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REASONABLE BEHAVIOR AT THE CFPB

Norman I. Silber[*]

INTRODUCTION

Deceptive Behavior and Consumer Regulation

The impetus for the Consumer Financial Protection Bureau, an agency charged with diminishing deceit in the marketplace for financial products, has antecedents that stretch back into the distant past. The ancient Greeks were troubled by deceitful marketing practices—recall that Diogenes, walking up and down the marketplace, searched in vain for an honest man.[1] Over the centuries, however, political leaders have usually resigned themselves to the persistence of unethical practices by tradesmen, considering these to be the insuppressible by-product of the contest between buyers and sellers that takes place whenever bargains are formed.[2]

American courts, notwithstanding the invocation of privity requirements and doctrines like *caveat* emptor, have been willing to provide recourse to victims of actual fraud, at root because sales transactions rooted in deceit have never been culturally popular or understood to be economically beneficial.[3] During most of the nineteenth century, states and localities took responsibility for regulating markets to establish honest weights and measures and to promote honesty.[4] The federal government,

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[1] "On one bright, clear day, Diogenes was walking up and down the market place, holding a lighted lantern high in front of him and peering around as if searching for something. When people gaped and asked him what he was doing, he replied, 'I am looking for an honest man.'" David Quinn, *Teachings of Diogenes*, http://members.optushome.com.au/davidquinn000/Diogenes%20Folder/Diogenes.html (last visited Oct. 11, 2012) (recounting a story told of Diogenes).

[2] *See generally* NORMAN I. SILBER, TEST AND PROTEST: THE INFLUENCE OF CONSUMERS 1–16 (1983) (addressing the role in the United States of one of the first consumer products testing agencies); Norman I. Silber, *From* The Jungle *to* The Matrix*: The Future of Consumer Protection in Light of its Past*, *in* CONSUMER PROTECTION IN THE AGE OF THE INFORMATION ECONOMY 15, 15–34 (Jane K. Winn ed. 2006) [hereinafter Silber, *From* The Jungle *to* The Matrix] (twentieth century developments). *See also* Spencer Weber Waller et al., *Consumer Protection in the US: An Overview*, 2011 EUR. J. CONS. L. 853, *available at* http://ssrn.com/abstract=1000226 (providing an overview of the history of consumer protection).

[3] Jonathan Sheldon, *Deception, Unfair and Unconscionable Sales Practices*, *in* ENCYCLOPEDIA OF THE CONSUMER MOVEMENT 208 (Stephen Brobeck et al. eds. 1997); *see also In re* Int'l Harvester Co., 104 F.T.C. 949, 1056 (1984) ("[Deception] is harmful to consumers, undermines the rational functioning of the marketplace, and, unlike some other practices we are called upon to review, never offers increased efficiency or other countervailing benefits that must be considered.").

[4] JESSE VEE COLES, THE CONSUMER-BUYER AND THE MARKET 519 (1978).

responding to new circumstances as monopolies and mass production turned consumer problems into national phenomena, authorized independent agencies to foster competition, promote honesty in merchandising, and mandate product safety.[5]

Many consumer problems come to public attention most vividly in novels. The perils of unregulated mortgage markets received their first brilliant exposure in Upton Sinclair's 1906 novel *The Jungle*.[6] Those who remember *The Jungle* will recall that the protagonist, Jurgis Rudkis, and others in his immigrant family, looked forward as much as anything else to buying a home when they came to America, and they pooled their resources to come up with a down payment.[7] But the process of buying a house was frightening to them—with one snare after another. They became suspicious of everyone with whom they dealt, and were scared of the documents they were asked to sign.

A lawyer, who might—or might not—be reliable, assured the family that the agreement they had been presented was a "standard" agreement of sale, despite language which, they feared, signified that it was a rental. They were relieved by the lawyer's assurances, and they signed the document, without focusing on the high fees and the security provision that the agreement contained. Toward the conclusion of *The Jungle*, illness, tragedy, and the fine print have led to a default.[8] The home is lost to the mortgagee, who forecloses and resells. Sinclair writes poignantly about Yurgis's ultimate defeat:

> Their home! Their home! They had lost it! Grief, despair, rage, overwhelmed him—what was any imagination of the thing [compared] to this heart-breaking, crushing reality of it—to the sight of strange people living in his house hanging their curtains in his windows, staring at him with hostile eyes! . . . Only think what he had suffered for that house—what miseries they had all suffered for it—the price they had paid for it! The whole long agony came back to him. Their sacrifices in the beginning, their three hundred dollars that they had scraped together, all they owned

[5] Silber, *From* The Jungle *to* The Matrix, *supra* note 2 (tracing development of consumer protection during the Progressive era). *See generally* Bernard Schwartz, *The Federal Regulatory Commissions*, *in* THE ECONOMIC REGULATION OF BUSINESS AND INDUSTRY: A LEGISLATIVE HISTORY OF U.S. REGULATORY AGENCIES (1973) (development of regulatory agencies); MURRAY J. HORN, THE POLITICAL ECONOMY OF PUBLIC ADMINISTRATION (1995) (providing political context); GABRIEL KOLKO, THE TRIUMPH OF CONSERVATISM (1977) (discussing original motives and capture by industry); RICHARD A. HARRIS & SIDNEY M. MILKIS, THE POLITICS OF REGULATORY CHANGE: A TALE OF TWO AGENCIES (1993) (examining the FTC and the EPA); THOMAS C. BLAISDELL, JR., THE FEDERAL TRADE COMMISSION: AN EXPERIMENT IN THE CONTROL OF BUSINESS (The Lawbook Exch., Ltd. 2008) (1932) (emphasizing the gap between achievement and original goals).

[6] UPTON SINCLAIR, THE JUNGLE (Paul Negri & Josyln T. Pine eds., Dover Publ'n Inc. 2001) (1906).

[7] *Id.* at ch. 4.

[8] *Id.* at ch. 18.

> in the world, all that stood between them and starvation! And then their toil, month by month, to get together the twelve dollars, and the interest as well, and now and then the taxes, and the other charges, and the repairs, and what not! Why, they had put their very souls into their payments on that house, they had paid for it with their sweat and tears—yes, more, with their very life-blood. Jurgis could see all the truth now. . . . That first lying circular, the smooth-tongued slippery agent. That trap of the extra payments, the interest, and all the other charges that they had not the means to pay, and would never have attempted to pay! . . . And now, with this hideous injustice . . . [the Justice system] had turned them out, bag and baggage, and taken their house and sold it again! And they could do nothing, they were tied hand and foot—the law was against them, the whole machinery of society was at their oppressor's command![9]

In the end, Upton Sinclair exposes a truth about this consumer financial product: that while the purchase agreement and mortgage may or may not have been standard, they were unquestionably opaque and oppressive.[10]

Efforts to understand why consumer buyers were so frequently victimized puzzled commentators, who came to attribute this problem to what would now be called inherent relational disparities between buyers and sellers. Writing in 1912, Wesley Clair Mitchell observed that innovations in productive techniques had improved industrial efficiency and turned the manufacturing of consumer demand into a corporate endeavor; but factors including love, parental affection, and racial ties cemented families together and ensured that consumption was not ever going to be a corporate endeavor, but would be, unfortunately, "standardized in the institution of monogamy."[11]

In 1938, Congress broadened the Federal Trade Commission's (FTC or the Commission) "unfair competition" mandate, making it clear that the Commission held a responsibility to police the market for "unfair and deceptive practices."[12] It was at this time that the FTC received principal federal responsibility not only to preserve and promote fair competition among businesses, but to prohibit unfair treatment of consumers.[13] The FTC

[9] *Id.*

[10] *Id.*

[11] Wesley C. Mitchell, *The Backward Art of Spending Money*, 2 AM. ECON. REV. 269, 270 (1912).

