

# NOTES & COMMENTS

## PHONE AND TELEVISION SCAMS IN THE AGE OF THE INTERNET

by  
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*While threats of online identity theft, email phishing scams, and other internet cons seem to dominate our world view of scams these days, a more traditional way of scamming people still exists and thrives: the telephone. Some may think it quaint in this age of the internet that anyone falls for telephone scams, or even uses a phone for anything more than texting and web surfing, but estimates put phone fraud at close to a \$10 billion annual cost for consumers. The Federal Trade Commission (FTC), in its role as consumer protector, has done a great job of providing educational resources to try to combat the phone fraud, yet the problem remains.*

*Get-rich-quick television infomercials have also defrauded consumers of hundreds of millions of dollars over the years, with their phony promises of making money in a “proven” system. For the most part, the FTC has cleared the airwaves of these late-night scams. However, it is not as simple to suggest the FTC should take the same approach with phone scams as it did with television. Phone fraud is a more elusive threat and takes a more robust approach to fight. Perhaps if the FTC went beyond education and fines, and started pursuing tougher criminal penalties, then the specter of phone fraud may finally be diminished.*

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## INTRODUCTION

*“It’s morally wrong to allow a sucker to keep his money” W. C. Fields<sup>1</sup>*

We are all familiar with them: late night infomercials promising to fulfill our dreams of financial independence and making a better life for ourselves and families, and all for the small price of \$39.99; calls from the local Internal Revenue Service (IRS) “agent” claiming we owe back taxes and must pay immediately or face arrest; calls claiming we have won the lottery, sweepstakes, or a new car. In sum, calls and ads that prey upon our hopes, dreams, and fears. There is no shortage of examples of the tricks and tactics that fraudsters use via the telephone and television to free us of our hard-earned money and personal information, and no shortage of people still falling for them. The question becomes: what is being done to regulate and punish the devious perpetrators of these fraudulent interactions, and is it enough?

While it may seem ridiculous to many that anyone actually falls for these types of scams, or perhaps quaint that phone and television scams still exist in the age of the internet, the numbers are still staggering. For example, the Department of Justice (DOJ) states that while no definitive studies exist measuring the exact extent of “mass marketing fraud”—fraud that uses a mass-communication technique such as the telephone, internet, or mail—studies suggest that it is millions of dollars.<sup>2</sup> One major

<sup>1</sup> YOU CAN’T CHEAT AN HONEST MAN (Universal Pictures 1941).

<sup>2</sup> *Mass Marketing Fraud*, DEP’T. OF JUST. (Feb. 17, 2017), <https://www.justice.gov/criminal-fraud/mass-marketing-fraud>.

difficulty in getting an accurate estimate of fraud is that so much of it goes unreported: Studies estimate that only 37% of fraud victims over the age of 55 report being victims of fraud and just over half of those victims under 55 do so.<sup>3</sup> Narrowing the estimates to phone fraud, the Harris Poll conducted an online study that found that close to 18 million Americans lost an estimated \$8.6 billion in 2013, and that once again, the true numbers were probably higher because of the amount of fraud that goes unreported.<sup>4</sup>

In just one example of these types of phone scams—IRS imposter scams—the Treasury Inspector General for Tax Administration estimates that 10,000 of these IRS imposter calls are made *every week* and have defrauded citizens of millions of dollars.<sup>5</sup> To wit: “In an era when everyone seems to have a connected gadget at their fingertips, scammers are continuing to rely on one old-fashioned technology: the telephone.”<sup>6</sup> In fact, the National Consumers League, America’s oldest nonprofit consumer organization,<sup>7</sup> estimated that in 2015, for the third year in a row, scammers used the telephone over both the internet and email as their preferred method to reach their victims.<sup>8</sup>

While scams have existed for centuries, the advent of the telephone, the television, and the internet has increased the scope and effectiveness of the cons, and the need for regulation and protection has never been greater. Because consumer fraud is such an enormous topic, this Note focuses on increasingly overlooked, yet ever-present phone and television swindles and proceeds as follows: Part I briefly surveys the types of scams that have existed over time with a focus on how the advent of the telephone and the television has significantly increased the ability of con artists to find their victims. Part II identifies the main federal agency responsible for protecting consumers against fraud, the Federal Trade Commission (FTC), and what powers it has to prevent, regulate, and enforce. Part III discusses some of the more specific regulations aimed at telemarketing and television ads and how those regulations evolved over time. Finally, Part IV concludes with an aim to recommend new policies

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<sup>3</sup> MARIA KONNIKOVA, *THE CONFIDENCE GAME: WHY WE FALL FOR IT . . . EVERY TIME* 11 (2016).

<sup>4</sup> Herb Weisbaum, *Americans Lost \$8.6 Billion to Phone Fraud in Last Year, Survey Suggests*, TODAY (Aug. 27, 2014), <http://www.today.com/money/americans-lost-8-6-billion-phone-fraud-last-year-survey-1D80108259>; Zach Epstein, *Phone Scams Cost Americans \$8.6 Billion Last Year—Here’s How To Protect Yourself*, BGR (Aug. 27, 2014), <http://bgr.com/2014/08/27/phone-scams-how-to-block/>.

<sup>5</sup> *Catch Me If You Can: The IRS Impersonation Scam and The Government’s Response*, opening statement to the Special Committee on Aging (2015) (statement of Sen. Susan M. Collins).

<sup>6</sup> *Top Ten Scams of 2015*, FRAUD.ORG, [http://www.fraud.org/2015\\_top\\_ten](http://www.fraud.org/2015_top_ten).

<sup>7</sup> *Frequently Asked Questions*, FRAUD.ORG, <http://www.fraud.org/faqs>.

<sup>8</sup> FRAUD.ORG, *supra* note 6.

that will hopefully help us come closer to ridding society of the scourges that are phone and television hucksters.

### I. A (VERY) BRIEF REVIEW OF SCAMS IN AMERICA AND BEYOND

Con artists and their scams have existed for centuries: “The confidence game, fraud, swindle or scam has a long tradition, probably dating to the invention of money.”<sup>9</sup> The types of scams that have existed over time, and still exist today, are as plentiful as the names are colorful: Disappearing Act, Man of the Cloth, Horse Trading, the Pigeon Drop, Pyramid Schemes, and many more.<sup>10</sup> What these scams all have in common is that, for them to be effective, the con artist must attain the confidence of his or her victims through “trust, sympathy, [and] persuasion”—he is not interested in hard crime like burglary or theft.<sup>11</sup> The very term “con man” (or con artist) comes from “Confidence Man”—a term coined around 1850<sup>12</sup>—and denotes that the crucial element in all these scams must not only be that the con artist is himself confident in his actions, but that he achieves and maintains the victim’s confidence as well.<sup>13</sup>

Some consider the 1800s the “golden age” of schemes;<sup>14</sup> however, the tales of intricate cons and swindles span countless generations up to the present. Many are probably familiar with Charles Ponzi, the inventor of the eponymous Ponzi Scheme,<sup>15</sup> or his protégé in spirit, Bernard Madoff, perpetrator of perhaps the largest fraud in history, costing unwitting investors over \$50 billion.<sup>16</sup> Perhaps not so well known are two scams equally as repulsive—or perhaps impressive, if one has an appreciation for the more insidious types of creativity that the darker side of human ingenuity can produce. The scams were created by Gregor MacGregor, the “king of con-men” who pulled off possibly the greatest swindle of all time by inventing an entire country and securing investments in excess of what

<sup>9</sup> Karl A. Menninger, *Scams and Cons*, 74 AM. JUR. PROOF OF FACTS 3d 63, § 1 (Feb. 2017).

