these concepts to evolving markets, has been bound for a quarter of a century by a far more cumbersome, expensive, and unwieldy rule-making process than these other agencies.[11]

B. An Ounce of Prevention is Worth a Pound of Cure: Prophylactive vs. Retrospective Regulation

Regulation can be forward looking, or backward looking. By virtue of the Magnuson-Moss rule-making, the FTC has been locked into the backward looking mode for all practical purposes. One type of preventive regulation, rule-making, sets the market standards. Businesses have a benchmark for their conduct, and consumers are in a position to know what those minimum standards of conduct are. Some agencies, such as the bank supervisory agencies, have an additional preventative tool when they have authority to do routine, recurring monitoring and oversight of the entities under their control. When properly utilized, this routine oversight should enable such agencies to identify problems early and stop them before they grow and infect the market. As we have seen to our regret, it does not always work this way in practice, but at least the structure is in place, when those regulators have the will to use it.

By contrast, the law-enforcement model is backward looking. As crucial as it is, it has serious limitations. One is that it is virtually impossible to get ahead and stay ahead in a time of rapidly evolving markets. Only after a practice has gotten big enough to create a problem of sufficient magnitude that it cannot be dismissed as "an isolated incident" does the law enforcement model kick in. By then, significant harm as already occurred. Further, law enforcement is targeted at particular defendants, not entire industries. Investigation and litigation can be a very long process. And, while, over time, standards can evolve from a series of case-by-case determinations, the market may have moved on in the meantime, and those standards may no longer be relevant to current realities.[12] So, while law enforcement is crucial, it is not, alone, adequate.

With respect to the credit and debt marketplaces, the FTC has been functionally limited only to the retrospective law enforcement model. It has no routine monitoring oversight authority, as bank supervisory agencies do. As we discussed earlier, while it in theory has rule-making authority, as a practical matter, the practical impediments against using it are far too great.

C. The Exercise of FTC Rule-Making Does Not Pose a Threat to Honest Businesses and Will Not Inappropriately Restrict Credit Markets

The opposition to consumer protection proposals virtually always includes assertions that it will harm the businesses affected. When the proposal relates to credit, it is also asserted that it will impede access to credit, thus really hurting consumers, as well. And today, of course, there is an addendum to that argument: ".... not now, when credit is already constrained."

The evidence shows that those concerns are not warranted. Not even now. In fact, the lesson of the last two years is that what truly constrains credit is a lack of confidence – a lack of confidence that even some of the biggest financial institutions in the country actually knew what they were doing, and a lack of confidence that anyone was minding the store. Sound consumer protections, we now know, are not a zero-sum game – they benefit everyone.

Even before the current crisis, the evidence was against the *sky is falling* opposition. Two of the older FTC credit-related rules have done much to make the market more fair and more honest, a boon both for competition and consumers. They have proven their worth to consumers, and similar dire predictions of harmful unintended consequences failed to materialize. The "preservation of claims and defenses rule", which assures that lenders and sellers cannot separate the seller's obligation to comply with the law and contract from the consumers' obligation on that contract, has been particularly important.[13] This rule has been a part of most retail installment sales contracts since 1975, including car loans, to assure that consumers did not lose claims and defenses they had against car dealers just because the dealer arranged financing with or sold the contract to a third-party lender. The Credit Practices rule, the 1985 rule that was 10-years in the making, was the subject of similar dire warnings. Yet the segment of the consumer credit market affected by these rules grew from $189.5 billion in 1975, to $475.25 billion in December, 1985 to $1.6 trillion in March, 2009.[14]

Further evidence of the positive benefits of sensible rules is available from empirical evaluations of state laws aimed at curbing predatory mortgage lending. Studies have found that there is a Gresham's Law operating in the credit marketplace – with "bad money driving out good money." Far from having adverse impacts, sound regulation curbed the abuses, tamping down the bad lending, and allowed more room for good lending to flourish.[15] In other words, what's good for consumers is good for fair competition.

Recommendation:

We support the CCDPA's proposal to give the FTC fair and functional rule-making authority and authorize the Commission to use the same process that the other agencies with UDAP authority over consumer financial practices can use.

II. The Context: Consumer Credit and the Household Balance Sheet

We hear much today about the need to get credit flowing again, to get consumers buying cars again, to stimulate demand to get the economy moving again. Yet one of the issues on your radar screen, Mr. Chairman, is the "rogue" debt settlement industry, and its astonishing growth is explained by the simple fact that American households are drowning in debt.[16] This record debt load amplifies in today's recession the "Paradox of Thrift" conundrum that is a feature of all economic downturns. On the one hand, recovery requires stimulated demand in the aggregate. On the other, American households need to de-leverage: too many are too burdened by debt, and for now, their economic future is uncertain. In this context, "getting credit flowing again" must not mean simply re-inflating a debt bubble.

I noted earlier that consumer credit – that is, non-mortgage credit – grew from $189.5 billion in 1975 to $1.6 trillion now. Overall household debt, including home mortgage debt, ballooned from $734.3 billion in 1975 to $13.8 trillion in 2008.[17] The debt-to-disposable income ratio per household more than doubled from 1980 (60%) to 2007 (133%).[18] For the middle three quintiles – the literal middle class – that ratio was 141% in 2004.[19] According to a recent article in *the Economist*, the share of household and consumer debt in our country "went up from 100% of GDP on [sic] 1980 to 173% today, equivalent to around $6 trillion of extra borrowing…."[20]

It is simple, but most likely neither fair nor accurate, to chalk these astonishing figures up to people "living beyond their means," with an unchecked taste for McMansions and bling. To dig deeper, we need to have a better sense of what it takes to live within our means these days. Over the course of the last twenty-five to thirty years, the real-after tax income gains in the bottom four quintiles have ranged from 6% (bottom) to 30% (4^{th}), while the top quintile saw an 80% change and the top 1% saw a 228% gain.[21] Or, to put it another way, the "bottom" 90% saw an average income growth of 83% from 1946 – 76, but only 10% growth from 1976-2007.[22]

Table 1: Cumulative Percent Growth – Average Household Income

	"Bottom" 90%	Top 1%
1946-1976	83%	20%
1976-2007	10%	232%

A recent study of IRS data looked at income gains between 2002 and 2006, which sheds some light on why the majority of American families feel worried about the economy: 75% of all income gains between 2002 and 2006 went to the top 1% of American households – those making more than $382,600 a year.[23] In the meantime, the median household income, adjusted for inflation, dropped nearly $1000 from 2000 to 2006.[24]

Meanwhile, the growth in many of the big-ticket items on the expense side of the household ledger sheet has not been so slow. For example, since 1982, energy costs have risen 108%, health costs 251%, and college costs an astonishing 439%.[25] And, of course, there's housing: between 2000 and 2005, real housing prices grew 22%, while median wages grew only 1.7%.[26]

Against this backdrop, the need to assure that new credit is sold transparently and fairly is clear. We do not need – indeed, we cannot afford -- a return to too much debt that was deceptively sold, and recklessly given , solely to maintain growth and volume, without regard to whether it was sustainable, or had value to the consumer.

III. Where To Begin: Providing the FTC with Priorities for Rule-Making

The current crisis has exposed foundational cracks in our financial sector. Like a house with years of neglected maintenance, there is much that needs to be done, and the question is where to start chipping away at the "to-do" list.

The two items given top priority in H.R. 2309 deserve top priority. Vehicles are one of the three most expensive purchases most of us make, along with our homes and educations, and there are serious, insidious and anti-competitive abuses in the vehicle financing market in need of attention. And the combination of over-leveraged households and an economic downturn brings out opportunists who look for prey, instead of customers. The climate is ripe for them, and the market is rife with them. We support putting debt settlement companies on this list. We suggest adding a third top-tier priority to the list – a review of the Credit Practices rule, now nearly 25 years old to update it to address today's market.

A. Car Trouble: Problems in the Auto Finance Market

H.R. 2309 highlights auto finance practices for review by the Commission, and directs it to consider adopting rules in three areas:

- restricting post-sale changes in financing terms, the so-called "yo-yo" deals;
- dealer mark-ups, the practice of bumping up the rate at which the buyer qualifies to give extra compensation to the dealer; and
- permitting a cooling-off period following the sale or receipt of final information concerning the terms, similar to that available for non-purchase mortgages on primary residences.

The two abuses listed clearly meet the standard for "unfairness." They cause substantial injury to consumers, without countervailing benefits to consumers or competition, and they are not reasonably avoidable by consumers. The cooling off period is a reasonable way to provide a market incentive for the vehicle retailers to deal fairly and transparently with their customers at the outset – and to discourage not only the two listed abuses, but others not specifically listed.

CRL recently conducted a study of four significant problem areas in vehicle sales and financing, including two which H.R. 2309 identifies for attention: post-sale changes in financing terms, and dealer mark-ups.[27] Our data permits us to offer the subcommittee some specific information about how these two practices impact consumers nationally.

1. <u>Post-sale changes in financing terms</u>

a. *MacArthur in the showroom: The "yo-yo", or "spot-delivery" – the deal that isn't*

It is not music to the ears of a car salesman to hear from a potential customer: "We're going to go home and think about it first," or "We're going to shop around some more." That's a way to lose a sale to a better deal down the street, or to a decision against making a purchase at all. Better to reel in the deal before the customer walks off the lot, even if the deal isn't really a deal – at least as far as the dealer is concerned. There is a commonly used technique to accomplish this in sales where the dealer is arranging the financing. As with so much dealer lingo, the descriptive short-hand for the practice speaks volumes about the technique. Variously called a "yo-yo" sale, a "gimme-back", a "MacArthur" deal ("I shall return"), or "spot delivery", the technique is to send the consumer home with the vehicle "on the spot," with the retail installment sales contract in hand that incorporates the financing terms for the purchase. There's a hitch, though: the dealer – who is arranging the financing with a third-party lender -- actually hasn't concluded the financing half of the deal with that outside creditor. (Most dealers offer seller-financing in name only. Instead, they function essentially like mortgage brokers, arranging financing with a third-party lender. The resulting retail installment sales contract integrates the terms of the sale of the vehicle and the financing terms into a single contractual obligation for the consumer.[28])

The buyer may – but frequently does not – know that the contract is not really a final contract.[29] In the yo-yo deal, the consumer is called back to the dealership later – sometimes days, sometimes weeks later – because "the financing fell through." These consumers then are told they must sign a new contract with different – and more costly -- financing terms, pay the car off in full, or return the car (sometimes with a usage fee of some sort). Unfortunately, in the interim, the dealer also may have sold the consumer's trade-in, making it impossible to simply unwind the deal back to the *status quo ante.* With or without the complication of the disappearing trade-in, the consumer by then is both psychologically invested, and often economically invested in the new car, having paid for new insurance coverage, for example.

A justification often given for yo-yos is the "Saturday night sale" – it is a way to get an eager consumer into the car when the potential financing partners are unavailable, or unexpected impediments to the agreed upon deal. But few consumers are so cavalier about their finances to knowingly say: "I'll buy this car now. You can tell me next week what it will cost." Further, the practice occurs in far too many situations for an unexpected failure in the approval process to explain its frequency. (After all, like mortgage brokers, the finance and insurance staff – the "F&I guys" – are supposed to be credit professionals. Credit reports are available almost instantaneously on line, and credit professionals have a good idea of what prevailing rates are generally for ranges of credit capacity, types of collateral, and down payments.) Sometimes it is clearly a bait-and-switch: send the consumer off with a 9% contract, sell the trade-in, then call them back in to sign a 21% deal, as I saw happen. Sometimes it may be to renegotiate to increase compensation to the dealership in other ways – to get more profitable add-ons packed into the loan, or to get more compensation out of the rate. (*See* III-B, below.)

b. *The profile of a yo-yo customer: vulnerable*

The CRL survey, unfortunately, gives some weight to the notion that yo-yo sales have a bait and switch taint to them. Sadly, it adversely affects low and low-moderate income buyers, and buyers with lower credit scores. We found that, of those who used dealer-financing for their last vehicle purchase, 1 in 8 buyers with an income less than $40,000, and 1 in 4 with an income less than $25,000, reported experiencing a yo-yo deal.[30] While at first blush it might be argued that it is simply harder to find financing for lower income buyers, that seems overly simplistic. Assuming again that the credit professionals at the car dealers are familiar with underwriting standards and consequently with what should be an affordable credit sale, as they should be, then it is difficult to understand why there is such a distorted impact. But more to the point, those who report being "yo-yo'd" pay more than equally positioned buyers who were not, on average, five percentage points more. (See Appendix A).

We may find a plausible parallel in the dynamics of the mortgage market as we have come to understand them. Many consumers were pushed into loans with riskier features than was appropriate to their needs and circumstances, and higher prices than they qualified for, in order for the supply-side of the market to maintain sales volume *and* increase profitability.[31] In other words, a shaky deal was better than no deal, and a deal with more profitability was better than one with less. The empirical evidence is that even the so-called "risky" borrowers could perform on loans with standard features, properly underwritten.[32] It is plausible, perhaps even likely, that the same dynamic operates on an auto lot. A yo-yo car deal reduces the odds of those consumers walking away from a deal that is too expensive in the first place, and increases the odds for the sales staff and the dealership to meet the monthly sales and revenue goals.

Another finding from our study also lends credence to the fear that the yo-yo is too often part of a bait and switch. After controlling for credit risk, we found that consumers who had experienced a yo-yo received an average interest rate that was *five percentage points higher* than a comparable risk-consumer who hadn't been subjected to a yo-yo. Cars are important assets for households, especially since so few areas have good public transportation alternatives. Making a car loan more expensive than risk requires for those least able to afford the excess loss of income is more than troublesome, and putting them at higher risk of default – with all the subsequent consequences of potential repossession, lower credit scores, and higher costs subsequently – clearly brings this practice well within the scope of a practice that causes substantial consumer injury.

2. Dealer mark-ups: Reverse competition in dealer-arranged financing

a. *Yield-spread premiums in the finance and insurance (F&I) office*

Another auto financing practice to which H.R. 2309 directs the Commission's attention is the dealer mark-up of the interest rate on a car loan over what the buyer qualifies for. The practice imposes substantial extra costs on consumers, just as the analogous "yield-spread premium" does in the mortgage market. In the mortgage market, we know that perverse market incentives encouraged brokers to steer their clients toward more expensive loans than the borrower would qualify for, because the brokers could increase their own compensation by doing so.

As explained above, the dealer functions as an arranger, or loan broker, for its customers who do not bring their own cash or financing.[33] The dealer's F&I staff deals with the buyer, discuss the financing needs, take the information, and act as the intermediary with the credit providers. And just as the mortgage brokers do, they are typically given the leeway by those lenders to close the deal at a higher rate than the buyer qualifies for. The dealer gets to keep all or part of that higher rate – a "mark-up" or a "yield-spread premium." Some call it, more simply, a kickback. This creates a "reverse competition" dynamic, where the intermediary has an incentive to steer the consumer to a higher rate option.

While dealerships argue that these yield spreads are compensation for arranging the financing, that argument does not justify the practice nor the cost. There is simply no legitimate reason for a dealer to receive more compensation for putting a consumer into a 10% loan than for putting her into a 9% loan. The only purpose the yield-spread premium serves is to incent dealers to squeeze extra interest payments out of their unknowing consumers. The abusive nature of the practice is intensified because consumers don't know about it or about how much it costs. Yet it is not a practice that can be cured by disclosure, as testing by the Federal Reserve Board and other agencies has demonstrated with YSPs in the mortgage market. Indeed, the FRB originally proposed to address the issue through disclosure, then withdrew the proposal because testing showed disclosure does not work well.[34] Moreover, the hidden cost is too substantial for that argument to be justified.

b. *Dealer YSPs: the $20.8 billion surcharge*

We calculate that nationally, these dealer kick-backs cost consumers an estimated extra *$20.9* billion in 2007. Chairman Rush: your home state of Illinois ranked # 6, with the 2007 volume estimated to be over $882.5 million. Ranking Member Radanovich, your state ranks # 1, with Californians paying about 10% of that national surcharge, at an estimated $2.5 billion.[35]

The dealer YSPs add an average $647 to the cost of each vehicle – the rate bumped up an extra .6% for new cars, and 1.8% for used cars. Other data, looking at five major captive auto lenders, reported an average mark up of $989 per vehicle.[36] If evaluated as compensation for a "service", that is a hefty price. Particularly so for a service that, after all, benefits the dealer as much as the consumer: the dealer wants to make the sale, and financing is what lets that happen. In 2007, finance and insurance sales staff in the dealership averaged about half an hour with a customer – less if the customer took a test drive. That would mean that the dealer would be getting a whopping $1,097 per hour for the F&I "service" of putting the consumer in a higher rate loan than she qualifies for.

It is not unreasonable for car buyers to assume that the rate they are offered is what they qualify for, based on their creditworthiness and the collateral. This is particularly true when the retail installment sales contract actually lists the seller/dealer as the creditor on the deal.[37] Our survey indicated that close to half of buyer-borrowers did not negotiate the *credit* price because they trusted the dealer to give them a good rate.[38] These buyer-borrowers paid a steep price for that trust: it works out to a 2% "trust tax" on the price of credit.

But not all borrowers pay the YSP, so in fact, those consumers who do pay a mark-up pay more than that average. And in yet another parallel to the mortgage market, there is evidence from other studies indicating that minorities were both more likely than whites to be charged a kickback, and that the amount of the kickbacks were larger than the kickbacks whites were charged. Some 54.6% of African American's were charged a kick-back, compared to 30.6% of whites, and the amount of kickbacks charged to African-Americans is about $427 greater.[39] As a result of fair lending litigation over the discriminatory aspect of these mark-ups, some third party lenders capped the amount of the mark-up they permit dealers to around 2-3%.[40] However, that still is a considerable additional cost, and even assuming it eliminates the racially differential impact, it just puts the practice into the category of being an equal opportunity abuse.

Highlighting this practice as one for the FTC to prioritize for its rule-making is a welcome signal from Congress that the price of credit should be based on creditworthiness, not on opportunism, especially opportunism that adversely affects those who can least afford the excess cost.

3. <u>A cooling-off period is a reasonable and proven mechanism to deal with high-pressure, high-stakes markets</u>

We support the recommendation that that the Commission consider a cancellation period following the sale or receipt of financial information concerning the terms. Cooling-off periods have long been the law for several other types of transactions where significant assets are at stake, or high-pressure sales tactics are prevalent. Over forty years ago, Congress recognized that putting the family home on the line in a non-purchase money mortgage was both a major risk for a family, and where high-pressure sales tactics were far too common: a cooling off period let the consumer review the terms, seek advice, and think about it outside the high-pressure sales atmosphere.[41] It cannot be seriously argued that the availability of that right over the last forty years unduly harmed refinance mortgage lenders or restricted the flow of mortgage credit.

The auto sales and finance arena is a high-stakes, high-pressure market. A cooling off period is a sound and proven approach that ultimately encourages fair, transparent and pro-competitive behavior. Dealers who know that they can't trap a customer into a one-way deal like the yo-yo, binding on the customer but not on the dealer-- will have an incentive to offer final and fair terms upfront. Dealers who know that the consumer has a cooling off period will have no incentive to engage in the myriad other high-pressure tactics. Here, too, the beneficiaries are not just the consumers, but the dealers who don't want to do business that way.

***Recommendations regarding auto sales and finance*:**

H.R. 2309 would charge the FTC to consider adopting rules that "limit"dealer mark-ups, and "restrict" post-sale changes in financing terms. We believe that yield-spread premiums and yo-yo deals meet the test for unfairness, and that the legislation should assure that the FTC is clearly empowered to declare them to be unfair practices.

- *Dealer yield-spread premiums should be deemed an unfair practice.*

We strongly support bringing the costly and unfair practices of post-sale changes in terms and dealer mark-ups to the top of the FTC's to-do list. They are costly to consumers, and are inherently anti-competitive. CRL and NCLC have recommended that dealer yield-spread premiums should simply be banned: there should be no incentive for a dealer to put its customers into a higher-cost loan than that for which they qualify.[42]

- *Yo-Yo Deals should be deemed an unfair practice.*

Similarly, one-way deals like the yo-yo do violence to concept of bargained for contracts. They, too, should be banned, and dealers should be prohibited from selling any trade-ins until there's a final deal, and should be required to return any down payment, and any other fees or taxes associated with the deal.[43] These direct approaches should supplement the cooling-off period, preventing these inherently unfair and deceptive acts in the first place.

B. Debt Settlement: The Business Model Is Inherently Harmful to Vulnerable Consumers

As we discussed earlier, many Americans are under a serious burden of debt. The decrease in the value of the major asset most families own, their homes, and the loss of jobs has exacerbated those difficulties. Keeping ahead of that debt by churning it, from one credit card transfer to another, or a debt consolidation mortgage refinance was only a short term solution in the first place, and the current crisis has shut that option off in any event.[44] Moreover, some families in financial trouble are continuing to use their credit cards to pay for essential purchases and are therefore attempting to stay current on their credit card loans but not their mortgage payments, a shift in behavior from past economic crises that will likely lead to further deterioration of their financial condition.[45]

It is unsurprising, then that consumer demand for debt reduction or debt management assistance has increased.[46] And, it is unsurprising, too, that some of those who step up to "help" are scammers. There are different debt management business models. As discussed below, the *credit counseling* model, though not without its current problems, can with proper protections and under certain circumstances benefit consumers. The *debt settlement* model, on the other hand, does not—because the model itself is inherently problematic.

In the last decade, the number of debt settlement companies operating nationwide has increased from very few to as many as two- to three- thousand. These are typically for-profit entities, unaffiliated with credit card companies. Sometimes calling themselves credit counselors, they promise to painlessly reduce consumers' credit card debt through a variety of expensive, harebrained and harmful schemes.

In March, the Texas attorney general sued the debt settlement firm that calls itself the largest in the country, Credit Solutions, on claims of "false, deceptive and misleading acts and practices."[47] Just last week, New York's Attorney General, calling the debt settlement industry a "rogue industry," issued subpoenas to 14 of these debt settlement companies to inquire into their fee structures and whether they are indeed offering the relief they advertise.[48]

These state actions are encouraging, but the industry remains very loosely regulated, and its abuses are flagrant and highly destructive.

1. <u>The *credit counseling* business model is different from the *debt settlement* model.</u>

Credit counseling was created in the mid-1960s by credit card companies that saw an opportunity to recover overdue debts, and in the beginning, most of the agencies were non-profit.[49] These agencies offered a feature debt reduction service, the debt management plan (DMP), in addition to financial and budget counseling and community education sessions.

Under a DMP, a consumer sends the credit counseling agency a lump sum, which the agency then distributes to the consumer's creditors. In return, the consumer is supposed to receive a break in the form of creditor agreements to waive fees and lower interest rates. Consumers also gain the convenience of making only one payment to the agency rather than having to deal with multiple creditors on their own.

The credit counseling industry has not been without its share of serious abuses. Over the years, as creditors reduced the percentage of debt collected they shared with the agencies, the agencies curtailed some free counseling services and raised consumer fees for DMPs. By the late 1990s, complaints about deceptive practices, improper advice, excessive fees and abuse of non-profit status had sharply increased.[50] In response, regulators, policymakers, and state attorneys general conducted widespread investigations,[51] and some state lawmakers put new laws on the books to curb abusive practices.[52]

In the last decade, credit card companies had been reducing the concessions they are willing to give debtors participating in DMPs. The Consumer Federation of America (CFA) found that some major creditors actually *increased* the interest rate they charge in credit counseling, while others have kept these interest rates high for many consumers.[53] This trend calls into question the viability of the DMP as a useful tool to help consumers reduce their debt. In a hopeful sign, the National Foundation for Credit Counseling recently announced that major creditors had agreed to offer "hardship" DMPs with more significant interest rate reductions to some consumers in credit counseling.[54] CFA has actively supported efforts to eliminate regulatory obstacles that inhibit issuers from authorizing DMPs that significantly reduce the principal (not just the interest charges) that consumers owe[55] and to limit consumers' tax liability when such principal is reduced. Reduced principal DMPs could not only help many families in debt trouble stay solvent, but also create a legitimate, pro-consumer alternative to debt settlement scams, as we discuss in the next section.

With appropriate protections, then, the credit counseling business model is not harmful and can be helpful to some consumers. An initial phase of research directed by CFA and American Express found that credit counseling can be effective in helping consumers to improve their creditworthiness over time.[56] And consumer groups often advise consumers that a DMP could be helpful in reducing some unsecured debts, depending on whether the financial condition of the debtor is stable or deteriorating, and on the interest rate reduction offered by creditors reduce some unsecured debts. (For a more detailed discussion of credit counseling issues, *see* CFA's testimony before the U.S. Senate Committee on Science, Commerce and Transportation, February 26, 2009.)

2. The debt settlement business model is inherently problematic.

Debt settlement involves negotiating with creditors to reduce the principal amount the consumer owes and to pay this reduced amount over a fairly short period, usually in one or two lump sum payments. Unlike most credit counseling agencies, debt settlement and debt negotiation companies are usually for-profit businesses. Settlement services are different from credit counseling (or debt management) mainly because settlement companies do not send regular monthly payments to creditors. Instead, these agencies generally maintain a consumer's funds in separate accounts— or direct consumers to deposit savings in an account that they can observe but do not control— until the company believes it can settle the consumer's debts for less than the full amount owed. Typically, debtors can only afford to pay off their creditors sequentially, saving up enough money (after upfront fees are paid) to make an offer to one creditor, then saving again until there is enough to offer a second settlement, and so on.

Many companies have advised consumers to stop paying debts as a condition of participation in the program. Debtors pay a variety of fees for this service, including enrollment fees, monthly maintenance fees and a settlement fee, which is usually a percentage of the forgiven amount of debt.

The Federal Trade Commission and, as mentioned earlier, attorneys general in several states have brought actions against a number of these agencies. Appendix B provides significant details about the range of deceptive, fraudulent, and harmful practices that these companies used that the FTC has uncovered, which can be summarized as follows:

- **Settlement firms often mislead consumers about the likelihood of a settlement.** Evidence from debt settlement investigations indicate that a large number of consumers never complete a debt settlement program. One North Carolina assistant attorney general estimates that 80 percent of consumers drop out of debt settlement plans within the first year.[57] A receivers' report on the National Consumers Council, a purported non-profit debt settlement organization that was shut down by the FTC in 2004, found that only 1.4 percent of NCC customers settled with all their creditors.[58] 43 percent of their clients cancelled the program after incurring fees of 64 percent of the amount remitted to NCC.[59]

- **Unlike credit counseling agencies, settlement firms cannot guarantee to consumers that the creditor will agree to a reduced payment if certain conditions are met.** In fact, some creditors insist that they won't negotiate with settlement firms at all,[60] or that they will initiate a collections action if they learn that a debt settlement company is negotiating on behalf of a consumer.

- **Settlement firms often mislead consumers about the effect of the settlement process on debt collection and their creditworthiness.** Withholding payment to settle multiple debts is a very long process. Meanwhile, additional fees and interest rates continue to build up, creditors continue to try to collect on unpaid debts, and consumers' creditworthiness continues to deteriorate.[61] Some firms still advise consumers not to pay debts, either implicitly or explicitly.[62] Others firms say they never tell consumers not to pay their debts but only accept clients who have already stopped paying. Moreover, many settlement firms have not followed through with promises that they will stop collection calls from creditors.[63] In fact, under the Fair Debt Collection Practices Act, consumers can only request that third party collection efforts stop—not collection attempts by a credit card company on its own behalf.

- **Settlement firms charge such high fees that consumers often don't end up saving much to make settlement offers, which is why so many drop out of settlement programs.** Debt settlement firms typically require consumers to pay fees of between 14 and 20 percent upfront[64] (and as high as 30 percent)[65] before they receive a settlement. It is often not made clear to consumers that a hefty portion of the payments they make in the first year will go to the firm, not to their reserve fund or creditors.[66] Many firms also charge monthly fees to maintain accounts, as well as a "settlement fee" of between 15 and 30 percent of the amount of debt that has been forgiven.[67]

- **As a result of high fees, consumers targeted by debt settlement companies are generally the least likely to benefit.** Some firms will work only with insolvent consumers who are unemployed or those in a hardship situation.[68] Many have minimum debt requirements of $10,000 to $12,000.[69] Consumers facing serious hardship with very high debts are, of course, the least likely to be able to afford the hefty payments that are charged. Settlement firms also appear to make no distinction, as a good attorney would, between consumers in these hardship situations who are vulnerable to legal judgments to collect and those who are not.

- **It is unclear what professional services most debt settlement companies offer to assist debtors while they save money to pay for a settlement.** Serious negotiation with creditors cannot commence until a significant settlement amount is saved, which could take years once high fees are paid. A persistent complaint by consumers is that settlement companies do not contact creditors at all in some cases.

3. The impact on consumers is devastating.

These practices clearly meet the test for substantial injury; indeed, the combined impact on consumers of these practices can be devastating. To get a sense of the impact on the many indebted borrowers for whom the debt settlement business model does not work, CFA examined some of the thousands of debt settlement complaints that are on various consumer review web sites. Here are a few summaries of the stories we found (all from the past eight months), which are generally consistent with claims made by the FTC in its investigations (*see* Appendix B):

- One (anonymous) consumer was convinced by a debt settlement company that it had strong relationships with major creditors and that its services would be a good alternative to bankruptcy. After she signed up with the settlement company, she was instructed to stop making payments to creditors. She later found out that the extent of the settlement company's involvement amounted to sending "power of attorney" letters to the creditors. Without help from the company she hired, she is now facing at least two collections lawsuits alone.

- One woman was persuaded to stop paying her creditors and to start paying the debt settlement company over $800 a month with the promise that her creditors would stop their collections calls and that she could reach a good settlement on her credit card balance. The settlement company took the money, but no settlements ever took place, and creditors never stopped calling. After seven months of no progress with her accounts, she stopped paying the company's fees. Without being able to get a refund of the more than $5,000 she paid in fees, she is now saving money for a bankruptcy lawyer. After a legal firm later acquired her accounts, she discovered that the original settlement company routinely dealt with other customers in the same way.

- After hearing nothing from his debt settlement company for several months, Chris from Maryland attempted to respond personally to a credit card collections letter. The debt settlement company later scolded and threatened him because he contacted the creditor directly. He realized that the company was not keeping up its end of the bargain, and he decided that the $300 per month he was paying in fees was not money well spent. He has tried to sever his ties with the settlement company, but they continue to ignore his requests.

- "T" from Arizona regularly saw television advertisements for a particular debt settlement company and thought it appeared legitimate. He called the company and was promised that his payments would be only $300 a month. The company collected his personal financial information and instructed him to stop paying his creditors. After four months and over $1,500 in fees being automatically drawn from his bank account, the consumer found out that no creditors had been paid. He eventually had to put a "stop payment" order on his bank account to prevent the settlement company from automatically withdrawing what they pleased. The consumer is now stuck with a damaged credit report, excessive fees, and no debt settlements.

- Frank from New York was directly contacted by a debt settlement company after visiting the company website. After a promise that the company would settle his debts, he decided to accept the $250 per month fee. Nearly a year later, with no progress in debt settlements, he stopped hearing from them. After many unanswered calls and emails, he finally received a response from the company that he would get a partial refund. Since then the company has ignored his efforts to receive the refund and his debts remain unsettled.

Creditors obviously must share some responsibility for the growth of the debt settlement industry. For one thing, some credit card issuers are knowingly doing business with these firms. For another, there clearly is consumer demand for a legitimate debt reduction approach that offers more relief than traditional credit counseling but is not as far reaching as bankruptcy.

Ultimately, it appears clear that the business model for debt settlement is structurally flawed. The essential promise made by debt settlement firms to the public, that they can settle most debts for significantly less than what is owed, is often fraudulent. While there is general consensus that credit counseling, if done well, can provide significant benefits for some financially distressed consumers, no such consensus exists for debt settlement. Debt settlement firms should have to prove that, in the face of significant evidence to the contrary, their business model can and does actually help more than a few financially distressed consumers.

Recommendations regarding debt settlement:

➢ *Congress should enact legislation mandating that the FTC issue a directed rulemaking on debt settlement and including minimum baseline standards.*

To date, debt settlement has been regulated primarily at the state level. Seven states have banned debt settlement.[70] Four more have adopted limited restrictions on the practice proposed by the National Conference of Commissioners on Uniform State Laws.[71] A number of other states have restrictions on debt management or adjustment that do not explicitly pertain to the practice of for-profit debt settlement, but cover it. States can also deploy laws regarding credit repair, the unauthorized practice of law, and unfair and deceptive practices (UDAP) against selected debt settlement practices.[72]

However, the growing prevalence of debt settlement companies, despite these state efforts, is clear indication that further action—a federal <u>minimum</u> standard—is needed. Congress should enact a federal law setting a strong <u>minimum</u> standard based on the best state laws directed specifically at debt settlement. The law should direct the FTC to implement rules and regulations necessary to effectuate its purpose and give the FTC enforcement authority. The FTC has used the FTC Act well to pursue settlement firms that have used unfair and deceptive practices and would be greatly aided by directed rulemaking authority.

At the very least, the minimum legislated standards should:

- *Require debt settlement firms to inform consumers upfront whether or not creditors will participate in the plan;*
- *Prohibit debt settlement firms from collecting any fees from consumers until debts are settled, except for a small enrollment fee;*
- *Prohibit firms from misrepresenting the impact of the settlement process on the creditworthiness of consumers;*
- *Place a cap on back-end settlement fees, based on the settlement services actually rendered rather than the amount of debt that was forgiven;*
- *Require that any debt serviced by a settlement firm be settled within 12 months.*
- *Limit agencies allowed to engage in debt settlement practices to non-profits.*

C. The FTC Should Also Give Priority to a Review of the Credit Practices Rule

We would like to take this opportunity to highlight another important issue that should be a high priority for the Commission. The Credit Practices rule, with its laborious birth, (see Section I) was worth the ten-year wait for consumers. Before the rule, it was standard practice for consumer credit contracts to include confession of judgment clauses and wage assignments, which subjected consumers to legal judgments or intercepted wages without due process and the safeguards of an opportunity to present defenses or counterclaims.[73] Creditors would routinely take non-purchase money security interests in household goods worth little to the creditor, except for the collection value of a threat to "clean out their house." (Indeed, my first client all those years ago was an elderly widow who came to us prompted by just such a threat. The list of items taken as security for her deceased husband's small loan included everything, right down to "two grey washtubs.") The credit practice rule changed all that, and contrary to the dire predictions of the credit providers, the sky did not fall.

In today's market, there is a modern day equivalent of these now banned practices – taking a personal check or equivalent electronic access to a bank account and holding it as security for a short term small loan. Some short-term, small loan lenders require that the borrower provide them either a personal check made out for the amount of the loan plus the finance charge or grant authorization for the lender to electronically debit the borrower's bank account The check or debit authorization is evidence of indebtedness, collateral for the loan, and a payment mechanism. The lender holds this check for the short period the loan is scheduled to be outstanding.[74] At the end of the short term, the consumer either brings in cash to pay the loan and reclaim the check, renew or roll-over the loan in some fashion, or the lender may use the check or electronic access to tap the deposit account.

There are many issues about this kind of lending: Congress has banned it for the military, and some states ban it, as well. But debates on those issues are for another day. Today we simply want to highlight a single feather – the check hold. This mechanism serves almost functions almost identical to the practices banned or limited in the Credit Practices rule. Given the prevalence of direct deposit paychecks, the direct access to the bank account that the check gives the creditor serves the same function as the wage assignment. For any other unsecured creditor to tap the bank account, it would have to go to court and obtain a judgment and garnishment order, making the check serve the same function as a confession of judgment clause. And, though the creditor knew the check was not backed by sufficient funds when written, (and hence is not a crime in most states), the consumers typically do not, which makes them vulnerable to *in terrorem* threats of criminal prosecution. We believe that the practice meets the FTC's unfairness test just as do those parallels long banned under the Credit Practices Rule.

- *Substantial injury* results from basing loans on checks or debit access. Our legal system is not supposed to permit incarceration for failure to pay a debt. Yet some payday lenders threaten criminal sanctions when borrowers are unable to make good on the checks. Some state laws treat the unpaid loan as a civil bad check, triggering multiple damages, attorneys' fees and court costs, while a few apply criminal sanctions for failure to make good on the check used to get the loan. By holding the borrower's check, lenders get the ability to call the consumer's bank to check "funds availability." As soon as the bank tells the lender funds are available to cover the check, the lender goes to the bank to collect. Then other checks written by the borrower bounce.

- *Injury that the consumer cannot avoid* includes insufficient fund fees charged by both the lender and the borrower's bank, possible loss of check writing privileges, and civil and/or criminal penalties for failure to make good on the check used to get the loan. To avoid these expensive consequences of failure to repay, many consumers roll over the loan or borrow from a second lender to keep their checks afloat, incurring repeated exorbitant finance charges. Check holding is also unfair because it deprives the consumer of any opportunity to present defenses to the loan, and forecloses the consumer's option to repay in an affordable manner. When the lender deposits the check written to get the loan, the borrower's other outstanding checks for rent, utilities, and other payments will bounce, costing more fees and exposing the consumer to criminal enforcement of those checks.

- *Injury that is not outweighed by the benefits.* Check/debit holding is simply a collection mechanism. The loss rate for payday lenders is less than for credit cards. The *in terrorem* effect of check holding leads to injury that is not commensurate with the benefit of being able to borrow a few hundred dollars at triple-digit interest rates with balloon payment terms.