[12] Wheeler-Lea Act of 1938, ch. 49, § 3, 52 Stat. 111, 111–14 (1938) (codified as amended at 15 U.S.C. § 45 (1982)) ("Unfair methods of competition in or affecting commerce, and unfair deceptive acts or practices in or affecting commerce are hereby declared unlawful."); *see* Patricia P. Bailey & Michael Pertschuk, *The Law of Deception: The Past as Prologue*, 33 AM. U. L. REV. 849, 870 (1984). Congress expanded the FTC's power after the Supreme Court ruled that the FTC had to prove injury to competition in advertising cases, despite the widespread opposition of the newspaper industry. *See* FTC v. Raladam Co., 283 U.S. 643, 649 (1931); Bailey & Pertschuk, *supra* at 870.

[13] *See* Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1, 96 (2003).

has risen to this challenge on many occasions, saving the money and economic lives of consumers.[14]

The subsequent history of the FTC's consumer protection activities, however, reveals periods of passivity as well as periods of active market vigilance.[15] Part of the difficulty with making an impact on fair dealing in consumer markets has been a matter of politics and budgets—the resources available to agencies charged with consumer protection have not kept pace with the magnitude of the task.[16] A more critical impediment has been those interpretations of the FTC's statutory authority that have left many bad acts and practices untouched—practices which confuse consumers and misrepresent the quality, terms, and price of products.[17]

A lenient approach to defining and discouraging "deceptive acts and practices" after 1980 reflects, in this view, the Commissioners' dedication to infusing the FTC with a deregulatory spirit and to eschewing the prevention of the victimization of the most vulnerable consumers—typical consumers who behave normally, but irrationally, in reaction to the stimulus of sellers.[18] Because of limits that the FTC imposed upon itself in this way, which continue to affect the jurisprudence of consumer protection, we inhabit a national marketplace where the legal threshold for what is "unfair" or "deceptive" does not correspond to our encountered experience with unfairness or deception.

The disconnection between law and experience emanates from rules, guidance, and decisions that vindicate only the disappointed expectations of consumers who respond "reasonably under the circumstances" to salesmanship and that impose expectations of rational behavior to explain what "reasonably" means.[19] Nonenforcement and under-enforcement have

[14] *The Federal Trade Commission Turns 100*, FTC, http://ftc.gov/ftc/turns100/index.shtm (last visited Sep. 15, 2012) (providing summaries of FTC milestones from 1914–2003).

[15] *See infra* pp. 6–7 and note 24 and accompanying text (discussing the case of *Charles of the Ritz Distribs. Corp. v. FTC*).

[16] *See, e.g.*, *Fighting the F.T.C. Down to the Bottom Line*, N.Y. TIMES, Dec. 15, 1974, at 1; *Excerpts from Carter and Kennedy Statements on Inflation, Energy and F.T.C.*, N.Y. TIMES, Feb. 8, 1980, at A16.

[17] *See infra* notes 69–72 and accompanying text.

[18] For an example of how consumers can behave normally but irrationally, see *infra* notes 65–68 and accompanying text.

[19] *See infra* Part II. The debate between advocates of a rational choice paradigm and advocates for appreciation of behavioral economics is decades old. *See, e.g.*, Howard Beales, Richard Craswell & Steven C. Salop, *The Efficient Regulation of Consumer Information*, 24 J. L. & ECON. 491 (1981); Norman I. Silber, *Observing Reasonable Consumers: Cognitive Psychology, Consumer Behavior, and Consumer Law*, 2 LOY. CONSUMER L. REV. 69 (1990) [hereinafter Silber, *Observing Reasonable Consumers*]; Richard A. Posner, *Rational Choice, Behavioral Economics and the Law*, 50 STAN. L. REV. 1551 (1998) (defending rational choice theory); Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998); Christine Jolls & Cass R. Sunstein, *Debiasing Through Law*, 35 J. LEGAL STUD. 199 (2006); Christoph Merkle & Martin Weber, *True Overconfidence: The Inability of Rational Information Processing to Account for Apparent Overconfidence*, 116 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 262 (2011).

been the result. This has led to a proliferation of objectionable behavior. The Commission's conservative approach to these problems has increased the danger and expense of products to consumers, including cars, appliances, computers, and product warranties, and has increased the number of shoddy financial products, including mortgages, insurance policies, credit cards, and investments.[20]

In 2010, in response to the recent national financial difficulties spawned by under-regulated financial product marketing behavior, Congress created the Consumer Financial Protection Bureau (CFPB or the Bureau) as part of the Dodd-Frank Wall Street Reform Act (Dodd-Frank or the Act).[21] The CFPB was charged with improving the overall quality of information and honesty in the marketplace for financial products and now holds responsibility for making sure that the markets of consumer financial products and services offered by both banks and nonbanks are "fair, transparent, and competitive."[22]

To enable it to meet its objectives, Congress provided the CFPB with extensive supervision, enforcement, and rulemaking authority, including the

[20] *See, e.g.*, Kimberly Janeway, *When Buying Cookware, Count the Pans Not the Pieces*, CONSUMER REP. (Mar. 16, 2012, 11:45 AM), http://news.consumerreports.org/home/2012/03/when-buying-cookware-count-the-pieces.html (warning consumers that cookware sets may have "20 pieces, but you can only cook in five" because "[l]ids are included in the tally"); *Wrinkle Serums Buying Guide*, CONSUMER REP., http://www.consumerreports.org/cro/wrinkle-serums/buying-guide.htm (last updated Mar. 2012) (describing that none of the serums lived up to the manufacturers' claims, but claims are not actionable); *Assessing Exercise Infomercials' Claims*, CONSUMER REP. (Jan. 2009) http://www.consumerreports.org/health/healthy-living/fitness/staying-fit/infomercial-exercise-2-08/how-they-tested/infomercial-exercise-equipment-how-they-test.htm (explaining how "miracle" devices failed to live up to claims). Illegal financial sales scams of many forms are rampant due to under-staffing and under-enforcement. *See, e.g.*, *Scamation!; Fraud is on the Rise. Protect Yourself from the Latest Tricks*, CONSUMER REP. MAG., Oct. 2012, at 22, *available at* http://www.consumerreports.org/cro/magazine/2012/10/protect-yourself-from-the-latest-scams/index.htm. Alternatively, consider the following:

> Even under that more conservative approach, the FTC may establish deception on a much lesser showing than is required of a consumer suing a merchant in, say, a common law fraud or breach of warranty action. Thus, in contrast with the common law rules, the FTC need not show that the merchant has made a false statement (in fact, the FTC may find even true claims deceptive); or that the merchant intended to deceive, or indeed that anyone relied upon the statement, was deceived by it, or even injured by it. . . . It would, in fact, be more accurate to refer to the law of confusing trade practices, rather than deceptive trade practices, because the FTC and the courts focus far more on confusion than on deception.