<sup>10</sup> See Linton Weeks, *How Scams Worked in the 1800s*, NAT’L PUB. RADIO (Feb. 12, 2015), <http://www.npr.org/sections/npr-history-dept/2015/02/12/385310877/how-scams-worked-in-the-1800s>; Menninger, *supra* note 9, §§ 2–8.

<sup>11</sup> KONNIKOVA, *supra* note 3, at 6.

<sup>12</sup> See AMY READING, *THE MARK INSIDE: A PERFECT SWINDLE, A CUNNING REVENGE, AND A SMALL HISTORY OF THE BIG CON* 24–25 (2012).

<sup>13</sup> Scott O’Neal, *Interviewing Self-Confident Con Artists*, FBI L. ENFORCEMENT BULL. (Mar. 2000), at 16.

<sup>14</sup> Weeks, *supra* note 10.

<sup>15</sup> See MITCHELL ZUCKOFF, *PONZI’S SCHEME: THE TRUE STORY OF A FINANCIAL LEGEND* 314 (2005) (detailing Ponzi’s history and describing his scheme).

<sup>16</sup> Robert Lenzner, *Bernie Madoff’s \$50 Billion Ponzi Scheme*, FORBES (Dec. 12, 2008), [http://www.forbes.com/2008/12/12/madoff-ponzi-hedge-pf-ii-in\\_rl\\_1212croesus\\_inl.html](http://www.forbes.com/2008/12/12/madoff-ponzi-hedge-pf-ii-in_rl_1212croesus_inl.html).

would today be worth £3.6 billion,<sup>17</sup> and “Count” Victor Lustig, who twice sold the Eiffel Tower and created the “10 Commandments of the Con,” still in use today, among which include: “Be a patient listener,” “Never look bored,” and “Never boast. Just let your importance be quietly obvious.”<sup>18</sup>

The takeaway from all these examples is that swindlers and con artists are nothing if not inventive and downright creative, and the telephone, the television, and the internet have only increased the number of ways in which they can push their swindles to the masses. The power of the telephone specifically, as opposed to the internet, is that it gives the fraudster the ability to create a more convincing persona much faster, whether the tactics used are fear or creating a personal connection.<sup>19</sup> Establishing a personal connection is especially effective; the ability of the fraudster to establish some kind of “special” relationship with his or her victim has been a staple of the confidence game for years, and is all the easier to establish with modern communication devices. For example, in the age of fraudsters like Ponzi, con artists needed to establish that they were a part of the community they were trying to swindle before they could achieve results. This is typically called an “affinity” scheme or fraud, where the scammers “prey upon members of identifiable groups, such as religious or ethnic communities, the elderly, or professional group[s]” and are themselves members of those groups.<sup>20</sup> This tactic is still incredibly relevant to this day: a review of the Bernard Madoff scheme shows that “[s]uch crimes would not have been possible without the cultural ease and social entre Madoff enjoyed in the Jewish community.”<sup>21</sup>

However, with the advent of the telephone, the person behind the line “could be anyone he or she chose to be, often purporting to share some background or characteristics with the caller in an effort to gain their trust.”<sup>22</sup> For phone scams, one does not have to look any particular way to prove his or her cultural bona fides; instead, the fraudster only

<sup>17</sup> *The King of Con-Men*, ECONOMIST (Dec. 22, 2012), <http://www.economist.com/news/christmas-specials/21568583-biggest-fraud-history-warning-professional-and-amateur-investors>.

<sup>18</sup> Jeff Maysh, *The Man Who Sold the Eiffel Tower. Twice.*, SMITHSONIAN (Mar. 9, 2016), <http://www.smithsonianmag.com/history/man-who-sold-eiffel-tower-twice-180958370/>.

<sup>19</sup> Neal Karlinsky et al., *Phone Scams: Why People Keep Falling for the Oldest Scam in the Book*, ABC NEWS (Nov. 20, 2014), <http://abcnews.go.com/US/phone-scams-people-falling-oldest-scam-book/story?id=27065371>; see *supra* note 9, § 9.

<sup>20</sup> *Affinity Fraud: How to Avoid Investment Scams that Target Groups*, SEC (Oct. 9, 2013), <https://www.sec.gov/investor/pubs/affinity.htm>.

<sup>21</sup> Harold A. Pollack, *Why Were So Many Madoff Victims Jewish?*, ATLANTIC (Feb. 8, 2016), <http://www.theatlantic.com/business/archive/2016/02/madoff-jewish-affinity-fraud/460446/>.

<sup>22</sup> Menninger, *supra* note 9, § 9.

needs to sound convincing, talk a good game, and let a potential victim's natural inclination to trust and believe do the work. It is often this need to believe "that continues to fuel the great cons of the world, even as their contours shift with the times."<sup>23</sup> And, of course, not having to do it face-to-face means a victim's perhaps inherent ability to visually spot a fraud is rendered inconsequential when it is only a smooth-talking voice behind the line.

This same type of trust can be established through television. Testimonials and endorsements on television and in other ads can be so effective that numerous regulations and guides exist to "address endorsements by consumers, experts, organizations, and celebrities, as well as the disclosure of important connections between advertisers and endorsers."<sup>24</sup> While the focus of this Note is on the "get-rich-quick" type infomercials, it is interesting to note the enormity of the direct-response television (DRTV—industry catchall for infomercial) market as a whole.<sup>25</sup> Estimates gauged the market at \$250 billion for 2015; a market which includes well-known products such as Snuggies, Sham-Wows, and The Perfect Bacon Bowl.<sup>26</sup> In terms of the get-rich-quick schemes that have been a staple of late-night television, three schemes recently pulled in over one million customers, or victims as the FTC sees it.<sup>27</sup>

This Note, of course, is not attempting to disparage The Perfect Bacon Bowl or any other infomercial product, nor is it arguing that these types of products are as insidious as the ways in which get-rich-quick schemes exploit the dreams of financial independence of the downtrodden.<sup>28</sup> But, the sheer size of the infomercial market shows how effective it can be to sell through the television: What used to require substantial leg work, from going door-to-door or county fair to county fair, has turned into a game of cheap production, late night ad buys, and celebrity en-

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<sup>23</sup> KONNIKOVA, *supra* note 3, at 311.

<sup>24</sup> *FTC Publishes Final Guides Governing Endorsements, Testimonials*, FED. TRADE COMM'N (Oct. 5, 2009), <https://www.ftc.gov/news-events/press-releases/2009/10/ftc-publishes-final-guides-governing-endorsements-testimonials>; *see* 16 C.F.R. § 255 (2016).

<sup>25</sup> Jon Nathanson, *The Economics of Infomercials*, PRICEONOMICS (Nov. 14, 2013), <https://priceonomics.com/the-economics-of-infomercials/>.

<sup>26</sup> *Id.*; Ariel Bogle, *Is the Infomercial Dead?*, SLATE (May 4, 2014), [http://www.slate.com/articles/technology/future\\_tense/2014/05/perfect\\_bacon\\_bowl\\_why\\_the\\_infomercial\\_deserves\\_a\\_little\\_more\\_respect.html](http://www.slate.com/articles/technology/future_tense/2014/05/perfect_bacon_bowl_why_the_infomercial_deserves_a_little_more_respect.html).