Congress has already prohibited this practice for our service men and women in the Military Lending Act due to its harmful impact on members of the military.[75] Civilians are harmed, as well, by this practice. We recommend that the FTC do a silver-anniversary review of the Credit Practices Rule to assure that it is adequate to cover contemporary equivalents of long-banned practices.

IV. State Attorneys General Should Be Given Concurrent Enforcement Authority

Finally, we fully support giving state attorneys general concurrent enforcement authority. We noted earlier that consumer credit has grown from $475 billion at the end of 1985 to $1.6 trillion this spring. Not all of that, of course, is in the FTC's bailiwick. Nonetheless, as the "default" federal regulatory agency, with jurisdiction over market players not specifically assigned elsewhere, it has a huge mandate. Add to that all its non-credit related responsibilities: advertising; marketing; privacy; data security; identity theft; internet issues like spyware, spam and phishing; telemarketing, direct mail and online fraud; health fraud; telecommunications. And that's just in the consumer protection bureau. Its resources are unlikely to ever be fully adequate to fully meet these needs.

Some state attorneys general have authority under their parallel state UDAP laws to take enforcement actions against entities subject to both jurisdictions, giving us enough experience to know that it is a viable model. But permitting this concurrent jurisdiction as a matter of federal law is important to assure that consumers in all states may benefit from having these extra cops on the beat.

In conclusion, we support the goals of H.R. 2309, and believe that it would bring much needed improvements to the marketplace, to the benefit of all.

[1] Ms. Keest is a Senior Policy Counsel at the Center for Responsible Lending (CRL), and was formerly Deputy Administrator of the Iowa Consumer Credit Code and an assistant attorney general in the office of the Iowa Attorney General. Delvin Davis and Joshua M. Frank of CRL conducted the study on auto financing practices discussed in this testimony. Rebecca Borné, of CRL, and Travis Plunkett and Jean Ann Fox of Consumer Federation of America wrote portions of this testimony or works upon which this testimony is based.

Center for Responsible Lending is a non-profit, non-partisan research and policy organization based in Durham, North Carolina, dedicated to promoting family wealth-building opportunities and eliminating abusive financial practices. It is an affiliate of Self-Help, a non-profit community develop financial institution that consists of a credit union and a non-profit loan fund. In total, Self-Help has provided over $5.6 billion of financing to 62,000 low-wealth families, small business and nonprofit organizations in North Carolina and across America.

[2] The **Consumer Federation of America** is a nonprofit association of over 280 pro-consumer groups, with a combined membership of 50 million people. CFA was founded in 1968 to advance consumers' interests through advocacy and education.

[3] The **National Consumer Law Center**, Inc. (NCLC) is a non-profit corporation, founded in 1969, specializing in low-income consumer issues, with an emphasis on consumer credit. On a daily basis, NCLC provides legal and technical consulting and assistance on consumer law issues to legal services, government, and private attorneys representing low-income consumers across the country. NCLC publishes and regularly updates a series of sixteen practice treatises and annual supplements on consumer credit laws, including Truth In Lending, Cost of Credit, Consumer Banking and Payments Law, Foreclosures, and Consumer Bankruptcy Law and Practice, as well as bimonthly newsletters on a range of topics related to consumer credit issues and low-income consumers. NCLC attorneys have written and advocated extensively on all aspects of consumer law affecting low income people, conducted training for tens of thousands of legal services and private attorneys on the law and litigation strategies to deal predatory lending and other consumer law problems, and provided extensive oral and written testimony to numerous Congressional committees on these topics. NCLC's attorneys have been closely involved with the enactment of the all federal laws affecting consumer credit since the 1970s, and regularly provide comprehensive comments to the federal agencies on the regulations under these laws.

[4] Wheeler-Lea Amendment, Publ. L. No. 75-447 § 3, (1938), amending current 15 U.S.C. §45(a).

[5] Michael M. Greenfield, *Consumer Law: A Guide for Those Who Represent Sellers, Lenders, and Consumers*, § 3.1, p. 58 (1995).

[6] 15 U.S.C. § 57a. The Act spells out a quasi-judicial procedure during which interested parties may give statements, present evidence, even *cross-exam* other witnesses. A hearing officer presides over these proceedings, and issues findings and conclusions to a presiding officer. The presiding officer cannot consult directly with interested parties without giving notice to other interested parties. The presiding officer then issues recommendations. The last rule issued using this procedure resulted in an entire book of the hearing officer's findings and conclusions, and, if memory serves, a second book of the presiding officer's recommendations.

[7] 16 C.F.R. § 444.

[8] 48 Fed. Reg. 7740 (March 1, 1984), *effective* March 1, 1985; appeal *American Financial Serv. Assoc. v. FTC*, 767 F.2d 957 (1985), *cert. den.* (1986).

[9] 73 Fed. Reg. 44522 (July 30, 2008). While these rules did come a bit late in the game to prevent the last meltdown, they do set a base-line of fair conduct that will, one hopes, prevent a resurgence of the same unregulated and highly damaging practices that brought on the crisis.

[10] 74 Fed. Reg. 5498 (January 29, 2009).

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[11] The Magnuson-Moss rule-making procedure was adopted in 1975. Magnuson-Moss Warranty –FTC Improvement Act § 202(a), Pub. L. No. 93-637 (1975).

[12] The dynamic of these different kinds of regulation as applied to the subprime mortgage market is discussed in prior testimony relating to the FTC, *see* Hearing Before the Senate Committee on Commerce, Science and Transportation, Subc. on Interstate Commerce, Trade and Tourism, *"Improving Consumer Protections in Subprime Home Lending,"* April 29, 2008 at 5-11 (Test. of Kathleen Keest, Center for Responsible Lending), *available at* http://www.responsiblelending.org/mortgage-lending/policy-legislation/congress/keesttestimony-senate-commerce.pdf

[13] 16 C.F.R. § 433 (promulgated 1975).

[14] Federal Reserve Statistical Release G.19, *Consumer Credit,* figures for non-revolving consumer credit. http://www.federalreserve.gov/releases/g19/hist/cc_hist_sa.html ("consumer credit" excludes mortgages, "non-revolving" excludes credit cards.)

The preservation of claims and defenses rule applies to closed-end loans financing the purchase of goods or services where the seller assigns the contract to a third party or arranges for the financing, which includes most dealer-arranged auto sales. *See generally* Kurt Eggert, Held Up In Due Course: Codification and the Victory of Form Over Intent In Negotiable Instrument Law, 35 Creighton L. Rev. 363, 428-430, (2002)(noting the absence of serious negative consequences on legit imate lenders). The credit practices rule is discussed in Section V, below.

[15] Wei Li and Keith S. Ernst, Do State Predatory Lending Laws Work? A Panel Analysis of Market Reforms, 18:2 Housing Policy Debate, p. 347 (2007).

[16] By one report, the industry grew from 300 to a 1000 companies in "just the past couple of years." *"Cuomo targets debt settling companies,"* NPR Marketplace, May 8, 2009, http://marketplace.publicradio.org/display/web/2009/05/08/pm_cuomo/.

[17] 1975 figure from Federal Reserve Board Flow of Funds Accounts Z.1, Table D.3 (June 5, 2008); 2008 figure from the March 12, 2009 release, http://www.federalreserve.gov/releases/z1/Current/z1r-2.pdf

[18] Dean Baker, *Dangerous Trends: The Growth of Debt in the U.S. Economy,* at 4, Fig. 1 (2004); Stephen Roach, *Comment: America's Inflated Asset Prices Must Fall,* Financial Times, January 8, 2008.

[19] Edward N. Wolff, *Recent Trends in Household Wealth in the United States: Rising Debt and the Middle Class Squeeze,* p. 21, 24, Levy Economics Institute at Bard College & Dept. of Economics, NYU, Working Paper No. 502 (June 2007).

[20] The Economist: "Greed – and Fear: A special report on the future of finance, *Fixing Finance,*" p. 20 (January 24, 2009).

[21] Arloc Sherman, *Income Inequality Hits Record Levels, New CBO Data Show,* Center on Budget and Policy Priorities, (December 14, 2007).

[22] Chye-Ching Huang and Chad Stone, *Average Income in 2006 Up $60,000 for Top 1 Percent of Households, Just $430 for Bottom 90 Percent,"* Fig. 2, Center for Budget Policy and Priorities, *updated* October 22, 2008, *available at* http://www.cbpp.org/3-27-08tax2.htm (based on the work of Thomas Piketty and Emmanuel Saez)

[23] Justin Fox *How the Next President Should Fix the Economy,* 37, 38 TIME (May 26, 2008).

[24] *Id.*

[25] Penelope Wang, *Is College Still Worth the Price,* http://money.cnn.com/2008/08/20/pf/college/college_price.moneymag/ (updated 4/13/09).

[26] *See* Testimony of Eric Stein Before the U.S. Senate Committee on Bank, Housing and Urban Affairs, *Turmoil in the U.S. Credit Markets: The Genesis of the Current Economic Crisis*, p. 11, (Oct. 16, 2008).

[27] The first release focused on the impact on North Carolina consumers. *See* Delvin Davis and Joshua M. Frank, *Car Trouble: Predatory Auto Loans Burden North Carolina Consumers*, Center for Responsible Lending, (April, 2009), *available at* http://www.responsiblelending.org/other-consumer-loans/auto-financing/car-trouble-predatory-auto-loans-burden-north-carolina-consumers.html

[28] With dealer-arranged financing, the seller-dealer is commonly listed as the creditor on the retail installment sales contract. However, the third-party lender to whom the dealer has sent the application makes the decisions to approve or disapprove, and, if approved, the terms of the credit. A dealer may – or may not – shop the application to multiple lenders, with implications discussed in the next section. The retail installment sales contract, on is on its face a two-party consumer contract between the buyer-borrower and the dealer. That is one contract. But that contract is then "assigned" – often simultaneously, to the third party lender. Legally, these are separate transactions: the assignment is a second, independent commercial contract between the dealer and the creditor. *See, e.g.* Patterson v. Ford Motor Credit Co., 2000 WL 123943 (4th Cir. 2000) (purchase of installment sales contract by FMCC is part of separate transaction from underlying automobile sale; assignment of contract is wholly between dealer and indirect lender); Walker Mobile Homes Sales, Inc. v. Walker, 965 S.W.2d 271 (Mo App. WD. 1998)(retail installment sales contract was a contract between the buyer and seller; not between assignee and buyer). But the parties all treat it functionally as a two-stage single transaction. The disconnect between the legal posture and the functional understanding is how dealerships exploit the situation to make this a one-way, one-sided deal: the consumer is bound, but the dealer is not. For a more detailed description of the process and the legal ramifications, *see* National Consumer Law Center, *Automobile Fraud*, Ch. 3a (2008 Supplement).

[29] In some cases, the contract is completed in the same way as any other contract, with no hint that any terms are subject to change. In other cases, there may be a reference to its being subject to financing or other language that it is conditional. Depending upon state law, the conditional sale may or may not be legal. For example, in Iowa, the cumulative effect of the credit code and the retail installment sales act precludes taking a retail installment sales contract signed by the buyer until the terms are final, which arguably precludes a subsequent condition on the contract.

States have adopted a variety of approaches to limit the yo-yo practice. Citations are compiled in John W. Van Alst, *Fueling Fair Practices*, p. 13, note 22, National Consumer Law Center (2009), *see generally* National Consumer Law Center, *Automobile Fraud*, Ch. 3a (2008 Supplement).

[30] Appendix A includes a summary of the findings and an explanation of the methodology.

[31] *See, e.g.* Keith Ernst, Debbie Bocian, and Wei Li, *Steered Wrong: Brokers, Borrowers and Subprime Loans*, Center for Responsible Lending (April 8, 2008), *available at* http://www.responsiblelending.org/issues/mortgage/research/steered-wrong-brokers-borrowers-and-subprime-l-oans.html. *See also* Structured Finance in Focus, *The Subprime Decline – Putting it in Context*, p. 3, Moody's Investors Service (March 25, 2008) ("The subprime crisis is largely a product of increasingly aggressive mortgage loan underwriting standards adopted as competition to maintain origination volume intensified amid a cooling national housing market.")

[32] Lei Ding, Roberta G. Quercia, Wei Li, and Janneke Ratcliffe, *Risky Borrowers or Risky Mortgages: Disaggregating Effects Using Propensity Score Models*, Center for Community Capital, Univ. of North Carolina & Center for Responsible Lending (Working Paper, Sept. 13, 2008).

[33] *See* III-A-1, text accompanying note 26. Some used-car dealerships, called "buy-here, pay-here" dealers, do act as both seller and creditors.

[34] 73 Fed. Reg. 44522, 44563-65 (July 30, 2008)

[35] *See* Appendix A, Fig.2 for complete list by state.

[36] Mark A. Cohen, Imperfect Competition in Auto Lending: Subjective Markup, Racial Disparity, and Class Action Litigation, Vanderbilt University (Dec 2006).

[37] As explained in note 26, though the seller-dealer is listed as the creditor on the contract, in fact it typically sends the credit application to one or more potential third- party lenders for approval or disapproval. The outside lender tells the dealer the terms upon which it would approve the deal, including the "par rate" or "buy rate" – that is the rate that the buyer qualifies for based on its credit qualifications and the collateral. The dealer mark-up, or yield spread premium is an upward bump to that "buy rate" from which the dealer receives extra compensation.

[38] *See* Appendix A. This too, is parallel to the mortgage market, where many borrowers believe that lenders are required to give them the best rate they qualify for.

[39] Mark A. Cohen, Imperfect Competition in Auto Lending: Subjective Markup, Racial Disparity, and Class Action Litigation, Vanderbilt University (Dec 2006). Figures are weighted averages using data from five major auto finance companies compiling 12.6 million records between 1993 and 2004.

[40] For example, the settlement agreement sets limits in this range for GMAC in *Coleman v. GMAC*, Para. 8.3, No. 3-98-0211 (M.D. Tenn, settlement agreement filed Feb. 10, 2004), *available at* http://www.consumerlaw.org/issues/cocounseling/content/GMACSettlementAgrmt.pdf

[41] Truth in Lending's unconditional 3-day cooling off period applies to non-purchase money homes secured by the consumer's primary dwelling. 15 U.S.C. § 1635. Home solicitation sales are also subject to a 3-day cooling off period under an existing FTC rule, 16 C.F.R. § 429, and analogous laws in all 50 states. Sales of timeshares, too, maybe subject to a cooling off period, *see, e.g.* Part 24 of Title 13 NYCRR.

[42] *See also* Van Alst, *Fueling Fair Practices*, at 14-15 (discussing other approaches, including the possibility of a flat fee for arranging credit, which would eliminate the possibility of discriminatory pricing. CFA has called for an end to unfair dealer markup while acknowledging that dealers should be able to receive some sort of fee).

[43] Several states have addressed yo-yo sales in a variety of ways. *See generally* John W. Van Alst, *Fueling Fair Practices*, National Consumer Law Center, (2009), *available at* http://www.consumerlaw.org/issues/auto/content/report-fuelingfairpractices0309.pdf

[44] Westrich, Tim and Weller, Christian E., "House of Cards, Consumers Turn to Credit Cards Amid the Mortgage Crisis, Delaying Inevitable Defaults," Center for American Progress, February 2008.

[45] Chu, Kathy, "More Americans Using Credit Cards to Stay Afloat," *USA Today*, February 28, 2008.

[46] "Look Out for That Lifeline, Debt-Settlement Firms are Doing a Booming Business—And Drawing the Attention of Prosecutors and Regulators," *BusinessWeek*, March 6, 2008.

[47] David Streitfeld, *An Inquiry Into Firms That Offer to Cut Debt*, N.Y. Times, May 7, 2009.

[48] *Id.* Mr. Andrew Cuomo said he issued subpoenas to the following firms: American Debt Foundation Inc., American Financial Service, Consumer Debt Solutions, Credit Answers L.L.C., Debt Remedy Solutions L.L.C., Debt Settlement America, Debt Settlement USA, Debtmerica Relief, DMB Financial L.L.C., Freedom Debt Relief, New Era Debt Solutions, New Horizons Debt Relief Inc., Preferred Financial Services Inc., U.S. Financial Management Inc. (operating as My Debt Negotiation) and Allegro Law.

[49] Housing counseling agencies, now central to seeking work outs for mortgages to avoid foreclosures, are yet a distinct species of credit counseling, and are not described in this testimony.

[50] Loonin, Deanne; Plunkett, Travis; "Credit Counseling in Crisis: The Impact on Consumers of Funding Cuts, Higher Fees and Aggressive New Market Entrants;" National Consumer Law Center and Consumer Federation of America; April 2003; http://www.consumerfed.org/pdfs/credit_counseling_report.pdf.

[51] "Profiteering in a Non-Profit Industry: Abusive Practices in Credit Counseling," Report Prepared by the Permanent Subcommittee on Investigations of the Committee on Homeland Security and Governmental Affars, United States Senate, April 13, 2005, http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_reports&docid=f:sr055.pdf. By late 2006, the IRS had investigated 63 agencies that brought in more than half the revenue of the entire credit counseling industry for violating their non-profit status.http://www.irs.gov/charities/article/0,,id=156827,00.html. The IRS has since reported that it has "revoked, terminated or proposed revocation of over half of the organizations examined, representing 41 percent of revenue in the industry," http://www.irs.gov/charities/article/0,,id=156829,00.html.

[52] Some states used the Uniform Debt Management Services Act proposed in 2005 by the National Conference of Commissioners on Uniform State Laws as a model and others acted independently to adopt standards regarding business practices and fees.

[53] For example, when CFA surveyed interest rates in credit counseling in 1999 and 2003, Bank of America was a model for the rest of the industry, charging 0 percent APR for those in a DMP. Consumer Federation of America, "Large Banks Increase Charges To Americans In Credit Counseling, New Practices Will Hurt Consumers On The Brink Of Bankruptcy, July 28, 1999. National Consumer Law Center, Consumer Federation of America, "First-Ever Study of Credit Counseling Finds High Fees, Bad Advice and Other Abuses by New Breed of 'Non-Profit' Agencies," April 9, 2003; http://www.consumerfed.org/releases2.cfm?filename=040903ccreport.txt. Now, Bank of America has a range of interest rates from 1 percent all the way up to 16 percent. There is not a single major credit card issuer right now that charges less than 5 percent APR for all of its clients in DMPs. (JP Morgan Chase comes the closest, at 6 percent.) Capital One charges a 15.9 percent rate, unless the client enters counseling with a lower rate. Discover charges a range of rates that go as high as 15.9 percent as well. Consumer Federation of America, Testimony before the U.S. Senate Committee on Science, Commerce and Transportation, Feb. 26, 2009.

[54] Michelle Singletary, *As Recession Deepens, Even Credit Cards' Minimums Can Become a Burden*, Washington Post, Apr. 23, 2009.

[55] The OCC and other financial regulatory agencies rejected a request made by CFA and the Financial Services Roundtable on October 29, 2008 to permit a pilot project that would allow some credit counseling agencies to offer some consumers reduced principal DMPs over a period of up to 60 months. Current guidance requires that reduced principal "settlements" must generally be paid in full within three to six months. Multi-year, reduced principal payment plans are not allowed unless the issuer charges off the entire loan before offering the settlement.

[56] Staten, Michael E., Barron John M., "Evaluating the Effectiveness of Credit Counseling," May 31, 2006; http://www.consumerfed.org/pdfs/Credit_Counseling_Report061206.pdf. Consumers who were recommended for a DMP by agencies and chose to start payments had a significantly lower incidence of bankruptcy, as well as improved bankruptcy and delinquency risk scores, over the two years following counseling than did those who were recommended for a DMP and chose not to start.

[57] "Look Out for That Lifeline, Debt-Settlement Firms are Doing a Booming Business—And Drawing the Attention of Prosecutors and Regulators," *BusinessWeek*, March 6, 2008.

[58] Robb Evans and Associates LLC, "Report of the Temporary Receiver, May 3, 2004 – May 14, 2004, First report to the Court."

[59] *Id.*

[60] Robert Berner and Jessica Silver-Greenberg, "Look Out for That Lifeline, Debt-Settlement Firms are Doing a Booming Business—And Drawing the Attention of Prosecutors and Regulators," *BusinessWeek*, March 6, 2008.

[61] *Id.*

[62] *See, e.g.*, FTC Investigation of Edge Solutions, Inc. and Money Cares, Inc. aka The Debt Settlement Company and The Debt Elimination Center; Pay Help, Inc.; Miriam and Robert Lovinger, Press release, Aug. 5, 2008 at: www.ftc.gov/opa/2008/08/edge.shtm and noted in Appendix B.

[63] *See* Appendix B for multiple investigations claiming debt settlement companies represented that they could stop creditors from calling a customer.

[64] Consumer Federation of America, Testimony before the U.S. Senate Committee on Science, Commerce and Transportation, Feb. 26, 2009.

[65] Berner and Silver-Greenberg, *BusinessWeek*, March 6, 2008.

[66] Berner and Silver-Greenberg, *BusinessWeek*, March 6, 2008.

[67] *See, e.g.*, FTC claims against Better Budget Financial Services (BBFS) in Appendix B (BBFS promised to negotiate with consumers' creditors for a non-refundable retainer fee, monthly administrative fees of $29.95 to $39.95, and 25 percent of any savings realized by a debt settlement).

[68] Consumer Federation of America, Testimony before the U.S. Senate Committee on Science, Commerce and Transportation, Feb. 26, 2009.

[69] *Id.*

[70] "Look Out for That Lifeline, Debt-Settlement Firms are Doing a Booming Business—And Drawing the Attention of Prosecutors and Regulators," *BusinessWeek*, March 6, 2008.

[71] Uniform Law Commissioners, "A Few Facts about the Uniform Debt-Management Services Act of 2005 http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-udmsa.asp. The National Consumer Law Center and Consumer Federation of America opposed including provisions regulating debt settlement firms in the same law that regulated debt management and credit counseling because the businesses are so different. The highly questionable debt settlement business model necessitates a different and more stringent regulatory framework that does not legitimize the debt settlement.

[72] Loonin, Deanne, National Consumer Law Center, "An Investigation of Debt Settlement Companies: An Unsettling Business for Consumers," March 2005.

[73] Federal Trade Commission, Credit Practices Rule: Statement of Basis and Purpose and Regulatory Analysis, 49 Fed. Reg. 7740, 7744 (March 1, 1984).

[74] Even if, as is common, there are insufficient funds in the account when the check is written, it would not be a crime under most, but not all, states' criminal bad check laws, because the payee knows that and agrees to delay deposit. More than that, the payee choose to go into business to do precisely that.

[75] 10 U.S.C. §987(e)(5); 32 C.F.R. 232.8(a)(5).

APPENDIX A

AUTO LOAN KICKBACKS AND "YO-YO" SALES: A DETRIMENT TO WORKING AMERICANS

Center for Responsible Lending

Consumers that finance their auto loan directly through a dealership are too often in jeopardy of finance and insurance staff looking to increase their individual compensation by overcharging their customers. In recent years, dealers have made more money financing the debt associated with a vehicle, than through the sale of the vehicle itself.[1] Therefore anything that inflates the vehicle cost and financing will also increase commission.

The Center for Responsible Lending recently looked at four major auto lending practices that leave consumers vulnerable to abuse, including two which are singled out in H.R. 2309 for attention: dealer reserve kickbacks and "yo-yo" scams. This is a summary of our findings as to those two specific abuses.

<u>Finding 1:</u> Dealer kickbacks in dealer-arranged auto financing cost consumers over $20.8 billion in 2007.

- Dealer kickbacks result in an extra 0.6 to 1.8 percentage points for new and used car loans, respectively, and an average cost of at least $647 per vehicle.[2] However, since not every car buyer receives an increased interest rate, the impact on the customers who do is much higher. According to data from five major captive auto lenders, consumers seeing loan kickbacks saw an average markup of **$989 per vehicle**.[3]
- According to our survey data, close to half of borrowers trusted that their dealer would give them a good rate, and therefore did not attempt to negotiate.[4] These respondents paid an interest rate at least **2 percentage points** higher than others.
- With automated technology, F&I staff spent only around a half hour with each customer in 2007, even less if the consumer has taken a test drive.[5] With a kickback bringing in at least an additional $647 in profit on average, the dealer will stand to gain over **$1,097 per hour** of service. Dealers should not be compensated for putting consumers in *worse* loans than they qualify for.
- Prior research shows strong evidence of racial discrimination, where African-Americans saw kickbacks over $427 greater than those seen by Whites.[6] Moreover, 54.6% African-Americans were also marked up as opposed to 30.6% of Whites.
- Some finance lenders have self-imposed rate caps of between 2 and 3 percentage points after allegation of racial discrimination with kickbacks. A five-year loan on a $15,000 vehicle with a 10% APR will still net $1,355 in additional revenue for the dealer and lender if marked up to a 3% cap. Whereas rate caps may address racial disparities, they only ensure that consumers are taken advantage of equally across the board.

<u>Finding 2:</u> A quarter of low-income respondents have experienced a "yo-yo scam", and having a yo-yo scam led to a 5 percentage point higher interest rate compared to others with the same risk.

- The overall prevalence of yo-yo scams in our survey were low, with only 4% of respondents having experienced a yo-yo scam.[7] However, among people with low incomes or low credit scores, yo-yo scams were much more common.
- Eleven percent of people with fair or poor credit scores had experienced a yo-yo scam, and this difference was statistically significant.[8] Among people with incomes below $40,000, 12% had experienced a yo-yo scam, and this difference again was statistically significant.
- For people with incomes of $25,000 or less, a quarter reported having experienced a yo-yo scam. Controlling for risk factors such as credit rating and income, consumer in yo-yos experienced rates that were 5 percentage points higher than their counterparts.

Figure 1: Prevalence of "Yo-Yo" Scams

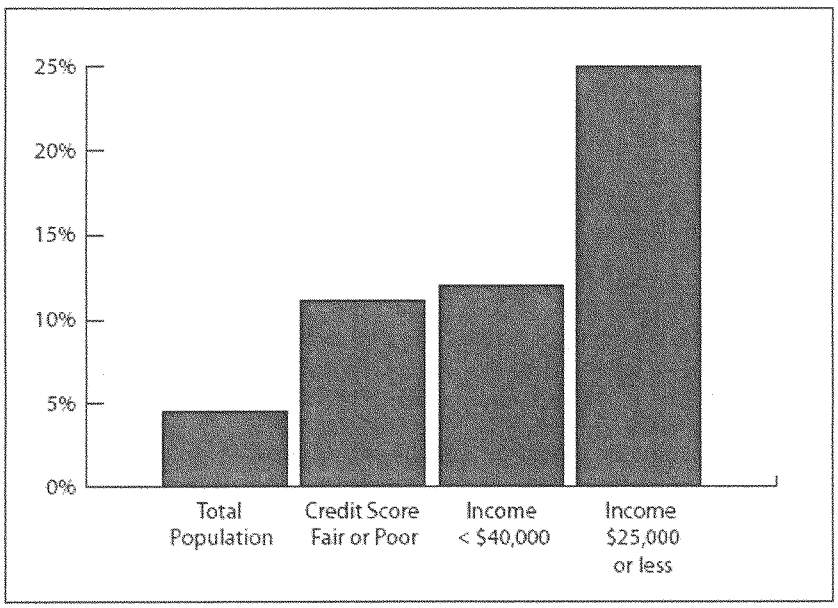

Figure2: Dealer Kickback Volume Estimates by State in 2007 [9]

State	U.S. Rank	New Vehicle Market Share	New Vehicle Kickback Volume	Used Vehicle Market Share	Used Vehicle Kickback Volume	Total Kickback Volume
Alabama	26	1.26%	$110,476,064	1.65%	$199,560,418	$310,036,482
Alaska	50	0.11%	$9,914,978	0.21%	$26,035,577	$35,950,555
Arizona	13	2.61%	$228,410,644	2.11%	$256,264,673	$484,675,317
Arkansas	35	0.85%	$74,402,532	0.90%	$109,059,142	$183,461,674
California	1	12.11%	$1,057,992,630	11.95%	$1,448,752,786	$2,506,745,416
Colorado	22	1.61%	$140,493,995	1.47%	$178,025,775	$318,519,771
Connecticut	30	1.17%	$102,079,879	1.10%	$132,847,890	$234,927,769
Delaware	49	0.31%	$26,820,950	0.21%	$25,634,228	$52,455,178
DC	46	0.26%	$22,468,182	0.15%	$18,663,357	$41,131,539
Florida	4	5.77%	$504,151,195	5.56%	$674,680,597	$1,178,831,792
Georgia	8	3.70%	$323,065,213	3.36%	$407,671,641	$730,736,855
Hawaii	42	0.33%	$28,538,113	0.30%	$36,936,277	$65,474,390
Idaho	39	0.55%	$48,427,492	0.49%	$58,969,272	$107,396,765
Illinois	6	4.52%	$394,937,006	4.02%	$487,602,027	$882,539,032
Indiana	16	2.18%	$190,226,706	2.02%	$245,349,422	$435,576,129
Iowa	27	1.35%	$118,358,410	1.20%	$145,118,756	$263,477,166
Kansas	32	0.99%	$86,458,502	0.96%	$116,945,478	$203,403,980
Kentucky	20	1.59%	$138,588,600	1.62%	$197,001,967	$335,590,567
Louisiana	25	1.31%	$114,836,696	1.63%	$197,071,081	$311,907,778
Maine	41	0.31%	$27,066,509	0.34%	$41,375,372	$68,441,881
Maryland	18	1.99%	$173,845,933	1.93%	$233,483,543	$407,329,476
Massachusetts	17	2.16%	$189,055,715	1.80%	$218,817,918	$407,873,633
Michigan	10	3.42%	$298,616,832	2.79%	$337,914,435	$636,531,267
Minnesota	24	1.43%	$124,807,602	1.56%	$189,653,997	$314,461,600
Mississippi	33	0.94%	$82,106,608	0.91%	$110,868,246	$192,974,854
Missouri	19	1.67%	$145,547,261	1.88%	$228,497,594	$374,044,855
Montana	43	0.29%	$25,054,850	0.27%	$33,335,045	$58,389,895
Nebraska	38	0.46%	$40,522,425	0.55%	$67,216,943	$107,739,369
Nevada	31	1.12%	$98,264,544	0.91%	$109,960,057	$208,224,601
New Hampshire	40	0.38%	$33,358,404	0.41%	$50,043,793	$83,402,197
New Jersey	11	3.01%	$263,222,301	3.05%	$370,352,203	$633,574,504
New Mexico	36	0.73%	$63,723,788	0.86%	$104,451,505	$168,175,293
New York	3	6.23%	$544,292,611	6.61%	$801,815,017	$1,346,107,627
North Carolina	9	2.97%	$259,900,705	3.34%	$405,176,242	$665,076,947
North Dakota	48	0.20%	$17,265,135	0.21%	$26,004,051	$43,269,186
Ohio	7	3.48%	$303,940,474	3.86%	$467,821,924	$771,762,398
Oklahoma	29	1.09%	$95,642,921	1.20%	$145,106,631	$240,749,552
Oregon	28	1.09%	$94,914,110	1.23%	$149,702,143	$244,616,253
Pennsylvania	5	4.11%	$358,910,664	4.47%	$541,872,721	$900,783,385
Rhode Island	45	0.27%	$23,919,687	0.28%	$33,479,337	$57,399,024
South Carolina	23	1.34%	$117,471,427	1.62%	$197,001,967	$314,473,394
South Dakota	47	0.21%	$18,698,289	0.27%	$32,424,430	$51,122,719
Tennessee	15	2.07%	$180,501,359	2.33%	$282,904,093	$463,405,452

Texas	2	7.85%	$685,630,944	7.90%	$957,842,960	$1,643,473,904
Utah	34	0.87%	$76,438,659	0.88%	$107,201,537	$183,640,196
Vermont	44	0.26%	$22,817,732	0.29%	$34,694,298	$57,512,030
Virginia	12	2.85%	$248,819,979	2.84%	$343,969,840	$592,789,819
Washington	14	2.31%	$202,267,821	2.24%	$271,233,432	$473,501,253
West Virginia	37	0.67%	$58,205,272	0.51%	$62,381,349	$120,586,621
Wisconsin	21	1.52%	$133,240,489	1.57%	$190,286,941	$323,527,431
Wyoming	51	0.11%	$10,024,212	0.13%	$16,281,936	$26,306,148
Total U.S.		**100.00%**	**$8,738,743,050**	**100.00%**	**$12,125,361,864**	**$20,864,104,914**

APPENDIX A.1 DATA AND METHODOLOGY

In order to quantify the scope of dealer reserve kickbacks in the industry, we relied on two sources of data that are routinely cited. The Consumer Bankers Association (CBA) conducts a semi-annual Automotive Finance Survey that includes 32 banks and finance companies that submitted over 12.5 million account records for 2007, the most full-year data available. It includes information on average buy and contract rates, as well as the dollar amount of kickback costs by grouping of LTV ratios, FICO levels and loan terms. Total outstanding accounts, auto loans, and related costs, for all 2007 survey participants was $223 billion.

Additionally, CNW Marketing Research Inc. has been respected as an industry source for auto manufacturing, sales, and financing for years. For the purposes of our research, CNW was used to ascertain the levels of new and used vehicle sales financed directly through dealerships. This allowed us to take weighted averages of kickback levels by cross-referencing sales data with dealer-arranged financing to kickback data in the CBA survey. CNW Marketing Research also provided data on state-by-state market shares for 2007 sales.

In order to gain further perspective of the potential predatory nature of auto lending CRL commissioned Macro International to conduct a national survey through their ongoing CARAVAN® survey. The survey was designed to gauge the customer's awareness of abuse, and their ability to negotiate for better rates and terms. The survey also allowed us to gather data on yo-yo deals and auto binding mandatory arbitrations, information not readily available elsewhere. The consumer-level survey data allowed us to use multiple regression to analyze the impact on the loan APR (annual percentage rate) while controlling for other credit risk factors and borrower demographics.

Survey Model

All variables used for statistical analysis came from a telephone survey commissioned by the Center for Responsible Lending. The survey was conducted among a national probability sample of 1,007 adults (505 men and 502 women 18 years of age and older) living in private households in the continental United States. Interviewing for the survey was completed during the period November 21-24, 2008.

81% of survey respondents owned a car or truck. White respondents were significantly more likely to own a vehicle than African-American or Latino respondents. About a quarter of the survey population (27%) used a loan at the dealership to purchase their car or truck. The remainder of the survey focused on this subpopulation, leaving a sample size for these questions of 268 respondents (with a smaller sample size used for analyses involving questions where some respondents chose not to answer).

The survey was conducted by Macro International as part of its regular CARAVAN® survey. All CARAVAN interviews are conducted using Macro International's computer assisted telephone interviewing (CATI) system. Macro International utilizes an unrestricted random sampling procedure that controls the amount of serial bias found in systematic sampling to generate its random-digit-dial sample. The sample is fully replicated and stratified by region. Only one interview is conducted per household. Unlike published directories, the probability telephone sample includes both unlisted numbers and numbers issued after publication of the directories. All sample numbers selected are subject to up to four attempts to complete an interview. Completed interviews are weighted by four variables: age, sex, geographic region, and race, to ensure reliable and accurate representation of the total population, 18 years of age and older. The raw data are weighted by a custom designed program which automatically develops a weighting factor for each respondent. All regressions shown in this report are for weighted results.

The income variable used in this analysis is a 1-10 scale, based on ten standard income ranges used in the CARAVAN survey. Credit rating was a number from 1-4 based on a four-category scale ("excellent," "good," "fair," or "poor"), with a 1 indicating the best credit rating. A cut-off of 5% was used to come up with a non-incentive APR in some regressions. In the first half of 2008, the average rate for borrowers with a credit score above 720 (the highest category) was 6.1%, making it unlikely that many unsubsidized loans by the manufacturer have rates lower than 5%.[10] This distinction was made because the dynamics of many of the issues studied (particularly the negotiation of APR) may be different for respondents receiving a subsidized rate.

While we believe our interpretation of the results yields the most likely cause of the statistical results, it should be noted that any survey has the potential for bias. This bias becomes more important if it can be a source of correlation between individual questions. For example, if people have a tendency to either believe or state their situation is more positive than it is, they may indicate their credit rating is better than it is, their income is higher than it is, and also indicate their APR is lower than it is. This would cause an appearance in this case of risk-based pricing even if there was not any. On the other hand, optimistic responses will also tend to reduce the stated prevalence of exploitative practices. Yo-yo scams, binding mandatory arbitration, unsuccessful loan negotiation, and other adverse indicators may be more common than the survey results suggest. Lack of knowledge may also play a role in survey interpretation. For example, while some people acknowledged that they know they received add-on products without realizing it at the time of sale, it is likely that others did not learn about receiving these products later. Therefore the frequency of being charged for add-on products without knowing it is probably higher than the results here indicate.

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[1] F&I Management and Technology Magazine, Dec 2008. (In 2008, F&I contributed over half (52.1%) of the average dealership's yearly profit.) Whereas, gross profit margin as a percentage of selling price has fallen from 6.5% to 5.0% between 1999 to 2007. (National Auto Dealers Association, 2008)

[2] Consumer Bankers Association, 2008 Automotive Finance Study: An Analysis of 2007 Year-End Data.

[3] Mark A. Cohen, Imperfect Competition in Auto Lending: Subjective Markup, Racial Disparity, and Class Action Litigation, Vanderbilt University (Dec 2006).

