

Consumer Protection in the District of Columbia Following the Suspension of DCRA Enforcement of the Consumer Protection Procedures Act

by the Antitrust, Trade Regulation and Consumer Affairs Section of the D.C. Bar

EXECUTIVE SUMMARY

This report with recommendations of the Antitrust Trade Regulation and Consumer Affairs Section updates its October 1997 report of the same title. It is the outcome of a year long process in which members of the Consumer Affairs Committee of the Section met and collaborated with a cross section of public and private entities with an interest in D.C. consumer affairs, to develop achievable recommendations for modernizing and improving consumer protection.

Under the existing enforcement structure, consumer protection is provided by four types of entities: The Department of Consumer and Regulatory Affairs (DCRA), designated by law as the District's consumer protection agency, the Office of the Corporation Counsel, the private bar, and public interest organizations. The consumer protection authority of DCRA has been suspended since 1994 as a cost-savings measure, and in the foreseeable future appears unlikely to be reinstated.

The Antitrust, Trade Regulation and Consumer Affairs Section of the D.C. Bar recognizes a number of critical shortfalls in the existing system. Suspension of DCRA's authority removed the primary mechanism for halting unlawful trade practices, and prohibited D.C.'s consumer protection agency from enforcing the law. Although the Office of the Corporation Counsel has recently established a new Consumer Protection Unit, legislative authority has not been enacted to provide Corporation Counsel with a similar range of authority to that previously exercised by DCRA, or to that exercised by the FTC or by the consumer protection units of state Offices of the Attorney General. Public interest organizations, and the bar do not have an enumerated authority to halt illegal practices through injunctive relief and disgorgement of ill-gotten gain in the public interest. There is no central "point of entry" for consumer complaints.

The Section recommends a number of actions be taken to modernize and improve consumer protection in the District. The Office of the Corporation Counsel (OCC) should be provided authority comparable to that held by the Federal Trade Commission, state and local consumer protection agencies and consumer protection units of state offices of the attorney general, and certain authority granted to DCRA but now suspended. The OCC Consumer Protection Unit's funding should be supplemented with a Consumer Protection Fund, similar to the account used by OCC's Antitrust Unit. Public interest organizations and the private bar should be statutorily enabled to seek injunctive relief and disgorgement of illegal proceeds in the public interest. A single point of entry should be reestablished for consumer complaints.

Financial Impact of the Recommendations: Low or none.

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Enforcement of the Consumer Protection Procedures Act**

Report With Recommendations

by the Antitrust, Trade Regulation and Consumer Affairs Section of the D.C. Bar.

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The views expressed herein represent only those of the Antitrust, Trade Regulation and Consumer Affairs Section of the District of Columbia Bar and not those of the D.C. Bar or of its Board of Governors

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Report With Recommendations

In October, 1997 the Antitrust, Trade Regulation and Consumer Affairs Section of the D.C. Bar issued a report with recommendations on the state of consumer protection in the District of Columbia following the prohibition of the Department of Consumer and Regulatory Affairs (DCRA), the District's consumer protection agency, from enforcement of the Consumer Protection Procedures Act, the District's principal consumer protection law.

A number of important changes have occurred since the issuance of the October, 1997 report, including legislative enactments of portions of the original report's recommendations. The Section has issued this report as an update of the original report, with recommendations in light of current circumstances.

Introduction

Members of the Consumer Affairs Committee of the D.C. Bar Section on Antitrust, Trade Regulation and Consumer Affairs have spent approximately twelve months studying possibilities for improving and modernizing consumer protections in the District, in light of the current crisis and lack of existing consumer law enforcement.

The goal of this process has been to create a series of recommendations that are manageable and practical to implement, informed and supported by those who will be affected by them including the various government agencies whose responsibilities relate to consumer protection, and to develop recommendations that are achievable given existing government budget constraints and priorities.

We have sought the input and advice of a broad cross section of experts and persons who share a commitment to creating an honest and fair marketplace that will prevent deception to consumers, and will level the playing field for legitimate businesses.

We wish to express our sincere appreciation to those who have met with members of the Committee or otherwise contributed to this process, including: Wayne Chapman, Office of the Chief Management Officer; Cliff Detrick, DCRA; Recita Evans, DCRA; Kitty Huggins, Multi-Door Dispute Resolution Division of D.C. Superior Court; Edward J. Johnson III, President, Better Business Bureau of Metropolitan Washington; Joan McKenzie, former Chief, DCRA, Office of Compliance; Nancy Mercurio, WTOP Call for Action; Charlotte Parker, Office of the Corporation Counsel; Sharis Pozen, Hogan & Hartson; Luis Rambaut, Chief, Civil Division of the Office of the Corporation Counsel; Bennett Rushkoff, Senior Counsel, Consumer and Regulatory Actions, Office of the Corporation Counsel; Melanie Saunders, DCRA.