<sup>27</sup> *FTC Wins Court Judgment Against Massive Get-Rich-Quick Infomercial Scam*, FED. TRADE COMM'N (May 1, 2012), <https://www.ftc.gov/news-events/press-releases/2012/05/ftc-wins-court-judgment-against-massive-get-rich-quick>.

<sup>28</sup> Although even these products have their issues. For example, the marketers of the much-loved Snuggie and other infomercial products recently had to pay \$7.5 million to the FTC in connection with deceptive "buy-one-get-one-free" promotions. *Direct Marketer Agrees to Pay \$8 Million for Deceiving Consumers*, FED. TRADE COMM'N (Mar. 5, 2015), <https://www.ftc.gov/news-events/press-releases/2015/03/direct-marketer-agrees-pay-8-million-deceiving-consumers>.

dorsements. It is obvious then that we, as a society that consumes everything in large doses, need some kind of protection from ourselves.

## II. WHO IS PROTECTING THE CONSUMERS FROM THEMSELVES?

As P.T. Barnum, the “patron saint” of scammers was reported to say, “There’s a sucker born every minute.”<sup>29</sup> So who is responsible for protecting consumers from the cons, and themselves? It’s complicated. In the United States, we have different federal, state, and private interests all providing varying levels of protection, enforcement, and education, so much so that some refer to the different agencies vying to protect us as a “veritable alphabet soup.”<sup>30</sup> Just on the federal level are numerous agencies such as the Federal Communications Commission (FCC) and the Office of the Comptroller of the Currency (OCC); however, the primary entity protecting consumers specifically against non-securities type fraud is the Federal Trade Commission (FTC).<sup>31</sup> Accordingly, this Note will mainly discuss the FTC’s role in consumer fraud prevention and enforcement.

### A. *Overview of the FTC*

The FTC is *the* nation’s consumer protection agency, and has “a broad mandate to protect consumers from fraud and deception in the marketplace. To fulfill this goal, the FTC takes law enforcement actions, provides consumer and business education, issues reports and policy guidance, leads workshops, and participates in other forums.”<sup>32</sup> In addition to consumer protection against fraudulent practices, the FTC also enforces antitrust laws.<sup>33</sup> The FTC was created when Congress passed the Federal Trade Commission Act (FTC Act) in 1914, and President Woodrow Wilson signed it into law on September 26, 1914.<sup>34</sup> “The Commis-

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<sup>29</sup> JEFFREY ROBINSON, *THERE’S A SUCKER BORN EVERY MINUTE: A REVELATION OF AUDACIOUS FRAUDS, SCAMS, AND CONS—HOW TO SPOT THEM, HOW TO STOP THEM* 9 (2010).

<sup>30</sup> David Adam Friedman, *Reinventing Consumer Protection*, 57 DEPAUL L. REV. 45, 45, 48–49 (2007).

<sup>31</sup> *Id.* at 49–50.

<sup>32</sup> *Protecting Consumers from Fraud and Deception*, FED. TRADE COMM’N, <https://www.ftc.gov/news-events/media-resources/truth-advertising/protecting-consumers>.

<sup>33</sup> 15 U.S.C. § 45 (2012); *A Brief Overview of the Federal Trade Commission’s Investigative and Law Enforcement Authority*, FED. TRADE COMM’N (July 2008), <https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority> [hereinafter *Brief Overview*]. The FTC recommends using FTC.gov over its operating manual as many parts of the manual are outdated and do not accurately reflect current policy. *FTC Administrative Staff Manuals*, FED. TRADE COMM’N, <https://www.ftc.gov/about-ftc/foia/foia-resources/ftc-administrative-staff-manuals>.

<sup>34</sup> Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1, 2 (2003); *Our History*, FED. TRADE COMM’N, <https://www.ftc.gov/about-ftc/our-history>.

sion's basic power and effectiveness as an agency . . . rest upon a single sentence in its enabling statute: "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful."<sup>35</sup> This single sentence comes directly from Section 5 of the FTC Act and is codified at 15 U.S.C. § 45(a)(1).<sup>36</sup>

Such a broad and somewhat ambiguous enabling statute would seem to present issues as to just what the FTC can regulate and enforce, and this has indeed been an issue. From the very beginning of the FTC's creation, concerns existed that the FTC would be overburdened because of the far-reaching powers that a broad interpretation of Section 5 of the FTC Act bestowed upon the FTC.<sup>37</sup> In debates over the initial bill, one Senator went so far as to say that the bill basically said "whoever shall do anything which is wrong shall be punished."<sup>38</sup> Early on, the Supreme Court twice attempted "to fence in the grounds upon which the FTC might rest a finding of unfairness."<sup>39</sup> Overall though, the Court has time and again "consistently and emphatically" determined that "the Commission has broad powers to declare trade practices unfair."<sup>40</sup>

## B. *Particular powers of the FTC*

### 1. *Investigative Powers*

The broad power with which the FTC operates is readily apparent in a review of the Commission's investigative and enforcement authority from the FTC Act, as well as the vast number of other laws under which the FTC has enforcement or administrative responsibilities. For example, under its investigative authority, the FTC "may . . . prosecute any inquiry necessary to its duties in any part of the United States."<sup>41</sup> The FTC has the power to "gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and

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<sup>35</sup> Neil W. Averitt, *The Meaning of "Unfair Methods of Competition" in Section 5 of the Federal Trade Commission Act*, 21 B.C. L. REV. 227, 228 (1980).

<sup>36</sup> *Id.* at note 1. It is important to note that the language of the original Section 5 of the FTC Act of 1914 only prohibited "unfair methods of competition." It wasn't until 1938 when the Wheeler-Lea Act added the prohibition against "unfair or deceptive acts or practices" and "confirm[ed] the Commission's consumer protection mission." David M. FitzGerald, *The Genesis of Consumer Protection Remedies Under Section 13(b) of the FTC Act*, FED. TRADE COMM'N 2-3, [https://www.ftc.gov/sites/default/files/documents/public\\_events/FTC%2090th%20Anniversary%20Symposium/fitzgeraldremedies.pdf](https://www.ftc.gov/sites/default/files/documents/public_events/FTC%2090th%20Anniversary%20Symposium/fitzgeraldremedies.pdf).

<sup>37</sup> George Rublee, *The Original Plan and Early History of the Federal Trade Commission*, 1 PROC. ACAD. POL. SCI. 666, 669-70 (1926).

<sup>38</sup> Averitt, *supra* note 35, at 277.

<sup>39</sup> *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 241 (1972) (discussing *FTC v. Gratz*, 253 U.S. 421 (1920) and *FTC v. Raladam Co.*, 283 U.S. 643 (1931)).

<sup>40</sup> *Id.* at 242 (quoting *FTC v. Brown Shoe Co.*, 384 U.S. 316, 320-21 (1966)).

<sup>41</sup> 15 U.S.C. § 43 (2012); *Brief Overview*, *supra* note 33.



management of *any person, partnership, or corporation* engaged in or whose business affects commerce . . . .”<sup>42</sup> The FTC also has numerous specific investigative powers including requiring a company to answer specific questions about its “organization, business, conduct, [or] practices.”<sup>43</sup>

Essentially, it appears that the FTC could investigate or require information from any company or individual for any reason, so long as that business “affects commerce” in some way. This kind of broad reach is no doubt a benefit to consumers in the fight for protection, if not a nuisance to businesses to know the FTC could come investigating at any time.<sup>44</sup> Yet, as Parts III and IV discuss *infra*, these investigative powers, while perhaps good at ultimately stopping fraud once it is a large enough operation to put the FTC on alert, do not help so much in the actual prevention of fraud to begin with.