[4] Data acquired through a Center for Responsible Lending-commissioned survey conducted through Macro International's CARAVAN interviews and includes a sample size of 1,007 customers across the U.S., 81% of whom owned a car or truck as of Nov 2008. The primary findings are based on approximately a quarter of those respondents (sample size of 268) who reported using a loan financed through their car dealership.

[5] F&I Factors: F&I Management & Technology annual data release. Dec 2007. (Customer spends 35.4 minutes with F&I staff. If consumer has taken a test drive, the average time drops to 18.1 minutes. For 2008, the amount of time increases to 51.5 minutes, or 27.2 minutes if consumer takes a test drive. This is the only year in recent history where F&I has taken as much time with consumers.)

[6] Mark A. Cohen, Imperfect Competition in Auto Lending: Subjective Markup, Racial Disparity, and Class Action Litigation, Vanderbilt University (Dec 2006). Figures are weighted averages using data from five major auto finance companies compiling 12.6 million records between 1993 and 2004.

[7] See endnote 4 about survey data.

[8] All group differences discussed in this paragraph were statistically significant using a Chi-square or Fisher's Exact Test at the 1% level. Also, the average income difference between those with yo-yo loan experience and those without was significant at the 0.1% level.

[9] State market shares retrieved from CNW Market Research 2007 data. Markup totals based on estimates using term data from CBA Automotive Finance Survey.

[10] *2008 Automotive Finance Study: An Analysis of 2008 Mid-Year Data*, Consumer Bankers Association (2008).

APPENDIX B

RECENT FTC DEBT SETTLEMENT CASES

1. Edge Solutions, Inc. and Money Cares, Inc. aka The Debt Settlement Company and The Debt Elimination Center; Pay Help, Inc.; Miriam and Robert Lovinger
Press release on August 5, 2008 at: www.ftc.gov/opa/2008/08/edge.shtm
Complaint filed on October 3, 2007
Complaint alleged that the defendants:

- Promised that they could reduce consumers' debts so they would only pay 55 cents for each dollar of debt.
- Told consumers that their payments would cover both negotiated debts and fees.
- Told consumers to stop making payments to and have no further contact with their creditors, and that this would place them in a "hardship condition," making negotiations possible.
- Promised that debts would be begin to be paid to creditors within several weeks and would ultimately be paid in a shorter time, and for a reduced amount, than if consumers continued to pay.
- Required consumers to set up direct debit from their bank accounts to a bank account controlled by the company, from which their fees and debts would be paid.
- Promised one-on-one financial counseling, which in most cases was never provided.
- Buried in the agreement the fact that consumers must pay 45 percent of total fee upfront before any payments would begin to creditors and that this might take several months.
- Failed to negotiate with and pay creditors as promised.
- Caused consumers to incur late fees, finance charges, overdraft charges, and negative information on their credit reports, and to face various types of legal action by creditors, leaving them in worse financial condition than before.

Status: Settlement

2. Debt-Set, William Riggs, Leo Mangan, Resolve Credit Counseling, Inc., and Michelle Tucker
Press release on February 14, 2008 at: www.ftc.gov/opa/2008/02/debtreduct.shtm
Complaint filed on March 27, 2007
Complaint alleged that the defendants:

- Falsely promised that they could significantly reduce consumers' credit card interest rates to between 0 and 9 percent or reduce the amount of their unsecured debt to 50 percent or 60 percent.
- Encouraged consumers who called in response to ads to enroll in a "debt consolidation program" if their unsecured consumer debt was up to one month

overdue, or in a "debt settlement program" if they were overdue by a longer period.

- Misrepresented that they would not charge consumers any upfront fees before obtaining the promised debt relief and buried inadequate fee information in the agreement, when in fact they generally charged 8 percent of the total debt before they would contact the creditors.
- Sent consumers documents to sign that were described as "not contracts" but "just information" but in fact were agreements that, among other things, authorized the companies to make withdrawals from consumers' bank accounts.
- Misrepresented that participation in their program would stop creditors from calling or suing consumers to collect debts.
- Failed to negotiate with and pay creditors as promised.
- Caused consumers to incur late fees, finance charges, overdraft charges, and negative information on their credit reports, and to face various types of legal action by creditors, leaving them in worse financial condition than before.

Status: Settlement

3. Homeland Financial Services, National Support Services LLC, United Debt Recovery LLC, Freedom First Financial LLC, and USA Debt Co, LLC, Financial Liberty Services, and their principals, Dennis Connelly, Richard Wade Torkelson, and Joanne Garneau (doing business as Prosper Financial Solutions)
Press release on September 21, 2006 at: www.ftc.gov/opa/2006/09/nationwide.shtm
Complaint filed on September 21, 2006
Complaint alleged that the defendants:

- Falsely claimed that, for a non-refundable fee of up to 15 percent of a consumer's unsecured debt, they could reduce all of their unsecured debts, including credit card balances and medical bills, by as much as 40 percent to 60 percent.
- Falsely represented that they would contact consumers' creditors immediately.
- Charged a nonrefundable fee of 12-15 percent of the total debt.
- To the extent that they initiated negotiations with creditors, these settlements typically began only after a consumer paid 30 percent to 40 percent of the fee. This could take up to three months after a consumer followed the advice of the settlement firm and stopped making payments to creditors.
- Rarely negotiated settlements with all of a consumer's creditors, and even when they have successfully negotiated an account, in many cases, the settlement amount is significantly more than 60 percent of what consumers owe.
- Caused most consumers, who typically left the program within six months of enrolling without completing it, to incur larger debt as a result of penalties, fees, interest, and other charges.
- Failed to adequately disclose the likelihood that consumers would be sued if they took the defendants' advice and stopped making payments to creditors.
- Falsely advised consumers that negative information that appeared on their credit report as a result of participating in the defendants' program would be removed upon completion of the program.

Status: Settlement for some of the defendants, injunctions still in place on others.

4. Innovative Systems Technology, Inc., dba Briggs & Baker; Debt Resolution Specialists, Inc., Todd A. Baker; and Jack Briggs, aka John Briggs
Press release on July 19, 2005 at: http://www.ftc.gov/opa/2005/07/briggsbaker.shtm
Complaint filed February 13, 2004
Complaint alleged that:

- Innovative Systems Technology, Inc., which did business as Briggs & Baker and Debt Resolution Specialists, Inc., falsely told consumers they could negotiate with their creditors and reduce their debt.
- Consumers were told to end all contact with their creditors and to stop making payments on their accounts.
- However, Innovative Systems Technology, Inc., never did negotiate with the consumers' creditors and consumers often ended up deeper in debt and incurred further damage to their credit ratings.

Status: Settlement. Both companies are now currently in Chapter 7 bankruptcy and barred from selling any debt negotiation services in the future.

5. National Consumer Council, London Financial Group; National Consumer Debt Council, LLC; Solidium, LLC; J.P. Landis, LLC; Financial Rescue Services, Inc.; Signature Equities, LLC; M&L Springfield Trust; PC Hailey Trust; Via Lido Trust; and United Consumers Law Group
Press release on March 30, 2005 at: www.ftc.gov/opa/2005/03/creditcouncel.shtm
Complaint filed April 23, 2004
Complaint alleged that:

- National Consumer Council, a purported nonprofit organization, solicited customers through an aggressive telemarketing and direct mail advertising campaign that falsely promised free debt counseling.
- In fact, NCC's role in the scheme was simply to generate leads for the other defendants who then charged consumers thousands of dollars in fees to enroll in their debt negotiation programs.
- The defendants deceptively claimed these programs were an effective way to stop creditors' collection efforts and eliminate debts.
- The defendants failed to disclose important information to consumers before they enrolled, including the fact that very few people were able to reduce their debts through the debt negotiation programs; consumers would suffer late fees, penalties, and other charges; and that participation in the program might hurt their credit rating.
- Very few consumers were helped; a court-appointed receiver determined only 1.4 percent of the consumers who enrolled in the defendants' debt negotiation programs – 638 out of 44,844 consumers – actually completed them. Forty-three

percent of NCC's clients cancelled the program after incurring fees of 64 percent of the total amount remitted to NFCC.

Status: Settlement

6. Jubilee Financial Services, Jabez Financial Group, Gustavsen Learning Centers, Inc., and Debt Relief Counselors of America, P.C. et al
Press release on January 26, 2005 at: www.ftc.opa/2005/01/jubilee.shtm
Complaint filed August 19, 2002
Complaint alleged that defendants:

- Lured consumers with false promises that consumers who enrolled in their debt negotiation program would be able to pay their debts at a reduced amount of 40 to 60 percent and that consumers would stop receiving collection calls from creditors.
- Told consumers to stop making payments to creditors so that they would be in a "hardship condition" that would make it easier to negotiate.
- Misled consumers about the effects of the Jubilee program on their credit report and failed to tell consumers that, as a result of using the defendants' services, negative information would appear on consumers' credit reports and stay there for seven years.
- Falsely told consumers that money sent to the Jubilee companies would be held in a trust account to be used by defendants to pay off consumers' debts at a reduced rate, when instead the companies withdrew the funds to pay operating expenses.
- Failed to negotiate with and pay creditors as promised.
- Caused consumers to incur late fees, finance charges, overdraft charges, and negative information on their credit reports, and to face various types of legal action by creditors, leaving them in worse financial condition than before.

Status: Permanent injunctions against defendants

7. Better Budget Financial Services (BBFS) and its principals, John Colon, Jr. and Julie Fabrizio-Colon
Press release on November 15, 2004 at: www.ftc.gov/opa/2004/11/bbfs.shtm
Complaint filed November 15, 2004
Complaint alleged that the defendants:

- Falsely claimed that they could negotiate with consumers' creditors to reduce their debt by as much as 50 to 70 percent.
- Promised to negotiate with consumers' creditors for a non-refundable retainer fee, monthly administrative fees of $29.95 to $39.95, and 25 percent of any savings realized by a debt settlement, resulting in consumers paying hundreds or even thousands of dollars in fees.
- Told consumers to stop paying their creditors directly, claiming that consumers' failure to pay their creditors will demonstrate a "hardship condition" that will enable BBFS to negotiate on their behalf and instructed them to set a bank

account into which to deposit a specific amount each month to cover the fees and negotiated debt amounts.

- Claimed that they would settle each creditor's account once the consumer saves half the amount owed on each debt.
- Told consumers to sign power of attorney forms, claiming that the forms would enable BBFS to contact creditors on the consumers' behalf and instruct debt collectors to stop calling consumers directly.
- Instructed consumers not to talk to any creditors who contacted them directly.
- Told consumers that negative information may appear on their credit reports while they worked with BBFS, but that the information was temporary and that BBFS would direct consumers to a company to get assistance repairing their credit.
- Failed to negotiate with consumers' creditors or to contact debt collectors as promised, even after consumers called to let them know that they had sufficient funds set aside to pay a settlement.
- Caused consumers to incur late fees, finance charges, overdraft charges, and negative information on their credit reports, and to face various types of legal action by creditors or to file for bankruptcy, leaving them in worse financial condition than before.

Status: Settlement

Mr. RUSH. The Chair now recognizes Mr. Beisner for 5 minutes for his opening statement.

STATEMENT OF JOHN BEISNER

Mr. BEISNER. Good afternoon, Chairman Rush and Ranking Member Radanovich. I am John Beisner. I am a partner at O'Meleveny & Myers, and I am appearing on behalf of the Chamber of Commerce and the Chamber's Institute for Legal Reform.

My focus today is a narrow one. It is on section 4 of the Consumer Credit and Debt Protection Act, which would expand the authority of the States attorneys general to enforce Federal credit laws. Under section 4, as I understand it, States would be empowered to bring civil lawsuits whenever they believe their residents are harmed by a violation of a regulation promulgated under the bill or any FTC regulation related to consumer credit or debt. This legislation is part of a recent trend to expand State AG authority to enforce Federal laws.

Obviously, protecting consumers from unfair trade practices is an important legislative goal, but giving State AGs broader authority to bring civil lawsuits can create some potential for litigation abuse. The problem is that when State AGs are authorized to bring lawsuits, the State officials and their staffs may not be the ones who actually handle the litigation. Some officials like to hire private attorneys to handle such cases. Having private attorneys enforce Federal law can create some problems.

First, when State AGs hire private attorneys, they frequently do so on a contingency fee basis. In other words, even though they are working for the States, the private lawyers are promised a percentage of whatever they win in court. That makes these contracts very attractive. The private attorneys get to go into court as a representative of the State, which gives them instant credibility with the courts; and if they win, they get to keep a substantial portion of the money. This is where things get troubling.

Private attorneys are not bound by the same ethical rules as Federal enforcement officials. As a result, people make political contributions in the hopes of landing lucrative legal contracts with the States.

Federal officials are subject to ethics rules that ensure that decisions to hire private attorneys are not based on political contributions. Federal officials must also follow Executive Order 13433, which limits the Federal Government's ability to hire private attorneys under contingent fee arrangements. But these laws do not apply when State AGs contract with private attorneys. The safeguards that protect the integrity of the Federal enforcement efforts presently do not apply to the State AGs, even though they may be enforcing Federal law.

Now, I want to be very clear that the vast majority of State attorneys general exercise enforcement powers very responsibly, but there have been some troubling media reports of State officials handing over large cases to private lawyers who contributed to their campaigns.

In Mississippi, Attorney General James Hood has been criticized for hiring friends and contributors on a contingency fee basis. In Pennsylvania, Governor Rendell faced criticism for hiring a campaign contributor to sue on behalf of the State; and Rhode Island State officials have been criticized for hiring a prominent contributor to State officials to lead the State's litigation against lead paint companies.

A second problem with contingency fee arrangements is they can create an incentive for lawyers to pursue cases most likely to bring them the most money. But when it comes to enforcing public laws, the most lucrative cases may not be the most important. Public prosecutors must use their discretion every day to decide which cases they should pursue in the public interest, but when attorneys with their own financial interests are making that decision or participating in those decisions, public interest considerations may be ignored.

A third problem with contingency fee arrangements in enforcement actions is that they can shortchange taxpayers. When government lawyers prevail in litigation, the State gets all the money. In the contingency fee arrangement, the private attorneys get a significant percentage, reducing the amount going to taxpayers.

For these reasons, the Chamber respectfully suggests that in any legislation expanding State AG authority to enforce Federal laws, you should consider including safeguards to protect the public interests and guard against abuses. The first suggestion would be to require disclosure of private attorney retention agreements. When State officials hire private attorneys to enforce Federal law, they should disclose the arrangements to the U.S. Attorney General for publication in the Federal Register. Such transparency will help ensure that Federal laws are implemented consistently and fairly.

Secondly, it is suggested that State officials be barred from rewarding large campaign contributors with potentially lucrative contracts to enforce Federal laws.

Finally, it is suggested that the applicability of Executive Order 13433 be expanded. That order puts limitations on Federal officials from hiring private lawyers on a contingency fee basis. The same standard should apply to State officials enforcing Federal law. These safeguards would help ensure the transparent, proper use of authority to enforce Federal law in a manner wholly consistent with the goals of this legislation.

I thank you for the opportunity to testify today, and I look forward to answering any questions you may have.

[The prepared statement of Mr. Beisner follows:]

Testimony of John H. Beisner
Partner, O'Melveny & Myers LLP, On Behalf of the U.S. Chamber of Commerce and U.S. Chamber Institute for Legal Reform

Before the House Committee on Energy and Commerce, Subcommittee on Commerce, Trade and Consumer Protection

May 12, 2009

Consumer Credit and Debt Protection Act: State Enforcement Authority

Good afternoon Chairman Rush, Ranking Member Radanovich, and members of the Subcommittee. My name is John Beisner. I am a partner at O'Melveny and Myers, and I am appearing on behalf of the U.S. Chamber of Commerce and U.S. Chamber Institute for Legal Reform ("ILR"). As you know, the Chamber is the world's largest business federation, representing more than three million businesses and organizations of every size, sector, and region. ILR is a national campaign representing the nation's business community with the critical mission of making America's legal system simpler, fairer and faster for everyone. I appreciate the opportunity to testify about the Consumer Credit and Debt Protection Act.

My focus today is not on the substantive elements of the Consumer Credit Protection and Debt Protection Act.[1] Rather, I would like to discuss Section 4 of the bill, which enables state attorneys general to enforce the bill's substantive provisions and a broad range of other federal laws. Under Section 4, states may "bring a civil action on behalf of [their] residents in an appropriate State or district court of the United States to enforce the provisions of the Federal Trade Commission Act or any other Act enforced by the Federal Trade Commission . . . whenever the attorney general of the State has reason to believe that the interests of the residents of the State have been or are being threatened or adversely affected by a violation of a rule prescribed under [the Act] or any other rule relating to consumer credit or debt promulgated by the Federal Trade Commission." States must notify the Commission 60 days prior to filing suit under Section 4 so that the FTC has an opportunity to intervene. Finally, Section 4 permits states to recover damages, costs, and attorneys' fees.

Because Section 4 permits state attorneys general to invoke any law within the jurisdiction of the FTC, its scope is significant. A wide range of laws fall within the FTC's ambit, including the Truth in Lending Act, the Equal Credit Opportunity Act, the Consumer Leasing Act, the Fair Credit Billing Act, the Fair Credit Reporting Act, and the Fair Debt Collection Practices Act. As long as a state believed its residents were harmed by a violation of a Commission rule related to consumer credit or debt, it would have authority under Section 4 to sue.

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[1] Although my testimony has focused on the grant of federal authority to the state attorneys general in Section 4, the Chamber may have concerns over other aspects of the bill, such as the expedited rulemaking authority, and it appreciates the opportunity to discuss later with the Committee.

Although protecting consumers from unfair trade practices is a laudable goal, it is important for the Committee to recognize that providing state attorneys general with new and expansive authority to enforce federal law carries with it a significant risk of litigation abuse. Therefore, I respectfully urge the Committee to consider adding safeguards to the legislation to ensure that such authority is exercised in a uniform, open, and impartial manner.

Background: State Enforcement of Federal Laws

The authority of state officials to enforce federal laws is well-established in the antitrust realm, where the Sherman and Clayton Acts permit state attorneys general to prosecute anti-competitive behavior that violates federal law. In recent years, however, Congress has enacted several statutes that expand the authority of state and local governments to enforce federal laws into new areas. For example, state attorneys general are now empowered to enforce federal laws governing diverse issues such as automated telemarketing, on-line gaming, transportation of household goods, and on-line privacy – to name a few. In the past four months, Congress expanded state enforcement authority even farther: the economic stimulus bill authorized state attorneys general to enforce the federal Health Insurance Portability and Accountability Act, and the Omnibus Appropriations Bill authorized state attorneys general to enforce the federal Truth in Lending Act and any mortgage loan rules promulgated by the FTC, If enacted, Section 4 of the Consumer Credit Protection Improvement Act would mark an even more significant delegation of federal authority.

When the executive branch of the federal government enforces federal laws, those involved are subject to numerous safeguards to ensure that prosecutorial efforts are consistent, fair, and free from outside bias or political interference. Those safeguards include statutes prohibiting public corruption, ethics rules governing political activities of anyone retained by the government to assist in enforcement efforts, and Executive Order 13433, which limits the use of contingent fee arrangements with private attorneys retained by the government. States and the private attorneys they hire are generally not subject to such safeguards. As a result, delegation of enforcement authority to states can result in inefficient, haphazard prosecution efforts – and create opportunities for public corruption.

Let me be clear: the vast majority of state attorneys general exercise their powers every day in a responsible manner, consistent with the need to protect the citizens of their jurisdictions. Nevertheless, there have been troubling reports of some state officials placing large-scale litigation projects in the hands of private attorneys who have contributed to their campaigns. For example:

- Questions have been raised in Mississippi about whether Attorney General James Hood used private attorney arrangements to reward friends and political campaign contributors with contingency-based engagements that yield lucrative fees that would otherwise accrue to the state treasury.[2]

[2] *See, e.g.*, L. Rupp, *Senate Restricts Attorneys' Contracts*, CLARION-LEDGER, Jan. 26, 2008, at 1B ("Hood was under fire after attorney Joey Langston - one of his biggest campaign contributors - was paid $14 million to help

- Pennsylvania Governor Ed Rendell has recently faced similar criticism for awarding a no-bid contract to a campaign contributor – after his own Attorney General declined to hire the attorney – to sue a pharmaceutical company on behalf of the state.[3]

- In Rhode Island, state officials came under criticism for hiring Jack McConnell, a prominent contributor to state officials, to spearhead the state's litigation against lead paint companies on a contingent fee basis.[4]

In the public litigation context, contingency fee arrangements can also create significant conflicts of interest. A basic principle of good government is that public actors should not participate in decisions in which they have a financial stake. Deputizing plaintiffs' attorneys to serve as private attorneys general flouts this fundamental principle, because those attorneys get paid nothing unless they win – and they have no chance of winning unless they prosecute claims. Accordingly, such attorneys have a clear incentive to litigate (and to continue litigating), even when doing so is not in the public interest (particularly when the facts discovered indicate that prosecution is unwarranted).

Finally, contingent fee arrangements often shortchange taxpayers. Any recovery in litigation initiated by the government belongs, by definition, to the public fisc. Because contingent fee arrangements typically require a governmental entity to promise a significant percentage of its recovery to private counsel, the payments to those counsel divert money that should be going to taxpayers (or relieving their tax burdens).

Proposed Safeguards

For all of these reasons, Congress should approach the expansion of state authority to enforce federal laws with care – and ensure that any such expansion is accompanied by safeguards to ensure that federal laws are enforced in an open, impartial and ethical manner.

As the Consumer Credit and Debt Protection Act moves through the legislative process, the Subcommittee should consider amending the legislation to include some or all of the following safeguards:

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the state collect $100 million in back taxes from MCI. Earlier this month, Langston pleaded guilty to corruption charges in an unrelated case. In his statement, he said he tried to influence Mississippi judges, sometimes with help from Oxford lawyer Dickie Scruggs."); S. Byrd, *Senate OKs Attorney Bill*, HATTIESBURG AMERICAN, Jan. 26, 2008 ("[Judiciary Chairman Joey] Fillingane cited attorney Joey Langston of Booneville as an example of 'a mistake' made by Hood. Langston received $14 million in legal fees for assisting in the state's successful lawsuit against MCI, Inc. The state received $118 million from the lawsuit about overdue taxes. Langston also has made hefty contributions to Hood's campaigns."); N. Chandler, *Hood Defends Contract Awarded to Political Donor*, CLARION-LEDGER, Oct. 23, 2007 at 1B ("Langston gave a $100,000 contribution to Hood and a similar amount to the Democratic Attorneys General Association, which then contributed to Hood.").

3 *See, e.g.*, *Editorial: There Has to be a Limit*, PHIL. INQUIRER, Apr. 15, 2009, at A14.

4 *See, e.g.*, Mike Stanton, *In Deposition, Lynch Defended DuPont Pact As 'Best Deal,'* PROVIDENCE JOURNAL, Aug. 20, 2006, at A01.

- **Require Disclosure of Private Attorney Retention Agreements.** In order to ensure that attorney engagements are not driven by political considerations, Congress should require state officials who retain private attorneys to disclose the arrangement to the Attorney General of the United States for publication in the Federal Register. For a federal policy to be successful, it must be implemented in a fair and consistent manner, with effective oversight by the federal officials primarily responsible for enforcing it. Effective oversight becomes more difficult when enforcement is delegated to non-federal actors, which can lead to enforcement decisions that do not necessarily coincide with federal policy goals. Requiring transparency will help ensure the objective, consistent implementation of federal laws.

- **Prohibit "Pay-to-Play" Arrangements.** Congress should sever the connection between campaign contributions and "private attorney general" retentions by prohibiting state and local government officials from rewarding substantial campaign contributors with potentially lucrative contracts to enforce federal laws.

- **Prohibit Contingent Fee Arrangements Consistent with Executive Order 13433.** Under Executive Order 13433, the federal government can only enter contingent fee arrangements with private attorneys if the Attorney General finds that such an arrangement is necessary. As a result, federal agencies using private attorneys to assist in the enforcement of federal law may use contingent fee arrangements only where it is cost-effective and consistent with the public interest. Congress should apply these same standards to state and local governments' efforts to enforce federal law.

While these safeguards would promote transparency and reduce ethical concerns about the use of contingency fee arrangements to reward political donors, they would ***not*** diminish the discretion of state and local governments to make independent, objective judgments about the best course of action in each case involving enforcement of federal law.

Once again, thank you for the opportunity to testify today.

Mr. RUSH. The Chair thanks the gentleman and all of the witnesses.

The Chair recognizes himself for 5 minutes for the purposes of asking questions of these witnesses.

In the subcommittee's last hearing on consumer credit issues, I asked the FTC Chairman, John Leibovitz, about the Commission's record in protecting consumers from unfair and deceptive practices in the past several years. I noted that the FTC arguably didn't do enough to stop the mortgage lending practices during the housing era or housing boom, I might add. The Chairman argued that the FTC argued that the FTC is "hamstrung" by the burdensome rulemaking process under Magnuson-Moss, and he assured me that if Congress gave the FTC the authority to issue rules under the Standard Administrative Procedures Act, the FTC would indeed be more effective in this particular area. Today we are considering legislation that would give to FTC this authority that Chairman Leibovitz requested at one of our hearings.

My question to Ms. Keest—and I would also like to get a response from Ms. Harrington—Ms. Keest, Congress has duly given the FTC streamlined rulemaking authority on a case-by-case basis. We have taken another approach in this bill. The Chairman has requested we give the FTC broad APA authority to issue rulings on anything involving consumer credit or debt.

My question is should we trust the FTC's discretion to essentially use this authority, or will we be better off sticking with direct rulemaking?

Ms. KEEST. I think it is extremely important to give them discretion for the simple reason that the velocity at which the market changes is far too fast to have to come back and make a record every single time.

For example, the last time before Congress passed the H.R.—the predecessor of H.R. 72, 1728, last week, it had been 15 years before Congress acted on consumer mortgage issues. And there is a lot that goes on, and there is a lot that the FTC has on its plate. There is a lot that Congress has on its plate. And in the meantime, the markets develop and move, and I don't really think it is feasible to wait for specific direction as every problem comes up one by one.

Mr. RUSH. Ms. Harrington, do you want to comment briefly on this?

Ms. HARRINGTON. You can trust us.

And let me just tell you, let me give you some examples of how we used the Administrative Procedures Act rulemaking that the Congress has given us on a case-by-case basis.

In the area of telemarketing, the Commission issued the rules that the statute required, and then it went back several years later and did the "do not call" amendment. It took us less than a year to do that, and I was managing that project. And at the same time I was managing that project, I was managing amendments to the FTC's franchise rule, a very important rule that protects investors in franchises by requiring that they be given itemized disclosure statements.

It took us 8 years to do that amendment. It took us less than a year to create "do not call." And that is the way that we have used our discretionary authority under the Administrative Procedures Act rulemaking that we have been given on a case-by-case basis.

Mr. RUSH. I know that payday loans play a necessary role in the economy. Payday loans are available to poor people when no one else will lend to them. This is especially true of the type of short-term loans that poor consumers need to get by in emergencies. And I don't like the fact that people have to take out payday loans, but it is the reality of where I come from. I also recognize that there are some extreme and multiple abuses in the industry, and reform is needed. And I have been a long-time champion in the Congress of cracking down on this abusive payday lending.

My question is, how do we regulate the payday loan industry without destroying it?

Ms. KEEST. I think that is one of the areas that we can take an incremental approach on. There is a lot of controversy, and there is a lot of experimentation going on with States that have regulated by different means, ranging from do whatever you want to prohibition and everything in between. And as time comes in, we will have a better sense of what works and what doesn't work.

And in the meantime, I think that the proposal or that the recommendation that we have made to look at one tactic which I think is kind of the—it is sort of one of the tools that really makes things not work so well for consumers is the check-hold system. So I would very much welcome—and we did, in fact, recommend that that be one thing that the FTC look at. And if we could start incrementally there, then we can kind of work and see what is happening and see what is working out in the States.

Mr. RUSH. The Chair now recognizes the Ranking Member Mr. Radanovich for 5 minutes.

Mr. RADANOVICH. Mr. Chairman, I did want to have a discussion on the States and the attorney generals on the enforcement of this.

Ms. Harrington, welcome to the committee.

Does the Commission take a position on the State attorney general enforcement of these laws?

Ms. HARRINGTON. The Commission has favored the scheme under which Congress has enacted statutes giving the FTC rulemaking authority and providing the States with enforcement authority in Federal courts of the rules that are promulgated by the FTC. We are very supportive of that arrangement.

Mr. RADANOVICH. Do you worry about inconsistencies and confusion concerning a broad array of industries if the rulemaking authorities are given the authority for the attorney generals to weigh in?

Ms. HARRINGTON. The protection that the Congress has put into the statutes to make sure that we can guard against that is the provision that the States notify the FTC before filing so that we have an opportunity to talk with them and to take a look at complaints before they are filed. And the FTC also has the authority, under the statutory provisions that have been used, to intervene in actions in the event that there is some concerns about inconsistency.

So I think that the Congress has fairly anticipated that. And what we have seen now in probably a half a dozen or more instances in which the Congress has given the FTC specific APA rulemaking authority is an absence of that kind of inconsistency. This has worked very well.

Mr. RADANOVICH. Now, in your opinion, if this bill does include giving State AGs the enforcement authority, can you define how it might be given, as narrowly as possible?

Ms. HARRINGTON. If the States are given the authority to enforce rules issued by the FTC under the statute, then that would be their authority. It would be very much like telemarketing, 900 numbers, certain other credit rules that the States are able to enforce.

Mr. RADANOVICH. The legislation contains a provision for any State AG to notify the Commission 60 days in advance of filing an action, if feasible. Otherwise, it can proceed without notifying the Commission. Is that a concern for you?

Ms. HARRINGTON. What I would be concerned about is 60 days is probably way too soon. We do these cases, the States do these cases. Sometimes it takes fewer than 60 days to work up the whole case, work up the complaint and be ready to file. So I think that 60 days is probably unreasonable. And several of the other statutes provide for notice if feasible, or there is some term like that.

We haven't had a problem. We work very closely with the States in consumer protection. We have different working groups on different subject areas: telemarketing, payment systems, whatever, their monthly phone calls. Everybody knows what everybody is doing here. There aren't many surprises in this area because there is an awful lot of work to do in consumer protection, and there aren't that many resources at the Federal and the State level to do it with. So we need to work closely together, and the left hand needs to know what the right hand is doing.

Mr. RADANOVICH. Thank you.

Mr. Beisner, welcome to the committee. I do have a question regarding the State AGs as well.

Were there no rules promulgated, we could have 52 interpretations of what is fair and deceptive, and that, of course, would be by 51 attorneys general and the FTC. What is the likelihood of inconsistent interpretation of the FTC's standard that it would create confusion and concern in a broad array of industries, and how could this impact industry at large?

Mr. BEISNER. I should make clear at the outset of responding to the question that the Chamber has no position on the delegation of authority to the AGs to enforce.

But I think there is some possibility of inconsistency just in the decisionmaking about where to enforce the priorities that would be given to certain areas, enforcement by certain State attorneys general. So I think there is some possibility of inconsistency on that just in the enforcement decisions that would be made when you have got that many people making decisions about where the enforcement resources should be devoted.

Mr. RADANOVICH. How do we make sure that the primacy of FTC's interpretations of the standard? How do we ensure that the FTC has primacy?

Mr. BEISNER. I think that a methodology for doing that is through the agency itself making clear its interpretations of what rules it wishes to enforce on that, and to ensure that the notice provisions in here and so on are such that the agency does have the opportunity to participate in making decisions about enforcement.

Mr. RADANOVICH. Thank you, Mr. Chairman.

Mr. RUSH. The Chair now recognizes the gentlelady from California, the wonderful coast of California, Ms. Matsui for 5 minutes.

Ms. MATSUI. Thank you, Mr. Chairman.

As you know, a government effort has been initiated by the Treasury Department, HUD, Justice Department, and the FTC to combat mortgage foreclosure rescue scams and loan modification fraud. As I mentioned in my opening statement, during debate on mortgage reform on the Anti-Predatory Lending Act, I offered an amendment that was included in the final bill to direct the GAO to evaluate ongoing government actions to combat foreclosure rescue fraud and to educate consumers about the risk of these scams.

In addition, I want to thank Chairman Rush for joining me in sending a letter today to the GAO Comptroller General to urge him to begin reviewing the administration's efforts to combat foreclosure rescue scams.

Mr. Chairman, I ask unanimous consent to enter this letter into the record.

Mr. RUSH. Hearing no objection, so ordered.

[The information follows:]

ONE HUNDRED ELEVENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON ENERGY AND COMMERCE

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May 12, 2009

Mr. Gene L. Dodaro
Acting Comptroller General
U.S. Government Accountability Office
441 G Street, NW
Washington, DC 20548

Dear Mr. Dodaro:

We are writing to request that GAO evaluate the federal government's recently announced efforts to combat mortgage foreclosure rescue scams and loan modification fraud, and to educate consumers about the risks posed by these scams.

As you know, the foreclosure crisis is at the root of the current economic crisis. More than eight million homeowners are expected to face foreclosure over the next four years, and many of these homeowners are seeking assistance in modifying their loans to save their homes. Too often, these struggling homeowners are tricked by scam artists posing as "foreclosure consultants" whose services only put the homeowners deeper into debt.

The Obama Administration has undertaken an ambitious effort to combat these fraudulent activities. On April 6, 2009, the Treasury Department, the Department of Housing and Urban Development, the Department of Justice, and the Federal Trade Commission announced a multi-agency crackdown targeting mortgage foreclosure rescue scams and loan modification fraud. This effort is aimed at combating fraudulent loan modification schemes, coordinating agency investigations of fraud, and assisting with enforcement and prosecutions.

It is imperative that Congress understand the scope of these efforts, their effectiveness, and their likelihood of success. On May 7, 2009, the U.S. House of Representatives passed H.R. 1728, the Mortgage Reform and Anti-Predatory Lending Act of 2009. An amendment to that bill introduced by Rep. Matsui would require GAO to assess and report on the Administration's interagency efforts to combat mortgage foreclosure rescue scams and loan modification fraud.

Mr. Gene L. Dodaro
May 12, 2009
Page 2

Rather than waiting for H.R. 1728 to become law, however, we request that GAO begin this review of the Administration's multi-agency effort now.

If you have questions, please contact Kyle Victor with Rep. Matsui at 202-225-7163 or Anna Laitin with the Energy and Commerce Committee staff at 202-226-5853. Thank you for your consideration.

Sincerely,

Bobby L. Rush
Chairman
Subcommittee on Commerce, Trade, and Consumer Protection

Doris O. Matsui

Doris Matsui
Member
Subcommittee on Commerce, Trade, and Consumer Protection

cc: Henry A. Waxman
Chairman

Joe Barton
Ranking Member

George Radanovich
Ranking Member
Subcommittee on Commerce, Trade and Consumer Protection

Ms. MATSUI. Ms. Keest, your organization prides itself on preventing mortgage fraud and providing consumer protection for the consumer in the marketplace. How big a threat are these foreclosure scams to the American homeowner today?

Ms. KEEST. They are a huge threat.

First, I want to thank you, Congresswoman Matsui, for your leadership on the issue of foreclosures.

It is a chronic problem. And every time the foreclosure rates rise, they come out of the woodwork. And the best way to get rid of them is to bring the foreclosure rates down. So hopefully we can do that. But that being said, they are going to be a presence.

And so I think it is one of the things that the State AGs and the States and the FTC I know have all taken to heart and put it at the top of the priority list, because right now that is the biggest equity-skimming scam out in there. And so it is number one right now, I would say.

Ms. MATSUI. How would the U.S. actually assess the current efforts of the government to educate and to get the word out to the homeowners of these scams?

Ms. KEEST. I will say that every time I go on a government Web site, I see it on its front page, so I recognize that they are really trying to do things. I don't know how many homeowners look to the Web pages of government agencies first when they are faced with that, so I am not sure what the outcomes would be. I would hope that one of the things that GAO would do would be to look at and evaluate those kinds of efforts.

Ms. MATSUI. Is there a particular area that you believe that the government or FTC should focus on to combat these scams during its rulemaking process?

Ms. KEEST. I think I would have to say part of the—one of the things that they need to do is to make sure that there is some substantive practices that are prohibited as opposed to dealing with disclosures, because the disclosures pretty much can always be worked around. So I would hope they would take stock of what some of the most common techniques are, the deed theft issues, that sort of thing, and consider substantively declaring them to be unfair, which is going to take care of the inconsistent enforcement problems and level the playing field for everybody.

Ms. MATSUI. That said, I would like to hear more on the government's efforts to prevent foreclosure rescue and loan modification scams.

What specific role, Ms. Harrington, does the FTC play in joining with other government agencies in combating foreclosure rescue scams?

Ms. HARRINGTON. Multiple roles.

First of all, the FTC operates the Consumer Complaint Center. It is Consumer Response Center and Consumer Sentinel, which is the complaint database. So we are the place where people complain to. And if you go to the Treasury Web site, makinghomeaffordable.gov, and need to make a complaint, that will come over to the FTC. So we collect the complaints, number one.

Number two, we do law enforcement work. In the last year, we have brought 11 cases against mortgage foreclosure rescue scams, and we have more in our pipeline.

Number three, we do consumer education. We do it in our Web site, but also there are a lot of other ways. In the initiative that we announced on April 6th, we announced that we had recruited and enlisted some of the largest mortgage servicers, including Chase, and, I think, Bank of America, and Wells Fargo and others, to put right in the delinquency notices that go out to homeowners when they are first behind on their mortgage payment a warning sheet from us about mortgage foreclosure rescue scams and how to spot them.