Jeff Sovern, *Private Actions Under the Deceptive Trade Practices Acts: Reconsidering the FTC Act as Rule Model*, 52 OHIO ST. L.J. 437, 444–45 (1991) (footnotes omitted).

[21] Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), Pub. L. No. 111-203, §§ 1001–1100H, 124 Stat. 1376, 1955–2113 (2010) (codified in scattered sections of 12 U.S.C.). *See generally Recent Legislation—Administrative Law—Agency Design—Dodd-Frank Act Creates the Consumer Financial Protection Bureau—Dodd-Frank Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010)*, 124 HARV. L. REV. 2123 (summarizing the creation of the CFPB by the enactment of the Dodd-Frank Act).

[22] Dodd-Frank Act § 1021, 124 Stat. at 1979–80 (codified at 12 U.S.C. § 5511).

power to prevent "*unfair, deceptive, or abusive*" acts and practices by exercising the authority placed at its disposal.[23] Now, if its Director chooses to do so, the CFPB has the ability to modernize the jurisprudence of unfairness and deceptiveness and endow "*abusiveness*" with a strong meaning that captures a robust understanding of what the term means. It can, furthermore, distinguish the restrictive interpretations of reasonable consumer behavior in areas *outside* financial consumer protection from new interpretations *within* the scope of the CFPB's authority.

The remainder of this Article offers new possibilities. Part I addresses the limited approach to market supervision intrinsic to earlier legal doctrine. Part II explains the deficiencies of that jurisprudence in light of several decades of research in behavioral psychology. Part III suggests a policy shift to reverse current practice by focusing attention on whether sellers in a given transaction could have avoided confusing consumers by behaving responsibly, instead of focusing on whether buyers could have avoided injury by behaving reasonably.

I. REASONABLE BEHAVIOR AND THE CAPACITY TO DECEIVE

Among the matters to be decided when consumer protection agencies apply the prohibition against deception to the factual circumstances of a bargain's formation are: (1) defining the population of consumers the prohibition is intended to protect; (2) establishing a minimal level of attentiveness that should be expected from members of the consumer population who may be deceived; and (3) identifying the degree of falsehood in a seller's representation that qualifies the representation itself as being deceptive. Depending upon the choices made by the agency, the protection offered by government will either expand or contract.

The high water mark for imposing consumer-protective standards for marketplace behavior along the three lines mentioned above occurred between 1946 and 1983. During this period, the FTC consulted its own legislative history and interpreted its responsibility under the governing statute to oblige it to protect the *entire* public—a population which, as the U.S. Court of Appeals observed in the case of *Charles of the Ritz Distributors Corp. v. FTC*, included the "ignorant, the unthinking and the credulous."[24]

The FTC proceeded on the assumption that consumers did not, and should not, be expected to exhibit entirely rational attentiveness to the advertisements and representations, or terms and conditions, of the bargains they struck. For example, misleading advertising included ads which created impressions with the capacity to deceive the unthinking consumer:

[23] Dodd-Frank Act § 1031, 124 Stat. at 2005 (codified at 12 U.S.C. § 5531) (emphasis added).

[24] Charles of the Ritz Distribs. Corp. v. FTC, 143 F.2d 676, 679 (2d Cir. 1944).

> If an advertisement is capable of conveying more than one impression to the consumer and any one of them is false or misleading, the advertisement may be found to be false or misleading. From its own review of an advertisement, the Commission may find impressions which the advertisement is likely to convey to the public, and determine whether such impressions have a tendency or capacity to deceive the public, even in cases where a number of consumers may testify that they were not actually deceived. In determining the tendency and capacity of an advertisement to mislead, the Commission looks to the impression an advertisement may make on the average consumer—the gullible and unthinking as well as the trained and sophisticated. Indeed, the central purpose of Section 5 is "to abolish the rule of *caveat emptor* which traditionally defined rights and responsibilities in the world of commerce."[25]

Commissioners took as a point of departure that sellers would often try to exploit the weaknesses of consumers—years later, many of these weaknesses could be described within the Commission as "cognitive limitations"[26]—and they understood the mission of the FTC as to restrain sellers' inclination to engage in such exploitative behavior. The marketplace would be more efficient, and justice served better, by operating under the proposition that consumers who did not act with the requisite skills, educational background, or emotional level-headedness of the median American shopper deserved to be sheltered as much or more than anyone else. If sellers were discouraged from making representations which, although to some extent truthful, nonetheless had the capacity to deceive, this was an acceptable cost of regulation in the interest of safer markets and a higher volume of market activity.[27]

The appointment of more new commissioners to the FTC by President Reagan in the years following his election in 1980, however, ushered in a different regime.[28] Against vigorous dissent, a new majority of the Commission aligned itself with economists who embraced less market regulation and who believed that, to function properly, markets needed to

[25] *In re* Bristol-Myers Co., 102 F.T.C. 21, 266–67 (1983) (footnotes omitted).

[26] *See, e.g.*, J. Howard Beales, III, Director, Bureau of Consumer Prot., FTC, Address at the George Mason Law Review 2004 Symposium on Antitrust and Consumer Protection (Mar. 2, 2004), *available at* http://www.ftc.gov/speeches/beales/040802adstokids.pdf (discussing "the cognitive limitations of young children").

[27] *See, e.g.*, David A. Rice, *Consumer Unfairness at the FTC: Misadventures in Law and Economics*, 52 GEO. WASH. L. REV. 1 (1983); J. Howard Beales, III, *Brightening the Lines: The Use of Policy Statements at the Federal Trade Commission*, 72 ANTITRUST L.J. 1057 (2005).

[28] President Regan was in office from 1981–1989. During this time, he appointed the following FTC Commissioners: James C. Miller III, Terry Calvani, Daniel Oliver, and Janet Steiger. *Commissioners and Chairmen of the Federal Trade Commission*, FTC (Aug. 2012), http://ftc.gov/ftc/history/commisionerchartlegal.pdf.

encourage reasonable, "rational actors."[29] They believed that the policies established by the FTC should allow a maximum possible range for sellers to design and market their products, and should encourage all consumers to balance costs against benefits to maximize their personal advantage when they shopped.[30] From this perspective, the functioning of the marketplace would not be served well by compensating consumers who were injured because they responded irrationally or ignorantly to marketing appeals without calculating the costs and benefits.[31] Coddling consumers paternalistically would not punish them sufficiently for their poor habits, choices, and abilities, and over time would produce poorly functioning markets.[32]

And so, during the early years of the Reagan administration, the FTC issued a Policy Statement to accompany its decision in *Cliffdale Associates*.[33] In its Policy Statement, the FTC revised, and in some respects reversed, its earlier positions. Notably, the FTC Commissioners defined three elements necessary to conclude that actionable deception had occurred:

> First, there must be a representation, omission or practice that is likely to mislead the consumer. . . .
>
> Second, we examine the practice from the perspective of a consumer acting reasonably in the circumstances. . . .
>
> Third, the representation, omission, or practice must be a "material" one.[34]

Each new requirement diminished the likelihood that a seller might be culpable for a deceptive advertising campaign or other sales practice. Demanding the establishment of a "likelihood" that a seller was misleading a consumer, for instance, imposed a higher threshold than determining whether there was a "capacity" to mislead. Requiring "materiality" imposed an old common law element of misrepresentation that provided sellers with opportunities to claim that their falsehoods did not really matter. Further, the second requirement demanded that the practice complained of should not simply be deceptive from the perspective of someone who might buy the product, but "from the perspective of a consumer acting reasonably in

[29] This view has been rejected by many economists who would dispute that the efficient markets hypothesis requires a commitment to consumer rationality. *See, e.g.*, Robert Shiller, *The Sickness Beneath the Slump*, N.Y.TIMES, Jun. 12, 2011, at BU6.