## 2. Enforcement Powers

In addition to its broad investigative powers, the FTC also has substantial enforcement authority, so much so that Congress initially contemplated that “the commission would be an enforcement agency.”<sup>45</sup> The FTC can use its powers to enforce consumer protection as well as anti-trust laws.<sup>46</sup> The focus of this Note is on the consumer protection side. The FTC only need have “reason to believe” that a company or individual is using some sort of unfair or deceptive act in order to initiate a proceeding against that company.<sup>47</sup> This vague language again demonstrates the low threshold that the FTC needs to meet to be able to exert its powers. If the FTC has “reason to believe” that a certain practice is violating the law, it can exert its enforcement powers administratively or judicially.<sup>48</sup>

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<sup>42</sup> 15 U.S.C. § 46 (2012) (emphasis added) (this power excludes banks, savings and loan institutions, Federal credit unions, and common carriers); *Brief Overview*, *supra* note 33.

<sup>43</sup> 15 U.S.C. § 46; 15 U.S.C. § 45; *see also* 15 U.S.C. § 49 (2012); 15 U.S.C. § 57 (2012); *Brief Overview*, *supra* note 33 (illustrating the FTC’s broad investigative powers).

<sup>44</sup> In 2010, nearly 30 major trade associations including the Direct Marketing Association, National Association of Manufacturers, National Retail Federation, and others joined together in expressing concerns about a potential repeal of statutory protections that exist to “ensure appropriate checks and balances on [the] FTC . . . .” *Financial Services and Products: The Role of the Federal Trade Commission in Protecting Consumers—Part II: Hearing Before the Subcomm. on Consumer Prot., Prod. Safety, and Ins. of the S. Comm. On Commerce, Sci. & Transp.* 111th Cong. 34, 37 (2010) (statement of Linda A. Woolley, Exec. Vice President, Gov’t Affairs, Direct Mktg. Ass’n).

<sup>45</sup> Winerman, *supra* note 34, at 88.

<sup>46</sup> *Brief Overview*, *supra* note 33.

<sup>47</sup> 15 U.S.C. § 45(b).

<sup>48</sup> *Brief Overview*, *supra* note 33.

*a. Administrative Enforcement*

If the FTC chooses to handle a matter under the administrative enforcement prong, it has the ability to resolve the issue through adjudication or rulemaking.<sup>49</sup> If the issue is adjudicated, then the FTC's own "Rules of Practice"—different procedural and discovery rules than those in federal court—govern the matter.<sup>50</sup> On initial thought, this may seem like an efficient way to handle potential consumer fraud, as the FTC is basically responsible for the whole process: discovering and investigating the fraud, then using its own rules to conduct proceedings using its own counsel to prosecute, and often in front of administrative law judges who are former commission staff members.<sup>51</sup> But as is often the case when an agency, company, or individual tries to do too much, it can happen that not any one thing is done all that well.

Concerns about the impartiality of the FTC and its ability to conduct its own proceedings under its own rules have existed for years.<sup>52</sup> Accordingly, there has been a substantial shift over time that has indeed moved the FTC away from its administrative adjudication role and more towards cases before the federal judiciary.<sup>53</sup> For example, a look back at consumer protection proceedings in 2004 shows that the FTC had 86 cases pending in the federal district courts and 11 more in federal courts of appeals, with fewer than a dozen administrative cases pending before Administrative Law Judges.<sup>54</sup> To find more recent numbers, a review of the FTC's website under the "Case Document Search" shows this same trend—very few administrative filings in 2015 contrasted with an abundance of federal district court filings.<sup>55</sup>

As mentioned, the FTC also has rulemaking authority within its administrative enforcement powers that it can use to proscribe unfair and deceptive acts that affect commerce by issuing "interpretive rules and general statements of policy," or specific rules that aim to stop the unfair practices.<sup>56</sup> Through the 1960s, the FTC used its rulemaking authority sparingly and in relation to matters many considered to be of little importance<sup>57</sup>—so much so that the FTC's nickname for years was "the little old lady of Pennsylvania Avenue."<sup>58</sup>

<sup>49</sup> *Id.*

<sup>50</sup> 16 C.F.R. § 3 (2016).

<sup>51</sup> Peter A. White, *F.T.C.: Wrong Agency for the Job of Adjudication*, 61 A.B.A. J. 1242, 1244 (1975).

<sup>52</sup> *See id.* at 1243–44.

<sup>53</sup> *Id.* at 1245.

<sup>54</sup> FitzGerald, *supra* note 36, at 2.

<sup>55</sup> *See Case Document Search*, FED. TRADE COMM'N, <https://www.ftc.gov/enforcement/cases-proceedings/case-document-search>.

<sup>56</sup> 15 U.S.C. § 57.

<sup>57</sup> PETER C. WARD, *FEDERAL TRADE COMMISSION LAW, PRACTICE AND PROCEDURE* § 7.01 (1986).

<sup>58</sup> *Id.*

Starting in the 1970s, this all changed to the point that critics began arguing the FTC had usurped lawmaking from Congress and become the “national nanny.”<sup>59</sup> In particular, the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, effective January 5, 1975, presented the FTC with new authority for the promulgation of “trade regulation rules.”<sup>60</sup> The FTC used its new rule-making authority to such an extent that “[o]ver a 15-month period, the Commission issued a rule a month, usually without a clear theory of why there was a law violation, with only a tenuous connection between the perceived problem and the recommended remedy, and with, at best, a shaky empirical foundation.”<sup>61</sup> While the FTC has slowed down its rulemaking capacity since then, a look at Title 16 of the Code of Federal Regulations (CFR) presents a multitude of guides and rules that were created under the auspices of the FTC, either per acts of Congress or of the agency’s own accord: guides against deceptive pricing;<sup>62</sup> telemarketing sales rules;<sup>63</sup> rules governing mail, internet, or telephone merchandise;<sup>64</sup> and many others.

*b. Judicial Enforcement*

Rather than the FTC using its own adjudicative authority to handle matters, it can instead bring suit in district court to seek a temporary restraining order, a preliminary injunction, and in proper cases, a permanent injunction whenever the FTC has “reason to believe that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission.”<sup>65</sup> This section, known as Section 13(b) of the FTC Act (codified at 15 U.S.C. § 53(b)),<sup>66</sup> has become a powerful tool for the FTC, but was not initially used for consumer protection remedies. In fact, until the 1970s, the FTC had little power to pursue consumer fraud and largely ignored it.<sup>67</sup> The FTC could not compel the fraudulent actors to comply with legal rules, could not impose personal sanctions, and its main remedy of the cease and desist order did nothing to rectify losses the fraudsters had already inflicted on consumers.<sup>68</sup>

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<sup>59</sup> *Id.*

<sup>60</sup> *Recommendation 79-1: Hybrid Rulemaking Procedures of the Federal Trade Commission*, ADMIN. CONFERENCE U.S. (June 1979), <https://www.acus.gov/sites/default/files/documents/79-1-with-table.pdf>.

<sup>61</sup> J. Howard Beales III & Timothy J. Muris, *Striking the Proper Balance: Redress Under Section 13(b) of the FTC Act*, 79 ANTITRUST L. J. 1, 1 (2013).

<sup>62</sup> 16 C.F.R. § 233 (2016).

<sup>63</sup> *Id.* § 310.

<sup>64</sup> *Id.* § 435.

<sup>65</sup> 15 U.S.C. § 53(b) (2012).

<sup>66</sup> Beales & Muris, *supra* note 61, at 3.