We also made audio recordings, and we gave them to all of the mortgage-servicing companies to play when people call them and are put on hold. We have really—and they are good. They are not like—they are interesting. But they warn people about what to watch out for.

So we are doing education. We are trying to reach consumers who are most at risk right at the point of where they are at risk.

And we continue to work. For example, FinCEN, which is the Department of Treasury data center where banks and financial institutions make suspicious activity reports to, the FinCEN people are working with us. They have created a special team of analysts to analyze suspicious activity reports concerning entities that we are watching as possible parties to mortgage foreclosure fraud. So there is a lot of criminal/civil/cross-government cooperation on this issue, better than I have ever seen.

Ms. MATSUI. Thank you very much.

Mr. RUSH. The Chair now recognizes the Ranking Member of the full committee Mr. Barton of Texas for 5 minutes—or for 2 minutes.

Mr. BARTON. I won't take the 5 minutes.

I have looked—of course, this panel is talking about the Consumer Credit and Debt Protection Act. The next panel will talk about the mercury bill. I think it is a good thing to have these legislative hearings.

I can tell you, Mr. Chairman, that the Republicans on the subcommittee are on board on moving these bills, but we certainly think we should take a look at them.

My only question on the Consumer Credit and Debt Protection Act would be to Mr. Beisner. Your testimony talks about the potential abuse of giving the attorneys general the authority to enforce a Federal statute. Is there anything you would care to elaborate about that?

Mr. BEISNER. I think fundamentally the view that we are trying to express is that when Federal enforcement officials go about enforcing a law they are subject to a series of ethical requirements in the way they go about doing that; and what is being suggested here is that if that authority to enforce Federal law is being given to State Attorneys General there ought to be a similar set of safeguards with respect to enforcement of that law. Not interfering at all with whatever decisions may be made about enforcing State laws, but the Federal principles ought to be the same so that there can be good efforts made to ensure the integrity of that law enforcement process. And it is just to ensure that that integrity will be there.

I don't mean, as I said earlier, to suggest that there is any suggestion that the vast majority of the State Attorneys General are going off on the wrong track with these enforcement decisions. But when you give, as some of them do—certainly not all of them, but some of them do give that enforcement authority to private attorneys. There is a special need to ensure that ethical considerations are being observed in that circumstance. Because they are not government officials, and they are not subject to the same requirements as a Federal office of enforcing the law is.

Mr. BARTON. Mr. Chairman, that is my only question. We certainly don't oppose the intent of H.R. 2309. If staff and members could work on some of the concerns that have just been raised, I think we could probably reach an accommodation.

But, with that, I yield back.

Mr. RUSH. The Chair thanks the Ranking Member, and the Chair would like to emphasize it is the Chair's intention to work with the Republicans so that we can come up with a bipartisan bill. So I think there is a lot of—if we all say——

The Chair now recognizes the gentlelady from Illinois, Ms. Schakowsky, for 5 minutes—or 2 minutes, rather—5 minutes, 5 minutes for purposes of questioning the witnesses.

Ms. SCHAKOWSKY. Thank you, Mr. Chairman.

I am wondering—and maybe you said this already. I am sorry. I had to leave. If you could walk us through how a single rulemaking under Magnuson-Moss procedures could take 10 years and how the new procedures then would make the agency more effective in protecting consumers.

Ms. HARRINGTON. Certainly. There are a variety of mandatory provisions in Magnuson-Moss rulemaking that aren't found in Administrative Procedures Act rulemaking. For a Magnuson-Moss rulemaking, there must be an advance notice of proposed rulemaking. Under APA 553 rulemaking, that is not required. The NPR not only must be issued but it must address certain matters, and it must be submitted to Congress in advance so that the Congress—and the Congress can essentially veto the rulemaking. That is not true with Administrative Procedures Act rulemaking.

At the notice of proposed rulemaking stage there are also very significant differences. Under Magnuson-Moss——

Ms. SCHAKOWSKY. Excuse me. Did you already do this for the committee?

Ms. HARRINGTON. No.

The proposed rule must be based on a Commission determination that the practice is to be deemed unfair and deceptive are prevalent. That is, if cease and desist has been issued against an act or practice or other information indicates a widespread pattern. There is a requirement of a showing of prevalence before the notice of proposed rulemaking can go or has to be included with a notice of proposed rulemaking. There are no findings of that type required under the Administrative Procedures Act before an NPR may be issued.

There is also a requirement that the Notice of Proposed Rulemaking be submitted to Congress 30 days before it is published in the Federal Register. There is no similar requirement under the Administrative Procedures Act.

There is a requirement under Magnuson-Moss for a public comment period. That is not always required under APA rulemaking. Generally, it is not a public comment period under an APA rulemaking when there is some sort of emergency rule that an agency is issuing.

There are express ex parte restrictions under Magnuson-Moss rulemaking. There aren't under the Administrative Procedures Act. Although I can tell you as a matter of practice at the FTC when we do APA rulemaking in the notice, we include ex parte restrictions. So that is pretty much the same.

OK, here is where it really gets bogged down. Under Magnuson-Moss, there has to be an opportunity for a public oral hearing. And if a hearing is requested by anyone—anyone can request a hearing in a Magnuson-Moss rulemaking—then there has to be a presiding officer appointed. And there has to be a supplementary NPR published before any hearing that outlines the hearing issues which may lead to addition or deletion of issues based on public comment to the notice of the hearing.

Then there is a process that is required for the identification of interested parties and their representatives to attend this hearing. Interested parties have to be given the opportunity to do direct and cross examination of other interested parties. So in some of the rulemakings, for example, the one that Ms. Keest mentioned that went on for 10 years, interests that did not want this rule to be issued engaged in perpetual rounds of examination and cross examination.

Then there is a requirement that all of this be prescribed—transcribed verbatim. And just getting the stenographer to transcribe, you know, days and weeks and months of Kathleen cross examining Eileen and Eileen cross examining Kathleen, this is what is required, that takes time.

Then the staff has to issue a staff report at the end of all of these hearings, and the presiding officer has to issue a recommendation or a decision. And then there is a public comment period required on all of this. That is just at the NPR stage.

Under the Administrative Procedures Act, generally comments are submitted in writing. There is no requirement for a public hearing. At the FTC when we do APA rulemaking, we always do public workshops. We want to be very transparent. But it doesn't take very long.

And then at the final rule stage for a Magnuson-Moss rule there has to be a statement of basis and purpose issued to accompany the rule; and it must state the prevalence of acts or practices that are treated by the rule, the manner and context in which they are unfair or deceptive and the economic effect of the rule, taking into account small businesses and consumers.

And specifically on the economic analysis there has to be a cost-benefit analysis of each of the rules provisions. The statement of basis and purpose needs to address all of the comments and explain why the Commission did not adopt any particular—I see you looking at this and I am going on and on. And this is just describing it. You know, living it and doing it takes 10 years.

The Administrative Procedures Act, at the conclusion of the comment period, a rule can be issued. It needs to contain a concise and general statement of basis and purpose, not this really detailed.

And then, finally, the standard for judicial review is different.

Ms. SCHAKOWSKY. I know the chairman is giving me extra time, but the time is up. I see even just by how long it takes to explain it how it is. But I am really encouraged by the notion that we can reach some agreement here, Mr. Chairman; and I really appreciate that explanation. Thank you.

Mr. RUSH. The Chair thanks the gentlelady.

The Chair really thanks these witnesses. You have been extraordinary in your sharing with the members of the subcommittee your thoughts, and they are really going to be taken into much great consideration as we proceed. I just again want to thank you for taking the time off of your schedule, and you will be contacted for further input as we proceed.

Let me just ask, if you would, we will keep the record open for 72 hours, and so within the 72-hour period you may or may not be getting written questions from members of the subcommittee, those who are present and those who are not present. And if you would be really timely in your responses that certainly would be a benefit to the subcommittee.

Thank you very much, and we will dismiss the first panel. Thank you so much. It was good. In a respectful manner. Thank you so much.

Mr. RADANOVICH. Mr. Chairman.

Mr. RUSH. The Chair recognizes Mr. Radanovich.

Mr. RADANOVICH. Thank you, Mr. Chairman.

I request unanimous consent that three items be included in the record. That would be a statement of the American Financial Services Association, the National Automobile Dealers Association, and the Florida Attorney General Bill McCollum.

Mr. RUSH. Hearing no objection so ordered.

Mr. RADANOVICH. Thank you, Mr. Chairman.

[The information follows:]

HOUSE COMMITTEE ON ENERGY AND COMMERCE
SUBCOMMITTE ON COMMERCE, TRADE, AND CONSUMER PROTECTION

HEARING ON
H.R. 2309, THE CONSUMER CREDIT AND DEBT PROTECTION ACT

Tuesday, May 12, 2009

TESTIMONY OF
THE AMERICAN FINANCIAL SERVICES ASSOCIATION

AFSA
American Financial Services Association

HOUSE COMMITTEE ON ENERGY AND COMMERCE
SUBCOMMITTE ON COMMERCE, TRADE, AND CONSUMER PROTECTION
H.R. 2309, THE CONSUMER CREDIT AND DEBT PROTECTION ACT
Tuesday, May 12, 2009

TESTIMONY OF THE AMERICAN FINANCIAL SERVICES ASSOCIATION

The American Financial Services Association (AFSA) is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. Its 350 members include consumer and commercial finance companies, auto finance/leasing companies, mortgage lenders, credit card issuers, industrial banks and industry suppliers.

AFSA appreciates the opportunity to provide testimony to the Members of the Subcommittee on H.R. 2309, *The Consumer Credit and Debt Protection Act*. While AFSA applauds the subcommittee's attempt to address problems facing the debt settlement and automobile sales industries, AFSA believes that much of the legislation as currently drafted will likely result in additional harm to consumers.

First, giving the Federal Trade Commission (FTC) expedited rulemaking authority and authority to obtain civil penalties in connection with unfair and deceptive acts or practices (UDAP) could result in rushed and unfair decisions that have a broad negative impact on industry and consumers. Second, the provision restricting post-sale changes in financing terms is too broad and would limit consumers options. Third, allowing the consumer to cancel the transaction within a specified period after contract is signed would greatly increase the complexity of car-buying with little, if any, added benefit for the consumer. Fourth, limiting the ability of automobile dealers to accept or solicit compensation could have the unintended consequence of eliminating the finance and insurance office in the dealership, thus destroying the indirect financing model, which would limit the number of financing options available to the consumer. Fifth, allowing state attorneys general (AGs) is unnecessary and would create confusion.

I. FTC: Expedited Rulemaking Authority [Section 2(a)] and Authority to Obtain Civil Penalties in Connection with Unfair and Deceptive Acts or Practices Relating to Consumer Credit or Debt [Section 3]

The expedited rulemaking authority could lead to a serious "rush to judgment," allowing the FTC to create major industry-wide regulatory changes without adequate time for business input and thoughtful consideration.

The Magnuson Moss rulemaking requirements, which have been in effect for more than 30 years, provide procedural safeguards that are appropriate when a federal agency is given a broad mandate to proscribe by regulation "unfair or deceptive acts or practices" in interstate commerce. When applied to the Commission's consumer protection mission, "unfair or deceptive acts or practices" can be, and has been, interpreted very broadly. Without adequate opportunity for concerned public input, the agency could promulgate rules that are based on subjective notions of unfairness or on an incomplete understanding of an industry or of the full consequences of a rule.

In at least two instances, a Court of Appeals overturned the FTC's final rule as unsupported by the record. In many other cases, the Magnuson Moss rulemaking process led the FTC to decline to publish a final rule or to promulgate a more reasonable rule than originally proposed. The deliberative process inherent in Magnuson Moss rulemaking has served the public interest well.

Additionally, if the FTC is allowed to obtain civil penalties in connection with UDAP, a defendant could face civil penalties of several thousand per violation, based on an act or practice that is adjudicated to be unfair or deceptive for the first time in the lawsuit against the defendant.

No company should face the prospect of civil penalties for an act or practice until there has been a prior determination that the act or practice is unfair or deceptive and the company has had actual knowledge of that determination. That is why FTC civil penalty actions in U.S. District Court under Section 5 of the FTC Act are reserved for violations of rules or cease and desist orders. This process provides appropriate notice, not only to the target of the FTC enforcement action, but to the industry as a whole, and lets market participants reform their practices before facing crippling fines and penalties.

The requirement of knowledge that an act or practice is "unfair or deceptive" is based on the fact that these terms are very broad, susceptible to differing interpretations and applied to many different industries. "Unfairness" is a particularly evolving standard, in both the FTC's interpretation and its use in enforcement actions.

II. Restricting Post-Sale Changes in Financing Terms

This provision is unnecessarily broad. It would clearly cover assignee serving activities, such as extensions, rewrites, payment schedule modifications. Such collection activity takes place in distressed obligations to allow the consumer to continue in the contract. Without such flexibility, repossessions would increase and consumer options would be greatly limited.

Additionally, the Truth In Lending Act (TILA) sets out a process to correct disclosures that are technically inaccurate but that do not harm the consumer. It is also the practice of many creditors to send similar notices to correct minor inaccuracies in the documentation that were not intended by the parties under "contract reformation" law. Failure to carve out the ability to make these changes is inconsistent with existing law (both TILA and general contract law) and would impose a significant hardship on consumers who would be required to come back to the dealer to correct their contracts for relatively minor items.

Finally, post-sale changes in financing terms are extensively regulated by the states. Further regulation is unnecessary.

III. Allowing the Consumer to Cancel the Transaction Within a Specified Period

AFSA does not believe that this provision is necessary. Car purchases are not impulsive buys. On the contrary, they are usually very well researched. It may be that Congress is trying to prevent the same pressure or undue influences as has been alleged in home solicitation sales from occurring in the automobile industry. However, there have been no signs of that pressure or undue influence in the automotive industry. Moreover, the right of rescission under a TILA mortgage transaction does not apply to purchase money mortgage loans, so it should not apply to purchase money automobile sales.

It is important to distinguish that door-to-door sales are much different that sales made at a dealership and so the regulations governing the two types of sales should be different. There are already heavily regulated. In fact, the FTC has public comment on its Trade Regulation Rule Concerning Cooling-Off Period for Sales Made at Homes or at Certain Other Locations (Cooling-Off Rule). There are states laws for duress under contract law and state unfair and deceptive practices laws. In fact, several states have looked at all of these issues and are happy with the solutions they have already come up put in place.

As opposed to helping consumers, the legislation could, in fact, end up mandating a "three day waiting period" provision where consumer picks up vehicle after expiration of rescission period to avoid titling issues. This will likely anger consumers, particularly if they had to trade in their car and then cannot drive home with a new one and so are left without a car.

This provision would also hurt the dealerships and finance companies the government is working so hard to save. If vehicle was sold as "new," but returned under a right of rescission it would then have to be classified as "used," which would lower its value. This would place an undue financial burden on dealers who would take back into inventory vehicles at significantly lower values. Additionally, if it becomes truly a three day right to rescind after delivery of the vehicle, and market practices result in those contracts being purchased prior to termination of rescission period, more risk is put on to the assignee finance company, who must now assume risk of dealer solvency when repurchase rights are exercised.

If Congress does feel that this provision will benefit consumers, it should allow consumers to waive their right to rescission.

IV. Limitations on Dealer Compensation

There is no indication that the existing method for computing dealer compensation has involved any type of systemic abuse or unfairness to consumers. Franchised automobile and truck dealers offer very competitive financing rates to consumers based on their relationships with numerous finance sources.

This provision appears to be based on the conclusion that the borrower will receive all the financial benefit from the decrease in dealer compensation. However, this provision could have the unintended consequence of eliminating the finance and insurance office in the dealership, thus destroying the indirect financing model, which is a major source of financing for consumers.

Not only may many consumers be left without the ability to get a loan, but those that do will have to do much more work to find someone to finance the purchase. In fact, this would have a greater negative impact on that segment of society that does not have access to traditional banking channels.

V. Enforcement by State Attorneys General

If Congress were to give the AGs the authority to enforce the federal rules and statutes, the result would be the creation of new federal requirements and prohibitions based on state enforcement actions. State AGs lawsuits enforcing the federal law could result in duplicative and inconsistent lawsuits based on the same conduct. Such lawsuits would undermine the federal standards under the FTC rules and federal statutes. Moreover, state unfair or deceptive acts or practices statutes often provide that they are to be interpreted consistently with the federal law. As a result, an action by a state AG could create new law in other states, as well as new federal law.

It is unnecessary to give state AGs this new power. As a matter of practice, the state attorneys general regularly join with the FTC in enforcement actions and settlements. When they do so, however, each attorney general proceeds under its own state law, which is how it should be.

Again, AFSA appreciates the opportunity to submit testimony to the subcommittee on this legislation.

Statement of the National Automobile Dealers Association

Regarding H.R. 2309, the Consumer Credit and Debt Protection Act
Before the House Commerce, Trade and Consumer Protection Subcommittee
May 12, 2009

Mr. Chairman, I appreciate the opportunity to submit testimony regarding H.R. 2309, the Consumer Credit and Debt Protection Act, on behalf of the National Automobile Dealers Association (NADA). NADA represents 19,000 franchised automobile and truck dealers who sell new and used motor vehicles and engage in service, repair, and parts sales. Together they employ more than 1,000,000 people nationwide yet a significant number are small businesses as defined by the Small Business Administration.

Each year millions of Americans buy millions of new and used vehicles. In addition to selling new cars, the nation's franchised dealers also sell used cars. Consumers may also purchase used cars from independent dealers or from another consumer in a private sale. Prior to the current recession, the new and used car market was relatively stable for several years. Franchised dealers sold approximately 16 to 17 million new vehicles each year between 2000 and 2007. During the same timeframe, the nation's independent dealers sold approximately __ million used vehicles per year.

The systemic, ill-advised lending practices that triggered the subprime lending crisis for residential mortgages are not evident in the auto finance lending model. During the past several months, it has become painfully evident that some residential lenders failed to engage in even the most rudimentary due diligence with respect to the creditworthiness of prospective borrowers. In effect, these lenders were "betting" more on the collateral to appreciate rather than on the borrower to repay. This approach is simply not possible in the auto industry, because all parties involved in auto lending – the lender, the dealer, and even the consumer – know that the collateral, i.e, the vehicle, is a depreciating asset. Moreover, subprime residential loans typically carried teaser rates, so which caused adverse economic consequences for some consumers when the interest rate adjusted. In contrast, auto loans typically carry fixed interest rates for a fixed term. Also, while many subprime residential loans included heavy penalties to refinance, the typical auto loan may be refinanced with minimal cost. Therefore, the problems and the solutions for the subprime lending crisis are not instructive when analyzing the current state of consumer auto lending.

America's auto retailing sector is highly competitive, and consumers benefit from a myriad of choices, not only in what vehicles to buy, but in financing options too. Dealer-assisted financing has increased access and decreased the cost of credit to Americans over the years. Consumers can rely on two types of financing – direct lending and indirect lending. In a direct lending relationship, the consumer works directly with a finance company, bank, or credit union to obtain a loan before visiting a dealership. When the consumer and the dealership enter a contract to purchase a vehicle, the buyer uses the proceeds of the loan from the direct lender to pay the dealership for the vehicle. With the indirect lending model, the dealer assists in arranging the financing.

In the United States, 94 percent of all consumer vehicle acquisitions are financed. Affordable and accessible credit is an essential element of motor vehicle commerce. Since the average price of a new vehicle is now more than $28,000, few consumers have the means to pay cash for such a major expenditure. Dealer-assisted financing has enabled tens of millions of Americans to meet their transportation needs. During the past 10 years, franchised dealers have sold almost 300 million vehicles – approximately 150 million new vehicles and approximately 150 million used vehicles. Therefore, approximately 300 million franchised dealer-to-consumer transactions occurred during the past decade, and ___ percent were financed by lease or a retail installment contract.

Below are NADA's comments on the specific provisions of H.R. 2309:

1. **Section 2(a)** creates authority for the Federal Trade Commission (FTC) to engage in an expedited rulemaking for any rulemaking related to consumer credit or debt. The current rulemaking process is intended to produce well-considered rules that

account for the concerns of consumers and businesses. There has been no showing that the current process is in need of revision. Imposing new authority to speed up the process will only increase the likelihood that the FTC will promulgate final rules that are uninformed and ill-considered.

2. **Section 2(b)(2)** states that the FTC shall "examine the practices of automobile dealers with respect to credit and lending and shall prescribe such rules as necessary...in order to prevent unfair or deceptive practices of such dealers." The Subcommittee should be aware, however, that the Federal Trade Commission Act, 15 U.S.C. § 41 *et. seq*., already prohibits deceptive or unfair practices in the auto retailing sector. This subsection directs the FTC to use its limited resources to conduct a "fishing expedition" into an area for which it already has the authority to address problems.

3. **Section 2(b)(2)(A)** mandates that the FTC consider adopting rules that (1) restrict post-sale changes. NADA believes that, in addition to the FTC's considerable existing authority to address unfair or deceptive acts or practices, current state laws and regulations governing post-sale changes ensure adequate protection for consumers .

4. **Section 2(b)(2)(B)** mandates that the FTC consider adopting rules that require purchase agreements include a provision which permits the consumer to cancel the transaction within a specific period. This type of proposal is often called a "cooling off" period. Some proponents cite as an example the situation in which consumers can reject financing contracts within three days of signing the loan documents. There are, however, some fundamental economic differences between auto purchases and other consumer purchases. A motor vehicle is not like many other consumer goods that – subject to a retailer's stated policy – can be returned and put back on the shelf for retail sale at the original price. Consumers recognize the reality that a new car is an asset that usually depreciates immediately upon leaving the showroom. Given the choice between a car that has

never been sold and a car that has been sold and returned within a cooling off period, virtually every consumer would chose the car that has never been sold unless the returned car is discounted. This depreciation is immediate, so the consumer would not be able to receive a complete refund without imposing a significant cost on the dealership. The California Legislature recognized this economic reality when passing state legislation. The [cite to CA car buyers bill of rights] enables consumers to return vehicles if they purchase this right.

5. **Section 2(b)(2)(C)** mandates that the FTC consider adopting rules that limit the ability of automobile dealers to receive compensation for providing dealer-assisted financing. This proposal needs to be considered in the context of the present economic state of the retail automotive sector. As Members are aware, the Obama Presidential Task Force on the Auto Industry is currently advocating the elimination of 2,600 General Motors dealers, and between 700 and 800 of Chrysler dealers. This action, if implemented, will result in 187,000 employees losing their jobs, at a time when the national unemployment rate is 8.9 percent. NADA strongly opposes further limiting dealer revenue streams, which would only serve to hasten the closing of more dealerships.

   In light of the weakened state of the auto industry, this subsection ignores the voluntary and optional nature of dealer-assisted financing. Dealers typically can offer consumers very competitive financing terms based on the dealership's relationships with multiple finance sources. A multitude of non-dealer financing options exist and consumers can, and frequently do, arrange their financing directly with those entities. Encouraging FTC to promulgate rules that alter the dealership's financing model is unwarranted.

6. **Section 2(c)** mandates that rulemakings "required under subsection (b)" commence within 6 months after the date of enactment. However, there are no required rulemakings under subsection (b).

7. **Section 3** provides the FTC with civil penalty authority for consumer credit or debt practices it determines to be unfair or deceptive. The authority to punish businesses for past conduct should not be permitted unless the conduct is understood to be clearly unlawful. The very nature of the phrase "unfair or deceptive" can be quite vague and permitting civil penalty authority for acts determined by the FTC to constitute a violation can unfairly subject businesses to punishment for conduct they were unaware was problematic. There is no compelling reason to alter the existing enforcement scheme in this arena.

Mr. Chairman, consumers do not need regulations for their protection; they need more education so that they can take more control over their personal finances. For the past several years, NADA has taken an active role in consumer education in the area of auto finance. In conjunction with the American Financial Services Association (AFSA) Education Foundation, NADA published *Understanding Vehicle Finance*, a consumer guide that provides in both English and Spanish the basics about financing the purchase of a car. This publication was prepared in cooperation with the FTC. NADA, AFSA, and other finance sources also founded and have supported the expansion of the Americans Well-informed on Automobile Retailing Economics (AWARE) Coalition to promote consumer education on the vehicle financing process. Its website, www.autofinancing101.org, contains numerous educational tools to assist consumers. We believe that continued dissemination of these types of materials will do more to increase consumer protection than potentially duplicative, and ill-considered regulations.

In general, the auto-related provisions of H.R. 2309 have already been addressed in some regard by Congress, the FTC, or the States. We believe that the unintended consequences of the regulations contemplated by this legislation could very well serve to reduce financing options for lower income consumers.

Mr. Chairman, NADA welcomes the opportunity to educate policymakers and the public on our members' business model. The dealer-assisted finance model provides convenience and competition which benefits the consumer. We look forward to working with Members of the Subcommittee in the months ahead on policy options that protect consumers without unintentionally causing more economic hardship in the auto sector.

Written Testimony of Florida Attorney General Bill McCollum before the House Committee on Energy and Commerce, Subcommittee on Commerce, Trade and Consumer Protection
May 12, 2009

In relation to the subject of today's hearing, I have submitted testimony about transparency in private attorney contracting with state Attorneys General. To put my testimony in context, I will discuss legislation that I supported before the Florida Legislature. I believe similar legislation is worthy of consideration by Congress where state Attorneys General are granted authority to enforce federal statutes.

Accountability in government is what people deserve. During the 2009 Florida Legislative Session, I urged the Florida Legislature to pass the *Transparency in Private Attorney Contracting* legislation, which secures good government principles for the Florida Attorney General's office. I have attached a copy of this legislation to my testimony.

As Floridians witnessed with the tobacco settlement, state government can go too far in hiring contingency fee lawyers for what is ultimately tens of millions of dollars that should go to consumers. A contingency fee legal contract may be needed when the State does not have the resources to pursue a complex lawsuit, however a number of states have seen abuse when the state's pursuit of justice is manipulated by money and political connections.

The *Transparency in Private Attorney Contracting* legislation ensures that contingency fee contracts are transparent and open to public scrutiny. The bill requires the Attorney General to make a written determination that a contingency fee agreement with a private attorney is both cost-effective and in the public's best interest.

The proposal requires the Attorney General to competitively procure these types of contracts, if feasible. The legislation also requires private legal counsel to keep contemporaneous time records of work performed.

Furthermore, the contracts and payment records would be posted on the Attorney General's website for timely disclosure to the public. This kind of legislation provides a framework for ensuring transparency and accountability in the Attorney General's contracts with outside legal counsel for contingency fee-based litigation.

Additionally, the Florida legislation imposes modest limitations on the contingency fee percentages to be applied to the damages award and establishes a ceiling of $50 million in contingency fees. It is important to note that the caps placed in this legislation are exclusive of fees and costs, which would allow for those expenses to be negotiated with the Attorney General's office. I believe that, as the injured party in these cases, the taxpayers should be able to recoup as much damages as possible rather than private attorneys receiving huge payouts.

The Florida legislation recognizes that a contingency fee arrangement with the Attorney General is appropriate only in extraordinary circumstances, when there are not sufficient and appropriate legal or financial resources within the agency to handle the matter. The lure of exceptionally large fee opportunities is not necessary for the State to engage high-quality lawyers for any matter where outside counsel may be needed. Many law firms and outstanding attorneys would jump at the opportunity to represent the State in almost any matter at fees far less and with transparency much more than they might expect from a private client. The best law firms have always come forward to answer the call. And this kind of legislation will not change that.

The *Philadelphia Inquirer* recently reported on a "pay-to-play" scandal involving a Texas contingency fee law firm and the Pennsylvania Governor. This Texas law firm gave over $90,000 to the Governor's re-election and was soon after awarded a contingency fee contract to represent the State of Pennsylvania. The same law firm made contributions to political campaigns involving the Mississippi Attorney General ($75,000), the New Mexico Attorney General ($50,000) and the Louisiana Attorney General ($20,000). Yet these campaign contributions pale in comparison to the millions of dollars in attorneys' fees the law firm could collect from this multi-state litigation.

Even though as Attorney General I have adopted transparency policies for my office, the Florida legislation would stop the possibility of any such "pay-for-play" schemes in a future Attorney General's office. Colorado, Connecticut, Kansas, Minnesota, North Dakota, Texas, and Virginia have passed laws to ensure outside counsel works for the state's best interests and not just their self-interest.

Representing a State is a privilege, and it is a privilege, if given, with which contingency fee lawyers must act honorably. Thank you for allowing me to submit this written testimony.

Mr. RUSH. The Chair now calls the second panel, panel number II.

The Chair wants to welcome this distinguished panel of experts who are here to provide input and testify on the bill, H.R. 2190, the Mercury Pollution Reduction Act; and I will introduce the panel starting from my left to my right.

First of all, I want to make sure that everybody recognizes Ms. Catherine O'Neill. She is an Associate Professor of Law in the Seattle University School of Law.

Next to Ms. O'Neill is Ms. Lynn Goldman, who is a medical doctor.

Dr. Goldman is a Professor at the Johns Hopkins School of Public Health.

And seated next to Ms. Goldman is Mr. Richard Jackson. He is the Executive Vice President of Operations for ASHTA, A–S-H–T-A, Chemicals.

Again, I want to welcome the witnesses. I want to thank you for taking the time off of your busy schedules to share with the subcommittee today.

STATEMENTS OF CATHERINE O'NEILL, ASSOCIATE PROFESSOR OF LAW, SEATTLE UNIVERSITY SCHOOL OF LAW, MEMBER SCHOLAR, CENTER FOR PROGRESSIVE REFORM; LYNN GOLDMAN, M.D., M.P.H., PROFESSOR, JOHNS HOPKINS SCHOOL OF PUBLIC HEALTH, PRINCIPAL INVESTIGATOR, JOHNS HOPKINS NATIONAL CHILDREN'S STUDY (FORMER EPA ASSISTANT ADMINISTRATOR FOR PREVENTION, PESTICIDES, AND TOXIC SUBSTANCES, ADMINISTRATION OF PRESIDENT WILLIAM JEFFERSON CLINTON); AND RICHARD JACKSON, EXECUTIVE VICE PRESIDENT OF OPERATIONS, ASHTA CHEMICALS INC.

Mr. RUSH. We will begin by testimony from Ms. O'Neill.

Ms. O'Neill, we ask that you pull the mike close to you, that you turn it on, and that you restrict your comments, please, to 5 minutes. Thank you and welcome.

STATEMENT OF CATHERINE O'NEILL

Ms. O'NEILL. Thank you, Mr. Chairman and members of the subcommittee.

My testimony makes four points today. First, mercury contamination poses a grave threat to the neurological health of children in the United States. The danger for mercury pollution is particularly acute for groups that rely heavily on fish as a food source and so raises environmental justice concerns.

Second, the chlor-alkali industry presents an easy case for eliminating this toxic pollutant. One simply doesn't need mercury to produce chlorine and caustic soda. In fact, alternative technologies that don't use any mercury at all have been used by the industry for 30 years. Yet four plants in the U.S. still refuse to update the processes.

Third, the cost of delaying action on these outmoded plants are large in economic terms and unconscionable in human terms. For each year of delay, another cohort of children will be born with neurological damage due to mercury contamination. This damage is irreversible. While chlor-alkaliplants contribute only a portion of the mercury releases, it is a portion that is entirely preventible.

Fourth, H.R. 2190 ensures the long-term viability of the chlor-alkali plants in the communities they support. Facilities that convert to the newer, more efficient mercury free technology are likely to remain competitive and provide jobs for years to come.

We have long known that mercury is a potent neurotoxin threatening those exposed in utero and during childhood to even very small amounts of methylmercury. We have also come to appreciate that the harms of mercury contamination aren't distributed equally. Rather, they are borne disproportionately by groups that rely heavily on fish, including Native Americans, African Americans, other communities of color and low-income fishers.

It is not acceptable simply to tell women and children to stop eating fish for several decades of their lives, yet that is basically the regulatory strategy we are using. Tennessee, for example, has recently issued such an advisory for the stretch of the Hiwassee River adjacent to the Olin chlor-alkali plant there, warning women and children to eat no fish from the river due to mercury.

The good news is that mercury releases from the chlor-alkali industry at least are entirely unnecessary. The industry developed alternative mercury free technologies years ago.

The phaseout called for by H.R. 2190 very sensibly capitalizes on this opportunity to eliminate thousands of pounds of mercury releases each year, while leaving intact the industry's ability to bring its products to market. Even if, as the industry suggests, the plants that currently use mercury can reduce some fraction of their emissions, the point remains that no mercury releases are necessary for this industry. Given mercury's potency, even a tiny amount can be harmful. An oft-quoted illustration is that it takes just a teaspoon of mercury to contaminate a 25-acre lake. We should therefore be looking for every opportunity to eliminate mercury releases.

An additional advantage of the newer mercury free technologies is that they are as much as 37 percent more energy efficient. While it might seem tempting simply to wait for the chlor-alkali industry to convert to these more efficient processes of its own accord, that would be a mistake.

The cost of delaying action on these outmoded plants are not trivial. For each year of delay, another cohort of children will be born with neurological damage. Researchers have estimated that, in fact, as many as 630,000 children are born each year with neurological damage caused by anthropogenic sources of mercury. This damage will affect the intelligence and life prospects of these children for their entire lives. It is unacceptable to stand by for even a few years and permit this harm to more children for what amounts to the chlor-alkali industry's convenience.

Finally, H.R. 2190 takes a long-term perspective on the viability of the chlor-alkali facilities in the communities they support. Evidence suggests that plants that use mercury cell technology merely be able to sustain operations for a few more years. Plants that have controverted to the more efficient membrane health technology, by contrast, are likely to be remain competitive and provide jobs for decades.

In addition, H.R. 2190 functions to stimulate the new jobs required for the conversion. Recent chlor-alkali plant conversions have created some 250 such jobs for architects, designers, plumbers, electricians, and mechanics.

In sum, H.R. 2190 overcomes our current myopia to ensure the environmental health and economic well-being for all those affected for the long haul.

Thank you, and I welcome any questions.

Mr. RUSH. The Chair thanks Ms. O'Neill.

[The prepared statement of Ms. O'Neill follows:]

Subcommittee on Commerce, Trade, and Consumer Protection
Committee on Energy and Commerce
U.S. House of Representatives

Testimony on H.R. 2190,
The Mercury Pollution Reduction Act

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May 12, 2009

CPR CENTER FOR PROGRESSIVE REFORM

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[1] The Center for Progressive Reform (CPR) is an organization of 60 academics from universities across the country specializing in the legal, economic, and scientific issues that surround federal regulation to protect public health, natural resources, and worker safety. One component of the Center's mission is to circulate academic papers, studies, and other analyses that promote public policy based on the multiple social values that motivated the enactment of our nation's health, safety and environmental laws. We seek to inform the public about scholarship that envisions government as an arena where members of society choose and preserve their collective values. We reject the idea that government's only function is to increase the economic efficiency of private markets. For more information, please see http://progressivereform.org.

Mr. Chairman and members of the Committee, thank you for the opportunity to appear before you today to testify regarding H.R. 2190, the Mercury Pollution Reduction Act. I come before you as an Associate Professor at Seattle University School of Law and a Member Scholar of the Center for Progressive Reform.

At least one in ten women of childbearing age in the United States has blood levels of mercury that threaten the neurological health of her newborn babies. Chlor-alkali plants are a major source of mercury pollution, and an entirely unnecessary source at that, because there's a cleaner and more efficient method of producing chlorine and caustic soda that uses no mercury whatsoever. The danger from mercury is particularly acute for communities that rely heavily on fish as a food source, including Native Americans, African Americans, and other communities of color and low-income communities. It's unacceptable simply to tell women to stop eating fish for several decades of their lives, until they're certain they won't have any more children – and yet that's basically the prevention strategy we're using.

For years now, we've tried waiting this problem out, allowing the chlor-alkali plants to switch over to mercury-free production methods on their own. It's time to stop waiting, and start requiring them to clean up their act, so as to reduce this serious and entirely unnecessary risk.

I would like to focus today on four points that counsel support for H.R. 2190.

Mercury Contamination Continues to Pose a Grave Threat to Children and Others in the United States

Mercury is a potent neurotoxin. Exposure to even small amounts of methylmercury *in utero* or during childhood can lead to permanent neurological damage. Yet according to a recent study, some 10 percent of women of childbearing age in the United States have blood mercury levels that pose a risk to a developing fetus. This number nearly triples for women who designated their ethnicity as "other" (i.e., who are Native American, Asian American, or from the Pacific or Caribbean Islands) – fully 27.4 percent of women of childbearing age in this group have blood mercury above levels that pose a risk to a developing fetus, as established by the Environmental Protection Agency (EPA). Kathryn R. Mahaffey, et al, *Adult Women's Blood Mercury Concentrations Vary Regionally in the United States: Association with Patterns of Fish Consumption (NHANES 1999-2004)*, 117 ENVIRONMENTAL HEALTH PERSPECTIVES 47 (2009). The most recent data have revealed other human health risks from methylmercury as well, including adverse effects on the cardiovascular systems of adult men. In short, there should be no question that mercury poses a grave threat to the health of children and others in the United States. The National Academy of Sciences reached just this conclusion in 2000, and the scientific data gathered since have continued to buttress this conclusion.

Americans are exposed to methylmercury primarily through eating contaminated fish. This contamination results from both anthropogenic and natural processes.