Brief History of Consumer Protection in D.C.

The Department of Consumer and Regulatory Affairs Office of Compliance was established by statute in 1976 as the District's "principal consumer protection agency."¹ The legislative history of the D.C. Council in creating this office reflects an intention to create an "independent consumer protection agency structured along the lines and authority of a 'mini-FTC.'"²

Among other things, the Office of Compliance was authorized to:

- receive and investigate complaints and initiate its own investigation of deceptive, unfair or unlawful trade practices against consumers; issue summonses, hold hearings, compel the attendance of witnesses, administer oaths and take the testimony of any person under oath, concerning any trade practice or practices;
- issue subpoenas to compel the production of documents, papers, books, records, and other evidence concerning any trade practice;
- report to appropriate governmental agencies information concerning any violation of any law;
- assist, advise, and cooperate with private, local and federal agencies and officials to protect and promote the interest of the District of Columbia consumer public;
- assist, develop, and conduct programs of consumer education and information through public hearings, meetings, publications, or other materials prepared for distribution to the consumer public of the District of Columbia.

DCRA became the primary "point of entry" for consumer protection complaints. In 1993, the Office of Compliance received 3,447 consumer complaints and achieved a cost savings to consumers of over \$1.5 million in refunds and judgments.³ In 1994, the District Council, citing budget constraints, prohibited DCRA, the District's consumer protection agency, from using administrative process to enforce consumer protection

¹ D.C. Code § 28-3902(a).

² Committee Report on Bill 1-253, the District of Columbia Consumer Protection Procedures Act, March 24, 1976.

³ "DCRA Consumer Protection -- Then, Now and Future: DCRA CPPA Statistics," Miriam Hellen Jones, Esq., Chief, Office of Compliance, DCRA, January 30, 1997.

law.⁴ That prohibition has been extended, and is now in effect through October, 2000.⁵

Currently, D.C. consumers can seek damages under a private right of action under the Consumer Protection Procedures Act.⁶ This provides limited recourse, however, because the right of action does not supplant the role of a consumer protection agency. It does not explicitly empower consumers to obtain injunctive relief to stop a known fraudulent practice prior to its damaging effects; nor for injunctive relief to stop a known fraudulent practice from continuing to cause damage; nor to bring an end to fraudulent misrepresentations.⁷ It does not provide for disgorgement of unjust gains to the public; nor does it allow an organization acting in the public interest, for example, to seek a remedy for or an end to a fraudulent practice prior to a victim coming forward.⁸

In 1999, the Office of the Corporation Counsel created a new Consumer Protection Unit. That unit does not yet have authority comparable to that exercised by DCRA, or by similar consumer protection offices in other jurisdictions. Legislation

⁴ D.C. Code § 28-3902(h) (suspending enforcement of the Consumer Protection Procedures Act by the DCRA); See also sections 807 and 808 of Act 10-389, the Multiyear Budget Reduction and Support Emergency Act of 1994, 42 D.C. Reg. 229-30 (Jan. 13, 1995).

⁵ The Consumer Protection Amendment Act of 1998, Act 12-399 (June 23, 1998) (extending suspension until October, 2000).

⁶ D.C. Code § 28-3905(k)(1).