[30] *See* Matthew A. Edwards, *The FTC and New Paternalism*, 60 ADMIN. L. REV. 323, 324 (2008).

[31] *Id.*

[32] *See* THOMAS O. MCGARITY, REINVENTING RATIONALITY: THE ROLE OF REGULATORY ANALYSIS IN THE FEDERAL BUREACRACY 3–16 (2005).

[33] *In re* Cliffdale Assocs., Inc., 103 F.T.C. 110, 174–84 (1984) (presenting the FTC Policy Statement on Deception).

[34] *Id.* at 174.

the circumstances."[35] When, if ever, it would be reasonable to act irrationally was not explicated.

Although the Commission continued to take action against the egregious deception of the rational and sophisticated, the basic posture of the FTC had been transformed. The older test essentially sought to restrain sellers from trying to exploit the innate cognitive limitations and ignorance of consumers. The new test relaxed that standard by seeking to discover whether a consumer who responded to a seller's representations reasonably or rationally would be deceived.[36]

The change was indeed dramatic. Less than a decade afterward, the "gullible consumer" standard for deception had been thrown into some disrepute. Corporate advertisers petitioned the Commission arguing that earlier restrictions on their advertising were entered at a time when the "gullible" consumer standard prevailed, reflecting "a presumption that consumers cannot discern for themselves whether accurate information is 'relevant' or of 'benefit.'"[37] "This now-rejected approach," it was argued, "inhibits the flow of accurate information to consumers without providing significant compensating benefits in consumer protection."[38]

The doctrine of unfairness was also reoriented during the Reagan administration, which had long been distinguished from "deception" jurisprudence.[39] In earlier years, the Commission asserted broad authority, upheld by the Supreme Court, to create unfair trade practices as a new and wide-ranging field of law:

> [The] responsibility of the Commission . . . is a dynamic one: it is charged . . . with utilizing its broad powers of investigation and its accumulated knowledge and experience in the field of trade regulation to investigate, identify, and define those practices which should be forbidden as unfair because contrary to the public policy declared in the Act. The Commission, in short, is expected to proceed not only against practices forbidden by statute or common law, but also against practices not previously considered unlawful, and thus to create a new body of law—a law of unfair trade practices adapted to the diverse and changing needs of a complex and evolving competitive system.[40]

[35] *Id.*

[36] Charles of the Ritz Distribs. Corp. v. FTC, 143 F.2d 676, 680 (2nd Cir. 1944).

[37] Petition to Vacate Consent Order at *33, *In re* California & Hawaiian Sugar Co., 1994 F.T.C. Lexis 123 (1994).

[38] *Id. But see* Sovern, *supra* note 20, at 444–45.

[39] J. Howard Beales, III, *The F.T.C's Use of Unfairness Authority: its Rise, Fall, and Resurrection*, FTC, http://www.ftc.gov/speeches/beales/unfair0603.shtm (last modified June 25, 2007).

[40] *In re* All-State Indus. of N.C., Inc., 75 F.T.C. 465, 491 (1969); *see also In re* Pfizer, Inc., 81 F.T.C. 23, 61 (1970) ("Unfairness is potentially a dynamic analytical tool capable of a progressive, evolving application which can keep pace with a rapidly changing economy. Thus as consumers [sic] products and marketing practices change in number, complexity, variety, and function, standards of fairness to the consumer may also change." (footnote omitted)).

Shortly after President Reagan appointees dominated, however, the Commission trimmed sails by more narrowly redrawing its mission through reinterpreting unfair acts and practices. It became incumbent on Commission investigators to first evaluate how a sales practice would be understood by consumers who were reasonably trying to avoid being misled, and then to ask whether the injuries due to unfairness to these consumers were outweighed by benefits to these consumers and to the market for the products and services being purveyed:

> The Commission felt that one of the most crucial elements in finding an act or practice to be unfair was that consumers be injured: (1) the injury must be substantial; (2) the injury must not be outweighed by any countervailing benefits to consumers or competition produced by the practice; and (3) the injury must be an injury that consumers could not reasonably have avoided.[41]

Congress codified the newer definition of unfairness in 1980.[42] The Commission stated in policy guidance that substantial injury to consumers existed when it could be demonstrated that the practice did "a small harm to a large number of people or it raises a significant risk of concrete harm."[43] As the FTC elaborated its approach in subsequent years, it became evident that a finding of unfairness would depend on calculating adverse "net effects" of an act or practice, weighing benefits against injuries or a significant risk of harm, and giving additional weight to whether consumers' "free market decisions are unjustifiably hindered."[44]

The changes made at the FTC during the years of the Reagan administration shifted investigative attention away from the seller's responsibility to design sales practices that did not confuse, exaggerate, or conceal qualities and terms, and toward permitting strategies of confusion when they did not preclude smart and attentive consumers from averting injury.[45]

[41] H.R. REP. NO. 98-156, pt.1, at 32 (1983).

[42] 15 U.S.C. § 45(n) (2006).

[43] MICHAEL PERTSCHUK ET AL., FTC, FTC POLICY STATEMENT ON UNFAIRNESS n.12 (1980), *available at* http://www.ftc.gov/bcp/policystmt/ad-unfair.htm (presenting FTC's views on concept of "unfairness" and appended to *In re* Int'l Harvester Co., 104 F.T.C. 949, 1070 (1984)).

[44] Truth in Lending, 75 Fed. Reg. 58,509, 59,513 (Sept. 24, 2010) (to be codified at 12 C.F.R. pt 226) (commenting on the FTC interpretation of FTC Credit Practice Rule, 16 C.F.R. § 444.1 (1999)).

[45]

> For another thing, California (and federal) case law have been very demanding in terms of the kind of evidence needed to prove[] the likelihood of deception. Thus, in *Haskell v. Time*, the court found that declarations from a "few" consumers and a professor of rhetoric to be insufficient. In *William H. Morris Co. v. Group W, Inc.*, the Ninth Circuit concluded that the plaintiff had not carried its burden where the evidence consisted of testimony from two out of 300 recipients. It would be hard to square these proof requirements with a substantive rule requiring only proof of a "tendency or capacity" to deceive a credulous consumer.