Anthropogenic mercury emissions in the United States are currently dominated by just a few categories of sources, chlor-alkali plants among them. Mercury emitted from chlor-akali plants is deposited to surrounding land and water – locally, regionally, and globally. Mercury then enters water bodies and becomes methylated: methylmercury is an extremely bioavailable form of mercury, readily taken up by fish in these waters. Methylmercury bioaccumulates in fish tissue, which in turn is a source of exposure to all those – including humans – that consume fish.

As a consequence of mercury contamination, health and environmental agencies have had to issue fish consumption advisories recommending that women and children reduce or eliminate entirely their consumption of some fish species. In the 1990s, advisories due to mercury were increasingly issued throughout the United States, with several states having to place all of their lakes, rivers, and coastal waters under advisory. In addition, 100 percent of Lakes Superior, Michigan, Huron, and Erie are under mercury advisory. In 2001, widespread methylmercury contamination prompted the Food and Drug Administration and the EPA to issue the first-ever national fish consumption advisory. This is an extraordinary indictment.

The EPA's response to this widespread contamination has been checkered. While EPA has required some industries to take real steps to reduce their mercury emissions, EPA has asked little of the chlor-alkali industry, coddling those plants that still use the outmoded mercury cell process. Yet each of these plants is a significant source of mercury emissions. The Olin Corporation plant in Charleston, for example, has consistently been the single largest source of mercury emissions in the entire state of Tennessee. In fact, source for source, chlor-alkali plants' mercury emissions dwarf those of many coal-fired utilities, although the latter sources have garnered more media attention. Taken together, the four remaining mercury cell chlor-alkali plants contributed over 2000 pounds of mercury pollution to the air in 2006. The industry reported decreased emissions as a group in 2007, but mercury emissions at some individual plants still dominate the emissions inventory. The Olin Corporation's Charleston plant, for example released 420 pounds of mercury to the air, an amount 41 percent greater than contributed by the average power plant in Tennessee in 2007. Due in part to the Olin plant's releases to the air and water, a stretch of the Hiwassee River bordering and downriver of the plant has been placed under consumption advisory for mercury and has been deemed by the Tennessee Department of Environment and Conservation as no longer "fishable."

To allow these mercury emissions to continue is to fail to protect many in the U.S. population, particularly communities of color and low-income communities that depend on fish for food. NATIONAL ENVIRONMENTAL JUSTICE ADVISORY COUNCIL, FISH CONSUMPTION AND ENVIRONMENTAL JUSTICE (2002). Indeed, while eating fish from the Hiwassee and other similarly contaminated waters would subject even the "average American" to unacceptable levels of risk, many Native Americans, African Americans, Asian Americans and others consume fish more often and in greater quantities than the "average American" – and so are exposed to even greater risks. Nor is it any solace to suggest that these people might take steps to protect themselves. If people "avoid" the risks of mercury contamination by reducing their fish intake, they are made to forego the considerable health benefits of fish, which are an excellent source of protein, omega-3 fatty acids, and other nutrients. Consider the extraordinary burden that current mercury advisories place on a young girl, who must avoid fish throughout her childhood until age 20 and then throughout her childbearing years until age 49 – over half her life. Note, too, that for some, this burden will be felt not only in terms of physical or economic health but also in terms of cultural health; this is the case, for example, for many Native people.

The Harms of Mercury Emissions from Chlor-Alkali Plants are Completely Preventable

The good news is that, in the case of chlor-alkali plants, the harms of mercury emissions are completely preventable. In fact, there are three technologies currently employed by chlor-alkali facilities, only one of which involves the use of mercury at all. While mercury cell technology was first enlisted to produce chlorine and caustic soda in 1894, alternatives to this outmoded technology have been available for more than 30 years. The mercury cell process has all but been replaced industry-wide: at present, some 95 percent of capacity at chlor-alkali plants is accounted for by processes using either the diaphragm cell or membrane cell technologies. These newer technologies are not only more efficient (a point taken up below), they are mercury-free. Plants don't purchase mercury; they don't discharge it to our rivers; they don't emit it to our air. Thus, the chlor-alkali industry presents an example of the rare "easy case" in terms of preventing toxic pollution: the industry has already developed an alternative technology that renders the use of mercury utterly unnecessary.

The phase-out called for by H.R. 2190 very sensibly capitalizes on this opportunity to eliminate hundreds of pounds of mercury emissions each year, while leaving intact the industry's continued ability to produce chlorine and caustic soda. The extraordinary nature of this opportunity becomes clearer when one recalls just how toxic mercury is in our environment: one oft-cited figure is that a mere 0.3 grams of mercury – about a teaspoonful – is capable of contaminating a 25-acre lake. Given mercury's toxicity, and given the serious impacts of mercury contamination on human health, it is important to seek whatever emissions reductions we can, from every possible source. Where, as here, the use of mercury isn't even necessary, the case for eliminating its use is especially compelling.

Even if, as the chlor-alkali industry suggests, the plants that use mercury can reduce a portion of their emissions, the point remains that *no* mercury emissions are warranted. One simply doesn't need mercury to produce chlorine and caustic soda. It should be noted, moreover, that the chlor-alkali industry continues to be dogged by questions regarding the fate of the mercury that it uses. Because mercury is merely a catalyst to the chemical reaction that produces chlorine and caustic soda, the amount of mercury at each facility should theoretically remain unchanged. But neither EPA nor the industry seems able satisfactorily to account for all of the mercury purchased for use by the chlor-alkali industry. The most recent set of questions was raised earlier this year, when *The Washington Post* covered the release of two studies finding that almost half of the tested samples of commercial high-fructose corn syrup (HFCS) – an ingredient that is ubiquitous in food and beverage products, particularly those consumed by American children and teens – were contaminated with mercury. According to the *Post*, "[t]he use of mercury-contaminated caustic soda in the production of HFCS is common. The contamination occurs when mercury cells are used to produce caustic soda." *Study Finds High-Fructose Corn Syrup Contains Mercury*, THE WASHINGTON POST (Jan. 29, 2009).

There are additional advantages to be gained from facilitating the chlor-alkali industry's shift to mercury-free technology. Membrane cell technology can be as much as 37 percent more efficient in terms of energy use than mercury cell technology. These efficiencies are obviously appealing from the perspective of these companies' bottom lines, and help explain why the four new chlor-alkali facilities that are or soon will be up and running have enlisted this newer technology. And while a shift from an energy-intensive process to one that is energy-efficient makes sense even at present, the potential that climate change legislation will render energy use even more expensive in the future makes such a shift that much more economically supportable.

The Costs of Delay are Large in Economic Terms and Unconscionable in Human Terms

The costs of delaying action on these outmoded plants are large in economic terms and unconscionable in human terms. Thus, while it might seem tempting simply to wait and let the remaining mercury cell chlor-alkali plants run out the clock on the theory that the industry will soon enough convert or shutter these plants of its own accord, this would be a mistake. The costs of delay are demonstrated by methylmercury's neurodevelopmental effects. In view of this impact alone, the failure to control mercury emissions from chlor-alkali plants can have irreversible consequences, affecting the intelligence and life prospects of the children in each new birth cohort who are exposed *in utero* to harmful levels of mercury. Each year of delay means another cohort of children born with preventable neurological damage. It is simply unacceptable to stand by and permit this harm to our children's health for what amounts to the cholr-alkali industry's convenience.

A team of scientists from the Mount Sinai School of Medicine's Center for Children's Health and Environment and elsewhere, led by Dr. Leonardo Trasande, has developed a method to calculate the societal costs of one component of this neurological damage – reduced cognitive abilities (as measured by intelligence quotient or IQ). Dr. Trasande and his colleagues estimated that, due to anthropogenic sources of mercury, 316,588 to 637, 233 children are born *each year* with cord blood mercury at levels > 5.8 µg/L, levels associated with neurological damage. "These infants suffer mercury-related losses of cognitive functioning ranging from 0.2 to 24.4 IQ points." Leonardo Trasande, et al., *Mental Retardation and Prenatal Mercury Toxicity*, 49 AMERICAN JOURNAL OF INDUSTRIAL MEDICINE 153 (2006); Leonardo Trasande, et al., *Public Health and Economic Consequences of Environmental Methylmercury Toxicity to the Developing Brain*, 113 ENVIRONMENTAL HEALTH PERSPECTIVES 590 (2005). Dr. Trasande and his team also calculated the additional societal costs due to the increase in cases of mental retardation (MR)(defined clinically as IQ <70) suffered by those children exposed *in utero* to anthropogenic mercury emissions each year, and found 1,566 excess cases attributable to these sources. It is crucial, of course, to recognize that chlor-alkali plants contribute only a portion of these anthropogenic mercury emissions. Yet,this contribution cannot be ignored given the seriousness of what is at stake.

One recent study has considered the societal costs attributable exclusively to chlor-alkali plants. This study, published just last week, estimated the losses in productivity that accompany the decreases in IQ due solely to mercury emissions from chlor-alkali plants. It placed this figure at \$3.9 million per year in 2006. Oceana, *Hidden Costs: Reduced IQ from Chlor-Alkali Plant Mercury Emissions Harms the Economy* (May, 2009). If the remaining four mercury cell chlor-alkali plants are permitted to continue to operate in similar fashion for even four to seven more years (the period that some studies have estimated as their useful lives), these yearly costs would be expected to tally from \$15.6 million to \$27.3 million.

This description of the costs of a delay, moreover, speaks only to a single impact of mercury contamination –losses in IQ suffered by those exposed prenatally. To this sum, one would need to add the societal costs of the myriad other adverse impacts of mercury contamination, on human and ecological health. These costs would include, for example, the costs of illness associated with cardiovascular impacts in adults, and the costs to the fishing industry when recreational and commercial fisheries are closed or consumer demand decreased due to fish consumption advisories.

And, of course, these numbers say nothing of the non-quantifiable costs of permitting continued mercury contamination. What of the diminished life prospects for those children on whom neurological damage will be visited? What of their anguish as they "struggle to keep up in school?" NATIONAL RESEARCH COUNCIL, TOXICOLOGICAL EFFECTS OF METHYLMERCURY (2000). And what if we could readily identify the children harmed by mercury and could gather their parents in a room: which of us would like to be the one to explain why it was a good idea to allow their children to suffer neurological damage because we didn't want to require chlor-alkali plants to upgrade their production methods?

Legislative leadership is important, then, to facilitate the chlor-alkali industry's timely transition to a more efficient, mercury-free process, and to guard against even a few year's delay – given the large costs this delay would mean, whether understood in human terms or in terms of social utility.

Conversion to Newer, More Efficient Technologies Ensures Long-Term Viability of Chlor-Alkali Facilities, and the Communities and Jobs that Depend on these Facilities

Finally, it is important to note the benefits of H.R. 2190 for the long-term viability of chlor-alkali facilities and the communities that they support. Whereas the four facilities that continue to use mercury cell technology may be able to sustain operations for a few more years, evidence suggests that this approach is likely to be viable only in the short term. Facilities that have converted to the newer, more efficient membrane cell technology, by contrast, are likely to remain competitive – and provide jobs – for years to come. For example, ERCO Worldwide recently undertook the process of converting its facility in Wisconsin from mercury cell technology to a mercury-free process. According to the company, if they had not modernized, they would have had to shut down in five to seven years. By converting to a more efficient, mercury-free technology, however, ERCO estimated that it would be able to continue to provide jobs for 30 years. Moreover, when a chlor-alkali facility decides to convert to mercury-free technology, it not only preserves existing jobs but also creates new local jobs associated with the conversion. By facilitating conversion, H.R. 2190 functions to stimulate jobs for the architects, designers, electricians, plumbers, and mechanics needed to convert each facility; recent chlor-alkali plant conversions have created 200 to 250 such jobs. Oceana, *No Excuses: Communities at Risk Without Mercury-Free Technology* (Oct. 2008).

While a concern for environmental justice requires attention to environmental burdens and how these are distributed, it also counsels attention to economic impacts and on whom they fall. H.R. 2190 considers the health and well-being of those affected for the long haul – facilitating a transition to a process that will remain viable and competitive for years to come.

In summation, I'd make four points:

- Mercury pollution is dangerous, with significant health effects for children.
- The pollution is widespread, affecting 10 percent of women of child-bearing age.
- Chlor-alkali plants contribute hundreds of pounds to overall U.S. mercury emissions, every ounce of it unnecessary, because chlorine and caustic soda can be produced more efficiently and with zero mercury emissions.
- We allow the mercury cell chlor-alkali process to continue simply to convenience industry, and we pay for it with the health of our children. It's long past time to fix this problem.

Thank you for the opportunity to appear before you today. I would be pleased to answer any questions you may have.

Mr. RUSH. The Chair recognizes Ms. Goldman for 5 minutes.

STATEMENT OF LYNN GOLDMAN, M.D., M.P.H.

Dr. GOLDMAN. Thank you very much Mr. Rush, and also thank you to Mr. Radanovich for the opportunity to testify before you today about H.R. 2190.

My name is Lynn Goldman, and I am a pediatrician and environmental health scientist and a professor at the Johns Hopkins School of Public Health who formerly served at the U.S. EPA as Assistant Administrator for the Office of Prevention, Pesticides, and Toxic Substances. And I have done research on mercury and its health effects on children. These comments that I have represent my point of view and not any point of view of Hopkins or any other organization I have ever been associated with.

As you know very well, mercury is a toxic metal; and it exerts its toxicity on children through formation of methylmercury in water. And this transformation is almost inevitable. When there is release of mercury into the environment, unfortunately, that mercury then contaminates fish.

There has been a lot of research that has demonstrated the toxic effects of mercury on the health of children, especially with in utero exposure; and, in fact, in the year 2000 the National Academies of Sciences released a report called Toxicological Effects of Methylmercury that not only documented these effects but also recommended a limit on exposure, that is, only 0.1 microgram per kilogram of body weight per day. Or if you had a 22-pound child we are talking about only 35 billionths of an ounce each day that is allowable. So you can understand why even what might appear to be small releases of mercury can amount to quite a bit when it comes to toxicity.

As has already been mentioned, EPA has estimated that 630,000 children every year are born with mercury levels in their blood that are above this. And in fact in my own research at Hopkins we can validate this with children in Baltimore. They are born with too much mercury in their blood.

In the past, there used to be controversy about this. There was a time when we thought, well, some studies showed the effects of mercury and others did not. But even studies that in the past appeared to be negative have now shown to be positive. Because what happened is that the benefits from eating fish can blur the effects of mercury.

So very, very tedious and careful methods have been needed in order to show that, despite the benefits of fish eating, that mercury itself is hazardous. In fact, over the last few years after the publication of the National Academy study, we have three new studies—one in Oswego, New York; one in New York City after the World Trade Center; and one in Boston—that all show these effects. I don't think that the effects are at all disputable in terms of the neurotoxicity of mercury on babies.

So what do we do? To manage the risk, we tell women of childbearing age to eat less fish, even though we know that there are actually benefits of eating fish. Well, then we can say, only eat the fish that have lower levels of mercury. But to do that we need to keep the mercury out of the environment. Because we have the threat of not having fish that women will find safe to eat if we keep polluting the environment with mercury. This is a very important issue. It must be addressed.

We know that the "mercury cell" chlor-alkali manufacturing process is not an essential use of mercury. We know that Japan has phased this out. We know that Europe has phased this out. We know that we have almost succeeded through voluntary means of phasing this out in the United States. But, unfortunately, minus a mandate, we are not going to get to zero with this issue. We have found that there continue to be a handful of companies that use the mercury cell process and even though their production is less than 5 percent of the total production of chlorine and of caustic soda production that it continues.

What is the problem with that?

Well, first, it creates the demand for mercury, which means that there is continued upstream pollution of mercury from mining, from manufacturing of the mercury.

Second, there are then continued releases of mercury so that there are downstream releases either through fugitive emissions from these plants and perhaps in the bodies of the workers in these plants, certainly demonstrated around the environment of these plants, and even in the product that is coming from these plants there are minute amounts of mercury.

So, in conclusion, elimination of mercury cell manufacture for chlorine and caustic soda will reduce the U.S. emissions of mercury. It also will contribute to our efforts to reduce mercury pollution globally. And in my experience with this issue we have too long taken positions that would say, on the one hand, let's not take care of this problem in the U.S. until they take care of it globally and then, on the other hand, for the current administration walking into global negotiations and saying we are not going to take care of it globally because it is basically a domestic problem.

We need to attack this problem on both fronts, and I do urge support of H.R. 2190. It is in the best interest of our children. Thank you.

Mr. RUSH. Thank you very much, Dr. Goldman.

[The prepared statement of Dr. Goldman follows:]

Lynn R. Goldman, MD, MPH

Professor, Johns Hopkins Bloomberg School of Public Health

Testimony on HR 2065
May 11, 2009

Thank you for the opportunity to testify today in support of HR 2065, which would phase out emissions of mercury from US chlor-alkali production plants.

I am a pediatrician and formerly served as Assistant Administrator for Prevention, Pesticides and Toxic Substances at the EPA from 1993-98. I currently am a professor of environmental health sciences at the Johns Hopkins Bloomberg School of Public Health. I am a member of the Board for the Children's Environmental Health Network and I am a Trustee of Environmental Defense. I have done research on mercury exposures and toxicity. This testimony reflects my views as a pediatrician and a scientist, and not necessarily those of any of the above organizations.

Mercury is a toxic metal that is transformed to methylmercury in water. Methylmercury accumulates in the food supply, especially in fish. We have long known about the serious effects of mercury on children. Several longitudinal studies of mercury exposure to the fetus and cognitive functioning in childhood were the basis for a 2000 National Academy of Sciences (NAS) report "Toxicological Effects of Methylmercury". The NAS recommended a "safe" level of methylmercury for children that is only 0.1 micrograms per kilogram of body weight per day or one microgram per day for a 10kilo (22lb) child. To put this into perspective, this is only 0.000000035 (35 billionths) of an ounce each day. The EPA has estimated that upward to some 630,000 children per year are born with mercury levels above this standard.

Evidence of toxic effects of methylmercury has continued to mount since 2000. At this point, *all* published studies of *in utero* mercury exposures have reported associated cognitive deficits as measured by decreased IQ, decreased attention and poorer motor skills. This includes not only earlier studies in the Faroe Islands and New Zealand but also an earlier study in the Seychelles that was once believed to be "negative". Today the Seychelles researchers can identify adverse effects related to mercury exposures that previously were masked by beneficial effects of fish intake (and have been uncovered through painstaking scientific analysis). Additionally, in the US three newer studies from Oswego, New York, New York City, and Boston have all reported that methylmercury is toxic to developing brains at levels that occur in the general population. In 2000, the opinion of the National Academy of Sciences was that the weight of evidence substantiated the occurrence of adverse neurotoxic effects at lower levels of exposure. Today, this evidence is overwhelming.

Methylmercury also is hazardous for adults, causing an increased risk of cardiovascular disease and neurological toxicity. So here is what we know. One, consumption of species of fish with highest mercury levels is the predominant pathway of exposure to methylmercury. EPA and FDA efforts to reduce mercury exposure have focused on educating the public about what kinds of fish to eat, and which to avoid. Two, fish consumption can provide many health benefits to both children and adults. So, to protect this valuable food source, we need to reduce mercury pollution.

Mercury emissions from chlor-alkali production plants

''Mercury cell'' chlor-alkali manufacturing processes are among the least essential uses of mercury on the market today. Japan has banned them and the European Union is phasing them out of production by 2020. In the United States, most companies have already switched from mercury cells to cleaner membrane-based technologies in order to eliminate the use and emissions of mercury in chlor-alkali production. These newer technologies are not only feasible, they also are cost-effective. Only a handful of US companies continue to use the mercury cell process; their production comprises less than 5% of the total US chlorine and caustic soda production. Yet, large quantities of mercury are used in these processes. These facilities generate demand for mercury, leading to upstream releases of mercury from mining and other activities that are needed to supply them with mercury. These facilities generate releases of mercury, in the course of manufacturing, in waste, and via mercury contamination of products. They have caused mercury exposure in workers who maintain and operate these plants. Releases of mercury anywhere in the world contribute to the levels of mercury in the global environment, but there are also significant amounts of local deposition. Studies have shown that mercury levels are generally higher in the proximity of mercury chlor-alkali plants.

We don't know the precise environmental fate of the mercury that is consumed in mercury cell chlor-alkali plants. What we do know is that elimination of mercury cell processes to manufacture chlorine and caustic soda will reduce US emissions of mercury, and will contribute to our efforts to reduce mercury emissions globally. For far too long we have heard both arguments to defer domestic action until global mercury releases are controlled, and to defer global action until we control US releases. It is time to step up to the plate on both fronts to protect not only the fish but also our children from harmful effects of mercury. Moreover the proposed legislation wisely provides for storage of mercury wastes in a manner in which the mercury will not be released to the environment. This is an important safeguard.

In closing, HR 2065 is both feasible *and* in the best interest of our nation's children. There is no need to expose a new generation of children to excessive levels of mercury pollution.

Mr. RUSH. Our final witness is Mr. Jackson.

Mr. Jackson, you are recognized for 5 minutes.

STATEMENT OF RICHARD JACKSON

Mr. JACKSON. Good afternoon, Mr. Chairman and members of the subcommittee. Thank you for the opportunity to testify before you today concerning H.R. 2190, the Mercury Pollution Reduction Act of 2009.

My name is Richard Jackson. I am the Vice President of Operations at ASHTA Chemicals in Ashtabula, Ohio. My testimony is on behalf of ASHTA and is intended to address the impact that this bill may have on our company and on the environment. While others in the chlor-alkali industry may be impacted by this proposed legislation, we do not intend to speak for them.

ASHTA is a privately held company with offices and its only production facility in Ashtabula County, Ohio. Our plant has been in operation since 1964. We currently employ nearly 100 people, with an annual payroll of approximately $7 million in an economically depressed part of northeast Ohio. We support local businesses and contractors with close to $2 million in annual capital investments and over $3 million in annual expenditures on maintenance, operating supplies, and contracted services.

While domestic mercury cell production may represent less than 5 percent of all chlorine caustic soda in the United States, production of chlorine and potassium hydroxide, or KOH, using the same mercury cell process represents about 50 percent of the total production in the United States; and it represents 100 percent of our production. KOH is used as the principal source of alkalinity in many critical operations, including cleaning and disinfecting water treatment, liquid fertilizers, alkaline batteries, photo processing, herbicides, and runway de-icers, to name just a few. In many of these applications, there is simply no substitute for KOH.

In our process, mercury is contained in closed electrolytic cells where it serves as a flowing cathode to extract potassium from potassium chloride. Strict safety procedures and process controls are followed to prevent workplace exposure and to minimize mercury emissions. Today, less than 1/10th of 1 percent of total global mercury emissions comes from the U.S. chlor-alkali industry; and less than 1/10,000th of 1 percent comes from ASHTA, as illustrated in Exhibit 1 of our testimony.

ASHTA does not propose to challenge the bill's findings regarding the effects of mercury on human health in the environment. However, ASHTA strongly disagrees with the findings that mercury cell production is obsolete and, most importantly, that the elimination of mercury cell production by ASHTA will materially impact the presence of mercury in the environment.

ASHTA has an excellent environmental health and safety record and a long history of working in cooperation with regulatory agencies such as the United States EPA and the Ohio EPA. We are and have consistently operated within our permits and in compliance with the regulations that govern our site.

ASHTA has also aggressively improved our environmental performance by making substantial financial investments to minimize mercury in water, air, and waste. We have eliminated the release of storm water and process water from our process areas in support of the Great Lakes Water Quality Initiative, and we achieved early compliance with the Maximum Achievable Control Technology, or MACT, under the mercury cell chlor-alkali NESHAP regulations.

ASHTA has also completed additional environmental projects to minimize fugitive emissions from our chlor-alkali process and work areas. This resulted in a significant reduction in our air emissions of mercury to less than 1/10th of one gram per day, which is less than 1/10th of one pound per year.

With the substantial reductions in mercury emissions achieved by ASHTA we believe that there are no human health or environmental issues that justify mandating this phaseout of mercury cell technology. Forced conversion or closure of ASHTA's facility will have no measurable effect on the global or local mercury emissions, human health, or the environment of the United States, the State of Ohio, or the city of Ashtabula, where most of our employees live and work. It would, however, have a substantial adverse effect on the KOH supply in the United States in those businesses which rely on it.

It could also result in the closure of ASHTA's only production facility and the loss of nearly 100 high-paying jobs. This in turn would negatively impact many of our customers and would also result in a large increase in the number of railcar shipments of chlorine across our Nation's mainline railroads in order to serve the needs of our adjacent customer who buys 100 percent of the chlorine we produce.

ASHTA has repeatedly evaluated the economics of converting our plant to membrane cell technology, and each time we have concluded that the economic risk to our company did not justify conversion. Particularly considering our long-standing record of environmental compliance and at a time when our country and local community are in the worst economic condition since the Great Depression, requiring us to make further significant and financial investment to convert to membrane technology is unwarranted, it is confiscatory, and it is bad public policy. Therefore, we urge you to consider the broader impact the adoption of this bill would have; and we urge you to defeat the proposed legislation.

Mr. Chairman and members of the subcommittee, thank you for your valuable time; and I will gladly answer questions at the appropriate time.

[The prepared statement of Mr. Jackson follows:]

TESTIMONY OF ASHTA CHEMICALS INC.

3509 MIDDLE ROAD
ASHTABULA, OH 44004
440-997-5221

BEFORE THE

SUBCOMMITTEE ON COMMERCE, TRADE, AND CONSUMER PROTECTION

COMMITTEE ON ENERGY AND COMMERCE

UNITED STATES

HOUSE OF REPRESENTATIVES

PERTAINING TO THE MERCURY POLLUTION REDUCTION ACT OF 2009
(H. R. 2190)

MAY 12, 2009

Introduction

Mr. Chairman and Members of the Subcommittee:

ASHTA Chemicals appreciates the opportunity to testify before you concerning the Mercury Pollution Reduction Act of 2009 (H. R. 2065) and the Mercury Pollution Reduction Act of 2009 (H. R. 2190). These two bills are duplicative in many respects and may be referred to collectively as "the bill" in this testimony. This testimony is being provided on behalf of ASHTA Chemicals Inc. and intended to address the impact the bill may have on our company and the environment. While others in the chlor-alkali industry may be similarly impacted by this proposed legislation, we do not intend to speak for them.

The chlor-alkali industry is represented by two distinct businesses, the production of chlorine and sodium hydroxide (caustic soda) and the production of chlorine and potassium hydroxide (KOH). The production of chlorine and caustic soda represents a very large market with annual production in the United States estimated to be 13 million tons while the production of chlorine and KOH represent a relatively small market with production in the United States estimated to be less than 600 thousand tons. Approximately 50% of the annual KOH production in the United States is currently from mercury cell production.

ASHTA Chemicals Inc. (ASHTA) is a privately held company with its offices and sole production facility in Ashtabula, OH. Located about one mile from the shores of Lake Erie on 92 acres of land, ASHTA employs nearly 100 people with an annual payroll of approx. $7 million in an economically depressed part of Northeast Ohio. Additionally, the company supports a number of local businesses and contractors with close to $2 million of annual capital investments in our facilities and $3.6 million in maintenance, operating supplies and contracted services. Our production facility has been operating as a mercury cell chlor-alkali plant for 45 years under several different owners. We currently produce two (2) principle products in Ashtabula, OH - chlorine and KOH by means of electrolysis. Utilizing this process, these "co-products" are produced in the identical manner as chlorine and caustic soda (sodium hydroxide).

ASHTA has an excellent environmental, health and safety record. The health and safety of our employees and being good environmental stewards, is of the utmost concern to us. Our facility currently produces less than one half of one percent (<0.5%) of the chlorine manufactured in the United States; however, we produce about thirteen (13) percent of the KOH manufactured in North America.

We believe that everyday life in this country would be very different without the benefits of chlorine and KOH chemistry. Combined with the power of human innovation, chlorine and KOH chemistry play an essential role in providing the indispensable products of modern life. Chlorine chemistry is an important part of the process to provide clean drinking water for all of us. It is also used to make high-tech first-responder equipment, sustainable building materials, food protection chemicals, computer microprocessor chips and more than 90 percent of prescription pharmaceuticals. KOH is used as a principle source of alkalinity in many soaps and cleaning products, disinfecting applications, alkaline batteries and water treatment applications. It is also used as a source of potassium - one of the three essential plant nutrients - in liquid fertilizers. You can also find KOH in a wide variety of other applications including photo processing chemicals, herbicides, runway de-icers and in chemical formulations that require KOH. In many of the above applications, there is simply no substitute for KOH.

The mercury cell process is one of three manufacturing processes used in the chlor-alkali industry to produce chlorine and caustic soda and one of two manufacturing processes used to produce chlorine and KOH. With the mercury cell process, mercury is contained in enclosed mercury "cells" where it is used as a flowing cathode to extract potassium from potassium chloride. It is used in a non-dispersive way to support chemical reactions and is recycled within the cells. Strict safety procedures and process controls are followed to prevent workplace exposure and to minimize mercury emissions. For that reason, chlorine production is a very small source of mercury emissions to the environment today, contributing less than one tenth of one percent (< 0.1%) of total global emissions of mercury from all natural and man-made sources. ASHTA's represents an even smaller fraction of the total global mercury emissions (see Exhibit 1).

ASHTA does not propose to challenge the findings by the Committee that (1) mercury is toxic to humans, ecosystems and wildlife; (2) a significant source of mercury exposure to people is the ingestion of mercury-contaminated fish; (3) the long term solution to mercury pollution is to minimize global mercury use and releases; (4) mercury is a transboundary pollutant that is deposited locally regionally and globally and affects various bodies of water. ASHTA does, however, strongly disagree with the findings that (1) mercury cell production is obsolete; (2) cost effective alternatives are in use in the vast majority of production of the products that we produce (chlorine and KOH) and, most importantly, (3) that that the elimination of mercury cell production by ASHTA Chemicals will materially impact the presence of mercury in the environment.

ASHTA has a long history of working in a cooperative manner with regulatory agencies such as the U.S. EPA, the Ohio EPA, OSHA and the DOT. We work in close cooperation with our local Community Advisory Panel (CAP) on local environmental, health and safety issues. We are and have consistently been in compliance with regulations that govern our site and the operating permits that we have been issued. We also have a history of aggressive improvement of our environmental performance over the past several years. In 1996 ASHTA made a substantial financial investment of our own funds to eliminating mercury emissions in water by becoming a ZERO WATER DISCHARGE FACILITY. By eliminating the release or discharge of any storm water or process water from its process areas, ASHTA has long complied with the Great Lakes Water Quality Initiative. We do this through the use of a proprietary technology that we developed and installed.

In 1996, the industry worked with EPA and voluntarily agreed to a mercury reduction goal that resulted in a mercury use reduction of more than 90%. In 2001, the mercury cell chlor-alkali industry publicly supported legislation to ban the export of elemental mercury after a facility was established to permanently store surplus mercury. In 2003, mercury cell chlor-alkali producers further committed to a full accounting of all mercury used by the industry. In 2005, the industry provided data to the EPA to allow it to promulgate further reductions in air emissions that became effective later that year. In 2008, the industry worked with a diverse group of stakeholders to secure passage of the Mercury Export Ban Act of 2008.

In 2005, ASHTA specifically achieved early compliance with the Maximum Achievable Control Technology (MACT) under the mercury cell chlor-alkali NESHAP regulations to minimize mercury air emissions from point sources at its facility. ASHTA also has completed additional supplemental environmental projects to minimize fugitive emissions from its chlor alkali process and work areas. We currently estimate that mercury air emissions from ASHTA's facility are approximately 0.1 grams per day which equates to approx. 0.08 lbs per year. ASHTA is also currently working with the Ohio EPA to process and monitor additional storm water from non-production areas of our property and we are in the process of completing a Voluntary Action Program (VAP), also in conjunction with the Ohio EPA.

Phase out of this Technology

With the substantial reductions in mercury use and emissions by ASHTA that have been achieved, we believe there are no human health or environmental issues that justify mandating this phase out of mercury cell technology and the phase out of our company. Closing ASHTA's facility will have no measurable effect on global or local mercury emissions. It will also have no measurable effect on human health and the environment in the United States, in the state of Ohio, or in the city of Ashtabula where most of our employees live and work. However, closure of mercury cell chlor-alkali plants that produce chlorine and KOH, which represent approx. 60% of the potassium hydroxide capacity in North America, would have a substantial adverse effect on the KOH supply in North America and those businesses which require it. For ASHTA specifically, the phase out of this technology could result in the closure of our only production facility, and thus the loss of nearly 100 high paying jobs in Northeast Ohio. Closing ASHTA's facility will also negatively impact many of our customers who rely on the chlorine, potassium hydroxide and other products that we supply. 100% of the chlorine that we produce is sold to a company located adjacent to ASHTA's facility. Closing our plant would result in a large increase in the number of rail car shipments of chlorine (a Toxic Inhalation Hazard) across our nation's main-line rail infrastructure in order to serve the needs of our customer.

ASHTA has repeatedly evaluated the financial impact of converting our plant to membrane cell technology. In each case, we have concluded that the economic risk to the Company was not warranted, particularly considering our longstanding record of operating well within compliance of all environmental regulations and operating permits. At this time, when the country and our local community find themselves in the worst economic condition since the Company's beginnings, requiring us to make a further financial investment of approx $60 million to convert to membrane technology is unwarranted, it is confiscatory, and it is bad public policy. Therefore we urge you to consider the broader impact that the adoption of this bill would have, and we urge you to defeat this proposed legislation.

The Proposed Legislation

We do not believe that H. R. 2190 is warranted. Furthermore, we believe this legislation has the real potential to undermine the mercury export ban that was enacted last year. Further, there are several specific portions of H.R. 2190 that we believe are not only impractical, but also not possible. We also do not believe the committee has fully considered the potential impact of this phase out on the KOH business in North America. We would like to briefly address each of these portions of the proposed legislation.

Under the prohibition section of the bill, if ASHTA were to make the decision to make the capital investment to convert its facility to membrane technology, we do not believe it would be feasible to do so within a period of 24 months after the enactment of the bill. Attempting to accomplish design, engineering, financing, permitting, procurement and contracting, construction and start-up would be very difficult and put onerous requirements on our company and our available resources. We also believe it would drive up the cost of conversion and out additional strains on our company's financial health.

Under the "Export Ban" section of the bill, until the Department of Energy has established a site for the receipt of surplus mercury, facilities like ASHTA's will have no place to store surplus mercury. RCRA regulations prohibit the temporary storage of hazardous wastes at our site for more than 90 days. The bill clearly states that mercury is to be treated as hazardous waste. If you cause us to stop using mercury at our facility, we will have no place to store the inventory of mercury that we carefully monitor and use in our current manufacturing process.

Under the "Reporting Requirements" section of the bill, ASHTA is willing to provide data specified in the bill for the current and future years, however, congress needs to recognize that the data is simply not available for early years. ASHTA keeps certain records in accordance with its record retention policies and current laws and regulations and thus the records of the type specified in the bill are simply not available from ASHTA.

Summary

ASHTA considers itself to be a responsible corporate citizen and a responsible employer. Our mercury cell manufacturing technology is used to make many products that are important to all of our daily lives. We have been proactive in inventing and employing technology that allows us to monitor and safely contain the mercury used in our production process. The amount of mercury that escapes into the atmosphere from our closed cycle process is so small, so insignificant, that it does not merit the prohibitions imposed by this legislation. The adoption of H.R. 2190 unfairly targets ASHTA and the chlor-alkali industry and imposes on us costs – costs that are so substantial and so unnecessary, that it could cause our company to close its doors and add nearly 100 well paid employees to the ranks of the "newly unemployed". This is not smart public policy from a variety of perspectives, and we urge this committee and congress to exercise restraint and to not enact H.R. 2190.

Mr. RUSH. The Chair thanks all of the witnesses, and the Chair recognizes himself for 5 minutes for the purpose of questioning the witnesses.

According to the EPA, concentrations of mercury in blood and hair are higher in African Americans than other ethnic groups. In 2004, a study found in its survey samples that African American and Mexican American children have higher mercury hair concentrations than White children; and this study further linked higher mercury levels with the consumption of fish.

In her written testimony, Professor O'Neill cites a study that found that 27.4 percent of women who are Native Americans, Asian Americans or from the Pacific or Caribbean Islands have mercury levels that pose a risk to developing fetuses. This is nearly three times the national average.

My question to both Dr. Goldman and Professor O'Neill, can you explain the disparate impact on mercury on people of color and on poor communities?

Dr. GOLDMAN. I can tell you what we know, and that is—and our research, by the way, shows the same thing—with higher levels in African American babies at birth and also Asian babies have higher levels. And what we know is that people who are poor, in immigrant communities as well are more likely to fish for subsistence, to go and to get fish in places that have mercury pollution and where the fish are accumulating that pollution.

And that is also why—one of the other statistics that you cited about Native Americans, that is also why often those populations have more exposure. And we think that that is the most important reason.

Mr. RUSH. Would you care to add some additional comments, Ms. O'Neill?

Ms. O'NEILL. Yes, thank you.

This finding is backed up by the National Environmental Justice Advisory Council, who in 2002 found the issue of exposure via fish consumption—because this is the primary route of exposure to mercury and a number of other pollutants—to warrant a full-blown study on just this issue. So this study—and I served as a member of the work group that drafted it—made just these findings.

And the studies show—and these studies were conducted in Detroit, Michigan, studies in the south, studies in the northeast and really all around the country and certainly in the Pacific Northwest—that when we are talking about these communities of color, whether we are talking Asian American communities, African American communities, certainly Native American communities, that the place of fish, whether both culturally and economically in their diets and in their lives is such that they are going to be the ones who are most exposed and the most harmed by contamination.