⁷ Most state Unfair and Deceptive Acts and Practices (UDAP) statutes authorize private injunctive actions, as does the model Uniform Deceptive Trade Practices Act (UDTPA). See e.g., 7 Uniform Laws Annotated (1978) (text of the UDTPA); Ala. Code § 8-19-1; Cal. Civ. Code § 1780 (West); Cal. Bus. & Prof. Code § 17200 (West); Conn. Gen. Stat. § 42-110(g); Del. Code Ann. tit. 6, § 2531; Fla. Stat. Ann. § 501.211(1) (West); Ga. Code Ann. § 106-701, 106-1201; Haw. Rev. Stat. § 480, 481A; Idaho Code § 48-608; 815 Ill. Comp. Stat. 505/10a et seq., 510-1; Kan. Stat. Ann. § 50-634; Me. Rev. Stat. Ann. tit. 5 § 213; Mass. Gen. Laws Ann. ch. 93A § 9 (West); Me. Rev. Stat. Ann. tit. 10, § 1211; Mich. Comp. Laws § 445.910; Minn. Stat. § 325D.23, 325F.69; Neb. Rev. Stat. § 87-301, 59-1608(2); N.H. Rev. Stat. Ann. § 358-A:10; N.M. Stat. Ann. § 57-12-1; N.Y. Gen. Bus. Law § 349; Ohio Rev. Code Ann. § 4165, 1345.09 (Baldwin); Okla. Stat. Ann. tit. 78, § 51 (West); Or. Rev. Stat. § 646.605; R.I. Gen. Laws § 6-13.1-5.2; Tenn. Code Ann. § 47-18-109; Tex. Bus. & Comm. Code Ann. tit. 2 § 17.50(b) (Vernon); Utah Code Ann. § 13-2-1; Utah Code Ann. § 13-11-17; Wash. Rev. Code § 19.86.090; W. Va. Code § 46A-6-106.

⁸ See, Cal. Bus. & Prof. Code § 17200.

should also be enacted to enable the Unit to supplement its funding through the damage awards it obtains, as is provided for in similar units, such as OCC's Antitrust Unit.⁹

Current Status : Consumer Law Enforcement Must Be Strengthened and Modernized

The prohibition of DCRA from administrative enforcement of the District's consumer protection laws leaves District consumers without a consumer protection agency. Three potential sources of consumer protection in the District remain, each of which has various abilities and legal authority to stop unlawful trade practices: The Office of the Corporation Counsel,¹⁰ Private Attorneys¹¹ and Public Interest Organizations.¹²

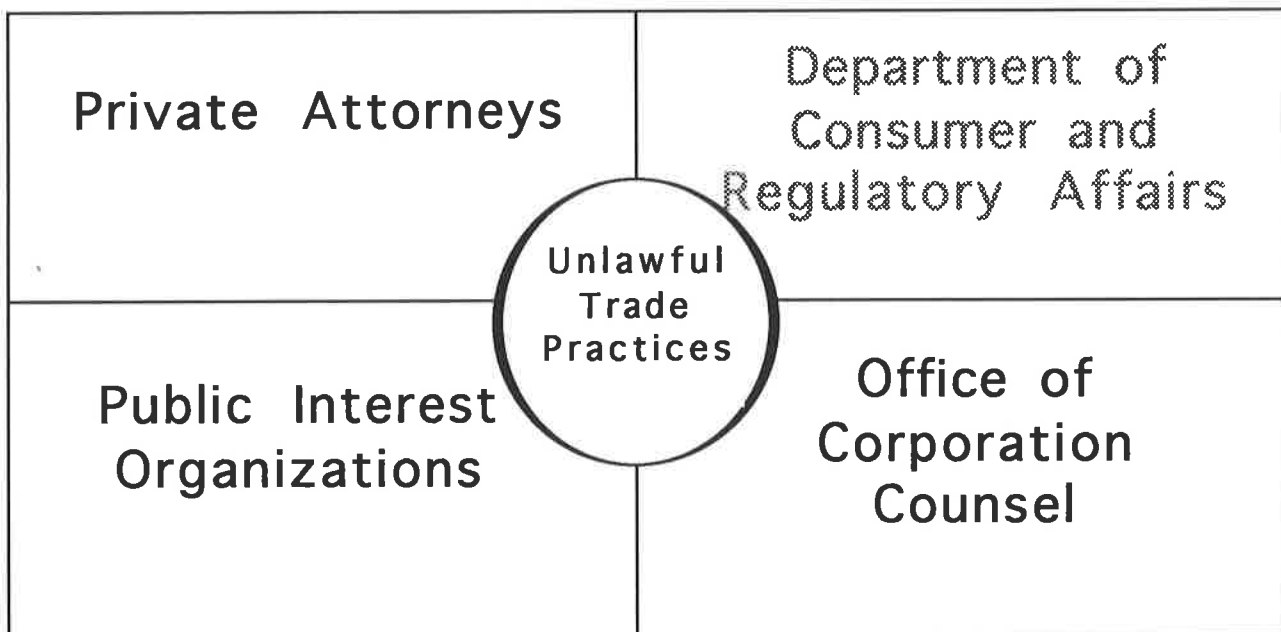


Figure 1: Sources of Consumer Protection in the District of Columbia

Historically, the most active of the above sources of consumer protection has been DCRA. The authority and the roles of the three remaining consumer protection entities should be adjusted to offset the withdrawal of DCRA from consumer law enforcement.