<sup>67</sup> *Id.* at 2.

<sup>68</sup> *Id.*

This all changed with additions to the FTC Act in 1973 and 1975. In 1973, Congress amended the FTC Act through the Trans-Alaska Pipeline Act,<sup>69</sup> and added that “in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction.”<sup>70</sup> Next, in 1975, after the Ninth Circuit rejected the FTC’s attempt to impose restitution on a fraudulent violator, finding that imposing such a penalty was at odds with the FTC Act,<sup>71</sup> Congress authorized the Commission through 1975 amendments to the FTC Act to “seek consumer redress in federal district court for either (1) violations of FTC trade regulation rules, or (2) acts or practices as to which the Commission had issued a final cease and desist order . . . .”<sup>72</sup>

Since then, the FTC has used its authority “to obtain asset freezes, disgorgement, redress and restitution . . . appointment of receivers, access to premises of businesses to inspect documents, and rescission of contracts.”<sup>73</sup> The ability of the FTC, through the district courts, to obtain large fines and penalties against the perpetrators of fraud has been a powerful tool in the fight to stop phone and television fraud. Yet one question that arises is whether civil penalties such as disgorgement or restitution are all that effective in the fight against fraud. Oftentimes these fraudsters are simply returning funds that were never theirs to begin with—in effect making them no worse off than before they started the scams. Or, oftentimes the fraudsters simply do not have the funds to pay their victims back. Would more criminal enforcement be a better solution, or even possible? This idea—somewhat similar to the discussions surrounding the 2008 financial crisis and the fact that no high-level executives were prosecuted in the wake of the Great Recession—is discussed in Part IV *infra*.<sup>74</sup>

### 3. *Litigation Powers*

Finally, as another example of the broad powers the FTC holds, it has authority to litigate cases in five different classes in its own name and using its own attorneys.<sup>75</sup> This power came about as another part of the

<sup>69</sup> FitzGerald, *supra* note 36, at 4–5.

<sup>70</sup> 15. U.S.C. § 53(b); Beales & Muris, *supra* note 61, at 3.

<sup>71</sup> Heater v. FTC, 503 F.2d 321, 323 (9th Cir. 1974); FitzGerald, *supra* note 36, at 6.

<sup>72</sup> FitzGerald, *supra* note 36, at 6.

<sup>73</sup> CHRIS JAY HOOFNAGLE, FEDERAL TRADE COMMISSION PRIVACY LAW AND POLICY 116 (2016).

<sup>74</sup> For a discussion on some of the possible reasons why no executives were prosecuted in the wake of the Great Recession, see Jed S. Rakoff, *The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?*, N.Y. REV. OF BOOKS (Jan. 9, 2014), <http://www.nybooks.com/articles/2014/01/09/financial-crisis-why-no-executive-prosecutions/>.

<sup>75</sup> “[T]he Commission may commence, defend, or intervene in, and supervise the litigation of, such action and any appeal of such action in its own name by any of its attorneys designated by it for such purpose . . . in any civil action—

1975 FTC Improvements Act regarding the DOJ's failure to adequately represent the FTC's interests.<sup>76</sup> "Specifically, on matters referred by the FTC to DOJ, significant delays in filing, unfavorable settlements, and the refusal to file cases had become common practice."<sup>77</sup>

As the above discussion regarding the broad powers of the FTC shows, the Commission has numerous ways in which it can choose to exert its influence in stopping fraud. It can investigate companies and industries at its choosing, request information on business practices, make its own rules to remedy deceptive practices that could affect entire industries, conduct proceedings under its own rules of practice, seek injunctions and equitable relief in federal court, and even litigate in its own name and with its own attorneys. But how does the FTC use all of these far-reaching powers specifically in the world of telephone and television fraud? The next section reviews some of the more specific measures the FTC takes to combat the ever-present threat of phone fraud and deceptive ads on television.

### III. WHAT CAN THE FTC DO TO SPECIFICALLY FIGHT PHONE AND TELEVISION FRAUD?

Given the wide ranging powers that the FTC has at its disposal to fight telephone and television fraud, it is helpful to start by looking at the specific rules that are in place to fight these types of fraud. While by no means an all-encompassing survey, the following will at least highlight some of the more important rules and regulations the FTC enforces.

#### A. *The Specific Fight Against Phone Fraud*

The starting point for any discussion regarding the fight against phone fraud involves the Telephone Consumer Protection Act (TCPA) of 1991 and the Telemarketing and Consumer Fraud and Abuse Prevention Act (TCFPA)<sup>78</sup> of 1994 (along with the Telemarketing Sales Rule

- (A) under section 53 of this title (relating to injunctive relief);
- (B) under section 57b of this title (relating to consumer redress);
- (C) to obtain judicial review of a rule prescribed by the Commission, or a cease and desist order issued under section 45 of this title;
- (D) under the second paragraph of section 49 of this title (relating to enforcement of a subpoena) and under the fourth paragraph of such section (relating to compliance with section 46 of this title); or
- (E) under section 57b-2a of this title[.]”

15 U.S.C. § 56(a) (2012).

<sup>76</sup> Neal Devins & Michael Herz, *The Battle that Never Was: Congress, the White House, and Agency Litigation Authority*, 61 L. & CONTEMP. PROBS. 205, 217 (1998).

<sup>77</sup> *Id.* at 217-18.

<sup>78</sup> Telemarketing and Consumer Fraud and Abuse Prevention Act, Pub. L. No. 103-297, 108 Stat. 1545 (1994) (codified as amended at 15 U.S.C. §§ 6101-6108 (2012)).

(TSR)<sup>79</sup> that gave effect to the TCFPA). The FCC enforces the TCPA and will not receive much discussion in this Note other than to note it includes “various restrictions on telephone solicitations” such as “the use of artificial and prerecorded voices to deliver messages to consumers on their home telephones.”<sup>80</sup> The TCPA also applies to unwanted calls directed to cell phones as well as text messages.<sup>81</sup>

Congress, in its enactment of the TCFPA, directed the FTC to “prescribe rules prohibiting deceptive telemarketing acts or practices and other abusive telemarketing acts or practices.”<sup>82</sup> This kind of legislation was long past due: In 1994, Congress estimated that telemarketing fraudsters may have taken as much as \$40 billion dollars from their victims in 1993. “Congress defined ‘telemarketing’ as any ‘plan, program, or campaign which is conducted to induce purchases of goods or services’ by telephone.”<sup>83</sup> The definition was amended in 2001 to also include charitable contributions along with goods or services.<sup>84</sup> The TSR that the FTC promulgated from the TCFPA addresses many of the concerns that Congress had. For example, the TSR has a section at 16 C.F.R. Section 310.3 that calls out “deceptive” telemarketing acts such as failing to disclose material information like cost, conditions to purchase, and refund policies,<sup>85</sup> and another section at 16 C.F.R. Section 310.4 that calls out “abusive” telemarketing practices such as threats, intimidation, and use of profane language.<sup>87</sup>

However, the phrase that is the bane of telemarketers, “put me on your do-not-call list,” did not come about until 2003, when the FTC amended the TSR to include do-not-call registry requirements and Congress passed the Do-Not-Call Implementation Act which authorized the FTC “to establish fees to fund creation and enforcement of the do-not-call registry.”<sup>88</sup> The do-not-call registry only applies to commercial tele-

<sup>79</sup> 16 C.F.R. § 310 (2016).

<sup>80</sup> R. Michael Hoefges, *Telemarketing Regulation and the Commercial Speech Doctrine*, 32 J. LEGIS. 50, 55–56 (2005).