Mr. RUSH. Thank you.

Mr. Jackson, in your testimony I believe I heard you say that your company did not alter its production methods because of the economic impact on your company, that there were alternatives but you chose not to use alternatives because it would have an adverse economic impact on your company. Is that correct?

Mr. JACKSON. Had we gone and done some of the conversions and so forth and put ourselves at financial risk through the financing of these, it would have put us at way too great a risk from any reasonable business operation. Basically, we would have had to choose to put ourselves at such a risk that we could not effectively compete. And through the markets that we have been through, effectively it would have been the same result as what this bill as currently written. It would take us out of business.

Mr. RUSH. So you are saying that you could not afford the transition from your current method to——

Mr. JACKSON. No, we were able to meet and beyond any of the regulations, all of the current regulations and previous regulations, regarding environmental compliance. Investment in those regulations, to meet those regulations, as laid out by the United States EPA and other regulatory bodies, we complied with every one and went beyond each one, as I noted in my testimony; and we saw no reason to take it beyond that level, because, clearly, we were meeting the objective of the environmental regulators at that time.

Mr. RUSH. Thank you.

The Chair's time has ended. The Chair now recognizes the Ranking Member for 5 minutes.

Mr. RADANOVICH. Thank you, Mr. Chairman.

Mr. Jackson, in the world of mercury, whatever you do is such a small part of that, it seems like. Of the four industries that this bill affects, it seems to be a small fraction of the number in the mercury world. Isn't there other places to look for substantially more reductions than your industry?

Mr. JACKSON. Well, there is still a number of places and sources of mercury. Europe continues to use more mercury cell technology than we do for the same process.

Gold mining is one of the most horrific uses of mercury, especially artisanal miners in the Malaysian area as well as Brazil and so forth, rain forest areas, unfortunately. These areas have significant impact on the mercury in the environment, as well as the power industry through their continued additional Chinese power plants that go in and put high-level mercury that is deposited throughout the world, not just close to the stacks of the Chinese power industry but throughout the world and effectively hitting every water body in the world. That is really the source of the mercury.

Mr. RADANOVICH. Dr. Goldman, I want to ask you a question.

It seems to me the trend right now—and people for energy purposes are encouraging compact fluorescent light bulbs which contain mercury. They are going into homes all over the country. It seems to me that that would be a bigger thing to go after than it would be something as small as this. What is your thought on that?

Dr. GOLDMAN. First, to the chlor-alkali mercury cell technology, Europe is phasing them out by 2020. So they have a clear deadline for taking them out of production. Globally, it is a major source; and it is hard for us to tell developing countries not to do something that we continue to do. I think you understand that.

But in terms of the compact fluorescents, there are lower mercury bulbs that have been developed; and I think that the market—EPA should be pushing the market toward those, as well as the new LED light bulbs and to move to LED technology that is a nonmercury technology, which at this point it is not quite at a place where you can replace light bulbs in your home but needs to be done.

Because it is a problem, and it is beginning to contribute quite a bit to not only the potential for breakage in the home and having to deal with all of that but also that—just another set of items that we are disposing of that we have to segregate and so forth, and it is just kind of better to not create that.

As a mom, for me it is just one more thing that I have to think about segregating and disposing of some special way; and I would really rather not have to deal with that.

Mr. RADANOVICH. Isn't it—I think this might be a case again that we experienced on lead poisoning, a hearing we did where it is either all or nothing. It seems like any presence of any mercury anywhere—say, for example, lead is used on a part of a handlebar on a bicycle, apparently where it needs some of that malleability to force the handlebars to stay on straight. And yet the probability of that getting into a child is—you know, I suppose there is a probability but very, very small. Isn't this the case that we are seeing here with this, that nothing is good unless it is all gone?

Dr. GOLDMAN. The thing about lead that is slightly easier than mercury is it is easier to immobilize. And the thing that is hard to understand about mercury is that when you see that little liquid stuff jiggling around that there is vapor coming off of it, unlike lead which does not vaporize at room temperature.

Lead can also be a major problem. Kids have gotten lead poisoning from all kinds of weird things. I have seen a kid get lead poisoning from sucking on their baby monitor, which who would let their kid suck on a baby monitor, you know. But there is all kinds of weird things that can happen. But at least lead in waste, you can kind of immobilize it.

It is very difficult to immobilize mercury. That is the major issue. Until it is converted to methylmercury, and then it doesn't vaporize anymore, but then you have the toxic compound that is right there in the environment. So it is a very different kind of a metal.

Even though you are right, in some ways, there are molecules of mercury that we could chase around forever and never be able to deal with. And I think you are right to be pointing to that because you aren't going to be able to get rid of every molecule in mercury.

Mr. RADANOVICH. Thank you.

Mr. Jackson, do you think by your company's following the EPA rules that you follow right now, is that sufficient in your mind to control the release of mercury?

Mr. JACKSON. We believe they are. We think that the EPA rules have been great guidance as far as our industry. We have seen much more stringent regulations in the last NESHAP through the maximum tubal control technology, which basically took our industry—and the Chlorine Institute has kept records of this over the last 11 years—has basically taken our industry and reduced the amount of mercury released from our industry by 94 percent.

ASHTA itself has already taken more than that, down to 98 to 99 percent. We believe fully that the little bit of mercury that we continue to put out in waste, it is well managed, it is controlled, it goes into restricted waste landfills, it is completely immobilized. The mercury in the water—we don't release any water from our site, but there is no vapor pressure on the mercury from our product or water. So the idea of a child breathing mercury or being exposed to it through any of our products directly is just not really practical.

Mr. RADANOVICH. Thank you, Mr. Jackson.

I appreciate all the witnesses, and I yield back.

Mr. RUSH. The Chair now recognizes the gentlelady from Illinois, Ms. Schakowsky, for 5 minutes.

Ms. SCHAKOWSKY. Mr. Jackson, can you explain to me why the EPA issued a health advisory in March of this year warning residents that fish caught in the Ashtabula River were contaminated with mercury?

Mr. JACKSON. I think if you look at fish advisories throughout the United States the location next to chlor-alkali industries has very little to do with where fish advisories are created. The fact is that the areas of which the fish advisory are I believe are well apart from any outfall that we have ever had. We currently do not release water at all from our facility, so we don't feel like we would have impacted a fish advisory at all.

The Midwest is a large burner of coal, and in coal fires that are in the releases from coal production energy is put into the upper atmosphere. It travels west to east. And as you can look at the Northeast corridor that is where your largest deposition of mercury has occurred.

Ms. SCHAKOWSKY. So you think your plant has nothing to do with it? I only have 5 minutes. So you are saying you don't think you have anything to do with it. Aside from no water emissions, are you saying there is zero air emissions?

Mr. JACKSON. No, we are not saying there is zero air emissions. Less than 1—.1 grams per day is what we have measured from our facility. Much—probably 10 times less than the EPA recommended standard.

Ms. SCHAKOWSKY. Now, you cited an EPA 1997 report. That is where you got your numbers. About less than 1/10th of 1 percent of mercury emissions in the world. Are you aware of the United Nations Environmental Program study of December, 2008?

Mr. JACKSON. I have been looking for that report. I have not seen the data from it yet.

Ms. SCHAKOWSKY. Well, what it says is that, actually, the chlor-alkali industry is responsible for a significantly higher proportion of global mercury emissions, 2.43 percent. So given—and maybe we can get more information from Dr. Goldman, Ms. O'Neill—but, given those figures, do you still believe that eliminating the use of mercury and chlor-alkali production won't make an impact on the presence of mercury in the environment?

Mr. JACKSON. It will not make a measurable impact. You could take away——

Ms. SCHAKOWSKY. Even if it were two point——

Mr. JACKSON. Even if you took all the chlor-alkali industry, mercury cell chlor-alkali industry I would say out of the world, clearly out of the United States, the impact on the lakes and rivers and streams and the amount of mercury in the fish would have virtually no impact.

Ms. SCHAKOWSKY. Let me get a response to that from either one of you, or both.

Dr. GOLDMAN. I think certainly that it would have an impact, and it would have an impact in the immediate time period just with the current existing production of these materials and also the associated mining and smelting that needs to be done in order to produce the mercury that is purchased.

But, also, if you look for it into the future and with the rapid pace of economic development globally, which will increase the demand for these products of chlorine and alkali, that if the world continues using this method there will be even more increase in mercury production, more releases of mercury. And this is a cumulative, persistent problem.

Ms. SCHAKOWSKY. Thank you.

Ms. O'Neill.

Ms. O'NEILL. Thank you.

I think it is certainly the case of the natural sources of mercury that we are not going to be able to control. But the fact is, and I think Dr. Goldman said it, that when there are nonessential uses, human made contributions that we can prevent, we should do so. The impact will be material from this industry.

Mr. Jackson quoted the emissions of ASHTA, but, of course, we have to remember that H.R. 2190 would phase out the use from the entire mercury cell process within the chlor-alkali industry. And the Chlorine Institute's numbers show releases from this group on the order of four tons, if you include releases to the environment and to end products that might end up in human food, as we have seen from the recent report in the Washington Post. And potentially as much as eight tons if you account for the unaccounted for mercury and the fugitive emissions which EPA still suggests are on the order of potentially to about half ton per source. So these are not needed for the processes. We can still bring all these products to market without the mercury, and as a nonessential source of mercury it is one that we can eliminate.

Ms. SCHAKOWSKY. Thank you.

I would like, Mr. Chairman, to submit for the record a letter from 43 environmental groups in support of H.R. 2190.

Mr. RUSH. Hearing no objection, so ordered.

Ms. SCHAKOWSKY. Thank you.

[The information follows:]

ALTAMAHA RIVERKEEPER • CARROLL CITIZENS FOR SENSIBLE GROWTH • CENTER FOR A SUSTAINABLE COAST • CITIZENS CAMPAIGN FOR THE ENVIRONMENT • CITIZENS FOR PENNSYLVANIA'S FUTURE • CONNECTICUT RIVER WATERSHED COUNCIL • COOSA RIVER BASIN INITIATIVE • ENVIRONMENT GEORGIA • FRENCH BROAD RIVERKEEPER • FRIENDS OF THE EARTH • GEORGIA CONSERVATION VOTERS • GEORGIA RIVER NETWORK • GEORGIA WILDLIFE FEDERATION • GLYNN ENVIRONMENTAL COALITION • GROUP AGAINST SMOG AND POLLUTION • HEALTHY CHILD HEALTHY WORLD • IDAHO CONSERVATION LEAGUE • INSTITUTE FOR AGRICULTURE AND TRADE POLICY • LOUISIANA ENVIRONMENTAL ACTION NETWORK • LOWER MISSISIPPI RIVERKEEPER • MERCURY POLICY PROJECT • MONTANA RIVER ACTION • MOTHERS AND OTHER FOR CLEAN AIR • OCEANA • OGEECHEE CANOOCHEE RIVERKEEPER • OHIO ENVIRONMENTAL COUNCIL • OHIO RIVER FOUNDATION • PHYSICIANS FOR SOCIAL RESPONSIBILITY • PITTSBURGH PHYSICIANS FOR SOCIAL RESPONSIBILITY • SAFEMINDS • SATILLA RIVERKEEPER • SAVANNAH RIVERKEEPER • SIERRA CLUB • SIERRA CLUB ALLEGHENY GROUP • SIERRA CLUB CHEROKEE GROUP • SIERRA CLUB SAVANNAH RIVER GROUP • SOUTHERN ALLIANCE FOR CLEAN ENERGY • TENNESSEE BASS FEDERATION • TENNESSEE CLEAN WATER NETWORK • UPPER CHATTAHOOCHEE RIVERKEEPER • WATAUGA WATERSHED ALLIANCE • WATERKEEPER ALLIANCE • WEST VIRGINIA RIVERS COALITION • WOMEN'S VOICES FOR THE EARTH

SUPPORT THE *MERCURY POLLUTION REDUCTION ACT*

Dear Representative,

On May 12, 2009, the Subcommittee on Commerce, Trade, and Consumer Protection will hold a legislative hearing on H.R. 2190, the *Mercury Pollution Reduction Act*, introduced by Rep. Jan Schakowsky. **On behalf of the millions of supporters our organizations represent, we urge you to support the passage of H.R. 2190, the *Mercury Pollution Reduction Act* in Subcommittee.** The goal of this bill is to phase out the use of mercury in chlorine and caustic soda production.

Mercury is a dangerous neurotoxin. Exposure to certain levels of mercury during fetal development can irreversibly impair children's brain functions as they grow. According to an Environmental Protection Agency (EPA) scientist, one in ten women of childbearing age has enough mercury in her body to pose risks to her unborn baby.

While there has been much focus on reducing mercury pollution from coal burning power plants, chlorine and caustic soda production continues using antiquated technology developed before Henry Ford developed the Model-T. This 19th Century technology causes the average mercury cell chlor-alkali plant to emit four times more mercury than the average coal-fired power plant.

The remaining four chlor-alkali factories that use mercury in chlorine production are located in Ohio, West Virginia, Tennessee and Georgia and are major sources of mercury pollution in their respective states. Collectively, these four plants were responsible for releasing more than one ton of mercury into the air and water in 2006. Meanwhile, a more efficient mercury-free technology is widely available. Currently, over 90 percent of the chlor-alkali manufactured in the United States uses mercury-free processes.

Technology is readily available to eliminate the use of mercury in all chlorine and caustic soda production. In addition to being beneficial to the environment and human health, mercury-free technology can be up to 37 percent more energy efficient. Some converted facilities have seen the new technology pay for itself in as little as five years due to savings in energy costs, increased chlorine production and increased profitability. *If the four remaining plants made such a change, their collective sales could increase by an estimated $300 million over five years and they could save more than $13 million due to increased energy efficiency over that same period.*

More than one-hundred facilities worldwide have already converted to mercury-free technology. In fact, Japan banned mercury based chlorine production the 1980s and other countries are currently engaged in phasing out this old technology. It is imperative that the United States make mercury based chlorine production a thing of the past.

Conversion to mercury-free chlorine production makes sense for business, the environment and human health. We support the efforts of this important legislation to eliminate the use of mercury in the chlor-alkali industry. **Please support passage of H.R. 2190, the *Mercury Pollution Reduction Act*, in the Subcommittee on Commerce, Trade, and Consumer Protection on May 12, 2009.** Thank you.

Sincerely,

Beth Lowell
Federal Policy Director
Oceana

Deborah Sheppard
Executive Director and Riverkeeper
Altamaha Riverkeeper

Deana Weaver, Mark Weaver, Brad Pealer
Co-Founders
Carroll Citizens for Sensible Growth

David Kyler
Executive Director
Center for a Sustainable Coast

Nicole Hayler
Executive Director
Chattooga Conservancy

Adrienne Esposito
Executive Director
Citizens Campaign for the Environment

Heather Sage
Vice President
Citizens for Pennsylvania's Future

Erich Pica
Director of Domestic Programs
Friends of the Earth

David L. Deen
River Steward
Connecticut River Watershed Council

Joe Cook
Executive Director
Coosa River Basin Initiative

Jennette Gayer
Advocate
Environment Georgia

Hartwell Carson
Riverkeeper
French Broad Riverkeeper

Jill Johnson
Executive Director
Georgia Conservation Voters

Rebecca Watts Hull

Program Director
Georgia Conservancy
Mothers and Others for Clean Air

April Ingle
Executive Director
Georgia River Network

Glenn Dowling
Executive Vice President
Georgia Wildlife Federation

Daniel Parshley
Executive Director
Glynn Environmental Coalition

Rachel Filippini
Executive Director
Group Against Smog and Pollution (GASP)

Christopher Gavigan
Executive Director
Healthy Child Healthy World

Justin Hayes
Program Director
Idaho Conservation League

David Wallinga, MD
Director, Food and Health
Institute for Agriculture and Trade Policy

Paul Orr
Communications Director
Louisiana Environmental Action Network
Lower Mississippi Riverkeeper

Michael Bender
Executive Director
Mercury Policy Project

Joe Gutkoski
Executive Director
Montana River Action

Chandra Brown
Executive Director and Riverkeeper
Ogeechee Canoochee Riverkeeper

Keith Dimoff
Executive Director
Ohio Environmental Council

Rich Cogen
Executive Director
Ohio River Foundation

Daniel Fine, M.D.
Executive Committee Member
Pittsburgh Physicians for Social Responsibility

Theresa Wrangham
President
SafeMinds

Gordon Rodgers
Executive Director and Riverkeeper
Satilla Riverkeeper

Frank Carl
Executive Director and Riverkeeper
Savannah Riverkeeper

Debbie Sease
National Campaigns Director
Sierra Club

Rachel Martin
Regional Representative
Sierra Club Allegheny Group

Elizabeth Tallman
Chairman
Sierra Club Cherokee Group

Sam Boer
Chairman
Sierra Club Savannah River Group

Sara Barczack
Program Director
Southern Alliance for Clean Energy

Carl Guffey
Conservation Director
Tennessee Bass Federation

Rene Hoyos
Executive Director
Tennessee Clean Water Network

Sally Bethea
Executive Director and Riverkeeper
Upper Chattahoochee Riverkeeper

Dennis Shekinah
President
Watauga Watershed Alliance

Scott Edwards
Legal Director
Waterkeeper Alliance

Shanda Minney
Executive Director
West Virginia Rivers Coalition

Tracy Lakatua
Executive Director
Women's Voices for the Earth

Mr. RUSH. The Chair thanks the gentlelady.

The Chair now recognizes Mr. Scalise from Louisiana for 5 minutes.

Mr. SCALISE. Thank you, Mr. Chairman.

First, a question for Dr. O'Neill.

Your testimony refers to allegations about mercury and high fructose corn syrup via caustic soda. Dr. Robert Stopford, a renowned expert on the health effects of mercury who graduated from Harvard Medical School and directs the toxicology program at Duke University Medical Center, has conducted research in this area, but he found that no quantifiable mercury was found in any of the sampled surveys, and high fructose corn syrup does not appear to be a measurable contributor in mercury food. Have you looked at Dr. Stopford's research findings, and if you can just comment on what he reported.

Ms. O'NEILL. And perhaps Dr. Goldman can speak to this as well.

I am not familiar with that study; and the studies to which I am referring are the ones recently published in the Environmental Health Perspectives, where they found that 50 percent of the samples showed measurable quantities of mercury.

My point is not that this is the primary route of contamination. In fact, we know that fish is the primary route of human exposure to mercury; and that is the graver source of concern, particularly given fish's health benefits that we have to forego if they are contaminated with mercury.

My point is to recognize that if we are using mercury by this process it ends up somewhere. We have to buy it. It ends up in the river. It ends up going out the stacks. It goes out as fugitive emissions into the environment and ends up in the water and ends up in product as a contaminant. And I think EPA and the industry and the textbook discussions of the process recognize that this is necessarily the case when you are using mercury cell technology.

Mr. SCALISE. Dr. Goldman.

Dr. GOLDMAN. I guess I should start by congratulating you, looking at the sticker on your jacket.

Mr. SCALISE. Thank you. I am operating on 3 hours of sleep, so I apologize.

Dr. GOLDMAN. No, I understand. I have been there.

I have read, actually, that study; and I think that it probably is true, that they can measure very minute amounts of mercury and the HFCS. And I also did not think that it was enough to be concerned about toxicologically. I mean, from the standpoint of whether you eat that or not, I would be more concerned for my child to be eating too much high fructose corn syrup just because it is not the best diet. It is basically the diet most kids want to eat, and we want them to eat vitamins and protein and other things.

But I think it is indicative of just kind of the problem that we generally have probably contamination of mercury in the environment that is not only through emissions and from plants and fugitive emissions but possibly in a little bit that goes out in the product. But I would not want people to be worried about eating this product on that basis.

Mr. SCALISE. A recent U.S. geological survey report found that methylmercury emissions from around the world, primarily in Asia, end up in the North Pacific, contaminating 40 percent of tuna as well as other seafood. Considering the vast expansion of coal-fired power plants in China and India, how much do you think that is contributing to some of the things that you are looking at?

Dr. GOLDMAN. I think it is a major concern. I think there is pretty good evidence that a large fraction of the mercury that we are exposed to is local, and another large fraction is from global emissions, and then there is a lot of it that is just from reentrainment. Some of the mercury is just deposited and then reentrains and comes back. So there is recirculation of mercury that has already been released.

So all of those have to be addressed on different fronts, and the global emissions I think need to be addressed through the UNEP and actions to try to get everybody in the world to take action to reduce mercury emissions. And the fact that there are many new coal-fired power plants being built in China every week is a great concern and not just from the standpoint of mercury but also from the standpoint of global warming that things need to be done in order to turn that around. You were talking about 6 billion people in the world, all of whom want to live just like we do; and we have got to take action to make sure that the things that seem to be little things——

Mr. SCALISE. A lot of them criticize——

Dr. GOLDMAN (continuing). Things that seem to be little, but if we multiply it times 6 billion, it is not a little, it is a lot.

Mr. SCALISE. Let me ask Mr. Jackson, because it looks like on the solid waste reporting requirements in Subsection C of the bill that relate to nonhazard waste—I don't know if you have looked at that. Would there be any value in your company actually having to report on its lunchroom trash contents?

Mr. JACKSON. We don't see this as any benefit whatsoever. We see it as onerous upon us. We have no—the idea of our office waste or food waste from employees, we don't even know how to manifest it or send it off.

The other thing I think the committee should recognize is that all even nonhazardous waste landfills are regulated so that the waste that goes in there, hazardous or nonhazardous, is basically treated the same as if it were hazardous. So the release of any potential mercury that could have slipped into the trash can with an office paper, which is just totally impractical——

Mr. SCALISE. I see I am out of time. I yield back. Thanks.

Mr. RUSH. The Chair thanks the gentleman.

This concludes this portion of this hearing. And, again, the Chair thanks all the participants for your involvement, for the sacrifice of your very important time. We really appreciate your contribution to the deliberation of this subcommittee on these very important issues. Thank you so very much and safe travels. Thank you. God bless.

Mr. RADANOVICH. Mr. Chairman.

Mr. RUSH. The Chair recognizes the Ranking Member for a unanimous consent request.

Mr. RADANOVICH. Thank you, Mr. Chairman.

I ask unanimous consent that the following documents be included in the printed record: a letter to you and I from Arthur Dungan of the Chlorine Institute dated May 11, 2009; a report titled the Assessment of Test Results for Mercury in High Fructose Corn Syrup by Dr. Woodhall Stopford; a report titled Normal Mercury Levels in Food and Beverages by Dr. Woodhall Stopford; a statement from the Corn Refiners Association dated February 3, 2009; a news release from the Corn Refiners Association dated March 18, 2009; and a news release from ChemRisk dated January 30, 2009.

Mr. RUSH. Hearing no objection, so ordered.

Mr. RADANOVICH. Thank you, Mr. Chairman.

[The information appears at the conclusion of the hearing.]

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May 11, 2009

The Honorable Bobby L. Rush, Chairman
Subcommittee on Commerce, Trade, and Consumer Protection
Committee on Energy and Commerce
United States House of Representatives
2125 Rayburn House Office Building
Washington, DC 20515

The Honorable George Radanovich, Ranking Member
Subcommittee on Commerce, Trade, and Consumer Protection
Committee on Energy and Commerce
United States House of Representatives
2322-A Rayburn House Office Building
Washington, DC 20515

Dear Congressmen Rush and Radanovich:

The Chlorine Institute wishes to provide you with these comments pertaining to the Mercury Pollution Reduction Act of 2009 (H. R. 2190).

Summary

We believe that H. R. 2190 is not warranted. Furthermore, we believe this legislation undermines the mercury export ban (Mercury Export Ban Act) that was enacted late last year. The chlor-alkali industry worked in a cooperative manner with other industry and environmental groups to pass this legislation. It appears to us that in return for our efforts, the mercury cell chlor-alkali industry is being singled out in a discriminatory manner.

While mercury cell chlor-alkali production accounts for only about 5 percent of the total chlorine production in the United States, approximately 50 percent of the potassium hydroxide production is made using this technology. If the bill is enacted into law, there will be significant disruptions in the potassium hydroxide markets in the United States for the next several years until new capacity can be brought on line.

Potassium hydroxide has several critical uses including the manufacture of potassium carbonate, potassium phosphates, potassium lactate, potassium benzoate, potassium permanganate, potassium citrate, potassium iodide, potassium sulfite, and potassium acetate.

These products of potassium hydroxide chemistry are used in a variety of ways to make essential products for our nation's well being. These include fertilizers and herbicides for food production, water treatment chemicals, film processing materials, airport runway de-icers, soaps and detergents, and in the refining of crude oil in petroleum manufacture.

We have great concerns about the gap in time between when the new DOE surplus mercury storage will be available to accept surplus mercury (2013) and when, under the proposed legislation, the mercury cell technology would be compelled under the proposed legislation to cease operations (as early as 2011). These facilities will be caught in a "catch-22" in that they could not legally store the mercury, which the bill classifies as a hazardous waste, for the intervening period.

We are disturbed by the discriminatory language regarding the mercury from chlor-alkali plants when compared with other sources. Mercury from chlor-alkali plants is identical to mercury from other sources. Yet, the export restriction only affects chlor-alkali mercury. We believe there is no justification for such a discriminatory provision.

Because of the substantial reductions in mercury use and emissions made by the industry over the past several years, there are no human health or environmental issues that justify legislating its phase out. CLOSURE OF THESE FACILITIES WILL HAVE NO MEASURABLE EFFECT ON GLOBAL MERCURY EMISSIONS.

Earlier this year, the new Administration worked to insure that the United Nations Environmental Program (UNEP) develop a binding global mercury treaty affecting mercury use and emissions. The mercury cell chlor-alkali industry has supported both the UNEP efforts and the Mercury Export Ban Act of 2008. We urge Congress to defer action on this new legislation until both have had time to be implemented. This legislation will achieve no measurable impact on global mercury emissions and will not enhance human health or environmental issues in this intervening period. However, passage will seriously disrupt markets for potassium hydroxide and will also have significant adverse economic effects on at least some of the communities where these plants are located.

Background

The Chlorine Institute, Inc., founded in 1924, is a 220-member, not-for-profit trade association of chlor-alkali producers worldwide, as well as packagers, distributors, users, and suppliers. The Institute's mission is the promotion of safety and the protection of human health and the environment in the manufacture, distribution and use of chlorine, sodium hydroxide, potassium hydroxide and sodium hypochlorite, plus the distribution and use of hydrogen chloride. The Institute's North American Producer members account for more than 95 percent of the total chlorine production capacity of the U.S., Canada, and Mexico.

Everyday life would be very different without the benefits of chlorine chemistry. Combined with the power of human innovation, chlorine chemistry plays an essential role in providing the indispensable products of modern life. From providing one of the most basic human needs - clean drinking water - to contributing to the production of high-tech first-responder equipment, sustainable building materials, food protection chemicals, computer microprocessor chips and more than 90 percent of prescription pharmaceuticals, chlorine chemistry is essential to everyday life in America.

The mercury cell process is one of three manufacturing processes utilized by the chlor-alkali sector to produce chlorine and caustic soda (sodium hydroxide) and caustic potash (potassium hydroxide). Mercury contained in mercury cells is used in a non-dispersive way to support chemical reactions and is recycled within the cells. Strict safety procedures and process controls are followed to prevent workplace exposure and to minimize mercury emissions. For that reason, chlorine production is a relatively small source of mercury emissions to the environment today, contributing less than 0.1 percent of total global emissions of mercury from all natural and man-made sources.

The mercury cell chlor-alkali industry has a long history of working in a cooperative manner with regulatory agencies such as EPA and OSHA. In the early 1990s, the industry cooperated with the EPA in providing data that resulted in the land disposal restrictions for mercury containing wastes. In 1996, the industry voluntarily committed to EPA a mercury reduction goal that resulted in mercury use reduction of 93 percent. The commitment included annual public reporting to EPA of the activities undertaken to reduce mercury use and emissions. In 2004, the industry further committed to a full accounting of the mercury used by the industry. The industry provided data to the EPA to enable it to promulgate further reductions in air emissions that became effective in 2005.

The chlor-alkali industry has also been an active supporter of the UNEP Mercury Programme and contributes to the UNEP Partnership on Mercury Reduction in the Chlor-Alkali Sector. This Partnership builds upon the industry's long-standing commitment to share best practices globally for reducing the use and release of mercury from mercury-cell chlor-alkali facilities to protect the environment and public health and welcomes enhanced efforts by the global community to reduce releases of mercury.

The mercury cell chlor-alkali industry has long supported legislation to ban the export of elemental mercury as long as a facility was established to permanently store surplus mercury. In 2007 and 2008, the mercury cell chlor-alkali industry played a very active role in publicly advocating for legislation that bans the export of elemental mercury by January 2013 and establishes a government facility to permanently store surplus mercury in an environmentally sound manner. The industry worked with a diverse group of stakeholders, including the Natural Resources Defense Council, the Environmental Council of the States, the American Chemistry Council, and the National Mining Association, to negotiate in good faith the content of the

Mercury Export Ban Act of 2008 (Public Law 110-414, October 2008) and to secure its passage and enactment. We believe H.R. 2190 significantly undermines this law.

Phase Out of This Technology (Sec. 6A (b) (1))

With the substantial reductions in mercury use and emissions made by the industry, there are no human health or environmental issues that justify mandating its phase out. Closure of the four affected facilities will have no measurable effect on global mercury emissions. Closure will also have no measurable effect on human health and the environment in the United States. In 1996, when the industry made its voluntary commitment, there were 14 mercury cell plants operating. In a few short months this number will be down to four. Of the ten plants that have discontinued the mercury cell process, six have permanently closed and only four were able to justify the investment to install another technology. In April 2009, Chlorine Institute data indicate that the industry is operating at only 63 percent of capacity. Historical numbers are well in excess of 90 percent. It is not unreasonable to conclude that at least some of the four remaining plants will not be able to justify the large investment that is required for a conversion during a period in our history that has been described by most knowledgeable scholars as the worst economic period for the United States since the Great Depression.

While mercury cell chlor-alkali plants represent only 5 percent of the chlorine capacity in the United States, they represent approximately 50 percent of the potassium hydroxide production. If this bill is enacted into law, there will be significant disruptions in the potassium hydroxide markets in the United States for the next several years until new capacity can be brought on line.

Export Ban (Sec. 6A (b) (2))

H.R. 2190 specifically singles out mercury used in the chlor-alkali plants for an export ban. This provision negates the export ban for such mercury as required by the Mercury Export Ban Act of 2008 (Public Law 110-414). The Mercury Export Ban Act was enacted into law only seven months ago. The mercury cell chlor-alkali industry worked with a diverse group of stakeholders, including the Natural Resources Defense Council, the Environmental Council of the States, the American Chemistry Council, and the National Mining Association, to negotiate in good faith the content of this export ban and was a key partner in securing its passage and enactment. It is offensive to us that in a few short months Congress would undo legislation that was passed in such a cooperative manner. Even more significant to the mercury cell chlor-alkali industry, the ban discriminates against mercury as used in our industry even though this mercury is identical to mercury from other sources. We believe there is no justification for such a discriminatory provision.

Additionally, this section not only prohibits the export of mercury as used in the chlor-alkali industry, but also bans the export of mercury cells, mercury compounds, and mixtures containing mercury. Again we believe there is no justification for such discriminatory action against the chlor-alkali industry. Furthermore, we wish to point out that because of technology developments that allow for the detection of mercury in very minute concentrations, detectable levels of mercury are ubiquitous in the environment. As a result, this provision would affect not only equipment that is in contact with mercury in the production facility but most everything within the facility. Current regulations prescribed by the USEPA that have been in effect for nearly 20 years (in some cases more than 20 years), mandate how mercury containing wastes and materials from chlor-alkali plants must be handled. These regulations are fully protective of human health and the environment.

Mercury Used Prior to the Prohibition

Until the Department of Energy has established its site for the receipt of surplus mercury, facilities would have no place to store such surplus mercury. (The Mercury Export Ban Act of 2008 requires such storage to be in place by 2013.) Most legal experts believe that RCRA regulations would prohibit the temporary storage of this mercury for more than 90 days. Since there is no viable market for this surplus mercury (the U.S. domestic demand is far lower than the domestic supply), many would argue that this mercury is a de facto hazardous waste.

We are greatly concerned about the legality of storing such mercury for a period that would most likely be two years or even longer. We are also concerned that EPA and state regulatory agencies could impose fines on these facilities for violation of the RCRA storage regulations which prohibit the temporary storage of hazardous wastes for more than 90 days. Since the new Department of Energy surplus mercury storage required by the Mercury Export Ban Act of 2008 will not be available to accept surplus mercury until 2013, enactment of H.R. 2190 later this year would put this gap in excess of two years. We believe that it will be very challenging for the DOE to meet the existing deadline required by the Mercury Export Ban Act. Accordingly, these four facilities will potentially be in the untenable position of not being able to legally store the mercury at their sites and having no place to send it.

Inventory Requirements (Sec. 6A (d) (1))

The industry is willing to provide data for the current and future years. Congress needs to recognize that the data is simply not available for early years. The industry keeps certain records in accord with laws and regulations and in accord with a company specific records retention program. Where not mandated by law or regulation, typical record retention programs are of three, five, or seven year duration, depending on the type of records. It is doubtful that the records of the type specified in the bill are available from any of the four mercury cell facilities that plan to continue to be operated beyond this year for periods much earlier than the last three to ten years.

Factual Inaccuracies

There are two inaccuracies in the "Findings" section of H.R. 2190 that we wish to correct.

- Section 2(7)(B) states that "cost-effective alternatives are available and in use in the remaining 95 percent of chlorine and caustic soda production." Cost effectiveness must be measured on a site-specific basis. The cost for such a conversion at an individual site is likely in excess of $100 million and may be significantly greater for a large site. Factors such as the long term availability of low cost raw materials (e.g., electricity and salt) and the proximity to long term nearby customers must be weighed in making such a huge investment.

- Section 2(8) states that "the chlor-alkali industry acknowledges that mercury can contaminate products manufactured at mercury cell facilities and that the use of some of those products results in the direct and indirect release of mercury." As stated earlier in these comments, technology developments allow for the detection of mercury in very minute concentrations, including the products of this technology. We believe the very low levels of mercury in some products of this technology have no adverse effect on human health or the environment.

Conclusion

In addition to Congress passing the Mercury Export Ban Act late last year, the new Administration has urged the United Nations Environmental Program to develop a binding global mercury treaty affecting mercury use and emissions. The mercury cell chlor-alkali industry supports both of these actions. We urge Congress to defer action on this new legislation, H.R. 2190, until both have had time to be implemented.

Very truly yours,

Arthur E. Dungan

Arthur E. Dungan
President

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Assessment of Test Results for Mercury in High Fructose Corn Syrup

Woodhall Stopford, MD, MSPH

Dr. Stopford, a graduate of Harvard Medical School, is an internist and occupational physician at Duke University Medical Center in the Department of Community and Family Medicine, Division of Occupational and Environmental Medicine where he directs a toxicology program. He has 36 years of experience as a practicing physician. He is widely published and has taught numerous courses and seminars on toxicology, occupational health, and family medicine. Dr Stopford is a renowned expert on the health effects of mercury, and has conducted extensive research on the subject.

CONCLUSION:

- No quantifiable mercury was detected in any of the samples analyzed.
- High fructose corn syrup does not appear to be a measureable contributor to mercury in foods.

I have reviewed the results of total mercury testing of samples of high fructose corn syrup conducted by Eurofins Central Analytical Laboratory (Metairie, LA) in February and March 2009. One hundred nineteen samples of high fructose corn syrup (HFCS 42 and HFCS 55) supplied by the 5 U.S. and Canadian producers from each of their 22 production facilities were analyzed.

Samples were collected after decontaminating surfaces to prevent unexpected mercury contamination of samples. Samples were digested in nitric acid and hydrogen peroxide in high pressure Teflon vessels using microwave heating in conformance with AOAC Official Method 986.15, developed for digestion and analysis of human and pet foods for heavy metals. Digestion samples were then analyzed for mercury using EPA Method 200.8, an analytical method utilizing inductively coupled plasma-mass spectroscopy (ICP-MS) which is specified by EPA for analysis of drinking water. Samples of high fructose corn syrup were spiked with mercury to act as positive controls with acceptable results if mercury recovery was in the range of 70-110%. For every 10 samples analyzed, a reference sample with a known level of mercury was also analyzed. Samples were analyzed in duplicate. I reviewed and approved these methods prior to the initiation of testing.

No quantifiable mercury was detected in any of the samples analyzed under the parameters of the method with a limit of quantification of 0.005 mg/kg or 5 parts per billion (ppb) and a detection limit of 2 ppb. Detection limits for mercury analysis by ICP-MS range from 0.4-3 ppb depending on the product type being sampled (Ysart et al., 2000).

Mercury in various food groups can range up to 141 ppb with levels generally <18 ppb in the last 10 years (Stopford, 2009). High fructose corn syrup with <5 ppb mercury would not be a significant additional contributor to mercury in foods.

References
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Normal Mercury Levels in Food and Beverages

Woodhall Stopford, MD, MSPH

CONCLUSIONS:

- Mercury is ubiquitous in the environment and has been identified at low levels in a wide variety of foods and beverages in both the United States and elsewhere since the 1930s.
- Mercury is generated both by manmade activities (such as coal-fired power plants) and by natural phenomenon (such as volcanoes).
- The introduction of high fructose corn syrup as a sweetener has not been associated with any noticeable difference in mercury levels in foods and beverages containing high fructose corn syrup.
- Mercury levels in foods prior to the start of the use of high fructose corn syrup in the early 1970s were consistently higher than those found in foods in the last 10 years.

