**Prepared Statement of the**
# Federal Trade Commission

**Presented by**

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**Before the**

**Committee on Commerce**
**Subcommittee on Finance and Hazardous Materials**
**United States House of Representatives**

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## I. Introduction

Mr. Chairman and members of the Subcommittee, I am William J. Baer, Director of the Federal Trade Commission's Bureau of Competition. I am pleased to appear before you today to present the testimony of the Federal Trade Commission ("Commission" or "FTC") concerning H.R. 10, The Financial Services Competition Act of 1997.[(1)] Competition in the banking and financial services industries is vital to the stability and growth of the American economy. Although the Federal Trade Commission Act does not apply to banks or savings and loan institutions,[(2)] the Commission has played an important role in eliminating unlawful restrictions on competition and in protecting consumers from fraud and deceptive practices in financial as well as other industries. The Commission enforces the Clayton Act and the FTC Act against anticompetitive conduct, both merger and nonmerger. On the consumer protection side, the Commission has an entire division devoted to policing unlawful practices in the credit industry, excluding banks and thrifts, and enforces 12 federal statutes relating to credit practices of nonbanks.[(3)]

The financial services industry is in a period of rapid change, including increased consolidation, driven in part by technological innovation and by a decrease in regulatory oversight and control. In competing in an environment of less regulation, the financial services industry joins other industries in which extensive regulation has been outmoded by time and technology. Regulation has been reduced in industries such as airlines, telecommunications, railroads, trucking, and electric power. There are lessons to be learned from the successes and difficulties of these deregulatory efforts, and the Commission has been in the forefront in advocating increased competition in many industries,[(4)] aided by effective antitrust and consumer protection law enforcement to prevent the anticompetitive accumulation and abuse of private market power and fraud or deceptive practices.[(5)] The deregulatory effort in financial services has coincided with an explosion in overseas expansion by banks, insurance companies, securities firms, and other sellers of financial products. The Commission recently held hearings that focused in part on

increased global competition, and the need for clarified, global antitrust and consumer protection policies in the wake of that trend.[(6)]

Market forces have the potential to benefit consumers through lower prices, more efficient allocation of resources, and greater innovation. These potential savings and innovations will not appear automatically, however. Ensuring the benefits of competition will require vigorous enforcement of antitrust and consumer protection laws. It will be particularly important to establish effective merger enforcement in the early years of deregulation to deal with the restructuring that will certainly occur as banks are able to enter other markets and industries. Many mergers represent a sound response to deregulation; others may be likely to preserve or create anticompetitive power. Deregulation will fail and consumers will lose if the withdrawal of regulatory restrictions is followed by the accumulation of private market power.

The Commission stands ready to protect consumers and competition as financial services industry restrictions fall, as our enforcement and advocacy efforts so far indicate, but the Commission's jurisdiction in this area is limited. When the FTC Act was enacted in 1914, Congress excluded banking from FTC jurisdiction because the industry already was extensively regulated.[(7)] H.R. 10 would authorize banks to enter nonbanking arenas in which both competition and consumers have traditionally been protected by the FTC. In light of the FTC Act's bank exclusion, the bill's broad authority for banks to expand into nonbank businesses may restrict the Commission's ability to continue to protect competition and consumers in these nonbank businesses. If the modernizations of H.R. 10 are to succeed in delivering the benefits of competition and avoiding pitfalls for consumers, the FTC should be able to continue to bring its expertise to bear in markets in which it is now active. We suggest that Congress reconsider the FTC's jurisdictional limitations to ensure that the Commission has the jurisdiction to effectively enforce the competition and consumer protection policies embodied in H.R. 10.

## II. H.R. 10 Provisions Affecting Competition and Consumer Protection

H.R. 10 would remove substantial regulatory restraints on large segments of the banking and financial services industries and would streamline the remaining regulation that is now subject to a complex web of statutory and regulatory oversight. Some of the changes contained in H.R. 10 have implications for the competition and consumer protection missions of the FTC.

Subtitle A of Title I would remove the cross-industry participation restrictions contained in the Glass-Steagall Act of 1933 and the Bank Holding Company Act of 1956, thereby allowing firms that can now provide only one kind of financial services product to enter other industries. Under this subtitle, banks would be permitted to affiliate, either directly or through bank holding companies, both with other financial services firms and with nonfinancial commercial firms. In addition, within limits, this legislation would permit a nonfinancial commercial firm to own a bank holding company. Subtitle B authorizes the federal banking agencies to impose firewalls between a bank and its subsidiary or affiliate; requires those agencies to impose consumer protections regarding bank retail sales of nondeposit products; and insulates insured depository institutions from the obligations of their subsidiaries and affiliates.