<sup>81</sup> *FCC Strengthens Consumer Protections Against Unwanted Calls and Texts*, FED. TRADE COMM’N (June 18, 2015), [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-333993A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-333993A1.pdf).

<sup>82</sup> 15 U.S.C. § 6102(a)(1) (2012).

<sup>83</sup> *Telemarketing Fraud: Putting Phone Scams on Hold: Hearing Before the Comm. on Small Bus.*, 103d Congress 35 (1994) (statement of Rep. John J. LaFalce, Chairman, Comm. on Small Bus.).

<sup>84</sup> Hoefges, *supra* note 80, at 52 (quoting Telemarketing and Consumer Fraud and Abuse Prevention Act § 7(4)).

<sup>85</sup> Hoefges, *supra* note 80, at 52 n.12; *see also* 16 C.F.R. § 310.2(gg) (2017).

<sup>86</sup> 16 C.F.R. § 310.3 (2016).

<sup>87</sup> *Id.* § 310.4.

<sup>88</sup> Hoefges, *supra* note 80, at 53–55.

marketing calls and does not apply to calls on behalf of political campaigns or calls seeking charitable contributions.<sup>89</sup>

All of these rules and regulations that cover telemarketing seem to be having an effect, as evidenced by the lower consumer loss estimates that exist for phone fraud compared to the high-water mark of the 1990s.<sup>90</sup> This is probably due in large part to the FTC's diligent enforcement of these rules. For example, from 1996 to 2009, "the Commission... initiated 271 telemarketing cases aimed at halting various telemarketing frauds, such as unauthorized debiting of consumers' financial accounts, as well as the deceptive sales of various goods and services, including work-at-home opportunities, advance-fee credit cards, government grants, sweepstakes and prize promotions."<sup>91</sup> The FTC subjects any company that violates the TSR to a newly raised \$40,000 penalty per violation, meaning there are substantial potential penalties for any company that utilizes telemarketing to sell its wares and violates the rules.<sup>92</sup> The question, though, is whether all of these rules and regulations really have all that much effect on the types of telemarketers that are purposely using fraudulent techniques to swindle consumers.

Perhaps not, as evidenced by the fact that complaints of consumer fraud are on the rise. The Consumer Sentinel Network (CSN), the FTC's complaint storage database, received over three million consumer complaints in 2015 compared to around 2.6 million in 2014.<sup>93</sup> Some of the increase may be attributed to the fact that more people know how to complain to the FTC.<sup>94</sup> However, the fact that complaints are on the rise also suggests that the fraudsters, although perhaps less effective at attaining the vast sums of money they did through the 1980s and 1990s, are still lurking in the shadowy underworld of commerce in great numbers. This increase in fraud complaints also makes sense when considering whom these FTC phone rules probably affect most: legitimate telemarketers. While probably not prone to much sympathy from average consumers,

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<sup>89</sup> *Id.* at 54.

<sup>90</sup> See, e.g., AUDE MARZUOLI ET AL., PINDROP LABS, 2016 TOP CONSUMER PHONE SCAMS 2 (estimating 2015 losses at \$7.4 billion). Compare *supra* note 83.

<sup>91</sup> *Prepared Statement of the Federal Trade Commission Before the Senate Comm. on Commerce, Sci., and Transp. Subcomm. on Consumer Prot., Prod. Safety, and Ins.*, 111th Cong. 15 (2009) (statement of David Vladeck, Director, Bureau of Consumer Prot., Fed. Trade Comm'n).

<sup>92</sup> The new \$40,000 per violation penalty—up from \$16,000—became effective as of August 1, 2016. See *FTC Raises Civil Penalty Maximums to Adjust for Inflation*, FED. TRADE COMM'N (June 29, 2016), <https://www.ftc.gov/news-events/press-releases/2016/06/ftc-raises-civil-penalty-maximums-adjust-inflation>; 16 C.F.R. § 1.98 (2017).

<sup>93</sup> CONSUMER SENTINEL NETWORK DATA BOOK FOR JANUARY–DECEMBER 2015, FED. TRADE COMM'N 2–5 (Feb. 2016).

<sup>94</sup> Colleen Tressler, *Consumer Complaints to the FTC Increased in 2015*, FED. TRADE COMM'N (Mar. 1, 2016), <https://www.consumer.ftc.gov/blog/consumer-complaints-ftc-increased-2015>.

legitimate telemarketing operations still exist in great numbers and would be greatly affected if they were to fall out of compliance with any of the TSR. However, actual phone scammers, such as IRS imposter scammers, are probably not overly concerned with whether they are compliant with the TSR or any of the many FTC regulations that try to keep phone sales in check. To keep up the momentum of reducing the scourge of consumer phone fraud, the FTC should take more creative approaches to stopping the crime as is discussed *infra* at Part IV.

### *B. The Specific Fight Against Television Fraud*

Fraudulent television advertising is connected to a vast array of products and services that might otherwise be legitimate if standing on their own; the focus for this Section is on one particular type of product advertised on television that is almost always associated with fraudulent practices: the “get-rich-quick” infomercials of late-night television. While perhaps not as prevalent as in years past, they still exist: One example is that of flipping houses, “an industry propelled by . . . get-rich-quick TV infomercials.”<sup>95</sup> In 2012, the FTC shut down three get-rich-quick infomercials—“John Beck’s Free & Clear Real Estate System,” “John Alexander’s Real Estate Riches in 14 Days,” and “Jeff Paul’s Shortcuts to Internet Millions”—for deceiving as many as a million customers, resulting in an astonishing \$478 million judgment against the fraudsters.<sup>96</sup> However, in researching the subject, it is hard to divorce the more specific get-rich-quick schemes from the broader, overall market of infomercials that sell such world-famous wares as the Snuggie or ubiquitous “special” weight-loss remedies. Similarly, there is also a broad FTC fight against work-at-home businesses, such as get-rich-quick schemes, but which also include scams such as “envelope stuffing” and “starting your own internet business” that are often advertised on the internet or newspapers as opposed to television.<sup>97</sup> Accordingly, the rest of this Section will naturally touch on all of these subjects, but with a focus on television get-rich-quick schemes.

Many of the issues that arise from get-rich-quick infomercials are reduced to false advertising claims, but a number of statutory and common-law bases for false advertising claims govern: the Federal Trade Commission Act, the Lanham Act,<sup>98</sup> state consumer protection laws,<sup>99</sup> civil

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<sup>95</sup> Kermit J. Lind, *Perspectives on Abandoned Houses in a Time of Dystopia*, 33 GPSOLO 70, 70 (2016).

<sup>96</sup> *At FTC’s Request, U.S. Court Hands Down Record \$478 Million Judgment Against Marketers of Massive Get-Rich-Quick Infomercial Scams*, FED. TRADE COMM’N (Aug. 23, 2012), <https://www.ftc.gov/news-events/press-releases/2012/08/ftcs-request-us-court-hands-down-record-478-million-judgment>.

<sup>97</sup> *Work-at-Home Businesses*, FED. TRADE COMM’N (Apr. 2015), <https://www.consumer.ftc.gov/articles/0175-work-home-businesses>.

<sup>98</sup> Lanham Act, 15 U.S.C. §§ 1051–1141n (2012).