Recently Wallinga, et al. (2009) evaluated 55 foods containing high fructose corn syrup and found mercury levels ranging as high as 0.35 ppb (micrograms per kilogram). The authors specifically selected products that were marketed to children as well as those that contained high fructose corn syrup as the first or second labeled ingredient. Although high fructose corn syrup has been increasingly used as a beverage sweetener for the last 20 years, the authors found no detectable mercury in the majority of the sweetened beverage samples they tested. The authors further relied on a study of Dufault, et al. (2009) that identified mercury as being found in 9 of 20 high fructose corn syrup samples tested. The authors concluded that high fructose corn syrup appears to be a significant additional source of mercury exposure.

Mercury, however, is ubiquitous and has been identified in a wide variety of foods and beverages in both the United States and elsewhere since the 1930s. Mercury levels in foods prior to the start of use of high fructose corn syrup in the early 1970s were consistently higher than those found in foods in the last 10 years. The values found by Wallinga, et al. (2009) are similar to those seen in Canada in the late 1990s-2000, even when compared to products that would not contain high fructose corn syrup (Table). Mercury measured in one sweetened cola beverage in 1964 (when sucrose was used as a sweetener) was 1.8 ppb compared to 0.06 ppb when measured in the same brand in 2009. Other ingredients in the foods studied by Wallinga, et al. have been found to contain mercury. For instance, grapes contain 0.18-0.6 ppb mercury (Dabeka, et al. 2003) which compares to a value of 0.1 ppb in grape jelly found by Wallinga et al. Chocolate contains 13 ppb mercury (Goldwater, 1972) and milk contains <0.13-0.25 ppb mercury which compares to <0.02-0.03 ppb in chocolate milk found by Wallinga, et al. It does not appear than high fructose corn syrup has been a significant source of mercury in any of the food groups evaluated by Wallinga, et al.

SUMMARY:

Mercury is ubiquitous in the environment being generated both by man-made activities (such as coal-fired power plants) and by natural phenomenon (such as volcanoes). Mercury is found naturally in all living things, including all categories of foods and beverages. Levels in foods and beverages have dropped significantly in the last 40 years. The introduction of high fructose corn syrup as a sweetener has not been associated with any noticeable difference in mercury levels in foods and beverages containing high fructose corn syrup. Levels of mercury found in such foods and beverages are what would be expected from mercury found normally in such foods and beverages and are at background levels.

Mercury in foods and beverages (in ppb mercury)

Type of Food or Beverage	US (1964) [Goldwater, 1972]	Great Britain (1997) [Ysart, et al., 2000] (mean values)	Canada (2000) [Dabeka, et al., 2003]	US (2009) [Wallinga, et al., 2009]
Dairy products	8.1-141	0.4-2	0.11-1.8	<0.02-0.06
Eggs	11-62	1.3	0.39-1.5	
Vegetables	<0.1-19	0.4-1	0.04-16	
Fruit-based products, and desserts	4-31	0.6-0.8	0.04-0.7	<0.03-0.18
Grains, cereals, and bread	2.2-25	2-4	0.09-1.8	0.35
Sugars, syrups, preserves, and candy	13	3	<0.11-0.32	<0.03-0.26
Beverages	1.3-4.4		0.02-0.11	<0.03-0.06
Dressings and condiments	0.7-38		<0.04-0.17	0.07-0.3
Baby foods			<0.05-0.53	
Soups			<0.08-0.17	<0.1
Fast foods and frozen entrees			0.05-18	0.15

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CORN REFINERS ASSOCIATION

NEWS RELEASE

FOR IMMEDIATE RELEASE
March 18, 2009

CONTACT: Audrae Erickson
(202) 331-1634

Tests Find No Quantifiable Mercury Levels in High Fructose Corn Syrup

WASHINGTON, DC – Manufacturers of high fructose corn syrup in the United States and Canada commissioned independent testing and expert review following a recent report alleging mercury findings in high fructose corn syrup. No quantifiable levels of mercury were found according to the independent lab Eurofins Central Analytical Laboratory, whose work and results were reviewed by Woodhall Stopford, MD, MSPH, of Duke University Medical Center, one of the nation's leading experts in mercury contamination.

"The American public can rest assured that high fructose corn syrup is safe. Safety is the highest priority for our industry, which is why we immediately commissioned external testing as well as independent expert review of claims concerning mercury and our corn sweetener. No quantifiable levels of mercury were found in high fructose corn syrup," said Audrae Erickson, president, Corn Refiners Association.

"Our industry has been supplying safe ingredients to the American public for generations. High fructose corn syrup is a trusted ingredient with the same sweetness and calories per gram as sugar and is metabolized by the body the same as sugar. It also has many beneficial attributes that make it a preferred choice for several foods and beverages."

The manufacturers enlisted the independent lab Eurofins Central Analytical Laboratory, which in February and March 2009 received 119 samples of high fructose corn syrup (HFCS 42 and HFCS 55) from all 22 of the production facilities in the United States and Canada. Testing by Eurofins found no quantifiable mercury in any of the samples, using accepted methods for quantifiable detection (limit of quantification of 0.005 mg/kg or five parts per billion and a detection limit of two parts per billion).

To further ensure verification of the safety of high fructose corn syrup, the Corn Refiners Association asked noted mercury expert Woodhall Stopford, MD, MSPH to review the test procedure and conduct an independent evaluation of the test results. Dr. Stopford, a graduate of Harvard Medical School, is an internist, Preventive Medicine, in the Duke University Medical Center in the Department of Community and Family Medicine, Division of Occupational and Environmental Medicine. He has 36 years of experience as a practicing physician. He has been widely published and has taught numerous courses and seminars on toxicology, occupational health, and family medicine. Dr. Stopford is a renowned expert on the health effects of mercury and has conducted extensive research in the field. To view Dr. Stopford's analysis and conclusions, please see: http://duketox.mc.duke.edu/HFCS%20test%20results4.doc.

For more information about high fructose corn syrup, please visit www.SweetSurprise.com.

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CRA is the national trade association representing the corn refining (wet milling) industry of the United States. CRA and its predecessors have served this important segment of American agribusiness since 1913. Corn refiners manufacture sweeteners, starch, oil and other products from corn.
www.corn.org

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CORN REFINERS ASSOCIATION

STATEMENT

FOR IMMEDIATE RELEASE
February 3, 2009

CONTACT: Audrae Erickson, President
(202) 331-1634

MERCURY STUDY SERIOUSLY FLAWED AND OUTDATED; FAILS TO MEET STANDARDS FOR SCIENTIFIC RESEARCH

WASHINGTON, DC – The Corn Refiners Association (CRA) provided an expanded response, following up on its earlier statement about an article released in *Environmental Health* on January 26 and an unpublished editorial report by the advocacy group Institute for Agriculture and Trade Policy (IATP; also a co-author of the journal article), which asserts that limited tests found a measurable level of mercury in foods containing high fructose corn syrup and high fructose corn syrup samples from early 2005.

"The article's authors and IATP engage in unfounded claims and speculations based on scant data of questionable quality. High fructose corn syrup is safe for use in foods and beverages. To imply that there is a safety concern based on this incomplete and flawed report is irresponsible," stated Audrae Erickson, President of the Corn Refiners Association.

"The article and the report are based on outdated information of dubious significance," Erickson added. "Americans should know that no mercury or mercury-based technology is used in the production of high fructose corn syrup in North America."

"It is important to put these questionable findings into context. Trace amounts of mercury can be found in the air, water, soil, and many other foods. The authors admit that they cannot determine the source of the mercury cited in the report."

"Equally important," noted Erickson, "the amounts of mercury the authors and IATP purport to have found in food products containing high fructose corn syrup are far below levels of concern set by the U.S. Food and Drug Administration and the Environmental Protection Agency. Specifically, EPA sets limits for mercury in drinking water at two parts per billion. In comparison, the IATP authors claim to have found levels at parts per *trillion* in only 2 of 19 beverages with high fructose corn syrup – at levels one-hundred times below the EPA limit of concern. All the other samples were devoid of detectable levels. " Erickson said.

"The IATP report and the journal article it references fail to meet scientific standards for serious research and published literature," according to Erickson.

Over twenty five years ago, the FDA formally listed high fructose corn syrup as safe for use in food. That decision was reaffirmed more than a decade ago. High fructose corn syrup contains no artificial or synthetic ingredients or color additives and meets FDA's requirements for the use of the term 'natural.'

"For more than 150 years, our industry has been perfecting the process of refining corn to make safe ingredients for the American food supply," Erickson stated.

CRA is the national trade association representing the corn refining (wet milling) industry of the United States. CRA and its predecessors have served this important segment of American agribusiness since 1913. Corn refiners manufacture sweeteners, ethanol, starch, bioproducts, corn oil, and feed products from corn components such as starch, oil, protein, and fiber.

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ChemRisk®

FOR IMMEDIATE RELEASE
January 30, 2009

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Recent Reports Regarding Mercury and High Fructose Corn Syrup Flawed and Misleading

SAN FRANCISCO - ChemRisk, a leading scientific consulting firm, was asked by the Corn Refiners Association (CRA) to examine the recent publication by Institute for Agriculture and Trade Policy (IATP), "Not So Sweet: Missing Mercury and High Fructose Corn Syrup," and the *Environmental Health* journal publication "Mercury from chlor-alkali plants: measured concentrations in food product sugar," by Dufault et al, 2009, and to offer our comments and analysis.

In summary we found:

- The IATP report and *Environmental Health* article it references fall well below standards for proper scientific research and published literature.
- The authors of both publications provide incomplete data and misleading conclusions.
- Methods described by the authors deviate from standard procedure in testing for mercury.
- The authors ignore important distinctions between organic and other forms of mercury and their implications for assessing human health risk.
- Even if it were assumed that the mercury content found in the extremely limited sampling of foods and beverages was representative, the amounts are far lower than levels of concern set by government agencies.
- The authors assume that the total mercury they detected in a questionably small sampling of consumer foods is primarily the result of high fructose corn syrup; an assumption that has not been properly tested or validated. The recipes for the items studied may have had multiple sources of potential contamination

To imply that there is a safety concern to consumers based on the findings presented is both incorrect and irresponsible.

By combining the results of a four-year-old sampling analysis of high fructose corn syrup with a more recent testing of branded foods and beverages for total mercury, the IATP report fails to recognize basic scientific facts regarding mercury; ignores common dietary sources of mercury, an element that is widely present in our environment at low concentrations; and makes improper assumptions regarding the source of the mercury measured in various branded food products.

- More than two-thirds of the samples analyzed by IATP had no detectable level of mercury at all. In the remaining sample, most of these were at or near the limit of

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detection. The average concentration for the 17 samples with detectable levels was only 128 *parts per trillion (ppt)*. EPA sets limits for mercury in drinking water at two *parts per billion.*

- It is well known that small amounts of mercury are broadly present in our environment. For example, Health Canada reported in 2003 that the concentrations of total mercury in steak ranged from 420 to 1,800 parts per trillion (ppt); fresh pork contained 1,100 to 1,500 ppt; organ meats (liver and kidney) contained over 2,100 ppt; and lamb contained 290 to 2,300 ppt of total mercury. (Dabeka et al, 2003) For the sake of reference, one part per trillion is equal to one drop of water spread out into 26 Olympic-size swimming pools. (Washington Suburban Sanitary Commission, 2009)

- That same study by Health Canada looked at mercury in seafood, finding amounts that ranged from 40,000 ppt in fresh or frozen marine fish to 148,000 ppt in canned fish. Other foods, such as canned mushrooms, had 5,100 to 16,000 ppt total mercury, grapes had 180 to 590 ppt, blueberries 210 to 640 ppt, rice 570 to 1,800 ppt, raisins upwards of 700 ppt, and shelled seeds up to 1,000 parts per trillion (ppt).

- The levels noted above are substantially greater than those found by Wallinga and colleagues in their reports. (Dabeka et al, 2003) Other studies by other international authorities (FDA, United Kingdom Food Standards Agency and others) have found similar or higher levels of mercury in common components of a typical human diet. (FDA, 2006; Ysart et al, 2000)

- IATP assumes that the total mercury they detected in a questionably small sampling of consumer foods is primarily the result of high fructose corn syrup; an assumption that has not been properly tested or validated. In fact, the authors do not attempt to characterize whether there may be mercury in any other ingredients contained within the consumer products tested, even while the recipes for the items studied may have had multiple sources of potential contamination. As we have mentioned, very small amounts of mercury are practically ubiquitous in our society.

- IATP demonstrates a gross lack of understanding of the current state of knowledge of the different forms of mercury and their effect on the human body. This is illustrated in their statement that "The mercury found in HFCS may be a different form of mercury than the methylmercury typically found in fish (we just don't know), but it poses a risk just the same. Mercury in any form can be toxic to the developing brain." (Wallinga et al, 2009). The ATSDR (Agency for Toxic Substances and Disease Registry) is a sister agency of the Centers for Disease Control, and regularly provides reviews of chemicals in our

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society that may pose a risk to human health. Regarding mercury, it is clear that inorganic forms are considered to be much less dangerous to humans than organic forms, with absorption generally at least ten times less (ATSDR, Public Health Statement on Mercury, 1999).

# # #

*Dr. Dennis Paustenbach is a board-certified toxicologist and industrial hygienist with nearly 25 years of experience in risk assessment, environmental engineering, ecotoxicology, and occupational health. He is currently the President of ChemRisk, Inc., a consulting firm which specializes in human and ecological risk assessment and risk analysis of pharmaceuticals and medical devices. ChemRisk's professionals have a longstanding reputation for thorough scientific analysis and for sharing their results both at major scientific meetings and in the peer-reviewed scientific literature. ChemRisk's more than 60 scientists are experienced in addressing health and safety concerns, with backgrounds including toxicology, industrial hygiene, epidemiology, ecotoxicology, environmental sciences, medicine, statistical analysis, and risk assessment. Many of the more than 1,000 papers presented at scientific conferences and 400 papers published by **ChemRisk®** scientists are frequently referenced in regulatory decision-making and relied upon in litigation proceedings.*

Acting Director Eileen Harrington
Bureau of Consumer Protection
Federal Trade Commission
Responses to Questions for the Record
"Legislative Hearing on H.R. ___, the Consumer Credit Protection Improvement Act and H.R. 2190, the Mercury Pollution Reduction Act"

Q1: If state attorneys general were allowed to contract with private attorneys to enforce the rules, would there be a potential for misaligned enforcement efforts to target 'deep pockets" rather than target bad actors perpetrating the most fraud?

A1: In the current financial crisis, many consumers clearly are at risk from those who engage in unfair and deceptive acts and practices in the marketplace. The Federal Trade Commission and state attorneys general have responded by increasing their law enforcement activities to protect consumers from these risks. Giving state attorneys general the authority to enforce FTC rules prohibiting acts and practices related to consumer credit and debt as unfair or deceptive would enhance the ability of state attorneys general to take such law enforcement action.

With regard to state attorneys general contracting with private attorneys to enforce FTC implementing rules, I would note that, under many statutes, Congress has given the Commission the authority to promulgate and enforce rules, as well as given the state attorneys general the authority to enforce the FTC's rules.[1] This approach to enforcement has been used to address consumer protection issues as diverse as credit reporting, pay-per-call telephone calls, children's online privacy, telemarketing scams, and spam. I am not aware of any instances in which a state has contracted with private attorneys to enforce any of these FTC rules. If Congress is concerned that state attorney general enforcement of FTC rules would result in misaligned enforcement efforts, then Congress may wish to address this concern more generally in connection with all of these statutes.

Q2: The Credit Repair Organization Act only preempts state law to the extent that it is inconsistent with Federal law, but more protective state laws are not considered inconsistent, and therefore not preempted.

a. Is there any reason we need State AG enforcement of Federal law or any future FTC rule related to credit repair practices if states are currently free to enact and enforce their own statutes?

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[1] *See, e.g,* Fair Credit Reporting Act, 15 U.S.C. § 1681s(c), 16 C.F.R. Part 600 *et seq.*; Telephone Disclosure and Dispute Resolution Act, 15 U.S.C. § 5712(a), 16 C.F.R. Part 308; Children's Online Privacy Protection Act, 15 U.S.C. § 6504(a)(1), 16 C.F.R. Part 312; Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. § 6103(a), 16 C.F.R. Part 310; and Controlling the Assault of Non-Solicited Pornography and Marketing Act, 15 U.S.C. § 7706(f), 16 C.F.R. Part 316.

b. Could credit repair regulations be promulgated under the APA rulemaking of this legislation as a "credit" issue?

A2: If the bill were enacted, traditional tools of statutory construction would be applied to determine the scope of the FTC's authority to promulgate rules relating to "credit." If these tools were applied to the term "credit" in the bill, it could be interpreted to mean that Congress intended that the Commission has the authority to use APA rulemaking procedures to promulgate rules prohibiting unfair and deceptive acts and practices relating to credit repair. The FTC would consider all indications of Congressional intent in guiding its decisions on rulemaking proceedings on credit-related subjects.

A vigorous law enforcement response from federal and state law enforcement officials is needed in response to the current financial crisis, including to address credit repair scams. The Commission and the states have a history of close law enforcement cooperation to protect consumers from credit repair issues. We have conducted many law enforcement investigations and prosecutions of credit repair scams working closely with the states. In these cases, the FTC has alleged violations of Section 5 of the FTC Act and CROA, while the states have alleged violations of their own statutes. Allowing states to bring law enforcement actions to enforce an FTC rule relating to credit repair might make state law enforcement actions and remedies more effective.

Q3: The legislation contains a provision for any state AG office to notify the Commission 60 days in advance of filing an action, *if feasible*. Otherwise it can proceed without notifying the Commission. Is there any case history or public health and safety circumstance related to consumer credit or debt issues that would require immediate action by a state AG without enough time to first notify the Commission?

A3: Although cases related to consumer credit and debt do not raise public health and safety issues, it often is in the public interest to file these cases as quickly as possible. Many consumer financial service cases are against scam artists that are causing substantial injury to consumers, such as the loss of their homes or large sums of money. Filing a case and obtaining injunctive relief quickly can halt these scams and the injury they cause. Filing a case and obtaining temporary and preliminary injury relief quickly, including asset freezes and immediate access to the premises, also make it harder for defendants to hide assets that could be used for consumer redress and civil penalties, as well as make it more difficult for them to destroy documents and other inculpatory information.

Section 4(b)(1) of the bill that the Subcommittee approved at mark-up requires state attorneys general to give 30 days written notice to the FTC before filing an action alleging a violation of the FTC's rules. Section 4(b)(2) of that bill states that a state attorney general can file such an action at any time after the day on which the 30 day notice period ends, or earlier than that time with the consent of the FTC. The purpose of the notice and intervention requirements in the bill is to permit the Commission to intervene in the action. Although the scheme in the bill varies somewhat from the approach with which the Commission has experience under the Telemarketing and Consumer Fraud and Abuse Prevention Act, the bill as amended does not appear likely to pose substantial impediments to the FTC's ability to intervene in actions.

Q4: What is the range of credit and debt issues that the FTC could issue rules on under the authority in the legislation (i.e., how is credit and debt defined?). What is the scope of the industries affected?

a. Does the Commission believes that a one-size-fits-all rule is appropriate for every industry that may extend credit?

b. How would the Commission address the differences between different industries in an APA rulemaking procedure?

c. How many rule making procedures for credit and debt issues has the Commission proposed since enactment of Magnuson Moss requirements?

A4: The FTC currently has the authority to issue rules prohibiting or restricting unfair and deceptive acts and practices relating to consumer credit and debt. To promulgate such rules, the Commission currently must use the burdensome and time-consuming Magnuson-Moss rulemaking procedures set forth in Section 18 of the FTC Act. Section 2 of the bill would not change the types of rules related to consumer credit and debt that the FTC can issue, but it would amend Section 18 of the FTC Act to allow the agency to use Administrative Procedure Act notice and comment rulemaking procedures to promulgate these rules more quickly and easily.

With regard to the scope of the rules under the bill that the Commission could promulgate using APA procedures, "consumer credit" and "debt" are defined in neither the bill nor the FTC Act. The bill also does not expressly define the type of entities that the rules would cover, but because the bill is an amendment to Section 18 of the FTC Act, the rules promulgated pursuant to the bill would apply only to entities that are already within the Commission's jurisdiction under that Act, specifically, non-bank financial companies.

In 1975, Congress amended the FTC Act to require that the Commission use Maguson-Moss rulemaking procedures to promulgate rules declaring acts and practices to be unfair or deceptive under the FTC Act, so-called "trade regulation rules." In the thirty-four years since these heightened procedural requirements were imposed, the Commission has issued or substantially revised only ten of its current trade regulation rules using these procedures. Only one of these rules relates to acts and practices concerning consumer credit and debt: the Credit Practices Rule, which the Commission issued in 1984.

Any rules that the Commission would issue to implement the bill would address unfair and deceptive acts and practices relating to consumer credit or debt. Such rules would impose prohibitions and restrictions on any entity within the FTC's jurisdiction under the FTC Act that engages in the conduct that the rule prohibits. There might be differences between types of entities engaged in the acts and practices that the rules would prohibit or restrict, and, therefore, a "one-size-fits-all" approach might not be appropriate. Determinations of whether there are distinctions among types of entities exist that justify different treatment under FTC rules cannot be made in the abstract, however. The Commission would make any such determinations based on the evidence in the rulemaking record.

Q5: If the state attorneys general can enforce any statute the Commission enforces and obtain civil penalties, what does that do to existing Commission enforcement policies and interpretations of unfair and deceptive acts and practices if different fact patterns are used by different state attorneys general to obtain civil penalties?

a. Under the legislation, the civil penalty authority standard is expanded from "actual knowledge" to include violations for "knowledge fairly implied" for violations that are determined to be unfair or deceptive. Isn't that a change that, when combined with state AG enforcement, will create unprecedented confusion for legitimate businesses and possibly change the FTC's interpretations of what is an unfair or deceptive practice?

A5: Under Section 4(a) of the bill that the Subcommittee approved at the mark-up state attorneys general could enforce the implementing rules that the FTC promulgates, but not the FTC Act itself. This is an appropriate approach. Although Commission statutes, especially Section 5 of the FTC Act, use broad and elastic terms, FTC rules set forth fairly specific requirements and interpretations of the FTC Act. This specificity significantly reduces the risk of varying and conflicting interpretations arising. Moreover, if a state were considering proceeding based on an interpretation of an FTC rule that was inconsistent with the FTC's interpretation, the notice and intervention provisions in the bill provide the Commission with ample opportunity to try to avoid the creation of conflicting standards.

The knowledge standard for civil penalties under the bill in fact is the same as the knowledge standard for civil penalties for trade regulation rule violations under the FTC Act. Under Section 5(m)(1)(A) of the FTC Act, the Commission may bring an action to recover civil penalties against anyone who "violates any rule under [the FTC Act] with actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by such rule." 15 U.S.C. § 45(m)(1)(A). Likewise, under Section 3 of the bill, the FTC may bring an action to recover civil penalties against anyone who "engages in any unfair or deceptive acts or practices in connection with consumer credit or debt with actual knowledge or knowledge fairly implied on the basis of objective circumstances that such an act is unfair or deceptive." Given that the same standard for knowledge is included in the FTC Act as in the bill, there is no difference that could create confusion.

Q6: **Mr. Beisner outlined a number of guidelines that would bring state AG enforcement policies in keeping with those already in place at Federal Agencies. Would you support the addition of such guidelines in the bill, thus reducing opportunities for potential abuses-of-powers by state AG's in the enforcement of FTC rules? If not, could you please explain?**

A6: Mr. Beisner proposes three main requirements on state attorneys general who contract with private attorneys to enforce the rules that the FTC promulgates under the bill. Specifically, he proposes that state attorneys general should be required to disclose private attorney retention agreements, prohibit "pay-to-play" arrangements, and prohibit contingent fee arrangements consistent with Executive Order 13433.

As noted above in response to Question 1, under a number of consumer protection statutes Congress has given the Commission the authority to promulgate and enforce rules, with state attorneys general also being given the authority to enforce the FTC's rules. I am not aware of any instances in which a state has contracted with private attorneys to enforce any of these FTC rules. If Congress is concerned that state attorney general enforcement of FTC rules would result in potential abuse or power by state attorneys general, then Congress may wish to address this concern more generally in connection with all of the consumer protection statutes listed in response to Question 1.

Q7: **Your testimony did not mention a position on the enforcement by state Attorneys General. Do you have a position on whether an additional grant of enforcement authority to the states is necessary given the "mini-FTC" state statutes and the industry specific regulations most states already have which provide AG enforcement authority?**

A7: A vigorous law enforcement response from federal and state law enforcement officials is needed in response to the current financial crisis. The creation of an enforcement scheme that allows for federal or state law enforcement is beneficial, because it increases the number of law enforcers monitoring, investigating, and challenging conduct harmful to consumers.

Some state attorneys general may be able to challenge some problematic conduct relating to consumer credit or debt under their state "little FTC Acts." Nevertheless, giving state attorneys general the option of enforcing an FTC rule may benefit consumers. If state attorneys general (with FTC oversight) are enforcing an FTC rule, it leads to the development of more uniform standards of conduct than would be the case if each state were enforcing its own little FTC Act.

Consumers likewise may benefit in some circumstances if state attorneys general have the option of enforcing an FTC rule. With an FTC rule, the Commission would have already determined that **specific** acts and practices are unfair or deceptive based on a extensive analysis of its effects on consumers and competition. In an action to enforce the FTC rule (unlike an action to enforce a state little FTC Act), it would be unnecessary for the state attorney general to prove independently to the court that the acts and practices are unfair or deceptive. In addition, in an action alleging a violation of an FTC rule, a state attorney general might be able to obtain better remedies than would be available in an action alleging a violation of a little FTC Act.

Q8: How do the legislation's new proposed state Attorneys General enforcement provisions compare to other state Attorney General enforcement provisions - either within the realm of FTC or other Federal agencies? Does the Commission support the ability of state attorneys general to bring cases in state courts as is permitted under H.R. 2309?

A8: As noted above in response to Question 1, the provisions in the bill that allow states to enforce FTC rules generally are modeled on provisions in other consumer protection statutes the Commission enforces.

The bill would allow state attorneys general to bring actions in federal court for violations of FTC rules. State attorneys general enforcing FTC rules in a federal forum would promote the development of nationwide standards and the imposition of nationwide relief. It therefore is important that state attorneys general should be able to bring actions in federal courts to enforce FTC rules.

The bill also would allow state attorneys general to bring actions in state court for violations of FTC rules. State attorneys general are in the best position to address the costs and benefits for their law enforcement efforts of allowing them to bring actions in state court to enforce FTC rules.

ASHTA

Sent via email to: Earley.Green@mail.house.gov.

June 12, 2009

The Honorable Henry A. Waxman
Chairman, Committee on Energy and Commerce
United States House of Representatives
2125 Rayburn House Office Building
Washington, DC 20515-6115

Dear Congressman Waxman,

The following are ASHTA's responses to the written questions directed to us from certain Members of the Subcommittee on Commerce, Trade and Consumer Protection regarding H.R. 2190.

As directed, we are providing our response via email to Earley Greene, Chief Clerk in Room 2125 of the Rayburn House Office Building.

Please feel free to direct any question that you or any other Members may have about these responses to me at your convenience.

Sincerely,

Richard L. Jackson
Executive Vice President
ASHTA Chemicals Inc.

ASHTA CHEMICALS

Answers to Written Questions from Hearing on H.R. 2190

To The Honorable Bobby Rush:

1. What safety measures has ASHTA put in place to protect its workforce from mercury exposure and what are the costs associated with those safety measures? Does ASHTA conduct any monitoring among its workers to measure their exposure to mercury?

   All of ASHTA's employees and contractors are trained to adhere to the policies and practices of ASHTA's Mercury Control Program. The program describes the health effects of mercury, pathways of exposure, control of exposures and exposure prevention, respiratory protection, industrial hygiene surveys, vapor monitoring surveys, urine monitoring, housekeeping procedures, contamination control, and disposal of mercury contaminated wastes.

   The costs associated with the safety measures to protect the work force from mercury exposures are nominal. Training, personal protective equipment, clothing, and monitoring are also required to protect employees from other chemical exposures. ASHTA estimates the annual cost specific to protect employees from mercury exposure to be less than $50,000 per year. (See Exhibit A attached to this document)

ASHTA CHEMICALS

Answers to Written Questions from Hearing on H.R. 2190

To The Honorable Bobby Rush:

2. The President of ERCO, a company that owns a recently converted chlor-alkali plant in Wisconsin, has stated "If we don't make this conversion over time … that plant would reach the end of its economic viability." He indicated that without the upgrade to non-mercury technology, the plant would be too inefficient to operate beyond another five to seven years, and a company news release said that the upgrade will extend the life of the plant greatly and increase its cash flow. Do you disagree with ERCO's assessment that such an investment is a good business decision and that the costs can be recovered in fewer than five years?

   ASHTA is not in a position to accurately assess the decision that ERCO has made to convert its facility to membrane cell technology. In making such a decision, there are many site specific conditions that must be considered and we are not familiar with the specific conditions in which they are operating. However, ASHTA has evaluated the economics and environmental impact of conversion (capital costs and ongoing operating costs) versus the current operation and costs thereof and has concluded that such conversion was not economically feasible. ERCO is a division of a larger, Canadian company with considerably more financial resources and started conversion plans several years ago. Even though ASHTA has a strong balance sheet, we believe it would be virtually impossible in today's credit markets to borrow the money required to convert our facility to membrane cell technology. As stated in our written testimony, ASHTA has spent millions of dollars in capital and operating costs over several years to fully comply with the environmental regulations of both the Ohio EPA and US EPA. ASHTA has complied with and relied upon the regulatory bodies and process to guide us in making business decisions. To now make such significant changes to the Toxic Substance Control Act regulations in such a short time-frame, which H.R. 2190 proposes to do, is unfair to ASHTA or any other business which has been in compliance and made similar decisions.

ASHTA CHEMICALS

Answers to Written Questions from Hearing on H.R. 2190

To The Honorable Bobby Rush:

3. In testimony you offered at the May 12, 2009, hearing you mentioned several times the possibility of closing your chlor-alkali plant in Ashtabula. Why is closing the plant the only option available to your company when other companies have converted successfully?

   We believe that the only way for ASHTA to be in full compliance with H.R. 2190 as currently written (and as amended in the recent mark up) is closure of the facility. Specifically, we are certain that it would not be possible for ASHTA to convert its facility in the 24 month period required under the proposed Bill, considering the resources, both human and financial, required to design, engineer, permit, fund, construct, and commission a new or converted facility and then decommission an old facility. For example, the construction phase will require significant additional time due to ASHTA's site specific space limitations. ASHTA has evaluated conversion within the present facilities and has determined that the construction space limitations in the existing process building plus the necessity of keeping the present plant operating during construction severely limits the number of construction workers that can work efficiently on the project at any given time and thus extends the time of construction significantly.

ASHTA CHEMICALS

Answers to Written Questions from Hearing on H.R. 2190

To The Honorable Bobby Rush:

4. According to company reports, over the past five years, ASHTA has purchased over 30,000 pounds of mercury, roughly 2,000 pounds of which was used to replace mercury lost due to normal operations, according to your mass balance calculations. According to documentation submitted by ASHTA to the Ohio EPA, over that same time, some new processes were installed, but these new processes warranted only about 14,000 pounds of that addition. Please explain the 14,000 pound discrepancy. Has ASHTA accounted for the lost mercury?

   ASHTA purchased 25,992 pounds of virgin mercury during five year period of 2004-2008 (as reported in ASHTA's Survey Reports to the USGS for 2004 through 2008). Although this represents our actual purchases, it is not a relevant number for determining mercury balances as ASHTA maintains a separate inventory of virgin mercury that is not currently used in its process. As reported to the Ohio EPA in ASHTA's Mercury Balance Reports for 2004 through 2008, ASHTA took 30,617 of mercury from its inventory to use in its process.

   You have indicated in your question above, that about 2,000 pounds of the virgin mercury purchased was used to "replace lost mercury due to normal operations." We believe that this number was either copied in error or was a misinterpretation of the reports that were submitted to different agencies. Further, your question indicates that ASHTA used only 14,000 pounds of mercury in newly installed processes. The mercury used in these newly installed processes, and reported to the Ohio EPA, for these five years actually totaled 20,128 pounds.

   In an effort to summarize and clarify the data that ASHTA has submitted on reports to the Ohio EPA and the USGS, please note that ASHTA measures all mercury that is a) discharged by air emissions from point sources, b) included in product produced, c) sent off for regulated waste disposal and d) captured in carbon systems for point source and fugitive emissions. The mercury removed from virgin inventory, less the mercury that is added to the process inventory, less the mercury in measured outputs equals the calculated mercury remaining in the cells and equipment (see Figure 1).

ASHTA CHEMICALS

Answers to Written Questions from Hearing on H.R. 2190

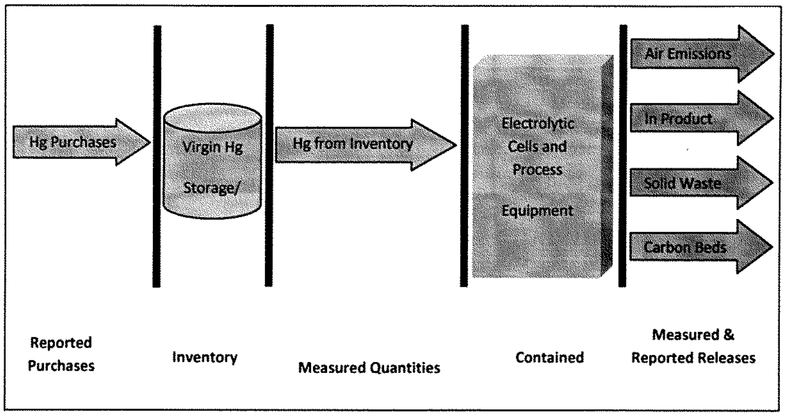

Figure 1.

These measurements and calculations for a) the five years from 2004 to 2008 and b) calendar year 2008 are summarized in the table below. You will immediately see that the many improvements ASHTA has added in the last several years have made a very significant difference.

	2004 – 2008	2008 Only
Mercury Introduced (Measured)		
From Virgin Inventory (lbs)	30,617	3,030
Mercury Uses and Releases (Measured)		
Added to Process Inventory[1] (lbs)	20,128	3,040
Emitted to Air (lbs)	677	0
In Product (lbs)	25	4
Solid Waste (lbs)	1,294	178
In Carbon Beds (lbs)	70	8
Total	22,194	3,230
Mercury Introduced less Mercury Uses & Releases (Calculated)	8,423	(200)
Mercury Remaining in Plant and Equipment (Calculated)	8,423	(200)[2]

[1] Added when 6 new/larger decomposers and one new impeller were installed.

[2] The gain in 2008 can be attributed to the timing of the calculations and the variances in the statistical methods used for calculating the mercury in the process.

ASHTA CHEMICALS

Answers to Written Questions from Hearing on H.R. 2190

To The Honorable George Radanovich:

1. Ms. O'Neil testified that conversion of your Chlor-Alkali facilities is necessary to ensure the economic future of the community and jobs that depend on your facility. Would you say this is a fair assessment? Will the mandates in this bill enhance your ability to provide good jobs to the people of Northeast Ohio?

   No, we do not consider this a fair assessment and we do not believe that Ms. O'Neil has the specific information required to make such an assessment. ASHTA has been a consistent and highly competitive supplier of high quality products to our customers both locally and across the country. Our customers (in particular, our chlorine customer), and suppliers have benefitted from ASHTA being in Northeast Ohio close to their businesses and freight advantaged to other areas of the US. Our neighbors and local contractors benefit from ASHTA being a long-term reliable supplier of good jobs and a long-term customer of goods and services.

   In order to conclude that the mandates from this proposed Bill are necessary to ensure the economic future of the community and jobs that depend on our facility, one has to assume that ASHTA will not be able to remain competitive and viable utilizing the current technology. We believe that this is the wrong conclusion based on uninformed assumptions specific to our business and our facility. We further believe that the mandates in this Bill will erode our ability to provide good jobs to the people in Northeast Ohio. We have concluded that taking on excessive debt to fund a new manufacturing process in the current economic environment and in the current financing environment is a plan for failure. I do not need to remind the honorable members of this Subcommittee that there are thousands of (former) homeowners and small businesses that were encouraged to leverage themselves and their businesses with large debt burdens and now find themselves in foreclosures and bankruptcies. ASHTA prides itself in being prudent in the management of its finances and risk averse when considering even borderline projects and new business ventures. We believe this has proven to be a good strategy in a cyclical commodity chemical business. So, conversion will only make sense for our Company if we are 1) provided with an adequate amount of time to fund the conversion, 2) provided with funding to pay for the conversion, 3) provided with low cost financing and/or 4) provided with tax credits to offset the millions of dollars that we have already spent to abide by the regulations that were, have been and are now in place and to minimize our mercury emissions.

ASHTA CHEMICALS

Answers to Written Questions from Hearing on H.R. 2190

To The Honorable George Radanovich:

2. Do the regulatory compliance requirements in this bill provide any additional barriers to your ability to overhaul your facility? If so, could you describe how those additional barriers might impact not only your business, but the community and jobs that your facility supports?