Subtitle C would establish a National Council on Financial Services, with regulatory authority regarding the relationship between depository institutions and their subsidiaries and affiliates. The Council is directed, in consultation with the FTC, to study and report to Congress on the broader affiliations between financial and non-financial companies, on the increasing use of technology in the provision of financial services, and on allowing consumers to protect the use of their financial information under proposed section 122. Finally, Subtitle I would streamline the review of competition issues that arise from bank mergers, by removing those issues from the scope of the banking agencies' review, while continuing to provide for review by the Department of Justice. The standards that apply under the antitrust laws to mergers and other similar transactions would apply to these transactions. The banking agencies would continue to consider the financial and managerial resources of the companies and banks involved in the transaction, as well as the convenience and needs of the community to be served.

## III. Antitrust Enforcement in a Changed Regulatory Environment

The antitrust laws were designed by Congress to apply to all industries. However, in certain industries, including banking, special regulatory agencies rather than the FTC were given significant jurisdiction over competitive issues, including mergers. In the banking industry, each special regulatory agency has been obligated to consider the competitive consequences of every proposed merger within its jurisdiction.[(8)] H.R. 10 would change much of the regulatory environment in the banking and financial services industries. Competition concerns would no longer be a part of the financial regulatory agencies' review of every proposed merger.

In addition, H.R. 10 would enable banks to move into businesses outside the banking agencies' experience. This would mean that banks could make acquisitions and conduct business in nonbanking areas that frequently fall within the FTC's expertise. Some merger proposals may substantially increase the risk of collusion or the unilateral exercise of market power. While some of these risks may be in banking itself, others may be in nonbanking industries, both within financial services and in other industries.

As a result, after the changes made by H.R. 10, expanded analysis by the antitrust agencies of competitive risks arising both within and outside traditional banking will be necessary to protect consumers and competition from anticompetitive mergers. As in other industries, merger review in the financial services sector will involve identifying and investigating the few anticompetitive transactions amid the many hundreds of procompetitive or competitively neutral transactions.

The Commission has had some experience in merger review in financial services industries. In 1995, we reviewed First Data's acquisition of First Financial Management Corp., which would have merged the only two competitors in the consumer money wire transfer market, Western Union and MoneyGram.[(9)] Consumers use wire transfers often in emergency situations, such as when a person loses a wallet or when a traveler runs out of money. They are also extensively used by consumers without banking relationships, which constitute about 20-25 percent of the total population. The Commission's enforcement action required First Data to divest one of the competing services. Based on our preliminary estimates we believe our enforcement action saved consumers $15-30 million per year.

The First Data matter illustrates the importance of not weakening the FTC's merger jurisdiction as regulatory barriers between banks and nonbanks diminish. Both First Data and First Financial were two of the largest nonbank participants in the merchant processing business. The Commission conducted an extensive investigation of that market but no enforcement action was taken. The current restriction on the FTC's jurisdiction over banks, however, if left intact, could mean that the FTC may not be able to review a future merger in the merchant processing market involving a bank and a nonbank.

As a general rule, the FTC and the Department of Justice share jurisdiction over mergers and other anticompetitive conduct. The two antitrust agencies routinely cooperate to determine the single agency that will review each particular merger proposal, to avoid duplication of efforts or burdens on the parties. The two agencies have standard clearance procedures that assign each matter to one agency or the other, considering each agency's expertise in the particular markets or firms involved. Thus, preserving in the restructured financial services industry the ordinary rule of shared jurisdiction between the antitrust agencies would not be inconsistent with the goal of H.R. 10 to streamline regulation.

H.R. 10 would streamline antitrust enforcement responsibilities for bank mergers by removing them from the scope of the banking agencies' review while preserving Department of Justice review. The provisions do not address mergers between banks and nonbanks, which are likely to occur in the wake of the legislation. Depending on the nonbank industries involved, the Commission's expertise and experience could be particularly relevant to some of these mergers, and the Commission should therefore not be prohibited from addressing such bank-nonbank mergers. We suggest that H.R. 10 make clear that the Commission would not be excluded from jurisdiction over mergers between banks and nonbanks.

In addition to merger cases, there could be increased opportunities for nonmerger anticompetitive conduct as a result of the opening of markets contained in H.R. 10. When potential horizontal competitors were kept in separate markets by regulators, there was little incentive or ability to engage in horizontal restraints. Distributional restraints were likewise absent when the various components of the financial services industries were prevented from joining forces. With consolidation now, of course, may come cases in which firms with dominant market power attempt to exercise that power in exclusionary ways, including in nonbank markets.