A concrete illustration of the shift described here can be drawn from the present efforts of well-intentioned FTC agents to pursue deception under the present regime. The credit reporting agency ConsumerInfo.com, which was acquired by Experian Consumer Direct in April 2002,[46] widely advertises a profitable website named *FreeCreditReport.com* on television, in print, and on the Internet.[47] Its target audience includes millions of Americans who are concerned about their precarious credit or contemplating seeking more credit. Despite its name, *FreeCreditReport.com* is a very costly site.[48]

American consumers are entitled to free credit *reports* from Credit Reporting Agencies, which are regulated by the Fair Credit Reporting Act and other statutes, and may obtain them by using *AnnualCreditReport.com*.[49] Every consumer can also obtain credit *scores* without great expense.[50] Nevertheless, the Credit Reporting Agencies do not widely advertise *AnnualCreditReport.com*, and Experian-owned *FreeCreditReport.com*, in order to better market its largely superfluous products more effectively, does not reveal this information conspicuously—even after promising to do so.[51] The site makes it highly unlikely that a consumer will order a "free" report without paying to obtain a score and monthly reports for a minimum of $16.99 per month, and much more for other reports, scores, and services.[52] As of February, 2010, the Better Business Bureau had received more than 11,000 complaints about the website.[53]

J. Thomas Rosch, Comm'r, FTC, Deceptive and Unfair Acts and Practices Principles: Evolution and Convergence, Address to the California State Bar (May 18, 2007) (footnotes omitted).

[46] *Experian Unit Settles F.T.C. Case and Pays Fine*, N.Y. TIMES, Aug. 17, 2005, at C3.

[47] *See* Stephanie Clifford, *The High Cost of a 'Free Credit Report,'* N.Y. TIMES, Aug. 4, 2008, at C9.

[48] *See* photograph, *infra* Exhibit A.

[49] Fair Credit Reporting Act, 15 U.S.C. §§ 1681–1681x (2006).

[50] *Credit Scores*, CONSUMER REP. (June 2009), http://www.consumerreports.org/cro/money/credit-loan/credit-scores/overview/credit-scores-ov.htm

[51] Press Release, FTC, Marketer of "Free Credit Reports" Settles FTC Charges (Aug. 16, 2005), *available at* http://ftc.gov/opa/2005/08/consumerinfo.shtm.

[52] FREECREDITREPORT.COM, http://www.freecreditreport.com/ (last visited Aug. 30, 2012). The site does not provide a clear explanation of the difference between a credit score and a credit report; and few of those who obtain their credit report through *FreeCreditReport.com* end up doing so without paying amounts that are not easily calculated for unlimited periods of time. *See supra* note 47. In 2010, the FTC enacted a rule "to require certain advertisements for 'free credit reports' to include prominent disclosures designed to prevent" consumer confusion. Free Annual File Disclosures, 75, Fed. Reg. 9,726, 9,726 (Mar. 3, 2010) (to be codified at 16 C.F.R. pt. 610). In order to sidestep the required disclosures, Experian began charging $1 for credit reports and giving the money to charity. Rob Lieber, *Free Report on Credit? No Longer*, N.Y. TIMES, Apr. 8, 2010, at B1. Fine print at the top of its website indicates that if someone does nothing after ordering a $1 credit report, they will be charged $16.99 per month until they terminate the service. FREECREDITREPORT.COM, http://www.freecreditreport.com/ (last visited Aug. 30, 2012).

[53] Julianne Pepitone, *Experian Sued Over FreeCreditReport.com*, CNNMONEY.COM (Feb. 4, 2009, 7:23 PM) http://money.cnn.com/2010/02/04/news/companies/experian_lawsuit_freecreditreport/.

For more than a decade, the FTC has tried to force Experian to clean up its website and to convey information without deception or confusion.[54] In 2005, the FTC entered into a settlement agreement and obtained a small disgorgement of funds after filing a complaint.[55] But as of the date this Article was written, the television ads and website were, in the opinion of thousands of people, still misleading, and the FTC has not yet been able to successfully address the problem.

Why is *FreeCreditReport.com* still allowed to operate? The advertising, directed especially at a vulnerable population of debtors, is confusing and makes a mockery of the word "free." The website defends itself on the ground that, inter alia, it has not violated any law relating to unfair or deceptive practices.[56] According to arguments Experian has made in court, its websites are educational and the governing "consumer protection statutes were not meant to stifle, but to encourage, the free flow of educational materials such as the ones it provides."[57] A spokesman for the FTC, who was asked why the website is still up, responded that "the agency must work within 'a legal framework,'" and "does not have the power to take arbitrary actions."[58]

II. THE IMPACT OF BEHAVIORAL PSYCHOLOGY

Academic research into behavioral and cognitive psychology during the years since the 1980s has undermined the Commission's key assumptions about the reasonable and rational behavior that is to be expected from economic actors.[59] Nor did this research support the view that maximizing consumer rationality would maximize the efficiency of free markets.[60] On the contrary, research into cognitive behavior has seriously undermined the rational choice paradigm with persuasive evidence that people who behave reasonably do not always make optimal, rational choices—consumers who

[54] Press Release, FTC, *supra* note 51.

[55] *Id.*

[56] *See e.g.*, Lieber, *supra* note 52 ("An Experian spokeswoman, Susan Henson, defended the new fee. 'The offer for the $1 report is very clear and in compliance with the F.T.C.'s rule,' she said in an e-mail reply to questions."). Interestingly, the standard in France is more protective of gullible consumers and could potentially prevent Freecreditreport.com from print advertising in that nation. Charlotte J. Romano, *Comparative Advertising in the United States and in France*, 25 NW. J. INT'L L. & BUS. 371, 397–98 (2005) (noting that the current French standard protects "credulous, ignorant and unthinking" consumers). I do not know what the rules are for website deception.

[57] Helms v. ConsumerInfo.com, Inc., 436 F. Supp. 2d 1220, 1232 (N.D. Ala. 2005).

[58] Bob Sullivan, *FTC Fights FreeCreditReport.com with Spoof Ad*, THE REDTAPE CHRONICLES ON NBCNEWS.COM (Mar. 10, 2009, 7:28 PM), http://redtape.msnbc.msn.com/_news/2009/03/10/6345777-ftc-fights-freecreditreportcom-with-spoof-ad?lite.

[59] *See e.g.*, Jolls et al., *supra* note 19, at 1541.