⁹ D.C. Code § 28-4516 (establishing District of Columbia Antitrust Fund).

¹⁰ See D.C. Code § 28-3909 (existing authority of the Office of Corporation Counsel to bring consumer protection actions).

¹¹ D.C. Code 28-3905(k) (existing authority of private litigants to bring consumer protection actions).

¹² Id.

Shortfalls in the Existing System

There are a number of critical shortfalls in the existing system:

- 1) The suspension of the enforcement authority of DCRA removes the primary mechanism for halting unlawful trade practices. When active, DCRA fielded approximately 3,000 complaints per year.¹³

Some of the complaints fielded by DCRA were misunderstandings involving legitimate businesses that could be resolved through mediation or conciliation. Others involved unscrupulous merchants and required outside intervention to prevent and remedy consumer harm. Some involved patterns of unfair trade practices that caused substantial injury to consumers.

For example, DCRA intervened after receiving allegations that D.C. based invention promotion companies were misrepresenting their services to investors across the country. DCRA negotiated a settlement that included repayment to 140 consumers of approximately \$500,000, establishment of a fund of \$200,000 for future complaints, and payment of fines to the D.C. Government.

In another situation, DCRA received multiple complaints that a local luxury car dealer was selling cars to D.C. area consumers even though the dealership never possessed title to the automobiles. Substantial recovery of damages was made.

DCRA litigated an award of compensatory and punitive damages against the "United Nations Student Council" for misrepresentation, after the Council marketed itself to international students falsely claiming to provide jobs, scholarships, student loans, immigration advise and other benefits.

- 2a) The Office of the Corporation Counsel has recently established a new Consumer Protection Unit, but legislative authority has not been enacted to provide Corporation Counsel with a similar range of authority to that previously exercised by DCRA, or to that exercised by the FTC or by the consumer protection units of state Offices of the Attorney General.

The only D.C. Government agency with existing consumer protection authority is the Office of the Corporation Counsel. However, OCC's existing authority was granted at a time when DCRA was understood to be the District's principal consumer protection agency, and therefore OCC's authority is more limited than

¹³ "DCRA Consumer Protection -- Then, Now and Future: DCRA CPPA Statistics," Miriam Hellen Jones, Esq., Chief, Office of Compliance, DCRA, January 30, 1997.

that granted to DCRA, which is now suspended.¹⁴

State agencies enforcing unfair and deceptive acts and practices (UDAP) laws generally have authority to conduct pre-filing investigations, and to issue civil investigation demands or subpoenas.¹⁵ Investigative authority was granted to DCRA for consumer law violations.¹⁶ The Office of the Corporation Counsel currently has such authority to investigate other illegal practices, such as antitrust violations,¹⁷ but such authority has not been vested in OCC for consumer law violations.

The legislative history of the Consumer Protection Procedures Act (CPPA) reflects an intent to grant the District a structure “along the lines and authority of a ‘mini-FTC.’”¹⁸ However, the illegal trade practices which the D.C. Government can remedy does not incorporate the definition of an unfair trade practice as defined by the Federal Trade Commission. The FTC’s definitions, as defined by federal statute, 45 U.S.C. § 45(a), and administrative rules and regulations, is frequently refined to reflect current business practices, and would be appropriate to incorporate by reference into the CPPA’s definition of illegal trade practices.

¹⁴ Compare D.C. Code § 28-3909 (consumer protection authority granted to the Office of the Corporation Counsel), D.C. Code § 28-3903 (powers of the consumer protection agency, DCRA); See also, D.C. § 28-3902(h)(suspending DCRA’s powers as consumer protection agency).

¹⁵ National Consumer Law Center, *Unfair and Deceptive Acts and Practices*, Fourth Edition (1997) at 641; See also, Md. Code Ann., Com. law II § 13-405 (providing Maryland Attorney General with subpoena power for consumer protection investigations).

¹⁶ D.C. Code § 28-3903(c), § 28-3903(1)(DCRA may issue subpoenas to compel the production of documents, records, and other evidence concerning any trade practice).

¹⁷ D.C. Code § 28-4505 (authorizing civil investigative demands for antitrust violations).

¹⁸ Committee Report on Bill 1-253, the District of Columbia Consumer Protection Procedures Act, March 24, 1976.