Although the Commission's nonmerger jurisdiction in financial services is largely coextensive with that of the Department of Justice, it differs in one important aspect. Under Section 5 of the FTC Act, the Commission can challenge unfair methods of competition, and that provision permits the Commission to investigate and challenge acts not clearly violative of other antitrust statutes.[(10)] We suggest that Congress make clear that the presence of a bank does not oust the FTC's authority to address exclusionary or other anticompetitive tactics in nonbank markets.

## IV. Consumer Protection in a Changed Environment

H.R. 10 would have substantial impact on at least two areas of concern relating to the Commission's consumer protection mission. The first concern is that the bill could prevent the

Commission from engaging in traditional law enforcement action where the firms are acquired or operated by banks. As financial institutions are permitted to engage in a wider range of commerce under this and other proposed legislation, the question arises as to what regulatory structure is best suited to the new role played by banks. The approach proposed in H.R. 10 is functional regulation. Regulators with the most expertise would regulate activities that fall under their traditional jurisdiction, regardless of the status of the entity owning the firm in question.

The Commission urges the Committee to ensure that the concept of functional regulation be applied to consumer protection matters affecting bank-owned or bank-affiliated firms. Where banks are permitted to own and operate firms that offer nonbank goods and services to consumers traditionally under the FTC's jurisdiction, those nonbank activities should continue to fall under the FTC's jurisdiction. The banking agencies' expertise is in protecting the safety and soundness of depository institutions. In contrast, the FTC is likely to have experience with the wide range of financial and commercial services potentially to be offered to consumers by bank-owned firms.[(11)]

Functional regulation that preserves the FTC's current jurisdiction will also maintain a level playing field in activities newly accessible to banks. It will mean that all firms engaged in a particular nonbank activity, for example telemarketing, will be subject to review and action by the same law enforcement agency. This will help avoid possibly inconsistent levels of scrutiny or enforcement positions by different enforcement agencies. Accordingly, we suggest that H.R. 10 make clear that the Commission would not be excluded from jurisdiction over nonbank activities.

The second consumer protection concern relates to the privacy of consumers' commercial transactions. Early versions of banking reform legislation would have allowed virtually unlimited cross marketing and information-sharing (even of sensitive consumer financial information) among bank affiliates. The sharing of credit information among affiliates in the financial services industries could pose problems for consumers. The Commission supports the mandated study by the National Council on Financial Services regarding the ability of consumers to control and safeguard the use of their financial information, as is currently included in H.R. 10. In the last Congress, the Fair Credit Reporting Act ("FCRA") was amended to significantly liberalize banks' ability to share information among affiliates. Those new provisions do not go into effect until September 30, 1997. It would seem prudent to develop some experience with those broad information sharing provisions before further expanding banks' ability to share confidential consumer information.[(12)]

We commend the decision not to include cross marketing and information-sharing provisions in H.R. 10 and urge the Subcommittee to ensure that they remain out of the bill. In light of the Commission's extensive experience in enforcing the FCRA and its recent work on information privacy,[(13)] we recommend that the study by the National Council on Financial Services contemplated by the current version of the bill be done "jointly with," as opposed to "in consultation with," the Commission.

## V. Conclusion

The banking and financial services industries are in a state of flux. Technological innovations in electronic commerce, along with service innovations that combine banking, securities, and insurance elements have increased the potential for competition between and among industries that were once rigidly separated. Also, many of the legal and regulatory structures erected over the last 50 years are being streamlined or removed. These changes have the potential to substantially increase consumer welfare far into the future.

This potential must be protected and nurtured through, among other policies, strong antitrust and consumer protection law enforcement. Commission merger and nonmerger antitrust enforcement has been effective in the broader financial services market in preventing the anticompetitive accumulation and abuse of private market power. The Commission has developed significant expertise in addressing both competition and consumer protection issues regarding both financial services and nonfinancial commercial enterprises.

For the reasons set forth above, it is important that the Commission have the jurisdiction necessary to fulfill this role with respect to nonbank entities and activities as the financial services industries are restructured. We would be happy to work with the Subcommittee in addressing these jurisdictional concerns.

**Endnotes:**

1. The written statement represents the views of the Federal Trade Commission. The oral presentation and any answers to questions are my own and are not necessarily the views of the Commission or any individual Commissioner.

2. 15 U.S.C. § § 45(a)2, 46(a).

3. These include the Equal Credit Opportunity Act, Fair Credit Reporting Act, Fair Debt Collection Practices Act, Truth in Lending Act, Consumer Leasing Act, Fair Credit Billing Act, Electronic Fund Transfer Act, Women's Business Ownership Act, Fair Credit and Charge Card Disclosure Act, Home Equity Loan Consumer Protection Act, Competitive Equality Banking Act, and Home Ownership and Equity Protection Act.