[60] *See supra* notes 29–31 and accompanying text.

are "reasonable under the circumstances" do not characteristically behave like rational actors.[61]

The "reasonable under the circumstances" standard, as noted earlier, developed during the Reagan administration prior to the years when the research in behavioral psychology and behavioral economics that demonstrated the limits of "rational" choice became well known. As late as 1990, when efforts to consider the implications of behavioral psychology for the development of legal standards started to appear,[62] the legal academy had not yet come to grips with the impact of cognitive psychology on legal standards of reasonableness in consumer law, criminal law, administrative law, or other fields. Not until after 2002, when Daniel Kahneman won the Nobel Prize in Economics for his work in exploring and critiquing conventional views about rational choice, did this work prompt a flood of attention in legal scholarship.[63]

In 2008, Professors Richard H. Thaler and Cass R. Sunstein familiarized the legal academy and the public with the implications of the shortcomings of rational choice models in their book *Nudge: Improving Decisions about Health, Wealth and Happiness*, which presented examples of the opportunities of generating incorrect answers by playing on cognitive limits and irrationalities.[64] A few of their simple illustrations of generated cognitive mistakes reveal how easily rational actors are misled into making bad choices:

1. A bat and ball cost $1.10 in total. The bat costs $1.00 more than the ball. How much does the ball cost? ___cents
2. If it takes 5 machines 5 minutes to make 5 widgets, how long would it take 100 machines to make 100 widgets? ___minutes
3. In a lake, there is a patch of lily pads. Every day, the patch doubles in size. If it takes 48 days for the patch to cover the entire lake, how long would it take for the patch to cover half of the lake? ___days[65]

Most people, they write, would say that the answers are "10 cents, 100 minutes, and 24 days," respectively.[66] As the authors point out, "all these answers are wrong," and they are wrong because of innate processing

[61] *See e.g.*, Jacob Jacoby, *Is It Rational to Assume Consumer Rationality? Some Consumer Psychological Perspectives on Rational Choice Theory* 48–50 (N.Y. Univ. Ctr. for Law & Bus., Working Paper No. CLB-00-009, 2000), *available at* http://ssrn.com/abstract=239538 (discussing how consumers engage in selective attention and how it is difficult to find rationality in "tendencies [that] lead consumers to ignore information that it pays them to know and which they ought to acquire").

[62] *See e.g.*, Silber, *Observing Reasonable Consumers*, *supra* note 19.

[63] *See infra* app. A.

[64] RICHARD R. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS 22 (2011).

[65] *Id.* at 21.

[66] *Id.*

limitations and because of the way in which the problems are framed to generate difficulty in answering them correctly.[67] Thaler and Sunstein argue that an appreciation of neurological operation and psychology should drive policymakers and lawmakers to create rules and regulations that are not based on false assumptions about the employment of reason in decision making.[68]

Today, cognitive "frailties" can be, and frequently are, exploited by merchandisers to their advantage.[69] Departments of consumer research at most major corporations devote substantial effort to learning how to sell their products more effectively than their competitors by using psychological insights into irrationality, and how to counter logical objections consumers might have to purchasing their products.[70] Ironically, the older approach taken by the FTC, for all its faults and without the benefit of the research of recent decades, anticipated this scholarship and created a rule that would have been immediately responsive to it.[71] The FTC's revised approach undervalued innate aspects of cognitive behavior which affect rational action in the face of seller conduct, and crafted the rule accordingly.[72]

III. CFPB AND THE POTENTIAL TO RECREATE THE JURISPRUDENCE OF DECEPTION, UNFAIRNESS, AND ABUSE

On April 22, 2010, President Obama delivered his landmark address at the Cooper Union Auditorium near Wall Street, in which he called upon the

[67] *Id.* at 21–22. By considering the problems more closely they will become easier to solve:

> If the ball costs 10 cents and the bat costs one dollar more than the ball, meaning $1.10, then together they cost $1.20, not $1.10. No one who bothers to check whether his initial answer of 10 cents could possibly be right would give that as an answer, but research by Shane Frederick (2005) (who calls this series of questions the cognitive reflection rest) finds that these are the most popular answers even among bright college students.
>
> The correct answers are 5 cents, 5 minutes, and 47 days, but you knew that, or at least your Reflective System did if you bothered to consult it.

Id.

[68] *Id.* at 252–53.

[69] *See id.* at 144 ("For mortgages, school loans, and credit cards, life is far more complicated than it needs to be, and people can be exploited. Often it's best to ask people to take care of themselves, but when people borrow, standard human frailties can lead to serious hardship and even disaster.").

[70] *See, e.g.*, N. Craig Smith et al., *Smart Defaults: From Hidden Persuaders to Adaptive Helpers* 8–14 (INSEAD, Working Paper No. 2009/03/ISIC, 2009), *available at* http://ssrn.com/abstract=1116650 (discussing marketing ethics and defaults).

[71] *See supra* pp. 6–7 (discussing "the high water mark for imposing consumer-protective standards for marketplace behavior" between 1946–1983).

[72] *See supra* notes 33–35 and accompanying text.

financial community to support a major overhaul of financial regulation.[73] In his speech, he attributed the financial crisis to more than unfairness and deception:

> [T]his financial crisis wasn't just the result of decisions made in the executive suites on Wall Street; it was also the result of decisions made around kitchen tables across America, by folks who took on mortgages and credit cards and auto loans. And while it's true that many Americans took on financial obligations that they knew or should have known they could not have afforded, millions of others were, frankly, duped. They were misled by deceptive terms and conditions, buried deep in the fine print.[74]

Consumers were not only deceived and treated unfairly, they were *abused* by sellers who tried to get them to act unreasonably.[75] A few months later, when the Dodd-Frank legislation became law, it included the Consumer Financial Protection Act (CFPA), which created the new Consumer Financial Protection Bureau.[76] The CFPA transferred from the FTC to the Bureau the FTC's rulemaking authority with respect to consumer financial products.[77] At its creation, the CFPB received authority

[73] President Barack Obama, Remarks by the President on Wall Street Reform at Cooper Union (Apr. 22, 2010), *available at* http://www.whitehouse.gov/the-press-office/remarks-president-wall-street-reform.

[74] *Id.*

[75] *Id.* (noting that "a few companies made out like bandits by exploiting their customers").

[76] Dodd-Frank Act, Pub. L. No. 111-203, §§ 1001–1100H, 124 Stat. 1376, 1955–2113 (2010) (codified in scattered sections of 12 U.S.C.); *id.* § 1031(a), 124 Stat. at 2006 (codified at 12 U.S.C. § 5531). The CFPB was authorized as an independent bureau within the Federal Reserve—statutorily insulated from the Federal Reserve's authority and supervision. *Id.* § 1101, 124 Stat. at 1964 (codified at 12 U.S.C. § 5491). The Federal Reserve funds the CFPB, but the Bureau sets its own budget. *Id.* § 1017(b), 124 Stat. at 1977–78 (codified at 12 U.S.C. § 5497). The CFPB has a single director who serves a five-year term. *Id.* § 1011(b), 124 Stat. at 1964 (codified at 12. U.S.C. § 5491(b)). The Director was, by statute, designated to be appointed by the President with confirmation from the Senate. *Id.* § 1011(b)(2), 124 Stat. at 1964 (codified at 12 U.S.C. § 5491(b)(2)). In an effort to force Congress to diminish the autonomy of the Bureau, Senate Republicans declined, through procedural maneuvers, to permit confirmation of the actual nominee, Richard Cordray. *See* Helene Cooper & Jennifer Steinhauer, *Bucking Senate, Obama Appoints Consumer Chief*, N.Y. TIMES, Jan. 5, 2010, at A1. The President nonetheless appointed Cordray as Director through a recess appointment. *Id.* Most of the arguments currently being made about the legitimacy of the Bureau, the enforceability of its rules and regulations, and the transferability of some other agencies' regulatory authority pursuant to the enabling statute stem from this series of events.