- 2b) The newly created Consumer Unit of the Office of the Corporation Counsel lacks a supplemental source of funding, similar to that used by OCC's Antitrust Unit.¹⁹
- 3) Public interest organizations, and private attorneys do not have the ability to seek injunctive relief and disgorgement of illegal proceeds in the public interest, as provided for example, by California consumer protection law.²⁰

Under existing D.C. law, a public interest organization cannot undertake representative actions to stop fraudulent conduct prior to a victim losing money. For example, under California law, an organization that monitors fraud against the elderly can take immediate action to enjoin illegal conduct, such as a fraudulent sweepstakes, before a victim loses his or her life savings.

- 4) There is no central "point of entry" for consumer complaints.

The elimination of DCRA's consumer protection functions left consumers without a central location for lodging complaints and seeking consumer information. It further deprives law enforcement of a central and accessible repository of local complaints for review to identify repeat offenders or patterns and practices of illegal conduct.

¹⁹ D.C. Code § 28-4526 (establishing D.C. Antitrust Fund).

²⁰ Cal. Bus. & Prof. Code § 17200.

Recommendations

We propose the following actions be taken to modernize and improve consumer protection in the District, and to offset the elimination of the Department of Consumer and Regulatory Affairs (DCRA) as the District's consumer protection agency.

- 1) **Extend to the Office of the Corporation Counsel a Range of Enforcement Authority Comparable to that Exercised Previously by DCRA, and by the Federal Trade Commission and Consumer Protection Units of State Offices of the Attorney General**

The Office of the Corporation Counsel should be provided with the ancillary authority necessary to carry out consumer protection functions, comparable to those vested in other law enforcement entities, such as Offices of the Attorney General in other states, the FTC, and those formerly vested in DCRA. This authority would include:

- Any appropriate²¹ authority that has already been extended to DCRA, but is now suspended.²²
- Authority to conduct pre-filing investigations, similar to the authority OCC currently holds for investigations of antitrust violations, and similar to the authority provided for consumer protection investigations to other enforcement agencies, including the Maryland Attorney General and the Federal Trade Commission.²³

²¹ Certain of DCRA's former authorities would not be appropriate to extend to OCC, as they are inconsistent with OCC's function. For example, DCRA previously exercised administrative rulemaking authority that would not appropriately be transferred. See D.C. Code § 28-3903(a)(10). Nor should OCC receive the authority to issue cease and desist orders, See D.C. Code § 28-3903(a)(3), as the OCC petitions for such relief by filing a complaint with the Superior Court of the District of Columbia.

²² See D.C. Code § 28-3903 (powers exercised by DCRA); D.C. Code § 3902(h) (suspension of powers exercised by DCRA).

²³ National Consumer Law Center, *Unfair and Deceptive Acts and Practices*, Fourth Edition (1997) at 641 (state agencies generally have authority to make civil investigative demands); See also, Md. Code Ann., Com. law II § 13-405 (providing Maryland Attorney General with subpoena power for consumer protection investigations).

- Creation of a District of Columbia Consumer Protection Fund, similar to the existing District of Columbia Antitrust Fund.²⁴ Contributions into this fund will consist of sums transferred pursuant to court order or judgment from an enforcement action brought by OCC, in settlement of penalties asserted by OCC, costs and attorneys fees awards to OCC, and gifts or grants or cy pres payments. This supplementary fund will enable consumer protection enforcement to be reestablished within reasonable budgetary constraints, as is the practice in other jurisdictions.
 - The definition of unlawful trade practices should incorporate by reference the definition of unfair trade practices, as established by the Federal Trade Commission.²⁵ This is consistent with the D.C. Council's original intent to create a "mini-FTC"²⁶ for the District, and will allow the District's definition of unfair trade practices to reflect current federal law.
- 2) **Provide Public Interest Organizations and Private Attorneys the Ability to Seek Injunctive Relief and Disgorgement of Ill-Gotten Gains in the Public Interest**
- Modify the existing private right of action to explicitly authorize injunctive relief and disgorgement. Disgorgement fulfills the "basic policy that those who have engaged in proscribed conduct surrender all profits flowing therefrom." Bank of the West, 10 Cal. Rptr. 2d, at 547, quoting Fletcher v. Security Pacific National Bank, 23 Cal.3d 442, 451 (1979). Similarly, the inadequacy of injunctive relief alone to deter and remedy wrongful conduct has long been recognized by the courts. "While an injunction against future violations might have some deterrent effect, it is only a partial remedy since it does not correct the past consequences of past conduct...An 'order which commands [a party] only to go and sin no more simply allows every violator a free bite at the apple.'" Consumers Union, 6 Cal. Rptr. 2d, at 198.
 - The private right of action should be modified to enable public interest organizations and individuals to take consumer protection actions in the public interest to stop fraudulent conduct. Currently it is not possible to bring a consumer action to stop illegal conduct until after a victim suffers injury. This is necessary in any event, but particularly important in light of the prohibition of DCRA from consumer protection enforcement, and OCC's foreseeable inability to step in and completely replace its functions.