RICO,<sup>100</sup> breach of express or implied contract, and tortious misrepresentation.<sup>101</sup> Of particular interest for this Note is the FTC's role. Section 12 of the FTC Act gives the FTC its power to regulate and punish false advertising:

[Section 12] prohibits the dissemination of “any false advertisement” in order to induce the purchase of “food, drugs, devices, or cosmetics.” 15 U.S.C. § 52(a)(2). It also provides that the dissemination of any such false advertisement is an “unfair or deceptive act or practice in or affecting commerce” within the meaning of section 5. 15 U.S.C. § 52(b). The Act defines “false advertisement” as “an advertisement, other than labeling, which is misleading in a material respect.” 15 U.S.C. § 55.<sup>102</sup> The FTC uses a three-part test for determining that an advertisement is misleading and deceptive: “[F]irst, there is a representation, omission, or practice that, second, is likely to mislead consumers acting reasonably under the circumstances, and third, the representation, omission, or practice is material.”<sup>103</sup>

Of particular applicability to the world of get-rich-quick schemes are the regulations concerning testimonials and endorsements. Ample evidence exists showing consumers purchase products that celebrities and other endorsers recommend,<sup>104</sup> and get-rich-quick infomercials have long exploited this fact. As such, the FTC has established numerous guides and regulations that govern and explain the use of testimonials in advertising.<sup>105</sup> For example, the commonplace and ineffective “results not typical” disclaimers that are so often associated with get-rich-quick schemes and their testimonials are no longer adequate: Since the 2009 revisions to the Testimonial Guides, the FTC has placed an increased emphasis on transparent disclaimers that “clearly and conspicuously” reveal the expected performance in a given advertisement.<sup>106</sup>

These tighter restrictions on get-rich-quick testimonials appear to be doing an excellent job in coming closer to eliminating the once commonplace get-rich-quick schemes of late night television. This could be

<sup>99</sup> See CAROLYN L. CARTER, NAT'L CONSUMER L. CTR., CONSUMER PROTECTION IN THE STATES: A 50-STATE REPORT ON UNFAIR AND DECEPTIVE ACTS AND PRACTICES STATUTES 3 (Feb. 2009).

<sup>100</sup> 18 U.S.C. § 1964 (2012).

<sup>101</sup> Perry Z. Binder, *Liability For Airing False or Misleading Television Infomercials*, in 37 AMERICAN JURISPRUDENCE PROOF OF FACTS 259, 267–80 (3d Series, 1996).

<sup>102</sup> FTC v. Pantron I Corp., 33 F.3d 1088, 1095 (9th Cir. 1994).

<sup>103</sup> *Id.*

<sup>104</sup> Consuelo Lauda Kertz & Roobina Ohanian, *Recent Trends in the Law of Endorsement Advertising: Infomercials, Celebrity Endorsers and Nontraditional Defendants in Deceptive Advertising Cases*, 19 HOFSTRA L. REV. 603, 603 (1991).

<sup>105</sup> See, e.g., 16 C.F.R. § 255 (2016); FED. TRADE COMM'N, THE FTC'S ENDORSEMENT GUIDES: WHAT PEOPLE ARE ASKING 21–22 (May 2015).

<sup>106</sup> 16 C.F.R. § 255.2(b) (2016).

partly due to the fact that it is much more difficult to hide one's insidious underpinnings on television than it is on the telephone. A television infomercial is there for everyone to see and is much easier to regulate with the addition of more restrictive disclaimers; a phone call is typically just between the scammer and his or her victim and is oftentimes not even recorded. Accordingly, it is much easier to get away with faulty disclaimers on the telephone than on television, or to simply conduct outright fraud because of the harder-to-track nature and abundance of phone fraud. Thus, it is not as simple as saying that the FTC should take the same measures against phone fraud that have been effective at removing the get-rich-quick schemes from television. However, the FTC does have more tools at its disposal that it could adopt in the continuing fight against phone fraud, and in the fight against television fraud as well.

#### IV. ADDITIONAL MEASURES NECESSARY TO STAMP OUT PHONE AND TELEVISION FRAUD

The FTC has done a fantastic job in recent years of flushing out fraud and protecting consumers. The Commission provides a wealth of education resources,<sup>107</sup> and as already discussed, has tremendous powers to squelch fraud in a number of ways. Yet, the problem is still enormous. For just one of the scams—IRS phone imposter scams—the issue has gotten so bad that Congress held a recent hearing about it.<sup>108</sup> In that hearing, one of the FTC's commissioners went to great length to detail all the educational measures they are taking to combat the IRS imposter fraud.<sup>109</sup> Making more consumers aware of the issue is, without question, an admirable and potentially very effective way to ultimately eliminate the scam. But is there anything else that can be done?

##### *A. More Criminal Sanctions Needed to Combat Phone Fraud*

One need only look at the FTC's webpage "Protecting Consumers" to see that the Commission is indeed flexing its powers in the area of fines and restitution.<sup>110</sup> There are a great number of examples of the successes the FTC has achieved in righting consumer wrongs.<sup>111</sup> However, a closer look at some of these big dollar settlements reveals it is often the

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<sup>107</sup> Bridget Small, *FTC Publications—Free and at Your Fingertips*, FED. TRADE COMM'N (Oct. 27, 2014), <https://www.consumer.ftc.gov/blog/ftc-publications-free-and-your-fingertips>.

<sup>108</sup> *Enough Being Done to Stop Growing Tax Scam?*, CBS NEWS (Apr. 15, 2015), <http://www.cbsnews.com/news/tax-scam-irs-agents-sen-susan-collins-holds-hearing/>.

<sup>109</sup> *Prepared Statement of the Federal Trade Commission on IRS Agent Impersonation Scam Before the Spec. Comm. on Aging*, 114th Cong. (2015) (statement of Julie Brill, Comm'r, Fed. Trade Comm'n).

<sup>110</sup> *Protecting Consumers*, *supra* note 32.

<sup>111</sup> *Id.*

case that what actually gets paid back is pennies on the dollar. A great example of this is Ari Tietolman who, with his cohorts, ran a fraudulent telemarketing operation that cheated consumers out of close to \$11 million.<sup>112</sup> Two of the main participants in the scam, despite headlines proclaiming multi-million dollar judgments, walked away with relatively minimal repercussions; one in particular had a judgment of \$9,655,638 partially suspended after agreeing to pay the FTC a paltry \$21,367.<sup>113</sup> Another example, and even more egregious, is that of Loyd Johnston, one of the ringleaders of a scam that took more than \$280 million from consumers.<sup>114</sup> Mr. Johnston must have spent all that money before the FTC brought charges though, as the \$7,002,960 judgment against him was *completely suspended* because of his inability to pay.<sup>115</sup> Of course, in these examples, the perpetrators are often banned from conducting any further business on the telephone, but all told, these are very light punishments for frauds that took literally hundreds of millions of dollars away from consumers.

These types of examples, and there are many, tend to show the inherent limitations of only seeking restitution from fraudsters and banning them from the phones—the fraudsters in essence simply end up where they started before the scam. Even the FTC itself admits these limitations and states that because the fraudsters seldom face any criminal sanctions, they “become better at hiding their involvement in new and improved scams and much better at laundering and hiding their assets.”<sup>116</sup> One possible solution to all of this is to institute more criminal penalties for phone fraudsters. Admittedly, this may be difficult as expending resources on phone fraud is probably not going to get priority in a world of larger and more looming potential threats, such as terrorism. However, we should not dismiss the effect that phone fraud has on our society. Phone fraud is a huge drain on resources—beyond just the huge direct financial losses to fraud, there are substantial future economic and non-economic losses to consider as well. Phone fraud wreaks havoc on a person’s self-esteem and oftentimes prevents victims from making

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<sup>112</sup> *Court Orders Ringleader of Scam Targeting Seniors Banned from Telemarketing*, FED. TRADE COMM’N (Mar. 12, 2015), <https://www.ftc.gov/news-events/press-releases/2015/03/court-orders-ringleader-scam-targeting-seniors-banned>.