4. For instance, the staff of the Commission has published studies and reports about financial services industries, including securities markets. *See, e.g.*, Bureau of Economics Staff Report, Minimum Quality Versus Disclosure Regulations: State Regulation of Interstate Open-ended Investment Company and Common Stock Issues (1987). In addition, the staff has occasionally commented to the SEC and others about competitive aspects of securities regulation. *See, e.g.*, Comments of the Staff of the Bureau of Economics on Regulations Governing Registration and Reporting Disclosures of Small Business Issuers (1992).

5. For instance, the Commission recently presented testimony before the House Committee on the Judiciary in favor of deregulation in the electric power industry. *See* Statement of the FTC before the House Committee on the Judiciary (June 4, 1997).

6. *See* Anticipating the 21st Century: Competition Policy in the New High-Tech, Global Marketplace (May 1996).

7. *See* United States v. Philadelphia National Bank, 374 U.S. 321, 336 n.11 (1963) ("the exclusion of banks from the FTC's jurisdiction appears to have been motivated by the fact that banks were already subject to extensive federal administrative controls").

8. *See* Bank Merger Act of 1996, 12 U.S.C. § 1828(c); Bank Holding Company Act, 12 U.S.C. § § 1842-43; and Home Owners' Loan Act, 12 U.S.C. § 1467a(e). Financial institution mergers are exempt from the filing obligations under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR Act"), 15 U.S.C. § 18a(c).

9. First Data Corp., C-3635 (April 8, 1996).

10. *See* FTC v. Mead Johnson & Co., No. 92-1366 (D.D.C. June 11, 1992) (consent order); FTC v. American Home Products Corp., No. 92-1365 (D.D.C. June 11, 1992) (consent order) (settling Commission charges that two infant formula manufacturers engaged in unilateral facilitating practices to eliminate competitive sole-source bidding in the federal government's Women, Infants, and Children (WIC) program in Puerto Rico); YKK (U.S.A.), Inc., 116 F.T.C. 628 (1993) (Commissioner Azcuenaga dissenting in a separate statement; Commissioners Owen, Starek and Yao filing separate concurring statements)(settling charges of invitation to collude).

11. The Commission is uniquely experienced in enforcing a number of rules that might apply to these new lines of commerce, such as the Mail Order Rule and Telemarketing Sales Rule. In addition, the Commission has decades of experience in policing deceptive advertising, promotional and marketing activities, including determining whether advertising claims have adequate substantiation. Furthermore, the Commission also has extensive experience in addressing consumer protection issues that arise in financial services industries. For instance, in 1992, Citicorp Credit Services, Inc. ("CCSI"), a subsidiary of Citicorp, agreed to settle charges that it aided and abetted a merchant engaged in unfair and deceptive activities by continuing to process the merchant's credit card sales even when CCSI knew or should have known about the merchant's deceptive sales practices. In 1993, the Shawmut Mortgage Company, which was affiliated with Shawmut Bank Connecticut, N.A., and Shawmut Bank, settled charges that it had discriminated based on race and national origin in mortgage lending. Shawmut Mortgage agreed to provide up to $960,000 in redress to victims. Finally, the Commission recently accepted, subject to public comment, a proposed settlement agreement with Sears, Roebuck and Company, which will safeguard $100 million in consumer redress based on allegations the company engaged in unfair and deceptive practices in its collection of credit card debts.

12. The amended FCRA allows affiliates to share information without becoming consumer reporting agencies, thereby avoiding triggering the requirements of the FCRA. Different types of information shared by affiliated companies are treated differently. Reports of information solely based on transactions with the consumer, even if pooled, do not constitute a consumer or credit report -- thus eliminating extensive rights of notice, access, and correction provided to consumers by the existing FCRA. Communication of any other information, such as credit reports, application information, or other information is also exempt from being treated as a consumer report, unless the consumer is given clear and conspicuous notice and actually directs in each instance that the particular information should not be shared. When information is shared with an affiliate, consumers' rights regarding possibly erroneous information are sharply curtailed. This FCRA provision may lead to consumer frustration about decisions being made based on erroneous information in databases which they cannot access and correct.

13. The Commission has held two public workshops on consumer privacy issues. The testimony of the first workshop, which was held in June 1996, is summarized in Staff Report: Public Workshop on Consumer Privacy on the Global Information Infrastructure (December 1996). The transcript of the 1996 workshop is available on the Commission's Web page at www.ftc.gov. The second workshop was held on June 10-13, 1997. Comments filed in the public record of the 1997 workshop are available through the Web page, and the transcript of the 1997 workshop will be posted there by the end of July.