²⁴ See D.C. Code § 28-4516 (establishing District of Columbia Antitrust Fund)

²⁵ See 15 U.S.C. § 45(a), Section 5, and related regulations.

²⁶ Committee Report on Bill 1-253, the District of Columbia Consumer Protection Procedures Acts, March 24, 1976.

This modernization would allow an entity or individual to bring an action and seek judicial relief when an unlawful trade practice comes to its attention. For example, an organization which monitors fraud against the elderly would be able to petition in court to stop a misleading and fraudulent mailing, in the public interest, without waiting for a senior citizen to lose his or her money.²⁷

- These actions will also allow the government to coordinate with the private and non-profit sectors more efficiently, allowing the government to target its activities in areas where enforcement by private parties will not be sufficient. As a consequence, consumer protection can be increased without any additional or substantial cost to the government, as the actions brought under the private right of action will be supported by the private and non-profit sectors. Public interest organizations will be able to bring additional resources to consumer protection enforcement in the District, contributing private and donated funds that will advance public priorities without causing the expenditure of additional government resources.

3) **Reestablish A Single Point of Entry for Consumer Complaints**

The elimination of DCRA as the central point of entry left consumers confused and lacking direction regarding where they can go for assistance, assuming assistance is available. We recommend options be explored for reestablishing a single point of entry for consumer complaints. Certain factors are necessary elements of any proposed point of entry:

- The point of entry should be able to advocate on behalf of the consumer and provide intake staff who are trained in the District's consumer laws.
- The point of entry should provide complainants with information that describes the full range of their options for resolution, including for example, legal remedies, sample complaint letters, information about filing a small claims complaint, and referrals to mediation centers, appropriate enforcement authorities, consumer law clinics, public interest organizations and private attorneys who offer consumer protection services.
- The point of entry, if not part of District government, must provide law enforcement and government agencies full access to consumer complaints, for tracking purposes and so priorities for law enforcement actions can be identified. If the point of entry is not part of District government it is particularly important that consumer rights to pursue litigation in addition to mediation or arbitration not be precluded or hindered.

²⁷ See California Business and Professions Code Sections 17200 et seq.

The Antitrust, Trade Regulation and Consumer Affairs Section offers its assistance to the D.C. Council in its consideration of these and other consumer related proposals. The Section welcomes input regarding additional measures that might be taken to aid D.C. consumers.

Financial Impact of the Recommendations

An important consideration in making these recommendations is the constraint created by reduced government funding for consumer protection services. We expect the financial impact of the recommendations to be low or none, for the reasons below.

Recommendation No. 1, to extend to the Office of Corporation Counsel certain authority exercised previously by the DCRA, and by the FTC and consumer units of state law enforcement agencies, can be accomplished through legislative amendment. Expanded functions of the Office of Corporation Counsel may be offset by the supplemental stream of funding produced by the proposed D.C. Consumer Protection Fund. Existing funding within OCC exists for the recently created Consumer Protection Unit. Although increase in that funding for staffing purposes is desirable and possibly necessary for the most effective government consumer protection activities, increased funding is not necessitated by the proposed legislative amendments which do not mandate activities, but rather allow OCC to take actions as it perceives necessary.

Recommendation No. 2, to grant public interest organizations and private attorneys the authority to seek injunctive relief and disgorgement in the public interest, will cause no increase in government funding. Any actions pursuant to the private right of action will be funded solely by the non-profit and private sectors, who may be independently funded for such activities and/or compensated by fee shifting statutes. By coordinating with these sectors, the government can leverage the impact of existing limited public resources.

Recommendation No. 3, to reestablish a single point of entry for consumer complaints, is primarily a statement of need and a proposal for study and informed action. The point of entry may be developed at the OCC or through the creation of a 501(c)(3) non-profit organization for such purposes, which would be funded through foundation funding or other private sources.