<sup>113</sup> *Two Defendants in Cross-Border Telemarketing Scheme Settle FTC Charges*, FED. TRADE COMM’N (Feb. 3, 2015), <https://www.ftc.gov/news-events/press-releases/2015/02/two-defendants-cross-border-telemarketing-scheme-settle-ftc>.

<sup>114</sup> *I Works Billing Scheme Defendant Agrees to Settle FTC Charges*, FED. TRADE COMM’N (Mar. 8, 2016), <https://www.ftc.gov/news-events/press-releases/2016/03/i-works-billing-scheme-defendant-agrees-settle-ftc-charges>.

<sup>115</sup> *Id.*

<sup>116</sup> Frank Gorman, *How the FTC Can Help Local Prosecutors with Cases of Criminal Fraud*, 42 DEC PROSECUTOR 28, 28 (2008).

future purchases of legitimate goods for fear of being conned again.<sup>117</sup> When we take the initial economic losses into account with the future economic and non-economic losses at stake, the problem becomes even larger and more pressing to rectify.

If the penalties were simple and tied to dollar amounts swindled, there could be an easy way for would-be criminals to know what they are getting into when they set up their scams; for example, a year of prison time for every \$1 million dollars taken from consumers. Harsher criminal penalties may have a much greater potential of making fraudsters think twice before they engage in their crimes, versus the current situation, where fraudsters know that most likely the worst that will happen to them is being forced to return money (if there is even any left) that was never theirs to begin with. Additionally, along with education, harsher penalties may provide more fraud prevention if the FTC seriously gets the word out about new penalties in such a way that would-be scammers are likely to find out about the new penalties.

It would not be impossible to do this, and in fact, harsher penalties have been successful in very small measure already. The FTC has a “Criminal Liaison Unit” that helps prosecutors to bring more criminal consumer fraud cases.<sup>118</sup> This Unit, established in 2003 and the first of its kind, identifies “appropriate and interested law enforcement agencies and case agents for specific types of consumer fraud cases.”<sup>119</sup> The number of criminal cases brought has been small, but with a very high percentage of victory.<sup>120</sup> Yet, even with the knowledge that increased criminal prosecutions combined with stiffer penalties can help deter consumer fraud, only a small fraction of these consumer fraud cases get criminally prosecuted, lack of prosecutorial resources typically being cited as the main reason.<sup>121</sup> While the continuing emphasis on educating consumers should be commended, there will always exist the more naive who more easily fall prey to scams. An increased push to criminalize these fraudsters, especially when considering the immense damage they inflict on the U.S. economy, should see a new emphasis from prosecutors.

Another idea that may seem somewhat more outlandish is making any phone scammer that has had a civil judgment against them, even if not criminal, register as a “phone-offender,” similar to the idea of a “sex-offender” registry. As it stands now, in the case of civil judgments, many

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<sup>117</sup> Giovanna Fabiano, *Stress, Anxiety, Regret: Costs of Fraud Beyond Dollars*, FIN. INDUS. REGULATORY AUTH. (Apr. 20, 2015) <https://www.thealertinvestor.com/stress-anxiety-regret-costs-of-fraud-beyond-dollars/#>.

<sup>118</sup> FED. TRADE COMM’N, CRIMINAL LIAISON UNIT, <https://www.ftc.gov/enforcement/criminal-liaison-unit>.

<sup>119</sup> David R. Spiegel, *Chasing the Chameleons: History and Development of the FTC’s 13(b) Fraud Program*, 18 ANTITRUST 43, 47 (2004).

<sup>120</sup> See Gorman, *supra* note 116, at 28.

<sup>121</sup> *Id.* at 29.

of the phone fraudsters are banned from working on the phones again,<sup>122</sup> but this does not create the badge of shame that an affirmative phone-offender registry might create. Anywhere the phone fraudster moves, he or she would have to register in their new community as a phone-offender, risking the ire of entire communities—banished into a home of drawn-curtains and darkness, scorned from society. Of course, there could be potential constitutional ramifications to consider since the fraudsters in this example were not criminally convicted. But, it is the more outside-the-box ideas like these that could ultimately help the FTC move ever more forward in ridding the world of the phony phoners.

*B. Finishing Up the Job on Ridding the Airwaves of Get-Rich-Quick Schemes*

As already mentioned, it appears that the FTC has done an excellent job of cracking down on the once ubiquitous get-rich-quick schemes of late-night television, particularly through the more restrictive disclaimers they must use to advertise their products. However, fraudsters are always out there, lurking, looking for new ways to peddle their next great con to the next unsuspecting mark. To continue the fight against get-rich-quick schemes on television and to protect consumers, the FTC could take various simple measures to continue its onslaught against these scams. As one example, there should be an absolute cap on the amount of money that individuals can purchase on back-end, upsell products before they earn any money. The annals of get-rich-quick infomercial victims are replete with stories of individuals purchasing an initial product for under \$100, only to be subsequently talked into purchasing \$20,000 or more worth of additional products that typically do nothing more than saddle their victims with debt.<sup>123</sup> Cap any additional expenditures at \$1,000 and prove that the system works through actual financial gains before the phone rooms are allowed to sell more products. We have seen what lax regulations can do in the world of selling mortgages: Sales people, often paid on commission, pressure individuals into mortgages that would be impossible to keep up with.<sup>124</sup> Congress passed the Dodd-Frank Act,<sup>125</sup> among other reasons, to bring more transparency to the mortgage mar-

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<sup>122</sup> *Court Orders Ringleader*, *supra* note 112.

<sup>123</sup> *See, e.g.*, Joseph L. Flatley, *Scamworld: 'Get Rich Quick' Schemes Mutate into an Online Monster*, VERGE (May 10, 2012), <http://www.theverge.com/2012/5/10/2984893/scamworld-get-rich-quick-schemes-mutate-into-an-online-monster> (describing current examples of telephone fraud and the methods used by scammers).

<sup>124</sup> *See, e.g.*, Julio Rotemberg, *Subprime Meltdown: American Housing and Global Financial Turmoil*, HARV. BUS. SCH. CASE COLLECTION 708-42, (2008).

<sup>125</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1502, 124 Stat. 1376 (2010) (codified at 15 U.S.C. § 78m (2012)).

ket.<sup>126</sup> Something similar could be done here to limit the ill-gotten financial incentives that drive these perpetrators of fraud.

### CONCLUSION

Frauds and cons will always exist as long as there are individuals that fall for them. Ultimately it is up to the consumers to police themselves and not buy into the charms of phone hucksters, or the dream of getting rich quick, or the fear of the fraudster's threats. However, we live in a society where we also maintain certain protections for all different kinds of people. Doing more to protect those that more easily fall for the scams is an admirable goal to have, and the FTC appears to be doing a very good job of just that. However, more can be done, and it is the hope that the FTC starts to consider more criminal sanctions and creative ways to get the fraudsters out of our lives.

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<sup>126</sup> *CFPB Finalizes Rule to Improve Information About Access to Credit in the Mortgage Market*, CONSUMER FIN. PROT. BUREAU (Oct. 15, 2015), <http://www.consumerfinance.gov/about-us/newsroom/cfpb-finalizes-rule-to-improve-information-about-access-to-credit-in-the-mortgage-market/>.