[77] Under the Dodd-Frank Act, the FTC retained its authority to enforce those rules and to continue defining acts or practices that are unfair or deceptive with regards to non-depository institutions. Dodd-Frank Act § 1061(b)(5), 124 Stat. at 2036–38 (codified at 12 U.S.C. § 5581(b)(5)). Section 5 of the FTC Act prohibits "unfair or deceptive acts or practices in or affecting commerce." Federal Trade Commission Act, 15 U.S.C. § 45 (2006). The FTC also has the authority to enforce rules prescribed by the CFPB under its "unfair, deceptive or abusive" authority as to entities in its jurisdiction. Dodd-Frank Act § 1061(b)(5), 124 Stat. at 2036–38. The CFPB is required to coordinate its rulemaking with the FTC to ensure that there is no overlap or conflicts between the two agencies. *Id*; *see also* FTC & CFPB, MEMORANDUM OF UNDERSTANDING BETWEEN THE FEDERAL TRADE COMMISSION AND THE CONSUMER FINANCIAL

from eighteen consumer protection statutes and regulations that were previously covered by many other agencies.[78]

The CFPB had been delegated considerable power to regulate consumer financial products—more than the FTC possessed when consumer financial products were within its jurisdiction. In addition to granting the Bureau the authority to issue regulations prohibiting "unfair or deceptive" acts or practices, Congress, as mentioned above, added the word "abusive" and included within its grant of authority extensive rulemaking, examination, and enforcement power.[79] The CFPB announced that its enforcement standard for unfair and deceptive practices would be consistent with the FTC's 1980 actions and its 1983 Policy Statement.[80] In guidance that it

PROTECTION BUREAU (2012) [hereinafter MEMORANDUM OF UNDERSTANDING], *available at* http://www.ftc.gov/os/2012/01/120123ftc-cfpb-mou.pdf.

[78] Dodd-Frank Act § 1002, 124 Stat. at 1957 (codified at 12 U.S.C. § 5481) (defining "enumerated consumer laws"). The agencies that gave up some or all of their power to the CFPB include the Federal Reserve, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the National Credit Union Association, the Director of the Office of Thrift Supervision and the Department of Housing and Urban Development. These consumer agencies all add their own interpretations of who a reasonable consumer is and who the agency ought to be protecting. The date that this authority was meant to transfer to the CFPB was designated as the "transfer date." *See id.* § 1062, 124 Stat. at 2039 (codified at 12 U.S.C. § 5582). Prior to the appointment of the Bureau Director, the Secretary of the Treasury had interim authority to run the CFPB. *Id.* § 1066, 124 Stat. at 2055 (codified at 12 U.S.C. § 5586). The Treasury Secretary set July 21, 2011 as the designated date. *See* Designated Transfer Date, 75 Fed. Reg. 57,252, 57,252 (Sept. 20, 2010).

[79] Dodd-Frank Act § 1031, 124 Stat. at 2005–06 (codified at 12 U.S.C. § 5531).

> The Bureau may take any action authorized . . . to prevent a covered person or service provider from committing or engaging in an unfair, deceptive, or abusive act or practice under Federal law in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service.

Id.

[80] *See generally* CFPB, SUPERVISION AND EXAMINATION MANUAL, at UDAAP 1–10 [hereinafter, CFPB EXAM MANUAL] (summarizing CFPB position on Unfair, Deceptive, or Abusive Acts or Practices (UDAAP)). To declare a practice unlawful because it is unfair, the Bureau must have "a reasonable basis to conclude that—(A) the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers; and (B) such substantial injury is not outweighed by countervailing benefits to consumers or competition." Dodd-Frank Act § 1031(c)(1), 124 Stat. at 2006 (codified in 12 U.S.C. § 5531(c)(1)). The CFPB standard is consistent with the FTC standard. Although "the Bureau may consider established public policies as evidence . . . [s]uch considerations may not serve as a primary basis for such determination." *Id.* § 1031(c)(2), 124 Stat. at 2006 (codified at 12 U.S.C. § 5531(c)(2)). No definition for "deceptive" is provided in the Dodd-Frank Act. But, the CFPB has provided that:

> A representation, omission, actor practice is deceptive when:
>
> (1) The representation, omission, act, or practice misleads or is likely to mislead the consumer;
>
> (2) The consumer's interpretation of the representation, omission, act, or practice is reasonable under the circumstances, and
>
> (3) The misleading representation, omission, act, or practice is material.

issued, the CFPB stated that "[a]lthough abusive acts also may be unfair or deceptive, . . . the legal standards for abusive, unfair, and deceptive each are separate."[81] It proceeded to issue general guidelines describing the way in which the new term "abusiveness" would be regulated.[82]

And so, going forward, the CPFB stands in a position to move "back to the future": to reformulate the definitions of unfairness and deception in order to bring them in line with the developments that have occurred in cognitive psychology and consumer behavior within the last thirty years. It also has the authority to develop the "abusiveness" standard to focus on sellers' abuse of consumers.

IV. POLICY SHIFT: INCORPORATING BEHAVIORAL PSYCHOLOGY INTO THE CFPB'S AGENCY JURISPRUDENCE

It is beyond the scope of this Article to develop in detail the way in which the new agency should redevelop unfairness and deception and develop a new standard for abusiveness. But query how differently the marketplace would look if the CFPB could establish a standard that shifts attention from whether buyers could have avoided injury by behaving reasonably to whether sellers could have avoided confusing consumers by conveying information fairly. Why not make it plain that, in the case of deceptiveness, unfairness, and abusiveness, the CFPB will, assuming other elements of the offense are established, prosecute financial institutions whose representations and agreements have the effect of exploiting known cognitive limitations and that cause substantial injuries to consumers?[83]

CFPB EXAM MANUAL, *supra*, at UDAAP 5 (citing the FTC Policy Statement on Deception and instructing that "[e]xaminers should be informed by the FTC's standard for deception"). Cooperation and consultation between the CFPB and the FTC in providing guidance in these matters is mandatory. *See* MEMORANDUM OF UNDERSTANDING, *supra* note 77.

[81] CFPB EXAM MANUAL, *supra* note 80, at UDAAP 9.

[82] An abusive act or practice is defined as one that:

- Materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service or
    - Takes unreasonable advantage of—
        - A lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service;
        - The inability of the consumer to protect its interests in selecting or using a consumer financial product or service; or
        - The reasonable reliance by the consumer on a covered person to act in the interests of the consumer.

CFPB EXAM MANUAL, *supra* note 80, at UDAAP 9.