   Yes, the regulatory compliance requirements create additional barriers and the impact would be seen in the following ways;

   - HR 2190 Sec 6.A (b) (1) – PROHIBITION – the prohibition of the mercury cell manufacturing process twenty-four months after enactment of the proposed Bill will be virtually impossible for ASHTA to comply with considering the resources required to maintain continuing operations and, at the same time, support a conversion project. We believe the only way for ASHTA to comply will be to close its facility after the mandated prohibition date. This would result in the direct loss of nearly 100 high paying ASHTA jobs in Northeast Ohio plus other job losses at the local businesses and contractors that we support through our presence in the region.

   - HR 2190 Sec 6.A (c) (1) (A) – REPORTING – reporting of mercury content in all non-hazardous waste would mean that virtually every waste stream would have to be sampled and evaluated for mercury concentration. This would include items such as office paper, food waste, and sanitary waste. These materials are non-typical and non-homogenous, like most industrial waste, and to characterize them and measure mercury content in them would not be feasible.

   - HR 2190 Sec 6.A (c) (1) (C) – REPORTING – Although this type of requirements is typical for hazardous wastes, which are manifested and tracked from cradle to grave, this is very difficult to determine for non-hazardous waste. Items like scrap metal, printer cartridges, and recycled office paper enter a new chain of recovery and reuse. The notion that these items can be tracked and managed by the generator is flawed. In fact, this regulation would likely require a mercury cell chlor-alkali producer (or former mercury cell producer) to dispose of all waste as manifested hazardous waste at considerable expense.

   - HR 2190 Sec 6.A (c) (1) (D) – REPORTING – We can safely say that no mercury is ever intentionally released into the air or water and only very small amounts of mercury are unintentionally released to the air. The volumes of mercury unintentionally released to the air are very small (measured in milligrams per meter cube) and well below the OSHA and NIOSH permissible exposure limits.

ASHTA CHEMICALS

Answers to Written Questions from Hearing on H.R. 2190

The actual volume is virtually impossible to measure with any absolute accuracy due to the computational flow dynamics around a cell and the large volume of mercury contained inside the cell, so neither can the volume be measured directly from emissions, nor indirectly from cell loss. Even US EPA has been unable to establish any method suitable for determining the amount of mercury released via fugitive emissions. However, we do know that the quantities are very small. US EPA in coordination with Olin and the Chlorine Institute performed detail analysis of mercury emissions into air from the Charleston, TN chlor-alkali plant. The data from that exercise proved that the prior estimating method for fugitive emissions was too conservative and of little value, instead from this study US EPA recognized that good housekeeping coupled with good maintenance practices was the most effective means to control fugitive emissions. ASHTA Chemicals has gone a step further by installing fugitive emission collection equipment from any known potential source of fugitive emissions containing mercury.

- HR 2190 Sec 6.A (c) (1) (E) – REPORTING – the volume of mercury accumulated in pipes and equipment could be estimated, but it would be an educated guess at best. ASHTA like other mercury-cell chlor-alkali plants does what it can to track the mercury flux, and measures recovery from pipes, tanks, and other equipment like steel scrap, etc. These amounts of mercury from ASHTA's experience are considerable, and although an estimate could be made, the precision of the accumulated amounts and the accuracy of the overall estimate would be of little value.

- HR 2190 Sec 6.A (d) (1) (A, B, C, D) – INVENTORY – Quite simply ASHTA could not comply with this aspect of the bill. The idea that a facility that has been operating 45 years is now supposed to go back and determine how much of any material it has used is ludicrous. From the initial operation of the plant there was no record kept regarding mercury purchases, inventories, or use. Not until the US EPA was formed and mercury regulations began to identify mercury as a chemical of concern were *any* records kept – and even then the requirements were minimal. Furthermore, the facility has changed hands multiple times over it operating life and the records transferred between existing and acquiring companies are not available due to records retention policies and non-consistent document practices between companies. The only records we know about that could begin to address this subject would consist of the data supplied to the USGS annual surveys.

ASHTA CHEMICALS

Answers to Written Questions from Hearing on H.R. 2190

To The Honorable George Radanovich:

3. Your main plant is located in Ohio. If you are forced to close your doors under this bill, what other facilities do you have in other states that would be forced to close? What kinds of customers would you strand?

   If ASHTA Chemicals was forced to close its doors as a result of this legislation, we would also likely close our small briquette manufacturing facility in Pasadena, TX and we would cease using several bulk liquid terminals and warehouses that serve our business and our customers across the country. It is not clear, based on the business that we provide these suppliers, whether or not they would have to shut down as well or not. Based on the current potassium hydroxide capacity in the United States, it is clear that by closing our doors, many of our customers would be left scrambling for supply, would likely pay much higher prices for potassium hydroxide, and or be left to buy from imports, many of which would likely come from Europe and many of those currently utilize the mercury cell process to produce their products, and will be permitted to utilize this technology until 2020.

ASHTA CHEMICALS

Answers to Written Questions from Hearing on H.R. 2190

To The Honorable George Radanovich:

4. Do you believe the chlor-alkali industry is a major source of mercury?

   Absolutely not! As various reports have shown, the chlor-alkali industry has been a very small contributor to the total mercury emitted to the environment. In fact in the latest UNEP report on Global Atmospheric Mercury (2008) the chlor-alkali industry worldwide has significantly reduced the mercury to the environment. It reports based on 2005 data that only 2.4% of all anthropogenic global mercury emissions come from the chlor-alkali industry. The United States chlor-alkali industry has reduced its consumption of mercury by almost 96% over the last ten years (as documented in the Chlorine Institute's annual report to the US EPA). ASHTA Chemicals has gone even further, reducing the amount of mercury air emissions by greater than 99% since 2005 through the installation of new air emissions control equipment to comply with the MACT for the mercury. The amount ASHTA releases to the environment (air and water) is now 0.2 grams per day (or 3.2 dry ounces per year) compared to 1,930 tonnes from world-wide anthropogenic sources (2008 UNEP Report). ASHTA's small contribution to anthropogenic emissions is only 0.000005% of all the world's emissions. The notion that this small amount has any measurable effect on the global or local environment is ludicrous.

   Most of the mercury leaving any mercury cell chlor-alkali facility operating in the United States leaves in solid waste to a highly regulated, US EPA-permitted hazardous waste landfill. These landfills are fully contained and secured. Therefore the actual amount of mercury that is actually released to the environment whether in product, point source emissions, water discharges or fugitive emissions is minimal compared to both natural and other anthropogenic sources of mercury emissions which are typically uncontrolled and uninhibited (i.e. artisanal mining, and coal and natural gas fired equipment).

ASHTA CHEMICALS

Answers to Written Questions from Hearing on H.R. 2190

To The Honorable George Radanovich:

5. What has your company done to reduce mercury use and releases? Can ASHTA fully account for the mercury it purchases and uses?

   In 2004 new air regulations were promulgated allowing 36 months to employ additional controls on ASHTA's air point sources and fugitive emissions. By January of 2006, one year earlier than required by the regulation, ASHTA successfully started up and operated the newly installed mercury reduction process for hydrogen and air point sources from the process. Routine analyses of the gas streams from ASHTA's point sources over the past year have demonstrated a drastic improvement in mercury released to the atmosphere and represents a removal efficiency of greater than 99%.

   Since April 2008, ASHTA Chemicals Inc. (ASHTA) has operated fugitive emission capture systems for process and maintenance practices. The fugitive emission capture systems ensure that the maximum mercury recovery is achieved while performing routine operation and maintenance activities. These operation and maintenance practices include: (a) the rebuilding of mercury pumps, (b) the rebuilding of decomposers, (c) the recovery process for mercury from filters, (d), vacuuming with a central vacuum system, and (e) the use of a cell maintenance cover for cell cleaning and anode replacements. Work rooms with controlled atmospheres and carbon bed collection systems were constructed for mercury pump and decomposer maintenance, as well as to house the filter presses. A carbon bed absorption system is also used for the central vacuum and maintenance cell cover systems. In addition to these systems, other maintenance and operating protocols have been modified to assure that mercury emissions are minimized during standard recurring tasks. ASHTA is committed to meeting or exceeding applicable regulatory compliance guidelines to protect the health and well being of our employees and communities in which we do business. ASHTA's continuing efforts to reduce mercury emissions from its process have allowed the facility to set the standard as far as mercury-cell chlor-alkali plants in the United States.

   As to accounting for the mercury that ASHTA purchase and uses, we believe we can. ASHTA has participated in the Chlorine Institute's annual survey of mercury cell chlor-alkali plants wherein the purchase, use, and consumption of mercury for each participating facility is reported. The information is further consolidated by the Chlorine Institute and presented to the US EPA in an annual report. Over the last eleven years, this report has documented mercury use by the US mercury cell plants. This report not only shows where the mercury is used but shows reduction of the consumption by our industry by greater than 94% in ten years. ASHTA has participated throughout the life of this survey and provided mercury purchase and use information. Also, since 2004, ASHTA has been performing a specific balance of mercury purchased, consumed, and released to product and other media. This information has been provided to the Ohio EPA on an annual basis and is summarized in the answer under the Honorable Mr. Rush's Question 4 (above).

ASHTA CHEMICALS

Answers to Written Questions from Hearing on H.R. 2190

To The Honorable George Radanovich:

6. The Chlorine Institute's 11th Annual Report to EPA argues that mercury purchases do not necessarily equate to mercury use. Do you agree with this statement and can you please explain why?

   Yes, I agree with the statement in the Chlorine Institute's report. Mercury purchases are simply the procurement of inventory for eventual use. Mercury cell Chlor-alkali plants must have some virgin mercury in inventory for changes/upgrades in process equipment that might require additional mercury to operate (i.e. larger equipment in the cell room) and to replace the mercury that is contained in hazardous wastes for recycle or disposal. Further it is very important how the term "use" is defined. Use defined as simply the mercury that goes out in product, emissions and wastes does not address the fact that mercury does migrate and settle throughout various parts of the process – including piping, tanks, and simple saturation of the processing materials.

ASHTA CHEMICALS

Answers to Written Questions from Hearing on H.R. 2190

To The Honorable George Radanovich:

7. Your company manufactures potassium hydroxide, approximately 50 percent of which is made from the mercury cell production process. If we were to outlaw this technology as this bill proposed to do, what effect could that have on this Nation's supply of KOH? What does KOH do, in what is it used, and why is this product important? How would this bill affect your company and the KOH market?

   ASHTA believes that the prohibition of mercury cell technology would have a significant negative impact on the KOH supply in the United States. Based on the current requirements of the proposed Bill, we believe ASHTA and perhaps Olin would be forced to shut down its plants and this would leave a significant shortage of supply to the many customers who require this critical raw material. It is possible that other suppliers would, over time, be able to add capacity and it is possible that importers would be able to fill a portion of the supply gap, but this could take time and could result in a significant run up in prices. KOH is a basic inorganic chemical that is used as a source of alkalinity and as a source of potassium in many critical applications such as cleaning and disinfecting, water treatment, liquid fertilizers, alkaline batteries, photo processing, herbicide manufacturing, and airport runway deicers to name a few. In many of these applications, there is simply no substitute for KOH. As we have indicated, we believe this proposed legislation, as currently proposed, would force us to close our doors and could have a significant negative impact on the KOH market while having no measurable impact on the environment or human health.

ASHTA CHEMICALS

Answers to Written Questions from Hearing on H.R. 2190

To The Honorable George Radanovich:

8. Have your employees ever had any health consequences specifically related to working around mercury or the mercury cell process?

   ASHTA employees and contract workers have not experienced any adverse health effects related to mercury exposure. ASHTA ensures employee health through: 1) Education on Mercury Hygiene, Hazardous Material Handling, and Physiological Effects of Mercury when exposed; 2) Routine Urinalysis for exposure; 3) Annual Physicals for any possible progressive, chronic health effects; and 4) routine workplace industrial hygiene and air monitoring studies.

ASHTA CHEMICALS

Answers to Written Questions from Hearing on H.R. 2190

To The Honorable George Radanovich:

9. This bill would force you to re-report items to the Federal and state governments. Please provide a simple "yes" or "no" answer to the following questions:
   a. Section (c)(1)(A) requires your facility to report each type and quantity of mercury-containing hazardous materials that you generated during the previous year. Do you already report this to the Federal government under the Solid Waste Disposal Act?

      Yes.

   b. Section (c)(1)(B) requires your facility to report the mercury content of the waste. Do you already report this to the Federal government under the Solid Waste Disposal Act, including waste characterization data?

      Yes.

   c. Section (c)(1)(C) requires your facility to report the manner in which the mercury was managed, including the off-site location where you sent the waste to be treated or disposed. Do you already report this to the Federal government?

      Yes.

   d. Section (c)(1)(D) requires your facility to report the volume of mercury released into the air and water by your facility. Do you already report this to the Federal government under the Toxic Release Inventory and the Clean Air Act, as well as make similar information available through your Clean Water Act permitting?

      Yes.

ASHTA CHEMICALS

Answers to Written Questions from Hearing on H.R. 2190

To The Honorable George Radanovich:

10. The chlor-alkali industry provides annual reports to EPA on its activities and work with mercury. Could you please discuss these reports, what is in them, and what you consider the most relevant information for our committee to know?

Since 1996, the Chlorine Institute has submitted annual reports on chlor-alkali industry's voluntary reduction of mercury use and emissions. Each report discusses the industry's progress in minimizing consumption per ton of chlorine produced, purchased mercury data, releases of mercury to the environment, and key projects for emissions reduction.

The most relevant information is as follows:

- Mercury use has declined more than 96% since the data collection began in 1996.
- Mercury use in facilities which are currently operating has declined significantly to 0.011lb / ton chlorine capacity. This is a 94% reduction in use when compared to the 1995 baseline figure (0.18 lb/ton of chlorine).
- Mercury purchases are reported, although this data does not necessarily equate to actual mercury use. Process equipment upgrades can require a higher volume of mercury for the process to operate efficiently.
- Mercury releases to the air, water, and solid wastes are tracked and reported. The latest data shows a 79% reduction in the chlor-alkali industry mercury emissions since 2001. The chlor-alkali industry mercury emissions are a very small portion (approximately 3%) of the total mercury releases occurring in the United States.
- The industry has made process improvements that include:
  - The capture of fugitive emissions during maintenance activities on cells and cell parts
  - Gasket materials to provide better seals on mercury containing equipment
  - Decomposer compressions systems design and larger decomposers to lengthen the time between schedules maintenance
  - Continuous emissions monitoring in the cell room

ASHTA CHEMICALS

Answers to Written Questions from Hearing on H.R. 2190

To The Honorable George Radanovich:

11. Is it standard practice for either ASHTA or the chlor-alkali industry to test its products (i.e. chlorine, caustic, or KOH) for mercury content before they are offered for sale?

    Yes. ASHTA tests its finished goods, parts sent for repair, and industrial wastes for mercury. ASHTA's KOH receives 100% inspection and testing for mercury and we have stringent specifications for limits of the mercury allowed in finished products. We ensure that no product is shipped that does not meet these stringent product specifications. Further ASHTA's KOH complies with the Food Chemical Codex standard which has a defined limit of 0.01 ppm on a dry weight basis for KOH and other potassium solutions (e.g. potassium carbonate). ASHTA has tested the chlorine for mercury produced many times over the life of the plant, and has not detected any mercury in the chlorine.

ASHTA CHEMICALS

Answers to Written Questions from Hearing on H.R. 2190

To The Honorable George Radanovich:

12. Please explain how the NESHAP requirements and additional rulemakings on fugitive emissions will affect mercury air emissions from chlor-alkali facilities?

    The US chlor-alkali industry and other stakeholders worked with US EPA in the development of the latest Mercury NESHAP (40 CFR Part 63) that became effective on December 19, 2006. This new regulation contains numerical emission limits for mercury from three primary air sources at mercury cell facilities: 1) end box ventilation system vents, 2) by product hydrogen system vents, 3) and mercury thermal recovery units. It also requires that the plants either install continuous monitoring systems or test each vent or exhaust three times per week. The new rule also contains a set of work practice standards (representing the best practices of the industry) that are considerably more stringent than the prior fugitive emissions limits or procedures required under the old Part 61 NESHAP. The new rule allows for an alternative program that involves continuous mercury air concentration monitoring and problem correction when a fugitive emissions action level is exceeded. Although we can only make definitive statements for ASHTA, we believe that all US mercury cell facilities are in compliance with this new regulation.

    The impact of the new regulation has been dramatic. Specifically, for ASHTA, point source mercury emissions have been reduced by greater than 99%, from a historical level of 327 grams per day to less than 0.2 grams per day. The work place practice standards with the required inspections, reporting, and corrective action requirements have had a direct impact on the mercury fugitive emissions concentration. A floor vapor monitoring program is required in the standard with an action level of 0.05 mg/m^3, which is only half of the OSHA permissible exposure limit. ASHTA's fugitive emission concentration has been consistently at or below 0.01 mg/m^3 in a mostly closed-in environment.

    Furthermore, the US EPA recently published amendments to 40 CFR Part 63. The primary changes proposed by the Agency would require:

    - Daily work practices.
    - Continuous mercury emissions monitoring in the cell rooms (no longer optional).
    - Resetting the continuous emissions monitoring action level at least once every six months.
    - Calculating the action level at the 90th percentile of the data acquired during the resetting period(s), and
    - Thermal recovery units (continue to operate in order to assist in the site clean up after the mercury cells have ceased to operate) to comply with the emissions limitations for thermal recovery units in § 63.8190.

EXHIBIT A

ASHTA's MERCURY CONTROL PROGRAM

(Rev. 12/07/07)

PURPOSE: It is the intent of ASHTA Chemicals Inc. to protect its employees and persons visiting its facility from the potentially harmful effects of over-exposure to mercury. It is also the intent of ASHTA to similarly protect the environment. This document describes the techniques ASHTA employees to accomplish this objective. It is not intended to be all-inclusive or limiting.

MERCURY AND YOUR HEALTH

Absorption of Mercury

Very small amounts of mercury are present all around us.

- the food we eat,
- the water we drink, and
- the air we breathe all contain very small amounts of mercury.

As a result, we all have some amount of mercury in our bodies.

- In very small amounts, mercury is safe, but if too much of it gets into your body, it can cause health problems.

There are several forms of mercury:

- elemental or pure mercury,
- inorganic, and
- organic mercury.

Exposures at ASHTA can be to elemental mercury and inorganic mercury salts.

How does mercury get into our bodies?

- One way is by contact with the skin.
  - Occasionally, a person may develop an allergic skin rash from contact with mercury or skin irritation from contact with inorganic salts of mercury.
- Another way mercury can enter the body is by swallowing it.
  - Workers can limit these hazards by wearing protective gloves and work clothes when working with mercury and by washing hands prior to eating.
- The most important and most harmful way mercury gets into the body is when a person breathes in mercury vapor.

- When mercury is left open to the air, it evaporates and produces a vapor that you can't see or smell.
- The evaporation rate of mercury increases dramatically as temperature increases.
- Contamination of work surfaces will result in higher mercury vapor levels in hot work environments.
- Mercury vapor can come from drops of mercury that are spilled on the floors, or on clothing, machines, or work surfaces.
- Any mercury on your skin will also give off mercury vapor. If you have mercury on your fingers and touch your face or mouth, some mercury will stay on those parts of your body.
  - This mercury will then give off mercury vapor that can be breathed in.
  - With mercury contamination of your work clothes or face, mercury exposures may be much higher than from the general workroom air.
  - Unless work clothes are changed at the end of the work shift and skin and hair are thoroughly washed, there can be continued exposure to mercury vapor beyond the workday.

Mercury Vapor

How can you tell when mercury vapor is in the air?

- Mercury vapor has no smell and no color.
- The surest way to tell is by using a machine that can detect it.
  - ASHTA regularly uses such a mercury vapor analyzer (sniffer) to check the air in the plant to be sure that the level of mercury vapor is within safe limits.
- Another way to 'check' for mercury vapor is assume all mercury you are able to see is evaporating into your breathing zone.
- A third recognition of mercury vapor exposure can be made from your location.
  - mercury is used and/or handled on the cell floor and below
  - areas of poor ventilation, heated surfaces and mercury containing (in between decomposers) are likely to produce mercury vapors.

Bodily Mercury Distribution and Excretion

Eighty percent of absorbed mercury is found in the kidney,

- Consequently, early effects of excessive mercury absorption can be seen as effects on the kidney.
- Elemental mercury can cross the blood-brain barriers and accumulate in the brain.
  - This accumulation is more likely to occur in those individuals who drink alcohol excessively (more than 12 drinks/week).
- Elemental mercury can also pass through the placenta and accumulate in the fetus.

Mercury is excreted in

- urine,
- stool,
- sweat,
- saliva,
- exhaled breath and
- breast milk.

Approximately one half of the body burden of mercury will be excreted in two months once a worker is taken out of a mercury exposure area.

EFFECTS OF OVER-EXPOSURE TO MERCURY

Acute Mercury Poisoning

What happens when you breathe too much mercury vapor within a brief time?

- Illness can occur after brief, high level exposures (acute poisoning): exposed workers may become ill within several hours.
- feel sick to the stomach;
- vomit or
- have stomach cramps,
- diarrhea,
- fever, or
- feel aches.
- shortness of breath,
- chest tightness, and
- coughing can occur.

Over the next several days, other symptoms may appear, including

- soreness and redness of the mouth and gums,
- loosening of the teeth,
- a metallic or bad taste in the mouth, and
- a shaking of the hands.

These symptoms usually get better within several days or weeks after exposure has ended.

Chronic Mercury Poisoning

A person who breathes in mercury vapor at levels moderately above the safe limits every day for weeks or months (chronic exposure) may also develop symptoms of mercury poisoning.

- The symptoms include:
    - gum inflammation,
    - loosening of the teeth,
    - numbness or tingling of the feet or hands,
    - shaking of the hands,
    - difficulty sleeping, and
    - memory problems.
    - The person may also feel depressed, irritable, easily angered, suspicious of others, and easily embarrassed.
    - Kidney damage can occur, which can be found by blood and urine tests.

Fortunately, these effects are all reversible if you are taken out of exposure when early symptoms of mercury poisoning are noted.

People differ in how they react to mercury.

- Some people get sick soon after exposure to moderate levels.
- Other people, exposed for years to high levels, never get sick.

If you think you are having health problems related to mercury, tell your supervisor. If necessary, ASHTA will arrange for you to see a doctor.

CONTROL OF MERCURY EXPOSURES

Clothing-Shoes-Showers-Locker Facilities

Clothing

- Each employee regularly assigned to work in the cell building will be furnished a daily change of shirt and trousers.
- Each employee, including supervision, must wear a clean set of clothing each day.
- Clothing will be sent out for laundering.
- No clothing is permitted to be taken home for laundering.

  (this is to prevent the possibility of mercury contamination of the home and family members)
- Employees are not permitted to leave the Plant premises wearing cell building work clothing.

- Employees should shower and change into clean clothes before leaving the plant.

  Locker Facilities

- Separate lockers will be provided for street clothes and work clothes.
- A physical wall separation is required so that an employee removes mercury contaminated clothing on one side of the locker building, walks to the shower room and after showering enters the street clothes area for dressing before leaving the plant.

Showers

- Each employee who works in the mercury building or is involved with mercury contaminated material is required to shower before leaving the plant.
- Daily washing of the head and scrubbing of fingernails is required.

Shoes

- Work shoes or boots will be furnished to employees who work in the mercury cell building. The work shoes/boots are to be kept in the work clothes locker area of the locker building. The shoes/boots are not permitted to be stored in the clean clothes locker and are not to be taken out of the plant.
- Discarded shoes must be disposed of as mercury contaminated waste (D009).
- ASHTA's shoe reimbursement program provides each plant employee $125.00 per year.

Food-Tobacco Products

Food

- No *open* food or beverages are permitted in the mercury cell building at any time.

Tobacco Products

- No tobacco products are permitted at ASHTA. ASHTA is a **NO SMOKING** facility.

Personal Hygiene

- Hands should be washed thoroughly before eating. Scrub hands with a scrubbing brush, especially cleaning under fingernails.

Respiratory Protection – Air Purifying

Employee care

- Every plant employee will receive training on the use of the respirator at least annually along with a respirator fit test.
- Every plant employee will receive an annual physical evaluation as to their ability to wear air purifying respirators.
- Employees not able to wear air purifying respirators will be provided Powered Air Purifying Respirators.

Respirator care

- Comfo II respirators should be washed following daily use and more often during the shift if necessary, depending on the job.
- Mersorb cartridge should be replaced when the cartridge band changes color.
- Respirators must be thoroughly inspected after every use.
- At least once a month employees will complete a written record of inspection.

Respirator Jobs

Comfo II Respirators with Mersorb-H cartridges are to be worn during the following jobs:

1. Cleaning Cells
2. Cleaning up visible spilled droplets of mercury
3. Changing grids
4. Replacing decomposers or re-packing vertical decomposers
5. Removing or working on end castings
6. Replacing caustic headers
7. Removing mercury pumps and rebuilding mercury pumps
8. Working on hydrogen coolers (air line respirator may be required)
9. Working under and between cells – during leveling operations
10. Dipping amalgam
11. Steaming Communications or mercury contaminated connections
12. Titration of amalgam
13. Operating mercury vacuum cleaner
14. Areas designated by Shift Lead or persons conducting mercury readings.
15. Handling mercury – working anywhere that may lead to mercury exposure
16. Changing caustic filter, seals, etc.

Additional areas

- The decomposer ends of the cells. Yellow lines painted on the south and north ends of the cell floor indicate that respirators are to be worn whenever entering the areas outlined by the lines.
- Areas around open cells or decomposers will be identified with RED flashing lights. The lights will be set up around the perimeters of such equipment to indicate that respirators are required to be worn when entering the areas defined by the lights.

Beard Policy

Compliance with the proper use of respirators is essential.

- Employees are instructed that no facial hair is permitted within the sealing area of a respirator.

- The following facial hair limitations must follow:
  1. Mustache above the upper lip must not extend beyond the corner of the lip – no handlebars and no Fu Man Chu mustaches.
  2. No goatees or small hair growth below the upper lip.
  3. No pork chop side burns – sideburns cannot extend below the bottom of the ear lobe.
  4. No more than a one day growth of facial hair.

Shift and Group Leads are required to assure compliance through regular observation of personnel under their supervision.

- Employees are responsible for compliance with this policy as a condition of employment.

Personal Time Weighted Average Sampling

- Personal monitoring of cell building employees will be performed annually.
- Breathing zone samples will be taken to determine compliance with the 0.05mg/m^3 TWA OSHA permissible exposure limit and to determine the effectiveness of the engineering control program.
- A minimum of four (4), eight hour (8 hr) and four (4) twelve hour (12 hr) time weighted average personal samples will be taken.
- Samples will be sent to a certified industrial hygiene laboratory for analysis.
- Sampling results will be discussed with the cell building employees and will be posted in the Safety Committee Bulletin Board.

Urine Sampling

- Each cell building employee must submit a grab urine sample for mercury analysis at least once a month or more often as required. (Sample taken AFTER showering, or when arriving at work.)
- Other plant employees not associated with the cell building will be required to submit a urine sample quarterly.
- An employee may obtain an analysis at their request.
- The Health & Safety Coordinator will:
  - maintain and communicate the Urine sampling schedule
  - notify employees and/or supervisory personnel of elevated results
  - retain a summary of employee mercury in urine analyses.
- The Plant Laboratory will conduct the analyses.

Procedure for Employees with Elevated Urine Mercury Values

All employees are welcome to see their mercury in urine analysis results. This can be done by contacting the Health & Safety Coordinator.

- Employees having analysis results of mercury in urine from 0.00 to 0.033 ppm will receive no feedback.
- Employees having analysis results above 0.033 ppm will receive notice via e-mail (or via e-mail through their Lead or Supervisor).
    - Employees will initial a hard copy of the e-mail for verification they received the notice.
    - Department Managers will be copied on these notes.
    - Notice verifications will be forwarded to the Health & Safety Coordinator.
- Employees having analysis results between 0.034 and 0.050 ppm will receive an "Informational" note advising them of their result which is above ASHTA's target level of 0.033 ppm mercury in urine.

- Employees having analysis results between 0.051 and 0.075 ppm will receive a note advising them of their result. This notice will initiate an "Awareness Level" response comprised of the following:
    1. The employee will be requested to collect a subsequent sample to verify the elevated result.
    2. If the second sample is also elevated, the employee's Supervisor or Lead will review with the employee (a follow-up e-mail will be sent which will include the employee's last six month's analysis results):
        - the urine sampling results,
        - previous job assignments,
        - work practices and the
        - mercury hygiene program to determine the root cause for the mercury in the urine level and to
        - set a course of corrective action that will eliminate any future mercury exposure.
    3. The Supervisor or Lead will complete a written report of the review.
- Employees having analysis results greater than 0.075 ppm, will receive a note advising them of their result which will initiate an "Action Level" response consisting of:
    1. The Awareness level steps detailed above,
    2. weekly sample submissions, and possibly
    3. a medical evaluation to determine whether or not there has been an adverse effect from plant mercury exposure, a physician may evaluate an employee with such elevated values. The medical evaluation of such an employee should include the following:

a. interim medical history.

b. a neurological exam which includes:

A. Physical examination concentrating on sensation, eye movements, gait and tremor.

B. A complete urinalysis and quantitative urine protein test and creatinine.

4. If an abnormality is identified during this examination, a further evaluation to determine whether or not the effect is mercury related may be indicated.

5. Any decision for having a medical evaluation performed will be made as the result of a meeting between the employee, his Supervisor/Lead and/or Dept. Manager, the Health & Safety Coord., and the V.P. Tech., ES&H.

- An employee with an averaged (five-week) elevated urine mercury value above 0.075 ppm shall be removed from mercury exposure until their averaged urine mercury level has decreased to 0.050 ppm (corrected) or lower on three consecutive samples.

HOUSEKEEPING

The first objective is to prevent mercury spills. However, if they do occur the following are necessary:

1. Vacuum the spill immediately with a mercury vacuum cleaner.
2. If that is not readily possible, cover with water any mercury held in an open container or in a ditch. This serves as a mercury vapor deterrent.
3. Using low-pressure water, hose any floor area holding mercury droplets to move the mercury to a sump where it can be covered with water until it can be removed.
    - Mercury spillage is to be cleaned up immediately.
    - Use of compressed air or dry broom sweeping for cleaning of floors and equipment is prohibited.
4. Place a container under equipment to collect any mercury that may drop to the floor. Once mercury drops to the floor it breaks up into very small droplets that are difficult to remove from tiny cracks and crevices in the floor.
    - Mercury leaks must be corrected on a priority 1 basis.
    - Floor coating chips, cracks and breaks must be corrected on a priority 2 basis.
5. Use low-pressure water, hose of castings and electrolysis to remove accumulated mercury.
    - This should be done at least once per day.
6. All cells are to be checked each shift or open wash chamber lids and loose vent hoses.
    - Corrections are to be made as required.

7. Amalgam buckets are to be emptied and thoroughly washed immediately after use.
8. Mercury in open containers must be transferred to closed containers or back to a cell by the end of shift.
9. Floors in plant offices and the control room are scrubbed by contract janitors as required with mercury X solutions to reduce mercury in air concentrations to below $0.04mg/m^3$.
10. No accumulation of debris can be allowed along the edges of the plant floor.
11. Storage of materials, pieces and parts under the cell floor is prohibited except when required for the normal operation of the area.
    - Items so stationed under the cell floor are not to be placed upon wood pallets.
    - Such items (collection barrels, cabinets, etc.) on either level need to be elevated.
12. Conduct daily (or regular) hosings or wet vacuuming of entire floor areas.
13. Ensure lighting works and is sufficient to see fine beads of mercury.

Contamination Control

1. Avoid walking under cell floor.
    - o Go around to access north end of plant (maintenance, stores, etc.)
2. Tarp and dike areas (possible water seal) under open cells instead of taping them off
3. Place cut down (and/or) smaller pools for under pump changes
4. Tarp and dike areas during decomposer changes
5. Do not drain liquids to the floor.
    - o Use a hose.
    - o Settling containers have been fabricated from totes to capture mercury and other solids where possible.
6. Cloth or fabric covered chairs shall not be used in the cell floor control and lunch rooms as well as the plant lunch room.

Ventilation

Natural ventilation will be used for exhausting or diluting mercury vapors as necessary to keep mercury exposure below the permissible exposure level of $0.04mg/m^3$.

Mercury Vapor Industrial Hygiene Surveys

Regular monitoring will be performed in order to ensure that ASHTA Chemicals engineering controls, work practices and procedures are keeping Mercury concentrations below the action levels of 0.04 mg/m3. At least once per quarter the following areas will be monitored.

- Cell Floor

- Below Cell Floor
- Cell rebuild Area
- Decomposer rebuild room
- Mg Pump rebuild room
- K106 and K071 filter press areas
- Operator lunch rooms and break areas
- Maintenance offices and work areas.
- MACT building

Any visible mercury accumulation or spill and/or mercury vapor reading at or above 0.04 ug/m^3 will require immediate corrective actions. These actions will include.

- Immediate notification of area operators, maintenance personnel, and shift lead.
- Affected area operators or maintenance will immediately tape off area with red tape.
- Affected area operators or maintenance will don respirator and try to find source of mercury vapor.
- Affected area operators or maintenance will initiate immediate clean up of any spills of mercury, unfiltered KOH, Muds, Brine or other sources.
- A follow up vapor check will be performed to ensure levels are below 0.04 ug/m3.
- Work Orders will be written to correct any deficiencies found that may have caused to elevated reading.

Records of all monitoring will be kept per ASHTA Chemicals' Business Discipline system.

DISPOSAL OF MERCURY CONTAMINATED MATERIAL

- Paper towels, gloves, wipe cloths, paper coveralls, floor sweepings, rubber gaskets, floor cleaning mops, and any other mercury contaminated material must be placed in designated covered drums.
- The lids to drums shall be secured to the drums except when materials are being added or emptied.
- The drums must be properly labeled.
- Full drums are to be weighed, recorded, and then emptied into the Cell Debris (D009) roll-off.
- All other mercury containing wastes shall be handled as described in ASHTA's Waste Management Policy.

Welding-Burning-Cutting

Supplied air respirators shall be worn when burning, welding or cutting on mercury contaminated material.

Self Contained Breathing Apparatus

Self Contained Breathing Apparatus are to be worn during emergency conditions.

Labels-Material Safety Data Sheets

- Every container of mercury must have a proper mercury-warning label permanently displayed.
- A Material Safety Data Sheet for mercury is to be kept in the cell building operator's station for immediate review by cell building personnel.
- The MSDS is to be reviewed with employees at least annually with a written record of the meeting to be completed by the Shift or Group Lead.

ASHTA PREGNANCY POLICY – VOLUNTARY EXCLUSION

There is no scientific evidence to suggest that exposures to mercury below the $0.05 mg/m^3$ levels set by the government are dangerous to the fetus. However, to be as safe as possible, the company recommends that pregnant women not work in a mercury use area at ASHTA until after delivery. After delivery, their old job will be available to them.

All women are required to immediately notify their supervisor when they first learn that they are pregnant. ASHTA will then inform the woman's doctor about the hazards of mercury exposure. In addition, ASHTA will review the hazards of mercury with the pregnant employee. The pregnant employee, her doctor and the ASHTA plant doctor must decide together whether or not the employee should stop working in a mercury use area for the duration of the pregnancy.

Mr. RUSH. The subcommittee now stands adjourned.
[Whereupon, at 4:07 p.m., the subcommittee was adjourned.]
[Material submitted for inclusion in the record follows:]

Statement of
Representative John D. Dingell
Committee on Energy and Commerce
Subcommittee on Commerce, Trade, and Consumer Protection
Hearing on "H.R. 2309, the Consumer Credit and Debt Protection Act, and H.R. 2190, the Mercury Pollution Reduction Act"

Thank you, Mr. Chairman. Today's hearing serves as further proof of your dedication to the noble cause of consumer protection. I commend you in particular, Mr. Chairman, for your hard work on H.R. 2309, the Consumer Credit and Debt Protection Act. As I mentioned during this Subcommittee's March 5, 2009, hearing on the matter, regulatory scrutiny should be applied to unfair practices in the market for used vehicles. For many working Americans, who do not own their homes, cars are their single greatest assets. These people have the right to be protected from deceptive practices, such as the charging of exorbitant document processing fees and so-called "yo-yo" lending. H.R. 2309 wisely directs the Federal Trade Commission to examine these practices and others, as well as promulgate rules to prohibit them, should there exist evidence to support such action.

Today, we will also debate H.R. 2190, the Mercury Pollution Reduction Act. While I appreciate and wholeheartedly support the need to reduce mercury pollution in order to protect the health of our children, I have several concerns about H.R. 2190 related to its efficacy in doing so and, more broadly, whether it is the proper vehicle by which to accomplish this end. I would welcome a frank discussion with our witnesses about the costs associated with mandating that chlor-alkali plants use more environmentally-friendly technologies, as well as the feasibility of the 24-month conversion timeframe required by H.R. 2190. In a more general sense, I would appreciate hearing the opinions of our witnesses concerning the interplay H.R. 2190 will have with existing statute and, furthermore, whether this issue might be more appropriately addressed via comprehensive reform of the Toxic Substances Control Act.

I thank you for your courtesy, Mr. Chairman, and offer my continued cooperation in your laudable work to protect and defend consumers and their health.

I yield back the balance of my time.

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