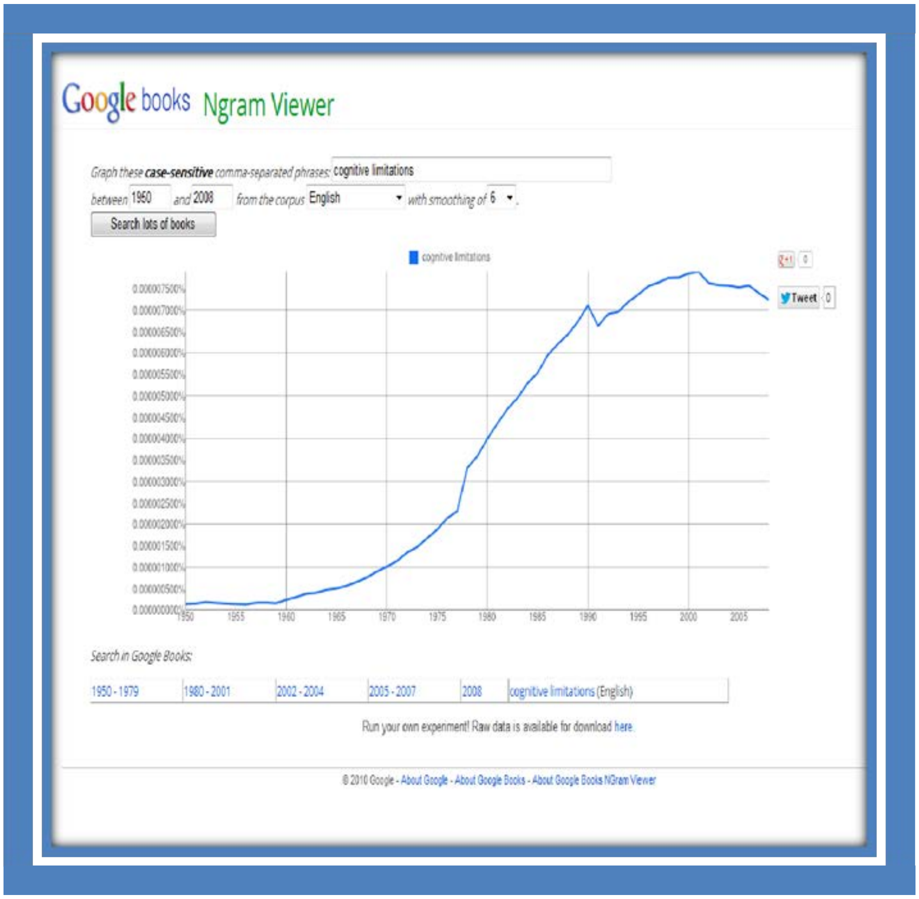
[83] If the regulations were reoriented in the manner suggested here, financial institutions might argue that the suggested approach infringes a First Amendment right to exaggerate or puff. *See* Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 467 (1988). However, "[t]he common theme that

Of course, such a rule would not resolve important issues of line-drawing. Pricing a product at $9.99 instead of $10, for example, leads many consumers to frame a product as a $9 product instead of a $10 product, and has the effect of exploiting a known cognitive limitation that can cause an injury to consumers.

Reasonable minds may differ as to whether injuries caused by these cognitive deceptions are substantial, but shifting to a standard for truthfulness that corresponds to our actual understanding of consumer behavior would revolutionize the marketplace.

seems to run through cases considering puffery in a variety of contexts is that consumer reliance will be induced by specific rather than general assertions.” Cook, Perkins & Liehe, Inc. v. N. Cal. Collection Serv., 911 F.2d 242, 246 (9th Cir. 1990). A statement that is quantifiable—that makes a claim as to the “specific or absolute characteristics of a product”—is actionable. *Id.* at 245. A prohibition of unspecific assertions that have the effect of misleading has been upheld against a First Amendment challenge. *See id.*

APPENDIX A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Graph these **case-sensitive** *comma-separated phrases:* cognitive limitations

between 1950 *and* 2008 *from the corpus* English *with smoothing of* 6 .

Search in Google Books:

1950 - 1979	1980 - 2001	2002 - 2004	2005 - 2007	2008	cognitive limitations (English)

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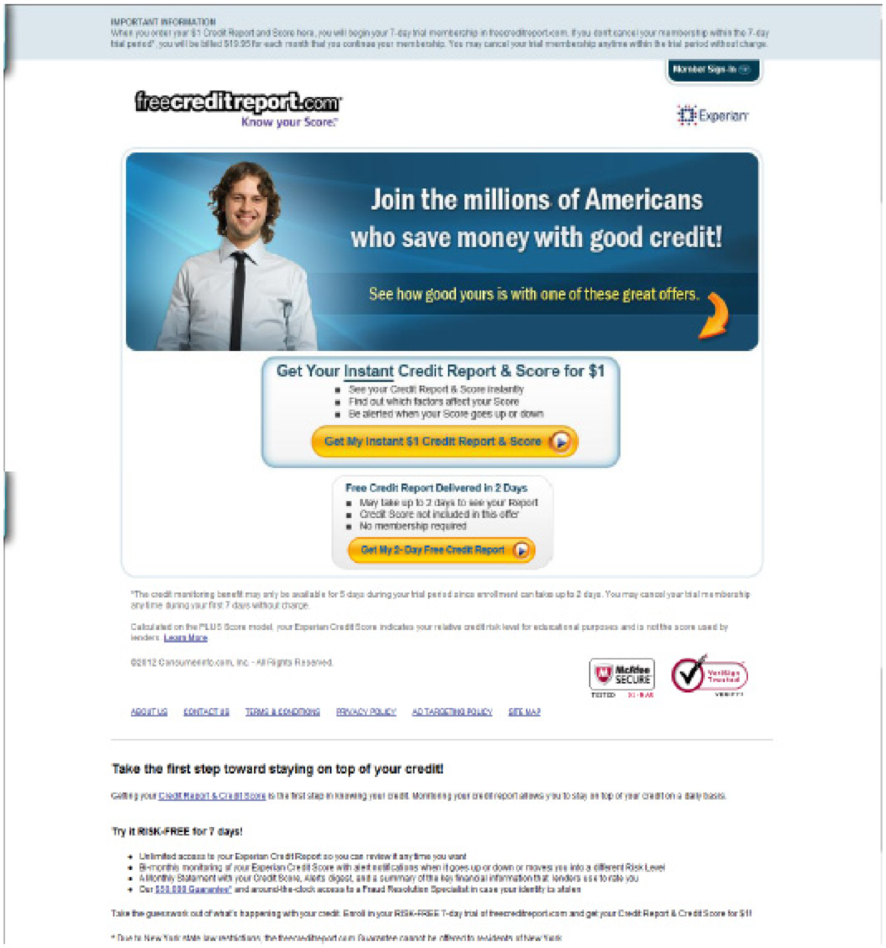
EXHIBIT A



IMPORTANT INFORMATION
When you order your $1 Credit Report and Score here, you will begin your 7-day trial membership in freecreditreport.com. If you don't cancel your membership within the 7-day trial period*, you will be billed $19.95 for each month that you continue your membership. You may cancel your trial membership anytime within the trial period without charge.

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Experian
Join the millions of Americans who save money with good credit!
See how good yours is with one of these great offers.

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- See your Credit Report & Score instantly
- Find out which factors affect your Score
- Be alerted when your Score goes up or down

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- May take up to 2 days to see your Report
- Credit Score not included in this offer
- No membership required

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*The credit monitoring benefit may only be available for 5 days during your trial period since enrollment can take up to 2 days. You may cancel your trial membership anytime during your first 7 days without charge.

Calculated on the PLUS Score model, your Experian Credit Score indicates your relative credit risk level for educational purposes and is not the score used by lenders. Learn More

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- A Monthly Statement with your Credit Score, Alerts digest, and a summary of the key financial information that lenders use to rate you
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